

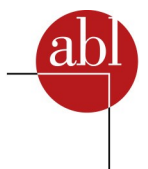
Submission from Arnold Bloch Leibler and Jirrawun Arts Corporation*

Senate Inquiry into Australia's Indigenous visual arts and craft sector

December 2006



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* to the Environment, Communications, Information Technology and the Arts Committee

1 Introduction

- 1.1 This submission has been prepared by Mark Leibler, Nicole Gordon, Peter Seidel, Shaun Cartoon and Christine Williamson on behalf of Arnold Bloch Leibler’s (“**ABL**”) Public Interest Law practice, and by Ian Smith, Chair Jirrawun Arts Corporation (“**Jirrawun**”) and Tony Oliver, Artistic Director, Jirrawun, on behalf of Jirrawun’s board and members. It responds to the terms of reference referred by the Senate to the Senate Environment, Communications, Information Technology and the Arts Committee (“**Committee**”) for the *“Inquiry into Australia’s Indigenous visual arts and craft sector”* (“**the Inquiry**”).
- 1.2 ABL and Jirrawun recommend that through the Inquiry, the Committee endorses the general proposition that the economic and cultural benefits available through the commercial sale of Indigenous art can be a valuable tool for reconciliation and self-determination. However, serious consideration needs to be given to the nature and extent of the duties or regulations that can be imposed on the artists, dealers and collectors operating within this sector. This submission canvasses the recommended nature and extent of those duties.
- 1.3 This submission contains specific recommendations directed at:
- (a) curtailing unscrupulous conduct in the Indigenous visual arts and craft sector (Inquiry Term of Reference (e)); and
 - (b) highlighting the Australian Taxation Office’s (“**ATO**”) crucial role in;
 - (i) improving the sector’s capacity (Inquiry Term of Reference (f)); and
 - (ii) dealing with the economic, social and cultural benefits of the sector (Inquiry Term of Reference (b)).

2 Summary

- 2.1 Of the issue identified at 1.3(a) of this submission, ABL and Jirrawun recommend the introduction of discrete legislation that requires certificates of authenticity to accompany every initial sale of Indigenous artwork from artist and/or artist’s representative organisation to first purchaser and every secondary sale from purchaser in the field to second purchaser.

- 2.2 This certificate would identify the name of the artist and initial purchaser and authenticate the provenance of the artwork, say by an accompanying photograph of the artist and the work. Importantly, the certificate would also specify the price paid to the artist upon the initial sale of the work. A register would also need to be maintained for the public to access such certificates containing information of a non-privacy kind. This mechanism would ensure ethical secondary purchasers of artworks bought in the field are fully aware of the facts surrounding the initial sale, particularly the price paid for the artwork. Unscrupulous dealings would also need to be policed by an agency or body established for such purposes¹ to avoid a blackmarket of unethical secondary sales of artworks originally purchased directly from the artist.
- 2.3 In relation to the issues identified at 1.3(b) of this submission, ABL and Jirrawun are firmly of the view that the ATO initiatives have not resolved the lack of understanding amongst Indigenous artists in relation to their tax obligations. The ATO should increase its efforts to educate Indigenous artists as to their tax obligations through the introduction of further culturally sensitive initiatives. We recommend that an independent report be commissioned that examines past ATO measures put in place to address tax compliance amongst Indigenous artists, critically examines the ATO's proposals for the future and makes recommendations to improve understanding of tax obligations amongst Indigenous peoples.

3 Arnold Bloch Leibler and Jirrawun Arts Corporation

- 3.1 A commitment to serving the public has always been deeply ingrained in ABL's culture. The firm has a long standing and genuine interest in giving back to the community and acknowledges its significant contribution to the public good. It is a long time supporter of Indigenous rights.
- 3.2 In selected cases, the firm offers its expertise, knowledge and resources to assist individuals or organisations in need, for significantly reduced fees or free of charge. Arnold Bloch Leibler engages in public interest law to defend or assert rights and interests, develop the law, or improve the administration of justice.

¹ Ideally an ATO affiliated body, because of the connection between of the current levels of awareness of Indigenous Australians of their tax obligations and "carpet bagging", which is a connection touched upon in part 6 of this submission.

