23 January 2004

Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

23 January 2004

Dear Assistant Secretary

Comments of the Arts Law Centre of Australia on *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*

The Arts Law Centre of Australia (Arts Law) congratulates the Government on the important initiative of developing Indigenous Communal Moral Rights (ICMR) legislation, the aim of which is to protect the unique cultural interests of Indigenous communities and to give Indigenous communities the means to prevent unauthorised and derogatory treatment of works and films which draw upon their traditions, observances, customs and beliefs.

Arts Law welcomes the opportunity to provide comments on the Exposure Draft Bill provided in December 2003. Arts Law notes in our comments attached, the work we do on behalf of Indigenous artists and organisations and the recent establishment of an Indigenous project at Arts Law to provide advice to Indigenous creators, their organisations and communities.

Whilst Arts Law is well aware of some of the concerns of Indigenous artists and communities about ICMR we note that the Government's timeframe for comments did not allow consultation with the many Indigenous stakeholders with an interest in the draft legislation. We also note that the comments provided herewith are limited to the major features of, and concerns about, the draft bill. In view of the timeframe we have not attempted to provide a comprehensive or detailed response.

The comments attached discuss our major concerns with the draft legislation and provide some suggestions about alternatives which would make the legislation simpler, and in our view more practical and workable.

Arts Law agrees with the Government's description of the proposed legislation as "ground-breaking" and because of this it is extremely important that the time and effort is taken to ensure that the legislation meets the needs of Indigenous communities as well as those of creators and users of Indigenous Culture and Intellectual Property (ICIP). Arts Law is concerned that there has been limited consultation with Indigenous people about the proposed legislation and their input is vital if this legislation is to be effective.

Arts Law appreciates this opportunity to comment on the Exposure Draft Bill and we would like to continue to work with the Government, key stakeholders and the Indigenous community to achieve changes to the proposed model of ICMRs which would make the legislation achieve the Government's stated aims. We note an effective system of ICMRs will also serve as a model for the International community.

We would welcome the opportunity to discuss the matters we have raised in our comments and if you require any further information please contact Robyn Ayres or Ant Horn.

Yours sincerely

Robyn Ayres
Executive Director

Arts Law Centre of Australia
Submission to Attorney General's Department on the draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003*

Introduction

The Arts Law Centre of Australia ("Arts Law") is the national community legal centre for Australian arts practitioners and organisations. We provide free legal advice to the Australian arts community on a broad range of arts related matters.

An important part of Arts Law's services is assisting Indigenous Australians with legal issues relating to the protection of their art and cultural intellectual property. In this capacity Arts Law acts as an advisor to:

- Indigenous organisations such as the Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA) and the Association of Central Australian Aboriginal Art and Craft Centres (DESART);
- Indigenous communities and individuals; and
- Non-indigenous authors working with Indigenous communities.

Our ability to assist these groups has been greatly enhanced by the implementation of the Arts Law Indigenous Project. We acknowledge the generous assistance of the Australia Council for the Arts in establishing this project. Arts Law now employs an Indigenous Legal Officer and a Liaison and Communications Officer to work directly with the Indigenous community and to assist with their particular concerns.

For these reasons we believe that we are well placed to assist Indigenous organisations in raising concerns in regards to the draft *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* ("the Bill").

The Intention of the Bill

The stated aim of the Bill is to provide Indigenous communities with "a means to prevent unauthorised and derogatory treatment of works and films which draw on their traditions, observances, customs or beliefs"[1]. Additionally, the framers of the Bill have "taken into account a number of considerations, particularly in relation to minimising the formalities required between the community and the author of the work in order for communal moral

[1] From undated cover letter to the Exposure Draft of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* as received by Arts Law Centre of Australia 16 Dec 2003.

rights to arise"[2]. These aims are consistent with earlier statements by the Government in regard to the introduction of Indigenous communal moral rights.[3]

The degree to which the Bill has met these aims will be discussed in conjunction with an analysis of the provisions of the Bill, which Arts Law considers to be most problematic.

Unless otherwise stated, all references to a Section, Division or Part of legislation in the body of this submission or in a footnote (for example s195AZZZZA or Part IXA), are references to sections in the Exposure Draft of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003.*

Works covered by Indigenous Communal Moral Rights

The Bill provides that literary, artistic, dramatic and musical works as well as cinematograph films *in which copyright subsists* may be subject to Indigenous communal moral rights ("ICMR"). We note that this will not provide protection to elements of Indigenous cultural intellectual property (ICIP) in which copyright does not subsist. This includes existing works where copyright has expired. An example would be old photographs of ceremonial activity. It would also include other ICIP where for other reasons copyright may not subsist, such as rock art or unrecorded oral history. This material has great significance to the community and as such should be protected by ICMRs.

