



Committee Secretary
House of Representatives Standing Committee on Indigenous Affairs
Parliament House
Canberra ACT 2600

11 May 2018

Dear Committee Secretary,

Further Submission arising out of other submissions and evidence to the House of Representatives Standing Committee on Indigenous Affairs Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia.

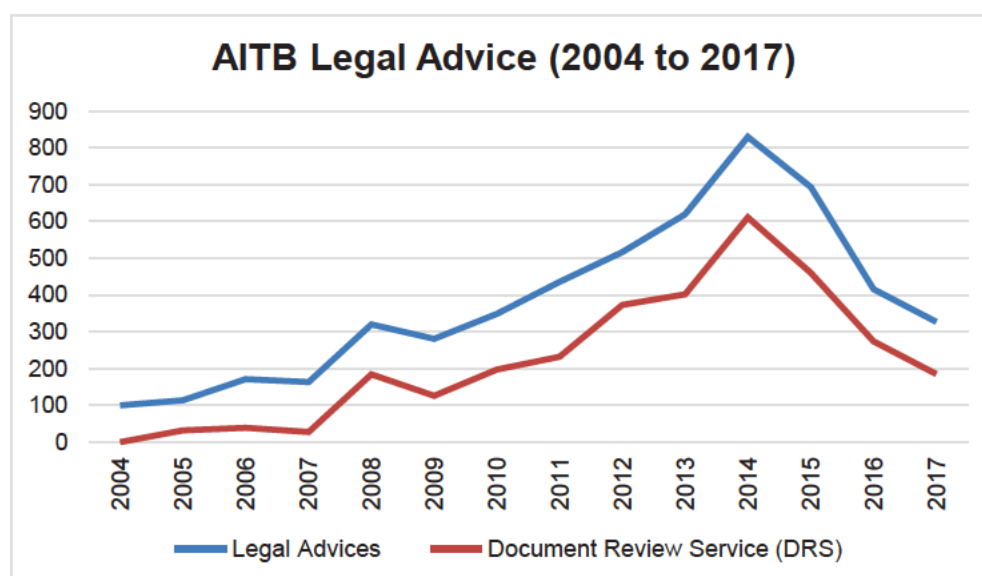
Artists in the Black (AITB) service for Aboriginal and Torres Strait Islander artists and arts organisations.

There are numerous submissions as well as evidence before the inquiry that raised concerns about the lack of legal services available for Aboriginal and Torres Strait Islander artists. As noted in our previous submission, the Arts Law Centre of Australia (Arts Law) has a dedicated service for Aboriginal and Torres Strait Islander artists, Artists in the Black (AITB), which was established in 2004, to provide targeted legal services for Aboriginal and Torres Strait Islander artists and arts organisations across Australia. The AITB service has always had at least one dedicated Aboriginal or Torres Strait Islander staff member and is supported across the Arts Law team.

Over the lifetime of the AITB program, Arts Law has assisted Aboriginal and Torres Strait Islander artists with their legal queries more than three thousand times. The graph below sets out both the number of legal advices as well as the number Document Review Services provided to both Aboriginal and Torres Strait Islander artists and their organisations from 2004 to 2017. The graph shows that over the years there was significant growth in service delivery responding to the demand in the Indigenous arts community. In 2014 this demand was acknowledged by the Australia Council through its Unfunded Excellence Funding which provided a level of additional support to Arts Law for various projects including AITB. This support is reflected in the 2014 AITB service delivery levels and outreach.

One of the hallmarks of the success of AITB has been the ability to provide outreach services with the map below showing the breadth of outreach in the period 2010-2016. Many of the artists and communities we visit are remote from the city centres and have English as a 3rd or 4th language. Significant resources are needed to continue this work as it is both time-consuming and costly.

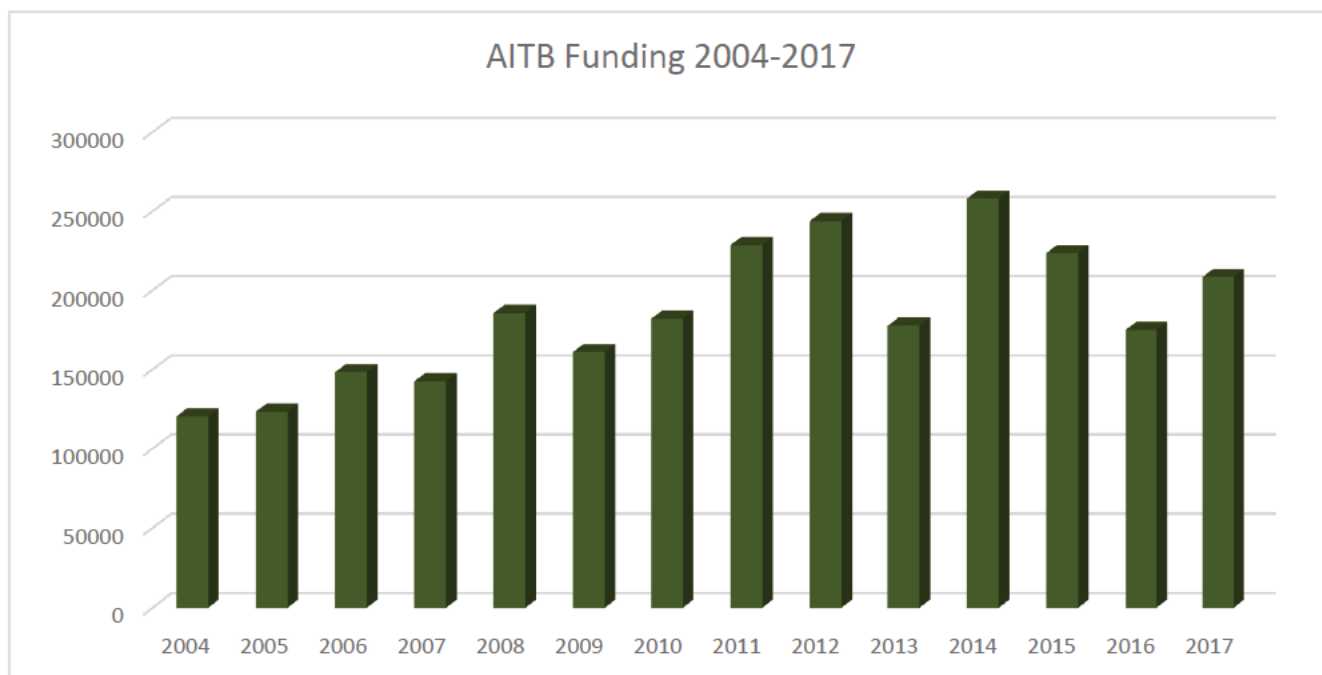
It is also clear from the graph below that the significant reduction in funding to Arts Law in 2015, primarily as a flow on from the cuts to Australia Council funding, contributed to a marked reduction on AITB service delivery levels from 2015 due to loss of Arts Law legal staff and the level of AITB work we can do.



Map of Artists in the Black Outreach 2010-2016



The graph below shows the amount of AITB funding support since its establishment through Australia Council strategic funding in 2004. Continuity of Government funding for AITB has been problematic with funding being inexplicably cut on several occasions. The service is now funded federally by both Department of Communications and the Arts and the Attorney General's Department as well as relatively small allocations as part of Arts Law's core funding from States and Territories. Because of Australia Council funding cuts in 2015 and the lack of growth in other Government support, in 2016 AITB had reached a point of being cross-subsidized by Arts Law by approximately \$250,000 per year.



In 2017 Arts Law made the very difficult decision to realign the resources dedicated to AITB in line with the funding received to deliver the service. Prior to this, because of the pressures on the service, from 2015 Arts Law drastically reduced the amount of casework we took on for AITB clients whereby we provided full representation in partnership with a law firm assisting pro bono. In 2017 Arts Law was no longer able to take any new casework clients and currently our practice is to refer AITB clients with matters requiring further representation, to pro bono law firms. In the last 12 months Arts Law has made 41 pro bono referrals.

Another way Arts Law has endeavoured to extend the support we can provide to the Indigenous arts community is through our Adopt A Lawyer program whereby we match an Aboriginal Art Centre with a law firm or corporate legal practice. The aim of this program is for the art centre to go directly to the law firm for pro bono legal services, thereby extending our capacity to provide high quality legal support. To date we have established 7 such relationships. However, there is still significant work involved in establishing and ensuring these relationships function effectively.

Whilst Arts Law actively seeks non-Government financial and pro bono support to supplement Government support for AITB, additional resources are needed to increase the support we can provide to Aboriginal and

Torres Strait Islander artists, especially to provide outreach services and higher levels of representation to assist artists to progress matters beyond the legal advice, the Document Review Service and reliance upon pro bono referrals.

Advocacy on the broader issue of need for better protection of Indigenous Cultural and Intellectual Property

The House of Representatives Committee asked Arts Law to provide further information about previous submissions we have made on the need for better respect for, and protection of Indigenous Cultural Intellectual Property (ICIP). Arts Law has actively advocated on ICIP issues both nationally and internationally for many years. This advocacy work has been in direct response to the issues and frustrations raised by the Aboriginal and Torres Strait Islander artists and communities we work with. Attached are the submissions or presentations we have made to the Australian Government, including inquiries and to the World Intellectual Property Organisation (WIPO) since 2007:

- 1. Submission to Inquiry into Indigenous visual arts and craft sector, 27 November 2006**
- 2. Letter to the Attorney General, 10 November 2009**
- 3. Letter to the Minister for the Environment, Heritage and the Arts, 10 November 2009**
- 4. Submission on discussion paper on Indigenous cultural heritage law reform, 16 December 2009**
- 5. Submission to IP Australia (Indigenous knowledge), 14 June 2012**
- 6. Submission on Reforming ACH in NSW, 28 March 2014**
- 7. Submission to UNHR Special Rapporteur, 15 September 2014**
- 8. Review of Native Title Act, 27 February 2015**
- 9. Submission to IP arrangements (Productivity Commission), 27 June 2016**
- 10. Submission on NSW Proposed Cultural Heritage Bill, 20 April 2018**

Also attached is *The Protection of Traditional Cultural Expressions: Draft Articles* of the WIPO Intergovernmental Committee on Intellectual and Genetic Resources, Traditional Knowledge and Folklore, 15 June 2017.

Yours sincerely

Robyn Ayres
Chief Executive Officer



ARTS LAW CENTRE OF AUSTRALIA

ACN 002 706 256 / ABN 71 002 706 256

27 November 2006

Dr Ian Holland
Secretary
Environment Communications Information Technology and the Arts Committee

By Email:

Dear Dr Holland

Re: Inquiry into Australia's Indigenous visual arts and craft sector

Thank you for the opportunity to make this submission on behalf of the Arts Law Centre of Australia.

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts. Arts Law is a not for profit company limited by guarantee.

Arts Law provides expert legal advice, publications, education and advocacy services each year to more than 5000 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Arts Law recognises the diversity in the arts community and our client base is multi-cultural, and both Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Arts Law also supports artists from across all art sectors, although we acknowledge that the visual arts and crafts comprise the largest group of artists utilising our services (35% of all legal advices).

The comments that we make in this submission are informed by the services we provide to our Indigenous client group. Whilst Arts Law has provided services to Indigenous artists and organisations throughout our 23 years, in January 2003, Arts Law established a service called *Artists in the Black* (**AITB**) specifically for Indigenous artists, their organisations and communities. AITB aims to provide access to legal and business advice, information,

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resources and education relevant to Indigenous arts practices across all art forms. The service employs 2 Indigenous staff, an Indigenous solicitor and an information/liason officer

About our approach to issues affecting artists and other creators

As an independent organisation giving legal advice to the arts community nationally, Arts Law is in a unique position to comment on the balance between competing interest groups when considering the Indigenous arts and craft sector. Arts Law not only provides advice to Indigenous artists, but also to Indigenous art centres, galleries, curators and other organisations working with Indigenous artists.

Arts Law not only provides legal advice but also has an extensive education program to educate artists and arts workers about legal rights and obligations of the arts sector.

In view of the wide exposure that Arts Law has had to the Indigenous arts and craft sectors, a primary concern continues to be the extent to which Indigenous artists continue to be exploited despite the huge growth of, and economic returns in the Indigenous art market.

Executive Summary

- There is a diverse array of Indigenous practice in Australia, encompassing artists in remote and regional locations as well as artists living in urban and regional centres. A “one size fits all approach” is likely to be inappropriate.
- The Indigenous arts and crafts sector cannot exist without Indigenous communities, art centres and artists and Indigenous arts and crafts is inherently linked to Indigenous culture. Current issues including changes to the permit system for entry onto Indigenous lands, the introduction of a 99 year lease between Indigenous land owners and the Commonwealth government, the Community Development and Employment Projects (CDEP) system and the inadequate legal protection currently afforded to ICIP are likely to negatively impact Indigenous culture.
- Art Centres play an integral role in developing the artistic practices of Indigenous artists, maximising financial returns and ensuring Indigenous culture is maintained and protected.
- The sustainability and development of the Indigenous art and crafts sector is only possible with the reduction of current exploitative practices. Indigenous artists are often faced with an unequal bargaining position when entering into contracts for the sale, distribution and licensing of their work. Accordingly, a regulatory framework is needed to minimise unconscionable practices.
- The lack of regulation of participants in the Indigenous arts industry and lack of recognisable authenticity protection mechanisms impacts negatively on the financial viability of the Indigenous art and crafts sector.
- A system of labelling Indigenous art and crafts should be explored in consultation with Indigenous communities.
- Mandatory licensing regulation together with an industry code of practice would protect artists and consumers and is vital to the continued success of the Indigenous art and crafts sector.
- Financial success and sustainability is more likely when Indigenous artists and communities are fully aware of their rights and are able to negotiate the terms of purchase and use of their work. Increased access to legal, financial and management education and advice services is critical to informing artists.
- Indigenous arts organisations, services and programs need additional resources to successfully contribute to the sustainability of the sector.

- Greater use should be made of laws against misleading and deceptive conduct. An increase in the involvement of the ACCC and other law enforcement agencies in policing this conduct would encourage ethical conduct in the Indigenous art sector.
- The introduction of legislation dealing with resale royalties, Indigenous Communal Moral Rights (ICMR) and Indigenous Culture and Intellectual Property, as well as Australia becoming a signatory to a number of international treaties will also strengthen the legal protection afforded to Indigenous artists.

(a) The current size and scale of Australia's Indigenous visual art and craft sector

Arts Law notes that insufficient research exists on the size and scale of the Indigenous art and craft sector. Of the economic data available, in 2002 the annual total value of the industry was broadly estimated to be between \$100 and \$300 million.¹

However, there are indicators that the sector is growing rapidly. The Department of Communications, Information Technology and the Arts' (DCITA's) recent publication, the *Indigenous Visual Arts and Craft Resource Directory 2006* lists 116 Indigenous art centres and 104 commercial galleries and auction houses dealing with Indigenous art. The 2006 edition of *McCulloch's Encyclopaedia of Australian* has increased its entry on the Indigenous art sector to 200 pages, up from eight pages in 1994.

Furthermore, Arts Law's Artists in the Black service provides legal advice and education to Indigenous artists and communities throughout Australia and Arts Law staff have visited every State and Territory in Australia to meet with Indigenous artists and organisations. In the three years AITB has been operating, Arts Law staff have had contact with more than 2500 Indigenous people through our educational workshops and legal advice services.

Over the 28 months of provision of educational services, Arts Law has provided more than:

- 60 workshops for Indigenous artists;
- in 40 different geographical locations around the nation; with
- 2,200 Indigenous participants.

While Arts Law is not able to quantify the size and scale of the Indigenous art and craft sector we have a very good appreciation of the issues which arise in sector.

The AITB legal advice service provides:

- telephone legal advice using our in-house Indigenous solicitor and other Arts Law lawyers (more than 300 legal advices to date);
- extended advice sessions (which are often conducted as face to face sessions) with the assistance of volunteer lawyers around Australia (200 lawyers on Arts Law's national volunteer panel); and
- casework assistance in more than 25 substantial matters.

The demand for AITB services continues to grow as more Indigenous artists and communities become aware of the services available to them. In 2006, Arts Law has 308 Indigenous subscribers, an increase of 91% on 2005 (161).

(b) The economic, social and cultural benefits of the sector

¹ Altman et al, *Some Competition and Consumer Issues in the Indigenous Visual Arts Industry*, 2002, p 3.

Arts Law acknowledges the social, cultural and economic benefits which flow from a healthy Indigenous arts industry to its many participants. The 2002 *Report of the Contemporary Visual Arts and Craft Inquiry (Myer Report)* notes that the arts play a significant role in Indigenous communities and that: “[t]he rewards of promoting and supporting traditional cultures are out of all proportion with the resources necessary to do so”.² This is an observation which Arts Law strongly agrees with.