- 3.3 Jirrawun, meaning “one”, acts under the stewardship of its Artistic Director, Tony Oliver, its board, with Ian Smith as its chair and the master artist Freddie Timms as its President, and its patron, Sir William Deane. Its principal artists include Paddy Bedford, Freddie Timms, Rammey Ramsey, Rusty Peters, Goody Barret, Peggy Patrick and Phyllis Thomas. Jirrawun is a non-Government funded organisation with tax deductibility status. Jirrawun is one of ABL’s longstanding public interest clients.
- 3.4 One of the major challenges for Jirrawun is to encourage younger Indigenous Australians to become involved in art, as it remains the domain of elders. If a career path is encouraged, through greater education and a fuller understanding of the career prospects arising from art, Jirrawun believes more young Indigenous artists will be encouraged to take up the career.
- 3.5 ABL’s pro-bono legal advice has allowed Jirrawun’s Indigenous and non-Indigenous board and members to meet their corporate governance responsibilities as they straddle Indigenous and non-Indigenous worlds “two way”, as the Gija describe the act of black and white working together on the symbolic and the practical. The establishment of the unique legal structure of Jirrawun protects the interests of the Indigenous artists and performers, including by way of supporting the introduction of new contractual arrangements, by which the artists own their works on consignment until final sale.
- 3.6 Most contemporary art galleries in Australia and many beyond (including the newly opened Musee du quai Branly in Paris) now display works of the Jirrawun masters, who in just 10 short years have moved from welfare dependency to being the architects of a burgeoning cross-cultural economy in the East Kimberly.

4 Is change needed?

- 4.1 Some of the richest and poorest in Australia and beyond meet through Australian Indigenous art. While large sums are increasingly being paid for Indigenous art in Australian capital cities and overseas, many Indigenous artists and their families remain strikingly impoverished.
- 4.2 It saddens and exasperates Jirrawun and its supporters when, despite best practice protective frameworks and mechanisms, Indigenous artists in many remote areas of Australia are regularly and successfully persuaded in the field to paint “rubbish paintings for quick money.” All too often these paintings resurface in city galleries or on e-bay and other online auction sites to be sold for many thousands of dollars. All

too often also, the artist will remain living in desperate circumstances and be supporting several family members from a painting income, unaware and unformed about the western value of the piece.

- 4.3 Increasing attention is being paid to the disparity between the amounts of money received by the Indigenous artists in the field and the amounts that the artworks are subsequently sold for in the secondary market, months or years later in the Southern States and else where. Despite this, in the experience of ABL and Jirrawun, “carpet-bagging”² has not waned. There is no uniform, legislatively backed mechanism by which a person purchasing Indigenous artwork in the secondary market (subsequent to the initial sale by the artist in the field to the “carpet bagger”) can ensure that they are not somehow indirectly participating in this disgraceful practice.
- 4.4 Jirrawun does not encourage paternalistic laws that can ultimately operate to isolate Indigenous artists from the broader Australian community and laws. Instead, Jirrawun aims to encourage personal responsibility and liberate the Jirrawun artists from welfare dependency.
- 4.5 We do not seek complicated protectionist legislation focusing on whether fair price has been paid. This is not the answer. Instead, we strongly recommend that the Committee considers simple rules and policies that will encourage and facilitate the participation of Indigenous artists in a “two-way” art market.
- 4.6 One tenet that would underpin the development of an efficient market economy is the reduction of information asymmetries and the bringing to the attention of secondary market purchasers (of works initially bought directly from the artist) the fact of the existence of the information asymmetry at the initial point of sale in the field. The reduction of such asymmetries can go some way to reducing disparities in bargaining power.
- 4.7 Because of life circumstances, far too many Indigenous artists remain unaware of or cavalier about the western economic value of their work. The information asymmetry is too great to allow free and informed participation in the Indigenous art market and creates grave inequities. Additionally, far too many purchasers in the secondary market remain unaware of this inequity.

² The exploitation of Indigenous artists by non-Indigenous traders who purchase art in the field for quick cash at far less than market value, made possible by the disempowerment and disenfranchisement of the artist.

4.8 Jirrawun recognises that there is no freedom without responsibility. Jirrawun considers that its success as a model should not be judged purely on its outward success or on the economic success of its artists. Artistic and economic success mean nothing if personal and collective responsibility is not added. Despite the laudable vision of Jirrawun (and other similarly minded organisations), this message is not getting through to those Indigenous artists in the field who deal directly with unscrupulous purchasers. They remain exploited, as passive and in some instances active participants, in “carpet bagging” practices. The Indigenous art market continues to be cash based, and so exploitation abounds.

5 Mechanisms to discourage exploitation

5.1 Beyond the “carpet baggers”, buyers of Indigenous art are not necessarily motivated by acquisitive or financial factors, but often feel that they are investing in a cultural experience. They are increasingly discerning and demand more information about the artwork they are buying. Jirrawun’s success³ is a reflection of market confidence in the quality of Jirrawun art and Indigenous art collectors’ willingness to support Jirrawun’s philosophy of true equity.

5.2 Beyond empowering structures of the kind Jirrawun has established for its artists, mechanisms are desperately needed for consumers to increase their awareness of the burgeoning exploitation of artists, particularly those artists dealing directly with purchasers of their works. Consumers need a mechanism to allow them to assess whether the art they are buying one step removed from the artist was originally purchased according to ethical practices.

