

## THE NEWS IS NOT GOOD

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It is now possible to report on the final text of the Australia/United State Free Trade Agreement and to comment upon its effects on music and the cultural sector. (You can read the thousand pages or so at [www.dfat.gov.au](http://www.dfat.gov.au))

In the February issue of *Music Forum*, the state of the negotiations for the free trade agreement (henceforth, the FTA) as of December were reported to readers. That report resulted from meetings in November and December with the Australian negotiators. At our press time, the final sessions of the negotiations were still to occur, and took place at the end of January.

Those sessions reversed a fundamental understanding that had been in place for the entire period of negotiations up to that time. The consequences could be very serious.

The simplest summary of the effects of the FTA on culture is this. *Before negotiation of this FTA, the Australian government's ability to intervene in support of Australian culture was unfettered. >From the time of the ratification of the agreement, it will be seriously constrained. Some negative effects may be felt in the short term. Some possible effects on Australian culture have not been investigated and indeed are unforeseeable.*

There are no compensating concessions from the USA in the cultural area. The only US concessions that would be of significance to Australia would require US government intervention to provide special access to the US market for, for instance, Australian audiovisual product. This was never likely to happen.

As reported in the last *Music Forum*, initially Australia sought a *total cultural exemption* from the FTA, on the model negotiated in Australia's FTA with Singapore. This position was consistent with Australian government statements of cultural policy at various international fora for some time before the US negotiations commenced.

In our last meeting with the negotiators in December 2003, they foreshadowed a new negotiating position. They would continue to seek a total cultural exemption, but then in the face of US demands, would make some concessions in the audiovisual area. In a sense, the agreement on culture would be a positive list agreement, sitting within a negative list agreement for the FTA overall. We of the cultural sector were opposed to any weakening of the cultural exemption, but agreed that if we must face some concessions to the US, this was an elegant formula.

Our next meetings with the negotiators came after completion of the negotiations in January. We were informed that the cultural exemption had been abandoned. **The loss of the cultural exemption meant that what had been positive list concessions became the only regulatory rights remaining to the Australian government.** Everything else in the cultural sector becomes subject to the FTA. (It should be acknowledged here that the right to subsidise was retained. (It is hardly a right that the US can contest, given its practices in agriculture.))

Because this upending of the position on culture occurred only in the final days of negotiations, it was never discussed with the cultural sector. We had never been presented with the need to consider such a policy nor to advise on its effects. The negotiators have offered no evidence that they had considered its possible effects. Indeed, while such an investigation would assist in identifying possible consequences, it is in principle impossible for all the consequences to be anticipated because that would require foreseeing the future.

(*Music Forum* readers may recall the Blue Sky case, brought eventually to the Australian High Court by New Zealand interests under the CER (FTA) with New Zealand. This was an

unforeseen consequence of a negative list agreement. The outcome is that New Zealand film or television productions can be shown on Australian television in satisfaction of Australian local content requirements. Imagine if the litigants had been American, as an unforeseen consequence of the negative list Australia-US FTA.)

*The principal reason that the FTA is unsatisfactory is that, because it no longer includes a general cultural exemption, it deprives the Australian government of the right to respond through regulation to any cultural circumstance not specifically covered by the language of the agreement. The future is unknown, and when it arrives the government will have lost important rights to regulate in support of Australian culture.*

## **Music**

The overall intention of an FTA is that there will be no obstructions to trade between the signatory countries. Most such obstructions come in the form of government interventions favouring their own country's enterprises over those of the other countries. But the right to continue or even introduce some specific interventions may be written into the agreement – either into the main text, or into “Annexes”. In the FTA with the USA, the main interventions (or “reservations”) on behalf of Australian culture are found in Annex I and Annex II.

Reservations in Annex I of this agreement are subject to something called ratcheting. The current Australian content quota for free-to-air television is placed in Annex 1. The effect of ratcheting is that if ever the present 55% quota were reduced, say to 40%, it could never again be increased above 40%. Reservations placed in Annex II are not subject to the ratcheting provision. It would be possible to place an entire area of activity in Annex II without any further qualifications; the effect would be to exclude it from the FTA entirely and any government intervention would be possible.

The only reservation specifically concerning music is that concerning quotas for the radio broadcast of Australian content, including music. It applies only to the commercial broadcasting sector. A maximum is imposed upon the quota which can be required. The maximum is 25% -- the same as the current quota. The present arrangements have lower quotas for most musical styles. These could be increased to but not exceed 25%. Similarly, the current requirement for new releases of Australian music could be increased to but not exceed 25%. Finally, the government retains the prerogative to reregulate commercial broadcasting should for some reason it decide that self-regulation is not achieving its objectives.

