

Submission on the Government Inquiry into Australia's Indigenous visual arts and craft sector, by Alex Malik¹

(1) Introduction

Indigenous visual arts and craft are the physical manifestation of an undeniable primary building block of Australian culture. The importance of protecting and developing Indigenous visual arts and craft is not reflected in the value or volume of practical academic work at present dealing with Indigenous visual arts and craft. However, this inquiry into the Indigenous visual arts and craft sector will ensure that future generations of Australians will have a better regard for, and understanding of the contribution Indigenous visual art and craft has made to Australian culture.

As an academic and practising lawyer with a strong commercial focus on intellectual property ("IP") rights, the majority of my comments will relate to the IP rights aspects of the Federal Government Inquiry into Australia's Indigenous visual arts and craft sector.

As a consequence of this analysis I recommend:

- Further research be undertaken to identify the nature of, extent of and impacts of IP crime on Indigenous Australians;
- Greater public education regarding the importance of Indigenous Australian IP rights and in the impact of IP rights infringement on this community;
- Legislative amendments which will directly assist Indigenous Australian IP rights owners; and
- Greater public and private legal enforcement activity with respect to the protection of Indigenous Australian IP rights.

(2) Importance of Arts and Crafts to Indigenous Australians

(i) Cultural Importance

Art and crafts are very important to Indigenous Australians. According to the Desert (Association of Central Australian Aboriginal Art and Craft Centres) website:

The art means to carry on our stories, to know it belongs to my family and it belongs to my father and grandfather, so that everyone can know about us, so we can carry on, so our kids can carry on forever, even when we're gone. So non-Indigenous people can know about us in the future, how we fought to keep our culture strong for the sake of our children's future. The art is about who you belong to, about what country you belong to, it's about the only way

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*you can know and others will know too. Our art has got to be protected because it belongs to individual people and their families. It is their belonging, it belongs to their group so it must be treated right way. The art movement should be really strong the way it's going now and we should be keeping it stronger. We got a lot of strong people in our communities. Those artists are strong about their art.*²

According to the Koorie Heritage Trust website:

*Koorie art itself is diverse and inclusive of a wide range of styles and mediums through which artists choose to represent themselves and tell their stories. Artists continue to use and reclaim the designs and patterns of their ancestors and reinterpret these traditional designs and beliefs through a wide range of contemporary and traditional mediums.*³

The cultural importance Indigenous Australian art and craft is tied to the existence of familial relationships and a sense of community. According to the Warlukurlangu Artists Aboriginal Association website:

*From the beginning the art movement at Yuendumu has been about artists working together in appropriate family relationships. For Warlpiri and many other desert people there are two complementary and mutually dependent forms of ownership of Jukurpa and country: kirda (owners) and kurdungurlu (guardians). These relationships find expression in artwork when, for example, husband and wife or aunty and niece sit down together to paint.*⁴

*Frequently, the men, or older more knowledgeable women sketch in the kuruwarri (design), leaving the dotting in of colour for younger members of their family to complete. Many of the more renowned artists recognise that paintings completed by themselves attract greater prices and more interest from the public, and have therefore discouraged family members from painting on their work.*⁵

(ii) Ancient historical Importance

According to the Aboriginal Fine Arts Gallery website:

*Australian Aboriginal art is the oldest living art tradition in the world, with paintings in rock shelters dating back 20,000 years. The art includes naturalistic paintings of human, plant and animal figures, as well as non-naturalistic, or "abstract" designs with concentric circles, "u" shapes, and lines. The naturalistic style, predominant in Arnhem Land in northern Australia, is often characterised by "X-ray" art, where the internal organs of animals are depicted. The abstract style, predominant in central Australia, originates from sacred designs used in ceremonies. These designs, originally for body painting, ground paintings, and carved on sacred stones and boards, are now painted on canvas.*⁶

According to the "Aboriginal Art Online" website:

² Desart 2006.

³ Koorie Heritage Trust 2006.

⁴ Warlukurlangu Artists Aboriginal Association 2006.

⁵ Warlukurlangu Artists Aboriginal Association 2006.

⁶ Aboriginal Fine Arts Gallery 2006.

*Aboriginal peoples have been producing visual art for many thousands of years. It takes many forms - ancient engravings and rock art, designs in sand or on the body, exquisite fibre craft and wooden sculptures, bark paintings and more recently an explosion of brilliant contemporary painting.*⁷

The concept of ancient aboriginal art is tied to the concept of "The Dreaming". According to the Aboriginal Australia Art & Culture website:

*The Dreaming refers to all that is known and all that is understood. It is the way Aboriginal people explain life and how their world came into being. It is central to the existence of traditional Aboriginal people, their lifestyle and their culture, for it determines their values and beliefs and their relationship with every living creature and every feature of the landscape ... The Dreaming is as important to Aboriginal people as the Christian Bible and the whole ethos of Christian belief is to the devout Christian. The Dreaming is still vitally important to today's Aboriginal people. It gives a social and spiritual base and links them to their cultural heritage. Many Aboriginal people are Christian as well as having a continuing belief in their Dreaming. In some areas, where Aboriginal people may no longer have the full knowledge of their Dreaming, they still retain strong spirituality, kinship practices and traditional values and beliefs ... Like European art, Aboriginal art represents and symbolises the world and the beliefs of people. Traditional Aboriginal art represent the Dreaming but is often also a vital part of ceremonies.*⁸

*Art is a very important part of our religious life, to maintain traditional representations and styles. It is still in the tradition to represent many of the desert Dreamings stories, and the sand paintings have been replaced by paintings on canvas and new styles like dot paintings and X rays styles are the most popular modern art styles based on traditional Dreamings and totemic representations. Symbols used within paintings include concentric circles, curved lines & straight lines. Concentric circles usually represent camp sites, waterholes or places of significance. Curved lines generally represent rain or water travelling underground. Straight lines may be indicative of travelling & when these lines join concentric circles it may show the pathway travelled by the ancestors. A small "U" shaped figure may represent a person & depending on the iconography next to the person determines whether it is male or female.*⁹

According to the Jinta Desert Art website:

The traditional art of the vast Central Australian Desert has always been complex and impressive. Used in ceremony it was performed on large, irregular surfaces such as rock walls and slabs. It was also painted on the body and artefacts such as shields, sacred boards and ceremonial posts. It was the arrival at Papunya in 1971 of a young school teacher, Geoff Bardon, that provided the catalyst for an explosion of artistic expression. Bardon started a school project to paint a mural. The painting was taken over by elders who used traditional art to create "Honey Ant Dreaming", the Dreaming for Papunya. Following this the men began painting acrylics on any material available to them, including plywood, linoleum and canvas. Acrylic paintings

⁷ Aboriginal Art Online 2006a.

⁸ Aboriginal Art and Culture Centre 2006a.

⁹ Aboriginal Art and Culture Centre 2006b.

*by Central Australian Aboriginals is one of the most exciting developments in modern Australian Art. Though the materials are European of origin the content and execution of the paintings lie firmly within the framework of Desert Aboriginal Culture. The paintings are mythical representations of landscapes or conceptual maps of designs wrought by ancestors. In this tradition sculptures, paintings, dances and songs relating to the Dreamtime are repeating the work of Ancestors, thus keeping the world alive. The designs painted are not public property. Through the Dreamings the Ancestral Beings gave them to certain groups to hold in sacred trust. The relationship between the Ancestor, the Land and the People is at the core of Aboriginal Art.*¹⁰

Songs of the dreamtime were also very important to Aboriginal communities. According to the Aboriginal Australia Art & Culture website:

*A song is sung as a series comprising many short verses, each of which tells about a particular event or place associated with the ancestor; or the performance may be a full ceremonial one which includes portrayal of relevant events in the performance of dances accompanied by the singing of the appropriate verses. The song associated with any one totemic "line" will have the one melodic form throughout. This means, in the case of very long "lines" of songs, where the ancestor is reputed to have crossed thousands of miles of territory, that the characteristic melodic form will be found in areas with different languages and musical techniques.*¹¹

A feature of traditional aboriginal music is the role of the "Songman". According to the Aboriginal Australia Art & Culture website:

*A songman was highly regarded. He was a special performer who composed songs to describe day-to-day events. His extensive repertoire could be enriched by songs handed down from ancestors. Like the skilled didgeridoo player, the songman was often asked to perform for other groups, and was rewarded for his services. He could be noted for his voice of varying pitch, leading others in a chorus. There were specialist leaders in dancing as well.*¹²

Another feature of traditional aboriginal music is the role of unique instruments. According to the Aboriginal Australia Art & Culture website:

*Different tribes used various instruments including boomerangs, clubs, sticks, hollow logs, drums, seed rattles and of course the didgeridoo. Hand clapping and lap/thigh slapping were common. Decorated drums were made from hollow logs and some covered with reptile skins. Large conch shells were used in the northern coastal areas. The best known of all Aboriginal musical instruments was the didgeridoo ...*¹³

Aboriginal sound instruments included the following:

- * Bark or skin bundle beaten, or struck on ground (women)
- * Bone or reed whistle
- * Boomerang clapsticks

¹⁰ Jinta Desert Art: Aboriginal Culture 2006.

¹¹ Aboriginal Art and Culture Centre 2006c.

¹² Aboriginal Art and Culture Centre 2006d.

¹³ Aboriginal Art and Culture Centre 2006e.

- * Didgeridoo and sticks (beaten by singer)
- * Folded leaf whistle
- * hand clapping
- * Hollow log struck with small stick
- * Lpirra or Central Australian "trumpet"
- * Lap slapping (women)
- * rasp or friction
- * Seed rattles
- * single head skin drum (struck with open palm or stick)
- * Stick beaten on ground
- * Sticks only
- * thigh slapping (men)¹⁴

(iii) Recent historical Importance

Various contemporary Aboriginal artists have achieved a great deal of fame for their artwork, although they and their descendents have not necessarily achieved a great deal of financial success as a result of this fame. This lack of financial success can at least be partially attributed to the prevalence of IP rights infringement. According to the "Aboriginal Art Online" website:

*Albert Namatjira is the best known of all the Aboriginal artists of Australia. In his lifetime, Albert Namatjira had great popular and commercial success as an artist and is still regarded by many Aboriginal people as a role model for achievement. After his death in 1959, the reputation of his paintings went through a period of neglect, and his work has at times been viewed as owing more to cultural assimilation than to his own artistic vision. More recently his reputation has recovered from this criticism and he, and associated artists such as his own older sons and the Pareroultja brothers, are recognised as making a distinctive and important contribution to Australian art.*¹⁵

The Hermannsburg School, which includes Namatjira owes its development to events in the 1930s. According to the "Hermannsburg School" website:

In 1934 an Aboriginal man by the name of Albert (Namatjira) saw an art exhibition being held at the Lutheran Mission of Hermannsburg, Central Australia. The exhibition was arranged by mission superintendent Pastor F.W. Albrecht and featured the works of traveling artists Rex Battarbee and John Gardner. Over the two-day exhibition more than 300 Aboriginal people attended. They stood bewildered and amazed at the sight of their tribal lands as portrayed by the European artists. The western style and outlook was unfamiliar. Instead Western Arrernte Aboriginal people interpreted their land topographically. Their art was symbolic. It consisted of totemic markings which represented storey, people and nature. These patterns were made up of wavy/parallel lines, semi and concentric circles. This visual language was written on sand, rock and sacred objects such as Tjurungas. The exhibition fired Albert's imagination and interest in painting. He endeavored to learn the new craft. One that would bring him fame, but also despair, as an age-old race collided head on with the hypocrisies and rhetoric of western civilization. The foundation of the Hermannsburg school turned the cottage industry of indigenous craft making into a vibrant art movement and provided a platform for the contemporary Aboriginal art market which thrives today, some 70

¹⁴ Aboriginal Art and Culture Centre 2006e.

