

Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006

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Aboriginal and Torres Strait Islander Arts Board
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Table of Contents

Checklist	3
1. Introduction	8
Outline of this paper	9
2. Indigenous cultural and intellectual property rights	10
Overview	10
3. Copyright	11
Overview	11
4. Indigenous communal moral rights	13
Overview	13
Background	13
Main issues regarding the draft	14
Voluntary agreement	14
Balancing ICMR and certainty to users	15
Drawn from a traditional base	16
Must be a copyright work	17
Acknowledgement of association	18
Interest holders	18
Agreement before first dealing	18
Productive consultation	19
The Use of Protocols and ICMRS	19
Implementation of ICMR	19
ICMR and prior informed consent	19
5. Resale royalty	21
Overview	21
Introduction	21
What is the Resale Royalty?	21
Arguments in favour of legislative implementation	21
Arguments in favour of non-legislative implementation or no implementation	22
Balancing the Arguments	23
Features of the Indigenous Art Market	24
Implementation of a Legislative Resale Royalty Scheme	26
6. Indigenous art in the market place	28
Overview	28
Trade practices	30
Development of certification trade mark	31
Geographic indications	33
Ethical branding	33

Special legislation against fake Indigenous arts	34
Codes of practice – implementing at a local level	34
Galleries and artists	34
Customs law	35
Legal representation and industry leadership.....	35
Internet sales of fake works and copyright infringements	35
Fraud and forgeries.....	37
7. Dealings with Objects of Cultural Heritage	37
Overview	37
Introduction	37
Import	37
Export.....	38
The Laws	39
8. Other Issues.....	43
Overview	43
Codes of Practice	43
Educational material.....	43
Protocols	44
Advocacy and representation	47
Market opportunities.....	48
Legal and Business Support for Artists and the Arts Industry	48
Indigenous Representation at International Standard Setting Forums	49
Indigenous Advisory Committee (IAC) for the Australian Government	49
National Indigenous Cultural Authority.....	50
Research.....	50
National Arts Inquiry	51
9. Conclusion	52
10. Bibliography	53
About the authors	57
Acknowledgements	57

Checklist

Problems encountered by Indigenous Artists		Potential Government Responses
1.	Artists and Indigenous people cannot stop the exploitation of their ICIP such as oral or performance works and rock art (and other works out of copyright)	<ul style="list-style-type: none"> • Draft sui generis laws • Prior informed consent mechanisms explored (Ref: section 3)
2.	Indigenous Communal Moral Rights are not recognised	<ul style="list-style-type: none"> • Productive consultation on proposed model • Consider adopting model based on prior informed consent of the owners (Ref: section 4)
3.	Artists receive no share of high prices paid for the works when sold a second or subsequent time (at auctions, by dealers and galleries)	<ul style="list-style-type: none"> • Draft laws to implement a legislative resale royalty scheme (Ref: section 5)
4.	Unethical practices including paying unfairly in alcohol and drugs; operating sweatshops	<ul style="list-style-type: none"> • Trade practices • Code of practice • Support advocacy and representation • Education and stakeholder liaison (Ref: section 6)
5.	Artist relationship with galleries no clear terms	<ul style="list-style-type: none"> • Written gallery and artist standard term contract • Code of practice • Support advocacy and representation • Education and stakeholder liaison (Ref: section 6)

Problems encountered by Indigenous Artists		Potential Government Responses
6.	Non-Indigenous artists imitating Indigenous art	<ul style="list-style-type: none"> • Trade practices • Support protocols (Ref: section 6)
7.	Indigenous artists are forced out of the market due to being out priced by cheap fakes and copyright infringements	<ul style="list-style-type: none"> • Trade practices • Stop importation of fakes - Customs Act to filter out fake Indigenous art and souvenirs • Authenticity label (certification marks) and quality assurance • Regular trade marks • Ethical branding • Geographic indications • Business and legal advice • Codes of practice/ethics • Special unfair trade practices legislation (Ref: section 6)
8.	Imported products are passed off as authentic craft	<ul style="list-style-type: none"> • Trade practices • Customs Act (Ref: section 6)
9.	Indigenous artists works are forged	<ul style="list-style-type: none"> • Introduce laws relating to fraud and forgery (Ref: section 6)
10.	Fakes and copyright infringements of Indigenous artists works are sold on the internet	<ul style="list-style-type: none"> • Copyright law • Legal support for artists to take action • Test case • Introduce laws requiring auction sites to require more details from sellers of Art on-line • Codes of practice

		(Ref: section 6)
Problems encountered by Indigenous Artists		Potential Government Responses
11.	Indigenous custodians of culturally significant objects need to be more involved with the movement of cultural objects to and from Australia	<ul style="list-style-type: none"> • Introduce consultation with custodians of culturally significant objects into the permit and certification processes which apply to the import and export of culturally significant objects. (Ref: section 7)
12.	Indigenous artists are often treated unethically and unconscionably by dealers	<ul style="list-style-type: none"> • Support industry Codes of Practice eg: NAVA, City of Melbourne • Consider implementation and enforcement • Consider Inquiry into Indigenous arts industry (Ref: section 8)
13.	Indigenous cultural practices are often ignored and breached through ignorance	<ul style="list-style-type: none"> • Support for educational projects • Support for protocols (Ref: section 8)
14.	Sometimes protocols are not followed	<ul style="list-style-type: none"> • Encourage inclusion of protocols in contractual arrangements. • Government arts funding conditional on following protocols (enforced in contract) (Ref: section 8)
15.	The rights of Indigenous artists and cultural custodians are often ignored or breached	<ul style="list-style-type: none"> • Support for advocacy through programs and organisations (Ref: section 8)
16.	Indigenous artists often require	<ul style="list-style-type: none"> • Support arts centres

	better industry representation	<ul style="list-style-type: none"> • Representation through collecting societies such as Viscopy • Legal and business support for artists and arts centres (Ref: section 8)
Problems encountered by Indigenous Artists		Potential Government Responses
17.	Sometimes Indigenous artists are treated as one group, and diversity of urban, regional, rural and remote cultures and traditions are not understood	<ul style="list-style-type: none"> • Support protocols • Support consultation at local level (Ref: section 8)
18.	Indigenous artists get ripped off by sharp practice	<ul style="list-style-type: none"> • Support the provision of accessible legal advice for artists (Ref: section 8)
19.	Indigenous artists miss opportunities to maximise financial benefit from their work	<ul style="list-style-type: none"> • Support government funded business advice to artists • Support Market promotion such as Gallery Shop Front initiatives and the institution of 'warehousing' practice (ie where a warehouse operation is set up drawing from art centers and other producers to supply shop fronts) (Ref: section 8)
20.	Indigenous artists not represented at international and national standard setting forums	<ul style="list-style-type: none"> • Support prior consultation with artists by delegates • Send Indigenous contingents (Ref: section 8)
21.	Indigenous cultural legal and policy matters are often complex and require new and innovative and sensitive approaches	<ul style="list-style-type: none"> • Engage in international dialogue and support Indigenous participation so Australian responses to issues have the benefit

		of this discourse (Ref: section 8)
Problems encountered by Indigenous Artists		Potential Government Responses
22.	Government is often required to respond to matters which are both culturally and commercially complex	<ul style="list-style-type: none"> • Seek advice of Aboriginal and Torres Strait Islander Arts Board members and staff • Consider establishing Indigenous Advisory Committee to provide advice on specific issues (Ref: section 8)
23.	No leadership or advocacy agency that represents the specific issues of Indigenous artists in the sector	<ul style="list-style-type: none"> • Support a National Indigenous Cultural Authority (Ref: section 8)
24.	Indigenous artists often want to develop their arts practice and engagement in the arts economy, but lack information for planning	<ul style="list-style-type: none"> • Commission research on issues which would help planning and cultural development (Ref: section 8)
25.	Uncertainty as to the extent of unethical practices and unfair trading in the Indigenous arts marketplace	<ul style="list-style-type: none"> • Conduct national Indigenous arts inquiry (Ref: section 8)

1. Introduction

We are pleased to be invited to present an overview of the most pressing issues for the recognition and protection of Indigenous Cultural and Intellectual Property (ICIP) in 2006.

Australia has a burgeoning Indigenous arts sector which provides enormous value to the cultural and economic life of the nation. Indigenous visual arts and culture contribute to strong primary and secondary markets. Indigenous artists and craftspeople, writers, performers and musicians enhance Australian tourism and cultural life.

Fundamental to Indigenous peoples are land, sea, lore, law, family and ancestors. The work of Indigenous creators is informed by common experiences and connection to culture. Amongst this common experience are equally strong layers of diversity. Some of this diversity pre-dates colonisation. Indigenous clan groups with different stories, songs, languages, governance structures and laws have maintained that diversity. This is further shaped by different experiences of colonisation across the nation. Some aspects of culture remain unchanged, and some aspects have adapted to new forms. Indigenous culture is diverse and alive. It is not static.

One foundational principle underlies the development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways.

In order to positively contribute to the integrity of Indigenous cultural life, arts infrastructure must support Indigenous control of ICIP management. An essential part of this support is acknowledgement of local community authority, communal rights over cultural heritage material, and engagement of Indigenous people through consultation and prior informed consent mechanisms. This must be balanced with acknowledgement of the authority of individual artists and encouragement of creativity and innovation.

Positive input into the Indigenous arts sector also requires responses to unethical and unconscionable practices towards artists, and consideration of protective measures for artists, consumers and the integrity of the Indigenous arts market. Indigenous artists are entitled to work in a safe environment, to be appropriately represented and to benefit fairly and equitably from the sales and copyright use of their work.

A targeted approach combining legislation, prosecution of test cases, protocols, codes of practice, promotion of best practice, education, advocacy, research and ongoing consultation can make an effective contribution to the recognition and protection of ICIP, and the rights of Indigenous Australians to continue their roles as custodians, practitioners and teachers of culture.

Outline of this paper

The purpose of this paper is to inform government consideration of the current issues for Indigenous cultural and intellectual property.

This issues paper sets out, in the opinion of the authors, all current major Indigenous Intellectual and Cultural Property Issues in 2006, for the Indigenous arts industry. In accordance with the brief this paper:-

- uses an articulated comprehensive framework providing an 'industry' or 'value chain' perspective and a 'social' or 'community' perspective
- cites major studies publications and authorities
- canvasses some of the instruments and interventions which could be considered in respect of these issues.

2. Indigenous cultural and intellectual property rights

Overview

Indigenous cultural and intellectual property rights refer to Indigenous peoples' rights to their cultural heritage. These rights allow Indigenous Australians to continue their roles as custodians, practitioners and teachers of culture

Indigenous cultural and intellectual property (ICIP) rights refer to Indigenous people's rights to their cultural heritage. Indigenous people's heritage is a living heritage and includes objects, knowledge, stories, songs, dances and images that are created today or in the future, based on that heritage.¹

The nature or use of Indigenous heritage material is such that it is transmitted or continues to be transmitted from generation to generation. It is also regarded as belonging to, or originating from, a particular Indigenous group(s) or its territory.

