

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

Background

- 2.1 It is proposed that Australia, as a member of the United Nations Educational, Scientific and Cultural Organization (UNESCO), accede to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the Convention).
- 2.2 The Convention identifies the expressions of culture by a country's citizens as tangible entities. The purpose of the Convention is to protect and promote the diverse range of these 'cultural expressions'.¹
- 2.3 The Convention aims to protect and promote cultural expressions by assisting the cultural activities, goods and services which give rise to these cultural expressions. The Convention is particularly concerned with securing cultural expressions that are at risk of extinction or otherwise under threat.
- 2.4 At the time of the Committee's hearing into the Convention there were 96 Parties to the Convention.²

1 National Interest Analysis (NIA), para 4.

2 Dr Stephen Arnott, *Transcript of Evidence*, 16 March 2009, p. 3.

Obligations

- 2.5 The primary obligations of Parties to the Convention are to undertake to assist the creation of cultural expressions, both domestically and abroad, through regulatory, legislative, financial and technical assistance, and to report to the United Nations on these measures. These obligations are not overly prescriptive and are expressed in generalised 'best endeavour' language.³
- 2.6 Articles 6, 7, 10 and 11 of the Convention require Parties to endeavour to encourage the recognition, production and dissemination of diverse cultural expressions. Parties must endeavour to achieve this through providing regulatory and financial support to cultural activities and industries. Parties must also endeavour to conduct educational and public awareness programs to increase the recognition of the diverse cultural contributions made by artists and others involved in creative processes.⁴
- 2.7 Articles 8 and 9 of the Convention outline the reporting and information sharing obligations of Parties. Parties must report every four years to both the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (established under Article 23 of the Convention), and to UNESCO members as a whole, on measures taken to protect and promote cultural expressions. Parties must also share and exchange with other countries information relating to the protection and promotion of cultural expressions.⁵
- 2.8 Articles 12 through to 19 outline the obligations of Parties to foster cooperation and collaboration among stakeholders both domestically and internationally. Domestically, Parties are required to encourage partnerships among government, civil society, non-governmental organisations and the private sector aimed at protecting and promoting diverse cultural expressions. Internationally, Parties are required to promote inter-governmental cooperation on cultural policy and to facilitate cultural exchanges.⁶
- 2.9 The Convention gives special attention to securing the cultural expressions of citizens in developing nations. Dr Ben Goldsmith, a member of the Steering Committee of the International Network for Cultural Diversity, submitted that the cultural industries of many
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3 NIA, para 11.

4 NIA, para 11.

5 NIA, para 11.

6 NIA, para 11.

developing nations are not well-established. Dr Goldsmith argued that in today's climate of economic globalisation and open markets, the cultural industries of these nations (and the cultural expressions created by these industries) may be adversely affected by the increased competition from the well-funded cultural industries of developed nations. Therefore, the cultural expressions of developing nations are argued to be less secure than those of developed nations. One of the primary intents of the Convention is to address this issue.⁷

- 2.10 Articles 14, 15 and 17 require developed nations to endeavour to assist developing nations in promoting and protecting their cultural expressions, with special regard to cultural expressions under serious threat, through strengthening the production capacity of cultural industries and their access to world markets. Parties are required to endeavour to provide developing nations with assistance in cultural policy development, private enterprise development, technology and expertise transfer and also to encourage collaboration between nations in areas such as music and film.⁸
- 2.11 Article 18 establishes the International Fund for Cultural Diversity to provide financial support for the protection and promotion of cultural expressions. Parties must endeavour to provide voluntary contributions on a regular basis to the fund.⁹
- 2.12 Article 16 requires developed countries to facilitate cultural exchanges with developing nations by granting preferential treatment to artists and other cultural professionals from developing nations.¹⁰
- 2.13 Article 20 requires Parties to take into account the relevant obligations of the Convention when interpreting and applying obligations under other treaties.¹¹