¹⁵ Aboriginal Art Online 2006b.

years later. This more recent movement owes its origins to the community of Papunya. It was here in 1971 that a school teacher by the name of Geoffrey Bardon introduced Aboriginal people to a new medium to transfer their symbolic sand drawings. Aboriginal art of all styles gives an insight into a highly evolved culture and ensures the passing on of knowledge for generations to come. Albert's success encouraged a new generation of artists. Walter Ebatarinja was one of the first to take up painting. He was soon followed by the Pareroultja brothers and Albert's sons. In 1941 Rex Battarbee founded the Aranda Art Group. This group controlled the supply of materials and helped handle the business affairs of the emerging artists.¹⁶

More recently, the development of urban Aboriginal art and craft has taken place. According to the "Aboriginal Art Online" website:

Artists in urban settings and in the larger Australian cities during the 1960s and 1970s began using art as a means of powerful social comment and political expression. Urban artists have experimented in a wide variety of media and modes of expression - ranging from paintings, prints and pottery to photography, digital work and installations. They have often had to battle against a stereotyping of Aboriginal art which sees works in ochre or on bark as being more "authentic" than work using non-traditional techniques and media. While the attraction of traditional work is strong, it is unfortunate if this diminishes appreciation of the authentic, living culture which we see in the work of contemporary Aboriginal artists using different media. Many urban Aboriginal artists now see themselves as being squarely in the mainstream of contemporary Australian art and refuse to be differentiated or marginalised into a separate category of contemporary art. Artists asserting their identity in this way have included Gordon Bennett, Judy Watson, Tracey Moffatt, Fiona Foley, Richard Bell, Sally Morgan and the late Lin Onus. Judy Watson made this point at a visual arts conference in late 1999 when she objected to a request from a major auction house to categorise her work for an auction as either "Aboriginal" or "Contemporary" - but not both ... Urban, and rural, Aboriginal artists are breaking through the barriers of prejudice and neglect to establish themselves as artists in their own right. Their work is at the leading edge of Australian art and reflects perspectives on Australian society which previously had been rarely acknowledged.¹⁷

Sally Morgan is one of the most successful of the currently active Aboriginal artists and writers. According to the "Aboriginal Art Online" website:

Sally Morgan is recognised as one of Australia's best known Aboriginal artists and writers ... This experience of her hidden origins, and subsequent quest for identity, was the stimulus for her first book "My Place" published in 1987. It tells the story of her self discovery through reconnection with her Aboriginal culture and community. The book was an immediate success and has since sold over half a million copies in Australia. It has also been published in the United States, Europe and Asia. Her second book "Wanamurraganya" was published in 1989. It is the biography of her grandfather, Jack McPhee. She has also written five books for children ... My Place remains her most influential work, not only because of its very wide popularity but also because

¹⁶ Hermannsburg School, The 2006.

¹⁷ Aboriginal Art Online 2006c.

*it provided a new model for other writers, particularly those of indigenous background.*¹⁸

Arnhem Land artists paint on bark (*Eucalyptus tetradonta*) using ochre (natural earth pigments).¹⁹ According to the Aboriginal Australia Art & Culture website:

*Acrylic paintings are merely a new form incorporating the classic elements of Aboriginal Life. They state a person's relationship to those around them, to the land and to the Dreaming. They also represent a new context of interaction between indigenous and western societies. Through modern art the Aboriginal people are able to introduce and express their culture to the world ... Acrylic paintings by Central Australian Aboriginal people is one of the most exciting developments in modern Australian Art. The paintings are mythical representations of landscapes or conceptual maps of designs wrought by ancestors. In this tradition, paintings, dances and songs relating to the Dreamtime are repeating the work of Ancestors, thus keeping the Dreaming alive.*²⁰

Aside from paintings, some Indigenous Australians earn income from industries which operate in association with or around paintings. For example, the Indigenart website reports that it:

*... provides a full range of highly experienced framing advice and services, utilising an extensive range of styles and designs. We cater for all budgets and specialise in original works on canvas and paper (finished to archival standard).*²¹

Some Aboriginal artists create popular glass works. The Aboriginal Dreamings Gallery “displays work by some of Australia's best Glass Artists (including) collectable art glass bowls, vases and perfume bottles ... The collection includes magnificent large platters by Australian Aboriginal Glass Artists”.²²

Also popular are hand-carved emu eggs. According to the “Aboriginal Art by Creative Native” website:

*Carving an emu egg requires painstaking care as one slip can easily destroy the fragile shell. Emu eggs are a deep flecked green with seven shades of inner shell. Only the most skilled artisans are able to expose the seven shades.*²³

Indigenous Australians are also involved in the creation and sale of pottery. According to the Hermannsburg Potters website:

The urge to reach out and touch the earth is inseparable from Aboriginal life, whether people are sitting, moving about their land or getting food. Often it is not even a conscious separation; people are part of the land and it interacts with them and their bodies. Clay is part of the skin of the earth itself. For most Aboriginal people it is also sacred, with associations in traditional religion.

¹⁸ Aboriginal Art Online 2006d.

¹⁹ Aboriginal Dreamings Gallery 2006a.

²⁰ Aboriginal Australia Art & Culture Centre - Alice Springs 2006.

²¹ Indigenart 2006.

²² Aboriginal Dreamings Gallery 2006b.

²³ Creative Native 2006.

*White clay and other clays infused with yellow or red oxides continue to be mixed into paint and applied to bodies for dancing, and during song cycles. Groups of women still sit together, their torsos, shoulders and breasts painted with ochre stripes symbolic of kinship connections and ownership of country.*²⁴

Some Indigenous Australians also create fibre sculptures. According to the Maningrida Arts & Culture website:

*(Fibre sculptures are) a unique art form from the Maningrida region. Since the early 1990's Rembarrnga artists Lena Yarinkura and her mother Lena Djamarrayku have been extending the medium of fibre with their pandanus sculptures and paperbark figures. Since 2002, other artists such as Jill Yirindili, Sylvia Campion, Gloreen Campion and Terry Butawiliya Wilson have started to make fibre sculptures. In using weaving skills to make three-dimensional representations, artists are adapting traditional techniques to explore new narrative possibilities for expressing mythological themes or illustrating stories from the bush. For example, artists often make animals typically found in the region including bandicoots, bush mice, quolls, lizards, crocodiles, echidna and turtles, as well as 'camp dogs' and the mythological spirit figure 'yawk yawk'. This form of art is unique to the Maningrida region and is now represented in major Museums and private collections.*²⁵

(iv) Societal Importance

According to the "Aboriginal Art Online" website:

*Traditional Aboriginal societies vary greatly across Australia but all have social structures and systems that organise life and experience and explain the universe and the place of people in it. Art is part of these systems and the making of artworks by Aboriginal artists is almost always connected to Dreaming stories. The ownership of Dreaming stories is determined by complex social and kinship structures and paintings can only be produced by those who are acknowledged to have the right to do so. But this does not mean that artists are rigidly bound by convention in their expressions of these stories - as the great flowering of innovation in contemporary Aboriginal art shows.*²⁶

Indigenous Australian Art & Culture is also important because it provides "opportunities for intergenerational knowledge transfer and learning".²⁷

(v) Unique Status of Aboriginal Art

According to the Aboriginal Australia Art & Culture website:

The concept of art in traditional Aboriginal society is very different to the concept of art in European society. In traditional Aboriginal societies, activities like dancing, singing, body decorations, sand drawings, making implements or weaving baskets were not considered to be separate activities called art and design. All of these activities were a part of the Dreaming and a part of

²⁴ Hermannsburg School, The 2006b.

²⁵ Maningrida Arts & Culture 2006.

²⁶ Aboriginal Art Online 2006a.

²⁷ Warlayirti Artists 2006.

*normal daily life. There was no concept of a special type of person, artists, because, in a sense, everyone was an artist. This is changing as tradition-oriented communities adapt to aspects of western culture although the number of 'artists' in any Aboriginal group would generally be far greater than in non-Aboriginal communities.*²⁸

(vi) Aboriginal Art Forms

According to the Aboriginal Australia Art & Culture website:

*Aboriginal people traditionally used the materials available to them to symbolise the Dreaming and their world. As a result, art forms varied in different areas of Australia. In the central desert, ground drawing was a very important style of art and throughout Australia rock art as well as body painting and decoration were common although varying in styles, method, materials and meaning. There is and was a wide range of traditional Aboriginal art forms.*²⁹

(vii) Importance to Specific Indigenous Communities

Arts and crafts support particular communities of Indigenous Australians. For example:

*Bula'bula Arts Aboriginal Corporation (BAAC – pronounced “bark”) was established in 1990 after a meeting of senior artists decided that they needed an independent artists organisation to represent their interests. After some discussion the name Bula'bula was chosen as it refers to the kangaroo, Garrtjambal, who travelled from Roper River in the south-east to Milingimbi in the north, linking all the clans along his peripatetic journey. Bula'bula translates as the ‘tongue’, ‘voice’ or ‘message’ of the kangaroo. Ramingining is built on Djadawitjibi country, whose principal creator being is Garrtjambal. Ramingining community has had an art centre since the remote settlement was first established in the late 1970s. Situated in Central Arnhem Land about half way between Darwin to the west and Nhulunbuy to the east, painters from the region initially sold their works through the Milingimbi Mission. Several major collections from the area were made from the 1930s-1970s, including those by Donald Thomson, Charles Mountford, Karel Kupka, Louis Allen, Ed Ruhe, Jim Davidson, Helen Groger-Wurm and Dorothy Bennett.*³⁰

Similarly, in 2001 the Wirrimanu Arts and Cultural Centre at Balgo Hills, run by the Warlayirti artists, received funding under the Federation Cultural and Heritage Projects program, to build a Cultural Centre. According to a report at the time:

The facility will become a focus for this unique and important regional arts centre. The administrators ... told Artbeat the Cultural Centre will ... repay the community and the children and grandchildren of the original artists for many years of artistic success, with a facility to showcase the artistic and cultural history and practices of the extraordinary people of this desert region. It will be a mix of the contemporary, historical, commercial and artistic ... Balgo Hills artists are considered by many to be the most innovative and daring painters working in Central Australia, having carved out international

²⁸ Aboriginal Australia Art & Culture Centre - Alice Springs 2006b.

²⁹ Aboriginal Australia Art & Culture Centre - Alice Springs 2006b.

³⁰ Bula'bula Arts Aboriginal Corporation 2006.

*reputations. The region's art demonstrates a strong link with the land and traditional art in its own right, with vivid use of colour and strong iconic imagery characterising the work.*³¹

The Aboriginal Dreamings Gallery sells painting from various regions/areas of Australia including the following:

- Arnhem Land
- Balgo & Fitzroy Crossing
- Hermannsburg
- Kimberley Region
- Papunya & Western Desert
- Turkey Creek
- Utopia³²

According to the Maningrida Arts & Culture website:

*The sculptures now produced in the Maningrida area by artists from all the different language groups represent a powerful innovation in art practices. Historically, Kuninjku artist Crusoe Kuningbal invented the representation of the Mimih spirit in sculptural form in the 1960s for use in a trade ceremony called Mamurrng. In the 1970s, Kuningbal made these carvings for the art market and after his death in 1984 his sons Crusoe Kurddal and Owen Yalandja continued in the production of these sculptures. In the 1990s, encouraged by art advisers to pursue this art production, many artists have started producing carvings during the dry season when bark is impossible to collect.*³³

Facilities sometimes create an artistic and creative environment around their location. For example:

*The Djómi Museum functions as an integrated element in the community's cultural and regional development. It promotes the richness of the region's artistic expression, it is the custodian of a wealth of historical and cultural material and an active source and repository of valuable reference and research data. Djómi is an official regional museum of the Museum and Art Gallery of the Northern Territory.*³⁴

Sometimes art and craft events are held in specific regions. For example, according to the Triple Alice website:

*Triple Alice is gathering around the Central Desert of Australia³⁵ ... Triple Alice 1 ... brought together more than 85 artists on site each day over the three weeks ... This laboratory was planned as the first step to developing the models and structures whereby a dialogue could occur between different artforms.*³⁶

³¹ Art Beat 2001.

³² Aboriginal Dreamings Gallery 2006a.

³³ Maningrida Arts & Culture 2006b.

³⁴ Maningrida Arts & Culture 2006c.

³⁵ Triple Alice 2006a.

³⁶ Triple Alice 2006b.

According to the Japingka website, the following are examples of art communities where artwork is sourced:

- Wangkatjungka
- Utopia
- Yuendumu
- Mt Liebig
- Lajamanu
- Warmun
- Ampilatwatja
- Titjikala
- Julalikari Arts - Tennant Creek ³⁷

According to the Japingka website:

Wangkatjungka is a remote community situated 120km south-east of Fitzroy Crossing in the Kimberley region of Western Australia ... In 1994 the Karrayili Adult Education Centre was established at Wangkatjungka. A large group of adults attended there between 1994-1998 to study numeracy and literacy. The Centre also provided community members with art materials and some guidance with their use. A number of senior people became very interested in painting as a means of recording stories and culture. From this activity has emerged a distinctive group of painters, with stylistic links to Fitzroy Crossing and Balgo, as well as to other Wangkatjungka-speaking Kimberley artists who worked in ochre pigment, including Rover Thomas and Billy Thomas. It has been over the last 5 years that Wangkatjungka artists have established a solid exhibition profile and a growing reputation for their distinctive work. ³⁸

Utopia is located 270 km northeast of Alice Springs on the eastern perimeter of the Western Desert 'bloc', next to the traditional land of the Eastern Anmatyarre and Alyawarre people ... In 1979 a successful land claim hearing resulted in the community gaining permanent legal title to the leasehold, and it was the Utopia women that played a key role. Only one year before, the women had learned the art of batik. The Batik project was to enable the women to establish a source of income in preparation for the land claim hearing. By being able to demonstrate the economic viability of the outstations through their batik, the women were justifying their legal and moral right to their land. The Utopia batiks were immediately distinct and featured a rawness and vitality that was a product from both the camp conditions and the women's attitude to the project. In 1981 Utopia batiks were shown at the Adelaide Art Festival – "Floating Forests of Silk: Utopia Batik from the Desert" ... In 1988-89 the medium of canvas was introduced to the artists ... The availability of acrylic paint and linen canvas enabled artists to produce works that were even more distinctive than the batik. This new medium saw the rise of the late Emily Kame Kngwarreye who paved the way in the more contemporary art form ... To this date, Utopia paintings are highly recognised and sought after and continue to grow in richness and variety. ³⁹

Yuendumu Community is 300 Kms north-west of Alice Springs and is the major centre for Warlpiri artists of the Tanami Desert. Warlpiri artists began

³⁷ Japingka Indigenous Fine Art Gallery 2006.

