

Documents tabled on 3 February 2009

National Interest Analysis [2009] ATNIA 1

with attachment on consultation

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions done at Paris on 20 October 2005 ([2009] ATNIF 3)

**NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY
SUMMARY PAGE**

**UNESCO Convention on the Protection and Promotion of the Diversity of Cultural
Expressions done at Paris on 20 October 2005 ([2009] ATNIF 3)**

Nature and timing of proposed treaty action

1. As a Member State of UNESCO, it is proposed that Australia accede to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, done at Paris on 20 October 2005 (the Convention), by depositing an instrument of accession with the Director-General of UNESCO.
2. It is proposed that Australia will seek the approval of the Federal Executive Council (see paragraph 28 of the attachment on consultation) to accede to the Convention as soon as practicable following tabling of the Convention in Parliament and a favourable recommendation by the Joint Standing Committee on Treaties (JSCOT). The Convention entered into force generally on 18 March 2007. In accordance with Article 29 of the Convention, the Convention would enter into force for Australia three months after the deposit of the instrument of accession with the Director-General of UNESCO.
3. If Australia accedes to the Convention, it is proposed that it will deposit an interpretive declaration to Article 16 (*Preferential treatment for developing countries*) and a reservation to Article 20 (*Relationship to other treaties: mutual supportiveness, complementarity and non-subordination*) with the instrument of accession.

Overview and national interest summary

4. The proposed treaty action accords with the Australian Government's support for the promotion of respect and dialogue between cultures and its recognition of the importance of protecting the diversity of cultural expressions that exist in Australia. The Convention provides an opportunity to expand and develop the measures already in place to protect and promote Australia's rich cultural diversity and to promote international cooperation in this regard. It would also continue Australia's good standing as a member of UNESCO.

Reasons for Australia to take the proposed treaty action

5. The Australian Government committed to acceding to the Convention in its *New Directions for the Arts* policy paper. The Government's policy objective in acceding to the Convention is to encourage the development of measures that protect and promote cultural diversity and to broaden opportunities for Australian artists both locally and overseas.

6. Accession to the Convention would make a positive contribution to the Australian 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 further opportunities for Australian artists to participate in cultural exchanges and to reach new international audiences.

7. The Convention has the potential to make a wider range of cultural goods, services and activities available to Australian audiences and consumers. This would foster a greater recognition of the diversity among Australia's Indigenous and immigrant cultures, as well as the diversity of cultures from around the world.

8. Accession to the Convention would expand Australia's active engagement with UNESCO, of which it has been a member since 1946. Together with the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (ratified by Australia in 1974) and the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, the Convention is one of UNESCO's "three pillars" which protect and promote cultural diversity. The Australian Government is currently giving consideration to ratifying the Safeguarding of the Intangible Cultural Heritage Convention.

Obligations

9. Part IV of the Convention sets out the rights and obligations of the parties in Articles 5 through 19.

10. Article 5.1 reaffirms, in general terms, the 'sovereign right' of the parties to formulate and implement cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation. Pursuant to Article 5.2, these policies and measures must be consistent with the provisions of the Convention. Article 6 permits, but does not oblige, parties to adopt measures aimed at protecting and promoting the diversity of cultural expressions within their territory.

11. Articles 7 through 19 set out the obligations imposed on parties, which generally relate to the promotion and protection of cultural expressions, information sharing and international cooperation. Obligations are for the most part expressed in 'best endeavours' language and are not overly prescriptive or onerous in nature. To summarise, the obligations imposed are as follows:

Promotion & protection

- endeavour to create an environment in their territory which encourages creation, production, distribution/dissemination, access to and enjoyment of diverse cultural expressions (Article 7.1);

- endeavour to recognise the important contributions of artists in cultivating diversity of cultural expressions (Article 7.2);
- promote understanding about the importance of the diversity of cultural expressions through educational and public awareness programs (Article 10);
- encourage the active participation of civil society in achieving the aims of the Convention (Article 11);