Interpretive declarations and reservations

- 2.14 The Government proposed to accede to the Convention with an interpretative declaration to Article 16 to clarify that the Convention

7 Dr Ben Goldsmith, *Submission No. 4*, p. 7.

8 NIA, para 11.

9 NIA, para 11.

10 NIA, para 12.

11 NIA, para 13.

will not affect the content or interpretation of Australia's immigration laws, or Australia's discretion under those laws.¹²

- 2.15 Dr Ben Saul, the Director of the Sydney Centre for International Law at the University of Sydney, in his submission to the inquiry noted that Australia's current immigration laws typically require migrants to have high levels of formal 'Western' style training before they are admitted to Australia. The submission argued that these requirements do not recognise the value of the extensive informal training that many cultural practitioners from developing nations may have. Dr Saul therefore asserted that Australia's immigration requirements disadvantage such people, and in turn the cultural industries they represent. The submission therefore asserts that the interpretive declaration to Article 16 reinforces this imbalance and recommends that Australia provide for greater ease of admission for cultural practitioners from developing nations.¹³
- 2.16 A representative from the Department of Immigration and Citizenship informed the Committee that the interpretive declaration to Article 16 was necessary in order to make it clear that the visa regime would continue as it exists currently, and that the Convention would not mandate the creation of new visa regimes.¹⁴
- 2.17 The Government also proposed to accede to the Convention with a reservation to Article 20 to clarify that Australia will interpret and apply the Convention in a manner that does not affect its rights and obligations under other treaties and does not restrict Australia's ability to negotiate future treaty rights and obligations.¹⁵
- 2.18 Dr Goldsmith, in his submission to the inquiry, argued that the reservation to Article 20 effectively negates the rights and obligations created by the treaty and makes the Convention subordinate to other agreements, such as trade agreements, which may impede upon or threaten cultural expressions.¹⁶
- 2.19 Representatives from the Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's (AG's) Department told the Committee that the reservation to Article 20 is needed due to the unusual and ambiguous wording of the Article. Representatives noted that Article 20(1) states:

12 NIA, para 12.

13 Dr Ben Saul, *Submission No. 6*, p. 2.

14 Ms Cassandra Ireland, *Transcript of Evidence*, 16 March 2009, p. 5.

15 NIA, para 13.

16 Dr Ben Goldsmith, *Submission No. 4*, p. 12.

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

Conversely, Article 20(2) states:

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

Thus, representatives told the Committee that the reservation to Article 20 is necessary in order to clarify the operation of the Convention in relation to Australia's other current, and future, treaties.¹⁷

- 2.20 The AG's Department assured the Committee that reservations are permitted by the Convention and that at least one other signatory has made a similar reservation to Article 20. The Committee was assured that there has been no adverse reaction to the reservation.¹⁸
- 2.21 A representative from Department of the Environment, Water, Heritage and the Arts (DEWHA) informed the Committee that, particularly due to the reservation to Article 20, any free trade aspirations of the Government will not be compromised by accession to the Convention.¹⁹
- 2.22 Dr Ben Saul's submission argued that Article 20 is ambiguous in nature and acknowledged the reasoning for the Government's proposed reservation to the Article. However, Dr Saul further argued that, despite this reservation, the Government must endeavour to ensure that Australia's obligations under the Convention are finely balanced with their obligations under other treaties, including trade agreements, and that the Government must appropriately support cultural industries.²⁰
- 2.23 The Media, Entertainment and Arts Alliance (MEAA) noted that several Parties that have ratified or acceded to the Convention have done so with provisions similar to the above mentioned interpretive declaration and reservation. The MEAA argued that the need to make

17 Ms Sue Robertson and Mr Richard Braddock, *Transcript of Evidence*, 16 March 2009, pp. 4-5.

18 Mr Richard Braddock, *Transcript of Evidence*, 16 March 2009, p. 5.

19 Mr Stephen Richards, *Transcript of Evidence*, 16 March 2009, p. 4.

20 Dr Ben Saul, *Submission No. 6*, p. 3.

such provisions should not prevent Australia's accession to the Convention.²¹

Reasons for Australia to take treaty action

2.24 A representative from DEWHA informed the Committee of the Government's motivations for acceding to the treaty:

The Australian government committed to ratifying and giving effect to the convention in the *New direction for the arts* policy paper in 2007. Accession to the convention would be a positive contribution to the government's efforts to protect and promote Australia's cultural goods, services and activities, both here and overseas.