³⁸ Japingka Indigenous Fine Art Gallery 2006.

³⁹ Japingka Indigenous Fine Art Gallery 2006.

*painting there in the early 1970's as a direct result of family and ceremonial ties between Papunya and Yuendumu ... The Yuendumu Community became internationally famous in 1983, when the senior men and elders, concerned at the impact of Western culture on the Community's youth, decided to paint the Community's school doors with traditional motifs and designs. These were intended to inculcate the children with their own culture and to remind them of their own rich heritage. The school doors became famous and valuable/historical artworks in their own right. This created such interest that it was decided that an art centre should be formed, and in 1985 Warlukurlangu Artists was created ... In 2005 Yuendumu celebrated the 20th anniversary of the Warlukurlangu Art centre with the opening a new purpose-built art centre building and the promotion a national program of exhibitions. Senior artists as well as emerging ones are expressing a new found sense of freedom in their treatment of traditional Jukurpa (Dreamings) and the stories, sites and family histories of their ancestral lands of the Tanami Desert. Their paintings have a great vitality and freshness that reinvigorates the rich tradition of Warlpiri culture.*⁴⁰

*Mount Liebig community, 325 Kms west of Alice Springs, is close to the heart of the region where the modern Desert art movement began. The community is 75 Kms from Papunya where those first paintings of the movement were painted in 1971-72 ... The art centre Watiyawanu Arts has been operating from Mt Liebig since 1990 ... when artists began painting 15 years ago, they worked from home ... Early artists included Billy Stockman, Long Tom Tjapanangka and Mitjili Napurrula. Soon after, Lilly Kelly moved to Mt Liebig with her husband and family, and started painting her own canvases. Other women began to join the group, and it was the success in the late 1990's of Lilly Kelly's elegant and finely detailed Sandhills paintings that started to bring recognition to Watiyawanu and its artists ... Watiyawanu artists have developed a distinctive stylistic approach in their work, often combining a detailed lacework of fine dotting along with strong iconography of Western Desert Dreaming sites. The work of senior artists is becoming highly prized in the market and younger emerging artists are coming forward to join them. With typical issues confronting the community- issues of youth employment and recreation, threats of petrol sniffing and alcohol abuse- the development of strong cultural models that reinforce the value of traditional knowledge and skills is a major advantage to desert communities like Mt Liebig. The artists of Watiyawanu are carrying forward that cultural model.*⁴¹

*Lajamanu's history as an Aboriginal settlement goes back to 1949, when several hundred Warlpiri people were taken by truck from Yuendumu to Catfish waterhole – 600km north across the inhospitable Tanami Desert... Over the years, Lajamanu artists have built up impressive individual reputations despite the difficulties in promoting their work. Collectively they have forged for Lajamanu painting its own distinctive identity.*⁴²

Warmun Community is located at Turkey Creek in the East Kimberley between Halls Creek and Kununurra in far north Western Australia... It was here in 1975 that Rover Thomas and Paddy Tjamatji began the artistic collaboration that was to become the model for contemporary Kimberley ochre painting. A ceremony was revealed to Rover Thomas through a series

⁴⁰ Japingka Indigenous Fine Art Gallery 2006.

⁴¹ Japingka Indigenous Fine Art Gallery 2006.

⁴² Japingka Indigenous Fine Art Gallery 2006.

*of dreams or visions of a spirit's journey after death. This Dreaming formed the basis of the Kuril Kuril ceremony. The paintings illustrating the Kuril Kuril journey started the modern art movement at Turkey Creek- with a style that is simple and uncluttered, and with shapes that are defined by rows of white dots. Warmun is Gija country, and the Gija artists there have followed the example of Rover Thomas and Paddy Tjamatji in depicting topographical maps in broad ochre areas mixed with various forms of fixative, including locally gathered gum from eucalyptus trees called bloodwoods. Today Warmun Artists continue to create maps of particular forms in the landscape on canvas and board. These are painted in both plan and profile, and often include the roads, dams, cattle yards and creeks of the stations where the artists have worked. They are recording and mapping particular incidents in recent history, and at the same time giving mythological potency to rock formations, caves and hills in the landscape. The works thus combine two ways of "seeing": temporal and metaphysical. The work of the Warmun artists draws on the Ngarrangkarni or Creation period, a concept referred to in many areas of Australia as the Dreaming. Warmun paintings glow in their natural ochre hues and serve to confirm the vibrancy of an ancient and evolving culture.*⁴³

*The Community of Ampilatwatja (pronounced um-bludder-watch) is the largest of three communities under the Aherrenge Aboriginal Association. It is located about 320 km north-east of Alice Springs... The artworks produced at Ampilatwatja maintain a strong focus on Alyawarr lore, with a particular emphasis on the natural landscape. The artists' work is distinguished by the microcosmic detail invested in elements of landscape, all of which is marked out in the finest of dot painting, using a rich palette of colours. Today Ampilatwatja artists exhibit widely, and are recognised as vibrant, creative painters.*⁴⁴

*Titjikala is a small community located about 130 km south of Alice Springs, and has a population of approximately 300 people, whose primary language is Luritja, Arrernte or Pitjantjatjara. The community is also known as Tapatjatjaka or Maryvale. Arts and crafts have been produced by the community and marketed through the Titjikala Arts Centre, which include paintings, batik, woodcarving, fabric and silk painting, ceramics and wire sculptures that include animal and bird representations inspired by the surrounding environment.*⁴⁵

Tennant Creek, just over 500 Kms north of Alice Springs on the Stuart Highway, is the home to Julalikarii Arts centre... The Art Centre is creative home to about 16 women artists. They represent, both in artwork and language groups, an enormous spread of traditional country in the Barkly Region and beyond. Their age and experience is of a similar broad range. In July 2004 Tennant Creek saw the opening of the Nyinkka Nyunyu Art and Culture Centre. This is a state-of-the-art exhibition, performance, retail and museum space, an extraordinary architectural work with strong local character. It provides an opportunity for local artists to market their works and showcase their talent. Peggy Jones, the best known of Julalikari artists, continues to produce her richly- applied and boldly executed paintings of bush tucker, animals and birds, and soakages. Most of the artists working from this

⁴³ Japingka Indigenous Fine Art Gallery 2006.

⁴⁴ Japingka Indigenous Fine Art Gallery 2006.

⁴⁵ Japingka Indigenous Fine Art Gallery 2006.

*region express a similar love for the flora and fauna, for the landscape, and for cultural activities and ceremonies.*⁴⁶

Typically these and other regions rely on the sale of Indigenous arts and craft as an important source of income. Certainly income from these sources supplements income received from other sources.

(viii) Political Importance

Aboriginal art or craft is of great political importance to the Indigenous Australian community. Some Aboriginal art or craft represents very sad or even tragic events, and may be symbolic of political issues or disputes. For example, Alice Springs based Ceramic artist Pip McManus's installation piece *The Poisoned Well* "documents a century of genocide with 100 glazed hands bearing individual plant impressions and accompanying text".⁴⁷ According to Pip McManus's website:

*Alice Springs based ceramic artist Pip McManus uses both universal human symbols and images taken directly from nature to explore issues of identity and survival in a world of destruction and dispossession.*⁴⁸

The importance of Aboriginal art or craft is often recognised by Government authorities. This recognition acknowledges the political and economic importance of Indigenous Aboriginal art and craft. For example:

The Queensland Indigenous Arts Marketing and Export Agency (QIAMEA) was established in 2003 by the Queensland Government and is part of the Trade and International Operations Division of the Department of State Development. It acts as a conduit between Government, the arts industry and the indigenous community to raise the profile of Indigenous artists from the state of Queensland, Australia. QIAMEA's aim is to build long-term relationships with key organisations and the arts industry to present and promote the very best of Queensland's Indigenous arts. It develops marketing and exporting strategies for the arts market to achieve new opportunities for Indigenous artists from Queensland, while maintaining indigenous cultural integrity within the Indigenous arts export industry.

*Today the Queensland Indigenous visual arts industry is vibrant with both young and mature artists creating works across all the mediums of painting and sculpture, ceramics, body adornment, feathered and fibre works, as well as in literature and the newer technologies of film, photography and digital imagery. Queensland's Indigenous artists have been taking their unique artistic forms to international audiences for many years. Their works are receiving recognition through their acquisition into public and private collections and museums across the globe. They have been at the forefront of shaping contemporary dialogues for Indigenous arts and culture in the national and international arena. Individuals such as Tracey Moffatt, Rosella Namok, Gordon Bennett, Fiona Foley, Ken Thaiday Snr, Arone, Thancoupie, Dennis Nona, Herb Wharton and Judy Watson have through their art been international cultural ambassadors.*⁴⁹

⁴⁶ Japingka Indigenous Fine Art Gallery 2006.

⁴⁷ Australian Government Culture and Recreation Portal 2006.

⁴⁸ Pip McManus 2006.

⁴⁹ Queensland Indigenous Arts Marketing and Export Agency (QIAMEA) 2006.

(ix) International Importance

Examples of Aboriginal art or craft are often given to international dignitaries and are treated as representative of Australian culture. According to the Gavala Aboriginal Art centre website, the following gifts have been presented to various dignitaries in recent years:

- US President Mr. Clinton – the “Children of the Sun” commissioned painting
- Mrs Hilary Clinton – an Indigenous community inspired brooch
- Sydney Organising Committee for the Olympic Games (SOCOG), Festival of the Dreaming - 2500 sets of Music Sticks
- Bob Carr, Milan visit - Message Sticks
- Rhoda Roberts, Premier's Department, Australian Day Celebrations - Seventy-five pairs of hand made Mulga Clap Sticks
- Journalist Program for SOCOG - 350 pairs of Music Sticks for SOBO
- Prince Harry, Buckingham Palace - Message Stick
- Paralympic Games, Sydney - 150 Gathering Dishes for native floral presentation to athletes, 7,500 personalised boomerangs⁵⁰

Aboriginal art or craft are also internationally renowned. According to the Hermansburg Potters website:

*The potters of Hermansburg are highly renowned. They have exhibited around Australia, toured Europe and the United States. They have become a Territory institution we should all be proud of...*⁵¹

An example of Indigenous Art of the Dreamtime appears at the visitor's entrance of the public lobby of the United Nations building in New York.⁵² According to the Japingka website:

*(There) has been a critical success for artists at Yuendumu, allowing their works to be promoted to an international audience, including at the 'Dreamings' exhibition in New York in 1988 and the 'Magiciens de la Terre' in Paris in 1989. Since then continuous exhibitions both internationally and Australia-wide have established an image of the Yuendumu style, typified by fine dotting technique and a multi-hued colour palette.*⁵³

*In ... 2003 a small group of Watiyawanu women artists were invited to exhibit and tour in Japan. Armed with emergency supplies of tinned bully beef and weetbix, the artists traveled to Japan and experienced traditional Japanese lifestyle, culture and art, visited special art/ healing centres and sampled traditional dishes. A film was made of their travels and experiences.*⁵⁴

According to the Warlukurlangu Artists Aboriginal Association website:

In recent years the work of Warlukurlangu Artists has featured in exhibitions hosted by the National Gallery of Victoria, M.H. de Young Museum, San Francisco; the Australian National Gallery, Canberra; the Glasgow Museum,

⁵⁰ Gavala Aboriginal Art Centre 2006.

⁵¹ Hermansburg Potters 2006.

⁵² Indigenous Art of the Dreamtime 2006.

⁵³ Japingka Indigenous Fine Art Gallery 2006.

⁵⁴ Japingka Indigenous Fine Art Gallery 2006.

