



ARTS LAW CENTRE OF AUSTRALIA

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Thank you for the opportunity to comment on the Australian Indigenous Art Commercial Code of Conduct (**the Code**).

The Arts Law Centre of Australia (**Arts Law**) is a not for profit community legal centre that provides services to over 5000 artists and arts organisations each year of which approximately 35% are from the visual arts and crafts sector. Arts Law through its specialist Indigenous service, Artists in the Black, also provides advice to Indigenous artists throughout Australia. In 2008, we spent approximately fourteen weeks on-country advising and educating Indigenous artists, with extensive travel through remote parts of Western Australia, the Northern Territory and South Australia. We provided direct legal advice and educational services to approximately 1000 Indigenous artists and arts workers. Arts Law is accordingly well placed to comment on how the Code will impact on Indigenous artists.

We propose to address our more general concerns first and then comment on the specific provisions of the Code. Arts Law has several overarching concerns:

1. As a fundamental structural comment, Arts Law's position is that the Code should be mandatory not voluntary and that legislation should be enacted requiring all art dealers, agents and galleries who wish to deal within the Indigenous art market to comply with its provisions. The exploitation of vulnerable Indigenous artists by unethical dealers and galleries is rife and widespread. We do not believe that those dealers and galleries are likely to sign up on a voluntary basis and their conduct is unlikely to be constrained in any way by a voluntary code.

2. Our experience is that agreements with Indigenous artists should be in writing and, preferably, witnessed by an independent third party. Oral agreements with Indigenous artists create a raft of problems: who is to be believed as to the terms, what are the terms, did the artist understand what he or she was agreeing to and so on. While these issues also are relevant where there is a written document, they are more manageable and it is more difficult for the person dealing with the Indigenous artist to vary the agreement unilaterally to suit their convenience or otherwise to avoid their responsibilities. From the perspective of enforcement and governance, requiring Code sanctioned agreements to be in writing simplifies the assessment as to whether an agreement did or did not meet the Code's best practice standards and makes it easier for the Indigenous artist to obtain advice on their rights. The experience of AITB is that many Indigenous artists are quite unclear as to what they may have agreed and, absent documentation, there is no way to ascertain that and therefore little prospect of providing them with useful assistance or recourse. We would not expect that written agreements would be opposed by dealers who also stand to benefit as a written document creates a clear understanding as to the terms governing the relationship between artist and dealer.
3. It is our view that the Code should impose on the dealer a responsibility to explain the terms of any proposed agreement. This should be coupled with an obligation to recommend that artists seek, and have the opportunity to obtain, independent legal advice. Again, our experience is that a large proportion of Indigenous artists, particularly those in remote and regional areas, are disadvantaged educationally and socially and often do not ask questions or understand the terms of an agreement.
4. Further, special allowance needs to be made where the artist's spoken or written English is poor. We have advised one very senior artist in Arnhem Land who believed the document he signed (with a cross as he neither read nor wrote English) was a sale document for his painting. In fact, it also purported to assign all his copyright to a third party who produced photographic reproductions for sale over the internet with no further royalty or payment. Arts Law's view is that in circumstances where an artist cannot sign his or her name, is illiterate or has poor English skills, the Code should prohibit a dealer from entering into an agreement unless the artist is accompanied by a friend or family member who can understand English and can, if necessary, explain or translate the agreement.
5. We recommend a register be established, accessible on the internet, which lists

dealers which meet the Code's best practice standards. This would be useful for Indigenous artists as a means of checking on a prospective dealer and also for members of the public who can be satisfied they are dealing with a reputable dealer.

6. A nationwide education program to explain the implications and operation of the Code to Indigenous artists is critical. For the Code to provide effective protection, the artists need to understand their own position under it and the best practice standards of conduct they are entitled to expect in their dealings with dealers. Such education programs should also extend to dealers and members of the public.
7. Currently the Code applies to agreements directly with the Indigenous artist. Depending on the meaning given to artist's representative, it is unclear whether it applies to agreements between agents and dealers who represent Indigenous artists (either exclusively or non-exclusively) and other dealers and galleries. We would like it made clear that the Code does apply to such agreements.
8. If a dealer intends to deal with a work that incorporates, is sourced from or refers to Indigenous objects, knowledge or works, Indigenous Cultural Intellectual Property or ICIP should be considered. This is an internationally accepted and understood term which refers to Indigenous people's interests in their cultural heritage, which includes songs, music, dances, stories, ceremonies, symbols, languages and designs. ICIP is a communal rather than an individual interest. The artist who uses ICIP in artwork may have duties and obligations to his or her community or tribal group in respect of that ICIP and the way it is used. ICIP rights are not currently protected under Australian law but there are a number of protocols designed to encourage a best practice of respecting and protecting it. Arts Law believes it is important that the Code acknowledges and respects ICIP and indeed the references to "culturally sensitive information" and "Indigenous cultural practices" in the Code suggest this may be the intention.

