



12 September 2022

BY EMAIL - indigenous.arts@pc.gov.au

Indigenous Arts and Crafts Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Chair

PRODUCTIVITY COMMISSION – ABORIGINAL AND TORRES STRAIT ISLANDER VISUAL ARTS AND CRAFTS DRAFT REPORT

1. NATSIMO is grateful for the opportunity to make a submission to the Productivity Commissions' Draft Report on Aboriginal and Torres Strait Islander Visual Arts and Crafts released on 19 July 2022 (**Draft Report**).
2. The National Aboriginal and Torres Strait Islander Music Office (**NATSIMO**) is an Indigenous-led initiative of APRA AMCOS and peak body for Aboriginal and Torres Strait Islander music creators. In 2019 NATSIMO underwent a re-branding and developed and released a five year strategic plan for 2020-2025.
3. The mission of NATSIMO is to support the growth and development of songwriters and composers and advocate for a thriving, self-determined Aboriginal and Torres Strait Islander music industry. NATSIMO has crafted this vision around the principles of value; self-determination; connection; and advancement.
4. A core goal of NATSIMO's program is to assist Aboriginal and Torres Strait Islanders (**ATSI**) music industry participants to better understand how the value of their music can be realised in the marketplace.
5. NATSIMO's activities include encouraging greater understanding of the role of the Australian Performing Right Association (**APRA**) and the Australasian Mechanical Copyright Owners Society (**AMCOS**) amongst ATSI music creators; growing these organisation's ATSI membership; and maximising financial returns to these members. These goals dovetail with the need for addressing economic exclusion outlined below.

6. NATSIMO is committed to empowering self-determination for ATSI musicians, with the intersecting goals of the growth of a self-determined ATSI music industry; the connection of ATSI members to the music industry, whilst encouraging best practice; and the championing of ATSI songwriters and composers to advance their careers.
7. NATSIMO seeks to nurture and facilitate ATSI participation in the music industry to increase representation and career opportunities and support members in their business development and appropriate partnerships with non-indigenous players in the music industry. It is vital that the music industry be a Culturally Safe Space for ATSI songwriters and composers. As such, the extant issues around systemic inequality in economic returns for ATSI cultural expression and the cultural issues around authenticity and ownership of Indigenous Cultural and Intellectual Property (ICIP) must be addressed in a comprehensive and progressive fashion.

APRA AMCOS

8. As noted, NATSIMO is an Indigenous-led initiative of APRA AMCOS.
9. The Commission is familiar with the operations of APRA AMCOS. Currently, APRA has more than 111,000 Australian and New Zealand members, comprising songwriters, composers, lyricists and music publishers, and reciprocal agreements with over 120 overseas similar copyright management organisations. The membership is diverse, ranging from unpublished writers to major music publishers. Licensee stakeholders range from sole traders to multinational content platforms across all industries. APRA owns the exclusive rights of performance and communication in millions of songs written by composers all across the world and therefore represents the majority of musical works and lyrics performed and communicated to the public in Australia and New Zealand.
10. AMCOS has around 24,000 members including music publishers, composers, and songwriters. Licensees include all major broadcasters and video on demand and music streaming services, as well as businesses such as background music suppliers. AMCOS controls the right to reproduce a vast number of musical works and lyrics in certain circumstances in Australia and New Zealand.
11. APRA AMCOS has participated fully and openly in reviews of creative industries and intellectual property legislation in Australia. Given the importance of ensuring protection, economic inclusion, and efficient administration of rights for our members, we have expended considerable resources in gathering evidence, considering issues, preparing submissions, and appearing before the relevant reviewing bodies when required. APRA AMCOS welcomes the chance to do so for the Commission in the current Study.
12. APRA AMCOS and NATSIMO stand ready to engage and consult with the Commission on any proposed regulatory or legislative outcomes from the Draft Report, in particular in our capacity as an advocate for the best interests of ATSI songwriters and composers. APRA AMCOS submits in the

strongest possible terms that ensuring the intellectual property rights of these practitioners is of equal importance to the protection of their fellow practitioners in visual arts and craft.

