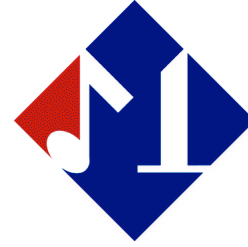


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Music Council of Australia

Mr Paul McInnes
Assistant Secretary, Arts Policy and Access Branch
Department of the Environment, Water, Heritage and the Arts

By email: localsupportacts@environment.gov.au

February 10, 2010

Dear Mr McInnes

RE: BRINGING AUSSIE MUSICIANS CENTRE STAGE

The Music Council of Australia appreciates the opportunity to comment on the proposed establishment of a Foreign Music Act Certification Scheme.

The Music Council has been a consistent supporter of the policy objective the government is seeking to address with this proposal, namely to ensure that Australian musicians are given the opportunity to perform with international acts when international acts perform in Australia. As the government recognizes, opportunities to perform with international acts affords Australian musicians the capacity to showcase their talent and their music, develop their careers and increase their income base.

Introduction

In 2007, in the lead-up to the federal election, the Australian Labor Party made an election commitment to "give Aussie musicians a boost by bringing them centre stage and ensuring new working opportunities when international acts tour Australia".

In making this commitment, it was noted that:

"There is a widely held belief that local artists must be employed as part of touring productions – but there is no migration regulation requirement to this effect ... Federal Labor wants international touring productions to employ at least one local band or artist as a support act and will amend current migration regulations to help make this happen.

"A Rudd Labor Government will provide Ministerial discretion under these regulations to ensure that international touring productions boost the employment of Australian music industry performers and technicians.

"Federal Labor's modified text will apply to Regulation 1.12A – Net employment benefit – of the Migration Regulations 1994 for the temporary Entertainment Visa (Subclass 420).

"Aussie musicians will benefit from new working opportunities and audiences will benefit from access to a wider range of musical talent. There can be few greater opportunities for emerging Australian musicians than sharing the stage with an international act in front of huge local crowds.

"Federal Labor recognizes the long history and commitment of Australian promoters in providing opportunities for local musicians when they bring the best overseas talent to our shores. Labor wants to strengthen these opportunities into the future."

Migration Regulations

The relevant visa for overseas performing artists wishing to perform in Australia is the Subclass (Entertainment) visa.

The key sections in respect of commercial live music are as follows:

(6) The Minister is satisfied that:

(a) the identified visa holder or applicant will be performing as an entertainer under a performing contract that:

(i) is not related to a film or television production; and

(ii) is for 1 or more specific engagements (other than non-profit engagements) in Australia; and

(b) the nominated activity will bring a net employment benefit to the Australian entertainment industry; and

(c) the entertainment sponsor holds any necessary licences in respect of the work to which the nomination relates; and

(d) the entertainment sponsor has consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia; and

(e) the entertainment sponsor has provided an itinerary specifying the dates and venues for all performances.

Production roles other than as a performer

(7) The Minister is satisfied that:

(a) the identified visa holder or applicant will be directing, producing or taking another part (otherwise than as a performer) in a theatre, film, television or radio production, or a concert or recording to be performed or shown in Australia; and

(b) the nominated activity will bring a net employment benefit to the Australian entertainment industry; and

(c) the entertainment sponsor holds any necessary licences in respect of the work to which the nomination relates; and

(d) the entertainment sponsor has consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia; and

(e) the entertainment sponsor has provided an itinerary specifying the dates and venues for the production, concert or recording.

Support staff

(8) The Minister is satisfied that:

(a) the identified visa holder or applicant will be supporting an entertainer or a group of entertainers (whether by assisting a performance or by personal services) in relation to a performing contract for 1 or more specific engagements in Australia; and

(b) the nominated activity will bring a net employment benefit to the Australian entertainment industry; and

(c) the entertainment sponsor holds any necessary licences in respect of the work to which the nomination relates; and

(d) the entertainment sponsor has consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia; and

(e) the entertainment sponsor has provided an itinerary specifying the dates and venues for all performances.