Indigenous cultural and intellectual property rights include the right of Indigenous people to:-

- ◆ **own and control** Indigenous cultural and intellectual property
- ◆ be recognised as the primary guardians and interpreters of their cultures. This raises issues relating to **representation** and how stories and information are presented
- ◆ **authorise or refuse the use** of Indigenous cultural and intellectual property according to Indigenous customary law
- ◆ maintain the **secrecy** of Indigenous knowledge and other cultural practices
- ◆ be given **full and proper attribution** for sharing their heritage
- ◆ control the **recording** of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.²

¹ Terri Janke, *Our culture: our future: Report on Australian Indigenous cultural and intellectual property rights*, Michael Frankel & Company, written and published under commission by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney 1999, p. 7.

² Terri Janke, *Our culture: our future*, n.1, pp 47 – 48.

3. Copyright

Overview

The interface between copyright law and ICIP has been the focus of much debate and there have been three reported Federal court judgments on the issue. Indigenous artists as creators and the carriers of Indigenous culture, must balance copyright and cultural obligations.

Since the 1970s, Indigenous artists have noted the inadequacies of the *Copyright Act 1968 (Cwlth)* to protect Indigenous works. In the 1990s, Indigenous artists commenced copyright action in courts. Cases such as *Yumbulul v Reserve Bank*³, *Milpurrurru v Indofurn*⁴ and *Bulun Bulun v R & T Textiles*⁵ have discussed issues where copyright applies, or does not apply to Indigenous art. The *Copyright Act* provides individual creators of works, sound recordings and films with exclusive rights that allow them to exploit their works without others being allowed to copy that creative input. There are also moral rights for individual creators. Indigenous creators' works will be protected by copyright where it meets the requirements of this Act.

Copyright has had the effect of granting exclusive individual rights to ICIP material that was in the past orally transmitted or performance based, as part of the cultural process. The copyright owners can make this information publicly available, alter and adapt it, digitise and authorise others to reproduce this ICIP material without having to consult the original custodians. This is a concern for Indigenous people because it moves ICIP out of the hands of Indigenous people.

Indigenous peoples' concerns about the shortfalls of copyright protection are outlined in the table below:-

³ *Terry Yumbulul v Reserve Bank of Australia and Aboriginal Artists Agency Limited and Anthony Wallis* (1993) 20 IPR 481A

⁴ *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209

⁵ *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513

NON-INDIGENOUS LAWS	INDIGENOUS CUSTOMARY LAW
<ul style="list-style-type: none"> • Emphasis on material form. 	<ul style="list-style-type: none"> • Generally orally transmitted.
<ul style="list-style-type: none"> • Limited in time; eg copyright is generally 70 years after the death of the artist 	<ul style="list-style-type: none"> • Emphasis on preservation and maintenance of culture.
<ul style="list-style-type: none"> • Individually based – created by individuals. 	<ul style="list-style-type: none"> • Socially based – created through the generations via the transmission process.
<ul style="list-style-type: none"> • Intellectual property rights are owned by individual creators or their employers and research companies. 	<ul style="list-style-type: none"> • Communally owned but often custodians are authorised to use and disseminate.
<ul style="list-style-type: none"> • Intellectual property can be freely transmitted and assigned—usually for economic returns—for a set time, in any medium and in any territory. 	<ul style="list-style-type: none"> • Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.
<ul style="list-style-type: none"> • Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned. 	<ul style="list-style-type: none"> • There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.
<ul style="list-style-type: none"> • Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression. 	<ul style="list-style-type: none"> • A holistic approach, by which all aspects of cultural heritage are inter-related.
<ul style="list-style-type: none"> • Emphasis on economic rights. 	<ul style="list-style-type: none"> • Emphasis on preservation and maintenance of culture.
<ul style="list-style-type: none"> • No special protection of sacred secret material or gender restrictions. 	<ul style="list-style-type: none"> • Specific laws on gender and sacred secret material.

4. Indigenous communal moral rights

Overview

The Government is to be commended for its commitment to establish Indigenous Communal Moral Rights. Eleven major issues need to be considered to achieve a workable, reasonable regime. The model must give meaningful rights to Indigenous people to guard the integrity of their ICIP, and to be attributed as the originators of it. An appropriate balance must be struck between the rights of Indigenous people and third party users who must also have certainty about their obligations. Productive consultation on the model is recommended.

Background

In 2000, when the individual moral rights legislation was passed through the Australian Senate, the Government made a commitment to Senator Ridgeway to consider Indigenous communal moral rights (ICMR).⁶ The Coalition government's 2001 election art policy, *Arts for all*, noted that the Coalition would 'take steps to protect the unique cultural interests of Indigenous communities and the cultural works that draw upon communal knowledge... Amendments to the moral rights regime will give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.'⁷ In December 2003, the government drafted the Draft Copyright Amendment (ICMR) Bill 2003 to recognise Indigenous communal moral rights of integrity, attribution and false attribution in original copyright works⁸ and films that meet the listed requirements before the first dealing of the work or film.

The draft was sent to a limited number of organisations and individuals for comment. The Government has stated that only minimal changes have been made in light of these comments and we understand that the draft bill will be put to parliament for debate some time this year.

⁶Intellectual Property Branch, Department of Communications, Information Technology and the Arts and the Copyright Law Branch, Attorney-General's Department, "*Indigenous Communal Rights Paper*", December 2003.

⁷ <http://www.liberal.org.au/documents/arts.pdf>

⁸Works refers to artistic, musical, dramatic or literary work that meets the requirement of *the Copyright Act 1968* (Cwlth).

Voluntary agreement

ICMR do not exist unless the Indigenous community enters into a voluntary agreement with the author/creator.⁹ This approach differs from individual moral rights which exist upon creation without such limitations .

This voluntary agreement (written, oral or implied) requires the Indigenous community to have a relationship with the creator, and to establish an agreement with the creator.¹⁰

Let's examine the ways in which this might work in practice. One straightforward example is where the creator is an Indigenous person from a community from which the Indigenous cultural expression originates. A voluntary agreement might be oral or implied under customary laws, where Indigenous artists for instance are living and interacting with the community. However, complexities will arise for Indigenous artists who live outside of their communities but have an attachment or belonging with a particular Indigenous clan or group.

Let's consider the same scenario for non-Indigenous creators. It may be possible for the Indigenous community to enter into an agreement where they are approached and consulted on the use of their Indigenous cultural material. However this will be difficult when it is used by non-Indigenous outsiders who access already published material to create new copyright works. There is no onus on these copyright creators to even contact or consult the Indigenous community where the ICIP originated. If the proposed law is designed to benefit Indigenous people then this surely is not achieved if third parties have no incentive to ask for use of cultural material.

It could be argued that these Indigenous communal rights might exist as a feature of customary law, whether the Australian legal system recognises this or not, in the same way native title laws existed before recognition at common law.

⁹ Ian McDonald, *Australian Intellectual Property Law Bulletin*, 'Indigenous Communal Moral rights', Australian Copyright Council 2003

¹⁰Jane Anderson, 'Indigenous Communal Moral Rights, 'The Utility of an Ineffective Law', *Indigenous Law Bulletin* (ILB), February 2004, Vol 5, Issue 30, pp 8 – 10, at 8. See also Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' *UNSW Law Journal* 27(3) 2004, pp 585-605.

‘Where cultural material is communally owned, pursuant to customary laws and traditions, it simply is. The task of legislation which aims to provide effective protection for Indigenous communal moral rights is to understand the content of the pre-existing right and build protections around it, to prevent unlawful uses. The draft exposure bill does not do that. It prescribes preconditions based, not on the nature or content of communal ownership, or Indigenous cultural property, but based on the kinds of assurances third parties might need to provide certainty in their dealings with Indigenous art.’¹¹

The common law is often able to take account of the diversity of different Indigenous customary practices. Given that statute subsumes the common law, legislators should avoid the situation where legislating on Indigenous communal moral rights in the *Copyright Act 1968* would limit recognition of these rights under the common law. For example, there could be an argument ICIP rights established under common law are restricted to interpretation under this Act only.¹²

Balancing ICMR and certainty for users

The model aims to provide certainty to users as to their obligations when making use of Indigenous cultural material. This is the foundation of the requirement of having an agreement in place in order to create the communal right.

However, the current draft does not encourage any interaction between users of Indigenous culture and Indigenous communities. This must be the foundation of any voluntary agreement, particularly in circumstances of language and cultural differences. The absence of this foundation creates an imbalance which leans predominantly in favour of protecting third parties who deal with Indigenous cultural expression rather than recognising the nature of communal ownership and protecting its content.

Another fundamental problem is the requirement that unless an Indigenous community’s ICMRs are established in a work or film prior to the first

¹¹ Robynne Quiggin, ‘The Contribution of Protocols and Moral Rights’, paper delivered at Snapshot 2 (AMAG), Melbourne 5 August 2004. p.8.

¹² *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513 at 524 – 525.

dealing, then any subsequent person who deals with the work or film, such as an artist, publisher or film maker, is not legally obliged to recognise any Indigenous cultural sensitivities in dealing with the work or film. Again, the foundation of interaction between Indigenous community and user of the ICMR is missing in the model. This interaction is essential to any reasonable agreement.

The draft proposals have been criticised as being ineffective. According to Jane Anderson, 'the draft Bill is highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their knowledge and its use'.¹³

Drawn from a traditional base

To qualify for ICMR, a work must be drawn from a traditional base. This means drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'. A community is defined loosely as an individual, family, clan or community group. This requirement of defining a community may cause unnecessary complexities, as seen in native title law. Communities, like art, are not static, and Indigenous people live in areas that are not their traditional lands. They also live in a diversity of situations – including rural, urban and remote. The lifestyles of Indigenous people will vary from living under close observance of customary laws, to those who live in cities and follow established protocols within that region or industry. It is difficult to be prescriptive on this point but we note the difficulties experienced in native title law in cases such as *Yorta Yorta Aboriginal Community v Victoria*¹⁴ and the recent Darwin Larrakia native title case (April 2006, unreported) where the Federal Court found that entitlement to rights rests on proof of traditions and customs of the group being maintained.

The law should recognise that Indigenous artists come from remote, rural and urban areas and that there are many different types of traditions, practices and protocols in this diversity.

¹³Jane Anderson, 'Indigenous Communal Moral Rights, The Utility of an Ineffective Law', *Indigenous Law Bulletin* (ILB), February 2004, Vol 5, Issue 30, pp 8 – 10, at 8.

¹⁴ *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

Must be a copyright work

Another issue with the current legislative model is that ICMR exist only in a copyright work or film.¹⁵ This will side step application of the laws to one of the most problematic areas of unauthorised appropriation. Unauthorised appropriation occurs where the cultural material is not protected by copyright in the first instance, such as when the cultural material is in oral form, or so old that it is no longer protected by copyright. This is the case for a lot of Indigenous cultural material.

For example, the copying of important Indigenous cultural material being depicted in rock art on t-shirts does not infringe copyright because the rock art is too old (out of copyright) and its author is unknown, so these works are not protected by copyright. When these works are incorporated into a new form such as a new artistic work, the question would then arise whether ICMR exists in the new artistic work. Under the current model, if the creator does not have a voluntary agreement that it does exist, then there are no ICMR.

