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18 December 2020

Consultation Paper on Growing the Indigenous Visual Arts Industry

The Arts Law Centre of Australia ('**Arts Law**') is pleased to contribute to the development of an Indigenous Visual Arts Action Plan by the Australian Government. While we are particularly encouraged by the development of the plan during the uncertainties of the ongoing COVID-19 global pandemic, we would nonetheless welcome the development of an Action Plan under normal circumstances to support and develop the capabilities and capacities of Aboriginal and Torres Strait Islander visual artists.

Arts Law will mainly contribute feedback in relation to **Issue 4: Legal Protections**, questions 14 to 19 of the Consultation Paper. Our submissions will focus on the protection of Indigenous Cultural and Intellectual Property ('**ICIP**') as an aspect of intangible Aboriginal and Torres Strait Islander cultural heritage. We will also reflect upon the development of authentication processes, the importance of the Indigenous Art Code, and what our experience suggests would contribute to sustainable growth, capacity building and increased access to local and international markets for Aboriginal and Torres Strait Islander artists.

Who are we?

Arts Law is a not-for-profit national community legal centre for the arts, actively protecting the rights of artists since 1983. In 2004, Arts Law established a dedicated service for Aboriginal and Torres Strait Islander artists, Artists in the Black. Arts Law and AITB are in a unique position in the art and legal landscapes, having advised and consulted with Aboriginal and Torres Strait Islander communities throughout Australia. Chief among our advice and advocacy areas has been the need to secure protection of Indigenous cultural heritage and expression in Indigenous art, music and performance. We have also advised extensively on Indigenous creative initiatives, social enterprises, partnerships and businesses, helping to drive economic growth and opportunities for Indigenous individuals and communities nationwide.

Arts Law has been active in these spaces for over 15 years and have made a number of submissions to government on ICIP, including to the Productivity Commission's *Draft Report on Intellectual Property Arrangements* in 2016, and the House of Representatives Standing Committee on

Indigenous Affairs Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia which reported in 2018. We have also made representations to the Attorney-General and the Minister for Indigenous Affairs. There have been other inquiries into these issues including the 1981 *Report of the Working Party into the Protection of Aboriginal Folklore*, the Federal government's *Issues Paper, Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* in 1994,[1] and discussions about an Indigenous Communal Moral Rights Bill (2003).[2]Most recently, following the destruction of the 46,000 year old caves at the Juukan Gorge in Western Australia's Pilbara region, Arts Law made a submission to the Joint Standing Committee on Northern Australia in July 2020.[3] No legislative protection or enforceable rights have resulted from any of these previous inquiries.

Arts Law has consistently participated internationally in this area since 2007 through its observer status at the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.[4] We recognise that the issue of ICIP rights is a global challenge and it is incumbent upon Australia to take a leadership role in this critical area. Australia must take action to empower its First Peoples, to protect its unique and diverse cultures and to project a positive model of Indigenous cultural best practice to the world.

AITB and Arts Law have answered thousands of legal queries from Aboriginal and Torres Strait Islander artists and organisations since the inception of the AITB project, with 911 advices delivered in 2019 alone. Through our outreach to over 100 Aboriginal and Torres Strait Islander communities, Arts Law has consulted with Aboriginal and Torres Strait Islander artists in metropolitan, regional and remote areas across Australia. Despite the suspension of our outreach activities in 2020 due to the COVID-19 pandemic, we were still able to provide 538 advices to Indigenous artists and arts organisations to 1 December 2020. Advice on business structures, licensing, contracts, copyright and the protection of cultural heritage has assisted Indigenous artists nationwide with exciting creative projects and economic opportunities, especially as Aboriginal and Torres Strait Islander artists turn to digital and new media to create and distribute their work.

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[1]Released by the Minister for Justice, the Hon. Duncan Kerr, the Minister for Communications and the Arts, the Hon. Michael Lee, and the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon. Robert Tickner. See Catherine Hawkins, 'Stopping the Rip-offs: Protecting Aboriginal and Torres Strait Islander cultural expression' (1995) 20(1) *Alternative Law Journal* 7 <http://www.austlii.edu.au/au/journals/AltLawJl/1995/4.pdf>.

[2] See discussion in Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *UNSW Law Journal* 585 <http://www.unswlawjournal.unsw.edu.au/sites/default/files/34_anderson_2004.pdf>.

[3]Arts Law thanks Lander & Rogers law firm for their important contribution to Arts Law in the preparation of that submission, which will be discussed in greater depth in response to question 19 below.

