

22 January 2007

Dr. Ian Holland  
Secretary  
Environment, Communications, Information Technology and the Arts  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Dr. Holland,

**RE: INQUIRY INTO AUSTRALIA'S INDIGENOUS VISUAL ARTS AND CRAFT  
SECTOR – VISCOPY SUBMISSION**

Many thanks for giving Viscopy the opportunity to provide a revised submission to the Inquiry. The Viscopy CEO has recently returned from maternity leave, and both she and the Acting CEO have now been able to contribute to the revised submission from Viscopy corporate knowledge.

Both the management of Viscopy and the indigenous copyright education program are happy to provide further comments to the Inquiry, on request.

The revised submission is presented in five parts:

- A. Introduction to Viscopy, Membership and Operations;
- B. Viscopy Indigenous Artist Members;
- C. Background: Viscopy Request to Minister Kemp for this Inquiry;
- D. Terms of Reference;
- E. Comments Addressing The Terms of Reference; and
- F. Conclusions.

Please do not hesitate to contact us, should we be of further assistance.

**A. Introduction to Viscopy Membership and Operations**

1. Viscopy is a copyright royalty collecting society for the visual arts in Australia, owned by 6399 professional visual creators. Viscopy is a non-profit company that represents rights for fine artists, illustrators, cartoonists, textile designers, photographers, crafts workers, sculptors and architects.
2. Membership of Viscopy is voluntary, and free. Like all collecting societies, Viscopy is funded by a commission on the royalties we collect for artist members.
3. Viscopy is a member of the International Confederation of Societies of Authors and Composers (CISAC). We represent 250,000 international visual artists through our 43 affiliates, with which we enjoy reciprocal distribution collection arrangements.

4. Like many of our visual arts collecting society peers, Viscopy has also elected to be an associate member of the International Reprographic Rights Organisation (IFRRO), the global body for reprographic rights linked with publications.

5. Both CISAC and IFRRO are closely linked to the World Intellectual Property Organisation (WIPO).

6. Viscopy members elect which of two sets of rights they wish to be represented:

- Primary rights are represented for 60% of Viscopy membership, and include royalties resulting from the direct licensing of images. Viscopy provides direct licensing services for Licensees, including: auction houses, cultural institutions, commercial galleries, film makers, public art galleries, libraries, manufacturers, publishers and other users of direct licensing image services, such as retail.

- Statutory rights refer to Government and Educational use and these royalties can be received on behalf of 96% Viscopy members. The remaining 4% are represented by other collecting societies for statutory rights only.

- While Viscopy members can receive statutory royalties, they are collected by the two collecting societies declared for these rights under the *Copyright Act 1968*, the Copyright Agency Limited and Screenrights. Viscopy members receive income from both these collecting societies.

7. In addition to managing the rights of our members, Viscopy provides services for them including Indigenous services, educational services, information, non-legal advice, infringement services and moral rights services.

8. Where legal advice is required for members, our officers and legal advisor Virginia Morrison work with the Arts Law Centre of Australia, the Australian Copyright Council and pro bono lawyers, to ensure members have representation.

## **B. Viscopy Indigenous Artist Members**

9. Viscopy has 2823 Aboriginal and Torres Strait Islander (ATSI) member visual artists who are represented for primary rights.

10. Viscopy has 294 ATSI member visual artists who are represented for statutory rights only.

11. Viscopy has a total of 3117 ATSI members, located in every state and territory. This is 40% of Viscopy's 6678 total membership. At times in 2005-6 this was a percentage of 45%. Since then, additional non-Indigenous new members have impacted the proportion. Indigenous Viscopy members speak 38 languages.

12. The 40% proportion reflects the large numbers of professional Indigenous visual artists in Australia, estimated at 13,000 by state and territory Governments.

13. As membership of Viscopy is voluntary, and English is often a second or third language, many Indigenous artists are still unaware of us, and the potential to earn a stream of income through royalties in the reproduction of their work.

14. The Viscopy Indigenous visual copyright education program has aimed to address this information imbalance since 1995.

15. Known as *Copy Rite* since 2006, the program employs two Indigenous officers, Trevor James, the Indigenous visual copyright education officer; and Joanne Brown, the Indigenous womens' business and marketing officer. Joanne is also Acting CEO of Viscopy, two days per week. Joanne and Trevor are supported by two Indigenous Board members: lawyer and curator, Tom Mosby; and artist, Banduk Marika. The Indigenous visual copyright education program is currently funded by a grant from the Department of Communications, Information Technology and the Arts (DCITA).

16. The *Copy Rite* Indigenous visual copyright education program aims to:

- a. Educate and provide advice to Indigenous artists and communities regarding copyright protection, and how to best to preserve and exploit the rights in their own works;
- b. Assist with the resolution of issues as they arise;
- c. Refer reports of infringements and market issues to Viscopy and/or other relevant bodies;
- d. Educate artists with regard to the importance of Wills and Estates to protect copyright for their beneficiaries;
- e. Promote the licensing services and royalty benefits of Viscopy membership;
- f. Advocate for the better protection of Indigenous artists from market and social abuses.

17. *Copy Rite* Indigenous visual copyright education program objectives are to:

- Increase knowledge of licensing, copyright royalties, and their implications;
- Increase awareness of artists rights;
- Provide on-going support to Indigenous Viscopy members; and
- Alert broader Indigenous community members of issues affecting Indigenous artists.

18. The program operates by delivering workshops, and travels to Indigenous communities throughout remote, regional and metropolitan Australia, free of charge to the artists. Workshops employ visual techniques developed with the WIPO Traditional Knowledge protocol, are delivered by Indigenous staff, and make use of community based translators where necessary.