We also question the exclusion of sound recordings under an ICMR regime. ICIP is often preserved or recorded as a sound recording. Many communities have extensive archives of material including sound recordings of traditional song, stories and language. We believe that this valuable ICIP should enjoy ICMR protection.

We would welcome the opportunity to discuss these issues further.

The conditions necessary for ICMR to arise

The Bill provides that a certain set of conditions must be met before ICMR will arise[4]. Broadly summarised these are as follows:

1. the work is 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 shown on work); and

[2] ibid
[3] The policy statement, *Arts for All*, 2001; Media release, *Indigenous communities to get new protection for creative works,* May 19 2003; Speech by the Attorney-General to the Copyright Law and Practice Symposium, November 2003.
[4] ss195AZY and s195AZZE

5. written notice of consent has been obtained by the author (or their representative) from everyone with an interest in the work. This would appear to include a party to an agreement to take an interest over the work eg a commissioner. All the people with an interest have to consent to Indigenous communal moral rights arising in the work.

Arts Law acknowledges that numbers 1 and 2 are necessary and appropriate. However, we have concerns with the remaining three conditions. These concerns rest largely on the fact that these are ***"conditions".*** They are necessary for ICMR to come into existence. Should, for any reason, one of these "conditions " not be met, the community will be left without any ICMR protection. This is inconsistent with the existing individual moral rights regime under which individual moral rights arise automatically upon creation of the work. This also undermines the aim of the Bill to provide Indigenous communities with a means to prevent unauthorised and derogatory treatment of works and films, which draw on their traditions, observances, customs or beliefs.

1. The requirement of an agreement

This is inconsistent with the existing individual moral rights regime under which individual moral rights arise upon creation of the work. It is also contrary to the *Copyright Act 1968 (Cth)* in requiring agreement before a right subsists in a work. The effect of this is that, should an author and an Indigenous community fail to reach an agreement, the community will be left without any ICMR protection.

We note also that the agreement system is voluntary. As such, there is no requirement that authors seek out an Indigenous community to form an agreement. The voluntary nature of the system also means that Indigenous communities are unable to assert their moral rights against an author. This gives rise to the possibility that an author may decide that seeking an agreement with the community is either too difficult, or, may potentially encumber the work in an undesirable way. Therefore, the author may simply choose not to seek an agreement. The result is that the community will be left without ICMR protection.

Example:
Sarah is a low budget filmmaker based in Sydney. She wants to include an artwork painted by an Indigenous artist in a music video she is making for a friend's band. The artist has given her consent to the use of the image. The Indigenous community is located in an isolated part of the Northern Territory. Sarah tries to contact the community by post and telephone but cannot get through. In the end Sarah decides to include the artworks anyway. As it turns out the music video is a huge success. Upon seeing the video the community are very upset and feel that the artworks have been used inappropriately. The community will not have any ICMRs because there was no agreement.

Another issue with the agreement requirement is that it undermines the existing relationship between indigenous authors and their communities. Indigenous authors will, in most cases, already have the implied consent of their community to use particular material, by reason of their relationship as a member of that community. Indigenous systems work more on an offence, rather than permission basis. Authors do not have to

seek explicit consent but will be punished if they use material they should not or for using material inappropriately. It seems unnecessarily complicated and onerous to require these authors and their communities to meet the various conditions necessary for ICMR to arise. Additionally, it may "muddy" the traditional systems within communities by creating confusion between those authors with traditional permission and those with permission established under an ICMR agreement.

There is also the possibility that the author and the appropriate member[5] are the same person. The Bill would appear to require that this person have an agreement with himself or herself.

From a practical point of view the requirement for an agreement does not minimise the formalities required between the community and the author of the work. In fact, it would seem to increase them.

For an agreement to be reached the following elements will need to exist:

a) The author appreciates that there is likely to be an association with a particular community;

b) The author is willing and able to seek out the community;

c) The community has appointed or recognises an "appropriate member";

d) The author and the appropriate member actually come to an understanding.

2. Acknowledgement of the community's connection

We recognise that it is important that the community's connection to a work be acknowledged. However, we do not feel that this should be a condition necessary for ICMR to arise.

It seems strange, for example, that for the right of attribution to arise it is necessary for the community to be attributed. This is also inconsistent with the legislative scheme for individual moral rights.