A cap therefore is imposed on the Australian music quota on commercial radio which essentially is a “standstill” on the current quota level. The government will lose its prerogative to increase the present quota beyond 25%, whatever the arguments in its favour. It should be noted that other countries such as Canada and France have considerably higher quotas, along with other regulations that might possibly have been emulated to the benefit of the Australian music sector and the national accounts.

The reservation covering Australian music on radio does not include the community broadcasting sector, which currently is self-regulated along similar lines to the commercial sector. Because of its genuine commitment to Australian music, its broadcast of a great range of musical styles ignored by the commercial stations, and the exposure it gives to new artists, the community sector is extremely important to us.

The negotiators claim that the community broadcasting sector would escape the terms of the FTA because it is not-for-profit and will be of no interest to the USA. If we could be confident of this, it would be better that the sector is not mentioned in the FTA. However, if the claim is incorrect, a challenge were mounted by the US against quotas for the community sector, and the sector is found to be subject to the FTA, it would be impossible to have any quota whatever. In the circumstances it would seem preferable that the community sector should be included in Annex II along with the commercial sector.

## **Interactive media**

A lot of the agitation from the audiovisual sector concerning the FTA was concerned with preserving Australian government rights to intervene in support of Australian content, including music, on new media. This concern was taken up by the negotiators in Annex II reservations for interactive media.

We were informed by the negotiators that the Americans were highly resistant to reservations in this area. We know from other statements by the US that its willingness to accommodate local content quotas in old media were based on a belief that they would be overtaken by obsolescence and that activity would move to new media. Perhaps the Australians won concessions from the US in this area but they are less than convincing. It is difficult to believe that the language of this reservation was written by any other than the Americans.

There is a requirement to invite "participation" by "any affected parties" in any preparations to change the regulations in interactive media. This obviously includes the US. The negotiators seem to want to obscure this by noting that the requirement will oblige consultation with domestic stake holders. This is as it should be, although it does not seem necessary to make such a stipulation in an international trade agreement. The requirement, however softened by the language of the FTA, to invite *participation* from the US is objectionable because in effect, it may translate into a de facto requirement for *approval* by the US.

Given the realities of the situation, probably both Australia and the USA have to *agree* that Australian audiovisual content or genres thereof are not "readily available" to Australian consumers and that access is not "unreasonably denied". This already invites major differences of opinion. Furthermore, they would have to agree on *all* of the following: that measures to address such a situation are "based on objective criteria", are the "minimum necessary", are "not more trade restrictive than necessary", are not "unreasonably burdensome". Each of these requirements could be subject to radically different interpretation between two parties, one of which wants to defend its own culture and the other which wants to remove all obstructions to its access to the market.

What happens if, having consulted, the Australian government wishes to proceed with regulations with which the US has stated it is in disagreement. Can the US then retaliate (as it has been seen to do elsewhere, and disproportionately)? Is the knowledge that the US is capable of retaliating likely to inhibit the Australian government from placing Australian cultural interests first? Or are they to be constrained *a priori* by the US's view of its own trade priorities?

## **Other areas of concern**

*E-commerce.* In the e-commerce area, the agreement applies to the cultural sector except as Australia's rights are detailed in the Annexes. What are the implications for e-commerce activities not now specified in the Annexes? A cultural exemption would have taken care of that issue. As things stand, it is another area in which the future could bring difficulties and the government may lack the prerogatives to address them.

*Public broadcasters and other quangos.* The negotiators did not think it was necessary to specify the ABC, SBS and Film Australia as 'non conforming measures', but it is arguable that some, even a large part, of their present activities are provided in competition with private service suppliers and therefore not exempt. The same argument could be extended to other quangos, existing or to be created, that are active in the cultural area.

*Government procurement.* In the government procurement section, there is a reservation allowing the government to purchase art works without applying national treatment. The implication is that procurement of cultural services or product outside the visual arts is subject to national treatment. We do not yet have an expert opinion on this, but have some concern.

*Intellectual property.* The Music Council generally does not object to the terms of the agreement in intellectual property. Especially, it supports the introduction of performers' copyright, incidentally allowing Australia to ratify the newish international agreement (see the following article). On extension of term and some aspects of enforcement, there is mixed opinion, with the main supporting argument that we align Australia with practice in other advanced economies. However, whether it is an advantage to introduce these changes in the context of an FTA with the USA is contested. It forestalls a more democratic consideration of the issues within Australia and makes our position effectively irreversible regardless of success or failure of the measures, unless the US consents to change.

*International Convention.* Prior to this FTA, the government was in a position to support the proposed International Convention on Cultural Diversity, now being formulated in UNESCO, on the basis that it already practises what it would be preaching. This convention will provide an international basis for the exclusion of culture from free trade agreements. Our government's position with regard to the convention, should it have wished to support it, now is compromised.

Having considered all of these issues, the Board of the Music Council finds that it does not have a basis upon which to offer support to the Australia – United States Free Trade Agreement.

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