



28 March 2014

Aboriginal Culture and Heritage Reform Secretariat

NSW Office of Environment and Heritage

BY EMAIL: ach.reform@environment.nsw.gov.au

Dear Secretariat,

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the NSW Government's response to the Working Party's recommendations, entitled "Reforming the Cultural Heritage System in NSW" (discussion paper).

Arts Law commends the NSW Government's ongoing commitment to broader community engagement in relation to the improved protection of Indigenous cultural heritage. The protection of Indigenous Cultural and Intellectual Property (ICIP) which encompasses cultural heritage is one of the key advocacy agendas of our community legal centre and something in which our Indigenous artist, Indigenous arts organisations and their broader community stakeholders have expressed strong support. We advise Indigenous artists and arts organisations through a program specifically designed for this purpose, called Artists in the Black. We have run this Indigenous program for 10 years and have visited many urban, regional and remote Indigenous communities over this time to provide them with legal advice on ICIP and advocate for the increased protection of ICIP through the introduction of sui generis legislation. Last year, our AITB program delivered 619 legal advices to Indigenous artists and arts organisations, a tenth of which related to the inadequacy of ICIP protection in Australia at present.

It is with this background that we approach the potential broadening of the current heritage protections in NSW. We are, of course aware of the limitations of state as opposed to federal legislation in respect of these protections and bare this in mind while making this submission.

In general, Arts Law supports the proposal for stand along legislation which protects ACH and the expansion of the current definition of cultural heritage. We also support the objective of the NSW Government to enhance and increase Aboriginal responsibility over ACH.

Who are we?

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Our response to the discussion paper:

1. Defining Aboriginal Cultural Heritage (ACH):

While we are pleased that the discussion paper proposes expanding the current definition of ACH to be more inclusive than it is, the proposed definition excludes many of the core values associated with cultural heritage and should be further expanded. We note that the proposed definition of ACH (as outlined on page 13 of the discussion paper) is based on the incorrect assumption that “the use of language and associated intellectual property rights relating to ACH are currently afforded protection under the Commonwealth laws and not within the purview of the state” (page 13). This is not the case. The law of copyright only protects the material expression of ideas and knowledge, and given that most cultural heritage is orally expressed, for example in the form of stories, many aspects of cultural heritage and ICIP remain unprotected. Our experience with advising Indigenous artists and arts organisations is that the lack of protection of ICIP represents a huge gap in the way that Aboriginal art and culture is protected. The paper wrongly states that there are currently laws in place which protect languages and “associated intellectual property rights”. Copyright (a federal system) does not protect

ICIP, including languages, traditional knowledge and cultural heritage. We are concerned that the scope of what requires protection under this reform is premised on a false assumption of what is currently protected. That is, the discussion paper assumes that it's not necessary to look at how to better protect ICIP because it is already (largely) protected.

We support the proposed inclusion of storylines in the definition of ACH and urge the NSW Government to look at other aspects of ACH which could be protected as ACH, for example dreamtime stories which relate specifically to certain areas or landmarks, languages which are particular to certain areas, imagery which is specific to certain parts of NSW or certain NSW landmarks. We would also like to see a broader explanation of the way in which intangible ACH values would be protected. That is, are ACH values of themselves sufficient in determining that certain land is to be protected, or are those intangible values only capable of protection if they attach to land which is already protected. This is unclear in the discussion paper. It is also unclear precisely what protection the songline, for example, would receive. Given that the cultural heritage system is traditionally one which relates to physical access to a particular site, for example, how would the new proposed model protect storylines, where the story itself is not a physically accessible place or thing, but represents Indigenous Cultural and Intellectual Property in the form of cultural knowledge? How will the story itself be better protected under the new proposed model? These issues remain unclear on our reading of the discussion paper and we respectfully request that some clearer, more practical information in respect of the broadening of the definition be considered.

2. A register of cultural heritage

Arts Law is concerned that the creation of a register of cultural heritage requires the disclosure of Indigenous Cultural and Intellectual Property which might be sacred or vulnerable to misuse by those with access to the register. We are also concerned generally about the treatment and disclosure of the information relating to the cultural heritage throughout the registration, negotiations and approvals process. Arts Law asks that the Department consider the treatment of this information throughout the registration, negotiation and approvals processes and look at ways to better protect the confidentiality of culturally sacred or secret information. One option is to require that where the register identifies a site which represents a sacred story line, for example, that the register simply indicates that the site is protected in relation to sacred knowledge relating to that site. The register need not disclose the sacred knowledge itself. Any parties then wishing to negotiate the use of that site would need to sign a confidentiality agreement in respect of the information disclosed in the negotiations in order to protect the sacred knowledge associated with that site.

3. Representation by local Aboriginal Cultural Heritage Committees

It is not clear what community or representative authority members of the local ACH committees will have, and to what extent they are therefore capable of properly consulting or granting permission on behalf of, the local community. We are also concerned that there may be potential or actual conflicts of interest within the committee itself. One possible way of addressing potential conflicts of interest within committees is to make mandatory the signing of a code of ethics which specifically identifies the roles and responsibilities of members of the committee.

4. Negotiation process

We are concerned that the current proposed model outlined in flowchart form on page 33 (incorrectly paginated as page 48 in the discussion paper) for development negotiation means that if agreement is not reached between the Proponent and the local ACH Committee, that development will continue regardless of that communities concerns after a 55 day period (including negotiation through an approved independent dispute resolution service).

Further consultation with Arts Law and its stakeholders

Please contact Suzanne Derry (Senior Solicitor) or Robyn Ayres (Executive Director) if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

We can be contacted at rayres@artslaw.com.au or sderry@artslaw.com.au or on (02) 9356 2566.

Yours faithfully



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