



ARTS LAW CENTRE OF AUSTRALIA

ACN 002 706 256 / ABN 71 002 706 256

27 November 2006

Dr Ian Holland  
Secretary  
Environment Communications Information Technology and the Arts Committee

By Email: [ecita.sen@aph.gov.au](mailto:ecita.sen@aph.gov.au)

Dear Dr Holland

**Re: Inquiry into Australia's Indigenous visual arts and craft sector**

Thank you for the opportunity to make this submission on behalf of the Arts Law Centre of Australia.

**About the Arts Law Centre of Australia**

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts. Arts Law is a not for profit company limited by guarantee.

Arts Law provides expert legal advice, publications, education and advocacy services each year to more than 5000 Australian artists and arts organisations operating across the arts and entertainment industries.

**About our clients**

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Arts Law recognises the diversity in the arts community and our client base is multi-cultural, and both Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Arts Law also supports artists from across all art sectors, although we acknowledge that the visual arts and crafts comprise the largest group of artists utilising our services (35% of all legal advices).

The comments that we make in this submission are informed by the services we provide to our Indigenous client group. Whilst Arts Law has provided services to Indigenous artists and organisations throughout our 23 years, in January 2003, Arts Law established a service called *Artists in the Black* (**AITB**) specifically for Indigenous artists, their organisations and communities. AITB aims to provide access to legal and business advice, information,

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resources and education relevant to Indigenous arts practices across all art forms. The service employs 2 Indigenous staff, an Indigenous solicitor and an information/liaison officer

### **About our approach to issues affecting artists and other creators**

As an independent organisation giving legal advice to the arts community nationally, Arts Law is in a unique position to comment on the balance between competing interest groups when considering the Indigenous arts and craft sector. Arts Law not only provides advice to Indigenous artists, but also to Indigenous art centres, galleries, curators and other organisations working with Indigenous artists.

Arts Law not only provides legal advice but also has an extensive education program to educate artists and arts workers about legal rights and obligations of the arts sector.

In view of the wide exposure that Arts Law has had to the Indigenous arts and craft sectors, a primary concern continues to be the extent to which Indigenous artists continue to be exploited despite the huge growth of, and economic returns in the Indigenous art market.

### **Executive Summary**

- There is a diverse array of Indigenous practice in Australia, encompassing artists in remote and regional locations as well as artists living in urban and regional centres. A “one size fits all approach” is likely to be inappropriate.
- The Indigenous arts and crafts sector cannot exist without Indigenous communities, art centres and artists and Indigenous arts and crafts is inherently linked to Indigenous culture. Current issues including changes to the permit system for entry onto Indigenous lands, the introduction of a 99 year lease between Indigenous land owners and the Commonwealth government, the Community Development and Employment Projects (**CDEP**) system and the inadequate legal protection currently afforded to ICIP are likely to negatively impact Indigenous culture.
- Art Centres play an integral role in developing the artistic practices of Indigenous artists, maximising financial returns and ensuring Indigenous culture is maintained and protected.
- The sustainability and development of the Indigenous art and crafts sector is only possible with the reduction of current exploitative practices. Indigenous artists are often faced with an unequal bargaining position when entering into contracts for the sale, distribution and licensing of their work. Accordingly, a regulatory framework is needed to minimise unconscionable practices.
- The lack of regulation of participants in the Indigenous arts industry and lack of recognisable authenticity protection mechanisms impacts negatively on the financial viability of the Indigenous art and crafts sector.
- A system of labelling Indigenous art and crafts should be explored in consultation with Indigenous communities.
- Mandatory licensing regulation together with an industry code of practice would protect artists and consumers and is vital to the continued success of the Indigenous art and crafts sector.
- Financial success and sustainability is more likely when Indigenous artists and communities are fully aware of their rights and are able to negotiate the terms of purchase and use of their work. Increased access to legal, financial and management education and advice services is critical to informing artists.
- Indigenous arts organisations, services and programs need additional resources to successfully contribute to the sustainability of the sector.

- Greater use should be made of laws against misleading and deceptive conduct. An increase in the involvement of the ACCC and other law enforcement agencies in policing this conduct would encourage ethical conduct in the Indigenous art sector.
- The introduction of legislation dealing with resale royalties, Indigenous Communal Moral Rights (ICMR) and Indigenous Culture and Intellectual Property, as well as Australia becoming a signatory to a number of international treaties will also strengthen the legal protection afforded to Indigenous artists.

#### **(a) The current size and scale of Australia's Indigenous visual art and craft sector**

Arts Law notes that insufficient research exists on the size and scale of the Indigenous art and craft sector. Of the economic data available, in 2002 the annual total value of the industry was broadly estimated to be between \$100 and \$300 million.<sup>1</sup>

However, there are indicators that the sector is growing rapidly. The Department of Communications, Information Technology and the Arts' (DCITA's) recent publication, the *Indigenous Visual Arts and Craft Resource Directory 2006* lists 116 Indigenous art centres and 104 commercial galleries and auction houses dealing with Indigenous art. The 2006 edition of *McCulloch's Encyclopaedia of Australian* has increased its entry on the Indigenous art sector to 200 pages, up from eight pages in 1994.