*Scotland and the Gifu Museum of Fine Arts, Japan and the Aboriginal Art Museum, Utrecht.*⁵⁵

(x) Financial Importance

According to the “Aboriginal Art Online” website, “between 5000 and 7000 Aboriginal people are estimated to be actively occupied regular making of art or craft”.⁵⁶ Some of these Indigenous Australians are hobbyist makers of art or craft, while others attempt to make a living or supplement their incomes from the sale of art or craft. As far back as back in 1984-85 the first range of placemats and coasters were produced out of Yirrkala.⁵⁷

For many international observers, interest in Indigenous Australian arts and crafts was increased by the Sydney Olympics, where:

*Almost 4 billion television viewers worldwide tuned into the opening ceremony of the Sydney Olympics and saw ... Cathy Freeman create one of the most memorial images ever witnessed on live television. Not only did this flame symbolize the opening of the games but the flame ignited international interest in 40,000 years of the worlds oldest living culture.*⁵⁸

Many examples of Indigenous Australian arts and crafts can be observed on the internet. These websites are used by the IP rights owners to raise revenues as part of their business model. For example, samples of the Art of Papunya Settlement and an explanation of the history of the artwork is available on the website known as “Aboriginal Art of the Western Desert”. The website explains:

*The inception of acrylic dot painting by the "tjilpi" (old men) of Papunya began almost by accident in the early 70s when school teacher, Geoff Bardon, conceived a project for his art classes involving the creation of a large mural on an exterior cinder block wall of the Papunya School. The project attracted the attention of the community, especially some of the old men. Before long they were taking the brushes away from the children and painting the wall themselves. Bardon, with the best of intentions, told the men that this was a project for the children, and gave them masonite to paint on. Within days, they returned with their masonite boards covered with ancient, Aboriginal sand art designs. Before long, Bardon was supplying them with canvas, the best acrylics money could buy and better brushes. Thus the Papunya/Tula Art Movement was born.*⁵⁹

The website notes, “The paintings are for sale. For price details and/or other information please contact Billy Marshall Stoneking”.⁶⁰ The Koorie Heritage Trust makes the following items for sale:

*Artifacts - Hand made cultural and artistic items including Boomerangs,
Bullroarers and Clapsticks
Books*

⁵⁵ Warlukurlangu Artists Aboriginal Association 2006.

⁵⁶ Aboriginal Art Online 2006a.

⁵⁷ Cracking Down On Copycats 2000b: LCA 344.

⁵⁸ Aboriginal Australia 2006.

⁵⁹ Art of Papunya Settlement, The 2006.

⁶⁰ Art of Papunya Settlement, The 2006.

Bush Tucker - Experience Australia's native bush tucker by selecting from a range of jams, sauces, mustards and spices.
CDs
Ceramics - Small trinket boxes to large coolamons
Childrens Books
Clothing
Design T-shirts
Didgeridoos
Emu Eggs
Greeting Cards
Koorie Heritage Trust Products
Miss Emily Silk Scarves
Posters
*Wathaurong Glass - from Geelong was established to express Aboriginal art in glass.*⁶¹

According to the Koorie Heritage Trust, "All proceeds go back to the Trust and all Koorie artists receive royalties for their work".

Colin Isaacs who describes himself as a "community artist" sells various artworks on his website, which also include his personal history. His works for sale include a one metre high turtle shell carving, wooden messages sticks and pelicans, and paintings of emus and black swans.⁶²

Tineriba Gallery "contains both traditional and contemporary works and sells wide selection of sculpture including burial poles, didgeridoos, carved emu eggs and tribal artifacts from all parts of Australia". "The Gallery exhibits and sells works by artists from the Top End, Central Desert and Kimberley regions. The paintings are featured on canvas, paper, bark and silk, and range in price from \$50 (AUS) to \$25,000 (AUS)".⁶³

The "Aboriginal Art Online" website offers for sale:

*... quality paintings and limited edition prints by Aboriginal artists - together with information and comment to help understand these art works. Visit our online galleries and explore the articles by experts, photographs and a wide range of information on Aboriginal art, culture and communities ... Because we work directly with Aboriginal communities, the quality of the work on offer is high, prices are very competitive and much of the income goes directly to the artists themselves.*⁶⁴

The "Aboriginal Dreamings Gallery" was established in Canberra in 1989, and attempts to earn revenue from Aboriginal art and craft by undertaking various activities including the following:

- *Professional advice on collection development;*
- *Interior decorating assistance; and*
- *Special interest talks, concerts, storytelling and didgeridu lessons by arrangement for groups.*⁶⁵

⁶¹ Koorie Heritage Trust 2006b.

⁶² Colin Isaacs' Gallery: Community Artist 2006.

⁶³ Aboriginal and Melanesian Art & Artifacts Australian Mineral Specimens 2006.

⁶⁴ Aboriginal Art Online 2006a.

⁶⁵ Aboriginal Dreamings Gallery 2006c.

According to their website, the gallery:

*... presents one of the finest, most comprehensive and affordable selections of authentic Australian Aboriginal Art and artifacts in Australia. The Gallery's collection includes over 1,500 original artworks representing many of the most respected Aboriginal artists ... Since moving to its present location in 1999, the Gallery has presented many outstanding exhibitions from its extensive collection, including works by Emily Kame Kngwarreye, Ada Bird Petyarre, Gloria Tamerre Petyarre, Walala Tjapaltjarri, Albert Namatjira and members of his family. Spectacular paintings, suitable for domestic and commercial interiors, including artworks for larger spaces- foyers, corporate collections, boardrooms, family rooms, foyers and stairwells, are a feature of the Gallery collection. Clients may select paintings with every confidence. All paintings are fully documented, and are sold with a Certificate of Authenticity.*⁶⁶

Cooinda Gallery, located near Coffs Harbour in NSW opened in 1987 and specialises in demonstrating and selling "aboriginal desert art - sometimes described as 'Dot paintings'". According to the website:

*The 'Dot paintings' are stories that were traditionally drawn in the sand to teach the culture and impart the traditional ways of the aboriginal people to their young - it is their 'language', and tells of the time of the Dreaming when the Ancestors roamed the countryside shaping the country into what we see today.*⁶⁷

As part of their business model, they "offer a personalised service to those requiring assistance in any aspect of purchasing this art form for personal collections and/or investment".⁶⁸

*'Tobwabba Art' is a 100% Aboriginal owned artist collective providing employment and income for twenty-two Aboriginal artists and staff. Beginning in 1992 with an Aboriginal art and culture course for the people of the local Aboriginal community, presently it is an art and design studio/gallery producing fine art, sculpture and designs for over thirty licensees.*⁶⁹

The Aboriginal Australia Art & Culture centre is a "100% Aboriginal Owned Community Enterprise", based in Alice Springs. The Aboriginal controlled Layata Inkeme Trust developed this website, "honouring our nation ancestors, law and tradition. We are laying the economic and cultural foundation for our children, who will be empowered to protect and promote our culture in the future".⁷⁰ The centre and centre's website offers for sale "and export high quality didgeridoos (Yidaki) to 76 countries and operate the worlds first on line Didgeridoo University".⁷¹ The centre also offers a personalized sales and consulting service. The website purports to be:

*Aboriginal Australia's online Aboriginal art gallery, gift and bookshop network. This site ... promote(s) authentic Aboriginal art to the world.*⁷²

⁶⁶ Aboriginal Dreamings Gallery 2006d.

⁶⁷ Cooinda Gallery Aboriginal Art 2006.

⁶⁸ Cooinda Gallery Aboriginal Art 2006.

⁶⁹ Authentic Australian Aboriginal Art 2006.

⁷⁰ Aboriginal Australia 2006.

⁷¹ Aboriginal Australia Art & Culture Centre - Alice Springs 2006c.

⁷² Aboriginal Australia 2006b.

According to the website:

*There are hundreds of Aboriginal art galleries and internet sites throughout the world, but as you can see our enterprise is one of only a "handful" that are actually **Aboriginal owned and operated** ... In the past 5 years we have exported over 5 thousand DIDGERIDOOS to 76 countries, so if you are interested in buying a didge it is really easy.*⁷³

A website developed in tribute to the Hermannsburg School also raises revenue from the sale of paintings. Painters represented include members of the Namatjira family, The Pareroultja Brothers, the Ebatarinja family, and the Raberaba family.⁷⁴

The Aboriginal Fine Arts Gallery website offers paintings for sale, and includes "j-peg" copies of the paintings on their website so that would-be purchasers can see what they would be purchasing.⁷⁵

Many galleries in Sydney, Melbourne and other major cities also stock Aboriginal paintings which they sell to consumers. For example, the Coo-ee Aboriginal Emporium and Art Gallery "which is now open by appointment, specialises in high quality Aboriginal paintings, sculpture and limited edition fine art prints".⁷⁶ Gallery Savah, based in Sydney's Paddington claims its Aboriginal paintings are "museum quality" and "ethically sourced".⁷⁷ Melbourne's Flinders Lane Gallery stocks paintings from a number of aboriginal artists.⁷⁸ Based in Adelaide, "Boomerang Art is a family owned business that offers the best in authentic Aboriginal art to clients all over the world ... (they) guarantee the authenticity of all artwork and supply a certificate for each painting".⁷⁹ Also in Adelaide:

*Gallerie Australis was established in 1991 at the Forecourt Plaza, Hyatt Regency Adelaide ... Since that time, Gallerie Australis has forged an enviable reputation as one of Australia's leading Aboriginal fine art galleries. In addition to representing artists from diverse communities across Australia, Gallerie Australis exclusively represents the renown Utopia artist's Kathleen Petyarre, Abie Loy and Violet Petyarre.*⁸⁰

All of these sales typically benefit the creator(s) of the artwork. In the words of Gallery Gondwana Australia, established in Alice Springs in 1990:

*Whenever Gallery Gondwana exhibits artists with no direct association with an arts centre, all artists are treated in accordance with fair and equitable trade practices as outlined by the Australian Commercial Gallery Association. Gallery Gondwana believes that representing and exhibiting artists is a privilege and prides itself on the long and lasting friendships it has developed over the years with artists and communities alike. Provenance assured.*⁸¹

⁷³ Aboriginal Australia Art & Culture Centre - Alice Springs 2006c.

⁷⁴ Hermannsburg School, The 2006c.

⁷⁵ Aboriginal Fine Arts Gallery 2006.

⁷⁶ Coo-ee Aboriginal Art 2006.

⁷⁷ Gallery Savah 2006.

⁷⁸ Flinders Lane Gallery 2006.

⁷⁹ Boomerang Art: Fine Art Gallery & Studio 2006.

⁸⁰ Gallerie Australis 2006.

⁸¹ Gallery Gondwana 2006.

Similarly, Gavala, a (Sydney) Darling Harbour-based Aboriginal Arts Centre notes that all “products are purchased directly from artists, or through licensed or authorised agents. Royalties and commissions are paid directly to artists”.⁸² According to the Hermannsburg Potters website:

*The pottery business is the major private income-generating operation in Hermannsburg. We also try to ensure the tradition will continue by running a school-based training program in pottery for local young people.*⁸³

In their website, Indigo Art describes themselves in the following manner:

*Indigo Art is Australia's largest internet art gallery. We have over a thousand quality, original Australian artworks for sale and rent and the number and diversity increases each month. With so many artworks to choose from, you are sure to find something you like! And if you can't, we will go out of our way to find it for you. We have artists all over Australia with excellent delivery systems and infrastructure in place. This means that we can get your artwork to you quickly, usually within a few days, 2 weeks at the most.*⁸⁴

Indigo Art artists undertake work on a commission basis for clients. As part of its business model, Indigo Art also allows clients to rent artworks using this procedure:

1. Choose an artwork/s - Start with our rental gallery and browse through the collection until you find the perfect artwork...
2. Contact us to reserve your artworks - ... We will confirm if these works are available and reserve them for you.
3. Rental Agreement - We shall e-mail you a rental agreement which lists the title of the artwork(s), the value of the artworks, the cost of rental per artwork for the rental period and the cost of any freight of the artworks...
4. Insurance of the artwork - You are responsible for the care of the artworks during the rental period...
5. Payment - To make it easy for you, we charge rental as a percentage of the value of the artwork. That way you can work out how much your rental will cost when you are making your selection of artworks. You can rent artworks for as short a period as you like with a minimum payment of \$70. Payment is due in full before the artworks are delivered...
6. Delivery of Artworks...
7. End of the hire period...⁸⁵

Indigo’s rental rates are as follows:

rental period	% of sale price per yr	% of sale price/mth	cost to rent \$5000 artwork		Monthly Pmt plan
weekly, < 3 mths	52%	1%/week	\$50/week	\$70 min fee	\$200
up to 3 mths	20%	1.66%	\$250	for 3 mths	\$104
4 to 6 mths	17.5%	1.46%	\$425	for 6 mths	\$83.30
7 to 9 mths	15%	1.25%	\$562.50	for 9 mths	\$72.90
10 - 12 mths	12.5%	1.04%	\$625	for 12 mths	\$62.50

⁸² Gavala Aboriginal Art Centre 2006.

⁸³ Hermannsburg Potters 2006.

⁸⁴ Indigo Art 2006.

⁸⁵ Indigo Art 2006.