In the *Rock Art on t-shirt matter*, t-shirts were made by a Sydney based t shirt company, copying images from a book of rock art published by the Australian Institute of Aboriginal and Torres Strait Islander Studies. The book was written by E J Brandl who researched and depicted figures carved in the rock in Arnhem land in his book. The process of capturing the rock art involved drawing the rock art in Indian ink. This resulted in a new work, the ink drawings, which were protected by copyright and at law, vested in Brandl, even though the rock art is not a copyright work because it is too old. This new work has already been dealt with given that it is published. This book is used by many appropriators of Indigenous art to create their own works. Would the relevant traditional owners have ICMR to this work? Not under the current model. In this matter, the AIATSIS and the Brandl estate took action against infringers on behalf of the traditional owners. For information on this example see *Minding culture*.¹⁶

¹⁵ We also note that sound recordings are not included and consider that they should be given that many oral or performance based ICIP has been recorded by this means. Access and ownership over tapes remains an important for language and cultural maintenance. In many cases, copyright in these recordings is asserted by researchers and institutions.

¹⁶Terri Janke, *Minding culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, prepared for the World Intellectual Property Organisation, Geneva 2003.

Acknowledgement of association

There must be acknowledgement of the Indigenous community's association with the work.¹⁷ This requires notice of association to be given by the community and the author to third parties such as funding bodies, publishers and others involved in a copyright transaction. The community can do this for works and films it has been consulted on, but it will not be able to give 'notice' on works and films it has not. These are likely to be the works and films that are infringing Indigenous communal moral rights.¹⁸

Interest holders

It is also a requirement that interest holders in the work need to have consented to Indigenous communal rights in the work or film. In this respect an Indigenous community has no rights if an interest holder refuses or fails to consent to the Indigenous communal moral rights. Just what constitutes an interest holder is not defined. It could perhaps include a funding body or a commissioner of work. This lack of clarity and problems with practical implementation are further concerns.

Agreement before first dealing

Under the current legislative model, ICMR will not arise unless the voluntary agreement is made before the first dealing. With reference to the communal moral right of attribution a dealing includes selling, letting for hire, by way of trade offering or exposing for sale or hire, exhibiting in public, or distributing where the proposed distribution is for the purposes of sale.¹⁹

Let's look at the application of this principle in another practical example: What happens when an author is pre-commissioned to write a book? Would no Indigenous communal moral rights arise when an author is pre-commissioned to write a book about Indigenous stories for a publisher, because the literary work is created after the commissioned contract has been signed, this commission being the first dealing of the literary work?

¹⁷Clauses 195AZZL and 195AZZM of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*

¹⁸ Terri Janke, 'The moral of the story: Indigenous communal moral rights', *Bulletin*, #3/05, ISSN #1440-477pp 1,2, 7 & 8

¹⁹Section 195AZZZB of the *Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*.

Productive consultation

The confidentiality surrounding the released paper has restricted the free-flow of discussion in this regard. As a result, the draft bill has had limited consultation with Indigenous peoples, communities and artists. These are the groups which are supposed to benefit from the new law. To engage Indigenous stakeholders in a meaningful debate on the contents of the Bill, we recommend that meetings and discussions be held at a local and practitioner level.

The Use of Protocols and ICMRs

The use of Indigenous protocols is essential to any model of ICMRs. Indigenous protocols are developing within the arts and cultural industry that recognise many ICIP rights of Indigenous communities including the issue of integrity and attribution. The model should aim to use these protocols as a reference in response to the reasonableness test.

Implementation of ICMR

A law as complex as this model will require a substantial education campaign to explain its operation to Indigenous artists and the broader industry. For communities to fully realise these rights, there need to be additional measures of protection including protocols, education and awareness raising.

Another important concern is the possibility for enforcement. Given the narrow scope of the current model, it is difficult to see where a remedy might arise for infringement.

ICMR and prior informed consent

ICMR do not provide ownership rights. The extent to which intellectual property and heritage laws can recognise ownership rights has been the subject of much debate nationally and internationally.

International developments are progressing the discourse about effective mechanisms for the interface between ICIP and IP laws. Mechanisms that are being advanced include consultation and permission to use ICIP, and the application of the principle of prior informed consent.

These international developments provide useful principles and models for ICIP management, including Indigenous communal moral rights and other ICIP rights.

We note that the issue of protecting Indigenous cultural expression and traditional knowledge has been debated in other regions including the Pacific and the World Intellectual Property Organisation (WIPO). WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Draft guidelines suggest member states adopt legal and practical measures to protect against the misappropriation of traditional cultural expressions of particular cultural, spiritual value or significance to a community, without free, prior and informed consent. This level of protection requires prior notification or registration on a public register.²⁰ This right of prior informed consent gives a community the right to prevent or authorise the use of the traditional cultural expression on agreed terms such as benefit sharing.

The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002)²¹ for Pacific countries recommends the introduction of traditional cultural rights which provide the prior and informed consent of traditional owners before reproducing, publishing, performing, making available online, traditional knowledge or expressions of culture.²² This right is in addition to recommended Indigenous moral rights for traditional owners – that is the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture. Material form is not required. The moral rights exist independently of their traditional cultural rights. The model also proposes that communal moral rights continue in force in perpetuity and that they are inalienable, meaning they cannot be waived or transferred.

²⁰ See Article 7. World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth Session papers, Geneva 6 – 8 June 2005, 'The protection of traditional cultural expressions/expressions of folklore – revised objectives and principles', (WIPO/GRTKF/IC/8/4), WIPO, Geneva, 2005.

²¹ An original draft by Dr Kamal Puri and Clark Peteru for the South Pacific Community in New Caledonia was debated and revised by Legal Experts attending Workshops held from 2000 - 2002.

²² Section 6, Model Law for the Protection of Traditional Knowledge and Expressions of Culture, *Ibid*.

5. Resale royalty

Overview

The Government's pursuit of a resale royalty arrangement model has initiated much useful discussion. To provide a strong workable system, a legislative model is preferred, which requires payments directly to artists so they can benefit from their successes in the market place.

Introduction

An important feature of the Indigenous arts market in recent years is an increase in the sale price of visual arts, in both the primary and secondary art markets. In 2004, the Department of Communication, Information Technology and the Arts released a discussion paper, designed to stimulate broad discussion about whether it would be desirable to introduce a resale royalty arrangement in Australia.

What is the Resale Royalty?

While visual artists benefit from the sale of their work at its first sale, they do not receive any share of the sale price of subsequent sales. Returns from these sales are made only by the seller and the dealer. This produces an inequity for artists because as they develop their expertise and in market worth, they are excluded from directly benefiting from this section of the market for their works.

The resale royalty or *droit de suite* ensures that artists receive a percentage of the resale price of their works.

Arguments in favour of legislative implementation

There are a number of arguments in favour of implementation of a legislated resale royalty in Australia.

1. Artists would benefit from the resale of their works
2. Visual artists would receive a royalty for their works, as do literary authors for their books and musicians for their songs and recordings
3. Indigenous artists would benefit most because of their low incomes and high dependence on the arts industry
4. A legislative scheme would avoid problems of avoidance of payments which would occur with an informal voluntary scheme

5. A legislative scheme would provide for individual payments to artists and their estates. This strikes the right balance between state support and personal responsibility.²³ It makes redundant current well-meaning but patronising trust fund arrangements which are often administered by volunteers
6. Indigenous artists would have recognition of their ongoing connection with the cultural material embodied in their artwork through the payment
7. A resale royalty scheme would implement Recommendation 5 of the Myer Report²⁴
8. Australia would harmonise its laws with the European Union²⁵
9. Australia would implement an optional provision of the Berne Convention
10. Administration of a resale royalty scheme would record the origin (provenance) of artistic works which is valuable to the Australian arts market, as well as collectors and artists.

Arguments in favour of non-legislative implementation or no implementation

1. The resale royalty does not provide benefits uniformly. This argument is based on some experiences in which late career artists and the estates of deceased are the main beneficiaries.
2. It will not end Indigenous disadvantage.
3. It will introduce an additional level of administration of sales.
4. It would introduce additional costs to buyers.

²³ Prime Minister Howard, National Press Club Address, 25 January 2006

<http://www.pm.gov.au/News/Speeches/speech1754.html>

²⁴ Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, Commonwealth Department of Communications, Information Technology and the Arts, 2002. The Report recommended: To further protect the rights of visual artists and craft practitioners, the Inquiry recommends the Commonwealth Government:

- 5.1 Introduce a resale royalty arrangement
- 5.2 Establish a working group, comprising representatives from government and the visual arts and craft sector, to analyse the options for introducing a resale royalty option
- 5.3 Conduct a tender to determine an appropriate body to administer the resale royalty arrangement
- 5.4 Allocate \$250,000 for the implementation of an implementation strategy.

²⁵ A directive requiring implementation of the resale royalty was issued by the European Union. Directive 2000/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art requires EU member states to harmonise their laws in relation to the resale royalty for artists. The United Kingdom is the most recent nation to implement the resale royalty.

Balancing the Arguments

Many of these arguments against the resale royalty are based on premises which either do not apply to the Indigenous art market or which misunderstand the purpose of the resale royalty.

The resale royalty would not only benefit “dead white males” as it is sometimes put. The work of young Indigenous female artists such as Tracey Moffatt, Judy Watson, Rosella Namok and Julie Dowling reach high sales figures would also be protected.

Opponents also argue that the limited number of artists who will benefit is a reason to shun the resale royalty. But this misunderstands its purpose. The resale royalty is not intended to provide returns in any uniform manner of distribution, like welfare payments or CDEP payments. It is intended to provide a share in the market success of sold works.

Much is made by those opposing the resale royalty of the difficulties with precisely forecasting outcomes of its introduction. Dire predictions are made about fleeing collectors and a collapsing market, as a result of an additional cost to buyers. But two costs which have recently been added to the purchase price of works in the secondary market without evidence of detriment. One cost is the buyer’s premium. It is a cost of between 10% and 20% imposed by auction houses on purchasers. The other is the GST. The Indigenous art market remains strong despite these costs by auction houses and government. While it is true that no prediction can be made with complete certainty, in the light of the buyer’s premium these fears appear to be overstated in the extreme.

The payment of royalties to authors of musical and literary works is accepted practice. The creative income of visual artists on the other hand, is mainly restricted to the first sale price of their work. The resale royalty would provide a return to artists, founded on the same fundamental principles of intellectual property laws: the encouragement of innovation, creativity and excellence. Australia’s cultural heritage, Indigenous art markets and arts sector would benefit from proper recognition of visual artists rights and returns from their successes in the market place.

While initiatives which strengthen business skills and market structures are important and should be pursued, so too should the championing of market

success by artists. Sharing in, and being rewarded by, success in the market are fundamental to the resale royalty.

Features of the Indigenous Art Market

Some opponents of the resale royalty complain that the main recipients are artists and their families, whose work sells at the high end of the art market, and who are already financially well off. This is an unpersuasive argument for a number of reasons.

Firstly, on the whole Indigenous artists, even those selling at the high end of the market are not well off and often have financial commitments to extended families.

