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ARTS LAW CENTRE OF AUSTRALIA
Art & Law

The Hon Peter Garrett AM MP
Minister for the Environment, Heritage and the Arts
PO Box 6022
Parliament House
Canberra ACT 2600

5 February 2010

Dear Minister Garrett

Submission on a National Cultural Policy

The Arts Law Centre of Australia (**Arts Law**) is pleased to provide its submission on a National Cultural Policy and commends you for starting a conversation on this topic with the wider community.

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 widely formed by the concerns artists raise with us when we provide legal advice and education

Our submission addresses 5 sets of issues

1. Establishment of a strong system to protect artists' rights;
2. Protection of Indigenous Cultural and Intellectual Property;
3. Protection of income streams for artists in "free culture" environment;
4. Repeal of section 65 of the *Copyright Act 1968* (Cth) (sculptures in public places); and

5. Protection for freedom of expression.

ESTABLISHMENT OF A STRONG SYSTEM TO PROTECT ARTISTS' RIGHTS

1. In order for Australia to have a strong and enriching artistic culture, the Government must play a leadership role in encouraging an appreciation and respect for the arts in our community. Similarly, through its national cultural policy the Government can assist in the development of a much deeper understanding of why a flourishing arts community is a vital part of any successful modern society.

2. It is a truism to say that artists and other creators must be able to earn an income from their creative endeavours for a vibrant arts community to exist. This means that the current entrenched impoverishment of the arts community must be addressed. In order for artists to be justly rewarded for their creative output, Australia needs strong systems in place, including legal and support systems. Such systems should ensure that artists' rights are respected and artists are free to be creative without exploitation.

3. Australia's peak arts organisations are central in assisting artists achieve sustainable arts practices by providing expertise on the creative, business and legal environments in which artists operate. Peak and service organisations, with a track record of supporting artists, should be properly supported by Government. Such organisations provide a voice for artists and the resources for artists to get quality advice and assistance when they need it.

4. Unlike companies and individuals who are producing creative work, the peak and service organisations, providing the back-end support, tend to have a lower profile in the community. This should not mean they are less important and less worthy of support. In reality, however, these organisations are much less likely to attract the philanthropic or sponsorship dollar. It therefore becomes all the more important that they are properly resourced by State and Federal Governments. These organisations tend to be starved for resources through chronic under-funding, making it extremely difficult for them to provide their much–needed services to the arts in a timely and professional fashion.

5. Arts Law provides a good case study of such a peak service organisation. On a shoe-string budget Arts Law delivers significant legal advice services to the arts community, including to Indigenous artists. Frequently our services are described as 'indispensable'. Many are surprised to learn how small we are in

view of the services provided, thinking we have the infrastructure of a Government department. However this does little to alleviate the stress and frustration experienced by the many who are unable to access our services due to limited capacity. In 2009, only one third of people attempting to access Arts Law actually received a service due to understaffing caused by underfunding. Hopefully this consultation process is a timely reminder that without proper resourcing, organisations like Arts Law are not sustainable and our 'indispensable' services will not longer be available. It is one thing to provide artists with rights, but if there are no means of enforcing those rights, they are little more than a paper tiger.

6. The National Cultural Policy needs to address not only the legal issues outlined below, but also the place of our peak organisations, their resourcing and the benefits they provide to the Australian arts community.

PROTECTION OF INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY

Arts Law strongly supports measures 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 six years. Much of that advice has arisen from concerns about the lack of a legal framework to protect Indigenous cultural heritage.

Inadequacy of the existing legislation protecting ICIP

1. The existing legislation creating individual rights of copyright, design, patent and other intellectual property rights is ineffective to protect, except tangentially and coincidentally, Indigenous cultural rights which are generally communal in nature.

2. There is currently no legal right of ownership of Indigenous Cultural and Intellectual Property (**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 not either any 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 disrespect Indigenous

culture and can cause substantial pain and anger within the Indigenous communities who are the custodians of that culture.

Why sui generis legislation is needed

3. Arts Law believes that adequate protection can only effectively be achieved by separate sui generis legislation for the following reasons:

    - ICIP covers a broader range of creative and intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. It 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;
    - ICIP is fundamentally different from traditional legal constructs of intellectual property in that it is a communal not individual right albeit with individual custodians;
    - ICIP is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
    - ICIP evolves and develops over time, unlike traditional Intellectual property rights which focus on fixing a point in time at which the property which is protected is defined;
    - ICIP is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;
    - ICIP stands beside existing intellectual property rights; It is not an extension of them.

