THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts.

Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries.

Arts Law provides an Indigenous arts service - *Artists in the Black* (AITB). The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address Indigenous peoples' concerns in relation to creative works.

About our clients

Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. We also represent the organisations that support them.

Submission in respect of the Australia Council Bill 2013

Arts Law thanks the Senate Standing Committees on Rural and Regional Affairs and Transport for the opportunity to make a submission on the Australia Council Bill 2013.

The Gunnery 43-51 Cowper Wharf Road Woolloomooloo NSW 2011 Australia
Phone: +61 2 9356 2566/1800 221 457 Fax: +61 2 9358 6475 artslaw@artslaw.com.au www.artslaw.com.au
ABN 71 002 706 256 ACN 002 706 256

Council of Patrons Robyn Archer AO, Jan Chapman AO, Deborah Cheetham, Ian David, David Gulpilil AM, Roger Knox, Frank Moorhouse AM, Professor Sally Morgan, David Page, Rachel Perkins, Peter Sculthorpe AO OBE, William Yang, The Hon. David Angel, The Hon. Justice Terence Buddin, Julian Burnside AO QC, The Hon. Jerrold Cripps QC, The Hon. Elizabeth Evatt AC, The Hon. Malcolm Gray RFD, The Hon. Michael Kirby AC CMG, The Hon. David Levine AO RFD QC, The Hon. Justice John Mansfield AM, The Hon. Justice Jane Mathews AO, Shane Simpson AM, The Hon. Antony Whitlam QC

1. Arts Law supports the statutory recognition of funding for Aboriginal and Torres Strait Islander arts programs

1.1 Arts Law believe that the Australia Council Bill should specifically establish funding arrangements for Aboriginal and Torres Strait Islander arts programs. Establishing funding arrangements is an important step in officially and respectfully acknowledging the important place of Aboriginal and Torres Strait Islanders in the Australia art community and is also a step towards implementing the United Nations' *Declaration on the Rights of Indigenous People* (2007) (known as 'DRIPs'), which the Australian government formally endorsed in April 2009.

1.2 Article 31 (1) of DRIPs provides that the Aboriginal and Torres Strait Islanders, as the Indigenous people of Australia, have the "*right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions … including … oral traditions, literatures, designs, sports and traditional games and visual and performing arts*". Article 39 of DRIPs also provides a commitment to provide "*access to financial and technical assistance … for the enjoyment of the rights contained in this Declaration*".[1]

1.3 Arts Law believe that establish funding arrangements for Aboriginal and Torres Strait Islander arts programs, which are currently managed through the Aboriginal and Torres Strait Islander Arts Board, would be an acknowledgment of the right of the Aboriginal and Torres Strait Islanders to self-determination in the development and promotion of their art forms and will be a commitment that addresses Article 39 of DRIPs.[2]

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[1] Article 39 of DRIPs states that "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration."

[2] Article 6 (2)(d) of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) is also relevant as it provides that parties, in meeting their commitments under that Convention, "*may adopt measures aimed at protecting and promoting the diversity of cultural expressions*" including "*measures aimed at providing public financial assistance*".

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2.1 Support for better protection of Indigenous Cultural and Intellectual Property

Summary:

2.1.1 Australia's treaty obligations include providing protective measures for cultural activities (including Indigenous cultural and intellectual property) under the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).[3] As noted above Australia has formally endorsed the United Nations' *Declaration on the Rights of Indigenous People* ('DRIPs') which states in Article 31 (1) that Indigenous people have a right to control their traditional knowledge and traditional cultural expressions.[4]

2.1.2 The recognition of the rights described in the UNESCO Convention and in DRIPs are necessary to ensure that respect is given to traditional laws and customary obligations regarding traditional knowledge and traditional cultural expressions as these represent vital aspects of the heritage and identity of Aboriginal and Torres Strait Islanders.

2.1.3 Arts Law submits that the acknowledgment of traditional knowledge and traditional cultural expressions in clauses 9 and 11 of the Bill will reinforce the special role of Aboriginal and Torres Strait Islander artistic culture and will represent a commitment, as described in DRIPs Article 31(2),[5] to recognise and protect the exercise of traditional knowledge and traditional cultural expressions.

2.1.4 The Australia Council currently provides support of the right to protect traditional knowledge and traditional cultural expressions through the publication of '*Protocols for Producing Indigenous Australia Visual Arts*' (2007) and through other aspects of the Australia Council's operations. The recognition of rights of Aboriginal and Torres Strait Islanders to their traditional knowledge and traditional cultural expressions would provide the basis on which the Australia Council could insist on compliance with the '*Protocols for Producing Indigenous Australia Visual Arts*' (2007), and protocols relevant to other art forms, in respect of grants provided by the Australia Council.

2.1.4 Arts Law believe that the recognition of rights of Aboriginal and Torres Strait Islanders to their traditional knowledge and traditional cultural expressions should be made in the Bill through the following amendments to the Bill.

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[3] The Convention entered into force three months after Australia became a party on 18 September 2009.

[4] Article 31 (1) of DRIPs refers *inter alia* to "the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

[5] Article 31 (2) of DRIPs provides that "States shall take effective measures to recognize and protect the exercise of these rights."

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2.2 Submissions as to amendments to the Australia Council Bill:

2.2.1 Arts Law submits that Clause 9 of the Australia Council Bill 2013 should be amended to include a further function of the Council:

> 'To support the right of Aboriginal and Torres Strait Islanders to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.'

2.2.2 Arts Law submits that Clause 11 of the Australia Council Bill 2013 should be amended to include a further matter to be taken into account by the Council:

> 'the right of Aboriginal and Torres Strait Islanders to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.'

3.1 Support for better recognition of the right to freedom of expression

3.1.1 Arts Law submits that the statement in Clause 11 (b) of the Bill regarding "*the right of persons to freedom in the practice of the arts*" should be amended to be consistent with the wording of Article 19 (2) ICCPR and the statement on page 4 of the Explanatory Memorandum, which provides *"the right to freedom of expression in the form of art"* as an example of what the Council, when making decisions in the exercise of its functions, must consider in evaluating the impact of the support it provides and the activities it undertakes.

3.1.2 Arts Law believes the statement *"the right to freedom of expression in the form of art"* reflects the wording of Article 19 (2) ICCPR, which states the freedom of expression then goes on to provide examples of the freedom, which include "in the form of art".

3.1.3 Arts Law submits that the statement "*the right of persons to <u>freedom in the practice</u> of the arts*" could be misunderstood to be merely a freedom to practice art, rather than what is intended, as described in the Explanatory Memorandum, to engage the 'right to freedom of expression in the form of art' that is set out in Article 19 (2) ICCPR.

3.1.4 Arts Law submits that suggested amendment to Clause 11 (b) of the Bill are consistent with the Explanatory Memorandum and the wording of Article 19 ICCPR and the amendments do not make any a substantive change as to how the Australia Council will exercise its functions under clause 11; nor does the suggested amendment impact on the general law related to 'freedom of expression' as that freedom remains subject to duties and responsibilities provided by law.[6]

[6] Article 19 (3) ICCPR notes that "[t]he exercise of the rights 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 or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

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3.2 Submissions as to amendments to the Australia Council Bill:

3.2.1 Arts Law submits that Clause 11(b) of the Australia Council Bill 2013 should be amended to provide:

(b) "the right of persons to freedom of expression in the form of art;"

Yours faithfully,

Robyn Ayres
Executive Director

Dr Morris Averill
Acting Senior Solicitor

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