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Australia's representative to the International Music Council



Music Council of Australia

The Hon. Alexander Downer MP
Minister for Foreign Affairs
Parliament of Australia

September 1, 2005

Dear Minister

In an emergency, some Australian children would dial 911.

0! 0! 0!

RE: THE PROPOSED UNESCO CONVENTION FOR THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS

What follows is an argument to your government for support to this proposed UNESCO Convention, to be voted upon in the UNESCO General Assembly in October.

The Music Council of Australia is the national peak organisation for the music sector. It has fifty members drawn from the full breadth of this very diverse constituency. Music is, of course, an industry and more than an industry. The Music Council is concerned with the situation of Australian music, nationally and internationally, culturally and economically.

Executive Summary

The Australian government has recognized the value of the arts to Australian society and has acknowledged that, especially in Australia's demographic and geographic circumstances, government support through subsidy, regulation and tax concessions is necessary to sustain Australian creative resources.

This policy has guided Australian negotiations under GATS and in, for instance, its Free Trade Agreement with Singapore, where culture has been excluded from trade liberalisation initiatives. However, the policy did not survive in the context of the FTA with the USA, where serious limitations were imposed on the Australian government's right to support Australian culture, especially in the area of new media.

Of particular concern is the reservation which (in theory) allows Australia to regulate new (literally ‘interactive’) media to ensure adequate access to Australian content. The reservation imposes so many constraints and conditions that it may preclude any attempt by an Australian government to implement it.

The threat extends beyond AUSFTA and new media. It is an objective of the WTO to phase out all subsidies. If realised, this would be a disastrous blow to Australian culture.

An Australian government truly committed to the protection and development of Australian culture will support the proposed UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention presents a normative instrument which will give some shelter to governments that seek to retain the right to support their own cultures even while giving energetic support to the liberalisation of trade in other sectors.

The obligations imposed by the Convention are not onerous. For the most part, it *reserves the right* for governments to act, or *encourages* various types of action in support of cultural diversity. The entire document seems to sit comfortably with current practices in the cultural realm by the Australian government.

There are abundant reasons for Australia to support the Convention and no apparent substantive reasons for its opposition.

1. In July 2001, the Australian Government stated this policy position with regard to Australian culture (Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, Geneva):

2. *‘Australia has long recognised the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of our society, and is committed to sustaining our cultural policy objectives within the context of multilateral trade negotiations...’*

3. *‘As reflected in the proposals, there are factors which distinguish cultural goods and services from other goods and services. Cultural activities make a unique contribution to the social, economic and political fabric of any country..’*

4. The Australian Government acknowledged that *‘Market forces alone are rarely sufficient to allow cultural organisations and individuals to be fully self-supporting. This is true for the cultural sector worldwide, but in Australia’s demographic and geographic circumstances it is particularly the case... The important mix of subsidy, regulation and tax concessions ...(is) a necessary subvention in the national interest to sustain Australian creative resources...’*

5. The Australian government continues apparently to manifest this policy in its offers under GATS and, for instance, in its FTA with Singapore. However, the policy was put to the test in the negotiation of the Australia United States Free Trade Agreement (AUSFTA).

AUSFTA

6. The Australia United States Free Trade Agreement is a negative list agreement that liberalises all aspects of trade between the two countries other than those exceptions specified in the agreement or its annexes.

7. Both governments are permitted under the agreement to continue to *subsidise* cultural activities. However, their prerogatives to *regulate* cultural activities as a strategy of support to their own cultures are severely limited. This is of little moment to the US

government since US culture is protected and supported simply by nature of the operations of the US market. For instance the US government has no need to regulate to ensure television broadcast of US productions when only about 4% of free-to-air broadcast content originates outside the country. However, for the reasons already noted in the Australian government's policy statement above, government intervention is essential in Australia to overcome the limitations of the Australian market.

8. Cultural concerns under AUSFTA were focused in particular on the audio and audiovisual sector. In the broadcast era, requirements have been formulated over time to oblige Australian television and radio broadcasters to assign a certain percentage of broadcast time or number of hours per year to various categories of Australian content. These have been essential to the maintenance of a local production industry and public access to a local voice.

9. Under AUSFTA, these requirements were essentially preserved, with minor changes. The overall effect has been to cap the requirements at the current levels and to permit their imposition on digital free-to-air broadcasting as on analogue broadcasting. Since the requirements were not formulated in the knowledge that no increase could ever be possible, and since there are at the least strong arguments to strengthen them, this is not particularly satisfactory. However, at least the status quo has been maintained for a period.