Many Indigenous artists continue to live in poverty while their works, originally bought for minuscule prices, fetch staggering amounts at resale. The resale royalty has therefore been suggested as a viable means of increasing economic returns to Indigenous and other Australian artists. For example, Tjupurrula's work, *Water dreaming at Kalipinya*, depicted the main site over which he had authority. The artist, (now deceased) said that he sold the painting for 'tucker not cash'; other reports say the work was sold for \$150. Sales of this work set consecutive sale records for Aboriginal art; first in 1997 when it fetched \$206,000 and then in 2001 when Sotheby's auctioned it for \$486,500. In 2005, Sotheby's held two Aboriginal Art auctions in Melbourne. The July auction sold Indigenous artworks to a total of \$4,837,825. This set a new record for the amount sold at one auction, and the November auction sold \$1,469,046. The total amount of works auctioned in 2005 was at \$6, 306,871.²⁶

In a more recent example, when Dorothy Napangardi's work *Karntakurlangu* was auctioned at Sotheby's in July 2004, the hammer price was \$129,750.²⁷ Many of Napangardi's extended family heard the news and, not surprisingly expectations were high about returns to the community. But while Napangardi received nothing, the auction house which sold her work would

²⁶Sotheby's, 2 February 2006, <http://search.sothebys.com/jsps/live/event/EventResultsSearch.jsp> cited in Terri Janke. *Looking out for culture*, forthcoming publication.

²⁷ Sunanda Creagh, "In a World Where Gain can be Loss", Sydney Morning Herald, 27 March 2006, <http://www.smh.com.au/news/arts/in-a-world-where-gain-can-be-loss/2006/03/26/1143330921395.html> accessed 7 May 2006.

have charged the purchaser the buyer's premium – approximately 17.5% of the hammer price. Clearly receiving some share of this resale price would benefit Napangardi, her family and community.

This case is even stronger for Indigenous people as the arts industry provides a source of income to people who, in many cases have severely limited capacity to engage in the economy.²⁸

Another argument raised against a resale royalty is that it will damage the art market. This argument is based on the assumption that a resale royalty will increase the risk incurred by collectors and dealers who invest in the secondary art market. There is no doubt that these participants make an essential investment in the market and there is always a risk of loss. But the argument is flawed because it assumes that dealers and collectors are the *only* parties entitled to directly financially benefit from the transfer of the property. It also assumes that they are the only participants who risk financial loss. As authors of the works, artists are always exposed to the risks and actual losses of the market. Further, in general artist's incomes are among the lowest in Australia. This is especially true for Indigenous artists. In the most recent survey of the income of Australian artists, *Don't give up your day job*²⁹, half the artists surveyed had annual incomes of less than \$7,300, though the average was \$17,000. Visual artists' median creative incomes were only \$3,100.

There have been some concerns expressed about the administration fees for a legislated resale royalty scheme. On the other hand, Viscopy, Australia's visual arts copyright collecting agency, argues that administrative fees are declining as a result of technological developments in data management.

Concerns about damage to the market by increased costs to buyers, are not supported by evidence at present. The imposition of the buyer's premium on the hammer price of a work by auction houses may be instructive.³⁰ While auction houses are discouraging about the effect of the resale royalty on the

²⁸ Historical reasons for Indigenous people's exclusion from the labour market include racism, removal from the land base, unpaid wages, child endowment, workers' compensation and deceased states have slowed accumulation of wealth by Indigenous people. See Professor Marcia Langton, *A New deal? Indigenous Development and the Politics of Recovery?* Dr Charles Perkins Memorial Oration, 4 October 2003 <http://www.media.usyd.edu.au/speeches/2002/langton.pdf> at 27.10.04 cited in Robynne Quiggin, 'The Resale Royalty', Part One, *Indigenous Law Bulletin (ILB)*[2004], Vol 6, Issue 5, pages 4 – 6, at 4.

²⁹ David Throsby and Virginia Hollister, *Don't Give Up Your Day Job, An economic study of professional artists in Australia*, Australia Council, 2003, Sydney, page 45. Cited in Robynne Quiggin, 'The Resale Royalty', Part One, *Indigenous Law Bulletin (ILB)*, [2004], vol 6, Issue 5, pages 4 – 6, at 4.

³⁰ Sotheby's buyer's premium is 20 % on works sold for up to AUD 20,000, 17.5% on works sold for amounts between 20,001 and 500,000, and 15% for works sold for over \$500,000. http://search.sothebys.com/help/faq/faq_duringauction.html#a03 accessed 7 May 2006.

art market, there is no conclusive evidence that the buyers premium or GST have adversely impacted on the market or artists.

There has been some discussion of the benefits of a voluntary regime outlined below. These models are unsatisfactory. They treat artists as incapable of determining their own financial futures:

The Aboriginal Benefits Trust Foundation was established by Indigenous Art Trade Association as an alternative model for a resale royalty. The auction house Lawson-Menzies contributes 2% of the resale price of all Aboriginal art sales to the Trust Fund and an Indigenous Board allocates the money to Aboriginal art projects.³¹ Whilst this is a gesture of goodwill, it should not be seen as an alternative to the resale royalty. Artists should be given the royalty as it relates to the sale of their works. To spend that money on behalf of any artist is patronising.³²

A contract based resale royalty is one in which the artist enters into an agreement with the buyer. The agreement binds the buyer to pay the artist a percentage of the resale price. The disadvantage of this approach is that subsequent buyers are not bound by the agreement, and the artist has no means of recovering a resale royalty from subsequent purchasers.

Implementation of a Legislative Resale Royalty Scheme

The implementation of a legislated resale royalty scheme for artists should look to the European Union examples, particularly the recent United Kingdom Regulations³³ as a model and consider inclusion of the following features:

- an involuntary scheme
- a non-transferable right
- a minimum sale price setting a threshold for payment of the resale royalty
- either a flat rate or sliding scale of payments depending on the sale price

³¹ ABC Background Briefing, 'Black Art Gold Rush' Sunday 25 September 2005, produced by Lorena Allam, <http://www.abc.net.au/rn/talks/bbing/stories/s1465615.htm>. cited in Terri Janke, *Looking out for Culture*, Terri Janke and Company Pty Ltd, Sydney, 2006 (forthcoming publication).

³² Terri Janke, *Looking out for culture*, *ibid*.

³³ The Artist's Resale Right Regulations 2005

- administration via a central collecting agency such as Viscopy, which is already administering services to artists;³⁴ and
- provisions for reporting and review of the operation of the scheme.

³⁴ Terri Janke, Robynne Quiggin and Angelina Hurley, *Getting From Principle to Practice, An Australian Dialogue on Resale Royalty Rights*, paper for The Aboriginal and Torres Strait Islander Arts Board of the Australia Council, 2001.

6. Indigenous art in the market place

Overview

The Minister has announced that the government will scrutinise the exploitation of Indigenous artists. There are many features of the Indigenous arts industry that require attention including unethical practices by traders, and unfair labelling and marketing. There are areas where the law could be used to stamp out these practices such as trade practices laws. However, there are other avenues, such as the development of trade marks, including a certification mark.

Nationally there have been concerns raised by Indigenous people and arts agencies, about the unfair and unethical practices in the Indigenous art market.³⁵ This has recently been the focus of media attention. Some practices reported include:-

- paying Indigenous artists unfairly including paying in alcohol, drugs, and Viagra
- operating sweatshops
- taking Aboriginal artists from their communities to paint artworks, for sale in city galleries, without providing proper care or food
- selling Fakes and forged works – *R v McLoughlin (Clifford Possum Case)*³⁶
- non-Indigenous artists creating ‘Indigenous-styled art’ and passing it off as produced by Indigenous artists – eg: didgeridoos painted by backpackers
- non-Indigenous people make ‘Indigenous’ craft souvenirs: *ACCC v Australia Icon*³⁷
- falsely stating the origin of products – selling mass produced products from overseas as authentic Indigenous craft
- there are many reports of market stalls, shops and tourist outlets selling fake Indigenous art and craft made overseas, but sold as ‘authentic’ (bamboo didgeridoos, and Indonesia produced wooden boomerangs). The buyer is not made aware that the item is not authentic and that it was mass produced rather than hand crafted

³⁵ Central Land Council, Media Release January, 2006, Trevor James, Viscopy, Media release 3 January 2006

³⁶ For a detailed summary of the case, and the short falls regarding laws relating to forgeries and fake art see Tania Johnson, *When is a Forgery Not a Forgery?* in *Journal of Indigenous Social Policy*, Volume 6, 2006 (forthcoming).

³⁷ Australian Consumer and Competition Commission, ‘Australian Icon Product’, ACCC Ejournal, <http://www.accc.gov.au/content/index.phtml/itemId/585941>, 10 February 2006.

- there have been a number of reports of false 'certification marks' being bogusly developed and displayed by retailers. These include a certificate purporting to be endorsed and signed on behalf of the Australian Government and reproducing the Australian Government crest, and other certificate style documents.

This type of activity has significant negative repercussions in the Indigenous arts industry:-

- For the market, it creates consumer doubt because the arts buyer can not be sure what they are getting is legitimate and raises further concerns that the work was produced in an exploitative environment. This loss of consumer faith can lead to loss of sales which results in a loss of income to artists, arts centres as well as reputable galleries which have invested time and resources in the placement of Indigenous art in the industry. In 1997, the Indigenous art and craft market was estimated by ATSIC's National Aboriginal and Torres Strait Islander Cultural Industry Strategy to be valued at over \$200 million per annum³⁸. In 2002, John Altman et al estimated that the national value of Indigenous visual arts sales is between \$100 million and \$300 million.³⁹ A loss of sales reduces income to Indigenous artists, galleries, retailers and arts centres.
- For the artist, it threatens their ability to continue to produce Indigenous art products because they must reduce the costs of their legitimate products to compete with cheaper imitations. Artists risk being driven from the marketplace altogether. Many remote Indigenous communities and urban ones as well, rely on arts income for their well-being. The loss of this income could translate into increased dependency on government welfare.
- For the Australian tourist industry there are losses too. Inbound tourists want to experience and buy authentic Aboriginal art. However, the Australian tourist industry's access to authentic products is complicated by the proliferation of overseas bogus Indigenous products being passed off as authentic.

³⁸ Aboriginal and Torres Strait Islander Commission, National Aboriginal and Torres Strait Islander Cultural Industry Strategy, prepared by Focus with the assistance of Sharon Boil & Association, Canberra, 1997, p.5

³⁹ J C Altman, *Cultural funding in Australia: Three tiers of Government 1999 – 2000*, Cultural Ministers Council Statistics Working Group, Canberra, cited in J C Altman, 'Developing an Indigenous Arts Strategy for the Northern Territory: Issues paper for consultations', Centre for Aboriginal Economic Policy Research, 2003, Canberra, p. 9.

- For the industry, in economic terms, there will be a loss of income. However, there is also risk of considerable loss in cultural value terms. The effects could potentially reduce Indigenous cultural production, and also threaten a legitimate, unique and internationally acclaimed Indigenous arts industry.
- The relationship between artists and gallery/retailer is also put under strain. Legitimate galleries wanting to engage with Indigenous artists fairly, suffer from the bad publicity focusing on imitations, fakes, carpetbaggers and forgeries.

Trade practices

Whilst there are Federal trade practices laws and state fair trading laws that prohibit misleading or deceptive conduct in the course of trade⁴⁰, they focus on consumer protection, and the ability of the Indigenous artist to use these to protect their interests is limited.

There is a need for greater education and awareness of how consumers and artists take action under these laws, and how applications can be made to the Australian Competition and Consumer Commission (ACCC) to investigate matters.

