

30 November 2021

Remote Employment Policy Taskforce
National Indigenous Australians Agency (NIAA)
Charles Perkins House
GPO Box 2191
CANBERRA ACT 2601

Sent by online submission form at <https://www.niaa.gov.au/niaa/nrep-submission>

ARTS LAW SUBMISSION RESPONSE TO AUGUST 2021 DISCUSSION PAPER, 'NEW REMOTE ENGAGEMENT PROGRAM'

Introduction and response to key issues

The Arts Law Centre of Australia (**Arts Law**) is a national community legal centre providing free or low-cost legal advice to artistic creators residing in all Australian states and territories.

Arts Law makes this submission on behalf of our broad client base and in particular, Aboriginal and Torres Strait Islander creators involved in the visual arts and craft markets and peak or professional organisations which represent the interests of the above clients. Arts Law is in a unique position, having advised many clients who have participated in art activities for “Community Development Program” (**CDP**), arts workers, and art centres in remote Australia.

Arts Law understands the NIAA is seeking general information and views on its new “Remote Engagement Program” (**REP**), which will replace the CDP in 2023. Arts Law seeks to raise to the following key issues:

- (1) That transparent, best practice contracts be required between participants and providers generally, but especially for those engaged in art activities where copyright, moral rights and Indigenous Cultural and Intellectual Property (**ICIP**) are involved.

- (2) That the REP be designed in a way that supports rather than undermines the important work being done by existing Indigenous art centres in remote areas. The provision of art activities should be led by art centres where they already exist, and REP providers should be required to collaborate in good faith with those art centres, which are one of the few reliable sources of employment in remote Australia.

Arts Law's submission is supported by the Indigenous Art Code. Its letter of support is annexed to this submission.

Best practice for art activities

To meet their "Mutual Obligation Requirements" and receive their benefit payments, many CDP participants engage in art activities for CDP providers or as part of work experience placements in art centres. Under the current scheme, there is insufficient oversight to ensure that transparent, best practice contracts (that protect artists' and participants' rights and interests in the work they create) have been put in place between CDP providers and participants (and other relevant parties).

Arts Law has assisted many artists with concerns regarding how their work has been used by CDP providers without their permission, or in ways that the artist did not know he or she had authorised. Matters that have come to Arts Law's attention include CDP providers taking artwork from participants without explanation and reproducing that artwork on merchandise and promotional material. This conduct is all the more concerning when the work involved embodies ICIP (like traditional stories or materials) that ought to be acknowledged and only used in ways that are considered appropriate by the relevant Aboriginal and Torres Strait Islander individual and community.

Job seekers reliant on the CDP have little ability to question or prevent misuse of their and others' artwork. As a first step, Arts Law supports the government's decision to remove

activities from participants' Mutual Obligation Requirements from 12 May 2021¹ (where previously they had been required to participate in at least 20 hours of activities per week without the legal protections or benefits usually extended to employees).²

However, job seekers should be able to participate in art activities with the certainty that their legitimate rights and interests in their work will be respected. The CDP scheme did not provide this certainty. For example, the template "Head Agreement" between CDP providers and the Commonwealth does not include any best practice requirements for how CDP providers should deal with the artwork (or intellectual property) of CDP participants (or others participating in those art activities).³

Arts Law recommends that REP providers who plan to engage in art activities be required to comply with the Indigenous Art Code (the **Code**).⁴ The Code, amongst other things, would require providers to act honestly,⁵ respect indigenous cultural practices and artist's rights,⁶ and, importantly, provide clear explanations of agreements.⁷ As discussed further below, allowing art centres (who are Indigenous-owned, artist-run and have extensive experience in this area) to take the lead on art activities will also help ensure the REP is fairer and more robust than its predecessor.

What is best practice when it comes to art activities? Arts Law understands that not every provider's situation is going to be the same, but at the very least, providers should have

¹ See NIAA, "Changes to Mutual Obligation Requirements for Community Development Program (CDP)" (11 May 2021): <https://www.niaa.gov.au/resource-centre/indigenous-affairs/changes-mutual-obligations-requirements-cdp>.

² Section 631C, Social Security Act 1991 (Cth).

³ The intellectual property provisions deal only with rights belonging to the CDP provider and not its participants: Department of the Prime Minister and Cabinet, "Head Agreement for the Community Development Program 2019-2022", clause 19: <https://www.niaa.gov.au/resource-centre/indigenous-affairs/cdp-agreement-operational-guidance>.