The Indigenous arts and crafts sector is a cornerstone of Australia’s cultural identity at both a domestic and international level. The range of benefits flowing to the community include the financial gains enjoyed by stakeholders in the art markets, as well as the sense of national identity provided to the Australian community more broadly as they enjoy the fruits of Indigenous arts.

At the “fine art” end of the spectrum, Australian Indigenous visual arts collections form the centrepieces in both international and national art galleries with two prime examples being the National Gallery of Australia, Canberra and the newly opened Musee du Quai Branly in Paris. The Indigenous arts are also used as powerful symbols in our Government buildings and courts to demonstrate the inclusion and appreciation of Indigenous culture by Australia’s decision-makers, with two high profile examples being the mosaic by Aboriginal artist Michael Nelson Tjakamarra in the forecourt of Parliament House, Canberra and a display of Indigenous art in the foyer of the Supreme Court of the Northern Territory.

Auction houses and arts dealers are developing their Indigenous arts businesses in view of robust economic returns. Examples include Sotheby’s Indigenous art auctions held in London, Paris and Melbourne, Lawson Menzies regular auctions of Aboriginal Fine Art, and the annual Aboriginal and Oceanic Art Fair. In July 2006, a Rover Thomas painting was sold for A\$660,000.

The Indigenous arts and craft sector is also used to showcase Australia in relation to national and international events. For example, in 2000 the opening ceremony for the Sydney Olympic Games focussed on Indigenous themes and many international tourists left with mementos of quintessential Australiana, taking with them souvenirs of Indigenous Australia. However the tourism industry is not limited to the souvenir market. There is also a rapidly growing Indigenous tourism market with Australian and international visitors wanting to have a greater appreciation and understanding of Indigenous culture and the arts.

Indigenous arts, crafts and culture feed these varying aspects of the market and none of it would be possible without the Indigenous communities, the art centres and their artists.

Indigenous Art Centres

To a large extent the Indigenous visual arts sector has been built on the backbone of the Indigenous art centres which provide crucial support and development for Indigenous artists. Indigenous art centres often play a key role in bringing economic returns to Indigenous artists and their communities through:

- the development of artists’ skills;
- promotion of the work of artists and the art centres to the market;
- connecting artists with the market; and
- the development of databases to assist with protection and provenance of the work.

The DCITA Resource Directory provides a fairly comprehensive guide to 116 Indigenous art centres that are currently operating.

² Rupert Myer, Report of the Contemporary Visual Arts and Craft Inquiry (*Myer report*), p52.

Arts Law points to the success of many arts centres which act as a focal point for the community. Not only do the art centres provide employment and bring economic benefits to the community from the sale of Indigenous art works, but they also play an important role in:

- providing support for Indigenous culture;
- keeping culture alive and protecting culture; and
- providing an opportunity for skills and knowledge to be passed from senior artists to younger artists.

The art centres also provide a forum for community participation and decision making in an enterprise where the benefits are returned to the community. A good example of this is at Arleheyarengge Art Centre, Ali Curung, west of Alice Springs in which sales are returned to the community. With these funds, the centre provides the following services:

- Women's Art and Craft Centre;
- Safe House (provides refuge for women);
- Home Makers Centre (provides meals on wheels);
- Respite Centre (provides services to the elderly);
- Community Housing Program;
- Sports and Recreation Program; and
- Parks and gardens.³

Another example is Nyinkka Nyunyu art and culture centre which was established by the Julalikari Council Aboriginal Corporation in 1995. It is a community project and was made possible by the collaboration of local elders. The centre was established under the following terms:

- it must be an alcohol-free area;
- the development must recognise that this is Warumungu land;
- the centre should tell the history of the Warumungu people from an Aboriginal perspective;
- to create a place where young people can learn from old people as well as learn dance and traditional skills; and
- for young people should be involved in this project and learn how to manage this place one day.⁴

Artists in urban and regional centres

The Indigenous arts and craft sector is not only comprised of the artists and art centres in the regional and remote locations of the Northern Territory, South Australia and Western Australia. There are also Indigenous arts and craft industries, established and developing, in urban and regional centres. These artists and support organisations play an important role in bringing greater recognition of the diversity of Indigenous cultures in Australia. In Sydney, the Indigenous artists cooperative, Boomalli, has been operating for almost 20 years and supports urban and rural artists from NSW. There are also a growing number of independent Indigenous artists achieving artistic and financial success, and although their work is not from a "traditional" genre, their connection to Indigenous culture is still integral to their work.

Prisons

The prison system is an important area where the benefits of participation in Indigenous arts and crafts should not be overlooked. Art programs in prisons and detention centres often

³ Arleheyarengge Art Centre, <http://www.alicurungarts.com/>

⁴ Nyinkka Nyunyu art and cultural centre, *About us*, <http://www.nyinkkanyunyu.com.au/history.htm>

provide an avenue for Indigenous prisoners to achieve a better appreciation of their own culture through the arts and to develop a means of employment when they leave the prison system.

Arts Law's service

Arts Law's AITB service provides legal and business advice to artists and arts organisations across this diverse array of Indigenous artistic practice. Arts Law recognises the significant benefits that can be achieved particularly, when work is brought to market using responsible and sustainable practices.

(c) The overall financial, cultural and artistic sustainability of the sector.

As discussed above, the market for Indigenous arts and crafts is strong but in order to be financially sustainable it needs to be built on sound and responsible practices in which artists are properly rewarded for their contribution to the industry.

Challenges to the sustainability of the sector

The lack of regulation of dealers of Indigenous arts and crafts, together with the exploitative practices in some places, threatens the financial viability of the Indigenous art sector. In addition, lack of recognisable authenticity protection mechanisms will have a further impact on the financial sustainability of the Indigenous visual arts sector. For example, when senior artists are brought from remote communities into town by unscrupulous dealers, and housed in "sweat shop" conditions in order to quickly produce works with the assistance of family or other Indigenous artists, they are away from their homes, country and the cultural reasons for creating art. As a consequence, the work may be of poor quality, as the aim is only to maximise financial returns as quickly as possible. This practice not only creates authenticity problems but will lead to a devaluation of Indigenous art and the reputation of the artists involved.

Ensuring artists are appropriately remunerated

There is an argument that Indigenous artists should be free to exchange their artwork for whatever returns they are able to obtain within a free market framework. However, this has led to instances of gross underpayment, the exchange of paintings for food and other items, unfair contracts and unduly large commissions being taken by galleries and dealers. Often Indigenous artists are extremely disadvantaged in the transaction process as a result of limited English language and business skills coupled with unscrupulous operators. These scenarios generally occur outside the Indigenous art centre situation. Arts Law is regularly asked to advise artists who have not been appropriately paid by the people to whom they have provided work. Examples include:

- a dealer providing an artist with canvases and paints and the artist never being paid for the final work;
- artists signing contracts with unfavourable conditions where the artist has minimal English language skills;
- artists exchanging paintings for food in order to feed themselves and their family;
- artists exchanging paintings for alcohol and drugs, including Viagra; and
- artists being pressured to sign blank canvases.

Regulation of authenticity

Another major issue affecting the financial viability of the industry is the lack of regulation as to the authenticity of Indigenous art works. In order for the market to be financially stable, buyers or “consumers” of Indigenous art need some guarantee that the work purchased is that which it is promoted as being. The lack of certainty about the authenticity of Indigenous art works clearly has an impact on the value of work in the market.

Arts Law regularly provides advice on issues of authenticity. Ongoing issues in relation to authenticity include situations in which:

- work is represented as being made by Indigenous artists but in fact is made by backpackers or has been imported from overseas;
- work is sold as “Indigenous-style” art but is imported from overseas;
- galleries displaying counterfeit authenticity certificates with the appearance of Government endorsement including the Australian coat of arms;
- Indigenous artists are required to hold up art works they have not produced for authenticity certificates; and
- counterfeit artworks are sold bearing a well-known artist’s name which they haven’t produced.

Significantly, research by criminologist Ken Polk, found no examples of fraud or authenticity problems in works that had been generated through the community art centres.⁵ Despite the demise of the label of authenticity trademark in the 1990s, this issue needs to be re-examined. It may be that a range of options dealing with authenticity are required given the regional differences.

Development of a sector which yields financial benefits to stakeholders while respecting and protecting Indigenous culture

Indigenous arts and crafts are inherent to Indigenous cultural practice. Conversely, without Indigenous culture, communities and artists the Indigenous arts and craft sector would not exist. The challenge is to develop the Indigenous art and crafts sector in a way which yields significant financial benefits to Indigenous and non-Indigenous stakeholders while respecting and protecting Indigenous culture.

This challenge relies on the operation of two very different cultural paradigms and there is a need for strong connecting bridges to be built to ensure the simultaneous financial and cultural sustainability of the industry. This is where the Indigenous art centres play an integral role. One often hears it said that it is where there is a strong art centre that there are good outcomes for the artists and the community. As has been noted above, the art centres play a broader role than just developing the artistic practice of the artists and maximising financial returns. Good art centres also play a role in ensuring culture is maintained and protected.

Artistic and cultural sustainability are likely to be threatened if Government and dealers in Indigenous art and crafts do not support Indigenous culture and recognise the value that Indigenous art centres play in Indigenous art and crafts sector. Moves to by-pass the art centres or to remove senior artists from their community, including instances in which galleries “cherry-pick” well-known or up-and-coming artists, can have a detrimental effect on the artistic and financial outcomes for a community. It is not possible for Indigenous arts and crafts to thrive if they are removed from culture. Art practices must be developed and strengthened *within* communities and their art centres as this provides the foundation for the artists to flourish.

⁵ Kenneth Polk and Christine Adler, *Authenticity and Aboriginal Art*, Paper presented at Australian Registrars Committee Conference, 2001, University of Melbourne.

Social disintegration

The higher the level of social disintegration within an Indigenous community, the more likely it is that the artistic and cultural sustainability of their Indigenous arts and craft practice will be affected. While this issue is beyond the scope of the current Inquiry, there are some initiatives which have the potential to impact in a negative way upon the maintenance of Indigenous culture. Arts Law does not have the resources to examine these issues in detail but we have concerns about the negative impact that the following initiatives may have.

(i) Permit system

The current permit system for entry on to Indigenous lands is being reviewed by the Commonwealth Government. While Arts Law is unable to comment on what changes need to be made to the permit system, we are aware that there are already unscrupulous operators who would be able to take even greater advantage of Indigenous artists and communities if there is regulation of their comings and goings from communities.

(ii) 99 year leases

The introduction of 99 year leases between traditional owners and the Commonwealth Government may also affect social cohesion and the maintenance of culture in Indigenous communities, if they are introduced in a way that the traditional owners are disempowered within their communities.

(iii) CDEP

The new system of Community Development and Employment Projects (CDEP) program is problematic for the financial viability of many artists and the CDEP providers with whom they are working. The CDEP system does not reflect the reality of job and business prospects for Indigenous people in regional and remote Australia, with CDEP participants expected to move into real jobs after 52 weeks on CDEP. There is also a need for recognition that some CDEP programs are more effective than others in supporting artists. In addition, more attention must be given to supporting artists to achieve professional arts practices through appropriate contractual arrangements which address the roles and responsibilities of artists and CDEP providers, particularly in terms of:

- ownership of art works;
- payment for art works sold by the CDEP provider;
- ownership of intellectual property;
- amount of commission taken by CDEP provider;
- promotion of the artist; and
- provision of business and professional skills.

(iv) Lack of adequate protection of Indigenous Culture and Intellectual Property (ICIP)

The inadequate protection of ICIP has been well documented in reports including Terri Janke's *Our Culture Our Future*,⁶ which contains practical reform proposals for the improved recognition and protection of ICIP. This is an ongoing problem for Indigenous artists and communities, which has a detrimental impact on both cultural and financial outcomes for artists. Some of the main concerns about ICIP include the:

⁶ Terri Janke, *Our Culture Our Future*, Michael Frankel and Co, 1999

- duration of copyright protection (life of artist and 70 years) in view of longevity of Indigenous culture (40,000+ years);
- lack of copyright protection for Indigenous communities in art and craft works;
- lack of protection for the traditional knowledge of communities contained within art and craft works (including the introduction of effective Indigenous Communal Moral Rights (ICMR));
- lack of understanding by the non-Indigenous world of collective ways in which some artworks may be produced which may potentially affect authenticity;
- potential for mining and other commercial interests to trump heritage protection; and
- potential for non-Indigenous interests to exploit Indigenous words, names, symbols and other aspects of culture without any redress for Indigenous custodians.

Arts Law recommends that the sustainability of the sector requires appropriate, responsible practice of Indigenous art and craft at each stage of the process from creation of the works through to sale and resale. Financial success and sustainability are more likely when artists and communities are fully aware of their rights and are able to negotiate the terms of purchase and use of their artwork.

(d) The current and likely future priority infrastructure needs of the sector

As referred to above, Australia's Indigenous visual arts and craft sector is not a monolithic industry. Rather, it reflects the multifarious Australian Indigenous nations, language and cultural groups, including peoples from remote and regional Australia, as well as those in urban communities. The history of Australia has been misguided in its treatment Australian Indigenous peoples as a single group. Arts Law recommends that any government response to the infrastructure which supports and regulates Australia's Indigenous visual arts and craft sector must take into account the multifarious nature of Indigenous Australians. One size does not fit all.

Beyond the need for physical infrastructure, including galleries and buildings to house arts centres, are the overarching future priority infrastructure needs of the sector. We have identified these needs as:

(i) Freedom of contract and appropriate remuneration

The current and likely future priority infrastructure needs of the sector must at first instance serve the dual goals of:

- promoting Indigenous artists' freedom to choose the commercial arrangements they enter into for the promotion, sale and distribution of their art and craft; and
- ensuring appropriate remuneration is received by Indigenous artists for the sale of their art and craft.

These priorities are inseparable. As mentioned above, the irregularities which mar the sector arising from unscrupulous and unethical conduct, inevitably jeopardise Indigenous peoples' freedom to contract and are often characterised by scenarios in which Indigenous artists and craftspeople are not adequately remunerated for their work.

In Arts Law's view, infrastructure which prioritises freedom of choice but fails to ensure that Indigenous artists are appropriately remunerated will only exacerbate the irregularities currently within the Indigenous arts and craft sector. Although an unregulated "free trade model" provides Indigenous artists with a choice of commercial arrangements, this model assumes that each party to a commercial transaction has equal bargaining power. In Arts

Law's view, many artists, and Indigenous artists in particular, are not in an equal bargaining position to those with whom they contract for the promotion, sale and distribution of their art and craft. Accordingly, Arts Law recommends that a "free trade model" must be tempered by a regulatory framework which ensures that Indigenous artists are appropriately remunerated.

(ii) The art centre model

The diverse nature of the Indigenous communities which support the visual arts and craft sector is evidenced by the 116 Indigenous art centres listed in the Australian Government, Department of Communications, Information Technology and the Arts (DCITA) *Resource Directory 2006*. DCITA recognises that supporting the arts and crafts centres in accordance with the *Indigenous Arts Centres Strategy and Action Plan* will build a strong and sustainable Indigenous visual arts sector. DCITA recommends that "buying art directly from indigenous arts and crafts centres means the majority of income from sales will pass directly to the artists."⁷

Accordingly, Arts Law supports the art centre model as an effective means by which Indigenous artists and craftspeople are appropriately remunerated for their work. It is a model which recognises and supports the diverse nature of Indigenous communities and their individual cultural practices. Furthermore, the art centre model provides a point of sale for multiple artists thereby improving the artists' bargaining position with purchasers, whether they are dealers, galleries or individuals. While there may be a need to regulate art centre practices, Arts Law submits that the current and likely future infrastructure needs of the Indigenous arts and crafts sector require support, development and regulation of the art centre model both in remote and regional communities as well as urban communities.

Arts Law acknowledges that the Association of Central Australian Aboriginal Art Centres (**Desart**) and the Association of Northern, Kimberley, Arnhem Aboriginal Artists (**ANKAAA**) provide a galvanizing framework for the Indigenous visual arts and crafts sectors in Central Australia and the "Top End". These organisations are in turn supported by and provide support to the various art centres in these regions. As mentioned previously, similar associations operate in South Australia, Queensland, Western Australia and New South Wales.

The success of these associations suggests that this galvanizing framework strengthens the effectiveness of the art centre model. The governance bodies of these organisations include artist representatives and the organisations themselves have been active in promoting ethical business practices in the Indigenous art industry.⁸ In this way, these organisations work to promote the twin goals of promoting artists' freedom to choose the commercial arrangements they enter into for the promotion, sale and distribution of their art and craft and ensuring appropriate remuneration is received by Indigenous artists for the sale of their art and craft.