In 2003, the ACCC took action against Australian Icon Products Pty Ltd (AIP), a Queensland-based souvenir manufacturer, to stop AIP from engaging in misleading and deceptive conduct.⁴¹

In 2003, the Federal Court granted the Australian Competition and Consumer Commission (ACCC) interim orders against Australian Icon Products Pty Ltd (AIP), a Queensland-based souvenir manufacturer, to stop AIP from promoting its entire souvenir range as “Aboriginal art” and “authentic” Indigenous products, when in fact the range of hand-painted and carved products (including didgeridoos, boomerangs and terracotta plates) were made by both Indigenous and non-Indigenous artists employed by AIP.⁴² Some of AIP’s products were labelled ‘certified authentic’ however they had not been through any certification process. Before the full hearing, AIP

⁴⁰ Section 52, Trade Practices Act 1974, (Cwth); It is also an offence for a corporation to make false or misleading representations about the standard or quality (Section 53(a), Trade Practices Act 1974 (Cwlth) of a product or service (Section 53(d), Trade Practices Act 1974 (Cwlth)), or to represent it as having sponsorship, approval or affiliation it does not have,⁴⁰ or the place of origin of the product (Section 53(eb), Trade Practices Act 1974 (Cwlth))

⁴¹ Australian Consumer and Competition Commission, ‘Australian Icon Product’, ACCC Ejournal, <http://www.accc.gov.au/content/index.phtml/itemId/585941>, 10 February 2006

⁴² *Ibid.*

agreed to accept certain orders relating to this matter which including corrective notices as well as compliance training for management.⁴³ This test case set standards, raised awareness of the issues and put manufacturers on notice that the government agencies will take action against such behaviour.

The Australian government should require the Australian Competition and Consumer Commission (ACCC) to investigate the marketing and labelling of Indigenous art and report to the government. The outcomes of this inquiry should inform the development of national labelling and marketing guidelines for Indigenous art and craft products.

The ACCC should be encouraged to take more test cases against misleading and deceptive conduct. An Indigenous art consumer complaints hot line should be established, and complaints should be investigated.

Additionally, the ACCC and relevant government federal and state agencies (including tourism agencies) should run education and awareness campaigns. We note that misleading and deceptive conduct and false representation of Indigenous art and craft at the point-of-sale is one of the focus issues identified by the Ministerial Council on Consumer Affairs in *Taking action, gaining trust: A national Indigenous consumer strategy, action plan 2005 – 2010*.⁴⁴ The plan acknowledges that it is the responsibility of consumer agencies (refers to the Consumer and Fair Trading Offices, Australian Securities and Investment Commission, ACCC and Commonwealth Treasury) to undertake education campaigns with consumers, artists, Indigenous communities, retailers, galleries and manufacturers and alert them to their obligations under the law.⁴⁵ This requires immediate action, but should also be accompanied by a formal investigation on Indigenous art trade practices, as noted above.

Development of certification trade mark

The introduction of a certification or authentication mark is still needed despite the now defunct National Indigenous Arts Advocacy Association's (NIAAA) label of authenticity. Whilst Aboriginal arts centres use logos or trade marks as marks of authenticity to show product source, Indigenous artists that are not affiliated with an arts centre, are not represented. In any

⁴³ *Ibid*

⁴⁴ National Indigenous Consumer Action Plan Implementation Group, *Taking Action, Gaining Trust, A National Indigenous Consumer Action Plan 2005 – 2010*, Ministerial Council on Consumer Affairs, Department of Consumer and Employment Protection, Perth, 2005, p.16

⁴⁵ *Ibid*, p.16

case, a certification mark to be used alongside existing regular trade marks should be explored.

The value of a certification mark is discussed at length in a case study on the NIAAA label of Authenticity in *Minding cultures*⁴⁶. In summary, such a label would be of great value because it would:-

- create a system which highlights the differences between authentic and ‘copy cat’ products
- support buyers who wish to purchase authentic Australian Indigenous artworks
- educate consumers about traditional stories and contemporary styles of Australian Indigenous art
- encourage wholesalers and retailers to buy and sell authentic Australian Indigenous products
- encourage manufacturers and distributors to enter into licensing arrangements with Aboriginal and Torres Strait Islander artists.

The label of authenticity mark model should be re-examined, and a new system developed and implemented. A failure of the NIAAA mark is that it was a national system, and its operation was too centralised. Therefore, Indigenous people who did not know the artist, or the art, were signing off on the “authenticity”. Aboriginal Arts Centres and arts businesses are using trade marks and logos. In this regard the government should assist Indigenous arts businesses’ access to the Australian trade mark system.

The developments should be incorporated into development of a new label of authenticity model. Any new model should give consideration to how local, regional and state levels feed into the system of authentication⁴⁷.

A new label of authenticity system could develop rules for use which authorised users must comply with. These rules can specifically address the protection and recognition of Indigenous cultural and intellectual property.

The mark could also introduce quality assurance issues. This could be developed in conjunction with an Indigenous specialist agency (an

⁴⁶ Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, prepared for the World Intellectual Property Organisation, Geneva, Switzerland, 2003

⁴⁷ Terri Janke, *Our culture: our future*, op cit, pp 204 – 206.

Indigenous cultural authority) working with existing Aboriginal arts centres, and arts umbrella organisation such as Desart, Umi Arts and ANKAAA.

In New Zealand, there is a Maori Made Mark (Toi Iho) which is based on the label of authenticity model. This model is a regular trade mark, created and developed by a government agency.⁴⁸ The 'Toi Iho Maori made mark' is a registered trade mark that can be used in relation to Maori arts and crafts made by Maori artists. There are two other marks - a "mainly Maori mark" which can be applied to artwork made mainly by Maori artists, and a "co-production mark" for works made by Maori artists with non-Maori persons. Quality control is regulated through a board of experienced and respected Maori artists. The scheme also involves lead Maori artists who are selected to use the label free of charge, which encourages use by other Maori artists.

Geographic indications

The use of geographic indications could also be explored. Geographical indications (GIs) are intended to designate product quality, highlight brand identity, and preserve cultural traditions. Examples of well-known geographical indications include the European makers of wines, cheeses and other foods to protect well-known regionally produced goods that have distinctive qualities such as 'Champagne' for sparkling wine produced in the region. Also, 'Tuscany' is a geographical indication protected under Italian law for olive oil produced in the Italian region of Tuscany.⁴⁹ Given that Indigenous peoples' cultural expression reflects their belonging to land and territories, geographical indications may allow some scope for Indigenous people to use GI labels for their clan names, artistic designs, motifs, stories, and language words for regions.

Ethical branding

Another possible course that could be explored is the development of ethical marks and branding given that informed and discerning consumers are looking for products that are 'organic', "environmentally friendly" and "non-exploitative". For example, green labelling⁵⁰ is used to help consumers identify foods that are environmentally

⁴⁸ See www.toiho.com.

⁴⁹ Law No. 169 of February 5, 1992, Italy, World Intellectual Property Organisation, About Geographical Indications, http://www.wipo.int/about-ip/en/geographical_ind.html, 17 February 2005

⁵⁰ John Cary, Suku Bhaskaran and Michael Polonsky, *Green Marketing and EMS: Assessing potential consumer influence on EMS development in fresh food chains*, Rural Industries Research and Development Corporation, Canberra, December 2004, < <http://www.rirdc.gov.au/reports/EFM/04-175.pdf#search=%22%22green%20labelling%22%22>

friendly. Also, there is the Fair Trade logo used for the marketing of ethically produced chocolate and coffee.⁵¹

Special legislation against fake Indigenous arts

Another possibility the government could explore is the possibility of developing separate legislation to deal with unfair Indigenous art trade practices. For example, see *Indian Arts and Crafts Act* (US). In the United States, the *Indian Arts and Craft Act 1990*⁵³ makes it illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggested it is American Indian produced, an American Indian product, or the product of an American Indian tribe or Indian arts and craft organisation, resident within the United States. For individuals who violate the Act, there may be civil or criminal penalties up to a \$250,000 fine or a 5-year prison term, or both. Businesses can face civil penalties or can be prosecuted and fined up to \$1,000,000.⁵⁴

Codes of practice – implementing at a local level

The City of Melbourne has responded to reports of unethical conduct from galleries in its jurisdiction by developing a code of practice aimed to encourage fair and equitable dealings in the Melbourne CBD. The promotion of the Code by way of a prestigious ethical gallery award will aim to encourage take up of the voluntary code by art galleries in Melbourne CBD.

Galleries and artists

The relationship between galleries and artists requires government intervention because of the unequal playing field. Artists need education and assistance in negotiating and understanding terms. Model contracts which set standards akin to Media, Entertainment and Arts Alliance (MEAA) standard term contracts for actors and performers, or the Australian Society of Authors' standard publishing contracts for authors should be developed. This could be another function of the National Indigenous Cultural Authority.

⁵¹ <http://www.fairtrade.com.au/>

⁵² Section 205(c) of Title 25 of the United States Code.

⁵³ The Indian Arts and Crafts Act of 1990 (P.L. 101-644), <<http://www.doi.gov/iacb/>>

⁵⁴ The Indian Arts and Crafts Act of 1990 (P.L. 101-644), <<http://www.doi.gov/iacb/>>

Some galleries are members of trade associations that promote fair and ethical conduct. For example, the Australian Commercial Galleries Association⁵⁵ and the Australian Indigenous Art Trade Association promote fair ethical practice by its members. Whilst these are beneficial, there is no monitoring of compliance.

Customs law

Australian Customs laws should include provisions which filter the export and import of fake and forged Indigenous cultural material.⁵⁶

Legal representation and industry leadership

There is a need for a lead Indigenous arts and cultural agency to provide support to artists, and arts centres and to set standards, as well as to provide legal advice and support. Since the demise of NIAAA, there has been an increase of rip-offs, because rogues take the risk that there is little likelihood of Aboriginal artists being able to afford the high costs of commencing legal action. While the Artists in the Black service delivered by the Arts Law Centre of Australia, provides an important education role and legal service to Indigenous artists, there is much more work to be done.

We recommend the establishment of an Indigenous arts cultural authority to assist between users and artists (rights owners). The authority would have a role as an industry representative and rights advocacy body. Such an organisation could provide information to artists, and third party users about copyright, contracting practices, set standard terms and template documents and give general industry advice – including financial and management skills).

Internet sales of fake works and copyright infringements

We feel there should be special attention paid to internet sales of Indigenous art. There have been an increasing number of complaints from artists and consumers about the sale of fake works including forged and copyright infringing items, sold over the internet on auction sites such as EBay. For example, infringing prints of artwork of one Aboriginal artist was reportedly being offered for sale on Ebay. It was reported to also use copyright information and photographs to sell the fake works. There was also a false accompanying statement that royalties were being paid to the Indigenous

⁵⁵ For more information visit: www.acga.com.au

⁵⁶ Terri Janke, *Our culture: our future*, page 174.

artist. This type of infringement is difficult to police because of seller aliases which give them anonymity. Furthermore, the infringing website, or “forger” might also be overseas, and this makes it more difficult for an Australian artist, especially an Indigenous artist, from a remote community, to take action. There are also reports on forgers targeting the works of deceased artist’s works. One matter currently under investigation involves the alleged forgery of a recently deceased artist’s work. The alleged forger is based in Hong Kong. This issue will only increase given the increasing international success of Indigenous art.

