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Aboriginal and Torres Strait Islander Visual Arts and
Crafts
Productivity Commission
GPO Box 1428
Canberra City ACT 2601, Australia

Dear Commissioner

**Submission to the Productivity Commission Inquiry into Aboriginal and Torres Strait
Islander Visual Arts and Crafts**

- 1 We refer to the Productivity Commission's Draft Report, *Aboriginal and Torres Strait Islander Visual Arts and Crafts* dated 19 July 2022 (**Draft Report**).
- 2 We welcome the opportunity to make this submission in response to the Draft Report, as part of the Productivity Commission's inquiry into Aboriginal and Torres Strait Islander Visual Arts and Crafts (**Inquiry**).
- 3 For nearly 30 years, Arnold Bloch Leibler has worked on a pro bono basis with Aboriginal and Torres Strait Islander communities, organisations and individuals, on a vast range of matters, including native title, organisational governance, business innovation and intellectual property. Particularly relevant to this submission is Arnold Bloch Leibler's representation of the Namatjira Legacy Trust in securing the return of the copyright in the lifetime works of iconic Aboriginal artist Albert Namatjira to his family in 2017. Having secured the return of the copyright, Arnold Bloch Leibler proceeded to negotiate a landmark settlement with the Northern Territory Government. The settlement was deeply significant to Namatjira's descendants, not just in terms of the dollar amount, but in terms of having put to rest a very painful aspect of the family's history.
- 4 We wish to share our experiences and learnings arising from the Namatjira matter with the Productivity Commission as part of the Inquiry.

Terms of reference

- 5 We echo the Australian Government's recognition, expressed in the Inquiry's terms of reference, that art is an important way for Aboriginal and Torres Strait Islander peoples to tell stories, share and reinforce cultures and connection to Country, promote understanding of history, strengthen communities and expand economic opportunities.

- 6 The Inquiry's terms of reference are broad. At a high level, the Draft Report has clarified much about the nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts. It contains promising recommendations to address specific shortcomings in those markets. For example, the recommendation to introduce new legislation that would enable traditional owners to take legal action when certain forms of Indigenous Cultural and Intellectual Property (**ICIP**) are used without authorisation would fill in some of the gaps in the current legal framework, which offers largely incidental protection to ICIP.
- 7 However, there are important matters that we feel are not addressed in the Draft Report, being copyright protections.

Summary of our recommendation

- 8 In our respectful submission, there is a deficiency in the *Copyright Act 1968* (Cth) (**Act**) – specifically, regarding the limitation on the period of copyright protection, which unfairly impacts Aboriginal and Torres Strait Islander artists and other stakeholders.
- 9 Under section 33(2) of the Act, the duration of copyright in artistic works is limited to the life of the author plus 70 years.
- 10 The traditional rationale in limiting the duration of copyright is to strike the appropriate balance between the monopoly rights of the copyright owner and the public interest in being able to freely exploit the works originally subject to copyright. We respectfully submit that this reasoning does not apply in the same manner when considering Aboriginal and Torres Strait Islander artistic works. The historical and cultural significance of many Aboriginal and Torres Strait Islander artistic works means that the limitation on the period of copyright protection is more likely to deliver inappropriate or unfair outcomes. The story of Albert Namatjira and the Namatjira Legacy Trust is a clear example of this, as detailed below.
- 11 We believe that there is an opportunity to address this deficiency by extending the period of copyright protection for the works of Albert Namatjira in perpetuity. We also believe that, in the longer-term, this reform should extend to the works of other Aboriginal and Torres Strait Islander artists who are identified as having similarly suffered unfair outcomes as a result of the limitation on the period of copyright protection. Acknowledging the time constraints of the Inquiry and the difficulties in identifying impacted artists, we propose that the Productivity Commission recommend in the final report that this issue be investigated further by an appropriate body.
- 12 To complement our recommendation, we also emphasise the need for better funding for education and awareness-raising measures. Funding a copyright education program for Aboriginal and Torres Strait Islander artists and other stakeholders would be an effective accompanying measure to any reform or investigation.

