Law AND Accounting Volunteers FOR Arts
HELPING QUEENSLAND ARTISTS PROTECT THEIR LEGAL RIGHTS AND FINANCIAL INTERESTS

27 November 2006

Committee Secretary

Senate Environment, Communications, IT and the Arts References Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Thank you for the opportunity to provide input into Australia's visual arts and craft sector. The Arts Law Centre of Queensland Inc (ALCQ) is a non-profit community legal centre incorporated in Queensland in 1991 to help the Queensland arts community to protect their legal rights and financial interests. The association receives an annual grant of around $90,000 from the Queensland government through Arts Queensland to conduct a program of legal and accounting advice, information and education involving 2,000 clients annually. ALCQ does not receive any funding under the Commonwealth or State Justice programs and, therefore, is not in a position to undertake legal casework.

Around 35% of ALCQ clients work in the visual art and craft sector, with approximately 5% participation by Aboriginal or Torres Strait Islander people. The nature of ALCQ's relationship with Indigenous visual art and craft practitioners is primarily in the course of their professional practice as the creators of original copyright works. ALCQ also has occasional contact with Indigenous custodians of cultural material, as well as Indigenous and non-Indigenous artists and other parties who wish to use works that are derived from or incorporate Indigenous cultural knowledge or material into their works.

1. INDIGENOUS VISUAL ARTISTS AND CRAFTSPEOPLE AS CREATORS OF ORIGINAL COPYRIGHT WORKS

Many Australian artists and craftspeople, along with all other copyright creators (including authors, playwrights, choreographers, songwriters, and composers), whether Indigenous or non-Indigenous artists, do not fully appreciate and/or understand their property and intellectual property rights that arise upon their creation of original copyright works. This may in part be attributable to practices established by the cultural and other industries[1] that, throughout the course of the 20th century and today, have employed contracts to diminish and/or relinquish the rights of creators.

[1] Including publishing, film, sound recording, manufacturing and galleries/museums that rely upon: the reproduction of original works to produce other subject matter (including publications, films, sound recordings and broadcasts); or produce products incorporating original works; or exhibit and/or sell original works

By way of example, creators and performers in the music industry are frequently offered complex and appallingly drafted agreements that provide poor royalty returns and sometimes contain clauses that completely relinquish the creators' rights by way of a copyright assignment. Furthermore, creators face a growing fervour by consumer and copyright user groups, including initiatives such as the creative commons, which advocate that access to copyright works should be free.

Such practices, coupled with the trusting and innocent nature of arts practitioners, frequently results in disappointment and disadvantage for ALCQ clients who are wooed by licensees to enter such agreements, having been assured by those licensees that the terms of the deal are favourable or standard industry practice. This situation is further compounded by the prohibitive cost of accessing requisite legal services, particularly professional expertise in intellectual property law, and the lack of availability of such services and expertise outside of major capital cities.

ALCQ supports the assertion made in the *Report of the Contemporary Visual Arts and Craft Inquiry* in 2002 that:

> 'As the artworld becomes more complex, artists become more likely to interact with other sectors or work in the public arena, and as government legislation concerning artists' rights, taxation and social security becomes more complex the need for entities such as the Arts Law Centre becomes fundamental.' [2]

ALCQ believes that extending government support to community-based initiatives that provide accessible professional advice, information and education to creators (such as Australia's renowned Arts Law Centres and the Australian Copyright Council) is a strategy that would improve the capacity of creators to deal with systemic unscrupulous and unethical free-market behaviour. This would, in turn, improve the sustainability of creators' professional practices and, as a consequence, encourage the creative industries to improve their current practices.

ALCQ supports the recommendation made in the abovementioned report that:

> 'To further protect the rights of visual artists and craft practitioners, the Inquiry recommends the Commonwealth Government:
>
> 5.1 Introduce a resale royalty arrangement
>
> 5.2 Establish a working group, comprising representatives from government and the visual arts and craft sector, to analyse the options for introducing a resale royalty option'[3]

ALCQ also supports the findings stated in the report that:

> 'The case for a resale royalties scheme is particularly strong for Indigenous artists

and that:

> The proceeds of resale royalties should be paid directly to the individual artist, rather than to a communal fund.'[4]

In May 2006, the Government announced that it is not going to proceed with the implementation of a resale royalty in Australia, concluding that a resale royalty would adversely affect commercial galleries, dealers, auction houses and investors.

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2 Department of Communications and the Arts *Report of the Contemporary Visual Arts and Craft Inquiry,* Commonwealth of Australia, 2002

3 Ibid

4 Ibid

Had the resale royalty been proposed as a means to improve the status of proprietors of entities that on-sell works rather than a mechanism to improve the status of self-employed art and craft practitioners, this reasoning may be sound.

2. THE PROTECTION OF INDIGENOUS CULTURAL EXPRESSION AND TRADITIONAL KNOWLEDGE

The authors of the 2005 *Background paper: Indigenous cultural and intellectual property and customary law* published by the Law Reform Commission of Western Australia remind us that it is now thirty-two years since the Commonwealth Government set up a working party to investigate the protection of Aboriginal folklore.[5] To date, there has been no satisfactory outcome to this identified need.

As discussed in the prior section of this submission, visual art and craft practitioners (including Indigenous creators) are afforded intellectual property rights under the *Copyright Act* 1968 (Cth) upon the creation of original works, as well as property rights in those works. However, ALCQ concurs with the *Report of the Working Party on the Protection of Aboriginal Folklore* that the Copyright Act is not an appropriate vehicle for the protection of Indigenous cultural expression and traditional knowledge because:

> 'There is a fundamental incompatibility between copyright law and protection for intellectual and cultural material under Indigenous customary law.'[6]

Similarly, while attempts and suggestions have been made to use Trade Mark and Designs laws to protect Indigenous cultural expression and traditional knowledge, ALCQ asserts that these laws are also unlikely to be a suitable means of protection. Instead, ALCQ suggests that the Government should enact a new intellectual property law, separate from but complementary to existing intellectual property laws (including copyright, trade marks, designs, patents, circuit layout rights and plant breeder's rights) to provide enforceable economic and moral rights to the custodians of Indigenous cultural expression and traditional knowledge.

There is already a large body of research that has been undertaken by both Government and non-government entities over the past thirty years that repeatedly concludes legislative protection is necessary to stop the unacceptable exploitation of Indigenous intellectual property. This includes the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* 2003 that this association is not in a position to comment upon given the very limited circulation of the draft bill for public comment. However, ALCQ is aware of concerns raised by the Arts Law centre of Australia in relation to the draft Bill and maintains the opinion that copyright laws are not a suitable means of protection for Indigenous cultural expression and traditional knowledge.

Arts Law Centre of Queensland Inc

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5 Janke, T and Quiggin, R *Background paper: Indigenous cultural and intellectual property and customary law*, Law Reform Commission of Western Australia, 2005 (at http://www.lrc.justice.wa.gov.au/Aboriginal/BackgroundPapers/P94-12_background-Janke_Quiggin.pdf)

6 Department of Home Affairs and Environment *Report: Working Party on the protection of Aboriginal Folklore*, Commonwealth of Australia, 1981