Review of market deficiencies for ATSI cultural products is necessary

13. NATSIMO offers its strongest support for the Commission's Study into the value, nature and structure of the markets for ATSI visual arts and crafts, and proposes that this scope of inquiry be expanded to other creative practices, including music. It is vital for the Commission to identify issues in ATSI creative industries which impact negatively on market participants, including musicians and other participants in the music industry.
14. There is no doubt that there is a need for reform in this sector. There must be a full consideration of all potential policy and regulatory responses that might address the current deficiencies and inequities in ATSI cultural industries, including beyond visual arts and craft. NATSIMO notes that APRA AMCOS is committing significant resources to addressing these issues, which it recognises are challenged by indigenous ownership and economic interests.
15. NATSIMO supports the Commission's focus on the unique cultural status held by ATSI traditional cultural expressions. The Draft Report's approach to the pervasive issues around authenticity and ownership in respect of visual art is welcome, and it is imperative that the protection of forms of ICIP remains at the heart of the Commission's recommendations in any of the regulatory or legislative outcomes of the Report.
16. NATSIMO joins the Commission in its view that the preferred means to improve recognition and protection of ICIP in visual arts and crafts – as well as other creative practices – is through the drafting and passing of dedicated legislation. The use of ICIP without the permission or authorisation of traditional custodians and the lack of economic benefits flowing back to ATSI people and communities are significant deficiencies and should be addressed with specifically-designed legislation, rather than via piecemeal amendments of existing law and policy.
17. At this juncture, with the weight of evidence and recommendations from cultural industry stakeholders, it is clear that specific and robust protections for ICIP in Australia's creative industries is required. It is necessary to enshrine such protections in law so that ATSI cultural traditions are preserved and the full economic benefit of the expression of those cultural traditions in contemporary creative practices flows to their rightful owners.

Expansion of ICIP protections to music

18. The Draft Report is necessarily focused on indigenous visual arts and craft given the Terms of Reference. However, NATSIMO emphasises the importance of protection for all indigenous cultural expression.

19. The same issues that arise with the treatment of ICIP in visual arts are equally relevant to music. In our view, the use of ICIP in music is just as pressing an issue as it is for visual creative practices or commercial design. NATSIMO sees the same need in this area to, as the Draft Report says, *“encourage and support collaborations consistent with the principles of free, prior and informed consent”*.
20. As in visual arts and craft, there are instances where music containing ICIP is produced without permission, with misleading context as to how the music is to be used or without the necessary authorisations from within the ATSI community. Just as in indigenous art practices, music and song is a complex and ancient part of the community’s history and customary law imposes rights, obligations and responsibilities on the custodians of those traditions. As such, the authorisation of the use of ICIP in music must be treated with the utmost care and attention - ensuring authenticity and community consultation remain at the forefront.
21. As with visual arts, space should be made for individual creativity of music practitioners, whether indigenous or non-indigenous. However, the unauthorised use of ICIP in music poses a danger to both the cultural sanctity of cultural works and economic justice underlying the commercialisation of those cultural works. Concerns also arise around the authenticity of ICIP in music produced in a contemporary context, whether in collaboration with ATSI communities or not.

Issues of authenticity in recording and use of ATSI music

22. NATSIMO draws to the attention of the Commission the long history of authenticity and the recording and use of indigenous music. This has taken the form of indigenous music (as a form of ICIP) being used by non-indigenous or non-authorised artists who have failed to seek permission or have failed to appropriately and adequately consult with the custodians of this cultural material as to how it will be used and remunerated.
23. There are both cultural protocols and cultural sensitivities in the use of indigenous music outside of its customary context, and NATSIMO is committed to ensuring that these protocols and sensitivities are upheld and protected, including by enshrining protections in specific legislation developed for this sector.
24. If protections are not established to ensure authenticity is preserved, the unique cultural status and forms of transmission embodied in ICIP remain at risk of exploitation. NATSIMO supports the development of an authenticity compliance regime for creative materials where ICIP is incorporated, including for music.
25. Of course, the mechanism for compliance will need to be led and developed in consultation with ATSI stakeholders and the larger indigenous community. Dedicated legislation in this area will need to be sensitive to the needs and obligations of the custodians of indigenous music traditions and, at

the same time, work hand-in-glove with the existing intellectual property laws of Australia - in particular the provisions of the *Copyright Act 1968* (Cth)(**Act**).