Reporting

- report to the Intergovernmental Committee all measures taken to protect cultural expressions at serious risk of extinction or in need of urgent safeguarding, as permitted under Article 8.2 (Article 8.3);
- report to UNESCO every four years on all measures taken to protect and promote cultural expressions and to designate a point of contact responsible for sharing information in relation to the Convention (Article 9(a) & (b));

Cooperation & collaboration

- provide and share information relating to the diversity of cultural expressions (Article 9(c)),
- endeavour to promote international cooperation, including inter-party dialogue on cultural policy (Article 12);
- endeavour to integrate culture in development policies for sustainable outcomes (Article 13);
- endeavour to support cooperation for sustainable development in developing countries, including through trade initiatives, capacity-building, financial assistance and technology transfers relating to the cultural sector (Article 14);
- encourage the development of partnerships between and within the public and private sectors to work at enhancing the capacities of developing countries to protect and promote cultural diversity (Article 15);
- endeavour to make regular contributions to the International Fund for Cultural Diversity, as established by the Convention (Article 18.7); and
- exchange information and share expertise in the collection and dissemination of relevant data (Article 19.1).

12. Article 16 imposes a further obligation on developed countries to facilitate cultural exchanges with developing countries by granting preferential treatment to artists and cultural goods and services from developing countries. Australia proposes to accede to the Convention with an interpretive declaration to Article 16 to clarify that the Convention will not affect the content or interpretation of Australia's immigration laws, or Australia's discretion under those laws.

13. Article 20 sets out the relationship of the Convention to other instruments by stating that it shall neither be subordinate to other agreements (Article 20.1), nor shall it 'be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties' (Article 20.2).

The Convention states that parties ‘shall foster mutual supportiveness between this Convention and the other treaties to which they are parties...’ (Article 20.1(a)). Due to this ambiguity in Article 20, Australia proposes to accede to the Convention with a reservation to Article 20 which clarifies that Australia will interpret and apply the Convention in a manner that does not affect its rights and obligations under other treaties and further, that accession to the Convention does not restrict Australia’s ability to negotiate future treaty rights and obligations.

Implementation

14. No new legislative measures are required to implement the obligations under the Convention.

15. The secretariat for Australia’s participation in the Convention will be the Department of the Environment, Water, Heritage and the Arts (DEWHA) in consultation with the Department of Foreign Affairs and Trade (DFAT).

16. There will be no change to the existing roles of the Commonwealth and States/Territories as a result of implementing the Convention.

Costs

17. While there would be some costs associated with the secretariat for Australia’s participation of the proposed Convention, these costs would be absorbed by DEWHA.

18. Costs incurred by other agencies in their participation in the Convention, including international travel to attend meetings, will be borne by those agencies.

19. The Convention establishes the International Fund for Cultural Diversity which is financed in part by voluntary contributions made by parties. There is a high level of expectation that Australia would make such contributions. 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.

Regulation Impact Statement

20. A Best Practice Regulation Preliminary Assessment was completed in consultation with the Office of Best Practice Regulation, Department of Finance and Deregulation, on 15 August 2008. This assessment confirms that a Regulation Impact Statement is not required.

Future treaty action

21. Article 33 of the Convention specifies that a party to the Convention may, by written communication addressed to the Director-General of UNESCO, propose amendments to the Convention which will then be circulated to all parties. If, within six months, half of the parties reply favourably to the proposed amendment, the Director-General will present the proposal to the Conference of Parties.

Amendments must be adopted by a two-thirds majority of parties present and voting. Once adopted, amendments to the Convention will be submitted to the parties for ratification, acceptance, approval or accession. Amendments enter into force three months after ratification, acceptance, approval or accession by two-thirds of the parties and thereafter, three months after each party's ratification, acceptance, approval or accession is deposited.

22. 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.

Withdrawal or denunciation

23. Article 31 states that any party may denounce the Convention by depositing an instrument in writing with the Director-General of UNESCO. The denunciation will take effect 12 months after receipt of the instrument. The financial obligations of the relevant party remain unaffected until the date on which the withdrawal takes effect.