Furthermore, Arts Law's Artists in the Black service provides legal advice and education to Indigenous artists and communities throughout Australia and Arts Law staff have visited every State and Territory in Australia to meet with Indigenous artists and organisations. In the three years AITB has been operating, Arts Law staff have had contact with more than 2500 Indigenous people through our educational workshops and legal advice services.

Over the 28 months of provision of educational services, Arts Law has provided more than:

- 60 workshops for Indigenous artists;
- in 40 different geographical locations around the nation; with
- 2,200 Indigenous participants.

While Arts Law is not able to quantify the size and scale of the Indigenous art and craft sector we have a very good appreciation of the issues which arise in sector.

The AITB legal advice service provides:

- telephone legal advice using our in-house Indigenous solicitor and other Arts Law lawyers (more than 300 legal advices to date);
- extended advice sessions (which are often conducted as face to face sessions) with the assistance of volunteer lawyers around Australia (200 lawyers on Arts Law's national volunteer panel); and
- casework assistance in more than 25 substantial matters.

The demand for AITB services continues to grow as more Indigenous artists and communities become aware of the services available to them. In 2006, Arts Law has 308 Indigenous subscribers, an increase of 91% on 2005 (161).

#### **(b) The economic, social and cultural benefits of the sector**

<sup>1</sup> Altman et al, *Some Competition and Consumer Issues in the Indigenous Visual Arts Industry*, 2002, p 3.

Arts Law acknowledges the social, cultural and economic benefits which flow from a healthy Indigenous arts industry to its many participants. The 2002 *Report of the Contemporary Visual Arts and Craft Inquiry (Myer Report)* notes that the arts play a significant role in Indigenous communities and that: “[t]he rewards of promoting and supporting traditional cultures are out of all proportion with the resources necessary to do so”.<sup>2</sup> This is an observation which Arts Law strongly agrees with.

The Indigenous arts and crafts sector is a cornerstone of Australia’s cultural identity at both a domestic and international level. The range of benefits flowing to the community include the financial gains enjoyed by stakeholders in the art markets, as well as the sense of national identity provided to the Australian community more broadly as they enjoy the fruits of Indigenous arts.

At the “fine art” end of the spectrum, Australian Indigenous visual arts collections form the centrepieces in both international and national art galleries with two prime examples being the National Gallery of Australia, Canberra and the newly opened Musee du Quai Branly in Paris. The Indigenous arts are also used as powerful symbols in our Government buildings and courts to demonstrate the inclusion and appreciation of Indigenous culture by Australia’s decision-makers, with two high profile examples being the mosaic by Aboriginal artist Michael Nelson Tjakamarra in the forecourt of Parliament House, Canberra and a display of Indigenous art in the foyer of the Supreme Court of the Northern Territory.

Auction houses and arts dealers are developing their Indigenous arts businesses in view of robust economic returns. Examples include Sotheby’s Indigenous art auctions held in London, Paris and Melbourne, Lawson Menzies regular auctions of Aboriginal Fine Art, and the annual Aboriginal and Oceanic Art Fair. In July 2006, a Rover Thomas painting was sold for A\$660,000.

The Indigenous arts and craft sector is also used to showcase Australia in relation to national and international events. For example, in 2000 the opening ceremony for the Sydney Olympic Games focussed on Indigenous themes and many international tourists left with mementos of quintessential Australiana, taking with them souvenirs of Indigenous Australia. However the tourism industry is not limited to the souvenir market. There is also a rapidly growing Indigenous tourism market with Australian and international visitors wanting to have a greater appreciation and understanding of Indigenous culture and the arts.

Indigenous arts, crafts and culture feed these varying aspects of the market and none of it would be possible without the Indigenous communities, the art centres and their artists.

### Indigenous Art Centres

To a large extent the Indigenous visual arts sector has been built on the backbone of the Indigenous art centres which provide crucial support and development for Indigenous artists. Indigenous art centres often play a key role in bringing economic returns to Indigenous artists and their communities through:

- the development of artists’ skills;
- promotion of the work of artists and the art centres to the market;
- connecting artists with the market; and
- the development of databases to assist with protection and provenance of the work.

The DCITA Resource Directory provides a fairly comprehensive guide to 116 Indigenous art centres that are currently operating.

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<sup>2</sup> Rupert Myer, Report of the Contemporary Visual Arts and Craft Inquiry (*Myer report*), p52.

Arts Law points to the success of many arts centres which act as a focal point for the community. Not only do the art centres provide employment and bring economic benefits to the community from the sale of Indigenous art works, but they also play an important role in:

- providing support for Indigenous culture;
- keeping culture alive and protecting culture; and
- providing an opportunity for skills and knowledge to be passed from senior artists to younger artists.