Definition of “net employment benefit”

The definition of “net employment benefit” is set out in Regulation 2.57(4):

In this Part, the entry of a person to Australia is taken to confer a ***net employment benefit*** on Australia if:

(a) the person seeks to enter or remain in Australia to carry out an activity individually or in association with a group; and

(b) the Minister is satisfied that the carrying out of the activity would lead to greater employment of Australian citizens or Australian permanent residents (or both) than if a person normally resident in Australia undertook the activity.

This has traditionally been interpreted, in the context of commercial live music, as meaning an Australian support act will be engaged. While the definition does not make clear the net employment benefit must be specific to the entertainment industry, this is clarified in 6(b), 7(b) and 8(b) of Regulation 2.72D.

It is this definition that the Labor Party committed to amending in their election promise.

Salary or wages

Obligations in respect of payment are as follows:

The salary or wages payable to the primary sponsored person in relation to the proposed work is required to be in accordance with Australian labour laws and

practices. If there is no award, and it is not a volunteer position, the primary sponsored person is to receive at least the minimum Federal award rate.¹

In short:

For commercial tours, there must be:

- An Australian sponsor;
- Consultation with the relevant union – the Musicians Union of Australia in respect of musicians and the Media, Entertainment & Arts Alliance in respect of singers and technicians (consultation is advisory not determinative);
- Rates of pay and terms and conditions no less than that which applies in relevant Australian industrial instruments;
- Evidence of satisfaction of the net employment benefit test.

Additionally, the Department of Immigration and Citizenship (DIAC) requires evidence of the payment of international return airfares and evidence of medical insurance policies in the absence of the sponsor being prepared to and able to demonstrate the financial capacity to pay any medical expenses of the overseas personnel should the need arise.

For so-called cultural, non-commercial tours, consultation with unions is not required, nor is the payment of award rates of pay. Cultural, non-commercial applications are those where no profit is to be generated and usually those where the overseas personnel are principally performing for members of their community resident in Australia or within proscribed festivals. It is ensure that Australians immigrants can have access to their own culture, in both the commercial and not-for-profit context, and for Australians to have access to a wide range of cultural experiences presented by performers from overseas in the context of festivals – where typically a need for balance between Australian and overseas “acts” is expected.

History

While in the overwhelming majority of cases, at least one support act is engaged to perform with overseas touring bands, the definition of net employment benefit gives no certainty.

Minister for the Arts, Peter Garrett, endeavoured to rectify this when in Opposition by way of a private member’s bill. Although work was undertaken to this end, a final draft was not completed prior to the 2007 election.

By itself, the definition of net employment benefit can be read as being a general employment benefit to Australia. However, reading it in the context of Clause 420, it is clear the benefit must be to the entertainment industry. Consequently, counting hotel beds, taxi fares, restaurant meals and the like cannot be utilised to demonstrate satisfaction with the test.

However, for the purposes of the Migration Regulations just what constitutes employment in the entertainment industry is less clear and is not defined. It can be taken and has been taken to mean, buying advertising space in the press, car park attendants, venue beverage staff and security personnel.

¹ *Nomination for an Entertainment visa or Media and Film Staff visa Form 1379*, see online at <http://www.immi.gov.au/allforms/pdf/1379.pdf>

Discussion Paper

The Discussion Paper proposes that, rather than amend the definition of “net employment benefit”, the Department of Environment, Water, Heritage and the Arts (DEWHA) establish a Foreign Music Act Certification Scheme.

The proposed certification scheme appears to be built on the model offered by the Department’s

Guidelines on the Entry into Australia of Foreign Actors for the Purpose of Employment in Film and Television Productions adopted on 17 August 2000 which require a certificate to be issued by the Minister as a condition precedent to visa application.

The Actor Certification scheme is, as is proposed with the Foreign Music Act Certification Scheme, administered by the Department.