Indigo also allows the hire purchase of paintings. According to their website, Mbantua Gallery and Cultural Museum online have:

*... a history spanning back to 1987 and representing over 250 Utopia artists (they provide a) selection of Aboriginal Fine Art from the Utopia Region in Central Australia.*⁸⁶

Mbantua Gallery take its business activities so seriously, they were finalists in the Northern Territory Telstra Small Business Awards, Mind Your Own Business Category. This category is for businesses with 5-20 employees. They were also finalists in the Chief Minister's Export Awards, the NT sector of the Australian Export Awards, recognizing excellence and innovation in exporting.⁸⁷

The Warlayirti Artists Aboriginal Corporation is a community-based not-for-profit organisation that "is controlled and managed by a Committee of Aboriginal artists, which is elected annually by the members of Warlayirti Artists". Typically of these types of organizations, aside from providing services to Indigenous Australian Artists, the Corporation employs the following (non exclusive list of) staff:

- *Director who oversees the management of the organisation;*
- *Art Centre Manager who manages the day to day operations of the Art Centre including sales, marketing and curating exhibitions;*
- *Culture Centre Business Development Manager who manages the day to day operations of the Culture Centre and development of Culture Centre enterprise;*
- *Culture Centre Community Development Worker who facilitates the participation of Indigenous people in the planning and activities of the Culture Centre;*
- *Art Centre Development Assistant who supports and assists with the effective operations and development of the Art Centre; and*
- *Indigenous Art and Culture Co-workers who work with the non-Indigenous staff to plan and implement activities and facilitate the participation of Indigenous people in the operation and activities of the Art and Culture Centres.*⁸⁸

Some businesses have developed in and around the Indigenous Aboriginal Art scene, even though they don't themselves sell art and craft. For example, "The Black Book" is a paid directory featuring:

*... more than 2,700 listings of Indigenous organisations and individuals working across 95 professions in the arts, media and cultural industries. Each listing provides contact information as well as a history of individual professional experience and organisational profiles ... The Black Book is also available to purchase in print at \$55 (inc gst and postage). The print version is useful for easy browsing of the entire the data contained in The Black Book. Purchase can be arranged on the directory page.*⁸⁹

The Black Book is an example of a commercial venture which indirectly profits from the Indigenous Aboriginal art and craft community.

⁸⁶ Mbantua Gallery and Cultural Museum 2006a.

⁸⁷ Mbantua Gallery and Cultural Museum 2006b.

⁸⁸ Warlayirti Artists 2006.

⁸⁹ Black Book Online, The 2006.

(xi) Flow-On Importance

Notwithstanding that between 5000 and 7000 Aboriginal people actively work in producing art and craft in Australia, many more people benefit economically from Indigenous Australian art and craft. Shop assistants, truck drivers, landlords, advertising agencies, administrators, public relations personnel, tour guides, coach captains and many others owe part or all of their income the existence of Indigenous Australian art and craft.

These flow-on effects of the existence of intellectual property rights have been recognised by the Australian judiciary, although not yet in the context of Indigenous IP rights. For example, in the Tran case (*CDPP v Ng, Tran and Lee* [2003] NSWLC 17), Deputy Chief Magistrate Henson said:

It is the view of the Australian music industry that the unauthorised distribution of musical works causes great loss to the music industry. The copyright owners derive income from the sale of recordings in various formats, mostly CD format. The artists on the recordings derive income from the receipt of royalties from the sale of their recordings. It is the view of the Australian (and overseas) music industry that the distribution of unauthorised recorded music reduces the likelihood of sales of CDs. The Crown further points out "that it is extremely difficult to prevent piracy of recorded music by the use of technology. It is also difficult to detect and identify persons involved in such piracy".

(3) Extent of the Problem of Piracy and Counterfeiting

Australia was and continues to be a nation made up of two cultures – a white Anglo Saxon immigrant-based culture, and a nation of Aborigines who can trace their culture back hundreds of thousands of years. Yet while the Anglo Saxon immigrant-based culture effectively uses the Western common law based legal system to protect its art, craft and burgeoning culture, the Aboriginal culture is seemingly left largely unprotected, and is able to be used and abused by unscrupulous manipulators.

From an examination of the available materials, my analysis, and market surveillance undertaken by a commercial IP enforcement consultancy, it is apparent that a large range of aboriginal arts and crafts are impacted on by piracy and counterfeiting in Australia including:

- Boomerangs;
- Carvings such as ceremonial bird/crane wood carvings and wooden ceremonial masks – some with shells, feathers or string;
- Craft work;
- Didgeridoos;
- Glass works;
- Historical artifacts such as Woomeras (spear throwers), Nulla Nullas, fighting sticks, digging sticks, clubs, Bullroarers, Nolan Music Sticks made of Mulga Wood, hand burnt shields and spears, carved animals and Coolamons;
- Jewellery such as brooches, earrings, hairclips, pendants, necklaces and pewter animals;
- Masks and Statues;
- Paintings;

- Sculptures; and
- Weavings such as baskets, mats, baby carriers, and eel traps.

In addition, some non-traditional goods with an IP rights component may be subject to piracy and counterfeiting including:

- Books (poetry and literature);
- CD-Roms/Multimedia – for example Moorditj “is a multi-award-winning interactive CD-ROM celebrating the depth and diversity of the cultural expressions of Indigenous Australian artists. Moorditj explores 300 artworks from 111 Aboriginal and Torres Strait Islander artists, including Sally Morgan, Yothu Yindi, Neville T Bonner and the Bangarra Dance Theatre”. Although this CD-Rom was funded by the Department of Communications and is available on a non profit basis, the contents of the CD-Rom could be subject to piracy and other unauthorised usage;⁹⁰
- Ceramics such as coffee mugs and collector plates,
- Clothing - Aboriginal designs often appear on hats, scarves, polyester ties, sarongs, and screen printed T shirts;
- Films – for example a number of DVDs celebrating Uluru have been released commercially,⁹¹ as well as a video produced by Bushmechanics.com, which “is dedicated to the amazing ingenuity of the indigenous mechanics. Whether it be finding a solution to a flat tyre when you've got no spare or overcoming many obstacles of the notorious Tanami Track by playing the Bush Mechanics game. This site is full of information and new experiences”. The Bushmechanics video and website was produced by Warlpiri Media Association in Yuendumu, and the video was distributed by Film Australia;⁹²
- Homewares such as Coasters - Cork, Coaster - Pewter, Photo Frames, Placemats and Rugs;
- Musical works;
- Paper products such as Bookmarks, Calenders, Envelopes, Letter Sets, Notepads and Xmas Cards (Boxed);
- Photographs;
- Sound recordings; and
- Souvenirs such as table cloths, boy/girl dolls, kangaroo/leather/suede purses, wooden bowls, magnets, screensavers, mousemats, cotton/suede bags, golf balls/tees, Bullroarers, Paper-mache boxes with stories, and Keringke bowls.

Having conducted market surveillance in retail stores in tourist areas in Sydney and on the Gold Coast, it was clear that there were many examples of fake Aboriginal art and crafts for sale, in many locations. In almost all instances, the counterfeit items are overtly being passed off as genuine Aboriginal art and craft. When asked about whether the items were pirate or counterfeit as part of the surveillance process, some tourist store staff seemed to feign ignorance of the background of the products they were selling. Most preferred to simply ignore or brush aside these types of questions as “too difficult”.

Tourists understandably visit Australia and seek to take home a genuine Australian souvenir. Indeed, there is an established link between tourism and the sale of Indigenous art and craft. The NSW Department of Aboriginal Affairs issued a press

⁹⁰ Moorditj: Australian Indigenous Cultural Expressions. 2006.

⁹¹ Uluru 2006.

⁹² Bush Mechanics 2006.

release regarding the 2005 'Corroboree' Indigenous Tourism Expo which "showcased the best in Indigenous dance, music, art and stories, stimulating interest in domestic, as well as international visitors, to have an Indigenous tourism experience".⁹³

A major problem impacting on Indigenous Australian art and craft is that tourists, rather than purchasing a "genuine" item may unintentionally purchase a "cheap knock-off" from a tourist shop. Often the purchaser won't even be aware that the item is not a genuine item. The tourists take the item home and find after a week the paint is flaking off the item, or it is broken, or it never worked as it was supposed to have worked. The so-called "souvenir" may not even contain country of origin information. Not only have the consumers been misled and wasted their money on a poor purchase, but they have taken home a poor quality souvenir which will provide a long lasting poor impression of Australia for a former visitor to Australia, their friends and family.

Many items that appear to be aboriginal arts and crafts are manufactured overseas. It is unclear whether or not they have a license in place from the rights owner, but it seems unlikely. Some items are of a poor quality and are very inexpensive. In many situations, genuine products cannot compete with these cheap unlicensed copies.

Counterfeit aboriginal arts and crafts appear to originate from China, Indonesia and Thailand, although they seem to rarely be subject to seizure by the Australian Customs Service (ACS). The lack of seizures may be as a result of the IP rights owners not registering the products with the ACS so that they can be detained at the border through the implementation of the Notices of Objection system.

Under the Notices of Objection system the Copyright Act 1968 and Trademarks Act 1995 establishes a procedure whereby a person known as the "objector", who is the owner or exclusive licensee of copyright in copyright material, or the registered owner of a registered trademark, may lodge with the ACS a notice of objection in relation to the importation of copies of that material. When a notice of objection is lodged, the ACS is empowered to seize any goods covered by a current Notice of Objection and hold them for 10 working days, extendible for a further 10 days upon reasonable request by the objector.

In effect Indigenous Australians do not appear to be participants in the Notices of Objection system, although the system seems to work effectively with respect to other types of IP rights.

Sometimes counterfeit aboriginal arts and crafts are manufactured locally in backyard factories by visiting backpackers. This phenomenon has been identified in Bondi and the Gold Coast where English and other international backpackers reportedly manufactured boomerangs and other Aboriginal art and craft. In one instance, Gold Coast staff actually worked from photographs of genuine Aboriginal paintings, which were being reproduced without the permission of the rights owner who is based in the Northern Territory. In one instance, it was suggested that a community work for the dole program had hired indigenous workers to copy artwork from an indigenous artist's book, which were then sold for profit much to the annoyance of the indigenous workers.

Pirates in this area often rely on using an artist's name in their fraud, without the knowledge of the artist. Sometimes the piracy and fraud occurs in what can be

⁹³ NSW Department of Aboriginal Affairs 2005.

described as “the middle of nowhere”, which makes enforcement activity even more difficult. Similarly, the rights owners are often located in rural areas and indigenous communities. This type of piracy also often elicits an apathetic response from those informed of its existence and occurrence.

A didgeridoo can be bought on line from a foreign website for as little as \$US1.50. A didgeridoo can be bought on line from a local website for as much as \$75. A genuine didgeridoo can be bought from a physical retailer for \$150 to \$300. The overseas made items may not suggest they are Australian made, although some do. There is definitely an implication that they are genuine items, and consumers are misled as a result.

(4) Historical Context of the Problem of Piracy and Counterfeiting

These concerns associated with the infringement of the IP rights of Indigenous Australians do not appear to be new concerns. According to the testimony of Mrs Fay Theresa Nelson, Director of the Aboriginal and Torres Strait Islander Arts Board, Australia Council, at the Cracking Down On Copycats Inquiry:⁹⁴

The concerns that we have are growing in number and have continued to do so ever since the marketing of Aboriginal art began back in 1975. Over a period of years, there has been strong evidence of appropriation of traditional imagery and design. Copyright users do not always respect the legally established rights of indigenous artists, and I think there is a lot of ignorance on behalf of the copyright users in that they do not understand Aboriginal cultures and protocols. The fact that paintings are often left unsigned is almost an open go for copyright users. Internet and online communication seem to be accelerating the unlicensed and inappropriate use of indigenous cultural materials, as service providers use Aboriginal and Torres Strait Islander art and design to identify themselves and attract customers in the global market. The ability to enforce copyright under copyright law is paramount, especially for holders of rights with very little means. Indigenous artists and communities are prime examples. Compliance with the requirement to make payments to collecting societies has not been uniform in Australia. There has also been widespread discussion in the arts community about public and private art organisations, including galleries and museums, not making the contributions artists feel that they should be making.⁹⁵

It appears that since this inquiry little has been done to protect Indigenous IP rights. No initiatives have been undertaken by the Federal Government or any other authorities including non-Government organisations and there has been no academic contribution that has had any practical impact on this issue. As a result of the lack of valuable academic contribution in this area, most of the authorities for this study are commercial websites specialising in the sale of Indigenous Australian art and craft to the public and dealers.

(5) Impact of the Problem of Piracy and Counterfeiting

Piracy and counterfeiting can have a devastating social and economic impact on particular groups and segments of the economy, as well as the overall economy. These impacts are one of the reasons that Australian and international authorities have focused so much attention on this problem in recent years, and have devoted

⁹⁴ Cracking Down On Copycats 2000b.

⁹⁵ Cracking Down On Copycats 2000b: LCA 341.

so many resources to fighting piracy and counterfeiting. Yet, little has been done to focus on the problem of piracy and counterfeiting as it impacts on the Australian Indigenous community.