The Code should require dealers to act consistently with the ICIP protocols produced by the Australia Council for the Arts *Visual Arts: Protocols for Producing Indigenous Australian Visual Arts* www.australiacouncil.gov.au. Additional protocols include Arts Tasmania's *Respecting Cultures: Working with the Tasmanian Aboriginal Community and Aboriginal Artists* designed as a companion text to the Australia Council's protocols providing a specific Tasmanian perspective. It can be downloaded from the Arts Tasmania website www.arts.tas.gov.au or telephone: (03) 6233 7308, freecall: 1800 247 308 or email: arts.tasmania@arts.tas.gov.au.

9. There are a number of provisions of the Code which may operate unfairly to Indigenous art centres which generally are community based non-profit enterprises that represent artists under a charter which obligates them to act at all times in the best interests of the artist. Many of the commercial best practice provisions in the Code operate to find the correct balance between the dealer's business interests and the artist's interests: however may be unduly burdensome on art centres. We believe this issue needs further discussion. It may be appropriate to exclude community based non-profit Indigenous art centres from the operation of the Code.
10. Finally, Arts Law is disappointed at the exclusion of public galleries from the operation of the Code. We do not believe that public galleries should be held to any lesser standard in their dealings with Indigenous artists. We understand that a separate code is contemplated but the rationale for this is unclear. We see no practical reason why the Code's standards could not be applied to such entities.

Arts Law would like to comment on specific provisions of the draft Code as follows:

Part One- Preliminary

Clause 2 Purpose of Code

The opening sentence refers to the regulation of the conduct of "participants". For uniformity, this should be changed to the defined term "dealers". Participants is not a defined term and the Code does not seek to regulate the conduct of all participants, merely dealers.

Clause 3 Definitions

There are inconsistencies in the definitions of agent, art centre, artist's representative and dealer:

- The words "and includes an art centre" should be added to the definition of **agent** for clarity as this is often the role taken on by an art centre and there may otherwise be some ambiguity as whether this is the case.
- **Art centre** should read "means **an** Indigenous". The words "legally constituted" are unnecessary and could operate to exclude certain art centres, for example where the art centre is merely a business division of a Council or Aboriginal Corporation

with no separate legal standing.

- The definition of **Artist** should read “and does **not** include that artist’s representative”. The current definition of artist’s representative covers the artist’s agent. The effect of this as currently defined would appear to mean that an agent would be relieved of obligations to the artist as he or she would essentially agree with himself or herself. Also, a dealer could make an agreement with an agent without the knowledge or consent of the artist.
- The Code provides no guidance as to the circumstances in which a person is regarded as having authority “to speak for” an artist. We assume that **Artist’s representative** is not meant to cover an artist’s agent as that term is understood in the industry but only a person who stands in loco parentis to the artist such as the parent or guardian of a minor or the guardian of an artist under a disability. If so, this should be made clear. If a broader definition is intended, then the definition of **artist** needs amendment as outlined above.

Commercial art gallery isn’t used anywhere in the Code so we are not sure why it is defined. “Art gallery” is used but not defined. Is that term meant to include art centres which display work for sale to the public? What about dealers who rent space for specific shows? It should also include public galleries.

Culturally sensitive information does not appear to be used in the Code so the purpose of this definition is unclear. There are references to ‘Indigenous cultural practices’ and ‘culturally sensitive artwork’ however these terms are not defined. We suggest this be redefined as Indigenous Cultural Intellectual Property or Indigenous Cultural Heritage. Arts Law uses the following definition:

Indigenous Cultural Intellectual Property (ICIP) means Indigenous peoples’ interests in their cultural heritage, includes songs, music, dances, stories, ceremonies, symbols, languages and designs.