The Actor Certification scheme was established in acknowledgement of a number of factors not common to the commercial live music sector. Specifically, the Actor Certification Scheme recognizes that many productions are in receipt of government subsidy and sets thresholds that have regard to the need to support the industry for which the subsidy has been made available. Importantly, it recognizes that the size of roles for actors in any one production can range from lead roles through to roles where an actor may deliver only one line of dialogue.

The Music Council is not convinced that the issues the government is seeking to address with respect to ensuring the engagement of an Australian support act for all tours of overseas bands are best managed by a certification scheme. Rather, the Music Council considers that the issue might be more effectively handled by way of regulatory amendment, possibly by amending Regulation 2.72D 6(b) accordingly and adding a definition of “Australian support act” to the definition of “net employment benefit” in Regulation 2.57.

The Music Council’s concern is this. It understands that the certification does not of itself signify acceptance of an application. Only the Department of Immigration can do so, and therefore the certification is only advisory. It is compliance with the regulations, not guidelines or a certification scheme, that is determinative.

Nevertheless, the certification process adds 14 days to the duration of the procedure. Unless the Department of Immigration simply accepts the certification, and does not undertake another process of certification or assessment, that 14 days is not balanced by a reduction of time taken for the process in the Department of Immigrant.

The Music Council is also concerned about the possible impact of a Foreign Music Act Certification Scheme on the industry. This proposal may not take account of the different realities of the two industries. The live music sector sometimes must work on shorter time lines than the film and television industries. It also has more peak intensity periods – for instance, the high volume period of December and January when Australia presents a raft of festivals. Especially prior to that period, the volume of applications that the Foreign Music Act Certification Scheme will encounter is larger than is the case for the Actor Certification Scheme.

Whether or not applications are assessed against the guidelines of the certification scheme, they must still be tested against the Migration Regulations themselves. The Music Council suggests that the Minister consider whether the objectives of the scheme might be achieved with more certainty with all the requirements covered through amendments to

the Migration Regulations and a single process conducted by the Department of Immigration.

This submission now addresses some of the issues raised in the Discussion Paper in respect of the establishment of a Foreign Music Act Certification Scheme and how it might be defined and implemented.

Proposed definition of a 'local support act'

Questions:

- Is [the] definition of a "local support act" appropriate?
- Should the requirement of a local support act be Australian citizenship only?
- Are there any other criteria or requirements that could potentially assist in defining a local support act?

The Discussion Paper proposes that a "local support act" could be classified as a local entertainer or group of entertainers who perform music and, in the case of a solo artist "that the individual would have to be an Australian resident or permanent resident of Australia" and in the case of a group "that the majority of its members would need to be Australian Citizens or permanent residents of Australia".

The Music Council considers that if the defined policy objectives are to be met, a local support act must normally be just that – an individual or group comprising only Australian citizens or Australian permanent residents already having full work rights in Australia. Other than New Zealand citizens, all other persons would require a subclass 420 (Entertainment) visa to perform in Australia and axiomatically such persons cannot be considered local.

The Music Council considers that excluding New Zealand citizens from the definition may offend the provisions of the Closer Economic Relations (CER) agreement and notes that New Zealand citizens have full work rights in Australia and do not require a visa in order to enjoy those rights.

That said, there may be circumstances in which a local support act envisages that it can make more telling use of its opportunity by using one foreign band member, while otherwise fully retaining its identity. The regulations might include the possibility for the act to argue for such inclusion.

Proposed definition of a "foreign music act"

The Discussion Paper proposes a definition as follows:

- a foreign solo musician;
- a foreign solo musician and accompanying band or group;
- a foreign band or group;
- a foreign musician/s with or without musical instruments;

and proposes that "the requirement to have a support act would not be triggered where the majority of members of an incoming act are Australian citizens or permanent residents".

Questions:

- Is this definition of a foreign music act appropriate?
- How should an international band with at least one Australian citizen in the group be treated?