The art centres also provide a forum for community participation and decision making in an enterprise where the benefits are returned to the community. A good example of this is at Arleheyarengge Art Centre, Ali Curung, west of Alice Springs in which sales are returned to the community. With these funds, the centre provides the following services:

- Women's Art and Craft Centre;
- Safe House (provides refuge for women);
- Home Makers Centre (provides meals on wheels);
- Respite Centre (provides services to the elderly);
- Community Housing Program;
- Sports and Recreation Program; and
- Parks and gardens.<sup>3</sup>

Another example is Nyinkka Nyunyu art and culture centre which was established by the Julalikari Council Aboriginal Corporation in 1995. It is a community project and was made possible by the collaboration of local elders. The centre was established under the following terms:

- it must be an alcohol-free area;
- the development must recognise that this is Warumungu land;
- the centre should tell the history of the Warumungu people from an Aboriginal perspective;
- to create a place where young people can learn from old people as well as learn dance and traditional skills; and
- for young people should be involved in this project and learn how to manage this place one day.<sup>4</sup>

#### Artists in urban and regional centres

The Indigenous arts and craft sector is not only comprised of the artists and art centres in the regional and remote locations of the Northern Territory, South Australia and Western Australia. There are also Indigenous arts and craft industries, established and developing, in urban and regional centres. These artists and support organisations play an important role in bringing greater recognition of the diversity of Indigenous cultures in Australia. In Sydney, the Indigenous artists cooperative, Boomalli, has been operating for almost 20 years and supports urban and rural artists from NSW. There are also a growing number of independent Indigenous artists achieving artistic and financial success, and although their work is not from a "traditional" genre, their connection to Indigenous culture is still integral to their work.

#### Prisons

The prison system is an important area where the benefits of participation in Indigenous arts and crafts should not be overlooked. Art programs in prisons and detention centres often

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<sup>3</sup> Arleheyarengge Art Centre, <http://www.alicurungarts.com/>

<sup>4</sup> Nyinkka Nyunyu art and cultural centre, *About us*, <http://www.nyinkkanyunyu.com.au/history.htm>

provide an avenue for Indigenous prisoners to achieve a better appreciation of their own culture through the arts and to develop a means of employment when they leave the prison system.

#### Arts Law's service

Arts Law's AITB service provides legal and business advice to artists and arts organisations across this diverse array of Indigenous artistic practice. Arts Law recognises the significant benefits that can be achieved particularly, when work is brought to market using responsible and sustainable practices.

### **(c) The overall financial, cultural and artistic sustainability of the sector.**

As discussed above, the market for Indigenous arts and crafts is strong but in order to be financially sustainable it needs to be built on sound and responsible practices in which artists are properly rewarded for their contribution to the industry.

#### **Challenges to the sustainability of the sector**

The lack of regulation of dealers of Indigenous arts and crafts, together with the exploitative practices in some places, threatens the financial viability of the Indigenous art sector. In addition, lack of recognisable authenticity protection mechanisms will have a further impact on the financial sustainability of the Indigenous visual arts sector. For example, when senior artists are brought from remote communities into town by unscrupulous dealers, and housed in "sweat shop" conditions in order to quickly produce works with the assistance of family or other Indigenous artists, they are away from their homes, country and the cultural reasons for creating art. As a consequence, the work may be of poor quality, as the aim is only to maximise financial returns as quickly as possible. This practice not only creates authenticity problems but will lead to a devaluation of Indigenous art and the reputation of the artists involved.

#### Ensuring artists are appropriately remunerated

There is an argument that Indigenous artists should be free to exchange their artwork for whatever returns they are able to obtain within a free market framework. However, this has led to instances of gross underpayment, the exchange of paintings for food and other items, unfair contracts and unduly large commissions being taken by galleries and dealers. Often Indigenous artists are extremely disadvantaged in the transaction process as a result of limited English language and business skills coupled with unscrupulous operators. These scenarios generally occur outside the Indigenous art centre situation. Arts Law is regularly asked to advise artists who have not been appropriately paid by the people to whom they have provided work. Examples include:

- a dealer providing an artist with canvases and paints and the artist never being paid for the final work;
- artists signing contracts with unfavourable conditions where the artist has minimal English language skills;
- artists exchanging paintings for food in order to feed themselves and their family;
- artists exchanging paintings for alcohol and drugs, including Viagra; and
- artists being pressured to sign blank canvases.

#### Regulation of authenticity

Another major issue affecting the financial viability of the industry is the lack of regulation as to the authenticity of Indigenous art works. In order for the market to be financially stable, buyers or “consumers” of Indigenous art need some guarantee that the work purchased is that which it is promoted as being. The lack of certainty about the authenticity of Indigenous art works clearly has an impact on the value of work in the market.

Arts Law regularly provides advice on issues of authenticity. Ongoing issues in relation to authenticity include situations in which:

- work is represented as being made by Indigenous artists but in fact is made by backpackers or has been imported from overseas;
- work is sold as “Indigenous-style” art but is imported from overseas;
- galleries displaying counterfeit authenticity certificates with the appearance of Government endorsement including the Australian coat of arms;
- Indigenous artists are required to hold up art works they have not produced for authenticity certificates; and
- counterfeit artworks are sold bearing a well-known artist’s name which they haven’t produced.

Significantly, research by criminologist Ken Polk, found no examples of fraud or authenticity problems in works that had been generated through the community art centres.<sup>5</sup> Despite the demise of the label of authenticity trademark in the 1990s, this issue needs to be re-examined. It may be that a range of options dealing with authenticity are required given the regional differences.

#### Development of a sector which yields financial benefits to stakeholders while respecting and protecting Indigenous culture

Indigenous arts and crafts are inherent to Indigenous cultural practice. Conversely, without Indigenous culture, communities and artists the Indigenous arts and craft sector would not exist. The challenge is to develop the Indigenous art and crafts sector in a way which yields significant financial benefits to Indigenous and non-Indigenous stakeholders while respecting and protecting Indigenous culture.

