



Submission to the Department of Infrastructure, Transport, Regional Development, Communications, and the Arts (the **Department**)

By email to: culturalpolicy@arts.gov.au

NATIONAL CULTURAL POLICY SUBMISSION

The Arts Law Centre of Australia (**Arts Law**) is a national community legal centre providing free or low-cost legal advice to creators residing in all Australian states and territories. Arts Law makes this submission on behalf of our broad client base and, in particular, creators and the peak or professional organisations which represent their interests. Arts Law assists thousands of Australian artists and organisations annually. Artists in the Black (**AITB**) is a specialist program at Arts Law that provides advice and information on legal issues for Aboriginal and Torres Strait Islander artists and communities.

Arts Law would like to acknowledge the Traditional Owners of the various lands on which Arts Law works and pay our respects to Elders past and present. Please note that for the purposes of this submission, we respectfully use the term 'First Nations' to reference the Aboriginal and Torres Strait Islander people belonging to this country.

Arts Law will address below each of the five pillars proposed by the Department and answer the Department's questions about their importance and the challenges and opportunities that exist for each.

1. FIRST NATIONS: RECOGNISING AND RESPECTING THE CRUCIAL PLACE OF THESE STORIES AT THE CENTRE OF OUR ARTS AND CULTURE.

To meet this priority, it is critical to increase funding for First Nations artists and organisations, as well as the peak bodies and support services like Arts Law who assist them. Legal acknowledgement and protection of Indigenous Cultural Intellectual Property (**ICIP**) is also required. To truly recognise and respect ICIP, Arts Law advocates for standalone legislative provisions that offer legal protection. Policies and protocols have helped guide the sector on best practice, but do not offer a legal remedy if they are not followed and ICIP is disrespected.

Since 2016, Arts Law has been working extensively on the 'Fake Art Harms Culture' (**FAHC**) campaign, a joint initiative with the Copyright Agency and the Indigenous Art Code. In response to the Productivity Commission's Draft Report into the Indigenous arts and craft market, we made the following recommendations (full submission available [here](#)):

- Implementation of amendments to the Australian Consumer Law (**ACL**) to combat the fake art market.
- Recognition of ICIP in legislation.
- Stopping the exploitation of artists: from bad licensing arrangements through to unfair working conditions.
- Increasing support and funding for the arts, the peak organisations and support services like Arts Law who provide critical resources and assistance to artists.



Arts Law is pleased that the Commission agreed with the concerns that the FAHC campaign raised in 2016 – that there is a significant issue with inauthentic arts and crafts saturating the market – disrespecting culture and depriving Aboriginal and Torres Strait Islander artists of income.

Arts Law is disappointed the Commission has not supported our recommendation to change the ACL to ban inauthentic Indigenous art and products altogether. Labelling of ‘fake art’ is an inadequate response, which is not commensurate with the severity of the harm caused by fake art. Given the Australian Government’s commitment to ‘Closing the Gap’ and the ‘Indigenous Advancement Strategy’, why would we want to continue to allow inauthentic product in the market at all? We have many skilled and diverse Indigenous and Torres Strait Islander artists who already create authentic products. Once the mandatory labelling and packaging has been removed from an inauthentic product, the cultural harm and damage will still exist.

The Commission has acknowledged that current intellectual property laws do not do enough to recognise and protect ICIP and have agreed with our view that standalone legislation must be introduced. While the scope of the Draft Report was limited to the visual arts market, Arts Law’s view is that most of the recommendations made by Arts Law need to be applied to the wider arts sector, including screen, theatre, music, dance and other performing arts and literature. Arts Law advocates for standalone ICIP legislation which includes protection across all arts practice areas which may incorporate ICIP.

2. A PLACE FOR EVERY STORY: REFLECTING THE DIVERSITY OF OUR STORIES AND THE CONTRIBUTION OF ALL AUSTRALIANS AS THE CREATORS OF CULTURE.