(iii) Mandatory licensing scheme and enforcement mechanisms

As mentioned above, Australian law often protects people in vulnerable situations from exploitative practices. Consumer protection laws together with licensing regimes for the provision of legal, medical, accounting, auctioneering, real estate and motor dealer services, amongst others, are commonplace examples of ways in which the government protects not only consumers but also practitioners and the integrity of sectors in which they work.

⁷ Australian Government, Department of Communications, Information Technology and the Arts (DCITA) *Indigenous Visual Arts and Craft 2006* at 13.

⁸ Ibid.

In Arts Law's view, the same needs to be done in relation to the Indigenous arts and crafts. Mandatory licensing regulation, together with an industry Code of Practice such as the one being developed by the National Association for the Visual Arts (**NAVA**), ANKAAA and Desart, would protect both practitioners as well as consumers. Voluntary regulation schemes do not adequately protect against the manufacture and sale of counterfeit Indigenous art and craft. There is scope for a mandatory regulatory regime administered by a National Indigenous Cultural Authority.

In addition, Arts Law submits that the following enforcement measures should be harnessed to ensure ethical conduct in the Indigenous arts and crafts sector:

- greater use of sections 52 and 53 of the *Trade Practices Act 1974* (Cth) in dealing with cases of misleading and deceptive conduct;⁹
- the ACCC should play a greater role in policing infringements;
- communal authorship¹⁰ and the advertising and labelling of Indigenous arts and craft needs to be reviewed in consultation with Indigenous people;¹¹
- greater use should be made of State based Fair Trading systems; and
- strengthening customs procedures to prevent the importation of counterfeit goods from foreign jurisdictions, particularly South East Asia, including specific provisions for customs officers in detecting and collecting counterfeit Indigenous materials.

Additional strategies and mechanisms which would support and develop the infrastructure needs discussed above are outlined in further detail below.

(e) Opportunities for strategies and mechanisms that the sector could adopt to improve its practices, capacity and sustainability, including to deal with unscrupulous or unethical conduct.

The following strategies and mechanisms should be considered as part of a comprehensive strategy in support of the current and likely future infrastructure imperatives described in response to (d) including, the introduction of a licensing scheme and enforcement mechanisms:

- adoption of a Code of Practice for the Indigenous Arts and Crafts Sector as a condition of any Indigenous art and craft sector licensing regime;
- increased access to legal, financial, management education, advice and services;
- introduction of Indigenous Communal Moral Rights legislation;
- introduction of a *droite de suite* (resale royalty) scheme;
- introduction of a National Indigenous Cultural Authority;
- introduction of a label of authenticity;
- *sui generis* legislation for Indigenous culture and intellectual property; and
- Australia should become a signatory to certain International instruments for the protection of Indigenous cultural heritage.

⁹ Altman et al, Some competition and consumer issues in the Indigenous visual arts industry, 2002, p 30.

¹⁰ Mark Rimmer, *Australian Icons: Authenticity Marks and Identity Politics*, Indigenous Law Journal (3) Fall 2004, p 151.

¹¹ Altman et al, p. 174.

(i) Adoption of a Code of Practice for the Indigenous Arts and Crafts sector

Arts Law recommends the adoption of a Code of Practice for the Indigenous Arts and Crafts sector as a condition of any Indigenous art and craft sector licensing regime. Currently, the City of Melbourne has introduced a Code of Practice for use in galleries in Melbourne. As mentioned above NAVA is developing a National Indigenous Art Commercial Code of Conduct in partnership with Desart and ANKAAA. Arts Law recommends the introduction and adoption of a national Code of Conduct for commercial dealings with Indigenous art and craft.

(ii) Increased access to legal, financial and management advice and services

In addition to the infrastructure imperatives described above, the sustainability of the Indigenous art and craft sector and the minimisation and regulation of unscrupulous and unethical behaviour requires increased access to legal, business, financial and management advice, education and services.

Additional resources need to be applied to ensure Indigenous artists, art centres and other organisations that support them have access to education and information about these issues. Arts Law's service is an example of a national service that could provide more assistance if additional resources were dedicated to it.

Access to Legal Advice

Arts Law is aware of Indigenous artists being signed directly by galleries without the assistance of a lawyer, business advisor or suitably qualified person from the local art or community centre. Many of these contracts are drafted in terms which unduly favour the gallery owner. However, artists may be unaware of this inequity if they are unable to read the contract and have not had access to legal advice. Access to proper advice may benefit both the artists and the gallery, with the artist having a better understanding of their obligations and responsibilities towards the gallery.

As outlined above, Arts Law's AITB service provides free legal advice services, legal education and advocacy services to and, on behalf of, Indigenous artists and arts organisations throughout regional and remote Australia as well as urban communities across the country. It is the only national service of its kind, staffed by an Indigenous lawyer and an Indigenous information officer and is well placed to service this need within the Indigenous art and craft sector.

Access to business and industry advice

Arts Law and other bodies such as NAVA, Viscopy and the Australian Copyright Council provide industry advice. In Victoria, the Koori Business Network (**KBN**) also runs programs to assist the promotion and development of Indigenous arts and cultural businesses. In the NT, SA and WA the umbrella arts organisations of ANKAAA and Desart provide invaluable services to the art centres in their regions. Ananguku (**Ku Arts**) in South Australia has been developing a similar role as has UMI Arts in Queensland in recent times. Much more is needed to ensure these organisations can provide services and continue to contribute to the sustainability of the sector by supporting artists and art centres.

In addition artists need information on accessing appropriate government bodies which are responsible for providing funds and services for communities and individuals.

Access to education

Arts Law's AITB service currently provides training for Indigenous artists, art centres and arts organisations on a range of business related topics including:

- Income streams for artists including the operation of art centres;
- copyright and moral rights;
- ICIP;
- licensing;
- contracts;
- marks of authenticity;
- governance;
- business structures, names and domain names;
- trademarks;
- insurance and tax advice;
- employment issues; and
- wills and estates.

Arts Law provides these services across Australia. Due to the isolated location of many communities, Arts Law solicitors must travel to these communities in order to provide education, legal and business advice. Adequate resources are required to fund current infrastructure requirements, such as the AITB program. AITB is funded through the Australian Council for the Arts received \$125,000 in 2006. This is supplemented by short-term project funds, an unsustainable funding model.

Arts Law recommends any funds for training go to organisations currently delivering services to Indigenous communities rather than allocating new funds to organisations without appropriate background, expertise or staffing in this area.

(iii) Arts Law recommends the introduction of adequate Indigenous Communal Moral Rights (ICMR) legislation

The enactment of ICMR legislation will enhance protection for Indigenous artists and communities through the course of commercial dealing. However, ICMR legislation should only be introduced after the findings of this Inquiry and tabled and after adequate consultation with relevant stakeholders. We note that the Government's 2003 exposure draft bill was problematic in many ways.

(iv) Arts Law advocates the introduction of a *droite de suite* scheme, also known as resale royalties.

Despite the recent rejection of a resale royalty scheme by the government, Arts Law continues to advocate for the introduction of such a scheme. Arts Law continues to support the findings of the *Myer Report*, which recommended the introduction of a resale royalty scheme, noting that it would provide significant economic returns for artists and their families, especially for Indigenous artists.¹²

A resale royalty scheme would address the current imbalance between first and subsequent sales of Indigenous works, which may be suggestive of the inappropriately low first sale price of the work as a result of unequal bargaining power between the artist and the first purchaser. For example, Clifford Possum Tjapaltjarri's work *Emu Corroboree* was originally sold for \$100, and later resold for \$411,750. None of the profits made their way back to the artist, the artist's family or community.

¹² *Myer Report*, p167.

One only has to look at ongoing results from auction houses for Indigenous art, to appreciate the significant injection of funds resale rights would provide for Indigenous communities. Voluntary resale schemes instituted by some auction houses under which arts foundations receive resale royalty equivalents for benevolent projects, underestimate the ability of communities to establish ways of developing arts and cultural infrastructure. Previous examples such as the Arleheyareng Art Centre illustrate the value of returning funds directly to communities.

(v) The introduction of a National Indigenous Cultural Authority, as advocated by Terri Janke's *Our Culture: Our Future*

The purpose of a Cultural Authority would be to regulate the Indigenous art and craft industry, provide legal and cultural information, authorise the use of Indigenous cultural material and raise public awareness.¹³

(vi) Re-introduction of a label of authenticity as an important protection mechanism for Indigenous art and craft.

Arts Law recommends that a label of authenticity should be reconsidered and points to the success of in the *toi iho* Maori Made Mark in New Zealand and the *Igloo* trademark in Canada. Both programs are administered by government departments.

A label of authenticity would ensure the cultural and financial sustainability of the sector, as well as providing consumer protection. However, several lessons must be learned from the unsuccessful implementation of the now defunct Label of Authenticity administered by the former National Indigenous Arts Advocacy Association (**NIAAA**):

- the test for Aboriginality was overly complex, with more than 75% of applicants unsuccessful;
- the definition of authenticity was problematic as it did not differentiate between Indigenous authorship and authenticity/originality;¹⁴
- the Label failed to distinguish between fine art and manufactured tourist art;¹⁵ and
- a "one size fits all" centralised system fails to acknowledge the different needs and situations of Aboriginal communities around Australia.

Arts Law recommends that regional models such the Desert seal and Certificates of Authenticity are considered and notes the importance of community consultation in this process.

(vii) Introduction of *sui generis* legislation for ICIP, administered by a National Indigenous Cultural Authority.

Sui generis legislation would provide significant, tailored protection for ICIP and should legally recognise the following:

- communal ownership;
- intangible form;
- time limitations;
- artistic styles; and

¹³ Terri Janke and Robin Quiggin, *Indigenous Cultural and Intellectual Property: the main issues for the Indigenous arts industry in 2006*, 10 May 2006, p 49.

¹⁴ Norman Wilson, Submission to the Myer report, p 8, quoted in Mark Rimmer, *Australian Icons: Authenticity Marks and Identity Politics*, *Indigenous Law Journal* (3) Fall 2004, p158.

¹⁵ Jon Altman, *The Indigenous Visual Arts Industry: Issues and prospects for the next decade*, quoted in Rimmer, p 158.

- protection against Indigenous cultural materials being used without appropriate consent of custodians.

(viii) Australia should become a signatory to the following International instruments:

UNHCR Declaration on the Rights of Indigenous Peoples

The Declaration is significant to Indigenous Australian artists as it clearly identifies the rights of Indigenous people to practice and maintain cultural traditions and customs, including traditional arts, crafts, languages and oral traditions.

The Declaration ensures protection by articulating the obligations of the state to uphold Indigenous peoples' cultural rights.

UNESCO Convention for Safeguarding Intangible Cultural Heritage

The Convention aims to acknowledge the importance of living communities and individuals as custodians of Intangible Cultural Heritage.

Arts Law supports the introduction of a list of the 'Intangible Cultural Heritage of Humanity' following the success of the 'World Heritage Listed' sites under the auspices of the World Heritage Convention, of which Australia is a signatory.

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The Convention acknowledges the importance of protection of cultural traditions and languages at risk of extinction.

Arts Law does not believe that there is sufficient reason to oppose the Convention on the grounds that it would undermine Australia's existing international trade responsibilities. Article 20(2) specifically provides for the accommodation of pre-existing legal obligations under international law. Arts Law points to the adoption of the Convention by over 140 states, including the U.K, as proof of its viability.

(f) Opportunities for existing government support programs for Indigenous visual arts and crafts to be more effectively targeted to improve the sector's capacity and future sustainability

While Arts Law recognises the current support provided by the Commonwealth, State and Territory governments for programs for Indigenous visual arts and crafts, there is scope for further support and the ability to more effectively target and improve the sector's capacity and future sustainability. Existing organisations are well placed to provide the additional support for the much needed strategies and mechanisms proposed in sections (d) and (e) above. These include the following:

(i) Co-ordinated and increased funding for art centres and regional associations

There is a fundamental need for increased and guaranteed funding for Indigenous arts and cultural centres to facilitate sustainable development of the industry at a community level. This includes increased and co-ordinated funding for regional associations such as ANKAAA, Tiwi Art Network (TAN), Desart, Ku Arts, Umi Arts and other organisations which

represent, co-ordinate and support the work of Indigenous artists and cultural centres in various regional and remote communities around Australia.

(ii) Increased funding for Arts Law and the AITB service

Increased funding would enable Arts Law to increase access to legal resources for Indigenous artists, arts centres and other organisations. This includes increased funding for legal information sheets in Indigenous languages, advising artists on their legal rights and how to protect their arts and crafts. Further funding would also enable Arts Law to develop sample agreements empowering artists to use legal agreements when dealing with galleries, agents, dealers and commissioners.

(iii) Increased funding for litigation and access to justice

Increased funding for prosecution, litigation and enforcement of indigenous artists rights would greatly increase the sector's capacity and future sustainability. This includes addressing issues such as:

- access to legal representation;
- geographical impediments to gaining legal access to representation;
- encouraging Indigenous artists to feel empowered by the Australia legal system;
- increasing awareness and knowledge of Indigenous artist's legal rights;
- tackling the problems faced by Indigenous artists dealing with overseas infringements; and
- addressing the lack of funds available to artists seeking to enforce their legal rights in the Australia courts.

Dramatically increasing funding to organisations such as Arts Law and the AITB service would enable Arts Law to employ a number of experienced litigation solicitors who could take on these matters and pursue them in the courts. Funding would also need to take into account the expenses involved in running cases for Indigenous artists and arts organisations from around Australia. As this inquiry will demonstrate, there is a clear need for greater support of Indigenous artists and arts organisations wishing to commence proceedings against infringers and those engaging in unscrupulous and illegal practices.

(iv) Support by law enforcement agencies

Encouraging and providing support for Indigenous artists and arts organisations to enforce their legal rights also requires support from Commonwealth, State and Territory police. Arts Law believes that in many cases the police are not acting on complaints from Indigenous artists and arts organisations when information or complaints are made about "carpetbaggers" or unscrupulous dealers or galleries.

Providing education for the police forces on the relevant legal issues and encouraging them to take action on these matters is an integral part of the approach needed. Recent amendments to the *Copyright Act* enforcement provisions also allow on the spot fines for copyright infringement and the potential for greater policing and enforcement of copyright infringement. Further support for law enforcement agencies to provide this support to Indigenous artists is integral to the sector's capacity and future sustainability.

(v) Support for establishing a National Indigenous Cultural Authority

As discussed above, Arts Law recommends the establishment of a system of regulation for dealers, galleries and agents dealing with Indigenous artists and arts organisations. We believe that this could be achieved by establishing a National Indigenous Cultural Authority

which, among other things, could administer a national licence system for dealers, galleries and agents and also hear complaints from artists and arts organisations when licensees behave inappropriately or beyond the terms of the licence.

Further, as discussed above, we recommend that the National Indigenous Cultural Authority should also be responsible for administering an authenticity label and other protection mechanisms for Indigenous arts and crafts in Australia.

(vi) Effective targeting of ACCC resources

Arts Law submits that there needs to be more effective targeting of ACCC resources and a focus on developing a means of regulating the industry. If a National Indigenous Cultural Authority is not set up then ACCC resources should be more effectively targeted to improve the sector's capacity and future sustainability through the regulation of authenticity and the provision of a label of authenticity and the licensing and regulation of galleries, dealers and agents who work in and trade in Indigenous arts and crafts and work with Indigenous artists and arts organisations.

(vii) Introduction of resale royalties

The introduction of resale royalties (as discussed above) and government support for collecting societies given administration of the collection and distribution of these royalties is also a key to improving the sector's capacity and future sustainability.

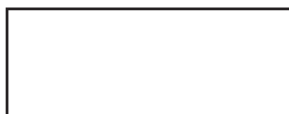
(g) Future opportunities for further growth of Australia's Indigenous visual art and craft sector, including further developing international markets

Arts Law and the AITB service do not have the expertise to offer submissions on future opportunities for growth of Australia's Indigenous visual art and craft sector. However, we refer to the points made above and note that future opportunities for growth are only possible if the Indigenous visual arts and crafts sector are given the support of the Australian legal system, including sufficient funding to provide access to legal assistance and initiatives, mechanisms and support for commencing proceedings against infringers. This support can only encourage growth of the industry and prevent the undermining effects of irregularities in the Indigenous arts and crafts market.

Part of this process also involves educating the international market and making visitors, collectors and buyers aware of Indigenous cultural and intellectual property and the rights and interests of Indigenous artists in Australia. Opportunities for further growth could also be supported through government bodies such as Austrade and the further support for regional associations such as ANKAAA and Desert which currently provide tours for overseas buyers and collectors that enable them purchase Indigenous art but also give them the opportunity to learn more about ethical purchasing and cultural imperatives.

Arts Law looks forward to hearing the outcome of the review. We are prepared to expand on any aspect of this submission, verbally or in writing.

