

15 September 2022

Mr Jim Betts  
Secretary  
Department of Infrastructure, Transport,  
Regional Development, Communications and the Arts  
GPO Box 594  
CANBERRA ACT 2601

By email: [culturalpolicy@arts.gov.au](mailto:culturalpolicy@arts.gov.au)

Dear Mr Betts

### **A Renewed National Cultural Policy 2022**

The Law Council of Australia (**Law Council**) is grateful to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**Department**) for the opportunity to provide a submission in relation to the development of a new National Cultural Policy (**new cultural policy**). The Law Council understands that the new cultural policy is being developed from the basis of the existing National Cultural Policy, *Creative Australia*, published in 2013.<sup>1</sup>

I acknowledge the significant contribution of the Intellectual Property Committee (**IPC**) of the Business Law Section of the Law Council in preparing this submission. I also thank the Law Council's Indigenous Legal Issues Committee for its review and endorsement of this submission.

The Law Council supports the development of a new cultural policy and seeks, through this submission, to highlight the importance of intellectual property law and principles to the development of that policy.

### **Context**

The Law Council notes that the Department proposes to develop the new policy around five pillars.

- **First Nations first:** recognising and respecting the crucial place of these stories at the centre of our arts and culture.
- **A place for every story:** reflecting the diversity of our stories and the contribution of all Australians as the creators of culture.

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<sup>1</sup> Office of the Arts, 'Creative Australia: National Cultural Policy' (Policy, 2013) <[apo-nid33126.pdf](#)>.

- **The centrality of the artist:** supporting the artist as worker and celebrating their role as the creators of culture.
- **Strong institutions:** providing support across the spectrum of institutions which sustain our arts and culture.
- **Reaching the audience:** ensuring our stories reach the right people at home and abroad.

The Law Council further notes that the Australia Council for the Arts (**Australia Council**) has identified the following concepts underpinning those pillars:

1. **First Nations:** Support thriving and self-determined First Nations creative ecosystems.
2. **Participation and inclusion:** Create opportunities for all Australians to participate in and contribute to arts and culture.
3. **Thriving arts and cultural sector:** Support skilled, diverse ecologies of artists and organisations.
4. **Public value:** Strengthen the capacity of the creative sector to deliver benefits to Australians.
5. **Creative economy:** Build sustainable, networked and globally recognised creative industries.

Both *Creative Australia* and the Australia Council's framing document recognise the role of intellectual property law in supporting cultural policy.<sup>2</sup> This response is confined to addressing those aspects of the new cultural policy.

### **Pillar 1: First Nations first**

The Law Council acknowledges that there have been some positive developments in the protection of the intellectual property of First Nations peoples.

For example:

- the Commonwealth's purchase of copyright in the Aboriginal Flag;
- the adoption of Protocols for the use of First Nations' Cultural and Intellectual Property in the Arts; and
- the establishment of the Artists' Resale Royalty scheme which has seen 65 per cent of royalties distributed to First Nations artists since 2010.<sup>3</sup>

Nevertheless, Australia still lacks a holistic approach to the protection of intellectual property of First Nations peoples. As observed by leading scholar Professor Michael Dodson in 1995, '[t]he roles and obligations of our artists, the relationships between the artist as an individual and as a member of the society in which he or she works finds little

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<sup>2</sup> Australia Council for the Arts, 'Towards a national cultural policy 2022' <[ncp2022-submission-001-aca-national-cultural-policy-framing-1july2022.pdf](https://www.australiancouncilforthearts.gov.au/ncp2022-submission-001-aca-national-cultural-policy-framing-1july2022.pdf)>.

<sup>3</sup> See Copyright Agency, 'Resale Royalty' (Web Page) <<https://www.resaleroyalty.org.au>>.

accommodation within the existing legal framework'.<sup>4</sup> There has been little substantive change to those realities since.

The Law Council notes that *Creative Australia* committed to 'developing a policy framework to respect and protect Aboriginal and Torres Strait Islander peoples' Traditional Cultural Expressions and seeking to work across government to build understanding of its goals and impact'.<sup>5</sup> The Law Council supports the Australian Government recommitting to this important work as part of its broader policy agenda. In this regard, the current Productivity Commission inquiry, *Aboriginal and Torres Strait Islander Arts and Crafts*, is noted.<sup>6</sup> At the time of writing, the Law Council expects to make a submission to that inquiry, which, if made, will be published on its website in due course.<sup>7</sup>

### **Pillar 3: The Centrality of the Artist**

Copyright law and policy has an important role to play in relation to all five pillars of the proposed policy. However, as the Australia Council framing document notes, intellectual property laws are key to a thriving arts and cultural sector.<sup>8</sup>

*Creative Australia* identified a number of action items in this area, some of which have been implemented and some of which remain outstanding. They are set out below.