We believe that it is more appropriate that acknowledgement of the community is a factor to be considered when assessing whether an infringement is reasonable or not. It should not be a requirement for ICMRs to subsist in a work.

Example:
Rugcorp has commissioned a number of Indigenous artists to create designs for a series of rugs. Representatives of Rugcorp have travelled to the community and have discussed the designs with appropriate members of the community and an agreement has been reached and consent obtained. However, when the rugs are produced and made available for sale there is no acknowledgment of the community's association either on or with the rugs. As a result the community does not have any ICMR in respect of the works.

[5] ss195AZZG and s195AZZJ

3. Consent is obtained from everyone with an interest in the work

We acknowledge that consent is important when dealing with ICIP. However, "interest" is not defined in s195AZZN and as a result "a person with an interest" can be read as being a very broad class of people. It is further stated that consent is also required of each person who is a party to an agreement to take an interest in or over a work[6]. Again, the lack of definition of "interest" allows for a very broad interpretation.

As it stands, there are likely to be numerous people with an "interest" in the work, many of whom will be from outside the community, for example, the commissioner of an artwork or the producer of a film. It seems inappropriate that the consent of these people should be required for an ICMR to arise. In effect, requiring their consent gives them the option of deciding if they want a work to be subject to an ICMR and takes the matter out of the control of Indigenous communities. 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 this is not the intention then this requirement would appear to be contrary to the interest of Indigenous communities.

Another issue is that for particular projects, such as films, a large number of consents may be required. This could be an onerous undertaking and, as such, may deter authors from entering into the ICMR process, the result being that Indigenous communities will not have ICMR protection.

We also note that consent must be in writing even though an ICMR agreement may be oral. From a practical point of view this adds another layer of bureaucracy and does not assist with minimising the formalities required between the community and the author of the work.

Example:
Chris and Dave are documentary makers. They intend to make a documentary about an indigenous artist. They have received the consent of the artist and the community and have reached an agreement. However, the production company funding the film has declined to consent to an ICMR arising in respect of the work. As the company has an interest in the film their consent is required. As they have declined to give it, the community has no ICMR in respect of the film.

We would welcome the opportunity to discuss these issues further.

The need to meet requirements before "first dealing"[7]

A further condition that is required is that the three conditions listed above must be satisfied before there is a first dealing with the work. This is inconsistent with the existing individual moral rights regime and the Copyright Act in general. The note to s195AZY(3) further states that no right will arise if the first dealing with the work occurs at the same

[6] s195AZZN(2)(a)
[7] ss195AZY(3) and 195AZZE(3)

time the work is made. The Bill also provides that an agreement to transfer an interest in the work will be considered dealing[8]. This seriously limits the protection afforded by ICMRs as, even if a community can satisfy the conditions giving rise to ICMRs, a large number of works will have been dealt with and, as such will not receive ICMR protection.

Example:
Joseph is an Indigenous artist. He has been commissioned by a company to create a painting for their offices. Joseph completes the work and is paid by the company upon delivery. Joseph has acknowledged his community on the work. However, as Joseph lives away from his community he has not had an opportunity to form an agreement with his community before the work is sold. As a result the community will not have any ICMR in respect of the work.

It is stated in the Guide to Indigenous Communal Moral Rights attached to the Bill[9] that:

> "the requirement that the agreement and acknowledgement be made prior to the first dealing is intended to ensure that a potential buyer of the work or film is aware of the existence or non-existence of communal rights in respect of the work or film and this provision prevents unexpected changes regarding the status of these works or films".

We recognise that certainty may be important. However, we question whether it should be elevated to such a level as to deny Indigenous communities ICMRs in respect of a work. If, as suggested, "the parties have a vested interest in confirming acknowledgement, so as to both reinforce the value and credibility of the work"[10], we also ask why it would be of concern to potential buyers that the work was subject to an ICMR.

We also make the comment that a large amount of effort and expense has been made in establishing a network of Indigenous arts centres throughout Australia. These arts centres are vital in promoting "best practice" models in respect to dealing with ICIP. In the majority of cases the relationship between author and art centre will satisfy the requirements for ICMRs to arise. However, most of the works involved will have been subject to a first dealing and as such will not be protected by ICMR. This would appear to undermine the good work already done as well as the stated aims of the Bill.

The requirement that the conditions be met before first dealing shifts the balance away from Indigenous communities in favour of purchasers and users of Indigenous cultural material. This seems anathema to the stated aims of the Bill.

We would welcome the opportunity to discuss these issues further.