Yours faithfully

A rectangular box with a black border, intended for a signature.

Robyn Ayres, Executive Director
Arts Law Centre of Australia

10 November 2009

The Hon Robert McClelland MP
Attorney General
Parliament House
Canberra ACT 2600

Dear Attorney,

Protecting Indigenous Cultural Heritage: The Way Forward

The Arts Law Centre of Australia (**Arts Law**) through the Artists in the Black (**AITB**) service has provided targeted legal services to Indigenous artists and their organisations and communities for the last six years. Much of that advice has focussed on ways of securing effective protection of Indigenous cultural heritage as expressed through Indigenous art, music and performance given the lack of a legal framework to protect Indigenous cultural heritage. It is in the context of the legal issues affecting Indigenous communities throughout remote, regional and urban Australia, and across all art forms, that the need to provide a system of better protection for Indigenous cultural heritage should be examined.

Recent developments relevant to making progress on this important issue include:

- The Government's commitment to the implementation of the *Declaration on the Rights of Indigenous People*;
- The proposal to establish a National Indigenous Cultural Authority as that envisioned in Terri Janke's *Beyond Guarding Ground*;¹
- The introduction of the Indigenous Australian Art Commercial Code of Conduct;²
- The announcement by the Cultural Ministers Council to appoint Arts Law to implement the Indigenous Intellectual Property Toolkit project;
- The forthcoming WIPO meeting of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**) which is looking at the development of an international instrument to protect Indigenous Culture and Intellectual Property.

In this letter, we express our willingness and commitment to the development of a strategy in partnership with the Federal government.

¹ Janke, T, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Co, 2009

² Indigenous Australian Art Commercial Code of Conduct available at <http://www.indigenousartcode.org/> accessed on 10-11-09

A Cultural Authority as one component of a comprehensive legal framework

A National Indigenous Cultural Authority provides a useful starting point for a government strategy on cultural heritage. Arts Law supports the establishment of such an authority as a component of a comprehensive legal framework designed to recognise and protect Indigenous Cultural and Intellectual Property (ICIP) by implementing Australia's obligations under Article 31 of the *Declaration on the Rights of Indigenous People*.

However, the establishment of a Cultural Authority alone is insufficient. Without legislation recognising and protecting ICIP, the authority can only be an advisory body generating policy and raising awareness about Indigenous cultural issues.

Inadequacy of the existing legislation protecting ICIP

The proposal put by Ms Janke to the Australia 2020 Summit was for an institution which would facilitate consent and payment of royalties, develop appropriate standards of appropriate use to guard cultural integrity and enforce rights. None of those objectives can be achieved without legislation creating a rights framework. *Beyond Guarding Ground* convincingly argues why the existing legislation creating individual rights of copyright, design, patent and other intellectual property rights is ineffective to protect, except tangentially and coincidentally, Indigenous cultural rights which are generally communal in nature.

There is currently no legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of ICIP capable of enforcement by the Australian legal system.

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the *Declaration on the Rights of Indigenous People* to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

Why sui generis legislation is needed

Arts Law believes that adequate protection can only effectively be achieved by separate *sui generis* legislation for the following reasons:

- ICIP covers a broader range of creative and intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright will be artificial and incomplete;

- ICIP is fundamentally different from traditional legal constructs of intellectual property in that it is a communal not individual right albeit with individual custodians;
- ICIP is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
- ICIP evolves and develops over time unlike traditional Intellectual property rights which focus on fixing a point in time at which the property which is protected is defined;
- ICIP is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;
- ICIP stands beside existing intellectual property rights – it is not an extension of them.

Alternatives

Arts Law is aware of the alternatives which have been canvassed for the protection of ICIP³ and believes each of those alternatives has shortcomings:

- Amending the *Copyright Act* – this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered in the Copyright Act. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of traditional knowledge;
- Treaty – agreement at international level is not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation;
- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression are thoughtful and comprehensive but rely on good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all

³ For example see the recent article by McKay, Erin, *Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach*, UNSW Law Journal 2009, vol 32(1)

protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;

- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a band aid solution to address the lack of relevant legislative protection. Again it relies on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the *Declaration on the Rights of Indigenous People*.

Beyond Guarding Ground is the impetus for domestic action on this internationally significant issue. Arts Law is willing to commit its resources to assist in the development of an effective policy, and seeks an indication from the Government as to its intentions and how we may most appropriately become involved. At this stage, we would welcome an opportunity to discuss these issues in more detail with you, together with information as to who has carriage of this matter within your department. We are particularly interested in the nature of the role that the Federal Government envisions for stakeholders in the processes toward implementation of the Government's responsibilities under the recently ratified the *Declaration on the Rights of Indigenous People*.

Yours sincerely

Robyn Ayres
Executive Director

10 November 2009

The Hon Peter Garrett
Minister for the Environment, Heritage and the Arts
PO Box 6022
Parliament House
Canberra ACT 2600

Dear Minister,

Protecting Indigenous Cultural Heritage: The Way Forward

The Arts Law Centre of Australia (**Arts Law**) through the Artists in the Black (**AITB**) service has provided targeted legal services to Indigenous artists and their organisations and communities for the last six years. Much of that advice has focussed on ways of securing effective protection of Indigenous cultural heritage as expressed through Indigenous art, music and performance given the lack of a legal framework to protect Indigenous cultural heritage. It is in the context of the legal issues affecting Indigenous communities throughout remote, regional and urban Australia, and across all art forms, that the need to provide a system of better protection for Indigenous cultural heritage should be examined.

Recent developments relevant to making progress on this important issue include:

- The Government's commitment to the implementation of the *Declaration on the Rights of Indigenous People*;
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In this letter, we express our willingness and commitment to the development of a strategy in partnership with the Federal government.

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However, the establishment of a Cultural Authority alone is insufficient. Without legislation recognising and protecting ICIP, the authority can only be an advisory body generating policy and raising awareness about Indigenous cultural issues.

Inadequacy of the existing legislation protecting ICIP

The proposal put by Ms Janke to the Australia 2020 Summit was for an institution which would facilitate consent and payment of royalties, develop appropriate standards of appropriate use to guard cultural integrity and enforce rights. None of those objectives can be achieved without legislation creating a rights framework. *Beyond Guarding Ground* convincingly argues why the existing legislation creating individual rights of copyright, design, patent and other intellectual property rights is ineffective to protect, except tangentially and coincidentally, Indigenous cultural rights which are generally communal in nature.

There is currently no legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of ICIP capable of enforcement by the Australian legal system.

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the *Declaration on the Rights of Indigenous People* to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

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- ICIP is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;
- ICIP stands beside existing intellectual property rights – it is not an extension of them.

Alternatives

Arts Law is aware of the alternatives which have been canvassed for the protection of ICIP³ and believes each of those alternatives has shortcomings:

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- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression are thoughtful and comprehensive but rely on good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all

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protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;

- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a band aid solution to address the lack of relevant legislative protection. Again it relies on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the *Declaration on the Rights of Indigenous People*.

Beyond Guarding Ground is the impetus for domestic action on this internationally significant issue. Arts Law is willing to commit its resources to assist in the development of an effective policy, and seeks an indication from the Government as to its intentions and how we may most appropriately become involved. At this stage, we would welcome an opportunity to discuss these issues in more detail with you, together with information as to who has carriage of this matter within your department. We are particularly interested in the nature of the role that the Federal Government envisions for stakeholders in the processes toward implementation of the Government's responsibilities under the recently ratified the *Declaration on the Rights of Indigenous People*.

Yours sincerely

Robyn Ayres
Executive Director

16 December 2009

Indigenous Heritage

Law Reform

Heritage Division

Department of the Environment, Water, Heritage and the Arts

GPO Box 787

CANBERRA ACT 2601

By mail and to

Submission in Response to the Indigenous Heritage Law Reform Discussion Paper

The Arts Law Centre of Australia (**Arts Law**) through the Artists in the Black (**AITB**) service has provided targeted legal services to Indigenous artists and their organisations and communities for the last six years. Much of that advice has focussed on ways of securing effective protection of Indigenous cultural heritage as expressed through Indigenous art, music and performance given the acknowledged deficiencies in the current level of legal protection for Indigenous cultural heritage.

Arts Law has considered the Discussion Paper in the context of the legal issues affecting Indigenous artists in communities throughout remote, regional and urban Australia, and across all art forms.

The Discussion Paper considers the reform of existing legislative arrangements as they apply to traditional areas and objects. Our overriding response is that laws restricted to a focus on 'places' or 'things' can only provide a very limited, piecemeal and unsatisfactory protection which fails to recognize the true nature of Australian Indigenous cultural heritage and is inconsistent with notions of cultural heritage at international law.

Recent developments at international law make clear that notions of cultural heritage encompass language, stories, spiritual knowledge, ancestral remains, medical and scientific traditions, music, literature and performance traditions as well as sacred places and objects. Arts Law believes that the reform of existing cultural heritage laws should be undertaken hand in hand with the Government's commitment to the implementation of Article 31 of the *Declaration on the Rights of Indigenous People* and its ongoing participation in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**) which is looking at the development of an international instrument to protect Indigenous cultural heritage.

Arts Law supports the establishment of a comprehensive legal framework designed to recognise and protect Indigenous cultural heritage (sometimes referred to as Indigenous Cultural and Intellectual Property or ICIP). Such an objective requires reform on a holistic level well beyond that contemplated by the Discussion Paper. The Paper provides a useful starting point for discussion but should, we respectfully suggest, be used as a stepping stone to more comprehensive reform.

There is currently no general legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of Indigenous cultural heritage capable of enforcement by the Australian legal system (except to the limited extent of native title and existing legislation concerning areas and objects).

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the *Declaration on the Rights of Indigenous People* to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

Why sui generis legislation is needed

Arts Law believes that adequate protection can only effectively be achieved by separate *sui generis* legislation for the following reasons:

- Indigenous cultural heritage covers a broader range of creative and intellectual and cultural concepts than those protected under the existing heritage and intellectual property laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright or land law will be artificial and incomplete;
- Indigenous cultural heritage is fundamentally different from traditional legal constructs of property in that it is a communal not individual right albeit with individual custodians;
- Indigenous cultural heritage is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
- Indigenous cultural heritage evolves and develops over time unlike traditional property rights which focus on fixing a point in time at which the property which is protected is defined;
- Indigenous cultural heritage stands beside existing intellectual property rights – it is not an extension of them as it is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;

Alternatives

Arts Law believes that the alternatives which have been canvassed for the protection of Indigenous cultural heritage¹ and believes each of those alternatives has shortcomings:

¹ For example see the recent article by McKay, Erin, *Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach*, UNSW Law Journal 2009, vol 32(1)

- Reform of existing cultural heritage legislation is limited to a focus on places and things – it does not address the fundamental premise of what constitutes cultural heritage but relies on a flawed assumption that a focus on areas and objects gets most of the way.
- Amending the *Copyright Act* – this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered in the Copyright Act. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of traditional knowledge;
- Treaty – agreement at international level is not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation;
- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression are thoughtful and comprehensive but rely on good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;
- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a band aid solution to address the lack of relevant legislative protection. Again it relies on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the *Declaration on the Rights of Indigenous People*.

Please do not hesitate to contact me if you require further information.

Yours sincerely

Delwyn Everard
Senior Solicitor



IP Australia

International Policy and Cooperation

Attention: Steven Bailie, Assistant Director

By email:

Office for the Arts

Attention: Johanna Parker, Assistant Director

By email:

[Contact details]

14 June 2012

Indigenous Knowledge Consultation : Have Your Say

The Arts Law Centre of Australia (**Arts Law**) is a not-for-profit national community legal centre for the arts. Through the Artist in the Black (**AITB**) service, Arts Law has provided targeted legal services to Indigenous artists and their organisations and communities for the last nine years. Much of that advice has focused on ways of securing protection for Indigenous cultural heritage as expressed through Indigenous art, music and performance.

ArtsLaw **welcomes** the opportunity to contribute to the discussion on the adequacy of protocols to manage 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP) and the potential for better protection to be achieved through reform of the existing IP legislation. Arts Law commends and agrees with IP Australia's broad definition of 'Indigenous Knowledge' to mean knowledge that is unique to Aboriginal and Torres Strait Islander Peoples and is interchangeable with traditional knowledge and cultural expressions (including stories, dance, languages, symbols, crafts, cosmology, medical and environmental knowledge). Arts Law also commends and endorses the multidisciplinary approach taken by IP Australia to this issue.

Arts Law's objective is to foster a society that promotes justice for artists and values their creative contribution. From our experience working with Indigenous artists and their communities we believe that while Indigenous protocols are useful, they are not capable of protecting Indigenous cultural heritage effectively. Such protection will require legislative reform creating a rights framework which facilitates consultation and consent, develops appropriate standards of use to guard cultural integrity and enforce rights.

Terri Janke's 2009 work *Beyond Guarding Ground*¹ convincingly argues why the existing legislation creating individual rights of copyright, design, patent and other intellectual

¹ Janke, T, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Co, 2009



property rights is ineffective to protect, except tangentially and coincidentally, Indigenous cultural rights which are generally communal in nature. There is currently no legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of ICIP capable of enforcement by the Australian legal system.

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the Declaration on the Rights of Indigenous People to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

Arts Law believes that adequate protection can only effectively be achieved by separate sui generis legislation for the following reasons:

- ICIP covers a broader range of creative and intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright will be artificial and incomplete;
- ICIP is fundamentally different from traditional legal constructs of intellectual property in that it is a communal not individual right albeit with individual custodians;
- ICIP is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
- ICIP evolves and develops over time unlike traditional Intellectual property rights which focus on fixing a point in time at which the property which is protected is defined;
- ICIP is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;
- ICIP stands beside existing intellectual property rights – it is not an extension of them.



Arts Law is aware of the alternatives which have been canvassed for the protection of ICIP and believes each of those alternatives has shortcomings:

- Amending the *Copyright Act* – this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered in the *Copyright Act*. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of traditional knowledge;
- Treaty – agreement at international level is not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation;
- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – IP Australia has identified the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression as a useful starting point. We agree that such protocols are thoughtful and comprehensive but by their very nature they fall short of providing adequate protection. Applying such protocols relies on the good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;
- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a bandaid solution to address the lack of relevant legislative protection. Again it relies



on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the Declaration on the Rights of Indigenous People.

In your discussions with us, you have identified case studies as an effective medium to illustrate the deficiencies of the existing system. Set out below are some examples of situations in which the assistance of Arts Law has been requested and in which the provision of effective help is hampered by the existing legal framework.

1. In 2010, a gallery in the Blue Mountains in NSW, erected a large sculpture featuring Wandjinas, the creation spirit sacred to the Worrora, Wunumbal and Ngarinyin Aboriginal tribes in Western Australia without permission from the cultural custodians of the Wandjinas. While the sculpture was highly disrespectful appropriation of Indigenous cultural imagery, it did not appear to be a copy of any particular artwork by a known artist and therefore no complaint about infringement of copyright could be made. Ultimately, the ability of community opposition groups to achieve removal of the sculpture rested on its serendipitous placement on the verge of a heritage listed property meaning that local development approval was required (which was not granted). The result was based on legal considerations of social impact NOT the value of any ICIP.
2. The unique and ancient rock art of Australia's Indigenous peoples has widely recognized cultural significance. Yet such works are invariably outside the period of copyright protection and can be reproduced and used by third parties without any need to consult or consider the cultural owners. Non-Indigenous artists can appropriate and reproduce such images with impunity and even claim their own copyright in their appropriation – see for example <http://www.archeologicalart.com/Web2/Galleries/The%20Aboriginal%20Art/Warmaj/FMWarmaj.htm> .
3. Researchers and anthropologists have routinely gone into Indigenous communities and been welcomed. They have written down dreamtime stories and taken film footage which they then claim copyright over and the Indigenous community has no rights over. In one example, unique footage by a documentary filmmaker in the 1960s showing sacred rituals and ceremonies is now held in a deceased estate. The deceased estate has refused access to the families and communities of the Aboriginal individuals who, at the time, permitted filming as



a way of explaining and sharing their culture, not realizing that such participation gave them no rights.

4. In other examples, non-Indigenous authors have persuaded Indigenous community members to relay oral stories over which they have then published and claimed copyright – with the bizarre result that the community is itself prevented from publishing those stories under threat of copyright infringement.
5. There are numerous examples of misappropriation of Indigenous artistic traditions to create cheap merchandise to see to the Australian tourist trade. The only legal avenue of complaint is if such items are branded as ‘authentic Aboriginal art’ and most are not.
6. There are examples of tourists filming dance performances and then using the footage to brand or sell their own local tourism businesses in competition with the local communities.
7. The widely publicized and brazen appropriation by the Russian ice-skating team at the last Winter Olympics of Australian Indigenous ceremonial body decoration traditions is another obvious example.
8. In one case, a non-Indigenous artist simply combined elements from various Indigenous cultural traditions to produce Indigenous style artwork, and sold his artwork without any clarification or explanation that he was not Indigenous – absent an actionable misrepresentation or omission in breach of the Australian Consumer Law, it is almost impossible to pursue such conduct. Not only did this compete and undercut local Indigenous artists but many were offended at the way certain symbols and stories had been intermingled and adapted.

