

The Hon. Simon Crean, MP
Minister for Regional Australia, Regional Development and Local Government,
Minister for the Arts
Parliament House
CANBERRA ACT 2600

21 October 2011

Dear Minister Crean,

Submission on the National NCP (NCP) discussion paper ("discussion paper")

The Arts Law Centre of Australia (**Arts Law**) is pleased to provide its submission on a NCP discussion paper and commends you for continuing to consult the arts community on this issue of national importance.

The Arts Law Centre of Australia (**Arts Law**) is a not for profit community legal centre that provides services to over 5,000 artists and arts organisations across all arts sectors and the entertainment industries each year. Through its specialist Indigenous service, Artists in the Black, Arts Law also provides advice to Indigenous artists throughout Australia. Our views are well informed by the experience we have as the only community legal centre in Australia specialising in the arts. We provide legal advice, education, resources such as sample contracts and information sheets and advocacy and casework services for individual artists and arts organisations. We are a peak service organisation, skilling artists and arts organisations with the tools required for them to be sustainable in their arts practice, contribute to the broader community and facilitate their participation in the arts generally.

Arts Law supports the submissions of the Australian Coalition for Cultural Diversity, ArtsPeak and Arts Access Australia in respect of this discussion paper.

Support of Peak Service Organisations

We agree wholeheartedly with the four goals set out in the discussion paper. Fundamental to achieving those goals in an economically sustainable way is the support of peak service organisations. Arts Law builds and develops the skills and economic strength of the arts by assisting artists and arts organisations to engage in creative activity and contribute to a strong and vital arts community not only locally, but nationally and internationally. Artists with the prospect of long term sustainability can better contribute to the arts economy and encourage social engagement which in turn feeds this economy.

One key tool in engaging in this way is having a sustainable, professional arts practice that allows artists to flourish, and continue to "grow" their arts practice and therefore their influence on their community. At Arts Law, we assist artists in developing these skills by providing comprehensive legal advice and education, including in the areas of business structures and contracts.

Government must take a leadership role in ensuring that those peak service organisations which advise, support, advocate for or educate artists and arts organisations (peak service organisations) are financially and legislatively supported in fulfilling that role.

The strategies set out in the discussion paper for meeting each of the four goals (including strategies to build capacity to engage in the arts – goal 1, to strengthen capacity to manage copyright and intellectual property and to improve business development – goal 2, to promote excellence and world class standards in our funded organisations and individuals – goal 3, and to build skills and capacity to contribute to engagement with the arts and creativity – goal 4) are all strategies which are already, and should continue to be, part of the service delivery of peak service organisations within the arts community such as Arts Law. Given that these strategies are already consistent with the objectives and expertise of such organisations, an efficient and effective means of implementing such strategies is by supporting those organisations.

The current funding model for peak organisations like Arts Law needs improvement. The national service organisations which the government relies upon to deliver free or low cost services to the arts community should be funded on an equitable basis with the Commonwealth states and territories all contributing. Currently Arts Law negotiates funding arrangements with 3 federal agencies and about 8 or more State agencies. Each grant requires an application, often different key performance

indicators to monitor and separate acquittal processes. Generally, the levels of funding received are not proportionate to the size of the State's artist population or the needs in the community or levels of service delivery. We encourage Government to develop and apply a multipartite funding model with all government agencies to streamline this process and make it more efficient for those organisations seeking Government support to do so.

Unlike individuals and arts organisations producing creative content, peak service organisations tend to have a lower profile in the community. They are no less worthy of funding support. These organisations are often less likely to attract the philanthropic or sponsorship support making it vital that they are properly resourced by State and Federal Governments.

The Four Goals of the NCP

Those goals are summarised below and will be dealt with in turn in the remainder of this submission.

- 1) Ensuring Government support reflects a diverse Australia, including the protection and support of Indigenous culture;
- 2) Encouraging the use of emerging technologies and new ideas that support the development of new artworks and the creative industries, enabling increased access and participation in arts and culture;
- 3) Supporting excellence and strengthening the role of the arts in depicting Australian 'stories' domestically and internationally; and
- 4) Increasing and strengthening the capacity of the arts to contribute to our society and culture.