[4] For further information about IGC work see <http://www.wipo.int/tk/en/igc/>.

Responses to the Issues and Questions in the Consultation Paper

Arts Law will provide responses to select questions from the issue raised in the discussion paper relevant to our expertise and experience, with the core focus being around **Issue 4: Legal Protections**, questions 14 to 19.

ISSUE 1: SUSTAINABLE GROWTH

4. Different words have different meanings for different people – how do you like to be referred to as – 'Aboriginal and Torres Strait Islander people' or 'First Nations people'?

Arts Law and Artists in the Black defer on questions of language to the individuals, communities and organisations with whom we communicate and advise. Our general practice is to use the phrase 'Aboriginal and Torres Strait Islander', however we will use the terms 'Indigenous' in particular or 'First Nations' interchangeably and where appropriate.

Especially following the Uluru Statement from the Heart and the call for a 'First Nations Voice to Parliament', Arts Law considered referring consistently to 'First Nations peoples'. But our experience has been that this term is divisive within different communities in different parts of the country in a way that 'Aboriginal and Torres Strait Islander peoples' is not.

When in doubt, we follow the lead of the organisations we are communicating with as to what nomenclature we use in correspondence, advice, applications or submissions, especially if the organisation has chosen a particular term in its name.

5. What do you understand 'authentic Indigenous art' to mean? What type of artwork should be included in this definition?

The Fake Art Harms Culture Campaign

In 2016, Arts Law, the Indigenous Art Code and the Copyright Agency|Viscopy responded to representations by Indigenous artists, peak bodies and community members to create the 'Fake Art Harms Culture' campaign. The key issue was to resist the sale of 'Aboriginal-style' art and craft products that have no connection to Aboriginal and Torres Strait Islander peoples. A mystery shopping exercise in tourist locations in various capital cities found very large numbers of such items and estimates suggest this is a multi-million dollar market.

The campaign has attracted broad support across the country with a national media campaign, backing from Indigenous artists and key dealers, as well as a change.org petition with over 13,000 signatures from the general public. Arts Law is pleased with the popularity of the campaign as it

continues into its fifth year. Until there is sufficient legislative reform to address these issues, and sufficient enforcement of such reform, the campaign will continue to fight fake art and rally for change.

Defining 'Authentic Indigenous Art'

On 3 November 2017, Arts Law made a submission to the House of Representatives Standing Committee on Indigenous Affairs *Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia*.[5]

The definition Arts Law set out in our joint submission to the House of Representatives Inquiry was as follows:

> Arts Law considers authentic Indigenous art and craft to be any art or craft produced by an Indigenous artist(s) or craftsperson(s). The definition would also include art and craft products (and merchandise) made pursuant to a licence with an Aboriginal or Torres Strait Islander artist(s) with their full authority.
>
> An Indigenous artist or craftsperson is an artist or craftsperson who:
>
> a) identifies as Aboriginal and/or Torres Strait Islander; and
> b) is recognised as Aboriginal and/or Torres Strait Islander by the community or group with which the artist identifies.
>
> Arts Law strongly supports the right of Indigenous people and businesses to financially benefit from expressions of their culture. This right can only be fully exploited if and when the law is changed to allow Indigenous people to maintain, control, protect and develop expressions of their culture. Arts Law is also of the view that merchandise made by non-Indigenous people, including products made overseas, should be permissible only if authorised by Aboriginal or Torres Strait Islander people in writing and where there is an income being returned to the artists, e.g. plates with artworks licensed with a royalty being paid to the artist.

Our definition and position on these issues remains unchanged since 2017.

Types of artwork that should be included in any definition of "inauthentic Indigenous art"

Arts Law's 2017 submission included the following elements for a prohibition of the sale of inauthentic products to be included in the Australian Consumer Law:

> (a) it would be an offence to supply or to offer to supply (at both a wholesale and retail level) an artwork (being a creative expression in a material form) that includes an 'Indigenous Cultural Expression'[6] that is not either:

[5]Arts Law thanks Allens law firm for their valuable contribution to Arts Law in the preparation of the consumer law and ACCC aspects of that submission, reproduced below.

(i) hand crafted by an Aboriginal or Torres Strait Islander person; or
(ii) a licensed reproduction of an artwork created by an Aboriginal or Torres Strait Islander person.

In which case the original artwork or licensed reproduction must attribute the artist or artists who created the original artworks;

(b) a defence should be available where a retailer or supplier can produce reasonable evidence of a product's authenticity. The law should allow regulations to be made specifying what would amount to 'reasonable evidence' for these purposes.