19.Viscopy workshops are conducted in a non-legal, practical manner. They are designed for artists and community members to obtain a greater understanding and awareness of the of role copyright collection agencies. They detail how royalties and licensing work, and how, through membership, Viscopy can provide a small stream of income based on reproduction of works, plus assistance in protecting the artists work.

20.If the artist or art centre Administrator is not educated regarding copyright, they can potentially give their rights away, or sell rights with artworks without realizing it, or not secure works from infringement, or be pressured to waive rights by various parties. All of these practices make it difficult to license the reproduction of an artwork, and thus reduce the potential income to the Indigenous artist.

21. As one third of artists live in the Northern Territory, the program has had a focus on this area, as well as urban areas, rural centres and remote communities.

### **C. Background: Viscopy Request to Minister Kemp for this Inquiry**

22. The Viscopy association with this Inquiry dates from March 2006, when Viscopy CEO Chryssy Tintner wrote to Minister Kemp, requesting that such an Inquiry be instigated.

23. During the course of their work, Trevor James and Joanne Brown have had a large number of incidents reported to them by Indigenous artists. Some are with regard to copyright infringement, and Viscopy has a mandate to resolve such problems, with the support of our legal advisors.

24. However, other incidents have been with regard to market and social inequities. As a small non-profit, Viscopy has dealt with these problems by referring them to a network of organisations, including the Australian Competition and Consumer Commission (ACCC), the Aboriginal Legal Service, Australian Federal Police (AFP), the Banking Ombudsman, Human Rights and Anti-Discrimination State bodies, and Offices of Fair Trading.

25. Viscopy officers have become concerned, due to the large number of repeat member reports, that many referred matters have not been resolved. Critical to the lack of resolution is the lack of Indigenous employees at a number of Government organisations, the cost of legal action, and the variety of financial and English language problems experienced by many Indigenous artists.

26. Viscopy officers have also felt that Indigenous artists do not always receive the support they require to report such incidents, and can often be undermined by the market itself. This can particularly be the case where there are variable standards of business practice, accusations of corruption at particular art centres or galleries, or carpet-baggers at work on community lands without permits.

27.As Viscopy is constrained under privacy legislation from discussion of member affairs, our letter to Minister Kemp informed him of our internal classification of groups of these incidents. We have commented on them below, under the terms of reference of this Inquiry.

28. Following the March 2006 letter, Chryssy Tintner, Joanne Brown and Trevor James met with Minister Kemp in April 2006. We also met with the Attorney-General Philip Ruddock and the senior advisor to the Minister for Indigenous Affairs, Jacob Pilot, to detail our concerns.

#### **D. Terms of Reference: Inquiry Into Australia's Indigenous Visual Arts And Craft Sector**

The Senate has referred the following matter to the Committee for inquiry and report by the first sitting day of 2007:

Australia's Indigenous visual arts and craft sector, with particular reference to:

- a) the economic, social and cultural benefits of the sector;
- b) the current size and scale of Australia's Indigenous visual arts and craft sector;
- c) the overall financial, cultural and artistic sustainability of the sector;
- d) the current and likely future priority infrastructure needs of the sector;
- e) opportunities for strategies and mechanisms that the sector could adopt to improve its practices, capacity and sustainability, including to deal with unscrupulous or unethical conduct;
- f) opportunities for existing Government support programs for Indigenous visual arts and crafts to be more effectively targeted to improve the sector's capacity and future sustainability; and
- g) future opportunities for further growth of Australia's Indigenous visual arts and craft sector, including through further developing international markets.

#### **D. Comments Addressing The Terms Of Reference**

##### ***a) Current size and scale of Australia's Indigenous visual arts and craft sector***

29. The overall size and scale of this sector is difficult to establish. However an idea can be gained by examining the number of professionally active Indigenous artists, which has been estimated at 13,000 by state and territory Governments.

30. The increase in size of the sector over the past ten years is due to the widespread sales and promotion of Indigenous visual art and crafts, both in the wider Australian community, and as an export. The problems involved in defining the scope of the sector were recently highlighted by Susan McCulloch, author and publisher of *McCulloch's Encyclopedia of Australian Art*. In 1994 she devoted just eight pages to Indigenous art, but the current fourth edition boasts over two hundred pages. The full text of her press release concerning the speed of growth of the sector is included at **Attachment A**.

31. Over the past ten years, estimates of the economic scale of the market for Indigenous arts and crafts has been made in a range, between \$70 million and \$200 million. This is only partially explained by growth.

32. The value of the market is dependent upon the definitions used by particular researchers, for example whether they include:

- fine art works for sale at auction;
- fine artworks for sale in commercial galleries;
- fine artworks for sale through art centres;
- fine artworks for sale through middle men, including reputable agents down to carpet-baggers;
- fine artworks for sale direct from artists;
- craft works for sale at auction;
- craft works for sale in commercial galleries;
- craftworks for sale through art centres;
- craftworks for sale through middle men, including reputable agents down to carpet-baggers;
- craftworks for sale direct from artists;
- works of art or craft made for the Tourism industry or Tourism art sector;
- works reputed to be Indigenous, yet made by non-Indigenous persons, and “passed off” as authentic in the Tourism art sector;
- works reputed to be Indigenous, yet made by non-Indigenous persons, and “passed off” as authentic in the fine art sector, including through auction houses, commercial galleries, art centres, middle men and persons who claim to be Indigenous artists who are not;
- works reputed to be Indigenous, yet imported from Bali, Thailand and a number of other ASEAN nations, either wholesale or via internet purchase.

33. These categories tell us more about the distribution mechanisms used to sell art, than the arts practice of particular artists. Viscopy notes that most Indigenous artists create works for a number of these categories. There is often a lack of understanding concerning why an artist who is capable of fine artworks might also create tourist art. This illustrates the perceived dangers in bartering with artworks of high value.