1) Goal One: Ensuring Government support reflects a diverse Australia including the protection and support of Indigenous culture;

Arts Law believes that Government can achieve this goal by:

- 1.1 implementing and maintaining laws which protect Indigenous cultural and intellectual property (ICIP)
- 1.2 implementing and maintaining laws which support and protect artists' rights and legislating for freedom of expression (which is discussed in more detail at goal 4 below)

1.1 Better protection of ICIP

Arts Law strongly supports the government's commitment to secure effective protection of Aboriginal and Torres Strait Islander culture. Through its Artists in the Black (AITB) service, Arts Law has provided targeted legal services to Indigenous artists and their organisations and communities for the last nine years. Much of that advice has arisen from concerns about the inadequacy of the existing legislative protection of ICIP. If Australia's Indigenous arts and culture are to be supported and developed, a key part of this is to ensure that there are adequate legal protections in place for those aspects of Indigenous culture which are currently unprotected at law, and vulnerable to exploitation. This can in part be achieved by the protection of ICIP, as outlined below. In addition, it is essential that education and legal advice services are readily available at a grass roots level for Indigenous artists across Australia regardless of whether they are urban, regional or remotely located.

1.1.2 Inadequacy of the existing legislation protecting ICIP

- i. The existing legislation creating individual rights of copyright, design, patent and other intellectual property rights is ineffective to protect, except tangentially and coincidentally, Indigenous culture and traditional knowledge which are generally communal in nature.
- ii. There is currently no legal right of ownership of ICIP capable of enforcement by the Australian legal system. Accordingly, there is no legal obligation to respect traditional Indigenous knowledge and culture which could be the basis for mandatory standards of third party conduct. There is also no legal right of community cultural heritage which would support a right to a royalty. Thus, souvenir businesses are free to import and sell objects decorated with distinctively Aboriginal art styles as long they do

not describe them as made by Aboriginal artists. Non-Indigenous writers and dance groups can take sacred dances and stories and reinterpret them or incorporate them into their own stories and performances with impunity. Such actions are disrespectful of Indigenous culture and can cause substantial pain and anger within the Indigenous communities who are the custodians of that culture. A recent example of these issues arose when a non-Aboriginal business misused imagery of the sacred Wandjina spirit in a manner deeply offensive to the Indigenous community. This spirit has been painted by three tribal groups of the Kimberleys region for thousands of years and thus was not capable of copyright protection under our current legal system.¹

1.1.3 Why sui generis legislation is needed

Arts Law believes that adequate protection can only effectively be achieved by separate sui generis legislation because ICIP interests are unique to other intellectual property models because ICIP:

- i. covers a broader range of creative, intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. ICIP should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of existing legislation, for example copyright laws, will be artificial and incomplete;
- ii. represents communal rather than individual ownership of the knowledge and culture of specific Indigenous communities;
- iii. is an intergenerational right which does not lend itself to the current expirations of intellectual property rights at law;
- iv. evolves and develops over time, unlike current legal concepts of intellectual property which focus on fixing a point in time at which the property is defined and then protected;
- v. is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents; and
- vi. stands beside existing intellectual property rights; and is not an extension of them.

¹ <http://www.artslaw.com.au/articles/entry/the-wandjina-case-demonstrates-the-lack-of-protection-for-indigenous-cultur/>

1.1.4 Alternatives to sui generis legislation

Arts Law is aware that alternatives have been canvassed for the protection of ICIP and believes each of those alternatives has shortcomings:

- i. **Amending the Copyright Act:** this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered by the Copyright Act. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of communal traditional knowledge;
- ii. **Treaty:** agreement at international level is important but not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation. It is worth noting that little progress has been achieved at the World Intellectual Property Organisation (WIPO) in the development of such a treaty despite more than 11 years of discussions;
- iii. **Customary law:** many Indigenous communities generally rely on customary law to guide their own conduct. However, the difficulty for Indigenous communities is that non-Indigenous people are not bound by traditional or customary laws;
- iv. **Protocols:** the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression are thoughtful and comprehensive but rely on the goodwill of third parties in choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who disregard them;
- v. **Private law and contract:** Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this still relies on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or have not agreed to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not in our view constitute compliance with the

Government's obligations under Article 31 of the Declaration on the Rights of Indigenous People.

The NCP provides the Government with a platform and the opportunity to review the inadequacies of the current protection of Australia's unique Indigenous culture and to implement Australia's obligations under Article 31 of the Declaration on the Rights of Indigenous People to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

1.1.5 Strengthening the Indigenous Art Code (Code): The Code is a significant step forward in establishing minimum standards for the conduct of Indigenous art dealers and does address some of the traditional knowledge aspects of Indigenous visual arts. However, the Code is not mandatory, leaving artists dealing with non signatory dealers vulnerable to exploitation. The Code needs ongoing strong support over a sustained period in order to encourage participation and educate the art industry and consumers if it is to achieve a genuine and lasting improvement of standards in an industry noted for its exploitation of the disempowered and vulnerable. Ultimately, our view is that the Code must be made mandatory, so that it creates a compulsory minimum standard of behaviour for all dealers, regardless of their interests, and penalises those who fall below it.