Contact details

Film Incentives and International Section

Film and Creative Industries Branch

Department of the Environment, Water, Heritage and the Arts

ATTACHMENT ON CONSULTATION

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CONSULTATION

24. In December 2007, the Department of the Environment, Water, Heritage and the Arts (DEWHA) convened an interdepartmental committee to progress the accession process. As a first step, members of the committee identified potential inconsistencies between the text of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (the Convention) and existing domestic policy and legislative and international treaty obligations.

25. While a number of potential inconsistencies were identified, the Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD) advised as follows:

- domestic and legislative obligations generally are not significant and should not delay Australia's accession to the Convention;
- concerns about some ambiguity in the wording of Article 16 in relation to Australia's domestic immigration rules while not significant can be addressed by Australia making an interpretative declaration to the Article upon accession which makes it clear that Australia's immigration laws and regulations are not subordinate to the Convention; and
- concerns that Article 20 may be inconsistent with Australia's international treaty obligations are significant but can be addressed by Australia making a reservation to the Article upon accession which clarifies that the Convention should be implemented in a manner that is compatible with other international treaties.

26. In order to address the concerns about ambiguity in the wording of Article 16 (*Preferential treatment for developing countries*) DFAT and AGD drafted the following interpretive declaration:

“Australia declares that it considers that the obligation in Article 16 on developed countries to “facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners as well as cultural goods and services from developing countries” is not intended to affect the content or interpretation of domestic legislation, regulations, rules or criteria relating to eligibility for immigration visas or permits, or the exercise of discretion under legislation or regulations or in respect of rules or criteria.”

27. In order to clarify Australia's position on the complementarity of the Convention to other instruments, DFAT and ADG drafted the following reservation to Article 20 (*Relationship to other treaties: mutual supportiveness, complementarity and non-subordination*):

With regard to Article 20(1)(a) and 1(b), Australia makes the following reservation:

“This Convention shall be interpreted and applied in a manner that is consistent with the rights and obligations of Australia under any other treaties to which it is a party, including the Marrakesh Agreement Establishing the World Trade Organization. This Convention shall not prejudice the ability of Australia to freely negotiate rights and obligations in other current or future treaty negotiations.”

28. Approval for Australia to proceed with accession to the Convention was received from all Australian Government ministers whose portfolio responsibilities were covered by the Convention on 27 August 2008. Approval was received by the Minister for the Environment, Heritage and the Arts from the Minister for Foreign Affairs, the Minister for Trade, the Attorney-General, the Minister for Immigration and Citizenship, the Minister for Innovation, Industry, Science and Research, the Minister for Families, Housing, Community Services and Indigenous Affairs, the Minister for Agriculture, Fisheries and Forestry and the Minister for Broadband, Communication and the Digital Economy. The Prime Minister was informed of the approval of these ministers.

29. State and Territory Governments have been advised of the proposed accession to the Convention through the Standing Committee on Treaties’ (SCOT) Schedule of Treaty Action. The Convention has been on the list of treaties under negotiation, consideration or review by the Australian Government since February 2008. No objections or concerns have been raised by the State or Territory Governments as a result of this notification.

30. On 30 September 2008, DEWHA sent a Call for Submissions to 121 arts, culture, Indigenous affairs, academic and collections organisations, individuals and institutions. Written submissions were invited in relation to:

- significant policy, resourcing or infrastructure implications that would affect activities under the Convention;
- opportunities created, or constraints imposed by, the Convention on the organisation’s (or the individual’s) ability to protect and promote the diversity of cultural expressions; and
- any other significant implications of Australia’s accession to the Convention.