34. Many definitions of the market are made by persons and organisations with a vested interest in the results. Some definitions are made by persons with scant cultural knowledge of Indigenous art practice or the nature of the market.

35. Indigenous artists can work as individuals, or more commonly as part of their community, painting both individual and group works. Artworks can be wholly contemporary; include traditional designs; interpret traditional designs; or incorporate mixtures of styles.

36. Indigenous artists are quite capable of making the assessment as to how much time to spend on a particular form of work, in accordance with the likely return from the market. This variety of practice results in works of varying quality and finesse, often by the same artists.

37. Where a particular Indigenous artist or group is a master of a particular style or technique, they are often encouraged by market advisors to focus on fine artworks of that style or technique. Because of the Western perceptions of the market, and its preference for works by single artists, this change in practice often results in an increase of income for the artist. This has nothing to do with the capacity of that particular artist.

38. The tendency of Indigenous artists to paint in groups is related to the idea of a community moral right, for designs and forms that have been passed down for generations through a community. The Government has considered legislation in this area. Communal moral ownership is recognised by the Traditional Knowledge protocols of the World Intellectual Property Organisation (WIPO) and indigenous cultures around the world.

39. The idea of community ownership and extended kinship groups also can lead to complex probate situations when an artist dies intestate, with regard to the ownership of copyright in images.

### **Size and Scope of the Indigenous Visual Royalties Market**

40. Viscopy is primarily concerned with copyright, rather than art sales. Prior to 2005 Indigenous artist members of Viscopy earned less royalties per capita than non Indigenous members. However, Viscopy reported a significant milestone in the royalties distributed to Indigenous artists for the June-December 2005 period:

- For the first time ever, the Indigenous artist members, who at that time represented 46.5% of Viscopy membership, earned 47% of the net royalties distributed to Australian artists, a total of \$133,633 for the six month period.
- Indigenous artists punched their own weight, earning \$50,000 more than in for any other six month period;
- There appears to be a new positive trend where Indigenous artists and art centres are beginning to think twice about giving reproductions of their images away. It is this awareness of value that is critical in creating a market for the licensing and reprography of Indigenous artworks.
- The DCITA funded, Viscopy *Copy Rite* education program has really helped get this message across, which is why we are so passionate about keeping it going at Viscopy;
- Direct licensing of members images is responsible for the majority of this royalty income. As a point of comparison, for the same six months, the total net royalties paid to Australian artists was \$280,497, and the total net royalties paid out, including internationals, was \$556,000.
- Further statistics will become available for two subsequent distributions, from March 2007.

41. These royalties are small, when compared to sales generated by the Indigenous art market. But they compare well to visual royalties earned by Australian artists in the visual royalty market. With the correct approach, it is possible to treat all artists equitably, in terms of the value of reproductions of their artworks. This could also be the case in the art market itself, with the appropriate interventions by Government.

42. The volume of royalties available to Indigenous artists would have increased substantially, were the Government to have introduced a Resale Royalty scheme for visual artists. The Government of United Kingdom and EU member nations introduced a form of the Resale Royalty in 2006, bringing the total number of nations with such a right to thirty-one. Viscopy has campaigned for a Resale Royalty since it was created in 1995.

43. In deciding to reject the Resale Royalty in May 2006, the Government has limited market growth for visual rights in Australia.

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

44. Viscopy will address both the benefits of the sector as described, and who receives these benefits. The Inquiry should all be mindful that the Indigenous art industry contains a large number of legitimate middle men and traders, associated with the Tourism sector and the Fine Art sector. These persons often work very hard on behalf of the Indigenous artists, as well as for commercial profit.

**Economic Benefits**

45. A quantifiable assessment of the economic value of the market from a reputable research company such as Access Economics is long overdue. Such an assessment would enable the Government to make the most informed decisions possible regarding the industry.

Indigenous

46. The Indigenous artist receives the following income from their artworks:

- Primary sale income, minus commission if an art centre member. DCITA funded art centres take a number of forms and can include, but not be limited to a location to paint, paint supplies, a mechanism to sell original artworks and a social repository of community and culture;
- Primary sale income, minus commission if signed to a commercial gallery. The artist may also elect to waive rights for promotional purposes of primary sales if a Viscopy member;
- Primary sale income, as negotiated if independent artist;
- Primary or consignment sales income from Tourism industry;
- Licensing royalty income, minus commission if Viscopy member.
- The artist receives no income from the resale of their artwork.

47. In many cases, this art-derived income is the only non-welfare income earned by an Indigenous artist or community. In addition, where there are artists of proven reputation, and their careers are carefully managed by reputable art centres or galleries, the income can be lucrative.



48. However, Indigenous artists have reported to Viscopy across Australia that the market has generated, in addition to economic return for Indigenous artists, many examples of unsavoury practices towards vulnerable artists and communities, with little or no economic benefits flowing back to them.

### Non-Indigenous

49. The following group derives income from the sale of Indigenous art:

- Auction houses receive variable commission plus 17% buyers premium on primary sales and resales of artists work. Auction houses usually sell resale works that have an established market value, or established artists.
- Commercial galleries receive variable commission on primary sales and resales of artists work. Commercial galleries can specialize in establishing the career of artists through primary sales or the resale of works that have an established market value. No figures exist on the size of this market although it has been estimated as twice the size of the auction house sales;
- Middle men often acquire artworks from artists or art centres on consignment and mark up the onsale to galleries, consumers or Tourism;
- The Tourism sector sells the majority of Tourist art through retail with typical wholesale markup. Reputable companies such as Rainbow Serpent are eager to work with Viscopy and have referred members to us;
- Consumers receive profit (and loss) on resale of artists work, which can be a profitable investment, for example Rover Thomas artworks reselling for hundreds of thousands of dollars, when he received hundreds for painting them decades earlier. Resale royalty would ensure the Indigenous artist would receive a percentage of the resale value.