1.2 Freedom of expression

Arts Law believes it is in the public interest to ensure freedom of expression generally, and freedom of artistic expression specifically. This aspect of our submission is further expanded upon below in respect of goal 4. Arts Law supports the protection of artists' ability to contribute to Australia's cultural identity and the values, traditions, attitudes and expressions we all share. In order for artists continue to do this, their right to comment, create and question must be improved and maintained. If more people are to engage or participate in, create, or experience the arts, then their ability to do so should be appropriately protected and encouraged. We speak with many artists about the issues created by the current lack of the protection of any freedom of expression, including for example those who, create certain controversial political works or work with children and are funded by the Australia Council. Arts Law notes the recent report of the Australian Law Reform Commission

with proposed reforms in respect of the National Classification Scheme to which we will be providing a separate response. Specifically we are of the view that artists should not have to jump unnecessary hurdles in respect of the classification of innocuous works. Specific exemptions should be in place for classification of art works and moving image art as long as they do not contain illegal content. We refer again to the submission at goal 4 where we further detail about the issues currently facing artists in respect of the lack of freedom of expression.

2) Goal Two: Encouraging the use of emerging technologies and new ideas that support the development of new artworks and the creative industries, enabling increased access and participation in arts and culture;

Arts Law supports and is enthused by the opportunities now available to artists to create, collaborate and disseminate art using existing and emerging technologies. We recognise that artistic practices in all arts spheres will change over time as a result of the broader scope of medium and forum created by new technologies. We provide advice on issues relating to existing and emerging technologies on a daily basis.

We agree that one of the key strategic indicators in achieving this goal is to strengthen the capacity of artists to manage copyright and intellectual property, particularly in relation to online content. We see our role in contributing to that goal as a strong and varied one, because we:

- i. advise artists from all disciplines about the issues around their use of or exposure to existing and emerging technologies, for example, online copyright infringement of music, visual art or film, advice about collaborating for an arts project online, or the use or creation of Creative Commons images;
- ii. advocate for the interests of artists in light of the issues created by existing and emerging technologies, in a number of areas of law including classification, copyright and censorship; and
- iii. educate and provide information sheets and sample contracts for artists and arts organisations on their rights and obligations in respect works created for, with or by existing and emerging technologies.

2.1 Copyright protection in the current digital environment

While existent and emerging technologies, including the internet, are an invaluable tool for many artists because they facilitate the quick, low cost, and often very effective dissemination of art by artists themselves, these technologies have also been used to facilitate easy copyright infringement on a very large scale. We remain very concerned that in many ways, online infringement of copyright is prolific, and more publicly accessible through numerous platforms including file sharing technologies. Examples of the sorts of issues which affect Australian artists include illegal music downloads and film file sharing, the online dissemination of unlicensed visual images.. Government should take a leadership role in actively and publicly inhibiting the growth of online copyright infringements as these infringements

represent significant revenue loss for Australian artists and affect Australia's ability to create long term economic sustainability in the arts.

Arts Law's principal concern is that widespread online copyright infringement continues to have detrimental effects on the income streams of professional and emerging artists. While the Creative Commons movement, which allows the online licensing of work under certain conditions works for some artists, it is not universally appropriate. One of Arts Law's key concerns is that many artists do not understand the impact this sort of licensing has on their future ability to earn income from their art. Arts Law believes there needs to be an emphasis on educating artists about all possible models for earning an income from their practice so that Australia can ensure the continued economic growth and sustainability of the arts. Examples include musicians whose music is downloaded without payment or Indigenous artists who find online reproductions of their paintings.

Arts Law is also concerned by the current social push for artwork to be part of the 'free culture' environment, meaning that in many cases artists are pressured into licensing the use of their works for no remuneration. An example of one of the technological changes fostering this kind of environment is the "Creative Commons" licensing scheme. While Arts Law acknowledges the advantages of Creative Commons licensing, we also recognise potential negative effects of this sort of licensing on an artist's future revenue streams. We are also aware that the more art is given away, rather than licensed, the less likely society might be to value it as an economic asset. Arts Law acknowledges 'copyleft' licences such as Creative Commons are a good option for some artists. Arts Law is alarmed that many artists who choose 'copyleft' licences do so without careful consideration, and without fully understanding the terms or consequences of applying such an open licence that affects that artists right to use their own copyright for the remainder of the life of that copyright. For example, a Creative Commons licence once applied is granted to the world at large and is irrevocable.