10. It is our understanding that this 'concession' was offered by the USA as an element in a longer-term strategy. A member of the parliamentary negotiating team for the Uruguay Round in the early 1990s informed this organisation anecdotally last year that he became aware of the strategy at that time, and it has since been remarked in various documents and articles. The US is willing to concede the rights to regulate traditional broadcast media in favour of local content, reversing its previous opposition, because it believes that they will very soon become obsolete and their regulation in favour of local content will therefore have little market to protect.

11. However, it is determined to prohibit regulation of 'new media' – generally speaking, the media beyond the world of free-to-air streaming broadcasting, some of which are taking shape now and others which are quite possibly beyond our imaginations – because they will dominate the future.¹

12. The Australian government, in that same 2001 statement to the WTO cited above, recognised that Australian culture could need support when it was created and disseminated in these emergent forms of the future:

13. *'Australia remains committed to preserving our right to regulate audiovisual media to achieve our cultural and social objectives and to maintain the broad matrix of support measures for the audiovisual sector that underpin our cultural policy; including retaining the flexibility to introduce new measures in response to the rapidly changing nature of the sector.'* (Our emphasis.)

14. The US determination with regard to new media is exemplified in the section of AUSFTA dealing with electronic commerce. This obviously follows a general line in US policy, since the language here is consistent with that in the US agreement with, for instance, Chile.

¹ A meeting of cultural sector representatives was informed by Australia's negotiator for services, Milton Churche, that the US had point blank refused to consider the inclusion of an exception that would have permitted a requirement that Australian content be given some minimum amount of 'shelf space' in the menu offered to users of online video on demand services based in Australia. Note that there would be no obligation on customers to purchase the Australian content; it would simply be available. It is difficult to understand the basis for the US position other than as an intention to allow no exceptions in new media. The reservation cited here in para. 19 might be read in that light.

15. Electronic commerce deals with ‘digital products’, defined in AUSFTA para. as ‘*the digitally encoded form of computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically...*’ So electronic commerce includes trade in digital cultural products.

16. With regard to digital products (16.4.2) ‘*Neither Party may accord less favourable treatment to digital products:*

(a) *created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party, or*

(b) *whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party.*’

17. This therefore prohibits Australia from giving any preferential treatment to Australian cultural producers or product over those from the US. However, 16.4.4. provides a partial escape: ‘*For greater clarity, paragraphs 1 and 2 do not prevent a Party from adopting or maintaining measures, including measures in the audio-visual and broadcasting sectors, in accordance with its reservations to Chapters Ten [Cross-Border Trade in Services] and Eleven.*’ The Australian government made some wriggle ground.

18. The wriggle ground is defined in Annex II of the agreement. Annex II lists reservations or exemptions from the free trade protocol, permitting the government to regulate in specified ways. The paragraph headed ‘**Interactive audio and/or video services**’ states:

19. [The Agreement reserves the right of the Australian government to implement] ‘*(m)asures to ensure that, upon a finding by the Government of Australia that Australian audiovisual content or genres thereof is **not readily available** to Australian consumers, access to such programming on interactive audio and/or video services is **not unreasonably denied** to Australian consumers. Any measures addressing such a situation will be implemented through a **transparent process** permitting **participation by any affected parties**, be based on **objective criteria**, be the **minimum necessary**, be **no more trade restrictive than necessary**, not be **unreasonably burdensome** and be applied only to a service provided by a company that carries on a business in Australia in relation to the supply of the service.*’ (Again, our emphases.)

20. So has the Australian government ‘retained the flexibility to introduce new measures’ as was its stated intention, or has the USA, through the language of this paragraph, managed so to circumscribe its flexibility that in effect it will be unable to act?

21. We address the terms printed in bold.

22. The reservation applies only to ‘**interactive**’ services. The issue here is whether between them the interactive services and the current broadcast services, which can be regulated in the present way, exhaust the universe of audiovisual services as it will develop. Will there be other important, non-interactive new media that are not covered by reservations in the Agreement? Will these fit under the classifications ‘**audio**’ and ‘**video**’? For instance, the Australia Council has recently taken a decision to fund ‘new media’ primarily through the Visual Arts and Crafts Board, and this Board is not at all involved in the support of film, television or music. The Australian Society of Authors, with a membership of novelists and poets but not screenwriters, is concerned with issues around new media because it envisages involvement of its members in new digital forms. Only

time will reveal the nature of new media, but we are going to be surprised. Who could have envisaged a multibillion dollar business in telephone ring-tones?

