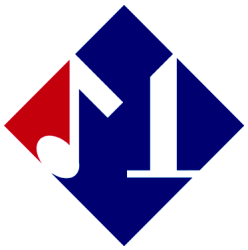
Administration
MBE 148/45 Glenferrie Road
Malvern, Vic 3144
Phone: 03 9507 2315
Fax: 03 9507 2316
Email: admin@mca.org.au
Website: www.mca.org.au
ABN 85 070 619 608
Executive Director
Tel: +61 (0)2 9251 3816
Fax: +61 (0)2 9251 3817
Email: mca@mca.org.au
Music. Play for Life campaign
Tel: 02) 4454 3887 or 0439 022 257
Email: tina.mpfl@mca.org.au
Website: www.musicplayforlife.org
Australia's representative to the International Music Council



Music Council of Australia

Free Trade Agreement Division
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221
October 4, 2012

By email: ia-cepa@dfat.gov.au

RE: Malaysia-Australia Free Trade Agreement

The Music Council of Australia appreciates the opportunity to comment on the Malaysia-Australia Free Trade Agreement.

Australia has one of the most open cultural markets in the world and has for decades fostered its own cultural sector while ensuring that Australians have access to the world's cultural output.

As argued in its submission in response to the Scoping Study, the Music Council considers that all trade agreements should exclude culture as was the case with the Singapore-Australia Free Trade Agreement (SAFTA). With the exception of the Closer Economic Relations Agreement with New Zealand and the Australia-United States Free Trade Agreement, it has long been government policy to make no commitments in respect of the cultural sector in positive list agreements, such as the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services, and to secure a comprehensive cultural exception in negative list agreements as in the case with SAFTA.

The Music Council considers that this approach is consistent with Australia's obligations under the Constitution of the United Nations Educational, Scientific and Cultural

Organisation (UNESCO), the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration on Cultural Diversity, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression and the Declaration on the Rights of Indigenous Peoples.

The Australia-ASEAN-New Zealand Free Trade Agreement (AANZFTA), which is a positive list agreement, provides as follows:

> For the purposes of this Agreement, the Parties understand that measures referred to in Article XX(f) of GATT 1994 include measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value.[1]

AANZFTA defined creative arts as including:

> the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts, and the study and technical development of these art forms and activities.[2]

This definition mirrors the definition contained in SAFTA.[3]

As the Productivity Commission pointed out in its 2010 Review of Bilateral and Regional Trade Agreements (BRTA), in respect of AANZFTA:

> under the general exceptions to the agreement, the parties agreed that — provided that they are not a disguised restriction on trade or unjustifiably discriminatory — measures necessary to protect objects or sites of historical value, or measures to support creative arts of national value would not be covered by the agreement.[4]

The Productivity Commission went on to suggest that:

> Where it is deemed that cultural goods and services should be quarantined from provisions in a BRTA, the Commission considers that there would be merit in adopting the approach taken in AANZFTA (box 14.6). The agreement provides an exception for cultural measures provided that the measures are not unjustifiably discriminatory or a disguised restriction on trade (in a similar manner to exceptions provided in the GATT). In doing so, it aims to preserve the sovereign rights for nations to regulate in such areas of legitimate national interest, but also guards against the introduction of unnecessarily protectionist measures.[5]

Yet, rather than mirroring AANZFTA, MAFTA uses much looser terminology, excluding measures:

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[1] See http://www.dfat.gov.au/fta/aanzfta/aanzfta.PDF, page 196.
[2] See http://www.dfat.gov.au/fta/aanzfta/aanzfta.PDF, page 196.
[3] See http://www.dfat.gov.au/fta/safta/SAFTA-4iia.pdf.
[4] See http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf, page 281.
[5] See http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf, page 284.

> imposed for the protection of national treasures of artistic, historic, or archaeological value.[6]

The Music Council does, however, note that in Australia's Schedule of Specific Services Commitments, in respect of Computer and Related Services (CPC 84), it is stated:

> For greater certainty, Australia's commitments in CPC 844 and 849 do not impose any obligations on Australia with respect to measures affecting services in other sectors, including audiovisual services, however delivered.[7]

The Music Council, as argued in other submissions to the Department of Foreign Affairs and Trade, considers the cultural exception contained in SAFTA, along with its definition of 'creative arts', the latter mirrored in AANZFTA, should act as the pro forma for all free trade agreements.

It is therefore disappointing that, while regard has been given to Australia's cultural sector in MAFTA, it is not as robust as the consideration given it in SAFTA and the AANZFTA.

Yours sincerely

Dr Richard Letts AM
Executive Director

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[6] See http://www.dfat.gov.au/fta/mafta/documents/Malaysia-Australia-Free-Trade-Agreement.pdf, page 97.

[7] See http://www.dfat.gov.au/fta/mafta/documents/Australian-Schedule-of-Specific-Services-Commitments.pdf, page 9.