2.2 Proposed reform

Arts Law suggests that the effective way to better protect income streams for artists in the digital age is to ensure that artists are educated and informed about how their rights practically function in the internet environment. There should also be widely available, accurate and unbiased information about 'copyleft' licences and how they interact with copyright in order to enable artists to make informed decisions about

how to best manage their work. This can be done through providing targeted support and funding to arts organisations that are best placed to advise artists and directly address specific individual concerns.

We urge the Government to very carefully consider the impacts of any legislative or policy changes with respect to the intellectual property protections currently available to artists. While there is a global expansion (due to the technologies available) in the way that art is created and shared, we encourage Government to protect and maintain the vital contribution made by Australian artists by ensuring that any such changes do not impact upon the income streams so vital to sustainable artistic practice.

3) Goal Three: Supporting excellence and strengthening the role of the arts in depicting Australian 'stories' domestically and internationally

Arts Law welcomes the Government's leadership role in encouraging an appreciation and respect for the arts in our community which is vital if Australia to have a strong and enriching artistic culture. Through its NCP the Government can assist in the development of a much deeper understanding of why a flourishing arts community is a vital economic and cultural asset of any society.

3.1 Supporting excellence by supporting arts sustainability

Artists must be able earn a long term income streams from their art and to establish sustainable artistic practices and businesses from their creative endeavours. This means for example, that they themselves are more capable of engaging and paying other artists to be involved in the arts, or setting up arts businesses which engage communities and encourage arts participation. This is vital for a vibrant arts industry to continue to engage its community and continue to participate in the make up of modern Australian society. A recent study entitled "Do you really expect to get paid?"ⁱ found that most Australian artists earn less than \$10,000 per year from their creative income. This is not an encouraging statistic for a nation hoping to develop and support its existing artistic community. In order for artistic excellence and talent to flourish and be celebrated, it must be supported and economically viable. In other words, artists who are justly rewarded for their creative output are more capable of excelling at what they do, and making a creative contribution to the creative economy which in turn drives the arts generally. Government has a strong leadership obligation in this regard, and can assist in giving artists the voice with which to tell these stories, in the form of funding, peak service support, and being an example itself of a body which remunerates artists fairly and implements best practice dealings with artists.

3.2 Supporting the globally recognised richness of Indigenous arts, language and culture by protecting ICIP

Government can only hope to attract international and domestic respect and recognition of Indigenous arts language and culture if it protects and recognises the unique value of these things itself. A key part of doing that is to ensure adequate protection of Indigenous arts, language and culture by implementing strong laws which protect ICIP. Without these laws, very valuable Indigenous cultural assets such as traditional stories can be exploited by non-Indigenous people both domestically

and internationally. The broad use of unique Indigenous stories, dreamings, language and other cultural references is, from a human rights perspective, a travesty, and from an economic one, devalues this asset as uniquely Indigenous and Australian.

4) Goal Four: Increasing and strengthening the capacity of the arts to contribute to our society and culture

For this goal to be achieved, the capacity of artists to create, and be free to do so is vital. Freedom of expression is a fundamental human right. International instruments, such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory, provide:

(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 article, or through any other media of his choice.

(3) The exercise of the right 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 and reputations of others;

(b) for the protection of national security or of public order, or of public health or morals.

Arts Law believes it is essential to the achievement of goal 4 to ensure artists have freedom of speech. In doing so, Government would support the protection of artists' ability to contribute to Australia's cultural identity and the values, traditions, attitudes and expressions we all share. In order for artists continue to do this, their right to comment, create and question must be improved and maintained. Having a freedom of speech would most certainly strengthen the capacity of individual artists to express their art in an environment where restrictions on that expression were balanced against underlying rights to the freedom to do so.

4.1 Freedom of expression generally

Arts Law supports the introduction of legislation which protects freedom of expression. This right has been recognised in many foreign jurisdictions because it encourages public comment and debate and therefore accountability of those in positions of power. Australian courts have recognised only a limited freedom of political expression. There is, however, no recognition or promotion of a general right to freedom of expression in Australia, in particular beyond the political arena. As a result, there are no restrictions on policies or laws which hinder 'free speech' or expression. Australia has recently seen a number of restrictions on this right, which

highlight the dangers of failing to protect free expression. It is imperative to the democratic nature of the Australian political system that questions and comments about this system are not unduly restricted. We see this right as imperative to the existence and effectiveness of other associated rights.