⁴ The Indigenous Art Code: <https://indigenousartcode.org/the-indigenous-art-code/>.

⁵ Clause 2.1.

⁶ Clause 2.3.

⁷ Clause 3.1.

transparent, written contracts with all of their participants—whether they are working as arts workers, creators, or in managerial roles. These contracts should clearly address:

- (1) the ownership of copyright in any work and materials that are created (so that there is no ambiguity, for example, regarding the exceptions for Crown copyright and employment);⁸
- (2) the moral rights of an artist:⁹ (i) to attribution, (ii) against false attribution, and (iii) to integrity of authorship (meaning the right not to have one's work subject to derogatory treatment through, for example, alterations that prejudice the honour or reputation of the artist); and
- (3) respect for any ICIP embodied in that work.

Arts Law suggests that contractual requirements are supplemented with easy-to-use checklists, factsheets and policies that providers can work through in individual cases. Compliance should be monitored, and, where possible, there should be accountability mechanisms both to the Commonwealth and directly to the local community (for example, through appropriate complaints procedures, disclosure obligations, or any other methods the community requests as reasonable and appropriate in the circumstances).

The accountability of providers is of paramount importance for *all* activities, not just art activities. There is huge potential for abuse of power by CDP (and soon, REP) providers because of the authority they get to exercise over community members (including Aboriginal and Torres Strait Islander elders who may be job seekers), the remote locations they operate in, and the potential to profit from government funding. Compliance and performance should be strictly and regularly monitored by the government, the community, and job seekers

⁸ See s 35(6) and Part VII, Copyright Act 1968 (Cth).

⁹ Part IX, Copyright Act 1968 (Cth).

themselves. Providers should not be free to subject job seekers to degrading activities; they should be required to meet certain minimum standards regarding the activities they provide.

Empowering art centres

The government's *Indigenous Art Centre Framework* describes Indigenous art centres as "often at the heart of community life" and "central to the social and economic well-being of regional and remote communities."¹⁰ Research has shown that arts worker roles at art centres are a highly valued form of employment that promote a wide range of professional, personal, social and cultural benefits.¹¹ Not only do art centres provide community development, but they have also shown the potential to be flourishing social enterprises.¹² A 2012 government report noted that "the visual arts sector provides a significant source of income for Aboriginal and Torres Strait Islander artists, particularly for those living in remote or very remote areas where employment opportunities are limited."¹³

In light of this, it is important that providers under the REP do not undermine the important work being done by art centres in remote Australia. The CDP model was to identify skill shortages in remote areas and attempt to create new opportunities from scratch. However, this is not the only viable approach. Art centres (in many areas, but not all) provide meaningful existing opportunities for training, community engagement and employment, and the REP should look at ways to complement and bolster art centres' ability to provide meaningful

¹⁰ Department of Infrastructure, Transport, Regional Development and Communications, Office for the Arts, *Indigenous Art Centre Framework* (November 2021), p 2: <https://www.arts.gov.au/documents/indigenous-art-centre-framework>.

¹¹ Tim Acker and Susan Congreve, "Desert Perspectives – Aboriginal arts workers in remote arts centres", (Report CR013, 2016): <https://apo.org.au/sites/default/files/resource-files/2016-01/apo-nid75765.pdf>

¹² See Gretchen Stolte "Policy mismatch and Aboriginal art centres: The tension between economic independence and community development", (National Museum of Australia, 10 November 2009): <https://www.nma.gov.au/audio/indigenous-participation-in-australian-economies-conference/transcripts/policy-mismatch-and-aboriginal>.

¹³ Office of the Registrar of Indigenous Corporations, "At the Heart of Art", (2012), p 6: https://www.oric.gov.au/sites/default/files/documents/06_2013/11_0327_Corp_Visual_Arts_Sector_v3-3.pdf.

options to job seekers rather than set up a structure that has the potential to compete with them.¹⁴

Arts Law has identified various concerns with the way the existing CDP scheme has affected art centres. Some Indigenous leaders have reported that lower-paid labour under the CDP has diverted positions from higher paid employment.¹⁵ While the CDP allowed participants to join art centres for work experience placements, in practice, arranging these placements has required the active collaboration of CDP providers (which has not always been forthcoming¹⁶), and the number of placements was heavily restricted (to avoid undermining paid employment).¹⁷

Art centres have unique expertise when it comes to art activities, including the appropriate use of high quality materials for artwork, tapping into national and international art markets for Aboriginal and Torres Strait Islander work, and creating publicly available resources that feed back into the community. There is no guarantee that a CDP (and now REP) provider will have the same expertise. The use of poor quality (or culturally inappropriate) materials could lead to the devaluing of Aboriginal and Torres Strait Islander artwork; conversely, artwork could sit unused and wasted due to a lack of connection with national and international galleries and markets; and the narrow focus of a provider could present a lost opportunity for the development of culturally significant community resources.