50. A balance is required between the income required by the markets that sell art to sustain themselves, and the income stream that should return to the Indigenous artist. Viscopy advocates working with all sectors in the market, for the benefit of the Indigenous artists.

### Both Indigenous and Non-Indigenous

51. The following bodies work with Indigenous artists and recover costs through commission:

- Public funded art centres receive between 30-60% commission on primary sales of artists work. There is a need for guidelines on what is and isn't acceptable to include in commission, and for standard practice between all Government funded art centres. For instance some art centres charge the cost of paint, materials, travel and accommodation to the artist, others do not;
- Viscopy is non profit and receives 25% commission on royalties generated by licensing reproductions of Indigenous artists work. This is the same rate of commission as that charged to non-Indigenous artists, but we are able to provide a greater range of educational service to the Indigenous members, due to the DCITA funding;

52. While these bodies provide services for the benefit of Indigenous artists they also derive income from their work.

## **Social Benefits**

### Indigenous

53. The creation of artworks can provide a form of self-determination and social cohesion for Indigenous communities. This can reinforce the training of young artists by older artists. However, art is not a panacea for all ills, but a reflection of the artists who created it. The social problems experienced by Indigenous artists also reflect the societal problems experienced by Indigenous people more generally, and their common exclusion from post-colonial, multicultural Australia.

54. Indigenous artists in urban, remote and regional areas have reported unethical and illegal practices by individuals that trade in Indigenous art. These activities have direct social impact on Indigenous communities, particularly in remote communities.

### Non-Indigenous

55. The promotion generated by the Indigenous art market has educated mainstream Australia, and the globe, concerning a small degree of what it means to be an Indigenous person. While the majority of art consumers may still not understand the story behind their purchase, their general interest has promoted Indigenous art as a desirable commodity, rather than a stone-age activity, as it was previously seen.

56. Art is PR for the Indigenous community that may assist to promote social change through public awareness. This has generated a niche market within the fine art and Tourism sectors specifically devoted to Indigenous art.

## **Cultural Benefits**

### Indigenous

57. The Indigenous art market provides an economic and social motivation for communities to continue, and strengthen, the expression of Indigenous culture. This is an expression of a contemporary culture that may take many forms, including the exploration of both new ideas and traditions.

### Non-Indigenous

58. The Indigenous art market provides an economic and social motivation for Australian society, to encourage the expression of Indigenous culture. This has encouraged Government to consider Indigenous Australia in a positive, non welfare based way.

## **Activities Illustrating a Lack of Benefit to Indigenous Communities**

59. However some unethical aspects of the Indigenous art market are without social or cultural benefit to Indigenous artists or communities. These practices are regularly reported to *Viscopy Copy Rite* workshops. As stated at the beginning of this submission, *Viscopy's* mandate from members is in the area of copyright licensing.

While Viscopy has received and passes on the information concerning incidents that are reported to us, we do not have the power, mandate or resources to adequately investigate these claims. They include:

i) Examples of businesses that use non-Indigenous backpackers to make artworks that are “passed off” as genuine Indigenous works. In some circumstances photographs of Indigenous people are placed next to these fake works when sold, to give the impression they were created by the person in the photograph;

ii) A business in North Queensland that falsely uses a photocopy of the Commonwealth Coat of Arms with notification that the Indigenous art sold at this establishment is genuine, and payments go to Indigenous artists;

iii) A business that imports Indigenous style art and crafts from South East Asia and passes them off as made by local Indigenous artists. This business claims to be 100% Aboriginal owned, to justify the sales of the fake products. This is untrue;

iv) There are examples of the abuse of barter by carpet-baggers who have used an unequal bargaining position to trade food, credit, alcohol, illegal drugs, drugs such as Viagra, gambling chips and clothing in exchange for artwork. There are many examples of no payment at all;

v) There have also been reports of certain carpet-baggers who deal with galleries, who deliberately target elderly Indigenous women and younger artists. They often cause artists to paint under tight deadlines without access to acceptable working conditions. In most circumstances the art work is sold at unacceptably high markup in the city with very little or nothing going back to the artist;

vi) Receipts are issued by some art centres to artists in which the expenses incurred are not explained in any detail.

vii) Human rights and working conditions issues, such as reports of elderly Indigenous artists being separated from family members when completing consignment works for particular galleries, and not being allowed to leave until a quota is complete. There are cases of artists who have not been allowed to see relatives when these relatives attempt to make contact;

viii) Indigenous artists whose estates or rights are left to non-Indigenous dealers and galleries, some apparently under duress. Family and community members are concerned by this practice, as is Viscopy;

ix) Indigenous artists being encouraged to sign contracts without reading them. Many examples of the Indigenous artist being threatened that the offer is only valid for a short period. This usually denies the artist the opportunity to seek translation of the document or legal advice, and many do not have access to this in remote areas;

x) A variety of persons connected with the art market gaining access to Indigenous communities without a permit;

xi) Reports by art centre staff and Indigenous artists of examples where Police are engaged in the sector. In one example, Police were said to have provided paints and canvasses to Indigenous artists in remote communities and paid minimal amounts for the resulting works, onselling them for a large profit;

xii) In Alice Springs galleries acting out of self interest often report Indigenous artists to the Police and Council by galleries, when they sell their works in the street;

xiii) A number of individual Indigenous artists are confused regarding the services art centre umbrella organisations such as Desert, ANKAAA, Umi Arts and Ku Arts should provide to them. Indigenous artists require a service that provides assistance and support when they visit town, and they are confused that the art centre umbrella organizations do not provide these services. (This is because the umbrella organizations are created for art centre members, rather than artist members).

xiv) In a number of cases, art centre administrators have not supported the idea of the “Copy Rite” program to run in the community. There is a perception from some individuals that education of Indigenous artists will create trouble, and *“the artists don’t need it.”*

60. These are not isolated incidences. Viscopy has created internal categories for non-rights related issues that are reported, which we have included under Term of Reference (e). We have reported a number of these incidents to Government authorities. Often little or no action is taken due to:

- a) a lack of resources to take the matter to court;
- b) a lack of priority for the issue;
- c) a lack of Indigenous staff with understanding of the issue;
- d) a lack of interest or expertise regarding market abuse issues from the arts sector.