4.2 Freedom of artistic expression

Arts Law agrees with the statement in the discussion framework that 'culture is at the heart of our nation and the arts are at the heart of our culture, feeding and in turn, being fed by it.' In order to foster and protect the arts, freedom of expression for artists must be protected. In addition to the need for a general right to freedom of expression, a specific right to freedom of expression should be available to artists. This right includes the right to create or perform art which expresses a particular opinion or belief about issues. In recognition of the importance of art in comment and criticism of society and politics, such a right would encourage and foster artists in this agenda. The right to use art as a means of expressing an opinion or belief is vital in articulating public or social debate, and developing a culture reflecting and documenting the society in which we live.

4.3 Examples of limits on freedom of expression in Australia

While the courts have recognised limited implied freedoms in relation to political communication, Australians have no constitutional or legislative right to free speech despite a number of existing and proposed limitations on freedom of expression and this freedom. Arts Law is particularly concerned about the current focus on censorship. Examples include the proposed tort for invasion of privacy, proposed internet filtering of content 'refused classification' and the introduction of protocols by Government which restrict artists' rights to freedom of expression. Government plays a very important role in ensuring that there is a balance between laws that legitimately restrict certain freedoms for public interest reasons (for example, racial discrimination laws) and those that threaten to create a society within which creative expression in relation to anything contentious is stifled. In doing so, Government should recognise the importance of a constitutionally or legislatively enshrined freedom of expression, and balance laws which would restrict this freedom against it.

- i. **Tort for the invasion of privacy:** Arts Law does not support the introduction on a state or federal level of a tort for the invasion of privacy. The introduction of a statutory cause of action for invasion of privacy that gives individuals rights over the use of their name, likeness or voice is

inappropriate because there are existing laws that provide protection against, and remedies for, the unauthorised use of a person's name, likeness or voice. To extend the law beyond the existing provisions is inappropriate and would have a disproportionate effect on:

- arts practitioners who create artworks that portray or capture images of people in public spaces (including photographers, painters, video artists and directors); and
- writers and journalists, whose freedom of expression is likely to be restricted by the proposed changes.

Arts Law is concerned that the proposed changes to the laws relating to privacy will be detrimental to visual artists, filmmakers, photographers, writers and journalists. We ask that the NCP discussion considers this issue and its potential impact on the arts and culture of Australians and their cultural legacy.

- ii. **Mandatory internet filter:** For artists, the filter has many unanswered questions primarily around the filtering decisions, and how these are made. Australia Council research shows the internet is now a key tool for people to engage with the arts,² and today most artists have some form of internet presence. This highlights the need for very careful consideration about the effects that any form of online filtering will have not only on arts participation, but also artists ability to disseminate their work online.
- iii. **Australia Council Protocols:** We note the Government's push for, and support of, the Australia Council Protocols for Working with children in the arts (Protocols). Arts Law considers that these Protocols continue to create additional hurdles for artists and arts organisations. Many of those detrimentally affected by the protocols are artists who make a significant contribution to Australia's unique, diverse and vital culture and often have no choice but to rely on Government funding. Arts Law supports the protection of children from harm. It does not support the imposition of additional and unnecessary regulations as a precondition for limited funding. Arts Law urges the Government to consider the ramifications of restricting Australian artists further.

² *More than bums on seats: Australian participation in the Arts*, Sydney, Australia Council for the Arts (2010)

Arts Law is concerned that the continued support and application of the Protocols will impact negatively on Australia's art culture. In our experience, they have already led to artists and arts organisations self censoring when creating art works and we view this as detrimentally affecting artists and arts organisations.

Conclusion

We are thankful for the opportunity to comment on the discussion paper. We are optimistic that its detailed analysis of what makes the Australian arts industry tick, and how it can better engage Australian society in the arts will provide a blueprint for nurturing a vibrant artistic and creative culture in Australia. Arts Law is keen to participate in that process and believes that it has the ability to make a substantial contribution.

Further information

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. We can be contacted at artslaw@artslaw.com.au or on 02 9356 2566.

Yours faithfully



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ⁱ Throsby, D. and Zednick, A, "*Do you really expect to get paid?*" Australia Council for the Arts (2010)