First dealing and the application of the legislation

[8] ss195AZY(4)(c) and 195AZZE(4)(c)
[9] At p2
[10] Guide to Indigenous Communal Moral Rights (attached to the Bill) at p3

The issue of "first dealing" also undermines the application provisions in respect of literary, dramatic, musical and artistic works[11]. These provisions state that (subject to the various conditions being met) ICMRs arise regardless of when the work is made but that Part IXA will only apply to infringements that occur after the commencement of Part IXA. However, if a work has been subject to a first dealing there will be no ICMR, therefore Part IXA will have no application. It is probably safe to assume that a large proportion of works currently in existence or which are created before the commencement of the legislation will have been subject to a first dealing and as such cannot receive any ICMR protection.

We would welcome the opportunity to discuss these issues further.

Exercising ICMR

The Bill provides if there is a particular person who the community recognises as having responsibility for exercising an ICMR then that person is the authorised representative in respect of the work.[12] Alternatively, the community may appoint a person as its authorised representative.[13] These provisions in themselves are not problematic. Neither are the provisions in s195AZZS, which allow for the authorised representative to be the author, or someone who is not a member of the community.

However, we note that under s195AZZR the authorised representative is the only person who can exercise ICMR. This creates the potential problem where the authorised representative determines that he or she does not wish to exercise the ICMR. In this case the community cannot force the authorised representative to exercise the right and cannot act independently of the authorised representative. The only option available is to revoke the authorised representative's appointment (assuming they have been appointed) and appoint someone who is prepared to exercise the right. This appears to undermine the community's right to self-determination.

We also note that an authorised representative must be an individual. We suggest that it may be appropriate to also allow for the appointment by the community of a non-profit organisation as its authorised representative.

We would welcome the opportunity to discuss these issues further.

Consenting to infringements of ICMR

The Bill provides that the only consent required in respect of an act or omission that would otherwise be an infringement of an ICMR is that of the authorised representative.[14] As previously stated, this person need not be a member of the community. Although it can be expected that communities would give careful consideration to the appointment of an authorised representative, this still appears to create the risk of consent being

[11] ss195AZZZZ, 195AZZZZA and 195ZZZZB
[12] s195AZZT(1)
[13] s195AZZT(2)
[14] ss195AZZZF and 195AZZZG

given inappropriately. A person may have been appointed more for their understanding of the law and for their ability to bring legal action rather than their cultural standing. It is significant that this person is free to give consent to an infringement of an ICMR independent of the community.

Consenting to infringements is of great importance as the effects could be very harmful to the community's honour and reputation. This is even more important because once consent is given by the authorised representative it will not be affected even if that person's appointment is subsequently revoked[15]. Therefore, if consent is given inappropriately there is nothing the community can do to rectify it.

Given these circumstances, it would seem a person similar to the "appropriate member" may be a more suitable person to consent. In addition there should be a requirement that this person consult with the community before giving consent. There should also be an opportunity to revoke the consent if it can be established that it was given inappropriately or without consultation.

We would welcome the opportunity to discuss these issues further.

Duration

Arts Law notes that as in the case of individual moral rights the duration of ICMR is linked to the term of copyright.[16] We are of the view that this is not appropriate in respect of ICIP as this material has a life and significance beyond that of the author. We are of the view that ICMR should exist until such a time as no person is recognised as being the custodian of that ICIP.

We would welcome the opportunity to discuss these issues further.

Defence to infringement if action is reasonable

As with individual moral rights, the Bill provides for a defence of reasonableness in respect of an infringement of an ICMR and that particular circumstances must be considered when determining if the infringement was reasonable. We note the Bill provides some additional circumstances to be considered which are not present in the individual moral rights legislation. These are primarily the following:

Ss195AZZY(2)(a) and 3(a), 195AZZZ(2)(a) and 3(a)

The nature of the relationship between the author of the work/film and the Indigenous community at the time of any contact, or attempted contact, by the person with the community for the purposes of:

(i) determining whether the community has a right of attribution/integrity in respect of the work/film; or

[15] s195AZZU(1)
[16] ss195AZZ, 195AZZF and195AZZQ

(ii) determining what is necessary to satisfy the community's right of attribution/integrity; or

(iii) seeking consent to an act or omission that would otherwise infringe that consent

Ss195AZZY(2)(b) and 3(b), 195AZZZ(2)(b) and 3(b)

The nature of the Indigenous community itself at the time of any contact, or attempted contact, by the person with the community for the purposes of:

(i) determining whether the community has a right of attribution/integrity in respect of the work/film; or

(ii) determining what is necessary to satisfy the community's right of attribution/integrity; or

(iii) seeking consent to an act or omission that would otherwise infringe that consent

It seems the intention may be to consider what efforts the person claiming that the infringement was reasonable has made in consulting the community. If this is the case, it would seem better to state this more clearly. For example, ss195AZZY(2)(a) and 3(a) and 195AZZZ(2)(a) and 3(a) could be replaced by:

The steps taken by the person to contact, or attempt to contact the community for the purposes of:

(i) determining whether the community has a right of attribution/integrity in respect of the work/film; or

(ii) determining what is necessary to satisfy the community's right of attribution/integrity; or

(iii) seeking consent to an act or omission that would otherwise infringe that consent.