The Music Council suggests that for the purposes of this policy, the word "musician" should be taken to include "singer".

The Music Council considers that if an Australian citizen is a member of an overseas music act and cannot perform in the absence of the overseas members of the act, then the act should be considered as foreign, notwithstanding the presence of one member who does not require a visa in order to perform.

Types of acts exempt from certificate requirement

The Discussion Paper proposes a number of circumstances wherein the need for a local support act would not be required:

- those participating in a festival or joint concert where local Australian bands already feature
- those performing a class of music which may not be conducive to having a support act, such as a chamber orchestra
- those performing music acts of a specific cultural nature for which a support act may not be available or culturally appropriate
- those performing in a competition
- those performing in a theatrical musical show or production
- those performing in a private performance

Festivals

The Media, Entertainment & Arts Alliance and Live Performance Australia have a long-standing agreement known as the Agreement Governing the Use of Foreign Artists in Live Theatre in Australia. Its provisions for festivals are as follows:

FESTIVALS

The parties acknowledge the role of Festivals in Australia in the development of audiences for the arts and in nurturing innovation, excellence and diversity in performance.

The parties recognise the important contribution made to Festivals by Australian companies and artists and the importance of Festivals to the development and promotion of Australian artists and companies.

The parties acknowledge that this involves inclusion in Festival programs of work by Australian companies and individual artists.

Accordingly the parties agree that:

- (i) there should be a satisfactory balance in Festival programs and in the use of Festival resources between local artists and foreign artists;
- (ii) early consultation will occur with the union on the mix of local and foreign artists; and
- (iii) any use of foreign artists outside the Festival concerned will be processed according to the relevant Clauses of these guidelines.

The Music Council supports the principle of fair balance between overseas and local acts in festivals and believes that fair balance should relate to the number of acts, as well as to matters such as venue comparability, audience capacity and marketing and promotion.

Class of music not conducive to support acts

The Music Council considers that symphony orchestra and chamber orchestra concerts may not be conducive to support acts. Normally in classical music, only one ensemble, whether orchestra, opera company or string quartet, performs in any concert and to add a local support act could be regarded as a curious intrusion and may create the opposite outcome to the one desired. However, the Music Council notes that there are works requiring multiple vocal soloists and orchestra and suggests that there should be Australian representation among them, just as there is for opera companies.

The Music Council, however, is opposed to arguments that posit the length of the program would preclude a support act, or simple assertions that a particular band is unique and as such there is no other group with a similar music style. All acts are unique and the Music Council suggests that such assertions may be designed only to avoid engaging a local support act.

Music acts of a specific cultural nature for which a support act may not be available or culturally appropriate

The Music Council is strongly supportive of facilitating the entry to Australia of a diverse range of music groups from around the world and will be making separate approaches to government regarding how this might be accommodated.

However, the Music Council is cautious of expressions such as "acts of a specific cultural nature". Firstly, it can be argued that all acts have a specific cultural nature. Secondly, the existence of festivals has served to demonstrate that music from around the world can be performed in the one venue at the one time and that it is not necessary to always match like with like. Thirdly, the Music Council is concerned that Australians who have migrated from overseas are not denied performance opportunities simply because they might come from somewhere deemed to have "a specific cultural nature". Migrant performers face considerable challenges in establishing viable careers in Australia and the Music Council would be resistant to those difficulties being exacerbated. Claims that a support act may not be available should be supported with evidence and assertions in that regard not accepted in the absence of evidence.

Performing in a competition

The Music Council does not have an objection to waiving the need for certification in such circumstances.

Performing in a theatrical musical show or production

The Music Council considers that applications for persons appearing in theatrical musical shows should be treated separately, in a manner consistent with the manner in which applications are considered for all live theatre productions and not caught by the provisions for live music. Persons appearing in such productions are typically cast as other cast members are cast and should be considered accordingly.