23. Concerning the language of the reservation, most of the terms in bold open the way for disputes over interpretation.

24. How do we define the phrase **not readily available**? Australian content might not be readily available because it is not produced, and the limitations on regulation may prevent important forms of regulatory support to production, such as those applying to the cable television industry. Or the content may be produced but for some reason some proportion of it is not made available by the owners of the new media, or made available only under certain restricted circumstances for reasons that are disputed. Some might say the access is being **'unreasonably' denied**; others may contest the definition of **'unreasonably'**.

25. The Australian government can take a position on these matters, but presumably will be held to account through its execution of the **transparent process permitting participation by any affected parties**. Prospectively this process invites opposition from audiovisual producers in the USA, severally or collectively, as well as the US government. That in itself could have a chilling effect on any impulse to action by the Australian government.

26. The measures proposed by the government can be argued by the 'affected parties' on criteria that are wide open to interpretation and therefore dispute. There might be argument as to whether they are based on **objective criteria**, or by extension, whether the criteria are adequate or representative. Are they the **minimum necessary**? Minimum to achieve what purpose? Is the purpose itself permissible? Similarly with the stipulations **no more trade restrictive than necessary**, and **not be unreasonably burdensome**: define 'than necessary', define 'unreasonably', define 'burdensome'.

27. Is an Australian government ever likely to set itself on this rocky road? And if it were to do so, and encountered opposition by US entities or the US government, would it persevere? And if, despite (possibly unreasonable) US opposition it decided to act, would it not face the prospect of damaging economic retaliation by the US, not necessarily in the audiovisual area, as has happened for instance to Canada?

28. This negotiation would be bilateral. The contest is unequal. And in this situation, in present circumstances, Australia effectively has no negotiating allies.

29. (It might be noted that although the agreement is bilateral, it effectively limits Australia's prerogatives relative to all countries.)

The right to subsidise

30. The USA is the most powerful and assertive nation culturally, and its interests lie especially in ensuring unrestricted global opportunities for its audiovisual industries, especially in the new media of the digital age.

31. However, the international threat to Australian culture is not confined to the US, audiovisual content or new media.

32. While AUSFTA does not constrain the Parties' right to subsidise culture, it is an objective of the WTO to phase out all subsidies.

33. If cultural subsidies were phased out, many other aspects of Australian culture, not only audiovisual and new media, would be affected either in actuality or in prospect. For Australia, the elimination of cultural subsidies in accordance with dicta of the WTO could not be compensated by the broadening of tax concessions because they are categorised as indirect subsidies, nor by imposition of regulations in favour of Australian cultural content,

because they are precluded under AUSFTA except as permitted by the existing regulations for audiovisual and new media.

34. In Australia, the focus on AUSFTA has shifted attention away from the WTO. In the cultural world internationally, the WTO remains as the looming threat to cultural sovereignty – despite the difficulties with the DOHA round.

The government's right to support Australian culture should not be circumscribed by the trade ambitions of another country.

35. It should not by now be necessary to reiterate that only Australians can produce an Australian culture. It is not something we can farm out to the Americans nor any other country. Australian culture is the reservoir and continuing expression and communication of *our* values, *our* identity, *our* way of life.

36. Increasingly it is generated and expressed through new media. Our children and grandchildren are comfortable with and immersed in new media, probably almost beyond the comprehension of many older citizens. Content is available from all over the globe. That is highly desirable.

37. But it is also important that sufficient of that content is our own. Do we leave that to chance, given the force of large foreign markets? Do we give away a culture already overrun by foreign content in order to satisfy the trade ambitions of other countries?

38. Many Australian children would now dial 911 in an emergency.

39. We are here dialling 000.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

40. The above scenarios argue the importance of the adoption of the proposed UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention presents a normative instrument which will give some shelter to governments that seek to retain the right to support their own cultures in the face of trade liberalisation pressures.

41. This Convention has emerged from discussions over a number of years by civil society groups and, in particular, the International Network for Cultural Policy (INCP).²

² *From its website:* The International Network on Cultural Policy (INCP) is an informal, international venue where national ministers responsible for culture can explore and exchange views on new and emerging cultural policy issues and to develop strategies to promote cultural diversity.

INCP Goals

The INCP aims to strengthen cultural policies so that governments, together with civil society, can create an international environment that values diversity, creativity, accessibility and freedom by:

- offering a means through which countries can share their expertise, exchange views and information and strengthen domestic and international partnerships;
- raising awareness of the importance of cultural diversity and identity to social and economic development;
- demonstrating the links between national cultural objectives and international development;
- advancing dialogue on cultural policy issues by ensuring that culture is "on the table" in international, national and local fora.

(Continued)

INCP Scope

As the INCP evolves, the scope of issues that ministers address continues to broaden.

