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Department of Infrastructure, Transport, Regional
Development, Communications, Sport and the Arts

By email to: culturalpolicy@arts.gov.au

NATIONAL CULTURAL POLICY SUBMISSION

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to the consultation on Australia's National Cultural Policy. Arts Law applauds the approach that led to *Revive: a place for every story, a story for every place*, in which Australia's arts, entertainment and cultural sector shaped the development of *Revive*. Placing the arts and artists at the centre of modern Australian life, including respecting and celebrating First Nations art and culture, and recognising artists as critical workers in our economy, is even more pressing now than it was in 2023.

As the national community legal centre supporting artists and arts organisations across Australia, Arts Law is Australia's national community legal centre for the arts. Arts Law was established in 1983 to meet the overwhelming demand from artists for accessible legal assistance. Today, this need has only increased. Arts Law's purpose is to empower artists and creative communities through the law and to this end, we provide specialised legal advice to artists and arts organisations and engage with many pro bono lawyers across Australia committed to our work. Arts Law makes this submission with a view to what is needed most in terms of the law and access to it for our broad client base, including all artists/creators and the peak organisations that represent their interests. And we write as lawyers whose careers are dedicated to the arts and who engage daily with the areas of law and legal mechanisms intended to support artists and to facilitate their extraordinary contributions to our cultural economy. Our perspective stems from our professional positionality at the intersection between the law and legislative change, policy and the arts.

Through our telephone legal advice, document review, education, advocacy and outreach services, Arts Law gives free or low-cost assistance to artists in all creative and cultural disciplines across Australia. We are committed to recognising and ensuring we are supporting appropriately Australia's first artists; our dedicated service (known as *Artists in the Black*) is geared towards genuine and appropriate legal assistance for First Nations artists, recognising the debt that our arts and cultural sectors, and all of society that benefit from them, owe to Aboriginal and Torres Strait Islander persons and cultures.

The operation of our legal and legal educational services is heavily dependent on government funding and support for which we are incredibly grateful. We value the feedback we get from artists about the great relief they feel having received legal advice that helps them build and sustain creative careers and especially when they tell us we have guided them to achieve just outcomes. Nonetheless, Arts Law is currently limited in the level and timeliness of assistance we can provide, given constraints in resourcing affecting the sector. We are not always able to support clients requiring assistance with urgent commercial negotiations, disputes or more complex matters, for instance. Many artists are

unable to ultimately protect their work and their rights because they cannot afford to engage private legal representation. Similarly, many artists we hear from express frustration about the lack of appropriate legal infrastructure to more robustly support their efforts to enforce their rights. These barriers to accessing justice affect artists across the sector and are often compounded for First Nations artists, artists working in regional and remote areas, emerging practitioners and those with low or irregular incomes. The work of cultural economists,¹ demonstrates that across the board, low and irregular incomes are a feature of a creative career, rather than an anomaly.² At the same time, market-oriented studies like that conducted by the Productivity Commission around the significance of Aboriginal and Torres Strait Islander art markets reveal the enormous contribution to Australia's economy that First Nations artists have made.³ In terms of current economic trends, a study analysing the contribution of Australia's artists to major generative AI systems and tools would be welcome. What is clear across all studies to date and in terms of Arts Law's firsthand impressions derived from the kinds of legal questions artists ask is that the impacts of the economic and structural barriers facing creators, including barriers to enforcing rights, accessing legal support and sustaining creative careers are significant.

This submission takes as a given understanding that all of society benefits from a robust cultural economy and assumes a common ground goal of establishing and embedding legal, normative and practical measures to support artists of all creative disciplines. It emphasises the importance of ensuring the National Cultural Policy continues to commit to prioritising First Nations arts and cultural protection, including progression of effective Indigenous Cultural and Intellectual Property (ICIP) legislation under the *First Nations First* pillar. Similarly, aligned with ensuring the *Centrality of the Artist* and *Strong Cultural Infrastructure*, it points to the need to further strengthen investment in legal and sector support services for artists. This includes continuing the effort to better safeguard creators' copyright and other related economic rights as well as their moral rights in the context of rapidly developing technologies such as generative AI and to promoting equity, diversity and inclusion through legal and policy settings, encouraging authentic and diverse Australian storytelling.