The following are some of the negative economic impacts of piracy and counterfeiting on the Indigenous Australian and wider community:

- Reduced sales of Indigenous Australian goods with an IP component, as legitimate items are forced to compete with lower priced pirated copies;
- Reduced rates of return available to Indigenous Australian IP rights holders, thereby reducing incentives for innovation and further investment in the production of goods and services with an IP component. This has an impact on the overall economy, including:
 - Reduced economic growth,
 - Reduced taxation collections,
 - Reduced employment levels in industries focused on the production of goods and services with an IP component,
 - Increased social security payments to those who would otherwise earn an income from art and craft,
 - Reduced technological innovation, and
 - Increased national trade and balance of payments deficits, especially if the IP industries detrimentally affected by piracy are export industries – as is the case with Indigenous Australian goods;

Piracy and counterfeiting of Indigenous Australian arts and crafts hurts Indigenous Australians and the community in general, taking away income from a segment of the Australian community that at times is disadvantaged. According to the “Aboriginal Art Online” website, many Indigenous Australian artists “have led amazingly varied lives, often in difficult circumstances”.⁹⁶ Certainly this group are deserving of an economic return on their creativity.

Indigenous Australians engaged in the production of art and craft also suffer as they are subject to depressed prices and reduced sales. In effect, the value of their trade marks and copyright is diminished. There is also a cost resulting from the loss of future sales from customers who, having been deceived into buying the inferior counterfeits, are deterred from any repeat purchasing. Counterfeits may also hurt Aboriginal Australia branding, by undermining the image associated with the brand. This may also result in lost future sales, or an inability to charge premium prices associated with high quality goods which could otherwise be charged for these exceptional goods.

The existence of excessive counterfeit Indigenous Australian goods in the Australian market place may also create a barrier to entry for the legitimate products of Indigenous Australians. After all, how can copyright owners compete with organised groups offering similar products, but at a much lower cost?

Piracy and counterfeiting costs rights owners license revenues as individuals engage in piracy and counterfeiting instead of purchasing licensed and authorised copies of artworks. This type of activity is encouraged as a result of a lack of enforcement activity in response to piracy and counterfeiting. According to one analysis:

⁹⁶ Aboriginal Art Online 2006a.

*Unlicensed imitations of Aboriginal art may offend Aboriginal people, harm their livelihood options, and can infringe copyright and moral rights.*⁹⁷

Some representatives of the Indigenous Australian community have also expressed fears about future piracy and counterfeiting impacts on their community. According to the testimony of Mrs Fay Theresa Nelson, Director of the Aboriginal and Torres Strait Islander Arts Board, Australia Council, at the Cracking Down On Copycats Inquiry:

*I am fearful that a lot of the myths that we have that tell about how we came to be here on this earth, how we were given life on this earth, can be taken by some non-indigenous person, put into books and then a copyright is claimed over those stories. I think that is dreadful. Our language is in much the same classification.*⁹⁸

(6) Impacts on Specific Artists

Copyright infringing activity impacts directly on specific artists. Joanne Brooker a freelance indigenous artist wrote:

*In October 2005, I received a postcard from Ireland. The postcard was a copy of my artwork. The original work had been printed in The Courier-Mail some years before. The copy had been changed using Photoshop to the detriment of my original artwork, including the replacement of my signature with the copier's signature. The postcard was printed by the Illustrators Guild of Ireland (IGI) of which he was a member. I had a friend email the copying artist, offering to buy the artwork. The artist said he had the artwork and it was available for sale. I then contacted the artist who admitted that he downloaded my artwork and had "put his own spin on it".*⁹⁹

(7) Indicia of Piracy and Counterfeiting

Price is the strongest indicator of the existence of pirated and counterfeit items. Pirated and counterfeit items typically retail for a price significantly lower than the retail price of the authorised item. As discussed above, a counterfeit didgeridoo can be purchased on line from a foreign website at low cost. Aside from price, infringements may be easily identifiable if the quality of the production or packaging of the good is poor. Indeed, appearance may also be an indicator of the existence of pirated and counterfeit Indigenous Australian items. However, the identifying factors classified as appearance will vary, depending on the item subject to piracy or counterfeiting.

Some didgeridoos are machine made - the dots on some didgeridoos have been observed to be equidistant from each other - which could not take place if they were manufactured by indigenous Australians in the traditional manner which is by hand. Some didgeridoos may not be made from Eucalyptus wood, but are made from plastic. Some didgeridoos are mass produced, not individually hand crafted. They may only receive a single coat of varnish, and may have a rough beeswax mouthpiece.

Sometimes it is unclear whether or not Indigenous Australian arts and crafts are made by Indigenous Australians. For example, one mail order website proudly claims

⁹⁷ Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAA) 2005.

⁹⁸ Cracking Down On Copycats 2000b: LCA 345.

⁹⁹ Brooker, J 2006.

that all of its products are Australian made. As well as other products, the website also sells “Aboriginal Artifacts including Boomerangs, Ceramics, Frames & Prints, Keyrings, Magnets, Other Items and Tableware”. However, there is no indication as to whether Indigenous Australians manufacture these items.¹⁰⁰ Indigenous Australians may feel resentment about non-Indigenous persons producing Aboriginal artifacts and art. According to one commercial website:

*MOST didgeridoos found on the Internet are made with cheap labor (sic) and cheap materials, in India or Indonesia, where corrupt manufacturing labor (sic) laws and ecological damage are rampant. Even many Australian companies offer didgeridoos that are not painted by Aboriginal artists.*¹⁰¹

(8) Auction Websites

Another source of physical piracy of films is auction websites. Auction websites allow consumers to purchase goods and services from websites using a bidding system. eBay is the world’s largest auction website, Unlike most traditional retailers, eBay does not sell goods that it holds in its possession or actually owns. eBay “merely facilitates the process of listing and displaying goods, bidding on items, and paying for them. It acts as a marketplace for individuals and businesses who use the site to auction off goods and services”.¹⁰²

Boomerangs are often on sale from eBay and other auction websites. For example, a search on 17 October 2006 yielded the following results:

- “U-THROW-A BOOMERANG GAME'S Rember (sic) Melbourne 2006 LOOK?” – price = \$AU 7.99;
- “GENUINE ABORIGINAL THROWING BOOMERANG” – price = \$AU 5.00; and
- “2 x Boomerang Frisbees – Green” – price = \$AU 5.95.¹⁰³

While there is insufficient information available regarding these items to make a definitive statement on whether or not they are genuine Indigenous Australian-made products, given the price of the items, and the spelling and grammatical errors in the descriptions of the items, it is unlikely they are all legitimate items.

Another search of eBay under the subject matter “aboriginal art work” yielded the following results:

- “4 Australia covers with Aboriginal art work inserts lot” (item location: Denver CO, United States) – price = \$AU 35.00; and
- “ABORIGINAL ART WORK KEY HOLDER, LAMINATED ON WOOD” (item location: Orlando, Florida, United States) – price = \$AU 4.99.¹⁰⁴

(9) A Worsening Problem

As a result of a lack of statistical information on the extent of piracy and counterfeiting of Indigenous Australian art and craft, we are unable to paint a

¹⁰⁰ Australian Choice 2006.

¹⁰¹ Yidaki 2006.

¹⁰² Wikipedia 2006.

¹⁰³ http://search.ebay.com.au/search/boomerang_W0QQfcIz4QQfnuZ1.

¹⁰⁴ http://search.ebay.com/aboriginal-art-work_W0QQfkrZ1QQfnuZ1QQfromZR8.

complete picture of the extent of the problem. However, it is likely that this problem will worsen in the future, as a result of market influences.

There is a substantial Australian and international demand for genuine Indigenous Australian art and craft. According to various reports this demand is likely to increase, and is currently not, nor will it be met by legitimate supply, in the short to medium term. According to the Warlayirti Artists website:

Warlayirti Artists is a very successful community art centre which has been operating since 1987. From its beginnings the organisation has grown significantly, especially in the last 3 years. Senior artists at Warlayirti have developed strong painting careers over the last decade. These artists include Eubena Nampitjin, Boxer Milner, Elizabeth Nyumi, Helicopter, Tjumpo Tjapanangka, Bai Bai Napangarti Sunfly, Kathleen Paddoon and Nancy Naninurra. No works of significant size by these senior artists are available for purchase on our website. This is because the current reality is that the demand for works by these senior artists considerably exceeds the supply. A system of waiting lists has been created to manage this demand. Warlayirti Artists is committed to maintaining an exhibition program which is important to the development of artists' careers and to maintaining the profile of Warlayirti Artists. In addition, we are committed to operating a successful retail business for the benefit of the artists and the sustainability of the Art and Culture Centres. We recognise the importance of striking a balance between these two areas of demand. The waiting lists system offers a fair and transparent way of managing these demands.

*How the waiting lists work: Anyone can add their name to a waiting list for particular artists, whether you are a private individual, commercial gallery or public institution. All you need to do is contact us via email or phone and provide us with your contact details including, phone number, email and postal address as well as the particular artist you are interested in and the size of the work you would like. We will then complete a request form for you and place you on the relevant waiting list. You will then receive a email confirming your placement on the waiting list. Waiting times for works vary depending on the artist. You could wait for between 6 months to 2 years for a work and Warlayirti staff are happy to give you an indication of the waiting times and where you are positioned on a specific list. When you reach the top of a list, you are shown up to three different works as they become available (which may not be necessarily be at the same time), with the opportunity to purchase one work. Payment for a chosen work must be received within seven days. If you decline to purchase any of the three works offered your name will be returned to the bottom of the list should you wish to wait for another opportunity to purchase that artist's work. Please contact us if you would like to be placed on a waiting list or would like further information.*¹⁰⁵

This unfulfilled demand will create an environment which will encourage ruthless profiteers to undertake acts of piracy and counterfeiting, in an endeavour to profit from these market conditions.

Another indication of the worsening trend of piracy and counterfeiting is the increasing prevalence and perceived need for retailers and wholesalers of Indigenous Australian art and craft to provide certificates of authenticity. For example, according to the Aboriginal Art Shop website:

¹⁰⁵ Warlayirti Artists 2006.

*One of the most important things that you want to know when you purchase a piece of Australian Aboriginal art or artefact, is that the product you are purchasing is authentic. That is why we provide you with a certificate of authenticity of the Highest Standard as well as exceptional Provenance with all purchases. This includes: Aboriginal Paintings, Boomerangs, Didgeridoos, Aboriginal Artefacts. We also provide you with the Aboriginal Artists' name and a detailed profile (Their life story) and in most cases a photograph of the artist. This way you can be totally confident, when you purchase through Aboriginal ArtShop.com, that you are receiving a genuine piece of art!*¹⁰⁶

Waterhole Aboriginal Art also provide a certificate of authenticity, although their website on explains the certificate in general terms.¹⁰⁷

It is common sense for purchasers of Indigenous Australian art and craft to expect to receive a certificate of authenticity when they purchase these goods, especially if a large expenditure is involved. However, the perceived need for these certificates demonstrates that pirated and counterfeit Indigenous Australian art and craft is a real and worsening problem.

(10) The Disappearing Culture

According to leading Aboriginal commentators, such as Deputy Director of the Yothu Yindi Foundation, and former Australian of the Year, Mandawuy Yunupingu, Aboriginal culture is disappearing. Recently invited to address the “Australian Leadership Retreat”, Mr Yunupingu said:

*... the cultural traditions and structures of Indigenous Australians – the first Australians – are being broken up and are disappearing, with horrendous consequences”. Mr Yunupingu added “major cultural traditions and beliefs – more than 40,000 years’ worth – and the way they are expressed, and practiced, and used to hold together communities, have been broken down, or broken up. Art, language, the mountain of traditional knowledge, the spirituality, much of it borne of the land, has gone, or is going. Cultural traditions and practices of traditional dance, song, ceremony - our social rituals and belief expressions - are being lost, not passed on to the next generation. The bonds, the ties are being broken. Aboriginal Australia – the First Australia – is disappearing.*¹⁰⁸

Of course, Mr Yunupingu is a former ARIA award winner, so his creativity has been recognised by the sound recording industry – which is one of the key IP based industries. Yet, Mr Yunupingu seems to be less recognised for his contribution to Indigenous Australian IP rights ...

One of the reasons for this disappearance of Indigenous Australian culture is piracy and counterfeiting, which covertly and overtly devalues Aboriginal culture and steals license revenues from Indigenous Australian painters, artists and crafts-people. This theft goes unpunished and is largely ignored. Of course, this is unsurprising given that we are unaware of the extent of piracy and counterfeiting and its impacts on the Australian Indigenous community.

¹⁰⁶ Aboriginal Art Shop 2006.

¹⁰⁷ Waterhole Aboriginal Art 2006.

¹⁰⁸ Garma Festival, Northern Territory 2006.

(11) Responses to the Problem

(i) Litigation and Enforcement activity

Despite the existence of legislation which can be applied to the piracy and counterfeiting of Indigenous Australian goods with an IP component, there has been an almost entire absence of IP rights enforcement activity in the sector.

There are no criminal prosecutions in the sector.

There are no private criminal prosecutions in the sector.

There are almost no civil proceedings in the sector.