Adoption of the convention would also encourage Australian artists to participate in cultural exchanges and to have further engagement with international audiences. The convention has the potential to make a wider range of cultural goods, services and activities available to Australian audiences and consumers, fostering a greater recognition of the diversity among Australia's Indigenous and immigrant cultures and cultures from around the world.

Becoming a party to the convention would also give Australia an opportunity for greater international engagement on cultural issues through the UNESCO forum and be an expression of Australia's ongoing commitment to protecting and promoting cultural diversity.²²

2.25 DEWHA also told the Committee that Australia's accession to the Convention may create impetus for cultural organisations and cultural practitioners to promote and develop new cultural activities in line with the aims of the Convention.²³

2.26 The Government submitted to the Committee that, along with the *Convention Concerning the Protection of the World Cultural and Natural Heritage* and the *Convention for the Safeguarding of the Intangible Cultural Heritage*, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is one of UNESCO's 'three pillars' which protect and promote cultural diversity. The Government

21 Media, Entertainment and Arts Alliance, *Submission No. 3*, pp. 1-2.

22 Dr Stephen Arnott, *Transcript of Evidence*, 16 March 2009, p. 3.

23 Dr Stephen Arnott, *Transcript of Evidence*, 16 March 2009, p. 6.

considered that accession to the Convention will demonstrate to the international community Australia's commitment to protecting cultural diversity and will expand Australia's active engagement with UNESCO.²⁴

- 2.27 A submission from the Music Council of Australia (MCA) supported the notion that accession to the Convention would contribute to Australia's good standing with UNESCO.²⁵
- 2.28 A range of submissions received during the inquiry argued that Australia's accession to the Convention would encourage nations to protect established cultural expressions and promote emerging cultural expressions. These submissions suggested that the Convention would encourage the Government to consider the impact of all policy areas (including education, developmental and financial policy), and the positive effect these policy areas could have, on cultural industries both in Australia and abroad.²⁶
- 2.29 One submitter noted a global benefit of the Convention:
- The Convention has the potential not only to protect cultural diversity *within* nations by supporting cultural policy development and information exchange, but also to strengthen and nurture *global* cultural diversity by ... supporting "the free flow of ideas", and by "constant exchanges and interaction between cultures".²⁷
- 2.30 The MCA considered that accession to the Convention will better place the Government to protect Australian cultural expressions during the negotiation of free trade agreements. The submission suggested that, despite Australian efforts to the contrary, some free trade agreement negotiations have resulted in arrangements that expose some Australian cultural industries and jeopardise some Australian cultural expressions. The MCA argued that accession to the Convention would better place Australia to resist such concessions when negotiating trade agreements in the future.²⁸
- 2.31 The MCA further considered that a positive flow-on effect would result from developed nations meeting their obligations to assist

24 NIA, para 8.

25 Music Council of Australia, *Submission No. 5*, p. 12.

26 Dr Ben Goldsmith, *Submission No. 4*, pp. 5-8; Dr Ben Saul, *Submission No. 6*, p. 1; Media, Entertainment and Arts Alliance, *Submission No. 3*, p. 2; Music Council of Australia, *Submission No. 5*, p. 11.