The case of *R v O'Loughlin* highlights the short falls in the law relating to forgeries and fake art.⁵⁷ We recommend that this area of law be made more effective so that art forgeries can be adequately dealt with, including criminal sanctions.

7. Dealings with Objects of Cultural Heritage

Overview

There are a number of laws which provide protection and regulation of the movement of Indigenous objects on and off shore. In relation to imports, we are seeing an otherwise growing market in Indigenous arts being flooded with imported fakes. Further regulation of these imports, would protect the integrity of domestic markets and support local authentic products. On the issue of exports, this regulation would benefit from consultation with local Indigenous custodians for objects, as they can best advise the Committee on the cultural significance of these objects.

Introduction

Effective management of Australia's cultural heritage, and the communities and businesses that depend on it, requires successful administration of the transfer of Aboriginal and Torres Strait Islander cultural objects into and out of the country.

Restrictions on imported objects to filter out fake Indigenous art and objects including souvenirs would strengthen the domestic market.

Greater participation of Indigenous people in the management of exportation of Indigenous objects would enhance existing processes.

Consultation with traditional owners and the descendants of creators of objects will provide important information for decision making.

Import

The importation of fake Indigenous art or souvenirs into the Australian art and tourism market weakens the quality of the domestic art market and

⁵⁷ See Tania Johnson, *When is a Forgery Not a Forgery?* in *Journal of Indigenous Social Policy*, Volume 6, 2006 (forthcoming).

denies Australian business the opportunity to promote and grow arts and tourist businesses. Australian Customs laws and practice are the best place to begin to intervene to stem the tide of imported fakes and protect domestic markets. Restriction of the importation of unauthentic or fake Indigenous art, souvenirs and artefacts would strengthen Australia's market in these items and add value to Australia's cultural heritage.

Export

A number of concerns have been raised about the operation of current laws in relation to the export of Aboriginal and Torres Strait Islander objects. These concerns include:

- the need for involvement of relevant local Indigenous people in decision making processes; and
- the scope of objects covered by the laws.

The Myer Report noted these concerns and suggested greater involvement of Indigenous people in decision making regarding cultural heritage matters. Myer found that:

In any future review of Commonwealth and State cultural heritage legislation, the needs of Indigenous peoples should be considered in details and decision making processes need to be designed to operate on a consultative and culturally-sensitive manner. ⁵⁸

This is necessary because the Indigenous traditional owners of objects, Indigenous people who have cultural connections with objects, and the Indigenous descendants of creators of objects can provide important and relevant information on the significance of objects, whether they contain culturally sensitive material,⁵⁹ and whether they are culturally significant to the local Indigenous people associated with the object and the wider Australian community. This advice would be invaluable for the decision makers including the Minister, the National Cultural Heritage Advisory Committee, the expert examiners and the authorised officers.

⁵⁸ Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, Commonwealth of Australia, 2002, page 157.

⁵⁹ An example of culturally sensitive material is the 1972 painting by Long Jack Phillipus Tjakamarra 'Corroboree for Young Men'. It was not exported because it depicts sacred objects and secret practices. Between 2004 and 2005, 5 of the 111 applications were rejected. This was the only application for Aboriginal art works which was rejected. <http://eriss.erin.gov.au/about/publications/annual-report/04-05/legislation-heritage.html#review> accessed 7 May 2006.

Difficulties, such as those arising from the recent transfer to and from the United Kingdom, of objects originating from Dja Dja Wurrung country in Victoria may have been avoided with consultation prior to the import and export of the objects.

In 2004, Museum Victoria held an exhibition entitled *Etched on Bark 1854*. Some of the items in the exhibition were on loan from the British Museum and the Royal Botanic Gardens Kew. The objects were brought into Australia pursuant to section 12 of the *Protection of Movable Cultural Heritage Act 1986*. A certificate enables a person to import Australian protected objects for temporary purposes and subsequently to export those objects. The Dja Dja Wurrung Native Title Group obtained a declaration under provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to prevent the return to the UK of two bark etchings and a ceremonial emu figure which originated in Dja Dja Wurrung country. The objects had been brought into Australia and displayed subject to a contractual loan arrangement made with the British Museum and the Royal Botanic Gardens Kew. The matter was resolved in the Federal Court and the objects were returned to the United Kingdom.

Amendments are proposed to ensure that the provision of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will not apply where a section 12 certificate is in place. While this may be a useful amendment, consultation with the relevant Indigenous people prior to the importation of the objects would fulfil a number of important functions including:

- a courtesy which should be accorded to the cultural custodians of such objects
- recognition of their custodial role in relation to the objects
- an important part of best practice.

The Laws

Australia has a number of laws which regulate the import and export of cultural objects. The purpose of the laws is to keep Aboriginal and Torres Strait Islander cultural objects free from injury or desecration and to protect the national interest by keeping Australia's most important heritage objects within Australia.⁶⁰ At present there are two Commonwealth laws relating to dealings with Aboriginal and Torres Strait Islander cultural objects.

⁶⁰ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and the Protection of Movable Cultural Heritage Act 1986*.

The protection of culturally significant objects is required by state and territory legislation and the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The export of culturally significant objects is regulated by the *Protection of Movable Cultural Heritage Act 1986* which implements Australia's obligations under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Amendments are currently proposed which will affect the operation of both Acts in relation to Aboriginal and Torres Strait Islander objects.⁶¹

The *Aboriginal and Torres Strait Islander Heritage Protection Act* provides for the protection of significant Aboriginal objects⁶² under serious and immediate threat of injury or desecration⁶³. The Act provides that the Minister may make a declaration for the protection and preservation of the object or objects from injury or desecration. In the case of Aboriginal remains, the declaration may include delivery of the remains to the Minister, or to an Aboriginal or Aborigines entitled to, and willing to accept possession, custody or control of the remains in accordance with Aboriginal tradition.⁶⁴ The Act also provides for an authorised officer to make an emergency declaration in relation to objects considered to be under serious and immediate threat of injury or desecration. The declaration will contain provisions for and in relation to the protection and preservation of the area, object or objects from injury or desecration, including, in the case of Aboriginal remains, provisions for their custody.⁶⁵

⁶¹ *Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005*.

Amends the: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to: give certainty to international cultural loan arrangements by providing that a certificate of exemption issued under the *Protection of Movable Cultural Heritage Act 1986* allowing the return of loaned cultural heritage objects cannot be overridden by a declaration under the Act; repeal Part IIA and other Victoria-specific provisions to enable the Victorian Government to administer Aboriginal heritage protection in Victoria directly through its own legislation; and make technical amendments as a consequence of the commencement of the *Legislative Instruments Act 2003*; and *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* to make amendments consequential on the repeal of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=48&TABLE=OLDBLST

Accessed 8 May 2006.

⁶² Section 3 defines significant Aboriginal objects as an object (including Aboriginal remains) of particular significance to Aborigines in accordance with Aboriginal tradition.

⁶³ Section 3 (2) states: For the purposes of this Act, an area or object shall be taken to be injured or desecrated if: (b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;

Section 3 (3) states: For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

⁶⁴ Section 12 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

⁶⁵ Section 18 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The *Protection of Movable Cultural Heritage Act 1986* makes a number of provisions for regulation of the movement of Aboriginal and Torres Strait Islander cultural objects. The Act regulates the export of movable cultural heritage of objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons⁶⁶. The Act is administered by the Minister for the Environment and Heritage. The Act provides for a National Heritage Control List which includes a number of categories of objects⁶⁷. The List is then divided into 2 classes. Class A objects cannot be exported except in accordance with a certificate, and Class B objects may only be exported in accordance with a permit or certificate.⁶⁸

Class A objects include sacred and secret ritual objects, bark and log coffins used as traditional burial objects; human remains; rock art and dendroglyphs.⁶⁹ These objects cannot be exported from Australia.⁷⁰ The following are Class B items⁷¹ and can be exported from Australia if a permit or certificate is granted under the Act in relation to the object. These include:

- (a) objects relating to famous and important Aborigines or Torres Strait Islanders, or to other persons significant in Aboriginal or Torres Strait Islander history
- (b) objects made on missions or reserves
- (c) objects relating to the development of Aboriginal or Torres Strait Islander protest and self-help movements
- (d) original documents, photographs, drawings, sound recordings, film and video recordings and any similar records relating to objects included in this category.

Certain archaeological objects are also subject to the Act. These include:

⁶⁶ Section 7 (1) *Protection of Moveable Cultural Property Act 1986*.

⁶⁷ The list includes objects of Aboriginal and Torres Strait Islander Heritage which are of cultural significance to Aboriginal or Torres Strait Island people, or made by Aboriginal or Torres Strait Islander people, and was not made specifically for sale. Schedule 1, Part 1, 1.2 *Protection of Movable Cultural Heritage Regulations 1987*.

⁶⁸ Section 8 *Protection of Moveable Cultural Property Act 1986*.

⁶⁹ Section 1.3, *Protection of Movable Cultural Heritage Regulations 1987*. Dendroglyphs are carved trees, scar trees or bark carvings and engravings.

⁷⁰ For a Class A object that is not in Australia and that a person wishes to temporarily import, a certificate may be granted by the Minister authorising the subsequent export of the object. From, Note, *Protection of Movable Cultural Heritage Regulations 1987*, page 9.

⁷¹ To be included as a Category B item, the object must also be at least 30 years old; and not adequately represented in Aboriginal or Torres Strait Islander community collections, or public collections in Australia.

Indigenous and non-Indigenous objects which are of significance to Australia and was recovered after remaining for at least 50 years in the place from which it was removed, and is not represented in at least two public collections in Australia by an object of equivalent quality.

- (a) is of significance to Australia; and
- (b) is an indigenous or non-indigenous object that was recovered, as mentioned in paragraph 7 (1) (a) of the Act, after remaining for at least 50 years in the place from which it was removed; and
- (c) is not represented in at least 2 public collections in Australia by an object of equivalent quality.⁷²

Finally, objects of Aboriginal and Torres Strait Islander Fine or Decorative Art are also objects for the purpose of the Act. These include an object made in the Indigenous tradition by an Aboriginal or Torres Strait Islander person. Such objects, which are purchased for over \$10,000 and are more than 20 years old require a permit or certificate before they can be exported from Australia.⁷³

⁷² Schedule 1, Part 2 Archaeological Objects, *Protection of Movable Cultural Heritage Regulations 1987*.

⁷³ Schedule 1, Part 5 Objects of Fine or Decorative Art, *Protection of Movable Cultural Heritage Regulations 1987* and adapted from Doreen Mellor and Terri Janke, *Valuing Art, Respecting Culture, Protocols for working with the Australian Indigenous Visual Art and Craft Sector*, 2003.

8. Other Issues

Overview

Proper communication and education will contribute to positive outcomes for the Indigenous art sector. The development of protocol documents has been one major focus in this area. There is also a role for advocacy, codes of practices, education and awareness, legal and business support, international and national representation. The establishment of a National Indigenous Cultural Authority could play a leading role.

