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Australia's representative to the International Music Council

Music Council of Australia

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
July 21 2011
By email: classification@alrc.gov.au

Dear Sir/Madam

The Music Council of Australia appreciates the opportunity to make a submission to the National Classification Scheme Review being conducted by the Australian Law Reform Commission (ALRC).

The Music Council is the national peak organisation for the music sector. Its membership of 50 is drawn from national organisations and distinguished individuals from across the entire music sector. It seeks to advance music and musical life in Australia by providing information, undertaking research, mounting advocacy and organising projects. It is the Australian affiliate to the International Music Council, based on the UNESCO campus in Paris.

Question 1: In this Inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework?

The Music Council broadly agrees with the approach being taken by the ALRC, and specifically that this inquiry focus on the framework for classifying content given the existing classification categories rather than focusing on specific content that should be permitted or prohibited.

Question 2: What should be the primary objectives of a national classification scheme?

Australia is a signatory to the Universal Declaration of Human Rights which declares at Article 19[1]:

[1] Universal Declaration of Human Rights, viewed 14 July 2011 http://www.un.org/en/documents/udhr/index.shtml#a19.

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This right is expanded upon in the International Covenant on Civil and Political Rights (to which Australia became a party in 1966), again in Article 19[2]:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> > (a) For respect of the rights or reputations of others;
> >
> > (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Australia is also party to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The objectives of the Convention are as follows:[3]

> (a) to protect and promote the diversity of cultural expressions;
>
> (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;
>
> (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
>
> (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;
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> (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;
>
> (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;
>
> (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;
>
> (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;
>
> (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

Importantly, the Convention recognizes that:

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[2] International Covenant on Civil and Political Rights, viewed 14 July 2011 http://www2.ohchr.org/english/law/ccpr.htm.

[3] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO, viewed 14 July 2011 http://unesdoc.unesco.org/images/0014/001429/142919e.pdf.

> Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.

Consistent with Australia being a party to these agreements, a right to freedom of expression is not an absolute right but a right subject to the exercise of responsibility in regard to matters such as defamation, vilification, national security, and having regard to community standards.

In light of the above agreements, the Music Council considers that a national classification scheme should afford adults the information necessary to make informed decisions about what they choose to view, read or listen to and what they wish to make accessible to their children. As the ARIA/AMRA Recorded Music Labelling Code of Practice[4] says:

> Consumers should be supplied with sufficient information so that they can choose to avoid exposure to material which may offend them, and make informed purchasing decisions in relation to Product which is not suitable for minors.

A national classification scheme should provide information to consumers but not operate to censor material that is otherwise legal.

A national scheme needs to strike a balance between sectors of the community holding divergent views. It needs to recognize that community standards, whilst often strongly contested, can also change rapidly over relatively short periods of time.

By way of example, only 15 years ago in 1996 when sodomy was still a crime in Tasmania, the then Minister for Communications and the Arts wrote to the ABC regarding complaints he had received regarding the scheduling of the Gay and Lesbian Mardi Gras coverage, observing that two years earlier a number of parliamentarians, himself included, signed a petition arguing it should not be broadcast at 8.30pm.[5] Yet a mere 12 years on in 2008, with the amendment of 84 laws, same-sex couples secured the same rights as de-facto heterosexual couples and today Galaxy, Neilson and News polling show 60 per cent of Australians support same-sex marriage, with 75 per cent considering it inevitable[6].

A national classification scheme needs to find a mid-point in balancing what members of the community find offensive and objectionable. Its purpose is to provide consistent advice, easily understood and recognized by the general public within the wider context of ensuring Australians are able to access the broadest possible range of content across all platforms and services.

The Music Council considers that a national classification system is likely to continue to be a mix of self-regulation, quasi-regulation, co-regulation and direct government regulation as is currently the case. The current mix of mechanisms has been driven by community concerns having regard to community expectations, classification costs and compliance efficiency. It is widely understood and accepted by the general public, delivers high levels of industry compliance and low levels of complaints.

The area likely to cause the most difficulty is material delivered online where much material accessible in Australia is hosted overseas and is beyond both the capacity of the government to regulate and industry to achieve cross-border self-regulation.

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[4] ARIA/AMRA, 2003, *Labelling Code of Practice for Recorded Music Product Containing Potentially Offensive Lyrics and/or Themes*, ARIA/AMRA, viewed 14 July 2011 http://www.amra.org.au/pdf/ARIA-AMRA_Code_april2003.PDF

[5] Senator Alston, 5 November 1996, Senate Official Hansard, Thirty-Eighth Parliament First Session—Second Period, The Senate, Canberra, p. 5059-5060.

[6] Croome, R. 2011, *Love and Commitment, to Equality*, The Drum, 8 June 2011, ABC, viewed 14 July 2011 http://www.abc.net.au/unleashed/2749898.html.

Consequently, as is currently the case where classification of online content is primarily a complaints-based system, and as the ALRC Issues Paper points out, 'it may be a useful way to target the most extreme and offensive content, without placing too high a regulatory burden on industry or government authorities'[7]. The Music Council notes that voluntary filtering is already in place with Telstra and Optus automatically blocking child pornography using an Interpol provided blacklist. Such a specific list, backed by appeal mechanisms, is unlikely to impede freedom of expression. Conversely, the imposition of broader mandatory lists may well do so. In any event, consideration of classification of material accessed online and hosted offshore must take into account all Australians' right to access the broadest range of material possible and accommodate obligations under the Convention on the Protection and Promotion of the Diversity of Cultural Expressions to ensure Australians can access overseas material.