Alternatives

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

    - **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 traditional knowledge;
    - **Treaty:** agreement at international level is 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 10 years of discussions.;

- **Customary law:** many Indigenous communities generally rely on customary law among themselves. However, the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous people who are not bound by traditional or customary laws. While traditional laws can be recognised by the common law, the native title experience shows that this can be deeply complex and costly, and still necessitates the enactment of legislation. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- **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;
- **Private law and contract:** Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a band aid solution to address the lack of relevant legislative protection. Again it 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 who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the Declaration on the Rights of Indigenous People.

5. The development of an Australian cultural policy provides the platform and the opportunity to protect 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.

PROTECTION OF INCOME STREAMS FOR ARTISTS IN A 'FREE CULTURE' ENVIRONMENT

Background

1. The Copyright Act 1968 (Cth) protects and encourages creativity by giving artists the right to control the publication, distribution and communication of their work. This protection applies to all artists regardless of media or professionalism for the purpose of enabling them to derive income and make a living from their creative endeavours. Arts Law supports the broad interests of artists, the vast majority of whom are emerging or developing artists limited in their ability to enforce their rights, and who work on low incomes with 60% earning less than $30,000 a year[1].

2. The internet has had an enormous impact on the ability of artists to control and publish their work. While it is undeniable that the internet is a valuable tool that has created new opportunities for artists, it is also undeniable that it has created an environment where copyright infringement is rampant and even normalised as 'free culture'. Not only does music sharing remain an issue almost ten years after Napster,[2] but advances in internet technology mean that it takes mere minutes to download television shows and films. Images and photographs are frequently illegally copied and used not just by individuals but businesses and the news media. The growing use of electronic book readers will inevitably encourage the digital dissemination of literary works with and without the author's consent. Each unauthorised publication or distribution of a work may be lost income for an artist who can ill afford it.

Concerns with the 'free culture' environment

[1] ABS (2006) Census of Population and Housing

[2] Napster was a computer program that between 1999 and 2001 allowed millions of people to share music over the internet. In 2001 it was the subject of court action in the United States of America where it was found to have encouraged and abetted the wholesale infringement of music copyrights, and as a result was forced to shut operations in 2002. Napster’s demise is widely seen as paving the way to the online file distribution systems that are used today.

3. Arts Law's principal concern is that widespread infringement of copyrighted works online has and continues to have a detrimental effect on the income streams of artists, whether they are professional artists who earn a living from their work or emerging artists who seek to do the same. While there are some artists who consciously choose to share their work online without expecting remuneration under a 'copyleft' Creative Commons licence, many others have not chosen this model and see their works exploited without authorisation. Examples include musicians whose music is downloaded without payment, Indigenous artists who find their online promotional pictures of their paintings mass printed for sale, photographers whose images are taken to be used on t-shirts, and more.

4. Arts Law is also troubled by the lack of distinction between information and a copyrighted work in the 'free culture' environment. Arts Law acknowledges the advantages of Creative Commons licences in improving access to public sector information for the benefit of society. Accordingly, it supports the decisions of government agencies who have applied such licences to their information. The situation of freely available publicly funded information must, however, be distinguished from that of a copyrighted work by an artist, a private individual, where the work's primary value is in the expression of information or an idea. In the latter situation, there is a greater benefit than in the former in remunerating the artist for their invested time, talent and resources as well as encouraging the creation of future works. A Creative Commons licence may be less than appropriate to achieve this, and is certainly unproven in its ability to reliably generate income for the artist in the long term. Arts Law is concerned the rights and ability of individual artists to control their work may be affected by the shift towards open access public sector information, especially if that shifts creates an expectation or belief that all intellectual property, regardless of type or origin, is or should be freely available.

5. Arts Law acknowledges that 'copyleft' licences such as Creative Commons are a genuine option for some artists. Such licences, however, are dependent on established copyright law for their effectiveness, and are only one of many options open to artists who have the right to control and specify how their work is to be used under the Copyright Act, including whether or not to allow use without payment and under what conditions. 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 essentially relinquishes copyright over their work.

Proposed reform

6. 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.

7. 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.