This challenge relies on the operation of two very different cultural paradigms and there is a need for strong connecting bridges to be built to ensure the simultaneous financial and cultural sustainability of the industry. This is where the Indigenous art centres play an integral role. One often hears it said that it is where there is a strong art centre that there are good outcomes for the artists and the community. As has been noted above, the art centres play a broader role than just developing the artistic practice of the artists and maximising financial returns. Good art centres also play a role in ensuring culture is maintained and protected.

Artistic and cultural sustainability are likely to be threatened if Government and dealers in Indigenous art and crafts do not support Indigenous culture and recognise the value that Indigenous art centres play in Indigenous art and crafts sector. Moves to by-pass the art centres or to remove senior artists from their community, including instances in which galleries “cherry-pick” well-known or up-and-coming artists, can have a detrimental effect on the artistic and financial outcomes for a community. It is not possible for Indigenous arts and crafts to thrive if they are removed from culture. Art practices must be developed and strengthened *within* communities and their art centres as this provides the foundation for the artists to flourish.

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<sup>5</sup> Kenneth Polk and Christine Adler, *Authenticity and Aboriginal Art*, Paper presented at Australian Registrars Committee Conference, 2001, University of Melbourne.

## Social disintegration

The higher the level of social disintegration within an Indigenous community, the more likely it is that the artistic and cultural sustainability of their Indigenous arts and craft practice will be affected. While this issue is beyond the scope of the current Inquiry, there are some initiatives which have the potential to impact in a negative way upon the maintenance of Indigenous culture. Arts Law does not have the resources to examine these issues in detail but we have concerns about the negative impact that the following initiatives may have.

### **(i) Permit system**

The current permit system for entry on to Indigenous lands is being reviewed by the Commonwealth Government. While Arts Law is unable to comment on what changes need to be made to the permit system, we are aware that there are already unscrupulous operators who would be able to take even greater advantage of Indigenous artists and communities if there is regulation of their comings and goings from communities.

### **(ii) 99 year leases**

The introduction of 99 year leases between traditional owners and the Commonwealth Government may also affect social cohesion and the maintenance of culture in Indigenous communities, if they are introduced in a way that the traditional owners are disempowered within their communities.

### **(iii) CDEP**

The new system of Community Development and Employment Projects (CDEP) program is problematic for the financial viability of many artists and the CDEP providers with whom they are working. The CDEP system does not reflect the reality of job and business prospects for Indigenous people in regional and remote Australia, with CDEP participants expected to move into real jobs after 52 weeks on CDEP. There is also a need for recognition that some CDEP programs are more effective than others in supporting artists. In addition, more attention must be given to supporting artists to achieve professional arts practices through appropriate contractual arrangements which address the roles and responsibilities of artists and CDEP providers, particularly in terms of:

- ownership of art works;
- payment for art works sold by the CDEP provider;
- ownership of intellectual property;
- amount of commission taken by CDEP provider;
- promotion of the artist; and
- provision of business and professional skills.

### **(iv) Lack of adequate protection of Indigenous Culture and Intellectual Property (ICIP)**

The inadequate protection of ICIP has been well documented in reports including Terri Janke's *Our Culture Our Future*,<sup>6</sup> which contains practical reform proposals for the improved recognition and protection of ICIP. This is an ongoing problem for Indigenous artists and communities, which has a detrimental impact on both cultural and financial outcomes for artists. Some of the main concerns about ICIP include the:

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<sup>6</sup> Terri Janke, *Our Culture Our Future*, Michael Frankel and Co, 1999



- duration of copyright protection (life of artist and 70 years) in view of longevity of Indigenous culture (40,000+ years);
- lack of copyright protection for Indigenous communities in art and craft works;
- lack of protection for the traditional knowledge of communities contained within art and craft works (including the introduction of effective Indigenous Communal Moral Rights (**ICMR**));
- lack of understanding by the non-Indigenous world of collective ways in which some artworks may be produced which may potentially affect authenticity;
- potential for mining and other commercial interests to trump heritage protection; and
- potential for non-Indigenous interests to exploit Indigenous words, names, symbols and other aspects of culture without any redress for Indigenous custodians.

Arts Law recommends that the sustainability of the sector requires appropriate, responsible practice of Indigenous art and craft at each stage of the process from creation of the works through to sale and resale. Financial success and sustainability are more likely when artists and communities are fully aware of their rights and are able to negotiate the terms of purchase and use of their artwork.

#### **(d) The current and likely future priority infrastructure needs of the sector**

As referred to above, Australia's Indigenous visual arts and craft sector is not a monolithic industry. Rather, it reflects the multifarious Australian Indigenous nations, language and cultural groups, including peoples from remote and regional Australia, as well as those in urban communities. The history of Australia has been misguided in its treatment Australian Indigenous peoples as a single group. Arts Law recommends that any government response to the infrastructure which supports and regulates Australia's Indigenous visual arts and craft sector must take into account the multifarious nature of Indigenous Australians. One size does not fit all.