This is an informal network of cultural ministers from (according to its website) 67 countries. For reasons that unknown to us, Australia is not a member. The INCP was initiated by Canada, a country with which Australia shares much culture and circumstance.

42. One of the most important issues for INCP members has been the survival of local cultures in the face of globalisation and international trade liberalisation. The great majority of countries are net importers in cultural trade and, like Australia, must take special steps if local cultures are to survive – and especially those aspects of local culture that can be a source of financial profit to foreign entrepreneurs. The principle of the cultural exception or exemption or carve-out has been strong within the INCP: essentially, that ‘culture is not a good to be traded like any other’ and should be exempted from international trade agreements.

43. Over time, it became generally agreed within the INCP and its civil society counterparts that the solution to this issue might be found in an international agreement that attempts to guarantee governments’ rights to ‘cultural sovereignty’ – to maintain and foster their own cultures, and that also attempts in other ways to support cultural diversity. Because to protect local cultures can be to reserve a part of the local cultural economy for local producers only, such an agreement would be counter to the philosophy and purpose of the World Trade Organisation.³

44. If such an agreement is to carry any weight, it needs to be securely auspiced and resourced. Various possibilities were considered and finally it was agreed to approach UNESCO. (UNESCO had already proclaimed a Universal Declaration for Cultural Diversity, which included the proposition that the non-binding declaration should be further evolved into a binding agreement.)

45. UNESCO embarked upon a drafting and consultation process and this has produced a document to be presented for a vote by the UNESCO General Assembly in October 2005. If adopted there, it is then subject to ratification by individual governments and comes into force for its signatories once ratified by thirty countries.

46. We take up just a few of the main points of this draft agreement (available from UNESCO). Perhaps the most important observation we can make is that, assuming that an Australian government does indeed wish to defend and foster Australian culture as indicated by the policy statements of 2001, the proposed Convention will only assist. It will do so, at the least, by offering a normative and sympathetic instrument as a reference point in international negotiations that have an impact on culture. Not to endorse the Convention would be perverse since it foregoes support for what Australia set out to do, for instance, in

Among those issues, INCP members are discussing and examining how to address the many challenges and opportunities associated with the growing issues of cultural diversity and identity in an increasingly globalized world. Although globalization -- through the increasing mobility of people, trade liberalization, new communication technologies and industry consolidation -- offers great opportunities for cultural expression, it also poses fundamental challenges to governments, civil society and the private sector in nurturing this diversity.

The policy challenge is to find the means by which to remain open to the best the world has to offer, while nurturing domestically rich and diverse cultural expression. INCP members are exploring how diversity can be integrated into a common approach to global development, including the challenges and opportunities of promoting and protecting cultural heritage for social and economic development.

³ The argument for trade liberalisation depends importantly on the principle of ‘comparative advantage’ – that production of a particular good or service goes naturally to the country that is the most efficient producer. The cultural exception says that regardless of comparative disadvantage in cultural production, each country has the right to its own culture and to implement policies to ensure its survival and development. This does not imply exclusion of other cultures so much as a reservation of a sufficient corner of cultural production to ensure survival of local cultures.

the cultural area in AUSFTA (initially, a total cultural exemption) and was unable because it had no such 'friend' in its negotiations with a much more powerful partner.

47. Secondly, the Convention gives the government the right to support Australian culture but does not oblige it to exercise the right.

48. Thirdly, in our perception, the Convention will not oblige the Australian government to take any action that is inconsistent with its present cultural policy and practice.

Some relevant detail of the Convention

49. The Convention begins in the usual way with a Preamble setting the context and basic understandings of the document. This is followed by a list of nine objectives and eight guiding principles.

50. For example, the first of the objectives is 'to protect and promote the diversity of cultural expressions.' The eighth is 'to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.' This is also expressed as a guiding principle: 'the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.'

51. However, this is not an invitation to close the cultural borders. Principle 8 states that 'When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention.'

52. Australian governments have long supported the diversity of cultures found in the Australian population – for instance, through subsidies from the Australia Council and state arts ministries. The Federal government has provided access to a diversity of foreign cultures through the Special Broadcasting Service (SBS) television and radio programs. Local content broadcast quotas have the purpose not of excluding foreign content but rather, of ensuring that some of the content that is available to Australians is Australian.

53. The Convention's lists of objectives and principles are followed by a section with definitions of key terms. 'Culture' is a term with a plethora of meanings. This section defines it and its derivatives for the purposes of this document.

54. The fourth section gets down to business: Rights and Obligations of Parties.

55. The language in a number of the following Articles *obliges* the signatories to take certain actions. Some paragraphs give them the *right* to take specific classes of action should they so choose. Some encourage but do not obligate specific actions.