We recommend the inclusion of a definition of **Intellectual property rights** which appears in clause 8 (2)(e) of the Code.

The definition of **Moral rights** should refer to the rights as defined in the *Copyright Act 1968* and include the right against false attribution.

A definition of **Protocols** would be useful. Protocols are referred to in the Code clauses 8(1)(e) and 16(6).

Clause 4 Application

(1) As already indicated, we believe the Code should be mandatory.

(5) This seems unworkable in practice. How will dealers track down artists and arrange an amendment? What about oral agreements? Does the obligation to amend “if required” mean only where the artist asks or wherever there is an inconsistency? We would prefer to see an approach whereby signatories to the Code agree that the provisions of the Code are automatically incorporated into earlier agreements. To the extent such agreements contain terms inconsistent with the Code, the Code should prevail.

(6) The reference to clause 20(1)(3)(c) should read 20(3)(c).

Part 2 Professional conduct

Division 2.1 Dealings with artists

Clause 5

(1) See our comments above on the meaning of artist’s representative. If artist’s representative is within the definition of ‘artist’ then those words are unnecessary.

(2) (b) Delete “unconscientiously”. Delete “special”. Replace “conserve” with “protect”.

(c) Delete “an overwhelming case of”. Arts Law wonders why bullying or thuggish behaviour is acceptable in any circumstances. Replace “and” with “or”.

(j) We suggest specifically referring to tobacco in this clause.

New clause on ICIP

We recommend that clause 15 be relocated to this section. Many of its provisions relate to communications with the artist.

Division 2.2 Agreements with artists

Clause 6

Delete the words “oral or written”. See our general comment 7 above.

Clause 7

Insert the words ‘be in writing and’ after ‘must’. Given that clause 8(4) effectively requires the terms in the template to be handed to the artist as part of the agreement, there will effectively be a written document. In that case, for clarity all the terms should be in one

document. Otherwise the situation where some terms are oral and some written and how to reconcile inconsistencies between what is said and written will be confusing, particularly for the artist.

It is difficult to comment on the efficacy of this clause absent a copy of the style template to become annexure A. We would like the opportunity to comment on that document when available.

Clause 8

All artwork agreements

(1)(b) This sub-clause is more appropriately located in clause 8(2).

Arts Law recommends a new sub-clause (b) reading “the artist’s rights of copyright in the artwork and the terms of any copyright licence”.

(1)(d) Replace the words “ method of payment and timeframes” with “ all matters in clause 10 of the Code”.

Arts Law recommends additional sub-clauses as follows:

“(i) resale royalties under applicable legislation in force:”

“(j) termination.”

Sub-clause 8(4) should be relocated after 8(1) as containing matters applicable to all agreements not just those with art galleries.

Additional requirements for agent agreements

(2)(a) Remove and replace with the wording in clause 8(1)(b).

(2)(e) add “including any licence of copyright in the artwork” .

2(f) Delete “if any relating to” and substitute “including any commission payable in respect of”.

Add a new sub-clause “territory”.

Additional requirements- art gallery agreements

(3) This clause seems directed less at agreements with galleries than at exhibition agreements: agreements for the temporary public display of the artwork whether for sale or not. Such exhibitions may or may not be undertaken by an art gallery. It should be amended accordingly.

(3)(a) Delete the words “artist’s agent and/or artist’s art centre” and replace with “artist” .

Insert “attributed and” before “acknowledged”.

Add a new sub-clause “the display of ICIP notices and other Indigenous cultural heritage issues consistent with applicable Protocols”

(3)(c) add “or other public space” after “gallery” on the opening lines.

Clauses (3)(c)(i)b. and c. appear directed less at exhibition agreements than commission agreements for the creation of an artwork. A separate clause is needed to address issues arising in artwork commission agreements.

(4) This clause applies to all agreements and should be moved to follow clause (1).

Clause 9

(2) This clause is problematic. Generally, if an artist terminates an agreement during the cooling off period, the artist should be entitled to the return of any unsold work subject to the completion of any exhibitions which have commenced. On the other hand, it may take an ethical dealer some time to find the right dealer. We are aware of practices where ‘carpetbaggers’ have persuaded vulnerable artists to cancel arrangements with art centres and ethical dealers for a ready cash sale at grossly low values. Further, art centres often provide facilities and materials and other resources to artists without charge on the basis that such costs are recouped after sale. On balance, our view is that clause (2) should apply to agreements between art centres and artists but not other dealers.