Codes of Practice

Codes of Practice are an essential part of best practice models for any industry. For the Indigenous arts industry, Codes of Practice provide important guidance for anyone participating in the market, from artists, agents, galleries, retailers and consumers. Some examples include:-

- the City of Melbourne has developed a Code of Practice for galleries and retailers selling Indigenous art in the Melbourne CBD
- the National Association for the Visual Arts is developing a National Indigenous Commercial Code of Conduct as well as Ethical Trade Strategies for the National Association for the Visual Arts
- Indigenous Art Trade Association has a code of ethics and code of practice. (See also ACGA for general commercial galleries code of ethics).

Educational material

The drafting of educational material to advise consumers, artists and users of ICIP about the issues is also important, and the government should provide funding and resources towards this. We note by way of good example the following projects:-

- the Consumer Guide pamphlet *Purchasing Australian Aboriginal Art: a consumer guide* provides information about art and artists, a checklist for consumers and referrals for further information. The Consumer Guide is a joint initiative between ANKAAA & the Arts NT Indigenous Arts Development Unit with other key stakeholders including Desart, ArtsMARK, Arts Law Centre of Australia and the Australian Copyright Council.

- national Indigenous Intellectual Property Toolkit. The Commonwealth is currently developing a National Indigenous Intellectual Property Toolkit for Indigenous artists, dealers and consumers. The Tool Kit will provide information and advice to these sectors in an accessible manner.

Protocols

Generally, protocols are appropriate procedures for interactions; they provide a basis for the way dealings occur within a particular situation, community, culture or industry.⁷⁴ Agreeing to comply with the accepted protocols of other cultural groups promotes interaction based on good faith and mutual respect, thus encouraging ethical conduct. Over time, protocols also set standards and inform the development of laws. They also serve as what is acceptable practice in terms of reasonableness issues for moral rights. They can also be made legally enforceable under contract. For example, arts and film funding could be made contingent on the protocols being followed.

Indigenous cultural protocols are about acknowledging and respecting Indigenous cultural beliefs and practices. In this regard, Indigenous protocols will differ from community to community. Protocols are the specific etiquette that should be adopted when interacting with another culture, and especially when using another's cultural material.

Protocols are also adaptable and can be aimed at providing guidance within an industry, geographic location or institution for managing Indigenous cultural and intellectual property.

A number of protocol documents have been produced in recent years to meet the needs of particular communities, organisations, industries and situations. In an effort to promote better understandings between Indigenous and non-Indigenous peoples within various sectors of arts, education and cultural affairs, Indigenous communities and relevant industries have been developing protocols to guide relationships between the users and the owners of Indigenous cultural material. Indigenous protocols have been developed for various sectors of our wider cultural industries that work with Indigenous communities. These documents are standard-setting protocol and ethical documents. They include:

⁷⁴ Terri Janke, *New Media cultures: Protocols for producing Indigenous Australian new media*, written for the Aboriginal and Torres Strait Islander Board of the Australia Council for the Arts, Commonwealth of Australia, Sydney, 2002, p. 2.

- Australian Film Commission, ‘Towards a Protocol for Filmmakers working with Indigenous content and Indigenous communities’⁷⁵ - protocol for the Australian film industry on respecting the Indigenous cultures, when using cultural material for film content.
- Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies*.
- Lester Bostock, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities*, SBS Corporation, Sydney, (2nd ed, 1997).
- Alex Byrne, Alana Garwood, Heather Moorcroft and Alan Barnes, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, endorsed by Aboriginal and Torres Strait Islander Library and Information Resources Network (1995).
- Darlene Johnson, *Indigenous Protocol*, written for Special Broadcasting Services (2003) – refers to documentary production.⁷⁶
- Australia Council protocols for various Indigenous artforms, written for the Aboriginal and Torres Strait Islander Board of the Australia Council’s Culture Series:
 - Terri Janke, *Visual Cultures: Protocols for Producing Indigenous Australian Visual Art and Craft*.
 - Terri Janke, *Writing Cultures: Protocols for Producing Indigenous Australian Literature*.
 - Terri Janke, *New Media Cultures: Protocols for Producing Indigenous Australian New Media*.
 - Robynne Quiggin, *Song Cultures: Protocols for Producing Indigenous Australian Music*.
 - Robynne Quiggin, *Performing Cultures: Protocols for Producing Indigenous Australian Performing Arts*.
- *Indigenous Arts Protocol: A Guide*, devised by Indigenous Arts Reference Group,⁷⁷ New South Wales Ministry for the Arts, 1998.

⁷⁵ Terri Janke for the Indigenous Unit of the Australian Film Commission, *Towards a protocols for Filmmakers working with Indigenous content and Indigenous communities*, Australian Film Commission, Sydney, 2003

⁷⁶ Available at <<http://www.sbs.com.au/sbsi/documentary.html>>.

⁷⁷NSW Ministry for the Arts, *Guidelines 2007, Cultural Grants 2007, Fellowships, Scholarships and Awards 2006-2007*, Sydney, pages 115–118

- *Valuing art, respecting culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector*, by Doreen Mellor, published by the National Association for the Visual Arts, 2001. This publication was written and researched by Doreen Mellor with a legal section by Terri Janke. It is the outcome of 2 years' research and consultation, and sets out protocols to both guide non-Indigenous people in their relationships with Indigenous artists and communities, and assist Indigenous artists to define their rights. It includes excellent discussion of the issues, guidance on protocols and legal information. It is especially useful for the visual arts and craft sector, museums, broadcast and print media, government agencies, educational institutions and the tourism sector.
- *Our culture: Our future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, written and researched by Terri Janke, Michael Frankel & Company Solicitors, for Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, Sydney, 1998.
- *Continuing cultures: Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage (February 2005) updates Previous Possessions, New Obligation (1994)*, a policy document produced by Museums Australia to provide a way for museums to approach Indigenous cultures.
- *Taking the Time – Museums and Galleries, Cultural Protocols and Communities, A Resource Guide*, Museums Australia Inc. (Qld), 1998.
- Michael Crayford et al. 2005, *Connections: Indigenous cultures and the Australian National Maritime Museum*, Australian National Maritime Museum, Sydney – specific ICIP issues for the ANMM Indigenous collection.
- *mina mir lo ilan man* – proper communication with Torres Strait Islander people, produced in conjunction with protocols for consultation and negotiation with Aboriginal people by the Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, Brisbane, 1998.

- *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities*, Lester Bostock, Special Broadcasting Services, 2nd edn, 1997.
- The Australian Society of Authors has produced two discussion papers relating to issues of Indigenous literature. Written by Indigenous Portfolio holder Dr Anita Heiss, the first set of protocols focuses on issues for non-Indigenous writers to consider when writing about Indigenous Australian society and culture. The paper outlines what Indigenous writers have said on the topic and how non-Indigenous writers have dealt with the issue. The paper includes a basic code of ethics checklist covering areas of representation, consultation and attribution. The second paper, *Australian Copyright vs. Indigenous Intellectual and Cultural Property Rights* explores the shortfalls in the Copyright Act's protection of Indigenous cultural interests.⁷⁸
- *The Respect, Acknowledge, Listen: Practical protocols for working with the Indigenous Community of Western Sydney* provides guidelines for arts and cultural projects with the Indigenous community in Sydney's west.⁷⁹ Written by then Indigenous arts adviser, Angelina Hurley, the protocols were one of the first in the arts sector to focus on a local community.

Advocacy and representation

Indigenous artists and creators also need legal advice and advocacy representation. Already the existing services are being well used:-

- Artists in the Black Service, Arts Law Centre of Australia. The Artists in the Black project provides free legal advice to Indigenous artists across the country. The service employs an Indigenous solicitor and liaison officer. They provide advice to Indigenous clients on issues including copyright, contracts, ICIP, taxation, business structures and other legal issues. In 2005 Artists in the Black provided advice to 114 clients as well as extensive education workshops across the nation and production of educational materials.

⁷⁸ Both papers can be downloaded from the Australian Society of Authors website at www.asauthors.org.

⁷⁹ Angelina Hurley, *Respect, Acknowledge, Listen*, Community Cultural Development NSW, Sydney, 2003.

- Viscopy is Australasia's visual arts copyright collecting agency, representing 250,000 premier Australian, New Zealand, and International visual artists. Viscopy represents many indigenous artists exclusively. Viscopy licenses the copyright in artistic works and pays the artist or copyright owner a royalty for the reproduction. Viscopy represents its artist members for the full range of rights, reproduction, publication and communication, thereby providing copyright users with authorised access to thousands of artistic works for commercial, non-commercial and educational purposes. Two Indigenous officers are employed with Viscopy. Viscopy reports that they have 5360 Australian artist members 40% of which are Indigenous artists.

Market opportunities

Indigenous artists, arts centres and creators need assistance with opportunities for their arts and cultural products. The government should support Market promotion such as Gallery Shop Front initiatives and the institution of 'warehousing' practice ie where a warehouse operation is set up drawing from art centers and other producers to supply shop fronts.

Legal and Business Support for Artists and the Arts Industry

One of the important components of arts projects is legal and business advice. Artists may have excellent creative skills, but often need support, guidance and advice on issues including:

- legal issues such as copyright, contracts and trademarks.
- business advice on business structures, taxation, employment and insurance.

Without access to this expertise and risk management artists are exposed to unethical conduct, mismanagement, legal liability, unnecessary errors and financial loss.

One way of dealing with this is to make legal and business advice an essential component of grants and to increase grant funding to cover these costs.

Another important way of providing these services is to continue funding programs such as:

- Artists in the Black, the free legal service provided to Indigenous artists by the Arts Law Centre of Australia; and

- business support services provided by Indigenous Business Australia which include provision of legal advice in business set up funding arrangements.

Indigenous Representation at International Standard Setting Forums

International organisations such as the World Intellectual Property Organisation (WIPO) and UNESCO conduct meetings to progress drafting of policy objectives and core principles for the protection of traditional knowledge and cultural expression. Indigenous Australians have an important role to play in the development of these standards.

The participation of Indigenous delegations to these meetings should be supported. This requires support for:

1. consultation meetings to provide delegations with an opportunity to gather information on the diverse and common experiences and needs of Indigenous artists and traditional knowledge holders from around the country.
2. legal advisors to inform the delegates of the legal implications of proposals.
3. support for delegates to report back to Indigenous Australians and government on the meeting and proposals.

It is particularly relevant that there be Indigenous representation at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, currently held biannually. There is a lack of Indigenous representation since the closure of the Aboriginal and Torres Strait Islander Commission, and a strategy to ensure that Indigenous concerns are represented here, is recommended, particularly as the guidelines are developed.

Indigenous Advisory Committee (IAC) for the Australian Government

As different arts and ICIP issues continue to develop and emerge, the Australian government would benefit from strengthening links with the Aboriginal and Torres Strait Islander Arts Board, and the establishment of an Indigenous Advisory Committee which could consider domestic legal and policy issues, as well as contributing to international consultation processes. An Indigenous Advisory Committee could have provided advice on issues such as the ICMR Bill, national and local arts strategies, consumer issues,

evidence of the exploitation of artists and protocols inter alia. Membership of such an IAC could include, the Chair of the Aboriginal and Torres Strait Islander Arts Board, the directors of major Indigenous arts centres, ACCC, legal experts, arts practitioners, and others.

An alternative structure is to reconvene the Interdepartmental Committee (IDC) to develop and implement strategies for ICIP protection (to be chaired by the Australia Council) and appoint an Indigenous Reference Group (IRG) to advise the Australia Council. Membership of the IRG would represent similar interests to the proposed IAC.