5.3 The Jirrawun model can be replicated to ensure ethical buyers in the secondary market, who buy from sellers who purchased directly from the artist, can make informed choices about whether to acquire a particular piece or not.

5.4 Jirrawun and ABL recommend the Committee gives serious consideration to introducing discrete legislation that requires Commonwealth registered certificates of authenticity to accompany every initial sale of Indigenous artwork from artist and/or artist’s representative organisation (like Jirrawun) to purchaser.

³ Brought about by the increasing value of Jirrawun artworks and the very high percentage of each sale prices paid to its artists, and other associated empowering structures

- 5.5 Each certificate would include the name of the purchaser, artist and/or artist's representative organisation and their signatures. This mechanism would not involve any qualitative assessment of the "fair value" of the work (which we discourage). Rather, it would operate to reduce the information asymmetries and inequality of bargaining power that currently exists in the Indigenous art secondary market (particularly for those works being sold by "carpet baggers"), albeit indirectly, by ensuring that ethical secondary purchasers can make informed choices about whether to buy a piece of art or not. A complementary register of certificates would exist that, excluding privacy details, would prescribe similar information.
- 5.6 This simple mechanism will ensure the authenticity of Indigenous artwork, and allow purchasers to assess the circumstances of the initial sale and purchase. Ultimately, this will increase the quality of the artwork available for purchase as well as prove an important tool for the empowerment of Indigenous artists, because the opportunity for "carpet bagging" is reduced. With art sold directly by the artist, ethical purchasers will not buy if they deem from the information on the certificate that there was an inequality of bargaining power during the initial sale.
- 5.7 Of course, the prospect exists for this legislative mechanism to result in two markets, particularly in the secondary market: an ethical and an unethical one. Alongside the ethical market, whose cornerstone feature would be the certificate of authenticity, the "carpet baggers" may still be able to sell to purchasers who aren't interested in artists' empowerment and will "turn a blind eye" to the certification requirement. In Jirrawun's experience, the proportion of purchasers in the Indigenous art market who adopt this view is low. Even for such "unethical" sales, the stakes would be raised because of the risks of being caught in contravention of the legislation and the re-sale value of artwork without a certificate would be reduced.
- 5.8 To complement the certificate scheme, the Commonwealth will clearly need to introduce policing mechanisms⁴ designed to reduce, if not smash, the blackmarket. Serious penalties should apply to those who do not attend to the registration requirements⁵ at the time of initial sale from artist and/or artist's representative (like

⁴ Such as an effective policing body to expose secondary blackmarkets of unethical sellers (being the purchasers in the field) and purchasers.

⁵ If the initial sale and purchase occurs in the field directly from an artist, the onus should be on the purchaser to register the purchase. That same purchaser in the field and the secondary market buyer should similarly be required to register details of the secondary sale. If the initial sale is by the artist's representative body on behalf of the artist, that body should attend to registration requirements.

Jirrawun⁶) to purchaser and to sellers and buyers in the secondary market who do not give certificates.

- 5.9 Where a purchase is made in the field direct from an artist, then the certificate of initial purchase must be produced at the time of the secondary sale if the initial purchaser wants to sell in the secondary market. Penalties should be incurred by the seller in the secondary market if that certificate is not produced to the secondary purchaser at that time, and the seller does not confirm that fact with the policing agency, whether by statutory declaration or otherwise.
- 5.10 We are generally wary of laws and systems that are designed to apply solely to Indigenous Australians. However to this limited extent a special set of rules that applies to Indigenous art is required, perhaps with the inclusion of a sunset clause (as education should remove the long term need for such rules). We recognise that the protection of art work remains an important and unresolved issue for all Australian artists. There is continued debate regarding resale royalties and the ability to copyright designs and ideas. For the purposes of this Inquiry, Jirrawun and ABL make no comment on these important issues, but would like to be given an opportunity to do so in the future.
- 5.11 The challenges faced by Indigenous artists and by those supporting their empowerment are unique. Indigenous artists inherit all of the history of Indigenous and non-Indigenous relationships. A dysfunctional art market does not offer any opportunity for reconciliation. Instead, it perpetuates welfare dependency amongst Indigenous communities and ensures that Indigenous artists remain disenfranchised from a market in which they should rightly be the key participants and beneficiaries.
- 5.12 For these reasons, ABL and Jirrawun commend this solution (which involves a small increase in the regulatory burden on market participants and the Commonwealth through the introduction of a certification and associated policing processes) to the Committee.

⁶ In the case of Jirrawun, for example, works are sold on consignment so that the artist owns his or her work until final sale, which means third party intermediaries, like galleries, never own any work. When a Jirrawun backed work is sold, either direct to a purchaser or through a gallery, the certification requirement would then be triggered. It would not be triggered beforehand at the Jirrawun/gallery stage.

