ANNEXURE 2 – SUMMARY OF POINTS INCLUDED IN ARTS LAW'S DEC 2015 SUBMISSION TO PRODUCTIVITY COMMISSION IP ARRANGEMENTS ISSUES PAPER OCTOBER 2015

3 A framework for assessing IP arrangements

Arts Law accepts that Figure 2 of PC Issues Paper set out classical statements of what is 'effective' and 'efficient', however Arts Law would question whether these principles are adequate to interpret or explain with any certainty as to what is the optimal level of IP protection necessary to promote innovation and advance social welfare.

3.1 Effectiveness: do IP rights target additional innovation and creative output?

The policy framework of the copyright system (as discussed above) can be said to be agnostic as to whether the creative work is original (beyond the minimum standard of originality for a work to be protected by copyright) or has any 'additionality' (as that term is used in the PC Issues Paper at pages 7 - 9). As a consequence, it is difficult to measure whether the copyright system "promotes the creation of genuinely new and valuable IP that in the absence of such a system would not have occurred." Although an analysis of the principles and doctrines of the copyright system (as discussed above) supports the conclusion that those principles and doctrines promote competition for the ideas and building blocks of creativity and innovation.

The literature on the drivers of innovation describes innovators being engaged in a constant process of innovation to create new products or the next generation of existing products that results in what some commentators describe as 'creative destruction', in that creativity and innovation is driven by the opportunities that entrepreneurs view as being available in markets where high prices can be achieve or are being achieved by existing producers. The implications of 'creative destruction' that flow from the characteristics of IP would appear to be to discount the effect of the scope and duration of protection afforded by the IP system and to highlight the effect of entrepreneur driven competition driven by profitable opportunities that may be perceived to exist in a market. The 'creative destruction' encourages the creativity, investment and new innovation that provides the social welfare benefits of new and improved products and services with price competition between suppliers of competing technologies and products**.**

3.2 Efficiency: getting the balance right

Arts Law position that the copyright system does not fit a simple economic model. The production and consumption of cultural products such as music, film, novels, paintings and other artwork, would appear to have economic attributes different to many utilitarian products. As consequence there are difficulties in measuring the efficiency and effectiveness of the copyright system in relation to the creation of cultural products.

The economics of music production have been described by Pitt (2010) as being that:

"The nature of the production process in popular music is that of high risk, high fixed capital costs, upfront artistic labor costs, and low marginal cost of production.

The risk level involved in each investment in each artist or even existing successful artists is highly speculative and significant because the level of expected future sales cannot be determine even using past success as a guide."

Arts Law accepts that utilitarian products that include intellectual property may have to be priced at or near marginal cost, depending on specific factors of the product or the market for the product, including the availability of substitutes for the product. It can be argued that product substitution is primary way that consumers address rent-seeking behaviour and product substitution limits the ability of producers to price their creative work or innovations above marginal cost. However, a cultural product may be freed from pricing at or near the marginal cost of the product. For example, some consumers purchasing decisions with regard to cultural works, such as paintings, may be described as "essentially the price of desire; if that price is greater than your desire, you won't buy it. On the other hand, if it's something so alluring that you simply must have it, you'll pay almost any price for it."

Arts Law is of the view that that the 'efficiency' framework of considering whether the copyright system encourages returns that are proportional to the cost of generating the work, does not appear to be an appropriate framework to consider the production and consumption of cultural products.

The report of CRC-REP (2015) on the income of Australian Aboriginal and Torres Strait Islander art centres and artist and the report of DoE, MU (2015) on the income of Australian writers indicates that in these creative endeavours, a small number of artists and writers generate the largest proportion of the revenue from the sale of artwork and literary works. At page 11 of the PC Issues paper the questions posed include: How should effort be measured? Is proportionality a desirable feature of an IP system? Art Law's view is that it is a flawed approach to attempt to measure 'effort' in generating IP or to assess the 'proportionality' of 'rewards' to the 'effort' in generating IP.