National Indigenous Cultural Authority

A National Indigenous Cultural Authority was proposed by Terri Janke in *Our culture our future*. This suggestion has been endorsed by a number of other commentators in the sector.

Our culture our future noted that a National Indigenous Cultural Authority could provide the following functions:

- authorise uses of indigenous cultural material
- provide general information on deals
- act as a watchdog over inappropriate and unauthorised use of indigenous cultural material
- undertake public education and awareness strategies
- supply information on the existing legal system
- provide cultural information.⁸⁰

Research

The Indigenous arts industry makes a substantial contribution to the Australian economy, and an even greater contribution to the Indigenous economy. The impact on health and wellbeing of Indigenous Australians from engagement in the economy, strong identities through respect for culture, and strong communities through employment and empowerment is enormous. To maximise the opportunity provided by Indigenous arts to foster engagement in a cultural based economy, high quality research should be conducted to ensure accurate planning and development. This research could be

⁸⁰ Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property rights*, p 227.

undertaken by Indigenous academics through ARC partnership research grants or research conducted by the Australian Bureau of Statistics.

Research topics might include:

- an economic analysis and estimate of the value of the Indigenous arts industry to the overall Australian economy: future directions
- an economic analysis and estimate of the value of the Indigenous arts industry to Indigenous peoples' participation in the Australian economy: future directions
- an independent analysis of the opportunities and problems arising from commercialisation of culture
- an economic analysis of the value of Indigenous cultural heritage to broader Australian industries
- analysis of the links between a successful Indigenous arts centre, health and well being
- a gender analysis of the Indigenous arts industry
- an analysis of the potential for Indigenous arts to impact on the well being of Indigenous youth: the music industry.

National Arts Inquiry

It is clear from this cursory list of research issues, that there is a need for an inquiry to inform government, take submissions from Indigenous industry and community groups, ask questions and develop strategies to address substantive issues.

We support the submission by Desart to convene an inquiry with the terms of reference drafted by Desart.

9. Conclusion

This Issues paper is a starting point for general information to government on how it might conduct its future work on ICIP issues. The Government (working in partnership with Indigenous artists and representative agencies) has the opportunity to make a lasting contribution to the recognition and protection of ICIP by:

- placing artists on solid foundations with the skills and tools they need to thrive
- further developing and enhancing an internationally acclaimed and unique industry
- rallying and educating consumers to buy wisely
- championing the lead operators to trade ethically
- challenging rogue operators to meet the standards and expectations of the law and industry.

We have aimed to put forward a comprehensive approach which draws from a range of options including:-

- legislation
- use of current laws through test cases and access to law
- protocols
- codes of practice, promotion of best practice
- trade practices
- trade marks (including certification marks)
- education and awareness raising
- advocacy
- research, and
- ongoing consultation.

10. Bibliography

Access Economics, *The Impact of an Australian Resale Royalty on Eligible Australian Artists*, Report for Viscopy, 2004.

Altman, Jon, "The Economics of the Indigenous Visual Arts Industry: Issues and Prospects for the Next Decade" Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Paper presented to the 1999 National Visual Arts and Crafts Conference, Cairns, 1-3 November 1999.

J C Altman, 'Developing an Indigenous Arts Strategy for the Northern Territory: Issues paper for consultations', Centre for Aboriginal Economic Policy Research, 2003, Canberra, p. 9 J C Altman, 'Developing an Indigenous Arts Strategy for the Northern Territory: Issues paper for consultations', Centre for Aboriginal Economic Policy Research, Canberra, 2003.

Anderson, Jane, 'Indigenous Communal Moral Rights, The Utility of an Ineffective Law', *Indigenous Law Bulletin (ILB)*, February 2004, Vol 5, Issue 30, pp 8 – 10.

Anderson, Jane 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' *UNSW Law Journal* 27(3)2004: 585-605.

Arts Law Centre of Australia, "Droit De Suite", Briefing Paper, 31 August 2001.

Australian Copyright Council, 1989, *Droit de suite: The Art Resale Royalty and its Implications for Australia*, report commissioned by the Australia Council and the Department of the Arts, Sport, the Environment, Tourism and Territories, Canberra.

Australian Copyright Council, *Response to Discussion Paper on Proposed Resale Royalty Arrangement*, 2004,
<http://www.copyright.org.au/policy-research/policy/submissions.htm> accessed 7

Berger, Dr F B, "Should Visual Artists have a right to a Resale Royalty?" published at www.weblaw.ch/jusletter/Artikel.jsp

"Background on the droit de suite", *Analysphere*, 18 June 01,
www.analysphere.com/18Jun01/droitenote.htm

Bostock, Lester, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities*, SBS Corporation, Sydney, (2nd ed, 1997).

Department of Communications, Information Technology and the Arts, Intellectual Property Branch, and Attorney-Generals' Department, Copyright Law Branch, "Indigenous Communal Rights Paper", December 2003.

Department of Communications, Information Technology and the Arts, *An Australian droit de suite*, Prepared for the Intellectual Property Branch by the Communications Research Unit, Canberra, January 2001.

Department of Communications, Information Technology and the Arts, *Discussion Paper, Proposed Resale Royalty Arrangement*, Commonwealth Department of Communications, Information Technology and the Arts, 2004.

European Union, European Parliament, The Council, Brussels, 6 June 2001, 1996/0085 (COD), Joint text approved by the Conciliation Committee provided for in Article 251(4) of the EC Treaty.

Film Australia, Memorandum of Understanding relating to the use of ethnographic footage taken by Ian Dunlop. (Unpublished), 1998 as cited in Terri Janke, *Our Culture: Our Future*, page 249-250.

Johnson, Darlene, 'Indigenous Protocol', written for Special Broadcasting Services, <<http://www.sbs.com.au/sbsi/documentary.html>>, accessed 5 December 2005.

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, World Intellectual Property Organisation, Eighth Session papers, Geneva 6 – 8 June 2005, 'The protection of traditional cultural expressions/expressions of folklore – revised objectives and principles', (WIPO/GRTKF/IC/8/4), WIPO, Geneva, 2005.

Janke, Terri, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property rights*, Michael Frankel & Company, written and published under commission by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney 1999.

Janke, Terri, Quiggin, Robynne and Hurley, Angelina, *Getting from Principle to Practice, An Australian Dialogue on Resale Royalty Rights*, Terri Janke and Company Pty Ltd, Sydney, 2001, written for the Australia Council.

Janke, Terri. *Looking out for Culture*, forthcoming publication.

Janke, Terri, 'The moral of the story: Indigenous communal moral rights', *Bulletin*, Arts Law Centre of Queensland, #3/05, ISSN #1440-477pp 1,2, 7 & 8.

Janke Terri, Indigenous Unit of the Australian Film Commission, *Towards a protocols for Filmmakers working with Indigenous content and Indigenous communities*, Australian Film Commission, Sydney, 2003.

- Janke, Terri, *Minding Culture, Case Studies on Intellectual Property and traditional Cultural Expression*, World Intellectual Property Organisation, Geneva, 2003.
- Janke, Terri and Quiggin, Robynne, 'Indigenous cultural and intellectual property and customary law', written for the Law Reform Commission of WA, *Aboriginal customary laws - background papers*, January 2006.
- Johnson, Tania, "When is a Forgery, Not a Forgery" *Journal of Indigenous Policy*, Vol 6, 2006 (forthcoming).
- Johnson, Vivien, *House of Aboriginality and Copyright Catalogue*, NIAAA and Macquarie University.
- McDonald, Ian, Article for Australian Intellectual Property Law Bulletin, 'Indigenous Communal Moral rights', Australian Copyright Council 2003.
- Maslin, Geoff, "Sold: Indigenous painting doubles own record", *Sydney Morning Herald*, 22 June 2000.
- Maslin, Geoff, "It's boom time in the Dreamtime", *Sydney Morning Herald*, 28 June 2000, page 17.
- Mellor, Doreen and Janke, Terri, *Valuing Art, Respecting Culture, Protocols for working with the Australian Indigenous Visual Art and Craft Sector*, 2003.
- Mundine, Djon, "Salt on Mina Mina", *Art Monthly* Nov 2001, No 145, pp 10 – 12.
- Munro, Catharine, "Meantime the artist is surprised", *Sydney Morning Herald*, 28 June 2000, page 17.
- Myer, Rupert, *Report of the Contemporary Visual Arts and Craft Inquiry*, Commonwealth of Australia, 2002.
- National Indigenous Consumer Action Plan Implementation Group, *Taking Action, Gaining Trust, A National Indigenous Consumer Action Plan 2005 – 2010*, Ministerial Council on Consumer Affairs, Department of Consumer and Employment Protection, Perth, 2005, p.16.
- Perlmutter, Shira, "Resale Royalties for Artists: An Analysis of the Register of Copyright's Report", *Columbia – VLA Journal of Law and the Arts*, Vol 16, 395-425.
- Puri, Dr Kamal, and Peteru, Clark *Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture* (2002) - drafted by the authors for the South Pacific Community in New Caledonia and debated and revised by Legal Experts attending Workshops held from 2000 - 2002.

Quiggin, Robynne, 'The Resale Royalty', Part One, *Indigenous Law Bulletin (ILB)*, [2004] Vol 6, Issue 5, pages 4 – 6.

Quiggin, Robynne, 'The Resale Royalty', Part Two, *Indigenous Law Bulletin (ILB)*, [2004] Vol 6, Issue 6, pages 7 – 10.

Quiggin, Robynne, 'The Contribution of Protocols and Moral Rights', paper delivered at Snapshot 2 (AMAG), Melbourne 5 August 2004.

Radde, Silke, "Droit de suite: The artist's right to a resale royalty and the implications for New Zealand," *New Zealand Intellectual Property Journal*, May 2001, pp 354 – 364.

Ricketson, Staniforth, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, Law Book Company, Sydney.

SBS Corporation, *Codes of Practice*, Cl. 2.1.2 refers to Indigenous Australians, <<http://www20.sbs.com.au/sbscorporate/index.php?id=1061>>, accessed 18 October 2005.

Simpson, Shane, *The Visual Artist and the Law*, 2nd Edition, The Law Book Company Limited, Sydney 1989.

Standford, J D, "Economic Analysis of the Droit de Suite – The Artist's Resale Royalty", School of Economics, University of Queensland, St Lucia Campus.

United Nations, Economic and Social Council, Sub-Commission on the Promotion of Human Rights, Working Group on Indigenous Populations, Nineteenth session, 23 – 27 2001, (E/CN.4/Sub.2/AC.4/2001/3), p. 5.

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Terri Janke is of Aboriginal and Torres Strait Islander descent. She has over 10 years practice as a solicitor, and has held an unrestricted practicing certificate since 2000. Her law firm Terri Janke and Company Pty Ltd is based in Sydney and specialises in Indigenous arts. Terri is the author of *Our culture: our future: Report on Australian Indigenous Cultural and Intellectual Property rights* (1999) and *Minding cultures* (2003) – eight case studies on Indigenous Australians use of intellectual property laws to protect their cultural expression, commissioned by the World Intellectual Property Organisation. Terri is also a writer of fiction and her first novel *Butterfly Song* was published by Penguin (2005).

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