REPEAL OR AMENDMENT OF SS 65 AND 68 OF THE COPYRIGHT ACT

Background

1. Section 65 of the *Copyright Act 1968* (Cth) (Act) allows the two dimensional reproduction of a sculpture or a work of artistic craftsmanship without the permission of the copyright owner if the work is displayed permanently in a public place or in premises open to the public. Non-infringing reproductions include: the taking of photographs; the making of paintings, drawings or engravings; and the inclusion of the sculpture or work of artistic craftsmanship in a film or television broadcast. Section 68 provides that non-infringing two dimensional reproductions can be published without infringing the author's copyright.

2. The Report of the Copyright Law Review Committee (1959) (Spicer Committee Report) recommended the introduction of s 65 into the Act given how impractical in is to control copying in public spaces. Furthermore, s 65 of the

Act was intended to "exempt twentieth century tourists from the dreadful prospect of having their holiday snaps delivered up for destruction."

Concerns with ss 65 and 68 of the Act

3. Arts Law's principal concern with s 65 of the Act is that rather than limiting its scope to reproduction for private use, for example the holiday snapshot mentioned in the Spicer Committee Report, it allows large scale commercial reproduction of public art without the permission of the copyright owner. The same concern applies to s 68 of the Act as the provision (among other things) allows widespread publication of reproductions made under s 65 without any regard to the copyright owner. As a result, those provisions unreasonably prejudice the legitimate interest of artists and conflict with the normal exploitation of their work. The commercial exploitation of public art without corresponding benefits for the creators of such art is particularly inequitable given:

   - the low income levels of Australian visual artists despite the significant contribution of the visual art sector to the Australian economy and tourist economy; and
   - the significant role public art plays in enhancing Australian public spaces.

4. Arts Law is also concerned that the exception makes an arbitrary distinction between creators of three dimensional artworks and creators of two dimensional artworks. Some negative effects of such a distinction are:

   - possible disincentives for the creation of three dimensional public art, i.e. most public art; and
   - a lack of recognition for creators of public art for the valuable contribution they make to the cultural and social wellbeing of the nation.

5. Another negative effect of s 65 of the Act is that the exception does not account for the irreparable cultural harm which can arise from unauthorised reproductions of works by Indigenous artists. The exceptions in ss 65 and 68 of the Act are of particular concern given the lack of protection of the interests of Indigenous artists and their communities in relation to Indigenous art under Australian law.

6. Other concerns with ss 65 and 68 of the Act are that:

- the sections do not accord with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Article 13 of the TRIPS Agreement provides that when legislating, members to the TRIPS Agreement must confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder; and
- there is uncertainty as to the scope of the exceptions: (1) the question whether reproduction of public art without the permission of the copyright owner under s 65 of the Act does in fact infringe copyright in any underlying two dimensional work, for example sketches for a sculpture, is unresolved; and (2) it is unclear whether s 68 of the Act allows the communication to the public (as opposed to the publication) of a reproduction made under s 65 of the Act.

We are of course happy to discuss any of those issues in more detail at any time.

Proposed reform

7. Arts Law suggests that the recognition of the contribution of visuals artists, in particular the creators of three dimensional public art, should be part of a National Cultural Policy. The repeal of s 65 of the Act should be a noteworthy step towards that recognition. That provision unfairly discriminates against creators of three dimensional artworks by exempting the two dimensional reproduction of such artworks from the infringement regime of the Act. The original rationale for s 65, the impracticality of controlling the two dimensional copying of public artwork, did not contemplate widespread reproduction of public art for commercial purposes and is not persuasive in the context of widespread digital reproduction and the advent of copyright collecting societies.

8. Alternatively, s 65 of the Act should be amended to limit its application to two dimensional reproductions of sculptures or works of artistic craftsmanship displayed permanently in a public place made or used for private or incidental uses. Limiting s 65 of the Act to private or incidental uses will strike an appropriate balance between the interests of creators of public art to exploit their work and derive the same benefits from commercial uses as any other

creator, and the needs of users to be able to reproduce public art for their own use and enjoyment.

9. Reform in this area has received widespread support over more than the past decade. In 1998, the Copyright Law Review Committee recommended the repeal of ss 65 to 69 in the context of a broader recommendation to reform the fair dealing provisions of the Act. In 2002, the Myer Report of the Contemporary Visual Arts and Craft Inquiry also recommended the repeal of s 65. The Australian Copyright Council, the visual artists' collection society Viscopy and the National Association for the Visual Arts Ltd (NAVA) all support the repeal of s 65. Any repeal or amendment of s 65 necessarily requires repeal or amendment also to be made to s 68. Further, the Australian Labour Party itself has foreshadowed amendments to the Act so that public sculptures are given the same protection as other artistic works.