Piracy and counterfeiting of Indigenous Australian goods with an IP component can be dealt with through either criminal or civil litigation, or both. Civil matters can be commenced in the Federal Court, the District Court, the Local Court and the Federal Magistrates Court of Australia. Criminal matters are typically heard in the Local Court.

Offences under the *Copyright Act 1968* (Cth) include commercial dealings (such as making for sale or hire) an infringing article where it is known, or ought reasonably to be known, that the article is infringing (section 132). Maximum penalties for most criminal copyright infringement offences are 550 penalty units and/or imprisonment for not more than 5 years, or 5 times this amount if the infringer is a corporation (1 penalty unit currently equals \$110). Penalties under the *Trade Marks Act 1995* (Cth) are 500 penalty units and/or imprisonment for not more than 2 years (a corporation may be fined 5 times this amount). Offences attracting this penalty include falsification of a registered trade mark in the course of trade (section 145), and selling goods which are falsely marked (section 148).

The main provisions of the Copyright Act that could arise in the prosecution of an Indigenous Australian IP matter include:

- Section 132 – Offences relating to infringing copies
- Section 132A – Presumptions in relation to subsistence and ownership of copyright
- Section 133 – Destruction or delivery up of infringing copies.

Trade marks offences may be tried either summarily or on indictment. The main provisions of the Trade Marks Act that could arise in the prosecution of an Indigenous Australian IP matter include:

- Section 145 – Falsifying etc a registered trade mark
- Section 146 – Falsely applying a registered trade mark
- Section 148 – Selling etc goods with false marks
- Section 149 – Penalties.

Section 52 of the Trade Practices Act 1974 (and similar State and Territory Fair Trading legislation) could also apply in relation to the sale of Indigenous Australian goods with an IP component, if there has been misleading or deceptive conduct and/or false representations. This legislation could apply if, for example, a retailer passed off a counterfeit boomerang as a genuine boomerang manufactured by Indigenous Australians.

(ii) Education

Some Indigenous groups and their associates have used their best endeavours to warn consumers of the dangers of purchasing counterfeit aboriginal arts and crafts.

For example, the Association of Northern Central Australian Aboriginal Artists (ANCAAA) has published a consumer guide, as part of a joint venture along with Desart, ArtsMARK, the Arts Law Centre and the Australian Copyright Council. According to the brochure:

*The brochure is aimed at informing consumers about the ethical purchase of Indigenous art and will be distributed through art centres, art galleries, tourist centres, back packers, hotels and art organisations. The publication is a result of wide-ranging consultation with artists, art centres, galleries, consumer affairs, legal and industry representatives. Publication of the Consumer Guide was generously supported by the Northern Territory Government through Arts NT.*¹⁰⁹

(12) Impediments to Litigation

While there has been some litigation on behalf of indigenous IP rights owners, numerous impediments face this group of rights owners. These impediments include the following:

- Difficulties over proof of subsistence / ownership - there is a general problem with “group ownership” being used as a basis for IP rights under legislation that envisages a single creator or inventor. According to the “Aboriginal Art Online” website:

*The custom of artists occasionally working on sections of each other's paintings ... points to the fact that cooperation is central to the successful outcome of any craft venture. It is this cooperative approach to learning and art creation that continues among the potters of today, in some ways similar to the Renaissance artisan guilds of Europe.*¹¹⁰

According to the testimony of Mrs Fay Theresa Nelson, Director of the Aboriginal and Torres Strait Islander Arts Board, Australia Council, at the Cracking Down On Copycats Inquiry:

*... nowadays only urban contemporary artists who are having to develop their own styles will have individual rights, but for a traditional person who comes out of, say, Yirrkala, if they are Riratjingu, that Riratjingu mob still own the copyright on everything that they do. An individual cannot take a painting of a sacred story, part of a song cycle, and use that for their own benefit, like establishing a company and marketing totally on their own. They would be breaching Aboriginal copyright and intellectual property law.*¹¹¹

These comments were made in response to a question from a Committee member: are there any individual rights for copyright for Indigenous Australians, or is there is only a community right? Mrs Nelson also explained:

¹⁰⁹ Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAA) 2005.

¹¹⁰ Aboriginal Art Online 2006b.

¹¹¹ Cracking Down On Copycats 2000b: LCA 344.

When we are born, we are born to a certain dreaming. That dreaming is painted on us when we are born; it is taught to us through song, dance, et cetera as we are growing. We go through various age grading ceremonies that assist us in understanding who our ancestral beings were, the land that they made for us, the plants, the animals. They gave us our totems; they taught us how to live in this country. That is a shared thing, with all of your group. We divided the world into half so that everybody and everything fits in one half of the world or the other. That is part of kinship. Those two halves are called moieties. When you are in one half of the world, there are certain things that you paint about that this is your dreaming: this is who you are; this is what you dance about; these are the plants that you can eat; these are the songs that you can sing; this animal, this bird, is one of your major totems. You have to paint and dance to ensure that that bird or that plant continues its life, because while ever that happens you are very strong. You are part of this group of people who continue this tradition and, as you grow through these age grading ceremonies, either male or female—and they are separate ceremonies—you have an understanding of your role and your responsibility to the community. As you grow, you inherit the right to paint certain designs, to sing certain songs ... Everybody inherits that right, as long as you go through the ceremonies. You go through and you are taught what you can do. With the coming of education and employment, a lot of that is being lost, but there are a lot of people who say, 'I have not painted this, I have not been through this ceremony, because I have not got the right to do so.' Today, many people—if they have been through ceremony—are able to paint whatever it is that their fathers or their grandfathers painted.¹¹²

- Work identification difficulties – according to Mrs Nelson:

When we began marketing Papunya Tula art back in the early 1970s, the work came to us on pieces of chipboard and sometimes on art board. It had a label on the back that the craft adviser filled out. A lot of the early bark paintings were also like that. I think that kind of authenticity has to be reapplied. Perhaps signatures can also be of assistance nowadays to identify some of our people's works;¹¹³

- Geographical difficulties - sometimes the piracy and fraud occurs in remote locations, or victims of piracy and fraud are located in remote locations, which makes enforcement activity more difficult – would be applicants/plaintiffs would have difficulties hiring a solicitor in some regions of Australia, let alone a solicitor with expertise in IP rights enforcement or an understanding of the Copyright Act;
- Language difficulties – at the time of first contact, “there was no single, homogeneous Aboriginal society. Groups differed in aspects of their cultural and social organisation, and in the Northern Territory alone, over 100 different languages were spoken. These were separate languages, as unlike one another as French and Russian. Existence of widespread social networks meant that people had to be multilingual to communicate. The Arrernte group could speak up to 10 languages / dialects”.¹¹⁴ According to the Aboriginal and Torres Strait Islander Languages website, “there are more than 200

¹¹² Cracking Down On Copycats 2000b: LCA 343.

¹¹³ Cracking Down On Copycats 2000b: LCA 347.

¹¹⁴ Aboriginal Art and Culture Centre 2006f.

Australian Indigenous languages”. According to the Australian Bureau of Statistics:

*About one in eight Indigenous persons (12%) reported that they spoke an Aboriginal or Torres Strait Island (Australian Indigenous) language at home. Indigenous languages were much more likely to be reported by Aboriginal and Torres Strait Islander peoples living in geographically remote areas. Over half the Indigenous persons living in very remote areas (55%) reported an Indigenous language, compared with 1% of those in major cities and inner regional areas.*¹¹⁵

It is difficult to understand legalese and legal processes if the individual who seeks to engage these processes does not have an adequate understanding of the English language – and that is certainly not a problem limited to Indigenous Australians;¹¹⁶

- Apathetic attitudes - rights owners are often located in rural areas and indigenous communities, and their response may be a disinterest in legal proceedings or a feeling that they are not empowered by the Australian legal system;
- Lack of knowledge/awareness of legal rights – some rights owners may be unsophisticated in matters related to their legal rights and aspects of IP rights enforcement, and in some situations may not even be aware that they have a potential cause of action, let alone an ability to recover substantial damages against a respondent. According to the testimony of Mrs Fay Theresa Nelson, Director of the Aboriginal and Torres Strait Islander Arts Board, Australia Council, at the Cracking Down On Copycats Inquiry:

*Indigenous people need to be informed about how existing cultural heritage laws might benefit their needs regarding the use and control of their indigenous cultural heritage material ... A lot of our people are not aware of the need to protect their symbols, designs and secret and sacred objects and materials, et cetera.*¹¹⁷ Mrs Nelson added:

*If you are a Gumatj, you have a certain dreaming design, the ancestral beings. You know that this is everything that you belong to. In our law, it is belonging to something. I think that our people are naive in the way of marketing and business. They do not understand that they must register the designs, the dreaming stories, of their particular group. It is something that I have seen greatly bastardised by commercialism in the past.*¹¹⁸

- Overseas infringers – where infringers are located overseas there may be difficulties associated with the service of legal documents, the collection of evidence, and even if legal proceedings are successful, there may be difficulties in enforcing judgements;
- “Fly by night” respondents/defendants – pirates will typically disappear or go bankrupt before legal proceedings can be completed, or damages can be recovered – of course this is not a problem limited to IP rights enforcement

¹¹⁵ Australian Bureau of Statistics 2001.

¹¹⁶ Nathan, D. 2005.

¹¹⁷ Cracking Down On Copycats 2000b: LCA 342.

¹¹⁸ Cracking Down On Copycats 2000b: LCA 344.

matters but exists as a risk in many areas where civil proceedings are commended. Consumer may have limited recourse against these so-called “fly by night” counterfeiters;

- Lack of funds – legal proceedings are typically very expensive, and would-be Indigenous Australian applicants/plaintiffs may lack the financial resources to commence legal proceedings, with few if any legal practitioners being willing to commence such proceedings on a “spec” or pro-bono basis;
- Lack of organisational skills – it takes a great deal of organisational skills to effectively run a complex IP rights enforcement matter – for example, solicitors must brief barristers, expert witnesses must be found and engaged, and a media/PR campaign must be devised and implemented – would-be Indigenous Australian applicants/plaintiffs may lack these skills; and
- Lack of legal expertise – would-be Indigenous Australian applicants/plaintiffs may be unaware of the steps they have to undertake to be successful in a IP rights enforcement case, and they may be unaware of the elements involved in such a case.
- Low enforcement priority - Indigenous Australian rights owners lack the resources and organisational skills to be heard and attract policing resources. Enforcement and investigative activity with respect to the IP rights of Indigenous Australian rights owners appears to be a low priority for the Commonwealth Department of Public Prosecutions (CDPP), the Australian Federal Police (AFP) and the State Police. It is unclear whether this is because these groups are not fully aware of the extent of infringing activity in this area, or this type of infringing activity is simply not considered to be a high priority for these Government organisations.

Decisions on CDPP prosecutions are made under the CDPP prosecution policy. Relevant factors include whether there is a prima-facie case, whether further evidence is required before the CDPP can proceed. These and other factors are considered to determine whether there are reasonable prospects of a conviction. Only after it is accepted that there are reasonable prospects of a conviction will the CDPP consider whether the public interest requires a prosecution.

All matters including IP matters are evaluated by the AFP in accordance with the AFP’s Case Categorisation and Prioritisation Model (CCPM).

It is unclear why the piracy and counterfeiting of Indigenous Australian art and craft appears to be such a low priority for the CDPP and AFP – especially compared to other illegal activity which seems to be subject to greater enforcement authority by public authorities. For example, it was reported that a NSW man was prosecuted for scratching his name on Pilbara cave containing rock art. According to a media release at the time the prosecution:

... is a reminder of the seriousness of damaging Aboriginal heritage sites ... DIA Acting Director General David Pedler said that the \$1200 fine imposed on Ifran Kapalan by the Perth Magistrate’s Court on 19 October served as a strong deterrent to vandalism of such sites. Mr Pedler said that the damage, which cost Kapalan \$1200 plus \$550.70 costs, took place in Jinawanurra (Trotman’s) Cave, in the Paterson Range 22km from Telfer, in 2004 and was

*reported to the DIA by a Newcrest Mining employee ... At the time of the damage, Kaplan was working as a sub-contractor for a Pilbara mining company. He was visiting the area with a group of people and was seen scratching his name and the date on the wall of the cave. This was despite Aboriginal heritage site signage and a plaque to indicate the importance of the cave, which is the site of rock engravings and paintings.*¹¹⁹

While damaging Aboriginal heritage sites is an undesirable activity and is deserving of punishment, it is unclear why such an activity is considered more serious than the seemingly more widespread problem of Indigenous Australian IP rights infringement. This is especially when Indigenous Australian IP rights infringement creates economy-wide losses, rather than merely impacting on a single isolated geographical area.

(13) Results of the Impediments to Litigation

As a result of these litigation impediments, there has been a lack of enforcement activity in the area of protecting the IP rights of Indigenous Australians. This has resulted in the following adverse consequences:

- (a) Lack of legal precedents;
- (b) Lack of community education on the value of Indigenous Australian IP;
- (c) Lack of a disincentive for would-be IP rights infringers;
- (d) The impact of cease and desist letters such as those sent by victims of IP crime is reduced;
- (e) The value of licenses and the desirability of obtaining licenses is reduced; and
- (f) The long term existence of a systemic, endemic and substantial problem of Indigenous Australian IP rights infringement.