27 Dr Ben Goldsmith, *Submission No. 4*, p. 13.

28 Music Council of Australia, *Submission No. 5*, p. 8.

developing nations under the Convention. The MCA suggested that despite the limited resources of some developing nations, all of these nations have at least one resource which has been highly developed over centuries, namely their cultural expressions. The MCA argued that, under the Convention, developed nations will assist developing nations to build viable industries which utilise these resources. In turn these nations with limited resources will gain valuable export markets and much needed economic prosperity which may lead to a reduction in poverty.²⁹

- 2.32 The MCA argued that through the development of cultural industries in developing nations, other sectors will also benefit. For example, the provision of modern software to capture traditional music would have the additional benefit of providing valuable skills in the use of software which could be employed in other sectors.³⁰
- 2.33 The MCA further argued that the reduction in poverty and increase in education resulting from the building of cultural industries in developing nations may foster social stability where previously the pressures of poor economic performance may have led to social fragmentation. Further, the recognition and promotion of these cultural expressions may foster recognition of a common history and a stronger cultural identity which may in turn help to build social stability in fragmented communities.³¹
- 2.34 The MCA argued that many of Australia's neighbours, particularly in the South Pacific, are in urgent need of such assistance and that Australia can play a major role through acceding to, and meeting its obligations under, the Convention. The MCA suggested that through acceding to the Convention, and aiding the development of these cultural industries, Australia can help to engender economic and social stability in the region, thus improving both regional relations and our regional security. The MCA also argued that Australia, through meeting its obligations under the Convention, will gain access to a wider range of cultural goods and gain a better understanding of its neighbours.³²

29 Music Council of Australia, *Submission No. 5*, pp. 13-16.

30 Music Council of Australia, *Submission No. 5*, p. 15.

31 Music Council of Australia, *Submission No. 5*, p. 17.

32 Music Council of Australia, *Submission No. 5*, pp. 13-14.

The Convention and Indigenous affairs

- 2.35 The MCA submitted that many forms of Indigenous expression in Australia, including forms of Indigenous music, are under threat of extinction. The MCA argued that accession to the Convention would encourage the protection and preservation of these Indigenous cultural expressions.³³
- 2.36 During consultations on the Convention some argued that in order for Australia to meet its obligations to preserve cultural expressions under threat, heritage and land access laws may have to be modified in order to protect lands and territories that are culturally significant to Indigenous Australians.³⁴
- 2.37 A representative from DEWHA stated that Australia already has in place a range of measures to support Indigenous culture and cultural expression. DEWHA was of the view that changes to current legislation are not currently needed.³⁵
- 2.38 During consultations on the Convention further concerns were raised as to the capacity of Australian cultural organisations, including Indigenous organisations, to apply to the Convention's International Fund for Cultural Diversity. It was argued that this capacity would be undermined due to Australia's status as a relatively wealthy developed nation. Some argued that special consideration should be provided to Indigenous communities.³⁶
- 2.39 DEWHA submitted that the Fund will operate on a grants based system where interested parties may apply for an allocation of resources from the Fund for specific projects, programs and activities. The submission stated that the resources of the fund will be allocated by the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions according to the *Guidelines on the use of the resources of the International Fund for Cultural Diversity*. These Guidelines are currently in draft form. The draft Guidelines state that the Intergovernmental Committee will consider requests for resourcing towards specific projects and activities including those identified by representatives of vulnerable groups such as Indigenous people.³⁷ Further, DEWHA informed the

33 Music Council of Australia, *Submission No. 5*, p. 9.

34 NIA, Attachment on Consultation, para 36.

35 Dr Stephen Arnott, *Transcript of Evidence*, 16 March 2009, p. 3.

36 NIA, Attachment on Consultation, paras 37 and 38.

37 Department of Environment, Water, Heritage and the Arts, *Submission No. 9*, pp. 1-2.

Committee that whilst the details of how the fund will operate for Australian cultural organisations are yet to be finalised, there is nothing in the Convention to preclude Australian cultural organisations, including Indigenous organisations, from accessing the fund.³⁸