IP Australia’s case studies on its website are, in our view, not representative – telling stories where goodwill and cooperation have achieved a successful result. We also have many such experiences but they are quantitatively outweighed by circumstances in which protocols have been ignored and cultural sensitivities trampled upon.

IP Australia has indicated some concern about the potential for sui generis legislation of the type proposed to be hindered by disputes between different groups of Indigenous cultural owners as to ownership of particular categories of Indigenous knowledge or cultural traditions. That has never been our experience. The first case study exemplifies this – Indigenous community leaders from four language groups reaching from the Kimberley to the Blue Mountains united and worked cooperatively to achieve an outcome consistent with respect for Indigenous culture generally. More recently the Canning Stock Route exhibition demonstrated how over ten different language group worked together to communicate the Aboriginal story of their interaction with white engagement along the Canning Stock Route. Many of the relevant traditional stories were shared or overlapped or varied. No ownership disputes were experienced.

Arts Law hopes that IP Australia’s consultation on this important issue will provide the impetus for domestic action on this internationally significant issue. Arts Law is willing to commit its resources to



assist in the development of an effective policy, and would welcome an opportunity to discuss these issues in more detail with you.

Yours sincerely

Robyn Ayres
Executive Director

Delwyn Everard
Senior Solicitor

28 March 2014

Aboriginal Culture and Heritage Reform Secretariat
NSW Office of Environment and Heritage

BY EMAIL:

Dear Secretariat,

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the NSW Government's response to the Working Party's recommendations, entitled "Reforming the Cultural Heritage System in NSW" (discussion paper).

Arts Law commends the NSW Government's ongoing commitment to broader community engagement in relation to the improved protection of Indigenous cultural heritage. The protection of Indigenous Cultural and Intellectual Property (ICIP) which encompasses cultural heritage is one of the key advocacy agendas of our community legal centre and something in which our Indigenous artist, Indigenous arts organisations and their broader community stakeholders have expressed strong support. We advise Indigenous artists and arts organisations through a program specifically designed for this purpose, called Artists in the Black. We have run this Indigenous program for 10 years and have visited many urban, regional and remote Indigenous communities over this time to provide them with legal advice on ICIP and advocate for the increased protection of ICIP through the introduction of sui generis legislation. Last year, our AITB program delivered 619 legal advices to Indigenous artists and arts organisations, a tenth of which related to the inadequacy of ICIP protection in Australia at present.

It is with this background that we approach the potential broadening of the current heritage protections in NSW. We are, of course aware of the limitations of state as

opposed to federal legislation in respect of these protections and bare this in mind while making this submission.

In general, Arts Law supports the proposal for stand alone legislation which protects ACH and the expansion of the current definition of cultural heritage. We also support the objective of the NSW Government to enhance and increase Aboriginal responsibility over ACH.

Who are we?

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Our response to the discussion paper:

1. Defining Aboriginal Cultural Heritage (ACH):

While we are pleased that the discussion paper proposes expanding the current definition of ACH to be more inclusive than it is, the proposed definition excludes many of the core values associated with cultural heritage and should be further expanded. We note that the proposed definition of ACH (as outlined on page 13 of the discussion paper) is based on the incorrect assumption that “the use of language and associated intellectual property rights relating to ACH are currently afforded protection under the Commonwealth laws and not within the purview of the state” (page 13). This is not the case. The law of copyright only protects the material expression of ideas and knowledge, and given that most cultural heritage is orally expressed, for example in the form of stories, many aspects of cultural heritage and ICIP remain unprotected. Our experience

with advising Indigenous artists and arts organisations is that the lack of protection of ICIP represents a huge gap in the way that Aboriginal art and culture is protected. The paper wrongly states that there are currently laws in place which protect languages and “associated intellectual property rights”. Copyright (a federal system) does not protect ICIP, including languages, traditional knowledge and cultural heritage. We are concerned that the scope of what requires protection under this reform is premised on a false assumption of what is currently protected. That is, the discussion paper assumes that it’s not necessary to look at how to better protect ICIP because it is already (largely) protected.

We support the proposed inclusion of storylines in the definition of ACH and urge the NSW Government to look at other aspects of ACH which could be protected as ACH, for example dreamtime stories which relate specifically to certain areas or landmarks, languages which are particular to certain areas, imagery which is specific to certain parts of NSW or certain NSW landmarks. We would also like to see a broader explanation of the way in which intangible ACH values would be protected. That is, are ACH values of themselves sufficient in determining that certain land is to be protected, or are those intangible values only capable of protection if they attach to land which is already protected. This is unclear in the discussion paper. It is also unclear precisely what protection the songline, for example, would receive. Given that the cultural heritage system is traditionally one which relates to physical access to a particular site, for example, how would the new proposed model protect storylines, where the story itself is not a physically accessible place or thing, but represents Indigenous Cultural and Intellectual Property in the form of cultural knowledge? How will the story itself be better protected under the new proposed model? These issues remain unclear on our reading of the discussion paper and we respectfully request that some clearer, more practical information in respect of the broadening of the definition be considered.

2. A register of cultural heritage

Arts Law is concerned that the creation of a register of cultural heritage requires the disclosure of Indigenous Cultural and Intellectual Property which might be sacred or

vulnerable to misuse by those with access to the register. We are also concerned generally about the treatment and disclosure of the information relating to the cultural heritage throughout the registration, negotiations and approvals process. Arts Law asks that the Department consider the treatment of this information throughout the registration, negotiation and approvals processes and look at ways to better protect the confidentiality of culturally sacred or secret information. One option is to require that where the register identifies a site which represents a sacred story line, for example, that the register simply indicates that the site is protected in relation to sacred knowledge relating to that site. The register need not disclose the sacred knowledge itself. Any parties then wishing to negotiate the use of that site would need to sign a confidentiality agreement in respect of the information disclosed in the negotiations in order to protect the sacred knowledge associated with that site.

3. Representation by local Aboriginal Cultural Heritage Committees

It is not clear what community or representative authority members of the local ACH committees will have, and to what extent they are therefore capable of properly consulting or granting permission on behalf of, the local community. We are also concerned that there may be potential or actual conflicts of interest within the committee itself. One possible way of addressing potential conflicts of interest within committees is to make mandatory the signing of a code of ethics which specifically identifies the roles and responsibilities of members of the committee.

4. Negotiation process

We are concerned that the current proposed model outlined in flowchart form on page 33 (incorrectly paginated as page 48 in the discussion paper) for development negotiation means that if agreement is not reached between the Proponent and the local ACH Committee, that development will continue regardless of that communities concerns after a 55 day period (including negotiation through an approved independent dispute resolution service).

Further consultation with Arts Law and its stakeholders

Please contact Suzanne Derry (Senior Solicitor) or Robyn Ayres (Executive Director) if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

We can be contacted at

Yours faithfully

Robyn Ayres
Executive Director
Arts Law Centre of Australia

Suzanne Derry
Senior Solicitor
Arts Law Centre of Australia

Submission to the UNHR Special Rapporteur on the impact of intellectual property regimes on the enjoyment of right to science and culture, as enshrined in particular in article 15 of the International Covenant on Economic, Social and Cultural Rights

Executive Director: Robyn Ayres

15 September 2014



THE ARTS LAW CENTRE OF AUSTRALIA

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts. Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

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

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. Each year Arts Law provides legal advice and other services to approximately 2,500 artists and arts organisations. Typically copyright issues comprise about 60% of all problems about which we provide advice.¹

Our essential approach to copyright reform issues

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between competing interest groups when considering proposed amendments to the *Copyright Act 1968* (Cth) (**Copyright Act**). Our perspective here is in keeping with our 'artists first' policy. That policy is implemented in our protocols as to circumstances in which Arts Law will provide advice or may decline to provide advice. That is, Arts Law's policy is to advise on matters that relate to, or affect the rights of individual artists. In situations where there is the potential for conflict between the interests of individual artists and those of arts organisations and other entities, Arts Law will normally not advise those arts organisations and other entities so as to avoid conflict with the 'artists first' policy.

Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. We also support fair and reasonable access to copyright material. We believe that balance is crucial in fostering creativity and is essential for the intellectual and cultural development of society.

The Arts Law welcomes the opportunity to provide this submission to the Special Rapporteur on the impact of intellectual property regimes on the rights to science and culture. In this submission, we will focus on the right of the rights of indigenous peoples and local communities to enjoy and access their cultural heritage.

¹ 1,487 of the 2,444 legal advice files in 2013 included copyright as one of the areas Arts Law advised on (Arts Law Annual Report 2013, p. 20).

Arts Law supports the submission of the Australian Copyright Council

Arts Law agrees with the submission of the Australian Copyright Council to the Special Rapporteur. The following paragraphs from the submission of the Australian Copyright Council also reflect the values of Arts Law:

"We believe in the values copyright laws protect: creative expression and a thriving, diverse, sustainable, creative Australian culture. A society's culture flourishes when its creators are secure in their right to benefit from their creative work and when access to those creative works is easy, legal and affordable. Copyright effectively and efficiently enables this balance between protection and access."

"In our view, "access to culture" is most meaningful where it refers to the ability to connect with content of cultural, social and educational significance or value."

Protection of 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP)

Arts Law provides an Indigenous arts law service - *Artists in the Black* (AITB)² and provides information and advice to Aboriginal and Torres Strait Islander artists and community arts centres including via the *Solid Arts* website.³ The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address the concerns of Aboriginal and Torres Strait Islander artists and community arts centres as to the adequacy of protocols to manage 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP) and the potential for better protection to be achieved through reform of the existing IP legislation of Australia.

In the request for submissions the Special Rapporteur expressed an interest in learning more about the concrete obstacles met by artists, authors and creators to benefit from the protection of the moral and material interests resulting from literary or artistic production of which he or she is the author. To meet this request for specific examples of obstacles, Arts Law provides to the Special Rapporteur a copy of a submission made on 14 June 2012 to *IP Australia*, which administers Australia's intellectual property rights system.⁴ In this submission Arts Law provided some examples of situations in which the assistance of Arts Law has been requested and in which the provision of effective help to Aboriginal and Torres Strait Islander artists is hampered by the existing IP regimes.

FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at

Yours faithfully,

Robyn Ayres
Executive Director
Arts Law Centre of Australia

² <http://www.aitb.com.au/>

³ <http://www.solidarts.com.au/>

⁴ <http://www.ipaustralia.gov.au/>



27 February 2015

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Via email:

Re: Review of the Native Title Act 1993

The Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts. Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries. Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law provides an Indigenous arts law service - *Artists in the Black* (AITB) <<http://www.aitb.com.au>> and provides information and advice to Aboriginal and Torres Strait Islander artists and community arts centres. The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address the concerns of Aboriginal and Torres Strait Islander artists and community arts centres as to the adequacy of protocols to manage 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP).

Submission of the Arts Law Centre of Australia

Summary

It is the view of Arts Law that the *Native Title Act 1993* should be amended and extended to provide appropriate recognition of the traditional knowledge and traditional cultural expressions of Aboriginal and Torres Strait Islander people.



Arts Law's position is that *Native Title Act* does not adequately recognise the vested customary and common law property rights of Aboriginal and Torres Strait Islander people in their traditional knowledge and traditional cultural expressions and that the Act should provide for the maintenance, protection and prevention of the misuse of cultural knowledge and cultural expressions, for example:

- the use of styles of ceremonial painting that are identified with specific cultural groups. For example, *rarkk* (cross-hatching) has origins as ceremonial art that is specific to Arnhem Land; and
- the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives.

Arts Law's view is that Aboriginal and Torres Strait Islander people also have a native title right to take and use native fauna and flora that is recognised by the common law of Australia and as described in ss. 211 and in the discussion of the expression "*native title rights and interests*" in s. 223 of the *Native Title Act*.

Detail

Australia's commitments to provide protective measures for cultural activities (including Indigenous cultural and intellectual property) are located in the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005)¹ to which Australia became a party on 18 September 2009; and the United Nations' *Declaration on the Rights of Indigenous People* (2007) which states that Indigenous people have a right to control their traditional knowledge and traditional cultural expressions.² Traditional knowledge and traditional cultural expression that is relevant to Aboriginal and Torres Strait Islander artists covers an extensive range of matters and includes: secret and sacred material or information, which under Aboriginal and Torres Strait Islander customary law is restricted in relation to who can view the material or learn the information; styles of ceremonial painting that are identified with specific cultural groups;³ and other aspects of traditional cultural expression that Arts Law can discuss with the Australian Law Reform Commission.

¹ The Convention entered into force three months after Australia became a party on 18 September 2009.

² Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* (2007) refers *inter alia* to "the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

³ The Australian Council for the Arts, provides examples of a style of ceremonial painting: "*rarkk* (cross-hatching) is recognised as art from Arnhem Land, and has origins as ceremonial art. Arnhem Land artists find it offensive to see their ceremonial styles copied by other Indigenous artists, or non-Indigenous artists, with no attachment or belonging to these styles. It is also offensive to copy images of creation beings such as Wandjinas and Mimis without proper claim under Indigenous laws." Australian Council for the Arts, *Visual Arts: Protocols for producing Indigenous Australian Visual Arts* (2nd edition, Page 16) <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>



Many Aboriginal and Torres Strait Islander communities rely on customary law to control their traditional knowledge and traditional cultural expressions among members of the community. However the difficulty for those communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws.

The ALRC's report *Recognition of Aboriginal Customary Laws* (ALRC Report 31) noted that the categories of customary rights recognised by the common law are not closed.⁴ However the existing case law shows that establishing that the common law recognises customary rights can be deeply complex and costly and leads to the conclusion that the common law of Australia may not adequately recognise traditional laws relating to traditional knowledge and traditional cultural expressions.⁵

The *Native Title Act 1993* provides a process of establishing the native title rights and interests, with s. 223(3) setting out the requirement of connection with the land. However the High Court in *Western Australia v Ward* [2002] held that the recognition of a right to maintain, protect and prevent the misuse of cultural knowledge is not a right in relation to land of the kind that can be the subject of a determination of native title under the *Native Title Act 1993*.⁶

Aboriginal and Torres Strait Islander people have the right to keep secret their sacred and ritual knowledge in accordance with their customary law. While sacred and ritual knowledge can be protected by the common law under the equitable principles of confidential information,⁷ the ALRC Report 31 comments that these remedies "*clearly cannot cover all situations where revealing information may itself be a breach of customary laws.*"⁸

⁴ *Recognition of Aboriginal Customary Laws* (ALRC Report 31) [62].

⁵ See discussion by Joseph Githaiga, *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, 5 (2) Murdoch University Electronic Journal of Law (June 1998) <http://www5.austlii.edu.au/au/journals/MurUEJL/1998/13.html>

⁶ *Western Australia v Ward* [2002] HCA 28 (8 August 2002) [57]-[62].

⁷ ALRC Report 31 [468]. Case cited: *Re Nationwide Publishing Proprietary Limited Trading As the Centralian Advocate v Rosie Furber* [1984] FCA 104; 3 FCR 19 (13 April 1984); *Foster v Mountford & Rigby Limited* (1976) 14 ALR 71; *Pitjanyatjara Council Inc & Nganingu v Lowe & Bender* (1982) 4 ALB 11.

⁸ ALRC Report 31 [468].



As a consequence there are many situations where Aboriginal and Torres Strait Islander people have no effective legal remedies and therefore no absolute right to keep secret their sacred and ritual knowledge or prevent the use of their traditional knowledge and traditional cultural expressions by others who do not have a customary right to use the knowledge or expressions in artwork.

FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at

Yours faithfully,

Dr. Morris Averill

Senior Solicitor

Arts Law Centre of Australia



3 June 2016

Intellectual Property Arrangements

Productivity Commission

GPO Box 1428

Canberra City ACT 2601

Via email: intellectual.property@pc.gov.au

**SUBMISSION ON THE INTELLECTUAL PROPERTY ARRANGEMENTS – PRODUCTIVITY COMMISSION
DRAFT REPORT (APRIL 2016)**

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the Productivity Commission Draft Report on Intellectual Property Arrangements.

About the Arts Law Centre of Australia

Arts Law is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Arts Law provides an Indigenous service - *Artists in the Black (AITB)*. The aim of AITB is to increase access to legal advice and information about legal issues for Aboriginal and Torres Strait Islander artists and communities.

In 2015, Arts Law provided 2733 legal advice services to Australia's artists and arts organisations, and provided legal education to 2045 people in the arts community. Approximately 43% of legal advice involved copyright issues.