56. Article 5.1 states the general rule, and this is key to our interests: '*The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognised human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.*'

57. Article 6 comprises a non-exhaustive list of such measures which a Party **may** adopt. For instance, there may be 'regulatory measures aimed at protecting and promoting diversity of cultural expressions.' The diversity need not only be internal within the country's borders. Diversity is strengthened even if a mono-cultural country sustains its culture in contrast to the cultures of other countries.

58. In brief summary, the firm obligations are only these: obligations to report relevant actions to UNESCO every four years, share and exchange information; obligations to encourage and promote through educational programs an understanding of the importance of the protection and promotion of cultural diversity; acknowledge the fundamental role of civil society relevant to the Convention objectives; developed countries facilitate cultural exchange with developing countries; cooperate with and assist other Parties; provide specified information. For Australia, this is hardly a burdensome list.

59. In the other Articles, signatories agree ‘to encourage...’, ‘to endeavour’. They ‘may’ rather than ‘shall’ take various actions. For instance: to create and disseminate cultural expressions, protect cultural expressions at risk of extinction, promote international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expression, strengthen cultural industries in developing countries, contribute to an International Fund for Cultural Diversity.

60. One of the most difficult issues is to establish the relationship of this Convention to other treaties. If it is automatically subservient to agreements under the WTO, for instance, it becomes an exercise in futility. Article 20 states the following:

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, they:

(a) shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

61. It is inevitable that obligations under this treaty will conflict with obligations under other treaties. It is not clear how Article 20 can so establish the status of this Convention as to resolve such conflicts. It is hardly realistic to propose that it supervenes other treaties and parties’ obligations to them. But at least it does state that this treaty is not automatically subordinated to others even though it later says that obligations under other treaties remain intact. How this matter plays out remains to be seen.

62. The remainder of the agreement specifies dispute resolution mechanisms and various administrative structures and practices.

The politics

63. In sum, the Convention generally supports and is nowhere in opposition to Australian government policy as enunciated in 2001. Ratification must surely advantage Australia.

64. The United States is now overt in its opposition to the Convention. The Convention would stand in the way of total access for its audiovisual product in the global market. Its audiovisual sector is possibly the sector making the greatest contribution to US export income.

65. It should be noted again that the extreme self-sufficiency of the US domestic market for US-produced audiovisual content means that US regulation in favour of US content would be redundant. Furthermore, on the evidence, while the US government strongly supports the export ambitions of its audiovisual sector and the related foreign projection of American popular culture and values, it places little value otherwise on cultural production

or its own role in supporting it. The funding to the US National Endowment for the Arts is about the same as the funding to the Australia Council, despite the fact that the US population is 15 times that of Australia and the USA GDP is twenty times greater than ours. In important ways, we are near opposites in cultural circumstances and philosophy.

66. Some suggest that Australia is following US policy concerning the Convention, despite the fact that our situation as a country engulfed by US cultural exports and the very assertive US stance with regard to Australian regulations for culture means that this is strongly contrary to our interests.

In conclusion

67. The passage of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is very much in Australia's best interests. The signatories to this letter advocate committed support for a strong Convention, a vote for its adoption by UNESCO and early ratification by the Australian government.

Sincerely

Dr. Richard Letts
Executive Director

The Music Council comprises nominees or officers of the following organisations:

Australasian Performing Right Association
Australasian Sound Recordings Association
Australian Band and Orchestra Directors Association
Australian Music Association
Australian Music Centre
Australian Music Examinations Board
Australian Music Industry Network
Australian Music Therapy Association
Australian National Choral Association
Australian Screen Composers Guild
Australian Society for Music Education
Australian Youth Orchestra
Community Broadcasting Association of Australia
Contemporary Country Music Foundation
Early Music Network Australia
Economic Strategies P/L
International Association of Music Libraries (Australia)
Music Managers' Forum (Australia)
Musica Viva Australia
Musicians Union of Australia
Musicological Society of Australia (SA)
National Council of Tertiary Music Schools
Phonographic Performance Copyright Association
Symphony Australia
The Orchestras of Australia Network
Tura New Music

And others elected from the fields of

Community music development
Computer music and multimedia
Early childhood education

Experimental music
Festivals
Folk music
Indigenous music
Jazz
Legal and copyright
Music and multimedia
Music composition
Music entrepreneurs and agents
Music in film and television
Music publishing
Music research
Music venues
Opera
Popular music
Public broadcasting
Record industry
Recording studios
School music education
Studio music teaching
World music