The problem with proposed framework is that it does not appear to take account of the different characteristics of the forms of IP. The rules that determine the scope of the rights and boundaries of each form of IP can be described as acting to prevent imitation but encouraging competition by substitution. That is, producers of IP products seek to differentiate their products and services from their rivals in the market, however competitive behaviour may involve rival producers imitating the ideas used by their competitors. The IP regimes act to prevent imitation by the specific rules and doctrines of each IP regime. The literature that considers the effect of innovation supports the view that the social welfare losses resulting from IPRs inhibiting allocative efficiency over the short to medium term are more than off-set by the welfare gains achieve by improvements to dynamic efficiency that flow from innovation and creativity. For example, Gans, Williams & Briggs (2004) identified that the exclusive rights provided by copyright law do not prevent close substitutes emerging, what copyright prevents is the copying or unauthorised adaptation of the copyright work or material.

Arts Law's view is that the economic framework proposed by the Productivity Commission does not take account of how authors and creators of copyright works do not have a monopoly over ideas so that other authors and creators can rework ideas to create works that are 'original' (as understood in copyright law as not copied from another work). That is, copyright provides authors and creators with protection against the imitation of an existing work (the 'substantial copy' test) but allows other authors and creators to produce new works that compete with an existing works in that the same ideas can be presented.

Page 10 of the PC Issues Paper considers possible problems that could be described as resulting in an inefficient IP system that does not generate IP at the lowest cost to society. With cultural products, it is difficult to identify whether the copyright legislation results in 'windfall gains' to the producers or 'windfall losses' to the community at large. That is, it can be argued that the production and distribution of cultural products does not fit the efficiency model described in pages 9 & 10 to the PC Issues Paper.

3.3 An efficient system ensures that IP rights are tradeable

Arts Law would question whether it is the design of the IP system that determines how innovation and creative output is disseminated – rather dissemination on IP products is carried out through business models and distribution practices adopted by participants in the value chain from creator and innovation to manufacturer and distributor to the end users.

For example, in relation to the copyright in cinematographic film: distribution strategies are used that result in a 'window' release that separates the film being available to the public in cinema, different forms of television (pay TV, pay-per-view, free-to-air) and consumer sell-through (digital download or DVD release). The allocation of exclusive rights may allow film, television and music industries owners to act strategically to limit dissemination – that is, to control the release in different media in an attempt to maximise the financial return from the copyright material. However, such business strategies are susceptible being damaged through changes in distribution technologies. The film distribution industry move from 120 day theatrical release window to a 90 day window can be attributed to the impact of unlicensed viewing of feature films as the result of consumers being able to illegally access the films online. The impact of digital technologies can be seen to put pressure on business strategies to evolve into distribution strategies that take account of the expectations of consumers of entertainment products and the technologies available to consumers to access those products.

Arts Law's position is that business strategies that enhance the value obtained from dissemination of IP should be regulated by competition policy rather than by changes to the IP systems. Arts Law's position on pricing and timing of dissemination of works to the public is set out in our submission to the Online Copyright Infringement discussion paper (July 2014), which stated:

"It should remain the decision of owners of copyright material as to the business model and the price at which they make material available to the public and the timing of when the material will be available in different markets and delivered through different distribution media. However it is apparent from the available studies that availability and pricing are factors that are relevant to the level of unauthorised downloading or viewing of material. That is delayed availability and limits as to media in which the material can be legitimately accessed both have consequences in terms of incentivising copyright infringement."

3.4 Adaptability: making sure IP rights are apt for the future

The policy design of the copyright regime indicates that the impact of copyright must be considered in relation to time frames of the duration of copyright. That is, the social welfare effects of the copyright system must be considered in relation to the long term – rather than short term to medium term - for considering issues related to "access to and cost of goods and services" (PC Issues Paper, Scope of the Inquiry, para 1 (b)) and the social welfare benefits that flow from "access to technologies and creative works" (PC Issues Paper, Scope of the Inquiry, para 2 (a)) or "access to an increased range of quality and value goods and services" (PC Issues Paper, Scope of the Inquiry, para 2 (b)).

3.5 Accountability: a transparent, evidence-based system

Arts Law's ALRC Copyright submission 2012, quoted the Hargreaves Report (2011) to the U.K. government stated that reform of the IP System should supported by high quality evidence:

"1. Evidence. Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights."