The annexures to this submission are:

- Arts Law submission to the Australian Law Reform Commission's *Copyright and the Digital Economy Discussion Paper* (DP79), dated 2 August 2012;

- Arts Law submission to the Australian Government's *Online Copyright Infringement Discussion Paper 2014*, dated 5 September 2014;
- Arts Law submission to the Advisory Council on Intellectual Property's *Review of the Designs System Options Paper*, dated 22 January 2015;
- Arts Law submission to the Productivity Commission on the *Intellectual Property Arrangements –Issues Paper*, dated 21 December 2015; and
- Arts Law letter to Department of Communications in relation to the *Copyright Amendment (Disability Access and Other Measures) Bill* Exposure Draft February 2016, dated 16 March 2016.

CHAPTER 2: The analytical framework

DRAFT RECOMMENDATION 2.1

In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and have regard to the principles of:

- *effectiveness, which addresses the balance between providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely*
- *efficiency, which addresses the balance between returns to innovators and to the wider community*
- *adaptability, which addresses the balance between providing policy certainty and having a system that is agile in response to change*
- *accountability, which balances the cost of collecting and analysing policy–relevant information against the benefits of having transparent and evidence–based policy that considers community wellbeing.*

Arts Law refers to its previous submissions to the Productivity Commission's Issues Paper on the question of the principles that should be considered in the formulation of intellectual property policy. Arts Law is concerned that the framework of evaluation proposed by the Productivity Commission in its Draft Report undervalues artists' contributions and discounts the interests of Australian creators in favour of consumers and other content-users.

Arts Law is especially concerned that the economic framework proposed by the Productivity Commission's Draft Report does not explicitly consider any issues in relation to Indigenous Cultural and Intellectual Property (ICIP). As noted in Arts Law's submissions to the Productivity Commission Issues Paper,¹ Australia has international obligations to consider the ICIP dimensions of any potential reforms as a party to the *UNESCO Convention and the Protection and Promotion of the Diversity of*

¹ Arts Law, Submission number 117 to the Productivity Commission, *Intellectual Property Arrangements*, 21 December 2015, 3.

Cultural Expressions (2005)² and the United Nations' *Declaration on the Rights of Indigenous People* (2007).³

The Productivity Commission's Draft Report also acknowledges that intellectual property rights sit within the broader intentional framework which includes the World Intellectual Property Organization (WIPO) as a key international institution. Arts Law notes that WIPO has recognised that "*Indigenous peoples and traditional communities have unique needs and expectations in relation to IP, which can be sensitive given their complex social, historical, political and cultural dimensions*" and that WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has paid particular attention to the protection of traditional knowledge, genetic resources and traditional cultural expressions.

It is Arts Law's submission that accordingly, Australian intellectual property policy must be developed consistently with international standards on ICIP, recognising the unique needs and expectations of its Aboriginal and Torres Strait Islander peoples in relation to the expression of their culture in their representations of their cultural heritage, as well as the special benefits enjoyed by both Indigenous and non-Indigenous peoples that result from these representations. Arts Law sets out its particular concerns in relation to the ICIP dimensions of the proposed reforms below.

CHAPTER 4: Copyright term and scope

DRAFT FINDING 4.2

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

Arts Law disputes the Productivity Commission's suggestion that the "optimal" copyright term is between 15 to 25 years after creation.

Arts Law understands that Productivity Commission's view is that given that "*the vast majority of works do not make commercial returns beyond their first couple of years on the market*", "*providing financial incentives so far into the future has little influence on today's decision to produce*". Arts Law is concerned that this is a simplistic view of the creative and cultural industries that severely undervalues the creative effort that artists invest in their works.

As discussed in Arts Law's submission to the Productivity Commission's Issues Paper, it is Arts Law's submission that the cultural industries are "*hit-driven industries*", in the sense that annually, there are a small number of very profitable releases, a range of mildly profitable to mildly unprofitable releases, and a significant number of unprofitable releases. In the cultural industries, the less

² See in particular Article 2, which makes specific reference to the recognition of respect for indigenous peoples and Article 7, which encourages cultural expressions, "*paying due attention to the special circumstances and needs of ... indigenous peoples*".

³ See in particular Article 31, which provides that "*Indigenous peoples ... have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*"

profitable releases are buoyed by the ongoing financial return on successful works.⁴ Similarly, on the individual creator scale, the ongoing commercial success of an individual title (for those who are fortunate enough to have one) acts as a balance to the lack of commercial return on other titles, playing a crucial role in providing a minimum standard of living for creators. It is Arts Law's position that limiting the copyright period to 15 to 25 years after creation will severely limit this important income stream and unjustifiably curtails artists' ability to recoup on their creative investment.

For example, as Adam Suckling, Chief Executive of the Copyright Agency has pointed out,⁵ Tim Winton's modern classic, *Cloudstreet*, was published in 1991 but has had ongoing commercial success over the last 25 years. If a copyright period of 15 years from the date of publication had applied to *Cloudstreet*, *Cloudstreet* would have been out of copyright by 2006; Tim Winton's permission would not have been required and no compensation would have been required to be paid for Foxtel's TV miniseries adaption of *Cloudstreet* in 2011, or for George Palmer QC's opera adaption in 2016. Similarly, under the proposed reduced copyright period, Australian creative works such as Midnight Oil's song *Power and the Passion* (1982) and Emily Kame Kngwarreye's *Big Yam Dreaming* (1995) would already be out of copyright and free for use in the public domain.

Further, it should be noted that there are observed cycles in which a "hit" product is released by a creator, driving a "revival" of previously released but commercially unsuccessful works. Reducing the copyright period to 15 to 25 years would also limit an artist's ability to capitalise on this income stream. While it is true that at this point any royalties earned by creators are not necessarily a reward that has been consciously pursued or bargained for, these returns play a crucial role in providing a means of financial support for creators - "*a mechanism that preserves market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs and a maximum artistic autonomy during the creative process*"⁶ - as well as for their families.

Arts Law regularly provides legal advice to Aboriginal and Torres Strait Islander families entitled to income because of the ongoing licensing of a family member's art; in 2015, as part of the Artists in the Black program, Arts Law prepared 115 wills in 2015 for Aboriginal and Torres Strait Islander artists across Australia. In the case of Aboriginal and Torres Strait Islander artists, these benefits are often spread among their communities as well. It is Arts Law's experience, therefore, that royalties are an important consideration for artists and their families and communities, not only in the initial years on the market, but many years into the future.

Ultimately, as noted by the Productivity Commission in its Draft Report, Australia's ability to reduce the term of copyright is limited by international agreements, namely the Agreement on Trade Related Aspects of Intellectual Property, which establishes a copyright term of 50 years (extended to

⁴ Arts Law, Submission number 117 to the Productivity Commission, *Intellectual Property Arrangements*, 21 December 2015, 6.

⁵ Adam Suckling, *Good for lawyers, bad for creators* (23 May 2016), ArtsHub <<http://www.artshub.com.au/news-article/opinions-and-analysis/grants-and-funding/adam-suckling/good-for-lawyers-bad-for-creators-251347>>

⁶ Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation* (2014) 38(4) Columbia Journal of Law and the Arts 467 at 473.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633263; as cited in Arts Law, Submission number 117 to the Productivity Commission, *Intellectual Property Arrangements*, 21 December 2015, 6.

70 years under the Australia-United States Free Trade Agreement). It is Arts Law's position that any action by Australia to encourage a reduction of this copyright period in the international sphere is contrary to the interests of creators and unwarranted in light of the international consensus on the 50 year copyright period.

DRAFT RECOMMENDATION 4.1

The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.

Arts Law acknowledges the difficulties presented by unpublished works and the arguments for making these items accessible to the public.

While the Productivity Commission has argued that demands for works that have been created but are not being supplied reduces consumer welfare and the profits of intermediaries and original rights holders, there is an outstanding question as to whether consumer demand should take priority over an author's deliberate decision not to publish a work.

In particular, Arts Law submits that unpublished works by Aboriginal and Torres Strait Islander creators would need to be considered apart from this proposed scheme, given that these works may include specific secret or sacred cultural material.

While a decision not to publish may mean that an author misses out on a potential income stream, as Arts Law has previously submitted to the Issues Paper, an author's decision not to publish a work may be based on the desire to maintain quality control over their work or concern about the impact on their reputation if the work is to be published. Allowing the publication of works despite the author's opposition sits uneasily with the right of the author to control the exploitation of their work, as well as the moral rights regime in the *Copyright Act 1968 (Cth)* (**Copyright Act**), which is aimed at securing and protecting the reputation of the author of copyright works

In light of this, Arts Law offers qualified support for the proposal to amend the Copyright Act so that the current terms of copyright protection also apply to unpublished works, subject to the author's right to specify that they do not wish a particular work to be published.

CHAPTER 5: Copyright accessibility: licensing and exceptions

DRAFT RECOMMENDATION 5.2

The Australian Government should repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.

Arts Law opposes the Productivity Commission's recommendation that the parallel import restrictions on books be repealed.

As the Productivity Commission has identified, the interests of consumers are already protected by provisions which allow individuals to parallel import books for personal consumption. While as the Productivity Commission has noted, there may remain search, transaction and delay costs under the

current exemptions for personal importation, these must be balanced against the impact that the removal of the parallel importation provisions will have upon Australian publishers and authors.

The Productivity Commission's Draft Report considered previous reviews of parallel import restrictions on the price of books, including, relevantly, a 2012 study by Deloitte Access Economics that showed a NZ \$3.06 price difference in a 100 book title-for-title comparison between New Zealand and Australia following the removal of parallel import restrictions in New Zealand in 1998. Arts Law notes that this study was based on a comparison of the price of books from the online retailers Fishpond in New Zealand and Dymocks in Australia. Arts Law questions whether these were the correct comparators – Fishpond is an exclusively online retailer, whereas Dymocks manages its online store in addition to 65 “brick and mortar” stores across Australia. A comparison with Dymocks may also be inaccurate for the purpose of determining the ultimate difference in price paid by customers, given that, as writers such as Nick Earls have noted,⁷ Dymocks is often undercut by discount outlets such as Big W and Kmart.

Even if the proposed repeal of parallel import restrictions does have the overall effect of providing cheaper books to the Australian market, as various publishers, authors, the Australian Copyright Council and Susan Hawthorne⁸ have argued, it will come at the expense of the Australian publishing industry, reduced authors' royalties from overseas rights sales, and the eventual reduction of diversity in Australian bookstores.

As Arts Law has previously submitted in its submissions to the Productivity Commission's Issues Paper, the copyright policy employed to guide the assessment of intellectual property arrangements must also take into account not only economic imperatives, but cultural and social welfare benefits that accrue to the broader Australian community.⁹ It is Arts Law's submission that this includes the considerable and unique benefit that accrues to the Australian community of access to Australian stories by Australian authors.

The Productivity Commission's suggestion that any detriment to local writing could be addressed by direct subsidies and funding aimed at encouraging Australian writing is unlikely to be sufficient to make up for the loss of long-term incentives for Australian authors through the removal of the parallel import restrictions. The Productivity Commission's reliance on direct subsidies and funding is especially unrealistic in light of the Government's current approach of cuts to direct funding and subsidies to the arts: the two 2015/2016 Australia Council for the Arts' funding rounds represented a fall of 70% for individual artists and 72% for individual projects, an approach which particularly impacts authors, who mainly work alone.

⁷ See Nick Earls, *Cheaper Books? Don't Count on it* (30 September 2009), Arts Law Centre of Australia <<http://www.artslaw.com.au/art-law/entry/cheaper-books-dont-count-on-it/>>

⁸ Susan Hawthorne, *The looming threat to our book industry is bad for authors, publishers ... but mostly for you* (4 May 2016), The Guardian <<http://www.theguardian.com/commentisfree/2016/may/04/the-looming-threat-to-our-book-industry-is-bad-for-authors-publishers-but-mostly-for-you>>

⁹ Arts Law, Submission no 117 to the Productivity Commission, *Intellectual Property Arrangements Discussion Paper*, 21 December 2015, 3.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the Copyright Act 1968 (Cth) to replace the current fair dealing exceptions with a broad exception for fair use.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement.

The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- *the effect of the use on the market for the copyright protected work at the time of the use*
- *the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- *the commercial availability of the work at the time of the infringement*
- *the purpose and character of the use, including whether the use is commercial or private use.*

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

Fair use

Arts Law has previously expressed its opposition to the introduction of any broad fair use exception to copyright infringement in its submission to the Australian Law Reform Commission's Copyright and the Digital Economy Discussion Paper dated 2 August 2012.¹⁰

Why have exceptions for fair dealing/use?

Arts Law notes that in its Draft Report, the Productivity Commission states that "*the key policy for Government should not be how to design exceptions that do not negatively affect rights holders at all, but rather how to design exceptions that result in a net benefit to the community overall.*"

Arts Law is concerned that the fair use provisions proposed by the Productivity Commission have been designed primarily with the interests of consumers in mind and that insufficient consideration has been given to whether the introduction of fair use in Australia would comply with Australia's international obligations under Article 9 of the *Berne Convention* to limit copyright exceptions to

¹⁰ See Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 2 August 2012, 36 – 53.

special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Arts Law notes the Productivity Commission's criticism that "*moral rights and performer's rights were developed despite little evidence of a policy problem*" and the Copyright Law Reform Committee's (CLRC) recommendation against the introduction of moral rights legislation in 1987.¹¹ However, Arts Law points out that following the CLRC report, the issue was revisited again in 1994 with the release of the Attorney General's Discussion Paper,¹² which noted various policy reasons that supported the introduction of moral rights, including the numerous examples of moral rights abuses cited in submissions to the Discussion Paper, the additional redress that moral rights would provide to Aboriginal and Torres Strait Islander artists, international trends towards the recognition of moral rights and the need to balance the rights of copyright creators and users in a society in which new technology provided the community with heightened ability to access, reproduce and manipulate copyright works. The introduction of a moral rights scheme was regarded by the Discussion Paper as '*a workable compromise between the rights of copyright creators, the rights of industries and organisations that rely on copyright materials and the rights of the community generally in having access to copyright materials*'¹³ – in other words, a considered response to an identified policy issue.

Arts Law submits that Australia's enactment of moral rights protections in Part IX of the Copyright Act means that Australia must take into account moral rights as an important element of the "legitimate interests of the author" in determining compliance with Article 9 of the *Berne Convention*.¹⁴ Having implemented a moral rights regime consistent with its treaty obligations, Australia cannot adopt a broad fair use exception. An open-ended fair use exception that allows the appropriation of existing work would conflict with both the existing obligation of third-party users to attribute the author of the work and the author's right to protection against derogatory treatment of the work. This is of particular concern as in the experience of Arts Law, artists highly value the moral rights that acknowledge their authorship and preserve the integrity of their work - in 2015, 226 of 2569 Arts Law legal advice requests involved some aspect of moral rights.

Arts Law also notes that a broad fair use exception and the corresponding increased scope for appropriation and non-attribution may raise issues in relation to the use of culturally sensitive ICIP.

It is Arts Law's submission that the appropriate balance between the rights of the creators and consumers cannot be achieved by a broad fair use exception but should be instead should be struck through exceptions to copyright infringement based on social, political and cultural purposes. It is the position of Arts Law that the current fair dealing exceptions for parody and satire, criticism and review and reporting the news, strike that balance.

¹¹ Copyright Law Review Committee, *Report on Moral Rights*, Report (1998).

¹² Attorney-General and Department of Communication and the Arts, *Proposed Moral Rights Legislation for Copyright Creators*, Discussion Paper (1994).

¹³ Above n 12, 53.

¹⁴ For detailed discussion, see Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 2 August 2012, 50 – 51.

'Fair use removes impediments to industry development'

In Arts Law's submission, to the extent that the current copyright provisions impede innovation in the digital economy by prohibiting critical technologies and innovative activities from being conducted in Australia, this can be addressed through targeted reforms.

The Productivity Commission's Draft Report also states that the movement to a fair use exception will pave the way to allow the greater creation of transformative works, such as mashups. However, it is the experience of Arts Law that while there is significant interest within the Australian artistic community in understanding the limits of transformative works, there is no serious demand for an expansion of those limits; most artists value their own creative work and understand the importance of valuing and respecting that of others. Arts Law has observed that to the extent that there is a demand for a fair use exception for transformative works, this is driven by the social media sector using these works for communicative purposes, rather than by the creative community which relies financially on copyright.

It should also be noted that to the extent that there is a desire by artists to engage in appropriation art, the permission of the rights holder can always be sought as a means of avoiding moral rights infringement. In addition, the "substantiality" threshold for copyright infringement also provides a measure of flexibility to allow a certain level of appropriation. Beyond this, the specific fair dealing exceptions for parody and satire,¹⁵ and criticism and review¹⁶ may also protect artists using appropriation techniques.

