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Free Trade Agreement between the UK and Australia

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector. UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society.
2. According to our latest research (published in our Music by Numbers 2019 report, available via www.ukmusic.org) the music industry added £5.2 billion value (income for UK music business) to the UK economy in 2018; £2.7 billion of this GVA was derived from exports. A net importer of copyright material, Australia is another important market for UK artists by volume of record sales and general use of UK music by licensing of download and streaming services. The Free Trade Agreement is thus of utmost importance to the future of the UK music industry. We welcome the ongoing discussions between officials to achieve a timely FTA.
3. We have set out below some key considerations for the UK Government in order to support this economically and culturally valuable sector in the course of its negotiations with Australia for a post-Brexit Free Trade Agreement (referred to below as the "UK/ Australia FTA"). We note the significance of this Agreement as a potential blueprint for trade deals with other countries in the region; the trade agreement needs to comprehensively address rights, collective management based on transparency, good governance and accountability, and enforcement (including reference to website blocking orders provided in both UK and Australia copyright legislation).

Summary.

Both the United Kingdom and Australia have ratified the relevant international copyright treaties providing minimum standards of protection and national treatment for each citizen. We trust that the UK will promote the high level of protection currently provided under the UK Copyright framework. Australia has declared reservations when becoming a party to the WIPO Performances and Phonograms Treaty which impact on the income of UK and Australian performers and record producers alike; these should be removed.

A Free Trade Agreement could address gaps in the protection offered to music broadcast or performed in public places; it would also ensure the continued absence of tariffs on physical and digital music products and copyright licensing.

We are concerned about ongoing campaigns to reduce copyright protection in Australia given the perception that Australia as net importer of cultural goods would benefit from a weakening of copyright, for instance by introducing an undefined and wide ranging “fair use” exception.

We ask the UK Government to

- **address the gaps in the protection of music in broadcasts or performed in public places;**
- **prevent the reduction of copyright protection;**
- **resist any extension of the so called safe harbour provisions as currently discussed in Australia**
- **retain a national approach to exhaustion**

In detail:

Protection of music in broadcasts or performed in public places.

4. At present, Australian copyright law imposes severe limitations on the scope of protection of recorded music when it is used in broadcasting and in public performance. The high level of protection offered to Australian recordings in the UK should be matched in Australia. In particular, the UK government should seek removal of the caps on the amount of the broadcast royalties payable for the use of recordings (s.152 Australian Copyright Act). That section indirectly limits radio broadcast tariffs to 1% of broadcasters' gross revenue because a copyright tribunal cannot set higher tariffs than 1%.

In addition, Australian copyright law also provides for a monetary cap (0.5 AUS\$ per person) on the amount that ABC, the public broadcaster, pays for the use of sound recordings.

Both of these caps are outdated, lack any economic justification and improperly fetter the ability of right holders to obtain a fair price. They amount to a private sector subsidy to the Australian broadcasters at the cost of the music industry, including UK producers and performers.

5. Similarly, Australian copyright law does not offer full protection to recorded music used in places open to the public. The UK/Australia FTA negotiations presents a good opportunity to remove those outdated limitations and match the level of protection offered in the UK. So called indirect uses of recordings in public performance, such as playing music from the radio or TV, are not currently protected in Australia. This fact weighs significantly upon the public performance revenues of UK performers and producers.

This lose- lose situation is easily addressed by amending local legislation and, where necessary, amending the WPPT reservations accordingly.

Exceptions.

6. Whilst we do not expect any changes to the established UK approach to exceptions following the withdrawal from the European Union we are concerned that the Australian Government may change its established fair dealing approach to a US style “fair use” approach.

We have been observing with increasing concern discussions on the introduction of a US style “fair use” exception in the context of the current copyright reform in Australia. The 2016 campaign of the Australian Productivity Commission to reduce copyright protection based its recommendation to weaken copyright on economic considerations as net importer of cultural goods. It concluded that it would benefit economically from a weakening of copyright. In this regard, Australia is not alone. Proponents of weakening copyright have been calling for the introduction of a “fair use” style doctrine or open-ended exceptions in copyright reviews in several countries (e.g. South Africa, Singapore). This was also proposed and rejected in the UK in recent years.

Changing the existing Australian law to a US style, open-ended fair use approach would not only weaken the protection of all rightholders including from Australia and the UK, it would also lead to increased legal uncertainty for right holders and users alike. Even in the United States there is no clarity on the scope of the fair use exception despite over 170 years of case law interpreting such exception. All that the fair use exception does in practice is to encourage prolonged and costly litigation, often to the detriment of smaller copyright right holders who frequently lack the resources and litigation budgets of the sort available to technology companies.

For the benefit of British and Australian rights holders alike, we ask the UK Government to reject a US-style fair use approach in any Free Trade Agreement between the UK and Australia and to engage in discussions to avoid the introduction of a fair use approach into Australian copyright law.

No detailed “safe harbours” provisions in free trade agreements.

7. Currently, legal initiatives at US, UK and European level address the role of content online platforms within the value chain. The “safe harbour” provisions under US law or the limitations of liability provisions in the UK and EU e-Commerce provisions will be updated to take into account technical developments in the last 20 or 18 years respectively. The extent of such changes will only become apparent once these initiatives are adopted based on initiatives such as the US Copyright Office 512 report, the UK Online Harms White Paper, or the European Union Directive Copyright in the Digital Single Market.

We note that the withdrawal from the European Union provides a good opportunity for the UK government to improve the situation for British composers, performers and right holders, most of them micro business or small and medium enterprises. This should not be jeopardised by including in a trade agreement with Australia detailed rules limiting ISP liability.

We urge the UK Government not to introduce such provisions in any Free Trade Agreement. This will ensure that the UK can act in a sovereign and flexible way to any technological developments. The UK/Australia FTA should be limited to providing minimum standards for ISPs to incentivise licensing.

Exhaustion.

8. Existing approaches to exhaustion are fundamentally different and in the absence of any obvious compromise on an international approach to exhaustion during the discussions of the TRIPS agreement, Article 6 of the TRIPS agreement expressly refers to national solutions to exhaustion.

We suggest to continue such individual approach. UK Music members generally prefer national exhaustion which will enable British composers, performers and rightholders to sell their works reflecting the specifics of individual markets.