31. A total of 17 submissions were received from the following organisations and agencies:

- Collections Council of Australia;
- History Trust of South Australia;
- NSW Environmental Defender’s Office;
- Council of Australasian Museum Directors;
- International Council of Museums Australia;
- Australian Institute of Aboriginal and Torres Strait Islander Studies;
- Australia Council for the Arts;
- UNESCO Australian Memory of the World Committee;

- NSW Government coordinated submission (Departments of Arts, Sport and Recreation; Premier and Cabinet; Environment and Climate Change; Planning, Education and Training; and, Aboriginal Affairs);
- Special Broadcasting Service;
- Australian Human Rights Commission;
- National Film and Sound Archive’
- Victorian Aboriginal Heritage Council;
- National Native Title Council;
- Museums Australia;
- Australian War Memorial; and
- Arts Victoria.

32. The National Native Title Tribunal noted that the Convention would not alter the responsibilities of the Tribunal and no submission was made.

33. The National Association of Community Legal Centres sent a letter of endorsement for the submission made by the Australian Human Rights Commission.

34. All submissions were supportive of the Australian Government’s accession to the Convention. Many stated that the aims of the Convention are already integral to their aims and activities and suggested new programs that could be implemented under the Convention. Around a quarter of the submissions stated that additional resources would be required to implement the Convention based on existing policies and programs. Most submissions noted that additional resources would be required for the appropriate training of staff and the development of new or expanded programs if the aims of the Convention were to be fully realised. Several of the submissions raised more specific policy and program issues related to implementation of the Convention and these are outlined in the following paragraphs.

35. The NSW Environmental Defender’s Office submitted that ‘[a]n environment fostering respect amongst non-Indigenous Australians for Indigenous culture, aspired to under Article 7, where achievable, would be likely to improve recognition of Indigenous claims for land and heritage. Australia’s accession to the Convention could arguably require new legislation to be passed or legislative reform to be undertaken. Amendments to existing legislation such as the *Native Title Act 1993* or certain heritage laws could potentially bring greater protection to Indigenous culture and culturally significant lands and territories.’ The submission also states that ‘Principle 3, the Principle of equal dignity of and respect for all cultures does not currently prevail within Australia. The insignificant value placed on Indigenous culture is highlighted by the inadequacy of law to enable Indigenous access to lands, and protect sites recognised by Indigenous people as culturally significant, particularly along the eastern seaboard and southern states.’ Other issues raised in the submission include the need to address the disproportionate impact of climate change on the island cultures of the Torres Strait and the reduced socio-economic development of Indigenous Australians compared to non-Indigenous Australians in order to fulfil the aims of the Convention.

36. The NSW Government submission raises concerns expressed by NSW arts organisations that Article 16 (Preferential treatment for developing countries) could impede the artistic and commercial decision making of their organisations by requiring that developed

countries facilitate cultural exchanges that give preferential treatment to artists and practitioners from developing countries. The submission suggests an additional interpretive declaration be made to Article 16 to protect the artistic and commercial decision making ability of Australian arts organisations. Based on advice received from the DFAT during interdepartmental committee consultations, DEWHA understands that the Convention does not stipulate what measures might be taken in giving preferential treatment under Article 16 and that it is for each party to determine what the appropriate institutional and legal frameworks are for the granting of preferential treatment. DEWHA has been advised by DFAT and the Attorney-General's Department that an additional interpretive declaration to Article 16 is not necessary in this instance.

37. The Victorian Aboriginal Heritage Council submitted that Indigenous Australians require specific attention under the Convention, as many live in 'developing country' conditions within a developed nation and that the Australian Government needs to actively foster the connection of Aboriginal people with their culture as an important component of development. The Council encourages Australia to advocate for special consideration offered to developing countries for capacity building for Indigenous people. Arts Victoria lent support to the Victorian Aboriginal Heritage Council's submission.

38. The National Native Title Council reiterated this concern in relation to Australia's access to the International Fund for Cultural Diversity. As a developed nation, Australia may have somewhat limited access to the resources of the Fund. The NSW Government also raised this issue as a concern for Australian organisations. The National Native Title Council sought clarification on whether Australia based organisations such as themselves or their member organisations would be limited in applying to the Fund due to Australia's status as a developed nation. Given that the resourcing and operation of the Fund are yet to be determined, DEWHA is not in a position to provide this clarification.