61. There has been limited direct regulation of the sector, (in fact NSW state regulation of the art market was reduced) during the last ten years, a time of phenomenal growth for the Indigenous art market. This has resulted in an expansion of the problematic aspects of the market as well as the income, such as examples of exploitation. Exploitation of individual Indigenous artists in a market that provides the only source of income to many communities is a matter of genuine concern that urgently needs to be addressed.

### ***c) The overall financial, cultural and artistic sustainability of the sector***

62. On the positive side, the Indigenous art market clearly has the potential to expand further in financial terms, to strengthen the culture of Indigenous communities, and to enrich the artistic expression of Indigenous artists. It also has the potential to enrich the lives of consumers, and to educate them with regard to Indigenous culture.

63. However, without adequate national regulation, and with the cost of court proceedings being beyond not only individual Indigenous artists, but also Viscopy itself, progress in the area of market abuses has been limited.

64. Many Indigenous artists and communities are currently distressed that a number of market players who are not Indigenous Australians, gain financial advantage, at the expense of many Indigenous artists. This typically occurs when individual artists have their works purchased for low amounts, only to have them sold at many times the original value soon afterwards, typically in a number of commercial galleries or the Tourism sector, with no flow on effects going back to the artist.

65. Some Indigenous artists have been subject to practices of insufficient administration, patronising attitudes from art traders and examples of inappropriate and very occasionally accusations of corrupt art centre staff. There is nowhere for

them to make an official complaint, and nobody to listen to it. In a number of cases they are being used as a source of cheap labour, and an additional protection is required, for instance through the Work Choices equivalent of an industrial award for freelance professional artists. Since the Artists Union dissolved, the MEAA has not covered visual artists.

66. One example of the shell-shocked attitude of many Indigenous artists is the long lead in time period it takes to convince them they will retain their own rights if they become Viscopy members.

67. There are of course many examples of excellent standards with many commercial galleries, middle men and the majority of art centres. We would like to support them. However in the face of member accusations of exploitation, the denial by some in the art industry does not assist Viscopy or Indigenous artists to improve conditions, or develop strong working partnerships, based on trust.

68. In the absence of Resale Royalty, one auction house has established a trust fund for Indigenous artists. Although the creation of this fund may have occurred with best intentions, it is seen as patronising and paternalistic by a number of our members. Resale royalties belong to the artists, according to international standards, and those specific artists whose works have earned them, should have direct control over how their monies are used. It is irrelevant whether a particular stakeholder approves of how Indigenous artists spend their money.

The denial of exploitation and the rejection of Resale Royalty leaves many Indigenous communities with the impression that many engaged in the Indigenous art market are self-serving and only interested in their own financial gain, at the expense of Indigenous art and culture. The common lack of grass roots consultation with Indigenous artists when the Indigenous art market is considered has also contributed to this perception.

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

69. With the exception of Viscopy and DCITA, there appears to be little infrastructure on a national level, but more on a state based and regional scale.

70. An adequate, national system of regulation, to give cohesion to various state laws and teeth to various codes of conduct, needs to be established. Amendments to the Trade Practices Act and State Fair Trading Acts could ensure Indigenous artists and their communities reap the benefits from the sales and use of their art and culture. To achieve this objective, those formulating such regulations should engage in genuine grass roots consultation with a broad church. Indigenous artists and communities from Yirrkala to Hobart should feel as included as the non-Indigenous “experts”.

71. A fighting fund should be created for legal test cases of merit run by the ACCC and state Fair Trading agencies, where the Indigenous artist is in constrained financial circumstances. Viscopy has access to a number of interested QCs who have offered to act in cases. The Artists in the Black component of Arts Law could provide access to appropriate legal resources.

72. Major art centre umbrella organisations such as Desart and ANKAAA do a splendid task in representing their art centre membership. However this

representation does not cover all of Australia. Ku Arts in South Australia and Umi Arts in the North are new and in the process of establishing themselves. Art centres in large sections of Queensland, New South Wales, Victoria, Tasmania and Western Australia are not covered by umbrella organisations at this time.

73.Viscopy would recommend the establishment of art centre umbrella organisations in all areas of Australia not currently covered.

74.Art centre umbrella organisations have art centres as members rather than Indigenous artists. While the National Association of Visual Arts does a great job with generic arts industry advocacy, Indigenous Australia prefers to be represented by organisations with Indigenous staff. While Viscopy will continue to raise advocacy issues for Indigenous artist members, our primary focus will remain licensing, royalty and education services.

75.It may be appropriate, given the scale of the issues raised, for the Government to consider the establishment of a national Indigenous panel, to best advocate the issues faced by Indigenous artists nationwide.

76.Viscopy supports the formulation of national regulations to cover the market behaviour of all parties in the Indigenous arts sector, rather than additional codes of conduct. Given the complexity of market abuse, Viscopy feels such codes may not have sufficient teeth to change the market or address the magnitude of issues faced by Indigenous artists.

