

INDIGENOUS COMMUNAL MORAL RIGHTS

The Arts Law Centre of Australia (Arts Law) is the national community legal centre for the arts providing legal assistance to the arts community across all of the art sectors.

Arts Law has serious concerns about the Government's proposed *Copyright Amendment (Indigenous Communal Moral Rights) Bill* (the Bill).

In 2003, Arts Law along with a few other organisations and individuals were provided by Government with a copy of the Bill on a confidential basis. Arts Law made submissions to Government to make amendments to the Bill because of our reservations about the effectiveness of the proposed legislation. The extent of the Government's consultations with Indigenous artists and communities is not known.

In March 2006, Arts Law received a letter from the federal Attorney General, Mr Phillip Ruddock confirming the Government's commitment to introduce into Parliament a new version of the Bill, possibly in the 2006 Winter Sittings. Mr Ruddock stated the Government would not engage in further consultation prior to introducing the Bill.

Arts Law has no information as to whether any of our concerns have been addressed. Whilst we have not seen the new Bill, the Government has given no indication that the issues about the 2003 Bill as outlined in our summary attached, have been dealt with.

Arts Law proposes to convene a public forum to discuss the new Bill. Mr Ruddock has accepted our invitation to address the forum after the legislation has been introduced.

If you wish to discuss this matter further or would like to be kept updated about developments on the Bill and proposed forum, please contact Samantha Joseph, the Aboriginal lawyer at Arts Law on phone 02 9356 2566.

Yours sincerely,



Robyn Ayres
Executive Director

Samantha Joseph
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Executive Summary

Arts Law Submission on draft *Copyright Amendment (ICMR) Bill 2003*

Purpose of the Bill: To provide Indigenous communities with “a means to prevent unauthorized and derogatory treatment of works and films which draw on their traditions, customs or beliefs”.

Works protected: Literary, artistic, dramatic and musical works as well as cinematograph films *in which copyright subsists* may be subject to ICMR protection. However:

- the Bill does not protect works where copyright has expired or elements of ICIP in which copyright subsists. For example, it would not protect some rock paintings or unrecorded oral histories; and
- protected works do not include sound recordings. ICIP is often recorded and preserved as sound recordings which should enjoy ICMR protection.

Conditions for protection: Five conditions need to be met before ICMR will arise:

1. the work must be made;
2. the work draws on the traditions, beliefs, observances or customs of the community;
3. the work is covered by an agreement between the author and the community;
4. the Indigenous community's connection with the work is acknowledged (notice is shown on the work); and
5. written notice of consent has been obtained by the author (or their representative) from everyone with an interest in the work.

Arts Law's response: Arts Law supports the first two *conditions* but has the following reservations about the remaining conditions:

Requirement of an agreement: The agreement system is voluntary so the author may choose not to seek an agreement with the Indigenous community. The agreement requirement is inconsistent with copyright law and moral rights in which protection arises upon creation of the work.

Acknowledgement of the community's connection: Arts Law recognises that it is important for a community's connection to the work be acknowledged but it should not be a condition necessary for ICMR to arise.

Consent is obtained from everyone with an interest in the work: Arts Law acknowledges that consent is important. However:

- the term “interest” is not defined in the Bill which allows for a broad interpretation and includes anyone which is a party to an agreement to take an interest in the work;
- If the intention is that consent be obtained from all members of the community with a “cultural or traditional interest” in the work, then this should be stated. If not, it appears that the condition is contrary to the interests of Indigenous communities.

Conditions must be met before “first dealing”: The five conditions stated above must be met before there is a first dealing with the work. This is inconsistent with individual moral rights and copyright law and shifts the balance away from Indigenous communities in favour of purchasers and users of Indigenous cultural material. First dealing includes an agreement to transfer an interest in the work. This limits the protection afforded by ICMR. Arts Law acknowledges that while certainty is important, it should not be elevated to such a level as to deny Indigenous communities ICMRs in respect of a work.

Exercising ICMR: Arts Law supports the appointment by an Indigenous community of an authorized representative to have responsibility for exercising ICMR. However, Arts Law suggests that such authorized representative should include a not-for-profit organisation. Furthermore, if consent is to be granted for infringement of ICMR, it should be granted by an authorised member of an Indigenous community.

Duration: Duration of ICMR is linked to copyright. Arts Law suggests that ICMR should exist until such a time as no person is recognised as a custodian to that ICIP.

Defence to infringement: The Bill provides a defence of reasonableness. Arts Law believes if the intention is to consider the reasonableness of the efforts of the infringer in consulting the community, this should be more clearly stated.

No infringement if notice given: Under the Bill certain treatment of works may occur without infringing ICMR, including the destruction of movable work if adequate notice is provided to enable removal of the work. Arts Law considers the notice periods inadequately short.

Arts Law's proposal: ICMR should arise automatically when the first two conditions proposed under the Bill are met. In addition Arts Law advocates a two-step reasonableness test which considers whether the person claiming that infringement was reasonable “knew or ought to have known” that ICMR subsists in the work.