Beyond the need for physical infrastructure, including galleries and buildings to house arts centres, are the overarching future priority infrastructure needs of the sector. We have identified these needs as:

##### **(i) Freedom of contract and appropriate remuneration**

The current and likely future priority infrastructure needs of the sector must at first instance serve the dual goals of:

- promoting Indigenous artists' freedom to choose the commercial arrangements they enter into for the promotion, sale and distribution of their art and craft; and
- ensuring appropriate remuneration is received by Indigenous artists for the sale of their art and craft.

These priorities are inseparable. As mentioned above, the irregularities which mar the sector arising from unscrupulous and unethical conduct, inevitably jeopardise Indigenous peoples' freedom to contract and are often characterised by scenarios in which Indigenous artists and craftspeople are not adequately remunerated for their work.

In Arts Law's view, infrastructure which prioritises freedom of choice but fails to ensure that Indigenous artists are appropriately remunerated will only exacerbate the irregularities currently within the Indigenous arts and craft sector. Although an unregulated "free trade model" provides Indigenous artists with a choice of commercial arrangements, this model assumes that each party to a commercial transaction has equal bargaining power. In Arts

Law's view, many artists, and Indigenous artists in particular, are not in an equal bargaining position to those with whom they contract for the promotion, sale and distribution of their art and craft. Accordingly, Arts Law recommends that a "free trade model" must be tempered by a regulatory framework which ensures that Indigenous artists are appropriately remunerated.

### **(ii) The art centre model**

The diverse nature of the Indigenous communities which support the visual arts and craft sector is evidenced by the 116 Indigenous art centres listed in the Australian Government, Department of Communications, Information Technology and the Arts (DCITA) *Resource Directory 2006*. DCITA recognises that supporting the arts and crafts centres in accordance with the *Indigenous Arts Centres Strategy and Action Plan* will build a strong and sustainable Indigenous visual arts sector. DCITA recommends that "buying art directly from indigenous arts and crafts centres means the majority of income from sales will pass directly to the artists."<sup>7</sup>

Accordingly, Arts Law supports the art centre model as an effective means by which Indigenous artists and craftspeople are appropriately remunerated for their work. It is a model which recognises and supports the diverse nature of Indigenous communities and their individual cultural practices. Furthermore, the art centre model provides a point of sale for multiple artists thereby improving the artists' bargaining position with purchasers, whether they are dealers, galleries or individuals. While there may be a need to regulate art centre practices, Arts Law submits that the current and likely future infrastructure needs of the Indigenous arts and crafts sector require support, development and regulation of the art centre model both in remote and regional communities as well as urban communities.

Arts Law acknowledges that the Association of Central Australian Aboriginal Art Centres (**Desart**) and the Association of Northern, Kimberley, Arnhem Aboriginal Artists (**ANKAAA**) provide a galvanizing framework for the Indigenous visual arts and crafts sectors in Central Australia and the "Top End". These organisations are in turn supported by and provide support to the various art centres in these regions. As mentioned previously, similar associations operate in South Australia, Queensland, Western Australia and New South Wales.

The success of these associations suggests that this galvanizing framework strengthens the effectiveness of the art centre model. The governance bodies of these organisations include artist representatives and the organisations themselves have been active in promoting ethical business practices in the Indigenous art industry.<sup>8</sup> In this way, these organisations work to promote the twin goals of promoting artists' freedom to choose the commercial arrangements they enter into for the promotion, sale and distribution of their art and craft and ensuring appropriate remuneration is received by Indigenous artists for the sale of their art and craft.

### **(iii) Mandatory licensing scheme and enforcement mechanisms**

As mentioned above, Australian law often protects people in vulnerable situations from exploitative practices. Consumer protection laws together with licensing regimes for the provision of legal, medical, accounting, auctioneering, real estate and motor dealer services, amongst others, are commonplace examples of ways in which the government protects not only consumers but also practitioners and the integrity of sectors in which they work.

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<sup>7</sup> Australian Government, Department of Communications, Information Technology and the Arts (DCITA) *Indigenous Visual Arts and Craft 2006* at 13.

<sup>8</sup> *Ibid.*

In Arts Law's view, the same needs to be done in relation to the Indigenous arts and crafts. Mandatory licensing regulation, together with an industry Code of Practice such as the one being developed by the National Association for the Visual Arts (NAVA), ANKAAA and Desert, would protect both practitioners as well as consumers. Voluntary regulation schemes do not adequately protect against the manufacture and sale of counterfeit Indigenous art and craft. There is scope for a mandatory regulatory regime administered by a National Indigenous Cultural Authority.

In addition, Arts Law submits that the following enforcement measures should be harnessed to ensure ethical conduct in the Indigenous arts and crafts sector:

- greater use of sections 52 and 53 of the *Trade Practices Act 1974* (Cth) in dealing with cases of misleading and deceptive conduct;<sup>9</sup>
- the ACCC should play a greater role in policing infringements;
- communal authorship<sup>10</sup> and the advertising and labelling of Indigenous arts and craft needs to be reviewed in consultation with Indigenous people;<sup>11</sup>
- greater use should be made of State based Fair Trading systems; and
- strengthening customs procedures to prevent the importation of counterfeit goods from foreign jurisdictions, particularly South East Asia, including specific provisions for customs officers in detecting and collecting counterfeit Indigenous materials.