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

78. Viscopy would like to acknowledge the attempts made by those in the industry who self- regulate and observe various codes of conduct. However there is little by way of enforcement for those parties who are not interested in following such codes. At the moment there is no dedicated avenue for Indigenous artists to report unscrupulous and unethical conduct. That is Viscopy supports the formulation of an additional tier of regulation in addition to Trade Practices, specific to this industry.

79.Many artists report situations to Viscopy because our Indigenous visual copyright program has:

- \* National grass roots communication, direct with professional Indigenous artists, many of whom have no membership to any art centre or gallery;

- \* Indigenous staff. There is a reluctance of many artists to report abuses to non-Indigenous staff in art centres, public funded organizations, or Government;

- \*A network of contacts with agencies such as the ACCC, Departments of Fair Trading, DCITA, Arts Law of Australia, AFP and etc. The problem is that once these matters are referred on, Indigenous artists perceive that little action is taken to address their concerns, and presume they are of low priority.

As a strategy, Viscopy suggests that any mechanism introduced to address the issues of the industry employ Indigenous staff to facilitate reporting of incidents.

Issues reported to Viscopy have included:

### **Invalid Contracts**

80. The pressure for Indigenous artists to sign contracts without understanding their contents, often where English is the artist's second or third language;  
Strategy suggested: Provide additional funds to Artists In the Black, to enable them to provide contractual services nationally to Indigenous artists.

### **Imbalance of Market Power**

81. Imbalances of market power in the Indigenous art market, generally where the artist lives and works in remote Australia, far from urban art markets. Large sums of money can be made by the proportion of those middle men willing to exploit this information imbalance.

Strategy suggested: Viscopy advises our members to sell original artworks through art centres, and to retain copyright ownership of their rights through Viscopy, in order to generate royalty income;

### **Importation of Fake Mass-Produced "Indigenous" Artworks**

82. The importation of fake artworks mass-produced for the Australian tourist market in Indonesia and Thailand, but often sold in Australia with the pictures of living Indigenous artists placed next to them. The ACCC is interested in these cases.

83. Viscopy is aware through our contact with Rainbow Serpent and similar industry licensees of three genuine art trader distribution businesses that have gone out of business in the last financial year, unable to compete with the cheap fake imports. This has had a devastating impact on member artists in those areas of the country;

Strategy suggested: The Attorney-General Mr. Ruddock has previously suggested that Viscopy and the Tourism sector approach the Minister for Customs to have these imports banned. We would appreciate any support the Inquiry is able to provide on this important issue, with ramifications for small business and tourist operators as well as artists;

### **Art Centre Business Practice, Administrator Quality and Succession Planning**

84. The varying quality of Administrators at art centres, for example in addition to many excellent Administrators, there are accusations of individual bad apples who subsequently set up for-profit businesses close by, and take all the profitable artists with them;

Strategy suggested: There is a clear need for common business planning and sales guidelines at art centres. Administrators should sign appropriate legal contracts at the point of employment, where they undertake to respect their duty of care with regard to the artists, and the obligation not to compete with the art centre in future. It also shows the need for clear contracts between the artist and the art centre.

Viscopy also suggests that a national database be formed to assist art centres with succession planning. Such a database should focus on Indigenous graduates of colleges such as Eora and Tranby or the Institute of Aboriginal Development, who are capable of administrative work.

## **Bookup**

85. The Inquiry is no doubt aware of the important work that has occurred concerning bookup at State Government level.

90. An example of incidents reported to us include grocery shops keeping the ATM cards of artists, where they had no means of checking the amounts taken out of their accounts. The artists were unable to retrieve their cards when they wanted to move to new art centres as part of their normal art practice.

Strategy suggested: We urge the Inquiry to support and implement the National Indigenous Consumer Strategy Action Plan 2005-2010;

## **Barter Transactions and the Need for Consumer/Trade Practices Protection**

91. Barter associated problems where artists trade their work outside of art centres in return for goods or services. The main issue is that many legislative protections and taxation benefits provided to commercial transactions fit less well into barter transactions, where the market power of one of the parties can be felt by the other in many cases.

Strategy suggested: There is a clear need to revise the Law further to include barter transactions, if discrimination is to be avoided;

## **Human Rights**

92. Human rights issues such as a number of sweat-shop type operations, where artists are kept in enclosures, and forced to paint without proper working conditions, or appropriate payment. Payment in terms of inappropriate goods and services designed to make the artist dependent on the business have been reported;

93. Viscopy has heard that there are few award conditions for freelance visual artists so this is a difficult area. Although the National Association of Visual Arts (NAVA) is active regarding number of Codes of Conduct, these have no legal force;

Strategy suggested: The formation of a Work Cover equivalent of an industrial award for freelance artists, to cover appropriate working conditions and minimum payments. These could work in a manner similar to the Australian Writers Guild minimum payments.

## **Discrimination**

94. Discrimination issues, such as certain galleries dealing only with Indigenous artists who have a darker skin colour, regardless of the quality of their art;

Strategy suggested: Information available through art centres for incidents to be reported to anti-discrimination bodies and the Human Rights and Equal Opportunities Commission (HREOC).

## **“Passing Off” Forgery**

95. A small number of forgery issues where non-Indigenous artists pass themselves off as Indigenous. We have found examples of Indian, Indonesian and Anglo Australians engaged in this practice;

Strategy suggested: Facilitate the collection of information on known offenders by auction houses, commercial galleries and tourist operators.

Also funds to educate art colleges not to train their students to paint in the style of Indigenous artists, as currently happens at a number of institutions.



### **Mission Mentality**

96. Remnants of the mission mentality have hung on in certain remote areas, and this has been transferred to the Indigenous art market. This is a complex set of cultural issues that is related to why non-Indigenous persons want to work in this market, and a variety of their motivations. Many motivations can be culturally misguided, regardless of whether commerce is involved.