'Fair use is inherently uncertain'

Arts Law acknowledges the Productivity Commission's argument that *"legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself."* However, the lack of certainty inherent in a fair use exception is of particular concern when viewed in terms of the rights of creators. Arts Law is concerned that the uncertainty inherent under a broad fair use exemption will lead users to assume that their use of copyright material is fair; artists who wish to challenge such a use will be required to obtain legal advice and prove through litigation that each use of their work is not fair.

While illustrative examples of fair use may be of assistance by providing guidance to parties, Arts Law notes that outside of these specific examples, the scope of uncertainty will remain and ultimately, what is fair use will need to be determined on a case-by-case basis by the courts. While US case law could be a source of some guidance, the US case law is notoriously difficult to interpret and may in any case be of limited use, given that it developed in an environment absent moral rights legislation.¹⁷ In addition, while the US and Canada have developed guidelines on fair use as part of efforts to reduce potential uncertainty, these guidelines themselves are complex, difficult to interpret and are ultimately of questionable utility. In the context of an environment in which the majority of Australian creators already do not have the time, financial resources or expertise to

¹⁵ Under section 41A of the Copyright Act.

¹⁶ Under section 41 of the Copyright Act.

¹⁷ Apart from the protection granted to visual artists under the *Visual Artists Rights Act of 1990*.

pursue litigation to enforce their copyright, a fair use exemption will therefore create further difficulties for creators struggling to control unlicensed use of their work.

Arts Law also opposes the introduction of “quotation”, “education”, “non-commercial private use” or “library or archive use” as illustrative examples of fair use purposes. Arts Law refers to its previous submissions to the ALRC Copyright and the Digital Economy Discussion Paper on this matter.¹⁸ In relation to the proposed exception for access for people with disability, Arts Law refers to the letter sent by Arts Law to the Department of Communications and the Arts in regards to the *Copyright Amendment (Disability Access and Other Measures) Bill* Exposure Draft dated 16 March 2016.

Orphan works

While Arts Law recognises the particular difficulties presented by orphan works, it is Arts Law’s view that the orphan work problem can be addressed without the need to resort to any broad fair use exceptions.¹⁹

Arts Law maintains its support for reforms to the Copyright Act to allow licencing of orphan works through an up-front payment of a licence fee to a collecting society, similar to the system introduced in Canada. As outlined in the Arts Law submission to the ALRC Copyright and the Digital Economy Discussion Paper, it is Arts Law’s position that the reforms should:

- provide a definition of orphan works that covers copyright owners or relevant performers who cannot be identified or located;
- provide a clear description of the necessary steps that a person must take to attempt to locate and identify the copyright owner;
- provide for the payment of a licence fee to the appropriate collecting society or government body;
- provide that the copyright owner would receive compensation for the use when identified or located; and
- include a mechanism to compensate for moral rights infringements.²⁰

Arts Law also submits that any model for the management of orphan works needs to take account of the special circumstances of Aboriginal and Torres Strait Islander artists, communities and rights holders in Australia, given that these works may include sensitive, secret or sacred cultural material. In particular, Arts Law would support the management of Indigenous orphan works through a body such as Terri Janke’s proposed National Indigenous Cultural Authority, such that Indigenous orphan

¹⁸ In particular, see Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 2 August 2012 at 67 (non-commercial private or domestic use), 73 (quotation), 74 (library and archive use), and 80 (education).

¹⁹ Arts Law notes that educational and other institutions and Commonwealth and State governments are already able to make use of existing licences and exceptions under the Copyright Act, regardless of whether or not a work is orphaned. See, for example, Part VA and VB Copyright Act in relation to educational and other institutions and Part VII Div 2 Copyright Act in relation to the Commonwealth and State governments.

²⁰ See Arts Law, Submission Number 706 to the Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper*, 76.

works could only be licenced subject to the consent of the relevant Indigenous community or custodian.²¹

Chapter 10: Registered designs

DRAFT RECOMMENDATION 10.1

Australia should not join the Hague Agreement until an evidence-based case is made, informed by a cost-benefit analysis.

The Productivity Commission's Draft Report notes that the copyright/design overlap limits copyright protection, such that a person who wants exclusive rights to make and sell three-dimensional products cannot rely on copyright in any underlying artistic work (such as drawings or models), but must register a design. However, this was not identified by the Productivity Commission as a particular issue in need of reform.

Arts Law's position is that there is a need for reform in relation to the copyright/design overlap provisions. Arts Law submits that the provisions in sections 74-77A of the Copyright Act and section 18 of the *Designs Act 2003* (Cth) (**Designs Act**) may unfairly burden artists. As noted in the Arts Law submission to the ACIP Review of the Designs System Options Paper in 2015:

*"Under section 77 of the Copyright Act, an unauthorised person making a product embodying an artist's work does not infringe that artist's copyright in their artistic work where a corresponding design of the artistic work has been applied industrially by the artist themselves. This means that although an artist may freely make unlimited two-dimensional reproductions and have those reproductions protected under copyright law, if that artist makes a small number of three-dimensional reproductions that copyright is lost. This results in an environment where artists are unable to fully commercially exploit their interest in their own work, and if they do, they run the risk of having their work freely copied and reproduced by others."*²²

Arts Law takes the opportunity to reiterate its support for reform to the copyright/design overlap provisions that do not exclude artistic works from the copyright system upon industrial application, but instead allow such works to retain copyright protection for a period equivalent to that under the registered designs system (i.e. 10 years). This would alleviate the current design/copyright confusion while providing protection to artists who wish to industrially apply their design but cannot afford formal registration under the *Designs Act*.

Arts Law also reiterates its recommendation that Australia enter into the Hague Agreement Concerning the International Registration of Industrial Designs (**Hague Agreement**) and that accordingly, the term of protection of designs be extended from 10 years to 15 years. Arts Law

²¹ See National Congress of Australia's First Peoples, *The Call for a National Indigenous Cultural Authority*, June 2013, < <http://nationalcongress.com.au/wp-content/uploads/2013/07/201306NationalIndigenousCulturalAuthority.pdf> >

²² Arts Law, Submission to the Advisory Council on Intellectual Property, *Review of the Designs System Options Paper*, 22 January 2015, 2.

notes that the United States has now joined the Hague system and that the long-term benefits of entering into the Hague Agreement are in the interests of Australian artists and designers. Given the priority given to consumer interests by the Productivity Commission report, it is Arts Law's view that the long-term benefits that would accrue to Australian creators upon joining the Hague Convention outweigh the "wait-and-see" approach recommended.

Chapter 18: Compliance and enforcement

DRAFT RECOMMENDATION 18.1

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).

Arts Law provides qualified agreement with the Productivity Commission's recommendation that the safe harbour scheme be expanded to cover the broader set of online service providers intended in the Copyright Act. Arts Law submits that before the safe harbour scheme is expanded, however, the take-down notice mechanism should be improved so that the mechanism better balances the burden of enforcement between service providers and artists.

Arts Law notes that the current safe harbour scheme puts the onus on artists, often of little means, to rely on notice and takedown procedures. However, Arts Law reiterates its previous submission that because Internet Service Providers (ISPs), search engines and social networking platforms reap significant financial rewards from the storage and transmission of the creative content that they distribute, they also have the responsibility to ensure that effective action is taken in response to take-down notices provided by copyright holders and to implement the licensing and payment mechanisms that allow artists and rights holders to receive remuneration for the use of their work online.²³

Arts Law submits that the takedown notice scheme may be limited use to rights holders. Even if rights holders are successful in having a specific URL link to copyright infringing material taken down, this does not change the fact that there may be multiple other links to, or copies of, the same infringing material. Furthermore, links or content, once removed, are often simply re-posted.²⁴

It is the position of Arts Law that the safe harbour scheme needs to be amended to better balance the burden of enforcement for artists so that, for example, it addresses the problem of "relentless reposting" of infringing files so that the obligation on the recipient notice is to take down the infringing content or link to the content as soon as it is notified of its infringing character by the rights holder, with a continuing obligation to ensure that it does not reappear.²⁵

²³ See Arts Law, Submission to the Australian Government, *Online Copyright Infringement Discussion Paper*, 5 September 2015, 5.

²⁴ As observed by Music Rights Australia. See Music Rights Australia, Submission to the Department of Communications and the Arts, *Copyright Amendment (Disability Access and Other Measures) Bill 2016 Exposure Draft*, February 2016, 8.

²⁵ Above n 22, 15.

Arts Law also notes recent developments in case law in the US in relation to the take-down notices, in particular *Lentz v Universal Music Corp. et. al* No. 13-16106, 13-16107, 2015 WL 5315388 (9th Cir. Sept. 14, 2015) (*Lentz*). In *Lentz*, the Court of Appeals for the Ninth Circuit held that under section 512 of the Digital Millennium Copyright Act, before a copyright holder issues a DMCA notice to remove alleged infringing content, the holder must make a good faith review of whether the content concerned is authorised by fair use.

Arts Law is concerned that if similar provisions were enacted in Australia requiring artists to, for example, swear a statement that no reasonable prospect of a defence exists as a prerequisite to issuing a take-down request, this would place an additional burden on artists, who are already required to invest significant time and resources in tracking the use of their work online. Coupled with the introduction of an uncertain fair use exemption to copyright infringement, such a provision may further restrict the ability of artists to robustly pursue copyright infringers.

Arts Law also submits that the extension of the safe harbour scheme to educational institutions should not have the effect of undermining the operation of the licences for educational institutions and other uses, as set out in Parts VA, VB and VII Division 2 of the Copyright Act.

DRAFT FINDING 18.1

The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

The Productivity Commission's Draft Report states that *"little evidence exists on the economic harm caused by online infringement, and Australia's position as a net importer of copyright-protected works does not favour stronger enforcement mechanisms"*.

Arts Law is concerned that the focus on Australia's position as a net importer of copyright-protected works is a consumer-centred one that overlooks the harm that is suffered by Australian content producers.

Arts Law's client data in 2015 established that out of a total of 175 requests for advice as to copyright infringement, 70 queries related to online infringement; that is, 40% of queries related to online infringement of copyright. Other surveys of professional artists (2003 & 2010) identified copyright infringement as a significant problem with 25% of artists saying that they have experienced copyright infringement. The Arts Law client data provides an indication of the significant impact on artists of copyright infringement occurring in the online environment.

The evidence drawn from Arts Law's client records suggest that artists are being harmed by online infringement, leading to commercial (and creative) losses which can be difficult to quantify. The following are some examples from the Arts Law client records:

- Indigenous and non-Indigenous artists who find their online promotional artwork images are reproduced and available for sale on websites;
- Indigenous artists/communities who find inappropriate use of their expressions of culture uploaded to the web (without prior and informed consent);

- images and photographs copied and published or distributed by individuals, businesses and the news media without the permission of the owner and without attribution of authorship;
- the digital dissemination of literary works without the consent of the author or publisher;
- audiovisual material available online in breach of agreements describing how the material can be exploited; and
- copying of music from CDs onto a computer and the digital dissemination of songs to mobile phones without the consent of the creators.²⁶

Arts Law agrees that one of the key ways through which online copyright infringement can be reduced is through the adoption of distribution strategies by artists, creators and copyright owners that counter the demand for infringing copyright material by being responsive to consumer demand for copyright material (including the timing of availability and pricing the material at levels that encourage consumers to deal with licensed providers of the material).

However, Arts Law submits that managing the implications of online copyright infringement requires a range of measures, including providing information and education to consumers engaging in online copyright infringement, such as a “graduated response” scheme implemented by ISPs in response to information as to online copyright infringement that is provided by the owners and managers of copyright. Arts Law envisages that this would operate in conjunction with improvements to the current “take-down notice” provisions in the *Copyright Regulations* (as outlined above) and the adoption of business models making content available in Australia that lessen the incentive for unlicensed downloading or viewing.

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

It is Arts Law’s submission that Australia’s current arrangements (involving a collecting society Code of Conduct (**Code**)), annual independent report on compliance with the Code and triannual review of the Code itself) are satisfactorily ensuring that copyright collecting societies operate transparently, effectively and at best practice.

In 2011 and 2013, Arts Law raised concerns with various collecting societies about the lack of transparency in the information provided to licensors in relation to the collection of statutory royalties. These concerns were subsequently addressed and resolved through review processes to Arts Law’s satisfaction.

It is the experience of Arts Law, therefore, that the Code has been a useful standard and an effective mechanism through which Arts Law has been able to bring issues to the attention of copyright collecting societies.

²⁶ For more detail, see Arts Law, Submission to the Australian Government, *Online Copyright Infringement Discussion Paper*, 5 September 2015, 6-7.

INFORMATION REQUEST 16.1

What institutional and governance settings would best ensure that IP policy benefits from a policy champion and is guided by an overarching policy objective and an economywide perspective? Would vesting IP policy responsibility in a single department further these goals, and if so, which department would be best placed to balance the interests of rights holders and users, including follow-on innovators? Are there any complementary or alternative measures that would help facilitate more integrated and evidence-based IP policy-making?

Arts Law agrees with the Productivity Commission's observation that intellectual property policy development would benefit from expert independent input and external scrutiny and agrees with the submission of Professor Andrew Christie²⁷ that expert advice can best be delivered by a standing body consisting of a broad cross-section of opinions, similar to the disbanded Advisory Council on Intellectual Property (ACIP).

It is the submission of Arts Law that the establishment of a standing advisory body is preferable to the ad hoc establishment of expert panels on an as-needs basis. While an expert panel would give the Australian Government the flexibility of selecting members of expert panels as needed for their particular experience, there is also a risk that members may be viewed by the public as having been selected for their particular opinions or stances on the issues in question. Any advisory body billed as "independent" must maintain both the appearance and actuality of impartiality.

Arts Law acknowledges the Productivity Commission's concerns that a standing committee would require an ongoing commitment of public resources but would submit that this is necessary in order to maintain a coherent, long-term overview of intellectual property issues. In addition, Arts Law submits that it is possible to minimise the level of resources required by a standing committee, for example, in the style of the Australian Tax Office (ATO) Consultation Groups. The ATO Not-for-profit Stewardship Group, for example, meets three times a year to (among other things) identify opportunities to improve the tax and superannuation system, gain insights into issues faced by not-for-profit organisations and to identify and discuss emerging issues or developments relevant to not-for-profit organisations. Members are not paid a sitting fee, or the costs of attending meetings. Rather, members participate in order to contribute to strong policy development by Government.

INFORMATION REQUEST 18.1

Would changes to the jurisdiction of the Federal Circuit Court improve access to dispute resolution by small- and medium-sized enterprises? Should additional rules be introduced, such as caps on the amount of costs claimable in a case? What is the upper limit on damages claims the court should hear?

Are there resourcing impediments to the proposed reforms to the Federal Circuit Court? Can greater use be made of cost orders in the Federal Court, including for discovery, to reduce costs further?

²⁷ Andrew Christie, Submission 29 to the Productivity Commission, *Intellectual Property Arrangements*, 30 November 2015, 2.

Should additional Federal Court rules be introduced, such as caps on the amount of costs claimable in a case?

Arts Law does not have sufficient experience in the Federal Circuit Court and Federal Court to provide an in-depth comment on these specific questions. However, consistent with the Productivity Commission's observations in its Draft Report, it is the experience of Arts Law that the considerable complexity, time, cost and uncertainty involved in litigation means that Australian artists struggle to make full use of Australia's courts as an intellectual property enforcement mechanism.

Arts Law understands that the introduction of caps on costs claimable from an unsuccessful party could, in theory, encourage rights holders to pursue litigation by providing a limit to liability. However, this incentive would have to be balanced against the fact that a successful party would still be required to pay any costs above the cap. Practically speaking, this amount would be subtracted from the amount of damages recovered by the successful party and therefore decrease the economic reward for pursuing litigation. In addition, as the Productivity Commission has observed, the fact remains that given the time and cost demanded by litigation, rights holders would generally only consider commencing litigation if they are confident of the outcome, which would decrease the likelihood that a party would seek to limit the amount of costs they could claim from an unsuccessful party.

Arts Law would support an increased focus towards low-cost, accessible alternative dispute resolution mechanisms, potentially through the development of a specific Intellectual property tribunal similar to the New South Wales Civil and Administrative Tribunal. Arts Law envisages that this would be a largely unrepresented jurisdiction presided over by intellectual property specialists which could access regional areas and process matters quickly.

Arts Law would welcome further exploration of this possibility.

FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at

Yours faithfully,

Robyn Ayres

Executive Director

Arts Law Centre of Australia

Jennifer Goh

Seconded Solicitor



NSW Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

20 April 2018

Dear Secretariat,

Arts Law's Submission on the proposed New South Wales Aboriginal Cultural Heritage Bill

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to the public consultation on the proposed Aboriginal Cultural Heritage Bill 2018 (the **Bill**).