Additional strategies and mechanisms which would support and develop the infrastructure needs discussed above are outlined in further detail below.

**(e) Opportunities for strategies and mechanisms that the sector could adopt to improve its practices, capacity and sustainability, including to deal with unscrupulous or unethical conduct.**

The following strategies and mechanisms should be considered as part of a comprehensive strategy in support of the current and likely future infrastructure imperatives described in response to (d) including, the introduction of a licensing scheme and enforcement mechanisms:

- adoption of a Code of Practice for the Indigenous Arts and Crafts Sector as a condition of any Indigenous art and craft sector licensing regime;
- increased access to legal, financial, management education, advice and services;
- introduction of Indigenous Communal Moral Rights legislation;
- introduction of a *droite de suite* (resale royalty) scheme;
- introduction of a National Indigenous Cultural Authority;
- introduction of a label of authenticity;
- *sui generis* legislation for Indigenous culture and intellectual property; and
- Australia should become a signatory to certain International instruments for the protection of Indigenous cultural heritage.

<sup>9</sup> Altman et al, Some competition and consumer issues in the Indigenous visual arts industry, 2002, p 30.

<sup>10</sup> Mark Rimmer, *Australian Icons: Authenticity Marks and Identity Politics*, Indigenous Law Journal (3) Fall 2004, p 151.

<sup>11</sup> Altman et al, p. 174.

**(i) Adoption of a Code of Practice for the Indigenous Arts and Crafts sector**

Arts Law recommends the adoption of a Code of Practice for the Indigenous Arts and Crafts sector as a condition of any Indigenous art and craft sector licensing regime. Currently, the City of Melbourne has introduced a Code of Practice for use in galleries in Melbourne. As mentioned above NAVA is developing a National Indigenous Art Commercial Code of Conduct in partnership with Desart and ANKAAA. Arts Law recommends the introduction and adoption of a national Code of Conduct for commercial dealings with Indigenous art and craft.

**(ii) Increased access to legal, financial and management advice and services**

In addition to the infrastructure imperatives described above, the sustainability of the Indigenous art and craft sector and the minimisation and regulation of unscrupulous and unethical behaviour requires increased access to legal, business, financial and management advice, education and services.

Additional resources need to be applied to ensure Indigenous artists, art centres and other organisations that support them have access to education and information about these issues. Arts Law's service is an example of a national service that could provide more assistance if additional resources were dedicated to it.

Access to Legal Advice

Arts Law is aware of Indigenous artists being signed directly by galleries without the assistance of a lawyer, business advisor or suitably qualified person from the local art or community centre. Many of these contracts are drafted in terms which unduly favour the gallery owner. However, artists may be unaware of this inequity if they are unable to read the contract and have not had access to legal advice. Access to proper advice may benefit both the artists and the gallery, with the artist having a better understanding of their obligations and responsibilities towards the gallery.

As outlined above, Arts Law's AITB service provides free legal advice services, legal education and advocacy services to and, on behalf of, Indigenous artists and arts organisations throughout regional and remote Australia as well as urban communities across the country. It is the only national service of its kind, staffed by an Indigenous lawyer and an Indigenous information officer and is well placed to service this need within the Indigenous art and craft sector.

Access to business and industry advice

Arts Law and other bodies such as NAVA, Viscopy and the Australian Copyright Council provide industry advice. In Victoria, the Koori Business Network (**KBN**) also runs programs to assist the promotion and development of Indigenous arts and cultural businesses. In the NT, SA and WA the umbrella arts organisations of ANKAAA and Desart provide invaluable services to the art centres in their regions. Ananguku (**Ku Arts**) in South Australia has been developing a similar role as has UMI Arts in Queensland in recent times. Much more is needed to ensure these organisations can provide services and continue to contribute to the sustainability of the sector by supporting artists and art centres.

In addition artists need information on accessing appropriate government bodies which are responsible for providing funds and services for communities and individuals.

Access to education

Arts Law's AITB service currently provides training for Indigenous artists, art centres and arts organisations on a range of business related topics including:

- Income streams for artists including the operation of art centres;
- copyright and moral rights;
- ICIP;
- licensing;
- contracts;
- marks of authenticity;
- governance;
- business structures, names and domain names;
- trademarks;
- insurance and tax advice;
- employment issues; and
- wills and estates.

Arts Law provides these services across Australia. Due to the isolated location of many communities, Arts Law solicitors must travel to these communities in order to provide education, legal and business advice. Adequate resources are required to fund current infrastructure requirements, such as the AITB program. AITB is funded through the Australian Council for the Arts received \$125,000 in 2006. This is supplemented by short-term project funds, an unsustainable funding model.

Arts Law recommends any funds for training go to organisations currently delivering services to Indigenous communities rather than allocating new funds to organisations without appropriate background, expertise or staffing in this area.

**(iii) Arts Law recommends the introduction of adequate Indigenous Communal Moral Rights (ICMR) legislation**

The enactment of ICMR legislation will enhance protection for Indigenous artists and communities through the course of commercial dealing. However, ICMR legislation should only be introduced after the findings of this Inquiry and tabled and after adequate consultation with relevant stakeholders. We note that the Government's 2003 exposure draft bill was problematic in many ways.