97. Continued need for access by Indigenous artists to Viscopy information and training in subjects such as licensing and copyright;

98. Access for stakeholders working in the arts to cultural training and education with respect to Indigenous art;

Strategy suggested: Viscopy feels these issues can be best served by targeted education programs for the sector.

### **Arts Sector**

Areas of additional major concern are with regard to the nature of the arts sector itself, and the degree of self determination in it:

99. The control of the arts sector by predominantly non-Indigenous managers, as many do not have an understanding of Indigenous society or culture;

100. Few managerial level career opportunities for Indigenous people who want to work in the arts sector;

101. Lack of mentor support and education for Indigenous controlled businesses;

Strategy suggested: For market abuse issues to be reported by Indigenous artists, Indigenous staff will need to be employed in decision-making roles at organisations that artists can approach. The lack of Indigenous staff has demonstrated that many artists will not come forward to report matters of unscrupulous and unethical conduct.

In addition the majority of the market problems that are reported would exist to a lesser degree if there were more Indigenous people involved in the art industry (as opposed to the art). Perhaps the Government could establish a scholarship or mentor program to address the need for Indigenous managers and administrators.

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

### **Education**

102. There are many opportunities that can be gained from Government support programs for Indigenous visual artists in the areas of education and training. The Viscopy Indigenous copyright education program is one of the strategies made possible by such support. It has demonstrated that, given the opportunity, many Indigenous artists seek education concerning their rights and obligations.

103. With this awareness and knowledge, many artists seek alternative options in their dealing with galleries, businesses and individuals who trade in Indigenous art. This gives the artists a sense of self-empowerment. It also makes them aware that if they have infringements or inappropriate use of their works, they know who they can contact, should the need arise.

104. One downside to this educational campaign has been the varied levels of enthusiasm of sector organisations, including particular art centres, to allow our program to provide the services and information sessions the Commonwealth funds.

105. The majority of arts centres are supportive of working together in addressing and assisting artists. However, a few go out of their way to not let this information be distributed. For example one arts centre co-ordinator stated that the Indigenous artists in his area did not want to know about copyright or what protections can be offered under the act. When we met with the artists directly, they were interested. In addition a number of staff practices they described were referred to other agencies. Perhaps the funding conditions for grants could specify that Indigenous artists should be provided with access to free educational programs of benefit to them.

106. Viscopy suggests that funding be made available to educate industry stakeholders in appropriate ways to interact with Indigenous artists, and appropriate transaction mechanisms. Viscopy also supports the education of Indigenous business operators and administrators through schemes similar to that available in the College of Fine Arts, through Aboriginal colleges such as Tranby and Eora, and through a system of scholarships.

### **Copyright Practice Education and Licensing Standards**

107. Include copyright practice education by Viscopy in the accreditation system for art centers. If an art centre provides free access to transparencies to commercial users, or does not secure the visual images of its artists online, then they are diluting the value of the reproduction, and thus the potential licensing income to the artist.

108. Where an artist is a Viscopy member and is represented by a commercial gallery for sales of their primary works, they can exclude these works from licensing fees, as the artist will benefit from the sale of the original work. However this should not imply licensing of the work in all circumstances should be free.

109. For Viscopy to license works to media, film and television, commercial galleries, auction houses, advertising, publications, public galleries, cultural institutions, Government and Industry it is very important that reproductions of the image are not previously made accessible for free. A number of art centers make good quality images of their artists work available as a matter of course.

110. Standard industry practice is to only provide low resolution images for free with a watermark so they cannot be used without permission.

### **Permits and Increased Police Powers**

111. Remote communities should be encouraged not to issue visitor permits to known carpet-baggers.

112. In addition, Police powers should be increased, to enforce the permit system. Where a carpet-bagger does not have a permit to be on community lands, they should be forcibly removed.

113. DCITA could also consider further legal mechanisms to assist the Commonwealth funded art centres, against known carpet-baggers. Guidelines concerning acceptable trading relationships for art centres could also be considered.

### **Maintenance of Rights with the Artist**

114. Viscopy supports the maintenance of all rights with the visual artist, according to article 9 of the *Berne Convention* and international treaty. If the artist does not have ownership of the rights in their own work, they cannot be licensed to achieve a stream of income for the artist.

115. In all of the instances below, the Indigenous artist is not aware of the rights ownership implications of taking part in a public program. In all the instances the party agreeing on behalf of the artist has not obtained permission from the artist.

116. This perspective has implications for the current arrangements for a number of public programs where Indigenous artists are considered employees, for example CDEP programs and prison programs. The art and the rights inherent in the art created under such programs should not belong to the Commonwealth or State Governments.

117. The Copyright Law Review Committee has recommended the abolition of the Crown Copyright ownership rule, and we support that. The Commonwealth should ensure that if Crown copyright continues, it is not allowed to imply rights ownership of any Indigenous art, when an art centre receives public funding. This can be addressed through the art centre funding agreements.

### ***g) Future opportunities for further growth of Australia's Indigenous visual arts and craft sector, including through further developing international markets***

118. There is no doubt that domestic and international markets for Indigenous art and crafts, and the licensing of those works to yield royalties, can all grow further. What is less clear is whether Indigenous artists and communities will be enabled to receive the benefits of this growth. The Commonwealth has a critical role to play through regulation, market reform and policy.

### **Indigenous Growth**

119. The commercial strength of the sector can only improve through greater cooperation between the Indigenous community and the Commonwealth.

120. As it stands, there are very few Indigenous people in managerial roles in the sector, yet it is organised around the sale of Indigenous cultural products. Many organisations continue to speak on behalf of Indigenous artists, but there are few career options available for Indigenous people who want to work in the industry. Many Indigenous people and artists want to be actively involved in the business side, but their lack of training and education make it difficult.