*Creative Australia* highlights that the Australian Government had commissioned the Australian Law Reform Committee's (**ALRC**) inquiry into *Copyright and the Digital Economy* (the **Inquiry**).<sup>9</sup> The Inquiry concluded in 2014. Since that time, there has also been a Productivity Commission inquiry into *Australia's Intellectual Property Arrangements*<sup>10</sup> (**Productivity Commission's Inquiry**) and a *Review of the Code of Conduct for Collecting Societies*<sup>11</sup> by the Bureau of Communications and Arts Research (as it then was).

There have also been several copyright amendments since that time which implemented some of the recommendations of those reviews. These included the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth), the *Copyright Amendment (Online Infringement) Act 2018* (Cth) and the *Copyright Amendment (Service Providers) Act 2018* (Cth). In December 2021, the Australian Government released an exposure draft of the *Copyright Amendment (Access Reform) Bill 2021* (Cth) (the **Bill**) for consultation. The Bill dealt with some outstanding issues from the Productivity Commission's Inquiry. The Law Council suggests that these matters are relevant to the Australian Government's new cultural policy.

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<sup>4</sup> M. Dodson, "Indigenous peoples and intellectual property rights" Geopolitics IX: Conference Papers and Resolutions Northern Land Council: Sydney, 1995, 31.

<sup>5</sup> Office of the Arts, 'Creative Australia: National Cultural Policy' (Policy, 2013) <[apo-nid33126.pdf](#)> 20.

<sup>6</sup> See, the Productivity Commission 'Aboriginal and Torres Strait Islander Visual Arts and Crafts', (Web Page) <<https://www.pc.gov.au/inquiries/current/indigenous-arts#draft>>.

<sup>7</sup> Law Council of Australia, 'Submissions' (webpage), <https://www.lawcouncil.asn.au/tags/submissions>.

<sup>8</sup> Australia Council for the Arts, 'Towards a national cultural policy 2022' <[ncp2022-submission-001-aca-national-cultural-policy-framing-1july2022.pdf](#)> 10.

<sup>9</sup> Office of the Arts, 'Creative Australia: National Cultural Policy' (Policy, 2013) <[apo-nid33126.pdf](#)>.

<sup>10</sup> Productivity Commission, *Intellectual Property Arrangements*, Report no78, 2016 <<https://www.pc.gov.au/inquiries/completed/intellectual-property#report>>.

<sup>11</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Reviewing the Code of Conduct for Copyright Collecting Societies' (Web Page) <<https://www.infrastructure.gov.au/have-your-say/reviewing-code-conduct-copyright-collecting-societies>>.

The Resale Royalty Scheme for Visual Artists has now been in operation for 12 years, but the most recent review unfortunately relied on outdated data, making it difficult to evaluate the extent to which the scheme is meeting its aims.<sup>12</sup> The Law Council notes that there has been significant maturation of online business models since *Creative Australia* was launched in 2013. In some instances, for example, the News Media and Digital Platforms Mandatory Bargaining Code,<sup>13</sup> this has involved regulatory intervention.

The Law Council submits there may be other areas where intervention is worth considering. For example, these include assisting access to justice for individual creators. This issue has received attention in other jurisdictions. For example, the United States Copyright Office has recently established the Copyright Claims Board to handle small claims.

Consideration should also be given to Australia becoming a party to the World Intellectual Property Organization's (WIPO) *Beijing Treaty on Audio-visual Performances* (the **Beijing Treaty**).<sup>14</sup> While Australia has ratified the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*,<sup>15</sup> as far as the Law Council is aware, there has been no progress on considering accession to the *Beijing Treaty*.

### Conclusion and further contact

If you would like to discuss this matter further, please contact Mr Matthew Wood, Principal Policy Lawyer, on [REDACTED] or at [REDACTED].

Yours sincerely

[REDACTED]

**Tass Liveris**  
President

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<sup>12</sup> Although the *Post-Implementation Review — Resale Royalty Right for Visual Artists Act 2009 and the Resale Royalty Scheme* report was published on 23 December 2019, it relied only on data for the period between 2010 and 2013. See further, Gina Fairley "Review of Resale Royalty Scheme outdated and opaque" *Artshub*, 3 June 2020 <<https://www.artshub.com.au/news/opinions-analysis/review-of-resale-royalty-scheme-outdated-and-opaque-259498-2365796/>>.

<sup>13</sup> Part IVBA of the *Competition and Consumer Act 2010* (Cth).

<sup>14</sup> *Beijing Treaty on Audio-visual Performances*, opened for signature 26 June 2012, WIPO, (entered into force 28 April 2020).

<sup>15</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, opened for signature 27 June 2013, WIPO, (entered into force 30 September 2016).