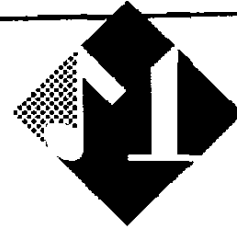


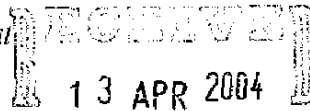
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AUSFTA
Submission No:31.....



Music Council of Australia



The Secretary
Joint Standing Committee on Treaties
Parliament House, Canberra
April 7 2004

BY:.....

Dear Sir/Madam

RE: THE AUSTRALIA -- UNITED STATES FREE TRADE AGREEMENT

- 1 The Music Council of Australia appreciates the opportunity to submit its assessment of the effects of the Australia -- United State Free Trade Agreement (FTA).
- 2 The Music Council of Australia is a national peak organisation with a membership of 50, representing national music organisations and various categories of activity across the entire music sector. It is Australia's representative on the International Music Council. It is a source of information, conducts research, is an advocate for music and a manager of projects.
- 3 The Music Council does not believe itself competent to offer an opinion or to take a policy position on the merits of the FTA as a whole. Its observations are entirely about the effects of the FTA on the cultural sector.
- 4 There is loss to the cultural sector from the FTA, and no benefit except possibly in some aspects of intellectual property rights.
- 5 The negotiators present the reservations negotiated for culture as notable successes in the face of very strong US pressure. Given their task, it probably is true that there have been negotiating successes and credit is due for those. However, taken from the cultural sector's perspective, they have managed only to limit the damage.
- 6 *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 of the possible effects on Australian culture are clear, others have not been investigated and indeed are unforeseeable.*
- 7 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. Our negotiators proposed that the US introduce a foreign content quota for television, possibly more in jest than as a concept that the US government would be likely to entertain.
- 8 The Music Council was among a number of cultural organisations consulted regularly by the Australian negotiators during the negotiating process. We were informed about the position taken by our negotiators as talks progressed. Initially, Australia sought a *total cultural exemption* from the FTA, on the model negotiated by Australia in its FTA with Singapore. This position was consistent also with Australian government statements of cultural policy at various international fora for some time before the US negotiations commenced.
- 9 It is a policy supported whole-heartedly by the cultural sector. A lamb chop grown in Australia is much the same as a lamb chop grown in the USA. But the USA cannot create an

Australian culture. Only we can do that. Given the realities of the market, aspects of our cultural production can only survive and thrive with government intervention. It is not appropriate that our efforts should be constrained by the trade ambitions of another country.

10 We had two meetings with the negotiators in December 2003. In the first of these, we were informed that it was clear that the USA would not accept the proposed total cultural exemption. The Australian negotiators proposed a revision to their position. They would continue to seek a total cultural exemption, but then would make some concessions to the US demands 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.

11 The cultural representatives saw no need to concede to the US position not any cultural benefit from so doing. We 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. The argument then focused on the exact nature of the concessions to be offered by Australia.

12 Some of the proposals of the negotiators were not well received. For instance, it was made clear to negotiators that a standstill agreement on broadcast quotas was not acceptable, and that much more scope was necessary for the regulation of new media than they proposed. Ratcheting was opposed. Our views were not brought to bear or at best only partially adopted in the reservations in the agreement.

13 Our next meetings with the negotiators came after completion of the negotiations in January. We were informed that the cultural exemption had been abandoned and we were given an approximate description of the concessions to the USA, which were of the type foreshadowed in December. **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.)

14 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.

15 The Committee will recall the Blue Sky case, brought eventually to the Australian High Court by New Zealand interests under the CER 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.

16 The basic position of trade liberalisation as achieved through a negative list FTA: i.e. that all international trade should be subjected to the free market, may be appropriate to many or most areas of economic activity. It is not an appropriate discipline for our cultural life.

17 We take as an example, Australian films. Our films are produced very economically, very efficiently. But given the realities of the world market, this does not, of itself, ensure that they are produced nor shown. Nor is it the primary reason for their production or exhibition. They affirm, reflect and develop national identity and character – a bipartisan government aspiration as revealed in the language of the charters of the ABC, the Australia Council, the Australian Broadcasting Authority/Broadcasting Services Act. We need them because in them, we see ourselves. But the market alone will not ensure production of Australian film. Government intervention is needed, as the government acknowledges.

18 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

19 Concerning the Annex II reservation for broadcast of Australian music—the Australian music quota, a cap is imposed which essentially is a “standstill” on the current quota level. The government will lose its prerogative to increase the present quota, 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. Presumably the fact that the Australian quota is not set by the government but is self-regulated by the industry will not exempt it from the constraints of the FTA.

20 The Committee should be aware of the context in which the music quota is imposed. As noted, as of the passage of the current Broadcasting Services Act, the quota is imposed by self-regulation – but this self-regulation occurs in a context in which the government through the ABA can re-regulate if it so decides, for instance, upon evidence that self-regulation is not achieving the government’s policy objectives.

21 The association of radio broadcasters, Commercial Radio Australia (CRA), and its predecessor the Federation of Australian Radio Broadcasters, have been vehemently opposed to Australian music quotas possibly over their entire history since first imposed in 1942, and certainly in recent decades.

22 The Australian recording industry and its main association, ARIA, dominated by the five multinational recording companies, has had little to say on the matter under its current management – even though, in the past, it was a strong protagonist for the quotas. We understand that ARIA has not made a submission to the current mandatory review of the quotas being conducted at present by CRA. Probably, the multinational recording companies can make higher profits by simply importing top 40 discs rather than risking investment in Australian artists. Their interest in Australian artists may well be motivated primarily by the fact that broadcast time is reserved for them and consequently sales are created.

23 In summary, the prudent position would be based on an assumption that for their respective reasons, both the broadcasters and the record companies would withdraw support from Australian music were the quotas to be terminated or weakened. Conversely, the position of Australian music would be strengthened if the quota requirements were increased (within reason).

24 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 give to new artists, the community sector is extremely important to us. If, as the negotiators have claimed, the community broadcasting sector would escape the terms of the FTA because it is not-for-profit, no action need be taken. However, we lack confidence in this analysis and believe that the sector probably should be included in Annex II along with the commercial sector.

Interactive media

25 Concerning the Annex II reservation for interactive media, the terms for regulation are too restrictive and open to dispute.

26 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 to invite comment from the US is objectionable because in effect, it may translate into a *de facto* requirement for approval by the US.

27 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 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.

28 Furthermore, it raises the question of 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

29 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.

30 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.

31 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 have some concern about this.

32 The Music Council generally does not object to the terms of the agreement in intellectual property. Especially, it supports the introduction of performers' copyright. 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, at best, open to doubt. 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.

33 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.

Summary.

34 As already stated, the Music Council of Australia does not wish to make a judgement on the FTA as a whole. It accepts that for some sectors the FTA may bring an exchange of benefits and even a net benefit to Australia.

35 However, given the above considerations, the Council can reach no conclusion other than that the FTA presents serious disadvantages to music and the cultural sector. It cannot endorse this. It does not believe that it would have the support of its constituency in offering sacrifices from the music and cultural sectors in order that other, possibly more financially resilient sectors, might benefit.

36 Indeed, a weakening of the cultural sector represents a contraction of the national spirit and identity. It is the consequence we should least accept from any trade agreement. We seek an expansion of the national spirit.

37 The Music Council therefore does not have a basis upon which to offer support to the Australia – United States Free Trade Agreement.

38 Thank you once again for the opportunity to offer comments on this important agreement.

Sincerely

Dr Richard Letts AM

Executive Director