121. One solution is to offer Indigenous people the training and opportunities to work in art centres and other organisations.

122. Another is to examine the possibility of establishing a national Indigenous arts panel, with representation of Indigenous artists in States and Territories to advocate on behalf of all Indigenous artists. This could facilitate a more professional, positive relationship with all stakeholders in the sector.

### Domestic Art Industry

123. Viscopy encourages the Inquiry to work with us and the Tourism industry, to petition the Customs Minister to restrict the importation of fake indigenous artworks. These are currently flooding the market from mass produced factories in Thailand and Bali. Fake importations pose the greatest threat to the Industry as a whole and has seen a number of several businesses shut down, plus the livelihoods of Indigenous artists damaged.

### International Art Industry

124. It is our experience that following public exhibitions of Indigenous works overseas, the demand for international licensing and for original artworks by the artist rises.

125. Viscopy would encourage international exhibitions where the artists retain the rights in their work. A copyright budget for such an exhibit need not be large and an up front quotation can always be given.

126. It is critical that any international initiatives made by the Commonwealth, DFAT or Australia Council do not encourage Indigenous artists to sign contracts which assign their rights to third parties, in particular companies or cultural institutions. This interferes with the international collection of royalties for these artists by Viscopy's international affiliates. We are currently trying to unravel a number of these problems which could be avoided by the appropriate cultural policy, to retain rights with the Indigenous artist.

## Recommendations

Viscopy urges the Inquiry to:

- I. Support the *National Indigenous Consumer Strategy Action Plan 2005-2010*, and back up this plan with additional regulation, and strategic policy, specific to the Indigenous art market.
- II. Facilitate the assessment of the economic value of the Indigenous art market by a reputable research company, such as Access Economics. The value of barter to also be considered.
- III. Request the Minister for Customs to stop the importation of fake Indigenous art, to benefit the entire Indigenous art industry and Tourism art sector.
- IV. Recommend the formation of a peak national Indigenous arts advocacy panel, with State and Territory Indigenous representation. This body to advocate on behalf of all Indigenous artists, including those that do not belong to art centres.
- V. Establish a Fighting Fund to underwrite important legal cases for Indigenous artists.
- VI. Recommend the creation of an industrial award equivalent for freelance professional artists, through Work Choices. The sweatshop conditions in which many Indigenous artists operate to be considered.
- VII. Recommend the extension of Police powers, to enforce the permit system on community lands, with known carpet -baggers to be targeted and refused entry.
- VIII. Recommend the development of umbrella art centre organisations in all areas of Australia currently not covered. Encourage these organizations to form ties with Aboriginal organizations such as Land Councils and Legal Services.
- IX. Recommend the reconsideration of Resale Royalty.
- X. Provide increased emphasis on education and training for Indigenous artists and industry stakeholders in all areas of Australia. Such training to include scholarships, internships with art sector bodies, galleries and art centres, and a program developed with aboriginal colleges such as Eora and Tranby.
- XI. Recommend funds to facilitate business advice for Indigenous businesspeople who wish to establish their own businesses in the market.
- XII. Encourage the employment of suitably qualified Indigenous candidates by all bodies who interact with Indigenous artists.
- XIII. Recommend the provision of training at art colleges to support copyright standards and prevent the appropriation of indigenous art styles of painting by non-indigenous artists.

That DCITA, through arts centre funding contracts, should be encouraged to:

- XIV. Specifically withdraw any claim to Crown copyright from the Indigenous artworks created in art centres. This to be clarified in funding agreements;
- XV. Consult with all parties to create a binding contract between an artist and an art centre, for increased transparency concerning commission rates and terms of payment;
- XVI. Encourage artists to sell artworks through art centres;
- XVII. Renew art centre funding subject to review of business standards;
- XVIII. Encourage art centres to allow their members to join Viscopy, to enable a stream of income to be earned from licensing royalties for the artist, and to preserve rights with the artist;
- XIX. Encourage the employment of qualified Indigenous candidates for art centre administrator positions. A succession planning database of suitable graduates from Eora and Tranby could be established.
- XX. Facilitate collaboration between arts sector organisations, to provide the best possible service and advice to Indigenous artists.

## **F. Conclusions**

Thank you for allowing Viscopy to provide a revised submission to the Inquiry into Australia's Indigenous visual arts and craft sector. The content and recommendations have been prepared with information from Viscopy, and research collected during the presentation of *Copy Rite* Education workshops to Indigenous artists across Australia.

Viscopy urges the Inquiry to promote practical solutions to these immediate and very pressing problems. We believe the main solutions are self-empowerment for the Indigenous artists, through targeted education programs and financial independence. In addition, appropriate regulative and legal force should be provided by Government, as a deterrent for illegal market behaviour.

Yours sincerely,

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*Copy Rite* Indigenous  
Visual Copyright  
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**MCCULLOCH PRESS RELEASE**

***Indigenous art sector taking off, says expert***

The publisher of the latest edition of a book referred to as “the bible of Australian art” says the huge growth in the Indigenous art sector has been difficult to document.

The third edition of *McCulloch's Encyclopedia of Australian Art* in 1994 dedicated eight pages to the Indigenous art sector but in the fourth edition just released that has risen to about 200 pages.

Author and publisher Susan McCulloch says it has been challenging to track the expansion.

"Because new communities kept springing up as we were going, so that's one of the very significant growth areas," she said.

"Then there's this huge development in contemporary Aboriginal artists with very sophisticated and strong and also clever and witty and powerful works."

McCulloch says the sector has exploded in size in recent years.

"I think it's bigger than you even think," she said.

"When we were working on the Aboriginal section and doing the research largely through web-based things, we were just staggered at the number of galleries and the number of people producing art.

"That was bigger than we could have really anticipated or believed."