¹⁴ See “Integrating Art Production and Economic Development in Central Desert (NT) and the APY Lands (SA)”, National Survey of Aboriginal and Torres Strait Islander Artists, Research Paper 1/2019, David Throsby and Katya Petetskaya (April 2019) at pp iv and 21: <https://apo.org.au/sites/default/files/resource-files/2019-04/apo-nid252706.pdf>.

¹⁵ Mr Cameron Miller, CEO, Ngurratjuta Pmara Ntjarra Aboriginal Corporation, *Proof Hansard*, Alice Springs, (28 August 2017), p. 3 cited in Senate Finance and Public Administration References Committee ‘Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)’, (2017), p 47: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/CDP/Report.

¹⁶ See for example the following report from Alice Springs News on 16 December 2016: <https://alicespringsnews.com.au/2016/12/16/pointless-jobs-for-the-dole-scheme/>.

¹⁷ For example, for an employer with up to 10 employees, only two work experience placements are available. See NIAA, *CPD Overview*, p 6: <https://www.niaa.gov.au/sites/default/files/publications/cdp-overview.pdf>.

The REP, therefore, should leverage the expertise and interconnectedness of existing Indigenous art centres. In October 2019, Minister Ken Wyatt said that “our CDP providers are now almost all Indigenous owned or controlled.”¹⁸ This is a commendable development for the CDP. Arts Law suggests that the substance of this approach is best implemented (for art activities) by empowering art centres in the new REP, both in design and implementation. In doing so, art centres should be properly supported with resources and funding for any additional responsibilities assumed.

A practical note on arts workers and artists

Arts Law wishes to raise one final practical issue for consideration. Anecdotally, CDP participants engaged in art activities are more likely to be arts workers than artists. Artists stand to profit when their work is, for example, sold on consignment. Arts workers, however, do not directly profit from the material they create. This difference should be reflected in contracts between providers and participants. For example, an artist’s contract (in addition to the best practice issues discussed above) will need to address issues like distribution of profits on sale of an artwork, and what effect this has on REP entitlements. For an arts worker’s contract, it may be desirable in some circumstances to allow arts centres to ‘top up’ participants REP payments to an ordinary wage.

Conclusion

Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion. Arts Law would be very pleased to engage in further discussions around how the new Remote Engagement Program can implement best practice arrangements with artists and collaborate with existing art centres. Please contact Arts Law by email to

¹⁸ See Department of Prime Minister and Cabinet, “Community Development Program Reforms Delivering for Indigenous Australians”, (Media Release, 2 October 2019): <https://ministers.pmc.gov.au/wyatt/2019/community-development-program-reforms-delivering-indigenous-australians>.



artslaw@artslaw.com.au or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.

A handwritten signature in black ink, appearing to read "Robyn Ayres".

Robyn Ayres

Chief Executive Officer, Arts Law

A handwritten signature in black ink, appearing to read "Aditya Vasudevan".

Aditya Vasudevan

Solicitor, Arts Law

PO Box 789
Randwick NSW 2031

0438 637 862
ceo@indigenousartcode.org



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Indigenous Art Code Ltd (IartC) Response to August 21 Discussion Paper, 'New Remote Engagement Program'

IartC makes this submission in support of the submission made by the Arts Law Centre of Australia. IartC understands the NIAA is seeking general information and views on its new "Remote Engagement Program" (**REP**), which will replace the CDP in 2023. IartC seeks to raise to the following key issues:

- (1) That transparent, best practice contracts be required between participants and providers generally, but especially for those engaged in art activities where copyright, moral rights and Indigenous Cultural and Intellectual Property (**ICIP**) are involved.
- (2) That the REP be designed in a way that supports rather than undermines the important work being done by existing Indigenous art centres in remote areas. The provision of art activities should be led by art centres where they already exist, and REP providers should be required to collaborate in good faith with those art centres, which are one of the few reliable sources of employment in remote Australia.

Background – Indigenous Art Code

The Indigenous Art Code is about a fair go for Aboriginal and Torres Strait Islander Artists.