In principle, Arts Law is supportive of all submissions from creators and informed policymakers and academics suggesting measures to increase access to the arts, diversity in representation across the arts,⁴ and to assist with livelihoods (such as a universal basic income for artists). Measures like tax incentives and training as well as suggestions to increase diversity and inclusion diversity, equity and inclusion artists with disability are worth serious consideration.

The pillars of *Revive* that most closely relate to Arts Law's historic focus include:

- First Nations First
- Centrality of the Artist
- Strong Cultural Infrastructure

¹ Throsby, D., & Petetskaya, K. (2024). *Artists as Workers: An Economic Study of Professional Artists in Australia*. Creative Australia and Macquarie University <<https://creative.gov.au/research/artists-workers-economic-study-professional-artists-australia>>.

² Ibid.

³ Australian Government Productivity Commission, *Aboriginal and Torres Strait Islander visual arts and crafts study report* (e.g. total sales exceed \$250 million annually) <<https://www.pc.gov.au/inquiries-and-research/indigenous-arts/report/>>.

⁴ E.g. on-screen in alignment with Screen Australia's *Seeing Ourselves 2* report.

Collectively, so long measures implemented under these pillars are geared towards achieving genuine improvement in the sector, such measures will assist in building a stronger, more sustainable and culturally representative creative arts sector.

First Nations First: *Elevating First Nations stories within Australian arts and culture.*

For Arts Law, this includes the importance of establishing legal measures and mechanisms in support of existing legal instruments that First Nations artists can deploy towards the goal of controlling and determining use and how to leverage their stories, as well as recognition of ongoing colonial violence within the legal gaps in terms of expressions that are not adequately protected by existing mechanisms.

Following the Federal Government's commitment to introducing standalone ICIP legislation to recognise and protect ICIP, it is clear there is a need also to consider further on a practical level the likely interaction between this promised legislation and existing legislation and legal mechanisms (such as copyright, moral rights and contracts). Around 17% of queries Arts Law received last year were at least partially about ICIP (for both Aboriginal and Torres Strait Islander artists but also non-Indigenous artists confused about the law). There is a need to support legal education, advice and additional creative mechanisms to ensure broad understanding about ICIP once the legislation is in place.

Regardless of the form of ICIP legislation, any use of First Nations cultural material should be guided by the principles of free, prior and informed consent, recognising that cultural heritage is not a public resource to be extracted, replicated or commercially exploited without permission. In the context of generative AI, specific safeguards are also needed for First Nations arts and cultural material. The National Cultural Policy should ensure AI strengthens Australia's cultural ecosystem while protecting the creators and communities on which it depends. Related to this, Australia's National Cultural Policy should maintain a strong focus on appropriately and genuinely progressing ICIP legislation, and also on ensuring that intended beneficiaries understand how to use the promised legislation and what its limits are. The process of consultation with communities and other stakeholders and efforts towards raising awareness about the promised new law seems to have been genuine, however, there has nonetheless been limited visible progress in its development and obviously none to date towards its implementation.

The absence of dedicated ICIP protections continues to manifest in gaps within Australia's legal framework that have only grown wider with the advent of generative AI. It has also resulted in the limited ability of First Nations peoples to protect and control their cultural heritage, traditional knowledge and cultural expressions. This is particularly significant given Australia's international obligations under Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises Indigenous peoples' rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. While protocols, voluntary codes and best practice guidance function as important support, they do not provide enforceable legal rights. Progressing effective ICIP legislation should therefore remain a

priority under the National Cultural Policy, particularly as emerging technologies, including generative AI, increase the risks of cultural misuse, unauthorised reproduction and inauthentic representations of First Nations cultural material, and undercut the capacity of First Nations artists to exploit their materials and generate livelihoods as an expression of self-determination.