FREEDOM OF SPEECH, FREEDOM OF EXPRESSION AND THE PUBLIC INTEREST

Background

1. 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.

2. Arts Law believes it is in the public interest to ensure freedom of speech. 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.

Freedom of expression generally

3. 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.

Freedom of artistic expression

4. 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.

Examples of limits on freedom of expression in Australia

5. While the courts have recognised limited freedoms, primarily parliamentary privilege in Australia, there is no enshrined or implied right to free speech. Further, there are a number of existing and proposed limitations on freedom of expression and the freedom to comment and question the society and politics.

Arts Law is particularly concerned about the current focus on censorship. Examples include the proposed internet filtering system and governmental pressure to introduce laws and protocols which do or will restrict artists' right to freedom of expression.

Proposed mandatory internet filtering system

6. A recent example of Governments' limitation on any interest in freedom of expression is the proposed mandatory internet filtering system. Arts Law understands there are a number of issues with that system (as it is currently proposed) including that it:

   - may block legitimate content;
   - is likely to slow internet speed;
   - will be mandatory (at the lower filter tier, anyway); and
   - will be based on a list of websites which is inaccessible to the public (and therefore incapable of debate or appeal as to whether those sites should in fact be on the list).

7. If the filtering system is implemented as proposed, the risks are that those artists disseminating their work online are subject to rules which are not transparent. This could lead to two undesirable outcomes for the arts:

   (1) Limited use of the internet to disseminate art where for some online distribution is the only means; and

   (2) Self censorship of art disproportionate and unnecessary to the stated objective of child protection.

Removal of 'genuine artistic purpose' defence

8. A further example of Government limiting those rights afforded artists is the intended removal of the 'genuine artistic purpose' defence in the *Crimes Act 1900* (NSW) (**Crimes Act**) in s 91H(4). The 2008 Bill Henson controversy saw heated debate about child pornography and art, following which the Government accepted a recommendation from former Supreme Court Judge James Wood, that the 'genuine artistic purpose' defence currently available to artists who might be charged with producing, disseminating or possessing child pornography in the Crimes Act be removed. While we understand that the changes proposed may in fact assist prosecutors and police in establishing

whether material constitutes child pornography to begin with, we are concerned that the push for changes in this legislation are indicative of a broader "scape-goating" of artists by Government.

Privacy

9. Arts Law does not support the introduction on a state or federal level of a tort for the invasion of privacy, as recommended for example by the New South Wales Law reform Commission. 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.

10. Such a right would be a significant expansion of existing rights and cannot be justified given:

    - the existing laws are sufficient;
    - it threatens freedom of speech and freedom of expression;
    - the absence of a strong human rights framework in Australia;
    - the detriment it would cause to our artistic, social and cultural heritage; and
    - the likelihood that it will primarily benefit celebrities (and corporations if not excluded).

11. 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 National Cultural Policy discussion considers this issue and its potential impact on the arts and culture of Australians and their cultural legacy.

Australia Council Protocols

12. 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 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, however, support the imposition of additional and unnecessary regulations as a precondition for limited funding. Arts Law urges the Australia Council to consider the ramifications of restricting Australian artists further. In our experience, the unnecessary burden placed on artists can be exemplified below :

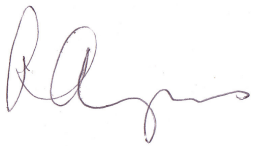
    Arts Law was contacted by a prominent Australia Council funded arts organisation, seeking to exhibit a number of film works. The film maker concerned had filmed a number of innocuous images of children in a foreign jurisdiction, filmed over a decade ago. Most of the children were clothed, but some were what the Protocols define as 'partially naked'. The organisation was concerned that the film maker was incapable of giving the undertaking in the Protocols requiring them to warrant that the work was compliant with all the laws in that foreign jurisdiction many years ago. This was largely due to the inability of lawyers in Australia to advise on the laws in that foreign jurisdiction, and the artist's inability to secure free advice in that foreign jurisdiction in relation to laws which were now "out of date". The arts organisation sought advice as to whether they could still show the works, given there was too little time to have the works classified. In this instance the arts organisation had to take the risk of breaching the Protocols, or removing prominent works from a collection, neither of which are acceptable outcomes.

13. 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 effecting artists and arts organisations.

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



Robyn Ayres

Executive Director

Arts Law Centre of Australia