Question 8: Should music and other sound recordings (such as audio books) be classified or regulated in the same way as other content

The current ARIA/AMRA Recorded Music Labelling Code of Practice is an example of industry self-regulation. It was originally developed in response to state and federal government concerns regarding potentially offensive lyrics dealing with adult themes, mostly arising from the emergence of hip-hop music, in physical recorded music products – compact discs, cassettes and vinyl records. A Senate Select Committee[8] reported in early 1997 that:

> Australia's censorship ministers agreed on 25 October 1996 to a proposal from the Australian Record Industry Association (ARIA) for a 12 month trial of voluntary warnings about explicit lyrics on retail CD covers. Of more direct relevance to this inquiry, the trial industry Code of Practice requires members of the industry to refuse distribution and sale of records with lyrics which encourage extreme violence or crime. The Ministers responsible have warned that a compulsory censorship scheme would be considered if the trial self-regulation fails.

Introduced as a twelve month trial, it was subsequently amended in 2003. A compulsory scheme has thus far not been found necessary.

The current Code has three classification levels and a refused for sale category for material exceeding Level 3. Its three classification levels are aligned with the M, MA and R18+ classifications for films. Products classified at the R18+ level stipulate they cannot be sold to minors.

When first introduced it was considered that the differences between audio products and audio-visual products were such as to warrant audio products being considered separately. The number of audio releases annually warranted a more streamlined, timely and cost efficient (for both government and industry) classification scheme than was the case for feature films.

With annual releases in the thousands, the need to classify has been remarkably low – typically less than six per cent of releases attracting a classification annually. The 1996/7 debate triggered deeply held views from both those opposed to censorship and those in

[7] Australian Law Reform Commission, 2011, *National Classification Scheme Issues Paper*, ALRC, page 24.
[8] Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, February 1997, *Report on the Portrayal of Violence in the Electronic Media*, viewed 14 July 2011, page 38.
http://www.aph.gov.au/senate/committee/history/comstand_ctte/violence/report.pdf.

favour.[9] However, over time, the Code has proved to be what it was intended to be – a source of consumer advice, not de facto censorship.

The Music Council considers that the ARIA/AMRA Code of Practice, as demonstrated by the very low level of complaints, is working effectively, is understood by industry and the community, and provides appropriate content advice to consumers.

Music videos and music embedded in other audiovisual products are considered separately according to whether the product is released theatrically or broadcast on television or radio. Similarly, artwork and the publication of lyrics are considered separately.

As a voluntary code, it is true that some releases escape the classification net. However, such instances are likely to be releases from musicians playing to niche audiences, where those outside an immediate fan base are unlikely to encounter the music. Examples are rare as the prosecution of gore grind band Intense Hammer Rage demonstrated. Approximately 200 copies of their CD *Avagoyamugs* were seized by Customs officers because of the extreme cover artwork and printed lyrics in 2002. However, even in this incident:

> In sentencing, Magistrate Tim Hill said he was not punishing the men for the content of the CDs, but merely for their importation. He could find no Australian precedent for importing products like this and did not impose the maximum $5000 penalty because the men had not profited from the imported CDs.[10]

Given the rarity of contraventions of the Code, it appears it works effectively.

While consideration of tightening classification regimes for music appears unwarranted, it is worth considering the 'chilling' effect any classification regime can trigger. The role of self-censorship should not be underestimated. While much discussed during the debate over Anti-Terrorism legislation last decade, establishing that there is a 'chill' effect is notoriously difficult. Nonetheless, just how effective it can be is demonstrated by the change in lyrics to the second verse of Powderfinger's *Black Tears* on their album *Dream Days at the Hotel Existence* in 2007. A song inspired by the death of Mulrunji Doomadgee in custody on Palm Island in 2004, the original second verse reportedly included the following lyrics:

> An island watchhouse bed
> A black man's lying dead

These lyrics were amended following an objection raised by the legal team for Chris Hurley as he faced charges of manslaughter and assault, arguing 'the content and proposed timing of the song's release raises some serious concerns regarding Mr Hurley's trial'[11]. In changing the lyrics, lead singer, Bernard Fanning said:

> In the interests of removing even the slightest suggestion of any prejudice, we have included an alternative version on our album. I hope that the song still has its desired effect, which is to bring attention to the obvious disadvantage that is still being suffered by Aboriginal people in this country and in particular, the issue of Indigenous deaths in custody.[12]

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[9] For example, Guest editorial, 1997, 'Music Censorship' in *Music and Media Magazine*, viewed 12 July 2011 http://danny.oz.au/freedom/music/immedia-article.txt.

[10] ABC, 2002, Does Freedom of Speech Exist in Australia, Space ABC Arts Online, viewed 11 July 2011 http://www.abc.net.au/arts/music/stories/s885891.htm.

[11] Freemuse, 2007, *Rock Band Changes Song Lyrics*, Freemuse Freedom of Musical Expression, 7 May 2007, viewed 10 July 2011 http://www.freemuse.org/sw19120.asp.

[12] Ibid.

Conclusion

Despite any shortcomings – however perceived – the Music Council considers the current mix of mechanisms that comprise the national classification scheme as it relates to music have worked effectively for industry, government and the general public. The Music Council is keen to see such amendments to the current system as may be deemed appropriate and necessary continue to deliver accessible and easily understood content advice to consumers that enables them to exercise choice consistent with their individual standards, not act as a de facto censorship regime, facilitate Australians' access to the widest range possible of material from here and abroad and underpin the flourishing of the arts in Australia.

Thank you again for the opportunity to make this submission. The Music Council would be pleased to respond to requests for clarification or further information.

Yours sincerely

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Executive Director