Public Consultation

Arts Law is concerned with the very short public consultation period since the release of the draft Bill (11 September 2017 to 20 April 2018), especially given that the development of this Bill has taken over four years. There needs to be ample time allocated to public consultations to be certain that all stakeholders are given the chance to understand what is proposed and to have their voices heard. It is unclear who was approached to give their input or to attend the public information sessions.

Arts Law representatives attended the Penrith workshop on 12 March 2018. There was very limited information provided and all feedback was within the framework of pre-organised activities that did not allow for free and open discussion. Whenever open discussion was engaged in, it was time-limited and the day progressed very quickly without the opportunity for real engagement. There were a small number of Aboriginal people present which raises the question of what engagement has been attempted with Aboriginal communities and organisations. From the information provided it does not appear that there has been specific engagement with Aboriginal people and communities. It is imperative that extensive consultation is completed before the Bill is to be put to the Parliament. There must also be a genuine effort to amend the Bill in line with feedback received during such engagement.

Intangible Aboriginal Cultural Heritage

During the Penrith workshop, there was little information offered regarding the introduction of intangible Aboriginal Cultural Heritage (ACH), and no feedback sought on this type of ACH. This is very concerning given that it is probably the largest change proposed in this Bill.

From the definition proposed, Arts Law considers intangible ACH to be the same concept as Indigenous Cultural and Intellectual Property (ICIP). It is Arts Law's view that the protection of such

traditional knowledge is more appropriately addressed within the Intellectual Property framework and requires the establishment of a comprehensive sui generis legal framework at a national level designed to recognise and protect Indigenous cultural heritage.¹

We understand that the OEH wishes to steer clear of any overlap with Intellectual Property law, however no details on how this is to be achieved has been offered. We also understand that the OEH has modelled this draft Bill on the Victorian *Aboriginal Heritage Act* 2006. This legislation was introduced without consulting renowned experts in ICIP or intangible ACH. Arts Law considers this legislation extremely problematic for the same reasons outlined in this submission.

Registration system incompatible with intangible Aboriginal Cultural Heritage

Arts Law is strongly opposed to any scheme that requires Aboriginal or Torres Strait Islander people (or groups) to register their traditional knowledge before being able to protect it. We have been working in this area for over a decade and have made submissions to other government inquiries in this area at a federal level² and international level³. It is our position that intangible ACH rights should apply automatically by nature of its existence, in the same way copyright is determined. If a person writes a song, or produces an artwork, copyright exists automatically upon the creation. It is our view that ICIP should be recognised the same way. A requirement to register a songline or story in order to create rights is antithetical to this principle. A community's right to control and exploit its cultural heritage should not depend on whether such ACH is registered.

Further, it is impractical and unreasonable to expect Aboriginal people and communities to register all 60,000 years (plus) of cultural heritage. Such heritage does not exist in registrable "chunks". It cannot be divided into separate items. It is a multi-layered, complex web of story, knowledge, belief and culture. Traditional knowledge can also take on various adaptations across different communities. How will the registration system deal with a situation where a story or songline exists within the culture of more than one group?

Whilst we understand that Aboriginal people would not be compelled to register ACH under this proposal, the practical effect would be that there is no recourse for a person or group in the event that their ACH is used commercially without permission, unless that ACH has been registered.

Impracticality of registration system for intangible Aboriginal Cultural Heritage

Arts Law is also concerned that the creation of a register of intangible ACH requires the disclosure of ICIP which might be sacred or vulnerable to misuse by those with access to the register (ie. the ACH Authority, Local ACH Consultation Panels and other persons), even if the register is restricted-access. This will be culturally inappropriate (and damaging) in many situations.

We are also concerned that there may be potential or actual conflicts of interest within the committee itself. It is not clear as to what happens in a situation where more than one group claim ownership over an item of ACH, or a group wishes to challenge the registration of an item.

¹ See attached to this submission, Arts Law's *Submission in Response to the Indigenous Heritage Law Reform Discussion Paper* (2009).

² Ibid.

³ See attached to this submission, Arts Law's *Submission to the UNHR Special Rapporteur on the impact of intellectual property regimes on the enjoyment of right to science and culture, as enshrined in particular in article 15 of the International Covenant on Economic, Social and Cultural Rights* (2014).

Similarly, the registration of intangible ACH is conditional upon the ACH Authority being satisfied under section 36(2)(a) that the heritage “is not widely known to the public and should be protected from unauthorised commercial use.” Why should the ACH be “not widely known to the public”? Does this mean that important ACH that has become widely known is not deserving of protection? This seems to be a completely inappropriate and inherently disrespectful proposition. Additionally, the requirement that the ACH Authority should be satisfied that the heritage “should be protected from unauthorised commercial use” suggests that there is some intangible ACH that should not be protected from such use. There is no explanation or justification for this provision and it is not clear what would make heritage undeserving of protection from unauthorised commercial use.

Broader implications of establishment of a regime to recognise ACH rights

The proper recognition and protection of ACH is an issue of both national and international significance. Most recently it has been raised by the House of Representatives inquiry into the proliferation of inauthentic Indigenous arts and crafts.⁴ As noted above, Australia needs a legislative scheme which protects ACH and fulfils our obligations under Article 31 of the *Declaration of the Rights of Indigenous Peoples*. We note that this is also an issue being considered by the World Intellectual Property Organisation’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC).

The owner of any ACH is the community or group it comes from. They are the only people that can ethically approve or reject the use of its cultural heritage. An ACH Authority, no matter how it is appointed, will consist of people from different communities and, under this proposal, will have ultimate decision-making as to whether an item of intangible ACH can be registered. This is not culturally appropriate, or even realistic, in this context.

The Bill in its final form should enshrine automatic recognition of intangible ACH, without the requirement for registration. Intangible ACH should be recognised as an automatic right vested in the Aboriginal community with ownership of the relevant cultural heritage over generations.

Yours sincerely

Robyn Ayres
Chief Executive Officer

4

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft



WIPO/GRTKF/IC/34/8
ORIGINAL: ENGLISH
DATE: JUNE 15, 2017

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Thirty-Fourth Session
Geneva, June 12 to 16, 2017

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES

Document prepared by the Secretariat

1. At the Thirty-Fourth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is taking place from June 12 to 16, 2017, the Committee developed, on the basis of document WIPO/GRTKF/IC/34/6, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that this text, as at the close of Agenda Item 7, on June 15, 2017, be considered by the Committee under Agenda Item 8 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee's mandate for 2016-2017 and the work program for 2017, as contained in document WO/GA/47/19. The present document is made available for consideration by the Thirty-Fourth Session of the IGC, as a working document under Agenda Item 8.

2. The text "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2", as developed during the Thirty-Fourth Session of the Committee, is annexed to the present document.

3. *The Committee is invited to review the document contained in the Annex, in accordance with its 2016-2017 mandate, its work program for 2017 and the decision on agenda item 7 during its Thirty-Fourth Session referred to above.*

[Annex follows]

The Protection of Traditional Cultural Expressions: Draft Articles

Facilitators' Rev. 2 (June 15, 2017)

[PRINCIPLES/PREAMBLE/INTRODUCTION]

1. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.
2. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.
3. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity.
4. [Recognizing]/[to recognize] the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.
5. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.
6. [Contributing]/[to contribute] to the promotion and protection of the diversity of traditional cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].
7. [Recognizing]/[to recognize] the importance of protection, preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.
8. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]
9. [[Acknowledging]/[to acknowledge] that the protection of traditional cultural expressions should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional cultural expressions and in a manner conducive to social and economic welfare and to a balance of rights and obligations.]
10. [[Recognizing]/[to recognize] the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.]
11. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free prior informed consent and approval and involvement of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]

12. [To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

13. [Nothing in this [instrument] may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.]

[ARTICLE 1
POLICY OBJECTIVES

Alt 1

This instrument should aim to:

1.1 Provide beneficiaries with the means to:

- (a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of their traditional cultural expressions;
- (b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary;
- (c) promote the equitable compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary; and
- (d) encourage and protect tradition-based creation and innovation.

Option

- (d) encourage and protect creation and innovation.

1.2 Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.

Alt 2

This instrument should aim to:

- (a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions];
- (b) encourage creation and innovation;
- (c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange;
- (d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain; and
- (e) [aid in the prevention of the erroneous grant [or assertion] of intellectual property rights over traditional cultural expressions.]

Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, [and to recognize][recognizing] the rights of [beneficiaries] [indigenous [peoples] and local communities].

Alt 4

The objective of this instrument is to prevent misappropriation, misuse, or offensive use of, and to protect, traditional cultural expressions, and to recognize the rights of indigenous [peoples] and local communities.]

[ARTICLE 2 USE OF TERMS

For the purposes of this instrument:

Traditional cultural expression means any form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions¹, materials², music and sound³, verbal⁴ and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.

Alternative

Traditional cultural expressions comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.

[Public domain] refers, for the purposes of this instrument, to tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

Alternative

Public domain means the public domain as defined by national law.

[Publicly available] means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[["Use"]/["Utilization"]] means

- (a) where the traditional cultural expression is included in a product:
 - (i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

¹ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

² [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

³ [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

⁴ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

- (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
- (b) where the traditional cultural expression is included in a process:
 - (i) making use of the process beyond the traditional context; or
 - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
- (c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]

[ARTICLE 3

[ELIGIBILITY CRITERIA FOR [PROTECTION]/[SAFEGUARDING]]/[SUBJECT MATTER OF
[THE INSTRUMENT]/[PROTECTION]]

Alt 1

This instrument applies to traditional cultural expressions.

Alt 2

The subject matter of [protection]/[this instrument] is traditional cultural expressions:

- (a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities;
- (b) that are the unique product of, and directly linked with, the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities;
- (c) that are transmitted from generation to generation, whether consecutively or not;
- (d) that have been used for a term as has been determined by each [Member State]/[Contracting Party] but not less than 50 years/or a period of five generation; and
- (e) that are the result of creative and literary or artistic intellectual activity.

Alt 3

This instrument applies to traditional cultural expressions. In order to be eligible for protection under this instrument, traditional cultural expressions must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation, and which may be dynamic and evolving.]

[ARTICLE 4

BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]

Alt 1

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.

Alt 2

The beneficiaries of this instrument are indigenous [peoples], local communities, [and]/[and where there is no notion of indigenous [peoples]], other beneficiaries as may be determined under national law.

Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.

Alt 4

The beneficiaries of this instrument are indigenous [peoples], as well as local communities and other beneficiaries, as may be determined by national law, [who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions].

[ARTICLE 5]

SCOPE OF [PROTECTION]/[SAFEGUARDING]

Alt 1

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

Alt 2

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.

5.2 Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.

5.3 Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.

Alt 3

Option1

5.1 Where the protected traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

- (a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:
 - i. [create,] maintain, control and develop said protected traditional cultural expressions;
 - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret protected traditional cultural expressions;

- iii. [authorize or deny the access to and use/[utilization] of said protected traditional cultural expressions based on free prior and informed consent or approval and involvement and mutually agreed terms;]
 - iv. protect against any [false or misleading] uses of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
 - v. [prevent] prohibit use or modification which distorts or mutilates a protected traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.
- (b) encourage users [to]:
- i. attribute said protected traditional cultural expressions to the beneficiaries;
 - ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions]; and
 - iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions.

5.2 [Where the protected traditional cultural expression is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], Member States should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to encourage users [to]]:

- (a) attribute and acknowledge the beneficiaries as the source of the protected traditional cultural expressions, unless the beneficiaries decide otherwise, or the protected traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]
- (b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions;
- (c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions[; and][.]]
- (d) [refrain from any [false or misleading uses] of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

5.3 [Where the protected traditional cultural expressions is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, Member States should/shall encourage users of said protected traditional cultural expressions [to], in accordance with national law:

- (a) attribute said protected traditional cultural expressions to the beneficiaries;
- (b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions;

- (c) [protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[:]] [and]
- (d) where applicable, deposit any user fee into the fund constituted by such Member State.]

Option 2

5.1 Member States should/shall safeguard the economic and moral interests of the beneficiaries concerning their protected traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

5.3 Protection/safeguarding under this instrument(s) does not extend to uses of protected traditional cultural expressions: (1) for archival, uses by museums, preservation, research and scholarly uses, and cultural exchanges; and (2) to create literary, artistic, and creative works that are inspired by, borrowed from, derived from, or adapted from protected traditional cultural expressions.]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

Alt 1

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

Alt 2

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument].

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]

[ARTICLE 7

EXCEPTIONS AND LIMITATIONS

Alt 1

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.

Alt 2

In implementing this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.
2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:
 - (a) learning teaching and research;
 - (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
 - (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.
3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2).
4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.

Alt 3

In [complying with the obligations set forth in]/[implementing] this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.

Alt 4

General Exceptions

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional cultural expressions:

- (a) [acknowledges the beneficiaries, where possible;]
- (b) [is not offensive or derogatory to the beneficiaries;]
- (c) [is compatible with fair use/dealing/practice;]
- (d) [does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and]
- (e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

Alternative

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

- (a) are limited to certain special cases;
- (b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]
- (c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]
- (d) [ensure that the [use] of traditional cultural expressions:
 - i. is not offensive or derogatory to the beneficiaries;
 - ii. acknowledges the beneficiaries, where possible;] and
 - iii. [is compatible with fair practice.]]]

[End of Alternative]

7.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional cultural expressions, [Member States]/[Contracting Parties] [may]/[should]/[shall] not establish exceptions and limitations.]

Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

- (a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]

- (b) [for preservation, [display], research and presentation in archives, libraries, museums or other cultural institutions recognized by national law, for non-commercial cultural heritage or other purposes in the public interest;]
- (c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]

7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

- (a) [the use of traditional cultural expressions in cultural institutions recognized under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, [display], research and presentation;]
- (b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]
- (c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]
- (d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]]

7.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, for works protected by [intellectual property rights [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].]

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

Option 1

8.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [this [instrument]/[[which may] [should]/[shall] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to this [instrument], and in consultation with beneficiaries.]]

8.2 [Member States]/[Contracting Parties] may determine that the protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, [should]/[shall] last indefinitely.

Option 2

8.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3.

Option 3

8.1 [[Member States]/[Contracting Parties] may determine that the term of protection of traditional cultural expressions, at least as regards their economic aspects, [should]/[shall] be limited.]]

[ARTICLE 9]

FORMALITIES

Option 1

9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.

Option 2

9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.

[ARTICLE 10

[SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]

Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.

Alt 2

10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.

Alt 3

Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.

Alt 4

Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.]

[ARTICLE 11]

[TRANSITIONAL MEASURES]

11.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the time of the [instrument] coming into effect/force, fulfill the criteria set out in this [instrument].

11.2 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] secure the rights acquired by third parties under national law prior to the entry into effect/force of this [instrument]].

11.2 *Option 2* Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of this [instrument] and which would not be permitted or which would be otherwise regulated by the [instrument], [[should]/[shall] be brought into conformity with the [instrument] within a reasonable period of time after its entry into effect/force, subject to Paragraph 3]/[[should]/[shall] be allowed to continue].

11.3 With respect to traditional cultural expressions that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]

[ARTICLE 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.]

[12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]

[ARTICLE 13]

[NATIONAL TREATMENT]

Each [Member State]/[Contracting Party] [should]/[shall] accord to beneficiaries that are nationals of other [Member States]/[Contracting Parties] treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this [instrument].]

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13
NO SUCH PROVISIONS]

[ARTICLE 14]

[TRANSBOUNDARY COOPERATION]

In instances where [protected] traditional cultural expressions are located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary [protected] traditional cultural expressions., with the involvement of indigenous [peoples] and local communities concerned, where applicable, with a view to implementing this [instrument].]

ARTICLE 15

[CAPACITY BUILDING AND AWARENESS RAISING]

15.1 [Member States]/[Contracting Parties] [should]/[shall] cooperate in the capacity building and strengthening of human resources, in particular, those of the beneficiaries, and the development of institutional capacities, to effectively implement the [instrument].

15.2 [Member States]/[Contracting Parties] [should]/[shall] provide the necessary resources for indigenous [peoples] and local communities and join forces with them to develop capacity-building projects within indigenous [peoples] and local communities, focused on the development of appropriate mechanisms and methodologies, such as new electronic and didactical material which are culturally adequate, and have been developed with the full participation and effective participation of indigenous [peoples] and local communities and their organizations.

15.3 [In this context, [Member States]/[Contracting Parties] [should]/[shall] provide for the full participation of the beneficiaries and other relevant stakeholders, including non-government organizations and the private sector.]

15.4 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument,] and in particular educate users and holders of traditional cultural expressions of their obligations under this instrument.]

[End of Annex and of document]