Arts Law provides legal advice to Australian storytellers across all arts practice areas. Storytelling is the backbone of Australian arts and culture and expressed through many different mediums such as literature, dance, music, theatre, screen, games and podcasts. It is crucial for storytellers to obtain advice on commercial opportunities to promote their work, particularly where they are engaging with large publishers, producers, broadcasters, or other commercial entities. Due to resourcing and funding constraints, Arts Law, as the only community legal centre for artists and arts organisations, is often limited in the level of support we can offer and in the timeliness of that support, which means we are often unable to provide services to clients involved in fast-paced negotiations or subject to other tight commercial deadlines.

We have also experienced first-hand the infrastructure challenges faced by many of our clients, particularly in regional and remote areas, in easily accessing our legal support services using the technologies that many of us take for granted. To truly showcase and support diverse stories from communities across Australia, essential infrastructure such as access to fast internet and reliable phone reception is essential.

For Arts Law’s storyteller clients, many of whom come from financially disadvantaged backgrounds, fair remuneration, recognition and respect for the legal rights of storytellers is integral to encouraging, supporting and incentivising them to create and develop new works. Accordingly, to truly support the contributions of all Australians as creators of culture, any reform to copyright law should maintain or strengthen, rather than erode, the rights of storytellers to receive income streams from licensing and royalties, providing both financial incentives and recognition of their work. Arts Law’s view is that recent suggested amendments to the Copyright



Act have favoured consumers of copyright material, rather than creators, which does not support a cultural landscape of diverse storytellers.

Arts Law supports the efforts of the Australian screen industry to advocate for a stronger commitment from funding bodies to develop and produce Australian stories and for Australian content quotas to be applied to streaming services to increase investment in the sector. Arts Law advocates for quotas or other regulatory mechanisms that specifically support First Nations stories and which also recognise the value of a diverse range of multi-cultural Australian stories. For example, Arts Law supports calls made by organisations like Screen Producers Australia to strengthen the Aboriginal and Torres Strait Islander screen sector through diverse funding streams for new entrants and mid-career practitioners.

Arts Law also supports the position of the Australian literary sector, which is woefully underfunded, for more support for Australian stories. According to the Australian Society of Authors (**ASA**), 'despite enjoying very high participation rates, literature is the most poorly funded of all the major art forms through Australia Council' having declined by 40% in the last decade. Further, the ASA has raised the concern that literature is the only major art form without a national plan pioneered by the Australia Council.

3. THE CENTRALITY OF THE ARTIST: SUPPORTING THE ARTIST AS WORKER AND CELEBRATING THEIR ROLE AS THE CREATORS OF CULTURE.

In recognition of the centrality of the artist, Arts Law has an artist's first policy across its legal services, advocacy, education and publications. All of our work is focussed on respecting the centrality of the artist. Below, we raise two key policy concerns that, to date, have undermined the centrality of the artist.

First, artists suffer immense financial hardship in Australia. In 2021, the average Australian earned a salary of \$90,329¹, while, as at 2017, the average gross annual income of an Australian artist was only \$48,000 (of which, around 33% came from non-arts related sources).² The best way the government can put artists first is to support them financially (i.e., with funding) and protect the income streams derived from their work (i.e., with strong copyright protections). When reviewing copyright legislation, reform that protects the economic rights of creators should be prioritised over calls for free access. Access to copyright material should of course be provided when there is a genuine public interest, but wherever possible, it should be paid for through existing mechanisms like statutory licences (see Arts Law's [25 February 2022 submission on the Exposure Draft of the Copyright Amendment \(Access Reform\) Bill](#)). We support the position expressed by certain Australian collecting societies that the previous government's proposed legislative changes to copyright would have not only placed Australia in breach of its international treaty obligations, but would have also irreparably harmed creators.