If the intention is not to consider the efforts made then we have difficulty in ascertaining the purpose of this provision.

We are of the view that the provisions contained in ss195AZZY(2)(b) and 3(b), 195AZZZ(2)(b) and 3(b) are unnecessary as they seem to refer to "difficulty and expense" considerations similar to those in s195AZZY(2)(i) and(3)(j). If these provisions are intended otherwise we have difficulty ascertaining this intention.

We believe the sections referring to consideration of voluntary industry codes of practice[17] should be consistent. These provisions should also require that any practice included in any "industry protocol", such as those produced by the Australia Council,[18] or

[17] ss195AZZY(2)(h), (3)(i) and 195AZZZ(2)(g), (3)(i)

[18] The Australia Council has produced a series of protocol booklets aimed at people intending to work with Indigenous artists or use Indigenous cultural material. The series covers visual arts, performing arts, new media, song and writing.

the Australian Film Commission[19] should also be considered. The reason for this is that these protocols are aimed at encouraging "best practice" in respect of Indigenous culture whereas an industry code of practice may not address issues relating to the use of Indigenous culture.

We would welcome the opportunity to discuss these issues further.

No infringement if notice given

Arts Law notes that s195AZZZA allows for certain treatment of works to occur without infringing ICMR. We have a number of concerns.

S195AZZZA(1) allows for a moveable artistic work to be destroyed if the person gives the community a reasonable opportunity to remove the work from where it is located. Given that many Indigenous communities may be geographically isolated, what is to be considered reasonable notice?

Similarly, we feel that the time periods for notice and action expressed elsewhere in s195AZZZA are unrealistic. As these rights are communal they will inevitably require the community to consult and the nature of Indigenous communities is that they may often be geographically isolated or their members or the community as a whole may temporarily have relocated. We, therefore, suggest that these time periods be extended to at least six weeks in each case.

We would welcome the opportunity to discuss these issues further.

A possible alternative

Again we would like to acknowledge the important work the Attorney General's Department has done in seeking to address the issue of providing protection to ICIP through ICMR legislation. We would, however, like to suggest a possible alternative.

1. ICMRs arise automatically when;

   (a) a work is made; and

   (b) the work draws on the particular body of traditions, observances, customs or beliefs held in common by an Indigenous community.

2. A two-step test for reasonableness is introduced.

The first step would consider whether the person claiming that the infringement was reasonable "knew or ought to have known" that ICMRs subsisted in the work. This could take into account considerations such as:

- is the work by an Indigenous artist

[19] The Australian Film Commission indigenous protocol for filmmakers is currently being prepared.

- is an association with an Indigenous artist or community acknowledged
- does the work contain elements that could reasonably be identified as having an indigenous connection
- were enquiries made as to the possibility of a connection.

If it is established that the person "knew or ought to have known" then the second step of the test can be applied. This would take into account the same considerations as apply under the existing individual moral rights regime. Additionally, a "difficulty and expense" consideration could also be included.

We feel that a "knew or ought to have known" test is necessary in regards to ICMR as not all works will be subject to ICMRs. Unlike individual moral rights, where the rights subsist upon creation of the work, ICMRs also require that the work draws on the particular body of traditions, observances, customs or beliefs held in common by the Indigenous community.

This approach simplifies the requirements for Indigenous communities while not being unduly onerous or uncertain for authors. It may be argued this requires people to have some knowledge or understanding of Indigenous culture. However, the inclusion of the "knew or ought to have known" test in regards to reasonableness reduces this requirement.

This approach would also meet the stated aims of the Bill. Namely to provide Indigenous communities with a means to prevent unauthorised and derogatory treatment of works and films which draw on their traditions, observances, customs or beliefs and to minimise the formalities required between the community and the author of the work in order for communal moral rights to arise.

Arts Law would welcome the opportunity to discuss this response and the ongoing development of any ICMR legislation.