The Code is a voluntary industry code of conduct administered by the Indigenous Art Code Ltd (IartC).

Art dealers and others are encouraged to become IartC members and signatories to IartC Code. Once signatories, Dealer members are required to adhere to the Code and ensure they are using fair, ethical and transparent practices when engaging with Aboriginal and Torres Strait Islander Artists.

The need for a national Indigenous art code was a recommendation of the 2007 Senate Inquiry into Indigenous Art which investigated, among other things, the unethical trading of Indigenous visual arts and craft. The Senate Inquiry Report - entitled *Securing the Future* - established the foundations of a self-regulation Code for the Indigenous visual arts sector. Almost one third of the recommendations in the Report refer to the establishment of the Code.

In 2008, in response to these recommendations, the National Association for the Visual Arts (NAVA), in collaboration with the Australia Council for the Arts commenced work on the Code.

In 2017, after launching the Fake Art Harms Culture Campaign, the IartC, in partnership with Arts Law and The Copyright Agency, advocated for the Commonwealth to consult Indigenous artists, organisations, and communities as a step towards developing legislation to prohibit the sale of inauthentic Indigenous products sold as souvenirs. The goal was to see an amendment of the Competition and Consumer Act 2010, as an interim measure prior to Indigenous Culture and Intellectual Property legislation being drafted.

What does the Code require?

The Code provides clear standards for dealings between dealers and Aboriginal and Torres Strait Islander Artists to deliver:

- a) fair and ethical trade in Artwork.
- b) transparency in the process of promotion and sale of authentic Artwork
- c) efficiency and fairness in how disputes are dealt with.

Dealer Membership

Dealer Members of the IartC must become signatories to the Code and agree to all its terms and conditions, as well as provisions in the Constitution, including:

- Acting fairly, honestly, professionally and in good conscience
- Not engaging in misleading or deceptive conduct
- Respecting Indigenous Cultural Practices and Artist's Rights, including:
 - respecting the Artist's Moral Rights and copyright in the Artwork
 - obtaining consent of the artists before reproducing the Artworks (or permitting a third party to reproduce the Artwork) in any form
 - not using the name and/or image of Artists who are deceased unless permission has been granted or best endeavours have been used to obtain permission
 - not marketing, promoting, displaying or selling Artwork or material (such as Tjuringas or human remains) which a reasonable person would know contains content that the relevant Indigenous community and/or traditional owners consider to be secret/sacred and/or restricted.

When dealing with Artists or their representatives, Dealer Members must also use best endeavours to ensure every dealing with an Artist involves the informed consent of the Artist, this includes:

- Providing a clear explanation of the Agreement
- Ensuring there is a written or verbal Agreement between the Dealer Member and an Artist in relation to Artwork that covers the key terms outlined in the Code
- Respecting an Artist's cooling off rights to terminate an Agreement
- Providing details of payment for the Artwork
- Keeping records of all dealings with Artists and making this available to Artists upon request.

Nature of concerns raised with the IartC about CDP

IartC has been contacted on numerous occasions by Aboriginal and Torres Strait Islander owned Art Centres about concerns they have about the "Community Development Program"

(CDP) operating in remote Australia. A majority of Aboriginal and Torres strait Islander owned, and governed art centres are Dealer Members of the IartC. While several Dealer Members of the IartC engage with the CDP program operating in their area, the CDP providers (excluding Art Centres) are not Dealer Members of the IartC.

In most cases when the IartC has been contacted by artists or art centres with concerns about the CDP program or specific concerns about the actions of CDP providers, the IartC makes a referral to the Arts Law Centre of Australia. The matters usually concern copyright, moral rights, Indigenous Cultural and Intellectual Property (ICIP) and employment contracts requiring legal advice. The IartC does not and cannot provide legal advice. The IartC has also raised general concerns about the CDP program when it is operating in a community where there is an Australian Government funded Art Centre.

Arts Law have consulted the IartC in drafting their submission and the IartC have provided input and feedback to the Arts Law submission. The Arts Law submission captures the points the IartC hope will inform the establishment of the New Remote Engagement Program (REP) which should value and respect the rights of artists, both working with their community art centres and for artists who work in a region where there is no Art Centre. We hope the new REP acknowledges and supports artists and their engagement in the commercial arts sector. Please reach out to the Indigenous Art Code if you have further questions. We welcome the opportunity to discuss the REP further and how the IartC can work with REP providers in the future.

Yours sincerely,



Gabrielle Sullivan
CEO, Indigenous Art Code