Albert Namatjira and the Namatjira Legacy Trust

- 13 During his lifetime, Albert Namatjira created thousands of iconic artistic works depicting the central Australian landscape. The copyright subsisting in those works (**Namatjira Copyright**) is an extremely valuable cultural asset.
- 14 Between 1983 and 2017, the Namatjira Copyright was owned by Legend Press Pty Ltd (**Legend Press**). The circumstances in which Legend Press acquired the Namatjira Copyright from the Public Trustee for the Northern Territory has been the subject of extensive media coverage. In short, wrongly and contrary to the wishes of Albert Namatjira, in 1983, the Public Trustee sold the copyright in the lifetime works of Albert Namatjira to Legend Press for \$8,500.
- 15 In October 2017, the Namatjira Legacy Trust entered into an agreement with Legend Press in which the Namatjira Copyright was transferred from Legend Press to the Namatjira Legacy Trust for \$1.

- 16 This agreement represented a historic moment in Indigenous cultural recognition and self-determination. More than 30 years after its sale to Legend Press, the ownership and control of the Namatjira Copyright was finally returned to the Namatjira family. This outcome received worldwide media attention and invigorated demand for Albert Namatjira's works. The *Australian* published an exclusive front-page story of the transfer ([accessible here](#)).
- 17 The Namatjira Legacy Trust is a charitable trust, whose Board includes direct descendants of the late Albert Namatjira, alongside a number of independent directors.
- 18 The primary purposes of the Namatjira Legacy Trust are to preserve the artistic legacy of Albert Namatjira and benefit the Hermannsburg community in the Northern Territory – where Albert Namatjira was a traditional custodian. The Namatjira Legacy Trust is also maintained for the purpose of:
- "preserving Indigenous cultural heritage and recognising Indigenous cultural identity by assisting participation in community, cultural and social activities or ceremonies, in consultation with the living heirs of Albert Namatjira"*
- 19 Since acquiring the Namatjira Copyright, the Namatjira Legacy Trust has been licensing its use for the benefit of Australian civil society – including to the National Gallery of Australia, which has finally been permitted to display a collection of Albert Namatjira's works.
- 20 The Namatjira Legacy Trust does not have a profit-seeking objective. The proceeds derived by the Namatjira Legacy Trust from the licensing and reproduction of the Namatjira Copyright are used to support cultural, wellbeing and educational initiatives for Western Aranda artists who continue to paint in Albert Namatjira's distinctive style. Funds are also used to benefit members of the Hermannsburg community, many of whom continue to live in poverty.

Reasons why the Namatjira Copyright should be extended in perpetuity

- 21 Albert Namatjira died in 1959 and therefore, in accordance with the current limitation on the period of copyright protection, the Namatjira Copyright is due to expire in 2029.
- 22 Because of the wrongful sale of the Namatjira Copyright to Legend Press in 1983, the Namatjira family was denied ownership or control of the Namatjira Copyright for a period of over 30 years – that is, nearly half of the statutory duration of the copyright. This occurred despite the express wish contained in Albert Namatjira's will for his assets (including the Namatjira Copyright) to be passed to his wife and children.
- 23 During that period, the Namatjira family had no say in the manner or form in which the Namatjira Copyright was reproduced and communicated to the public. This was a highly unfortunate state of affairs, given the inextricable cultural connection which the Namatjira family has with Albert Namatjira's iconic works.
- 24 Moreover, during the over 30 year period in which it owned the precious Namatjira Copyright, Legend Press – for unexplained reasons – sought to suppress the use of the Namatjira Copyright by educational, philanthropic and public organisations. This conduct had the tragic effect of obstructing public awareness of Albert Namatjira's works amongst current and future generations of Australians.
- 25 For those reasons, it is in our view appropriate that, following the return of the Namatjira Copyright to the Namatjira family in 2017, the duration of the copyright now be extended so as to permit the family and the broader national and international community to properly benefit from the asset over future generations, and to reinvigorate the public's awareness of Albert Namatjira's famous works.
- 26 The Namatjira Legacy Trust is the proper body to ensure that the legacy of Albert Namatjira is maintained for future generations. The Trust recognises the spiritual connection which the Namatjira family has with the Namatjira works. The Trust will therefore ensure that the works are communicated to the public, both in Australia and abroad, in a manner respectful to the late Albert Namatjira and his community.