6 Actions needed from Australian Tax Office

- 6.1 Jirrawun, with its unique ability to serve as an important cultural link between Indigenous and non-Indigenous peoples, is aware of a prevailing dependency culture amongst Indigenous artists, inherited through decades of welfare policy and colonisation. The role and proper function of the ATO, in its relationships with Indigenous communities, lies not in punitive intervention for lack of tax compliance, but in educating Indigenous artists about the importance of tax compliance through culturally sensitive initiatives. The ATO should not be seen as a government body that detracts from Indigenous communities. Quite to the contrary, the ATO can provide the opportunity for Indigenous persons to contribute to the collective well-being of their respective communities. The unprecedented success of many Indigenous artists has placed them in positions to make such contributions.
- 6.2 We are aware of the following initiatives implemented by the ATO in assisting Indigenous artists to comply with their tax obligations:
- (a) the establishment of the *Aboriginal and Islander Resource Centre* in 1996 which employs culturally aware tax officers to assist Indigenous persons in tax compliance issues⁷; and
 - (b) release of NAT 12066-09.2004 entitled “How tax applies to indigenous artwork” which explains how pay as you go (“**PAYG**”) withholding, the goods and services tax (“**GST**”) and the Australian business number (“**ABN**”) apply to Indigenous artworks sold at art centres;
- 6.3 In addition to the initiatives listed above at 6.2, the ATO has provided, over the last 10 years, the following facilities to assist Indigenous communities to comply with tax obligations:
- (a) establishment of the National Indigenous Project which works with internal and external stakeholders to establish and maintain relationships within communities⁸;

⁷ Australian Taxation Office, Media Release Nat 96/52 & Nat 97/57

⁸ ITAG Minutes for meeting 31 May 2005, p. 3

- (b) the work of the Indigenous Tax Advisory Group (“ITAG”) which provides a mechanism to get discussion on delivery of government initiatives to Indigenous people and organisations⁹;
- (c) a quick reference guide to tax obligations;
- (d) educational visits to explain the tax laws and help community organisations comply with their tax responsibilities;
- (e) seminars for community leaders, coordinators of local land councils and administrators of community organisations¹⁰; and
- (f) a newsletter (launched 16 July 1998) to assist Indigenous organisations to comply with their business tax obligations¹¹.

6.4 In our collective experiences, we firmly believe this area needs additional focus by the ATO and more resourcing to allow larger scale initiatives. The ATO initiatives outlined in 6.2 and 6.3 above have not resolved the serious lack of understanding amongst Indigenous artists of their tax obligations. There must be a significantly increased effort to educate Indigenous artists as to their tax obligations through culturally sensitive initiatives.

Next steps

6.5 Awareness and understanding of tax obligations remain extremely low in Australian Indigenous communities. In many respects, the low level of understanding of and compliance with tax obligations provides fertile ground for the “carpet baggers” to operate under the radar and ensure that their unscrupulous purchases are not open to scrutiny. This is because the “carpet bagger” can proceed reasonably confident that the transaction records and documentation usually brought into existence for tax compliance purposes will not be produced. In the result, by preying on the tax ignorance of the artist, the “carpet bagger” and its unscrupulous purchases in the field all but go unnoticed. By increasing tax compliance and creating paper trails, the “carpet-bagger’s” operations will be undermined.

⁹ See ITAG Minutes for meeting 31 May 2005, p. 2

¹⁰ Australian Taxation Office, Nat 2000/20

¹¹ Australian Taxation Office, Nat 98/45

- 6.6 ABL and Jirrawun recommend that the Australian Tax Office properly educates Indigenous artists of their obligations under the Australian tax system. This educative campaign could also raise awareness through Indigenous communities of the economic value of Indigenous art in the secondary market and encourage artists to demand higher values for their work in the field, particularly where artists are selling directly to the public, without representative body protection of the kind Jirrawun gives to its artists.
- 6.7 We strongly encourage the Inquiry recommends that an independent report be urgently commissioned that:
- (a) details and critically analyses the initiatives implemented by the ATO over the last 10 years to address tax compliance within Australian Indigenous communities;
 - (b) details and critically analyses the ATO's planned initiatives for the immediate future to better educate Indigenous Australians about their tax obligations; and
 - (c) makes recommendations on improving the current desperate state of misunderstanding of tax responsibilities amongst Indigenous Australians, taking into account the apparent linkages between the low levels of understanding of and compliance with tax obligations and the burgeoning unscrupulous conduct by the "carpet baggers", who prey on such ignorance.
- 6.8 We are ready, willing and able to speak to any aspect of, and expand upon, the suggestions in this submission at the convenience of the Committee.

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December 2006