26. Copyright law in Australia protects the rights of authors and makers of musical works and sound recordings, and provides for statutory licence mechanisms and exceptions for fair dealing with copyright works. NATSIMO submits that any legislative undertaking to ensure ICIP is protected will require a granular focus on the operation of the Act in concert with any new legislation provisions, such that vital copyright protections contained in the Act are not only available to the custodians of ICIP, but in a way which aligns with indigenous understandings of creation, ownership, use, and authorisation.
27. Community-owned traditional expressions of culture - where the artist functions as custodian of culture - need to be accommodated within the copyright protection regime. NATSIMO acknowledges that extended protections may be appropriate where issues of duration or the illegitimate and unjust transfer of copyright ownership in ICIP, including music, arise.
28. Additionally, any new legislative provisions should identify cultural harm as a species of damage incurred when ICIP is used in an unauthorised way. This might be analogous to the way moral rights provisions in the Act focus on the individual author of a work rather than the copyright owner, but expanded to take in collective concepts of ownership and to prohibit the misrepresentation and/or derogatory treatment of cultural property and identity.

Need to address economic exclusion

29. As the Draft Report has found, the commercialisation of ICIP remains a major area of economic exclusion, particularly in the lucrative market for indigenous – or in some cases inauthentically indigenous – visual arts and craft. While perhaps not as highly visible, the same threat of inauthenticity and economic injustice lies within the exploitation of ICIP in music.
30. Given the complexity of our contemporary creative industries, NATSIMO submits that significant outreach is required to ensure the availability of remuneration for creative works is better understood, particularly in remote communities.
31. This would include ensuring that proper processes are adhered to so that indigenous authorship under current copyright and royalty-flow processes are acknowledged and implemented. NATSIMO notes that APRA AMCOS has committed significant resources to working to assist in this aspect through changes to its internal processes and external outreach to indigenous communities.
32. The type of outreach programs NATSIMO is seeking to undertake covers broad issues such as education on the economic benefits that can result from the consensual sharing of cultural expressions; and more practical needs such as the tax consequences of royalty payments or the availability of payment facilities for remote communities to ensure that remuneration from creative industries reaches the appropriate parties or groups.

33. Overall, NATSIMO is dedicated to ensuring that protection for ICIP in music, whether at an industry level or in legislative form, is implemented in a culturally sensitive manner with adequate education and understanding for those impacted by the current market conditions and who might benefit from future reforms.

Conclusions

34. NATSIMO supports the Commission's recommendations in the Draft Report, particularly in respect of the need for unique and distinctive protection for ICIP.

35. NATSIMO stresses that, alongside visual arts and craft, music is a core cultural expression for ATSI communities and is also subject to the dangers of inauthenticity and unauthorised use.

36. NATSIMO asks that any changes that arise from the Draft Report do not act to exclude musical expression and also serve to protect against inauthentic production and use of musical expressions.

37. NATSIMO supports the development of designated statutory protections for ICIP which are carefully drafted to operate in coordination with the existing intellectual property laws in Australia.

38. NATSIMO recommends allocating government resources specifically for outreach for indigenous communities in respect of the cultural and economic benefit in protection of ICIP – this is urgent and should pre-date any long-term legislative program designed to provide for ICIP protection.

Thank you for the opportunity to respond to the Draft Report.

If we can provide further information, or be of assistance in any other way, please do not hesitate to contact Leah Flanagan, at NATSIMO.

Regards,

Leah Flanagan

Director, National Aboriginal & Torres Strait Islander Music Office