**(iv) Arts Law advocates the introduction of a *droite de suite* scheme, also known as resale royalties.**

Despite the recent rejection of a resale royalty scheme by the government, Arts Law continues to advocate for the introduction of such a scheme. Arts Law continues to support the findings of the *Myer Report*, which recommended the introduction of a resale royalty scheme, noting that it would provide significant economic returns for artists and their families, especially for Indigenous artists.<sup>12</sup>

A resale royalty scheme would address the current imbalance between first and subsequent sales of Indigenous works, which may be suggestive of the inappropriately low first sale price of the work as a result of unequal bargaining power between the artist and the first purchaser. For example, Clifford Possum Tjapaltjarri's work *Emu Corrobooree* was originally sold for \$100, and later resold for \$411,750. None of the profits made their way back to the artist, the artist's family or community.

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<sup>12</sup> *Myer Report*, p167.

One only has to look at ongoing results from auction houses for Indigenous art, to appreciate the significant injection of funds resale rights would provide for Indigenous communities. Voluntary resale schemes instituted by some auction houses under which arts foundations receive resale royalty equivalents for benevolent projects, underestimate the ability of communities to establish ways of developing arts and cultural infrastructure. Previous examples such as the Arleheyareng Art Centre illustrate the value of returning funds directly to communities.

**(v) The introduction of a National Indigenous Cultural Authority, as advocated by Terri Janke's *Our Culture: Our Future***

The purpose of a Cultural Authority would be to regulate the Indigenous art and craft industry, provide legal and cultural information, authorise the use of Indigenous cultural material and raise public awareness.<sup>13</sup>

**(vi) Re-introduction of a label of authenticity as an important protection mechanism for Indigenous art and craft.**

Arts Law recommends that a label of authenticity should be reconsidered and points to the success of in the *toi iho* Maori Made Mark in New Zealand and the *Igloo* trademark in Canada. Both programs are administered by government departments.

A label of authenticity would ensure the cultural and financial sustainability of the sector, as well as providing consumer protection. However, several lessons must be learned from the unsuccessful implementation of the now defunct Label of Authenticity administered by the former National Indigenous Arts Advocacy Association (**NIAAA**):

- the test for Aboriginality was overly complex, with more than 75% of applicants unsuccessful;
- the definition of authenticity was problematic as it did not differentiate between Indigenous authorship and authenticity/originality;<sup>14</sup>
- the Label failed to distinguish between fine art and manufactured tourist art;<sup>15</sup> and
- a "one size fits all" centralised system fails to acknowledge the different needs and situations of Aboriginal communities around Australia.

Arts Law recommends that regional models such the Desert seal and Certificates of Authenticity are considered and notes the importance of community consultation in this process.

**(vii) Introduction of *sui generis* legislation for ICIP, administered by a National Indigenous Cultural Authority.**

*Sui generis* legislation would provide significant, tailored protection for ICIP and should legally recognise the following:

- communal ownership;
- intangible form;
- time limitations;
- artistic styles; and

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<sup>13</sup> Terri Janke and Robin Quiggin, *Indigenous Cultural and Intellectual Property: the main issues for the Indigenous arts industry in 2006*, 10 May 2006, p 49.

<sup>14</sup> Norman Wilson, Submission to the Myer report, p 8, quoted in Mark Rimmer, *Australian Icons: Authenticity Marks and Identity Politics*, *Indigenous Law Journal* (3) Fall 2004, p158.

<sup>15</sup> Jon Altman, *The Indigenous Visual Arts Industry: Issues and prospects for the next decade*, quoted in Rimmer, p 158.

- protection against Indigenous cultural materials being used without appropriate consent of custodians.

**(viii) Australia should become a signatory to the following International instruments:**

*UNHCR Declaration on the Rights of Indigenous Peoples*

The Declaration is significant to Indigenous Australian artists as it clearly identifies the rights of Indigenous people to practice and maintain cultural traditions and customs, including traditional arts, crafts, languages and oral traditions.

The Declaration ensures protection by articulating the obligations of the state to uphold Indigenous peoples' cultural rights.

*UNESCO Convention for Safeguarding Intangible Cultural Heritage*

The Convention aims to acknowledge the importance of living communities and individuals as custodians of Intangible Cultural Heritage.

Arts Law supports the introduction of a list of the 'Intangible Cultural Heritage of Humanity' following the success of the 'World Heritage Listed' sites under the auspices of the World Heritage Convention, of which Australia is a signatory.

*UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*

The Convention acknowledges the importance of protection of cultural traditions and languages at risk of extinction.

Arts Law does not believe that there is sufficient reason to oppose the Convention on the grounds that it would undermine Australia's existing international trade responsibilities. Article 20(2) specifically provides for the accommodation of pre-existing legal obligations under international law. Arts Law points to the adoption of the Convention by over 140 states, including the U.K, as proof of its viability.