¹ 'Average Weekly Earnings, Australia, May 2021 | Australian Bureau of Statistics' (19 August 2021): <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/latest-release>

² Throsby, David and Katya Petetskaya, *Making Art Work: A Summary and Response by the Australia Council for the Arts* (Australia Council for the Arts, November 2017): <https://australiacouncil.gov.au/advocacy-and-research/making-art-work/#Sources-of-income>



Second, creators struggle to enforce their rights. The current options for under-resourced creators who have their rights infringed are woefully inadequate. Arts Law regularly provides hundreds of artists annually with advice on their rights but often those artists have very limited options to enforce those rights. It is almost impossible for self-represented artists to initiate legal proceedings, even in smaller forums like the Federal Circuit and Family Court of Australia. This is because of the complexity of intellectual property law and the difficulty of preparing formal court documents correctly (not to mention court fees). Paying for legal representation is just not an option for most creators. It is devastating to see artists giving up on pursuing their rights and being paid income they are entitled to, even if a small amount, which can still make a huge difference to their wellbeing. This creates a serious access to justice problem for the creative sector that needs to be addressed.

4. STRONG INSTITUTIONS: PROVIDING SUPPORT ACROSS THE SPECTRUM OF INSTITUTIONS WHICH SUSTAIN OUR ARTS AND CULTURE.

Support from strong institutions is critical for arts and culture to thrive. The current lack of core funding for organisations that provide essential support services to creators must be resolved. Arts Law, which is the only national community legal centre dedicated to the arts, is a typical example. With current resources, Arts Law is only able to deliver legal advice to a small percentage of Australia’s artist population (approx. 4%) and its Aboriginal and Torres Strait Islander artist population (approx. 3%). Taking into account variations caused by the COVID-19 pandemic, Arts Law’s funding from the Federal government has not increased significantly in the last 5 years. This is despite the indispensable and accessible services we provide to artists in this country, especially Aboriginal and Torres Strait Islander artists through our purpose-built Artists in the Black program, through which Aboriginal and Torres Strait Islander artists are able to receive free telephone advice and document reviews.

Aside from direct funding, arts organisations also rely on charitable donations. Arts organisations are currently required to register as charities with the ACNC as well as apply to be on the Register of Cultural Organisations to be able to accept tax deductible donations. This overcomplicated regulatory burden only stretches the limited resources of arts organisations further and undermines the purpose of deductible gift recipient status.

5. REACHING THE AUDIENCE: ENSURING OUR STORIES REACH THE RIGHT PEOPLE AT HOME AND ABROAD.

Audience exposure is, of course, extremely important to creators, but it should be balanced with the need to protect artists’ rights and income. The digital distribution of arts and culture is seemingly more focused on the consumer than the creator, for example, there is little regulation of online marketplaces despite widespread infringements of copyright (and limited practical options for artists to pursue those infringements). Arts Law hears from artists on a weekly basis who tell us of their direct experience with the widespread infringement of creators’ rights on digital platforms and marketplaces. Arts Law has advised hundreds of artists in the past year alone who have had work misappropriated and/or commercialised without their permission, and we have consistently raised this as a high priority concern with the government (see, for example, [Arts Law’s 19 August 2021 submission to the ACCC on its Digital Platform Services Inquiry](#)).



Any National Cultural Policy needs to recognise that with the benefits of digital distribution, adequate and practical safeguards for the rights of creators are required so artists can safely create, disseminate and receive income from their work in online environments, without fear of losing recognition for and control over their works, including potential income.

CONCLUSION

Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion and consultation. Please contact Arts Law by email to artslaw@artslaw.com.au or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.

A handwritten signature in black ink, appearing to read "Robyn Ayres".

Robyn Ayres
Chief Executive Officer
Arts Law

A handwritten signature in black ink, appearing to read "Roxanne Lorenz".

Roxanne Lorenz
Senior Solicitor
Arts Law

A handwritten signature in black ink, appearing to read "Aditya Vasudevan".

Aditya Vasudevan
Solicitor
Arts Law