Payment for artists

Clause 10

(1) This clause seems to permit a commercial dealer to ‘lock in’ an artist before agreeing a price or the dealer’s commission for the artwork. If “within 7 days” means within 7 days AFTER delivery, then this is grossly unfair to the artist. The usual practice would be to agree a price and commission prior to, or upon delivery, and that no agreement is reached until price and commission are agreed. The position may be different where an art centre is involved and materials and resources have been supplied for the creation of the work and the art centre is under a separate constitutional obligation to secure the best price for the artist.

(1)(d) We are concerned that there is no requirement for independent verification of market value. We are aware of cases where artists have exchanged art for broken down cars and

disused refrigerators based upon assertions as to reasonable value by the dealer. One possibility is that any 'in kind' payment should be able to be returned within 7 days in exchange for payment of the agreed market value.

(1)(e) The term "remuneration" needs to be changed to "payment" to be consistent throughout the document.

(1)(f) Such costs should be negotiated and agreed with the artist, not just deducted. This should be stipulated in the written agreement.

(2) add the words "or possession of the artwork is given to the purchaser, whichever is earlier".

Inconsistency

Clause 12

Art centres should be able to apply for exemption from the operation of the Code in special circumstances including geographic remoteness, non-profit operation etc.

Provenance

Clause 14

(4) add a further sub-clause reading " A certificate of provenance must contain an ICIP Notice if the artwork contains ICIP".

Respect for Indigenous cultural practices and artist's rights

Clause 15

(1)(a) Replace with "using their best endeavours to honour and respect the ICIP of the artist and the artist's community including but not limited to prominently displaying appropriate ICIP notices with the artwork and any reproductions of the artwork wherever reasonably practicable".

(1)(b)(c) Replace with "using their best endeavours to honour and respect the Moral Rights of the artist including but not limited to:

(i) correctly attributing the artist or artists in accordance with the artist's

Moral Right of Attribution;

(ii) ensuring that any images or reproductions of the artwork displayed on the internet or elsewhere are not used, altered or changed in a way that is inconsistent with the Moral Right of Integrity:"

Moral Right of Attribution and Moral Right of Integrity should be defined.

A new sub-clause should be added as follows;

ICIP notice means a notice in the following form:

Notice of Custodial Interest of the *[NAME]* Community

*“The images in this artwork embody traditional ritual knowledge of the *[NAME]* community. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the *[NAME]* community, and may also breach the Copyright Act 1968 (Cth). For enquiries regarding permitted reproduction of these images, contact *[COMMUNITY]*.”*

Care of artworks

Clause 16

(1) After “reasonable precaution includes having adequate insurance” insert the phrase “that will cover all of the artist’s artworks held by the agent or dealer”.

(2) This is already covered in the sections on provenance and artist’s rights.

(3) & (4) The purpose of these clauses is unclear. They seem to relate to rights held by third parties not the artist and have nothing to do with the care of the artworks.

(5) Insert the words “at the dealer’s cost” after “repair the artwork” and the word “qualified” before “conservator”.

(6) Replace “culturally sensitive artwork” with “artwork containing ICIP”.

(6)(a) This is confusing. The conditions of the Code are not relevant to the purchaser only the dealer or agent.

Add after (6)(b) a new sub-clause reading “a reminder that ownership of the artwork does not entitle the purchaser to reproduce the work and that copyright is retained by the artist.”

(7) We suggest this is better placed after clause 16(1) which also refers to insurance.

Record keeping and reporting

Clause 17

We assume reporting period will be defined in the annexure.

Dealers (other than agents) must provide a statement to artist

Clause 18

(1) We assume reporting period will be defined in the annexure.

(1)(a) Replace the word “quality” with “nature”. This has a well understood meaning eg oil, ochre.

Part 3 Code administration

Dispute resolution

Clause 19

Most Indigenous artists are unable to afford mediation. We recommend that the artist’s participation be funded by the Code, possibly using dealer registration fees. The parties can also be referred to Arts Law’s mediation service.

Thank you again for the opportunity to comment. Please do not hesitate to contact either Robyn Ayres or Delwyn Everard at Arts Law if you have any questions.

Yours sincerely,

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