Arts Law's ALRC Copyright submission 2012 also referred to the Merrill Report (2013), as describing a best practice approach to carrying out research on the economics of IP. The Arts Law submission noted that the Hargreaves Report warns of reform inquiries being presented with what is described as 'lobbynomics' rather than research conclusions that can be independently verified. The response of the Intellectual Property Office (IPO), to the Hargreaves Report recommendation was the publication of 'Good Evidence for Policy'. This document sets out guidance that describes the standards of evidence that is appropriate for use in the development of IP policy and is aimed at reports and research carried out in order to inform policy-makers. Arts Law's ALRC Copyright submission 2012 stated as a summary:

3.12 Arts Law submits that two key elements should drive the reform of the Copyright Act 1968:

3.12.1 analysis of objective evidence; copyright policy development should balance measurable economic objectives against social goals as well as balancing the impact of changes on rights holders against impacts on consumers and other interests; and

3.12.2 the existence of the moral rights regime in Part IX, Copyright Act 1968, has the consequence that copyright policy development in Australia must take account of the non-economic factors (such as moral rights) as well as the measurable economic objectives in determining the social welfare consequences of reform proposals. 4 Improving arrangements for specific forms of IP

4.1 Copyright Act

4.1.1 Pressures on the copyright system

The duration of copyright (as set out in the Copyright Act 1968) is the result of Australian's commitments to providing the minimum level of protection described in international copyright conventions and agreements as well as the higher standards of copyright protection that are the result of bilateral and regional trade agreements, including the Australia-United States Free Trade Agreement.

Arts Law recognises that the extension of the copyright term has exacerbated the 'orphan work' problem that that mechanisms should be put in place to manage the difficulty of identifying the copyright owner of older works and implementing licencing arrangement for the use of those 'orphan works'.

Arts Law views the Collecting Societies as important mechanisms to efficiently manage licensing of public performance of musical works and sound recordings, the recording of television programming for educational use, as well as managing educational uses of other copyright material. Arts Law notes that arrangements like the United Kingdom's Copyright Hub can be implemented to more efficiently manage licensing of copyright works and other material.

4.1.2 Transaction costs resulting for changes to the copyright regime

Arts Law's ALRC Copyright submission 2012 describes the policy context of the reform of the Copyright Act 1968, and a critique of the economic papers that discussed consequences of changing the existing categories of the 'fair dealing' defences to a U.S. style 'fair use' defence.

The definition and description of the scope of those the exclusive rights that are the copyright are subject to the exclusions or defences from liability that are established in the Copyright Act 1968. Changes to that legal framework potentially result in uncertainty as to the scope of the rights which increase transaction costs of those dealing with the rights. A significant transaction cost will be the litigation that is a consequence of the uncertainty as to the what are the exclusive rights provided by the Copyright Act.

A possible example of this effect would be if Australian moved from the category based 'fair dealing' exceptions to a U.S. style 'fair use' exception, it would result in an increase in transaction costs, as the scope of the rights will become more uncertain, and rights owners and users will be exposed to the risk of litigation costs to resolve disputes as to the scope of the rights and the 'fair use' exceptions to those rights. Lawrence Lessig has describe the U.S. 'fair use' exceptions as a "licence to hire a lawyer".

4.2 Designs Act

The Arts Law submission to the ACIP Options Paper in relation to reform of the Designs Act considered possible changes to the copyright/design overlap provisions. The ACIP Options Paper suggested three broad options for revising the copyright/design overlap provisions:

- Try to clarify areas in the overlap provisions that are currently uncertain;
- Allow a limited term of copyright protection for an industrially applied design equivalent to that under the registered designs system (currently 10 year); and
- Abandon the policy entirely.

Arts Law submission to the ACIP was that the second option, which would allow designs to retain a period of copyright protection once industrially applied, would alleviate the current copyright/design confusion without extending copyright protection to purely utilitarian designs (e.g. utensils, tools and machinery parts). Such a system is already in place in New Zealand. In addition, the second option could assist artists who wished to industrially apply their designs but could not afford formal registration under the Designs Act to retain some protection under copyright laws.