**(f) Opportunities for existing government support programs for Indigenous visual arts and crafts to be more effectively targeted to improve the sector's capacity and future sustainability**

While Arts Law recognises the current support provided by the Commonwealth, State and Territory governments for programs for Indigenous visual arts and crafts, there is scope for further support and the ability to more effectively target and improve the sector's capacity and future sustainability. Existing organisations are well placed to provide the additional support for the much needed strategies and mechanisms proposed in sections (d) and (e) above. These include the following:

**(i) Co-ordinated and increased funding for art centres and regional associations**

There is a fundamental need for increased and guaranteed funding for Indigenous arts and cultural centres to facilitate sustainable development of the industry at a community level. This includes increased and co-ordinated funding for regional associations such as ANKAAA, Tiwi Art Network (TAN), Desart, Ku Arts, Umi Arts and other organisations which

represent, co-ordinate and support the work of Indigenous artists and cultural centres in various regional and remote communities around Australia.

#### **(ii) Increased funding for Arts Law and the AITB service**

Increased funding would enable Arts Law to increase access to legal resources for Indigenous artists, arts centres and other organisations. This includes increased funding for legal information sheets in Indigenous languages, advising artists on their legal rights and how to protect their arts and crafts. Further funding would also enable Arts Law to develop sample agreements empowering artists to use legal agreements when dealing with galleries, agents, dealers and commissioners.

#### **(iii) Increased funding for litigation and access to justice**

Increased funding for prosecution, litigation and enforcement of indigenous artists rights would greatly increase the sector's capacity and future sustainability. This includes addressing issues such as:

- access to legal representation;
- geographical impediments to gaining legal access to representation;
- encouraging Indigenous artists to feel empowered by the Australia legal system;
- increasing awareness and knowledge of Indigenous artist's legal rights;
- tackling the problems faced by Indigenous artists dealing with overseas infringements; and
- addressing the lack of funds available to artists seeking to enforce their legal rights in the Australia courts.

Dramatically increasing funding to organisations such as Arts Law and the AITB service would enable Arts Law to employ a number of experienced litigation solicitors who could take on these matters and pursue them in the courts. Funding would also need to take into account the expenses involved in running cases for Indigenous artists and arts organisations from around Australia. As this inquiry will demonstrate, there is a clear need for greater support of Indigenous artists and arts organisations wishing to commence proceedings against infringers and those engaging in unscrupulous and illegal practices.

#### **(iv) Support by law enforcement agencies**

Encouraging and providing support for Indigenous artists and arts organisations to enforce their legal rights also requires support from Commonwealth, State and Territory police. Arts Law believes that in many cases the police are not acting on complaints from Indigenous artists and arts organisations when information or complaints are made about "carpetbaggers" or unscrupulous dealers or galleries.

Providing education for the police forces on the relevant legal issues and encouraging them to take action on these matters is an integral part of the approach needed. Recent amendments to the *Copyright Act* enforcement provisions also allow on the spot fines for copyright infringement and the potential for greater policing and enforcement of copyright infringement. Further support for law enforcement agencies to provide this support to Indigenous artists is integral to the sector's capacity and future sustainability.

#### **(v) Support for establishing a National Indigenous Cultural Authority**

As discussed above, Arts Law recommends the establishment of a system of regulation for dealers, galleries and agents dealing with Indigenous artists and arts organisations. We believe that this could be achieved by establishing a National Indigenous Cultural Authority



which, among other things, could administer a national licence system for dealers, galleries and agents and also hear complaints from artists and arts organisations when licensees behave inappropriately or beyond the terms of the licence.

Further, as discussed above, we recommend that the National Indigenous Cultural Authority should also be responsible for administering an authenticity label and other protection mechanisms for Indigenous arts and crafts in Australia.

**(vi) Effective targeting of ACCC resources**

Arts Law submits that there needs to be more effective targeting of ACCC resources and a focus on developing a means of regulating the industry. If a National Indigenous Cultural Authority is not set up then ACCC resources should be more effectively targeted to improve the sector's capacity and future sustainability through the regulation of authenticity and the provision of a label of authenticity and the licensing and regulation of galleries, dealers and agents who work in and trade in Indigenous arts and crafts and work with Indigenous artists and arts organisations.

**(vii) Introduction of resale royalties**

The introduction of resale royalties (as discussed above) and government support for collecting societies given administration of the collection and distribution of these royalties is also a key to improving the sector's capacity and future sustainability.

**(g) Future opportunities for further growth of Australia's Indigenous visual art and craft sector, including further developing international markets**

Arts Law and the AITB service do not have the expertise to offer submissions on future opportunities for growth of Australia's Indigenous visual art and craft sector. However, we refer to the points made above and note that future opportunities for growth are only possible if the Indigenous visual arts and crafts sector are given the support of the Australian legal system, including sufficient funding to provide access to legal assistance and initiatives, mechanisms and support for commencing proceedings against infringers. This support can only encourage growth of the industry and prevent the undermining effects of irregularities in the Indigenous arts and crafts market.

Part of this process also involves educating the international market and making visitors, collectors and buyers aware of Indigenous cultural and intellectual property and the rights and interests of Indigenous artists in Australia. Opportunities for further growth could also be supported through government bodies such as Austrade and the further support for regional associations such as ANKAAA and Desart which currently provide tours for overseas buyers and collectors that enable them purchase Indigenous art but also give them the opportunity to learn more about ethical purchasing and cultural imperatives.

Arts Law looks forward to hearing the outcome of the review. We are prepared to expand on any aspect of this submission, verbally or in writing.

Yours faithfully



Robyn Ayres, Executive Director  
Arts Law Centre of Australia