(14) Role of Collecting Societies and Enforcement Units

VISCOPY is the leading collecting society representing the indigenous sector.¹²⁰ According to their website:

*VISCOPY represent the interests of over 2,900 Aboriginal and Torres Strait Islander artists, their heirs and communities. To ensure cultural integrity and service charter, VISCOPY has enshrined within its' constitution, indigenous board representation, internal policy and the services of an Indigenous Visual Copyright Education Officer, a dedicated position servicing the requirements of our indigenous membership.*¹²¹

Yet unlike some IP rights owners, collecting societies, and enforcement units, such as AFACT for the film industry, and MIPI for the music industry, VISCOPY appear to act in no more than an advisory capacity. VISCOPY do not appear to commence proceedings on behalf of their members, nor do they appear to act on behalf of their members in legal or commercial disputes.

In other industries enforcement units have been very effective in reducing the incidence of piracy and counterfeiting. These enforcement units have been described as quasi-police forces, and feature trained personnel who have expertise in dealing with IP rights enforcement. Enforcement units typically use Anton Piller and other

¹¹⁹ Western Australia Department of Indigenous Affairs 2005.

¹²⁰ VISCOPY 2006a.

¹²¹ VISCOPY 2006b.

orders. They are tasked with instructing legal representatives, investigators, forensics specialists and other operatives.

These units are funded by the retention of a small portion of dividends which make up payments to members and stakeholders. Often less than 1% of all revenue received is retained in order to fund these enforcement units. As far as these rights owners are concerned, it is money well spent. For example, MIPI the music industry's enforcement unit has recently launched a stand alone website.¹²²

Despite their effectiveness in other industries, there are apparently no independent enforcement units operating in the Indigenous visual arts and craft sector.

(15) The Need for Enforcement Activity

Some protocols recognise that Indigenous groups own their IP. For example the Aboriginal and Torres Strait Islander Library and Information Resource Network (ATSILIRN) endorsed protocols that are intended to guide libraries, archives and information services in "appropriate ways". These protocols recognise "the moral rights of Aboriginal and Torres Strait Islander peoples as the owners of their knowledge" [Preamble].¹²³ Further:

The interests of the authors and publishers of records, books and other documentary material are protected by copyright law but the interests of those whose culture is described are not. The primary rights of the owners of a culture must be recognised. Libraries, archives and information services will:

- 2.1 Become aware of the issues surrounding cultural documentation and the need for cultural awareness training.*
- 2.2 Develop proper professional recognition of the primary cultural and intellectual property rights of Aboriginal and Torres Strait Islanders ...*
- 2.3 Develop ways, including the recognition of moral rights, to protect Aboriginal and Torres Strait Islander cultural and intellectual property.*¹²⁴

Yet these scattered protocols covering various types of subject matter are ineffectual, and the underlying principals are effectively meaningless, unless enforcement activity is undertaken to support these principals. Without enforcement activity, most individuals would be unaware these underlying principals exist, and would-be pirates and counterfeiters would not believe that these IP rights would be defended. In effect, they would believe that they can undertake any infringing activity they may wish to undertake without any negative or adverse consequences.

Similarly, some websites that sell paintings and other Indigenous Australian materials contain disclaimers and/or copyright notices. For example, the Gallerie Australis website, which represents a number of artists contains the following copyright notice:

*Artwork images remain the exclusive property of the artist or copyright holders. Written permission is required from the copyright holders for any commercial or public reproduction of all art images contained in this internet site.*¹²⁵

¹²² <http://www.mipi.com.au/>.

¹²³ Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services 2000.

¹²⁴ Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services 2000.

¹²⁵ Gallerie Australis 2006b.

Similarly, from the Maningrida Arts & Culture website:

*All artworks produced for Maningrida Arts & Culture come under international copyright law. Please remember the artwork displayed on our website cannot be reproduced or published in hardcopy, digital or any other format without the prior written consent of the artist.*¹²⁶

In addition, the Mbantua Gallery and Cultural Museum online include the following detailed notice:

*All images you see on this website have been taken by Mbantua Gallery with artist and staff permission. Copyright for the artworks shown on this website belong to the artists. They may be viewed and downloaded only for the purpose of buyer browsing. No reproduction of any image shown on this site may be made for any reason whatsoever without the artist's permission. Copyright for all images not of artwork on this website belongs to Mbantua Gallery. They may not be reproduced or downloaded by anyone other than Mbantua Gallery for any reason whatsoever without the permission of Mbantua Gallery. All information on this website has been written as an entire body by Mbantua Gallery Field and Research Department. It has come from years of knowledge, experience and passion. We would appreciate it being used with reference to Mbantua Gallery. No part of this text however may be copied and used without the permission of Mbantua Gallery.*¹²⁷

These types of notices, while being legally correct and appropriate in the circumstances would be relatively ineffectual or would be viewed as relatively ineffectual, without any supporting legal enforcement activity.

Even the Government provides warning notices in relation to potential copyright infringement concerning Indigenous Australian art and craft. For example, the Western Australian Government provides the following notice on its website:

If you intend to photograph or film an Aboriginal site for the purpose of commercial reproduction or publication, you must first obtain the consent of the Registrar of Aboriginal Sites ...

What does the law say about commercial photography and filming?

*Regulation 10(h) of the Aboriginal Heritage Regulations 1974 states that a person must not on an Aboriginal site or protected area "except with the prior written approval of the Minister, or the Registrar, and in accordance with such requirements as he may impose, **take any photograph or make any recording for the purpose of commercial reproduction or publication**".*

What is "commercial reproduction or publication"?

Examples could include:

- photography for business, tourism or other commercial promotional activities*
- filming or video recording as part of the production of a documentary or similar program intended for commercial sale or release*

¹²⁶ Maningrida Arts & Culture 2006d.

¹²⁷ Mbantua Gallery and Cultural Museum 2006c.

• *photography for publication on the Internet as part of a commercial or business activity*

What is an Aboriginal site?

*In general, an Aboriginal site is any sacred, ritual or ceremonial site of importance and significance to Aboriginal people.*¹²⁸

Again, these notices are largely ineffectual if they are not enforced by public authorities.

(16) Recommendations

(i) *Identify the Extent of Piracy and Counterfeiting of Indigenous Australian Arts and Crafts*

The extent of counterfeit aboriginal arts and crafts in the Australian market place is unknown. This is despite significant calls for research in this area.

While studies and market research activities have been undertaken to estimate the extent of piracy and counterfeiting impacting on the film, sound recording, toy, software, video gaming and luxury goods' industries, no similar studies have been undertaken with respect to the Indigenous Australian IP industries. Nor has any work been undertaken by the Australian Bureau of Statistics in this area.

Further research need to be undertaken to identify the nature of, extent of and economic/non-economic impacts of IP crime on Indigenous Australians. As part of this research, an analysis should be undertaken to identify the most effective means to reduce and prevent this type of crime.

(ii) *Additional Education*

We referred to the consumer guide prepared by the Association of Northern Central Australian Aboriginal Artists, Desert, ArtsMARK, the Arts Law Centre and the Australian Copyright Council discussed above. This brochure contains information regarding the piracy and counterfeiting of Indigenous Aboriginal art and craft. However the existence of this type of brochure appears to be a rare incidence.

The absence of brochures and information sheets other than this brochure demonstrates that there is a need for greater Government education in this area. In particular, greater public education should be undertaken regarding the importance of Indigenous Australian IP rights and in the impact of IP rights infringement in this area.

Indigenous Australians should also receive greater education regarding their legal rights in the advent of IP rights infringement impacting on them. Australian Aborigines need to be made aware that they are *not* powerless to prevent the theft of their creativity, and criminal and civil remedies exist to prevent this type of activity. Non Indigenous Australians need to be made aware that the theft of Indigenous Australian arts and craft is not a victimless crime.

(iii) *Legislative Change – Trade Mark Law*

There seems to be an imbalance in enforcement activity in Australia with respect to the IP rights of Indigenous Australians. Specific legislative provisions directed at

¹²⁸ Western Australia Department of Indigenous Affairs 2005b.

particular groups such as indigenous rights owners may redress an imbalance in enforcement activity which has developed in Australia.

Indigenous IP rights owners should be given the benefit of a special trade mark which guarantees the legitimacy of indigenous products that carry the trade mark. The development and widespread usage of such a trade mark would create a commercially viable enforcement and protection mechanism.

Consideration should be given to such a trade mark being a certification trade mark (CTM). A CTM indicates that those goods have been "certified" as meeting a particular standard of quality or accuracy, or as having a particular composition, mode of manufacture, geographical origin or some other characteristic (IP Australia 2006). In this instance, an indigenous Australia CTM would certify that goods carrying the trade mark are genuine indigenous Australian goods.

(iv) Legislative Change – Copyright Registration System

Consideration should also be given to the implementation of a stand-alone copyright registration system for indigenous Australian IP. If such a system were to be implemented, indigenous Australians could be encouraged to register their works and have them displayed and be available for license through an on line system. License fees payable and collected on the basis of such a system could provide funding for the system.

(v) National Survey/Collection/Library of Indigenous Goods and Services with an IP Component

A survey should be conducted of all Indigenous Australian art and craft, so that all items can be identified:

- In order to ensure that they are subject to copyright protection, and
- In order to register the items under the system of trade mark protection discussed above.

Such a survey would also allow Government authorities to make a definitive determination on the value of Indigenous IP rights to the Australian economy by independently valuing all goods and services with an IP rights component. It is likely that the results of such a survey would demonstrate that the importance of Indigenous IP rights to the Australian economy is far higher than previously estimated.

As a result of such a survey, copies of art could be included on a stand alone Government or non-Government website, so that a simple on line license process could be implemented. Additionally, all would-be licensees would no longer be able to feign ignorance of IP rights legislation, and claim they didn't know "the item was protected".

(vi) Public Enforcement Initiatives

Further research need to be undertaken to identify the reasons, if any, that enforcement and investigative activity in relation to IP offences as they impact on the Indigenous Australian community, is such a low authority for Federal and State Government authorities and agencies.

This should be undertaken with a view of having the CDPP, AFP and State Police prosecute and investigate more instances of IP rights infringement impacting on Indigenous Australian IP rights owners.

Indigenous IP rights infringement is a crime – so it should be treated as a criminal matter.

(vii) Private Enforcement Initiatives

Further research need to be undertaken to identify the extent of enforcement initiatives in this area by Indigenous victims of IP rights infringement, if any, to date.

There appears to be little real work on the development of a system of practical protection or enforcement initiatives by or on behalf of the Indigenous community by any stakeholders. This is despite the ideal position of a number of organisations which represent the Australian Indigenous community to do so.

Further, there seems to be a complete absence of license revenue protection by Indigenous Australian IP rights owners.

There no body of work on the actual enforcement of rights that extends beyond the occasional infringement case that reaches the court system. Little or no academic work appears to exist, which details efforts or actual attempts to enforce indigenous community rights in the present environment.

(viii) A Program of Civil Enforcement Activity

A program for the enforcement of Indigenous Australian IP rights through the civil system should be encouraged. A plan for such a system of enforcement could work in the following manner, and have the following components:

- (a) Surveillance of would-be targets to identify infringers of Indigenous Australian IP rights;
- (b) Collection of intelligence from consumers who are often the first to identify pirate or counterfeit Indigenous Australian items. This could take place through the use of a hotline or anonymous “tip” lines;
- (c) Examination of public registers and client searches, to identify infringers of Indigenous Australian IP rights;
- (d) Collection and analysis of intelligence collected, including evidence of infringing activity by targets;
- (e) Analysis to identify the “best” targets, being based on a number of factors including the likelihood of success, the seriousness of the infringing activity, and the need to establish a civil deterrent;
- (f) Identification of the best forums for these proceedings and the most suitable legislation under which to commence the proceedings – eg. Federal or State offences? Trade Marks or Copyright Acts? Federal Court, Federal Magistrates Court or Local Court?
- (g) Engagement of suitable lawyers, forensic accountants and surveillance experts to assist Indigenous IP rights owners in implementing their legal enforcement strategy;
- (h) Commencement of proceedings against select respondents;
- (i) If successful these proceedings would create an effective legal precedent or series of precedents which could then:
 - Form the basis of effective licensing activity;

- Form the basis of further enforcement activity including the implementation of settlements against other would-be respondents; and
 - Form the basis of a program of community education.
- (j) With effective planning, such a plan could be cost neutral – with solicitors and other enforcement professionals initially being encouraged to undertake these proceedings on a pro-bono basis, and damages being collected from unsuccessful respondents.

I have no objections with the Government undertaking a reproduction of portions of this report, or undertaking a reproduction of this report in its entirety.

Rgds,

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