Centrality of the Artist: *Supporting artists and arts workers with sustainable careers.*

For Arts Law, supporting artists and arts workers with sustainable careers includes empowering artists with knowledge about the law in order that they control and leverage their work and find recourse in legal mechanisms for disputes and redress, as well as advocating for whole of government consultation with artists as a key and under-recognised stakeholder contributor to Australia's economy and growth in key sectors.

Centring the artist should be an approach that is applied to all policy-making affecting the arts and artists. Particularly in the context of the most significant challenges facing creators today in terms of their livelihoods and the enforcement of their rights (for instance, in terms of law and policy-making around generative-AI), privileging artists' voices in consultation processes and appreciating the systemic and structural advantages that well-resourced lobby groups possess (e.g. Big Tech) in comparison, is essential and should be evident in the government's approach to policy.

Strong Cultural Infrastructure: *Providing targeted support for institutions and the arts sector.*

For Arts Law, this indicates the need for support for law and legal institutions appropriate for the arts sector.

Copyright and related economic rights are essential infrastructure for a sustainable creative sector, enabling artists and cultural practitioners to earn incomes, sustain creative careers and continue contributing to Australia's cultural life. As generative AI technologies evolve, policy settings should ensure creators retain meaningful control over how their works are used, including in training data, and can share in any value generated from use that they have consented to. AI should not displace artists, writers, performers and other creative workers or reduce opportunities for human-led cultural production.

In addition to support for organisations like Arts Law delivering advice and education about the law, trialling a small claims copyright court applying learnings from experiences in the United Kingdom (the Intellectual Property Small Enterprise Court)⁵ and United States (Copyright Claims Board)⁶ and supporting measures for ensuring remuneration for use of artists' work (for instance, in the context of generative AI), are important.

Many artists seeking assistance from Arts Law do so because private legal services are financially out of reach for them. Without access to affordable legal assistance, creators may be unable to enforce contracts, protect valuable intellectual property, respond to disputes or participate confidently in

⁵ < <https://www.gov.uk/government/publications/intellectual-property-enterprise-court-a-guide-to-small-claims>>.

⁶ < <https://www.copyright.gov/about/small-claims/>>; < <https://ccb.gov/>>.

commercial opportunities. To truly support artists, the Department should provide further funding to peak arts organisations and to First Nations arts organisations, as well as consistent financial support to artists, through grants, tax rebates and other monetary incentives to enable artists to enforce their rights.

Recommendations

At a high level, recommendations to further realise objectives under key pillars include:

Increase support for education and awareness-raising about existing legal mechanisms that will need to work in tandem with ICIP legislation.

Irrespective of the pace of realising appropriate ICIP legislation, embed ICIP principles in alignment with obligations of Article 31 UNDRIP across all government departments, not just the arts.

Embed commitments to ICIP principles across curricula in all schools and tertiary institutions.

Introduce required course modules about copyright and related rights (including moral rights and resale royalty rights) in all schools and tertiary institutions.

Commit to ongoing education about how to implement ICIP protections amongst First Nations custodians and amongst First Nations and non-Indigenous arts practitioners.

Commit to ongoing education about how to implement ICIP protections amongst consumers of arts and culture.

Support artists' access to legal advice and education through support for organisations like Arts Law to expand its services and reach.

Support Arts Law to establish more robust opportunities for alternative dispute resolution, including culturally appropriate mediation.

Explore mechanisms for equitably redistributing profits of powerful multinational corporations to artists whose work has been used to generate profits.

Increase tax and other incentives (e.g. universal basic income for artists) towards ensuring a diversity of representation in the arts and to ensure equity and inclusion are foundational pillars.

In recognition of importance of economic, social and cultural rights of artists and custodians of cultural heritage and expressions, explore pathways to ensure rights to practise culture and to make art are provided in particular to First Nations persons, disabled people, incarcerated people, marginalised persons.

Increase opportunities for redressing harm caused to artists (legal and normative).



Arts Law welcomes any further discussion with respect to this submission including as may be geared towards genuine efforts to consult with artists of all creative disciplines about their legal and policy needs with respect to the policy.

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Arts Law

*(On behalf of The Arts Law
Team)*