- 27 If the duration is not extended in this way, in 2029 the Namatjira Copyright will enter the public domain. Once this occurs, the Namatjira Copyright – one of Australia's most valuable cultural assets – would be open to reproduction by any person as they saw fit. For example, there would be nothing to prevent the disrespectful use of this valuable artwork. Furthermore, the Namatjira Legacy Trust would no longer be able to derive any material income from Albert Namatjira's works.
- 28 Albert Namatjira's works are ingrained in our society and our culture. The status of the works as being synonymous with our national identity means that they should not be open to free commercial exploitation by anyone who desires. Rather, steps must be taken to protect and preserve Albert Namatjira's works for generations to come.
- 29 The extension of the duration of the Namatjira copyright in perpetuity would represent a momentous occasion in Indigenous cultural recognition and reconciliation.

A broader problem

- 30 The case of Albert Namatjira is one example of how the limitation on the period of copyright protection can operate unfairly.
- 31 The limitation on the period of copyright protection also risks delivering unfair outcomes when applied to other Aboriginal and Torres Strait Islander artistic works for the following reasons, many of which are touched on in the Draft Report:
- (a) Aboriginal and Torres Strait Islander people have practised and produced arts and crafts to record and share their traditions and experiences for millennia. These cultural practices are long-standing, continuing and at odds with the finite limit on the period of copyright protection.
 - (b) Inauthentic arts and crafts — predominantly Indigenous-style consumer products that are not created by Aboriginal and Torres Strait Islander people — are a widespread problem. There is a need for more robust protection and preservation of Aboriginal and Torres Strait Islander culture and heritage, including the legacy of significant Aboriginal and Torres Strait Islander artists. Opening works to free commercial exploitation risks them being used in inauthentic, inappropriate and/or disrespectful ways.
 - (c) The income of many Aboriginal and Torres Strait Islander artists is low – many remain impoverished. Aboriginal and Torres Strait Islander communities in general suffer disproportionate levels of poverty and disadvantage. Lifting the limitation period would enable communities to receive the economic benefit of their cultural works over future generations.
- 32 Amending the limitation on the period of copyright protection more broadly to accommodate a wider range of Aboriginal and Torres Strait Islander artists would announce to Australia that Indigenous culture and artistic expression is a vital aspect of our society that ought to be preserved forever.

Proposed next steps

- 33 We recommend a three-step process to address the deficiency in the Act as it currently operates.
- 34 The first step relates to amending the Act so as to extend the duration of the Namatjira Copyright in perpetuity. We suggest that the proposed amendment be included as an exception to section 33(2) of the Act. This could be done via the insertion of a new subsection, which states that:
- "Subsection (2) does not apply to the copyright which subsists in the artistic works of Albert Namatjira, which will continue to subsist in perpetuity for so long as the copyright in those artistic works is owned by the Namatjira Legacy Trust (or any of its successors, substitutes or permitted assigns)."*
- 35 The Federal Government can enact the proposed amendment pursuant to its power under section 51(xviii) of the Constitution to make laws with respect to copyrights.

- 36 A comparable precedent exists in the United Kingdom in relation to the work, *Peter Pan*, by Sir James Matthew Barrie. Through an amendment to the *Copyright, Designs and Patents Act 1988* (UK), the copyright in that literary work has been extended in perpetuity. The purpose of that amendment was to ensure that the proceeds derived from the copyright are forever used to benefit the Great Ormond Street Hospital for Children.
- 37 We note that this month (August) marks the 63rd anniversary of the death of Albert Namatjira. In our submission, the granting of the copyright in Albert Namatjira's works in perpetuity would be a fitting gesture to recognise the indelible mark that Albert Namatjira has left on our culture.
- 38 The second step relates to broader amendments to the Act. This will involve:
- (a) identifying other Aboriginal and Torres Strait Islander artists and stakeholders – for example, the family members of deceased artists – who have suffered unfairly as a result of the limitation on the period of copyright protection, in addition to Albert Namatjira and the Namatjira Legacy Trust; and
 - (b) recommending appropriate legislative amendments.
- 39 Acknowledging the time constraints of the Inquiry, we propose that the Productivity Commission include in the final report a recommendation that this step be investigated further by an appropriate body.
- 40 The third step relates to complementary education and awareness-raising measures. Investing in a copyright education program for Aboriginal and Torres Strait Islander artists and other stakeholders would be an effective accompanying measure to any reform or investigation. It would allow Aboriginal and Torres Strait Islander artists and other stakeholders to better understand their copyright protections, identify where they have suffered unfairly, and seek appropriate remedies.

Conclusion

- 41 We are available to speak to any aspect of, and expand upon, the recommendation in this submission at the convenience of the Productivity Commission.

Yours sincerely

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