Performing in a private performance

The Music Council considers that applications in respect of private performances need not be caught by the Foreign Music Act Certification Scheme providing that such performances are exclusively for private performances to an invited non-paying audience.

What performances will be required to have a local support act?

In addition to the above, the Discussion Paper proposes a number of further circumstances wherein a local support act would not be required.

Venue capacity

The Discussion Paper suggests that the Scheme apply only to venues with a capacity of 400 or more.

Questions:

- Is venue capacity an appropriate criterion?
- If so, is the level that is proposed appropriate?
- If not, are there other types of criteria that could assist in determining the requirement for a local support act?

This question seems to go to the question of affordability for the presenter. Venue capacity may not be a reliable indicator. For instance, venues like Spectrum in Darlinghurst in Sydney (capacity 200) the John Curtin Hotel in Carlton in Melbourne (capacity 300), the Northcote Social Club in Melbourne (capacity 300) and the Rocket Bar in Adelaide (capacity 200) all present international acts supported by local bands.

On the other hand, it is possible that the ticket prices for their acts can be set higher than for a jazz group or world music group, which might therefore need a larger audience in order to meet costs.

There is advantage to the vitality of Australian culture in experiencing a flow of high quality foreign performers, certainly including those whose musical adventurousness limits their audience size. The regulations need to be simple and clear, but at the same time deal with a situation of some complexity. A study might be done of the criteria of affordability to ensure that at this small scale level, Australians have access to a reasonable number of high quality foreign musicians as well as to local acts.

This should be possible at the same time as achieving the primary purpose of the scheme -- to maximize performing opportunities for Australian musicians.

Headlining music acts and supporting music acts

The Discussion Paper proposes allowing for the possibility of an overseas act to support an Australian headline act. It also proposes that in the event application is made for both an overseas headline act and an overseas support act, then only the headline act would attract the requirement for a support act.

While supporting the proposal that in some circumstances an overseas act might support an Australian headline act, the Music Council is cautious about allowing an overseas headline and support act on the one bill to be supported only by one Australian support act. Circumstances involving more than two overseas acts should be treated in the same way as festivals.

Suggested Application Process

The Discussion Paper proposes that union consultation not be required as part of the certification process. This appears to be the only major departure from the Actors Certification scheme. The Discussion Paper notes that union consultation remains part of the process in respect of the visa application and thus it is curious that their views – albeit advisory rather than determinative – would not be considered by the Department.

The Discussion Paper proposes that completed applications be lodged 14 days before the sponsor wishes to apply to the Department of Immigration and Citizenship for the visas subject of the certification process.

As indicated above, the Music Council considers that this timeline is likely to cause considerable difficulty for sponsor.

Other Matters

The Music Council considers there are a number of other matters that deserve attention.

At the time of making application for overseas acts, the Music Council considers it appropriate that the identity of the local support act/s is advised – as is proposed for the guidelines under consideration.

The Music Council also considers that the local support act/s should be identified in advertising undertaken for the performances for overseas acts.

For this important initiative to deliver its full potential it is essential that the local support acts are afforded all reasonable opportunities that attend performance including advertising. Too often, Australian support acts are not identified in the advertising and are not even known at the time application is made for visas for the overseas touring party, by which stage advertising has often been in the media for some time.

Conclusion

The Music Council strongly supports the government's policy objective in fostering greater opportunities for Australians in the music industry. However, the Music Council has concerns regarding whether the Foreign Music Act Certification Scheme is the most effective way to achieve that end and recommends that regulatory amendment as originally proposed by the Labor Party be examined. However, Draft Guidelines would also no doubt assist in establishing the viability of the proposed Foreign Music Act Certification Scheme.

Finally, the Music Council does regret the very considerable period of time that has elapsed with little progress being made in the realisation of this important election commitment and urges the Department to act expeditiously.

Thank you once again for the opportunity to make this submission.

Sincerely

Dr Richard Letts AM

Executive Director