Implementation

- 2.40 No new Commonwealth or State/Territory legislative measures are required to implement the obligations under the Convention. There will be no change to the existing roles of the Commonwealth and States/Territories as a result of implementing the Convention.
- 2.41 The secretariat for Australia's participation in the Convention will be overseen by the DEWHA in consultation with DFAT.³⁹
- 2.42 Dr Goldsmith's submission to the inquiry noted that whilst many developed nations are Party to the Convention, few have so far contributed to the International Fund for Cultural Diversity. The submission urged the Government to assist in the implementation of the Convention by making a significant contribution to the Fund, thus demonstrating Australia's strong commitment to the Convention.⁴⁰
- 2.43 Dr Goldsmith further argued that civil society organisations can play a major role in implementing Australia's educational and cooperative obligations under the Convention. The submission recommended that the Government recognise and facilitate the role of civil society organisations in implementing the Convention.⁴¹
- 2.44 The MCA urged the Government to implement its obligations under the Convention to assist developing nations by providing funds (including through the International Fund for Cultural Diversity) and technical expertise (including through Government departments and contracted non-government organisations) to cultural industries in developing nations, with a particular focus on its regional neighbours.⁴²

38 Mr Stephen Richards, *Transcript of Evidence*, 16 March 2009, p. 4.

39 NIA, paras 14, 15 and 16.

40 Dr Ben Goldsmith, *Submission No. 4*, p. 14.

41 Dr Ben Goldsmith, *Submission No. 4*, p. 14.

42 Music Council of Australia, *Submission No. 5*, p. 13 & p. 18.

Costs

- 2.45 The Government anticipates that there would be some costs associated with the secretariat for Australia's participation in the proposed Convention. It is anticipated that these costs would be absorbed by DEWHA.⁴³
- 2.46 Costs incurred by other agencies in their participation in the Convention, including international travel to attend meetings, will be borne by those agencies.⁴⁴
- 2.47 There is a high level of expectation that Australia would make voluntary contributions to the International Fund for Cultural Diversity. The level of contribution is yet to be determined, however there is potential for it to be set at one per cent of a party's annual UNESCO contribution. In Australia's case, this would amount to approximately \$70,000 per annum. This cost would be met by DEWHA.⁴⁵

Future treaty action

- 2.48 Future amendments may be voted on if half of the parties reply favourably to the proposed amendment. The amendment must be adopted and ratified by a two-thirds majority of Parties to the Convention.⁴⁶
- 2.49 If a party is a Member of the Intergovernmental Committee for the Convention, amendments shall enter into force for that party at the time they are adopted by the Conference of Parties and are not subject to the normal ratification process.⁴⁷
- 2.50 A Party may withdraw from the Convention twelve months after the receipt of an instrument in writing by the Director-General notifying of their withdrawal. The financial obligations of the relevant party remain unaffected until the date on which the withdrawal takes effect.⁴⁸

43 NIA, para 17.

44 NIA, para 18.

45 NIA, para 19; Dr Stephen Arnott, *Transcript of Evidence*, 16 March 2009, p. 7.

46 NIA, para 21.

47 NIA, para 22.

48 NIA, para 23.

Consultation

- 2.51 Relevant Commonwealth Ministers and agencies and State/Territory Governments were consulted about the Convention and have provided support for accession. During consultations both DFAT and the AG's Department proposed the above-mentioned interpretative declaration and reservation.⁴⁹
- 2.52 DEWHA called for submissions commenting on Australia's accession to the Convention from a range of arts, culture, Indigenous affairs and academic organisations. All submissions received supported accession to the Convention.⁵⁰

Conclusions and recommendation

- 2.53 The Committee is of the view that the Convention will help to develop and maintain cultural industries and protect valuable cultural expressions in Australia and abroad. The Committee considers that accession to the Convention will demonstrate to the international community Australia's commitment to cultural diversity and will expand Australia's active engagement with UNESCO.

Recommendation 1

The Committee supports the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* and recommends that binding treaty action be taken.

49 NIA, Attachment on Consultation, paras 25 to 29.

50 Dr Stephen Arnott, *Transcript of Evidence*, 16 March 2009, p. 3; NIA, Attachment on Consultation, para 34.