The question of the "types of artwork" that should be covered under any legislative definition of fake or inauthentic art poses some notable challenges. No single organisation will be in a position to provide an exhaustive list of the items or categories of objects that satisfactorily represents the breadth and depth of Aboriginal and Torres Strait Islander culture. Any non-exhaustive list that does result can only be made after extensive consultation with artists and community members. The benefit of our submission was that it avoided the difficulties of isolating specific objects or categories of objects, with the focus instead falling on whether or not the offending act included an inauthentic 'Indigenous Cultural Expression'. This also has the benefit of allowing Aboriginal and Torres Strait Islander artists to have the flexibility to make commercial decisions around production and manufacture of art and craft products, especially in a licensing context, since it will be their artwork in which the Indigenous Cultural Expression is manifest and protected.

From Arts Law's previous consultations ahead of our 2017 submission, there is a strong view held by many Aboriginal and Torres Strait Islander artists and community members that certain artefacts – for example, boomerangs, didgeridoos/yidaki and woomeras – should only be handcrafted in Australia by an Aboriginal or Torres Strait Islander person.

There is also an important distinction that needs to be considered between art objects that are appropriate for commercial supply as opposed to ceremonial or sacred objects that would be inappropriate to commercialise. The distinction is not concrete and will vary from community to community. For example, some communities and art centres are comfortable selling coolamons and ceremonial poles where others are not. Any change in the law that creates categories of art and craft objects should be made only after significant and widespread consultation and collaboration with Aboriginal and Torres Strait Islander artists, communities and organisations.

[6]We propose that an 'Indigenous Cultural Expression' be defined to mean an expression of Indigenous culture (whether through images, form or any other medium) that: has archaeological, anthropological, contemporary, historical, scientific,social or spiritual significance to an Indigenous community; has its origins in an Indigenous community; is made by anIndigenous artist; or is derived from, or has a likeness or resemblance to, one or more Indigenous Cultural Expressionsmentioned previously.

ISSUE 2: CAPACITY BUILDING

6. What skills do you think are important in the industry? What ways do you build those skills? What would help you to build those skills?

Arts Law recognises that the following skills are central to capacity and capability building for those working in the visual arts industry:

- knowledge of governance issues relevant to an arts organisation or business
- management skills for an arts organisation or business
- understanding the legal basics of copyright, ICIP, contracts and licensing.

8. Is there more that can be done to encourage the development of Indigenous owned and operated businesses in the industry?

Indigenous owned and operated businesses require tailored and comprehensive support. Art and culture is an endemic economic sector that requires specific knowledge which cannot be provided by an ordinary business planner, advisor, consultant or lawyer. Initiatives like the Indigenous Business Sector Strategy of the National Indigenous Australians Agency are less helpful in the arts where consultants have little to no industry-specific expertise. This results in businesses receiving insufficient advice and support. Organisations like Arts Law and the Indigenous Art Code have decades of experience with highly relevant expertise and knowledge that can deliver the required support in a highly efficient and direct manner. It is better in our view to fund existing organisations with the knowledge required, a history of trust within arts communities, and a longstanding reputation for delivering high quality services.

From Arts Law's perspective, this assistance comes in the form of best practice legal advice to Indigenous businesses on business structures, corporate governance and employment law, as well as advice on copyright, contracts, ICIP, moral rights and licensing, to equip businesses with the skills needed to engage in commonplace transactions in the visual arts sector. In light of the economic uncertainty around the COVID-19 pandemic, we also continue to provide advice to art centres on the sale and exhibition of works online, the digitisation of collections, registering security interests on the Personal Property Securities Register ('**PPSR**') and other issues relevant to 'digital rights' online and on social media.

ISSUE 3: ACCESS TO MARKET

9. What can be done to assist artists to better connect with the art market?

Artists, arts organisations and galleries across the country have responded swiftly and smoothly to the online sale and exhibition of works. Arts Law's experience with Aboriginal and Torres Strait Islander artists, art centres and representing galleries has been that they were all eager to add to, or update their online presence, either by selling directly to consumers or participating in online events, art fairs and exhibitions to market and sell their work.

While the rapid uptake of these services has provided an economic lifeline for the visual arts industry during the ongoing downturn in tourism income, it poses a unique set of legal challenges which artists need to learn about and respond to proactively. Arts Law has been in a unique position to provide free or low-cost legal advice to visual artists during the pandemic and ensure that they are aware of the risks of selling works online and how to mitigate them. Common advice areas include:

- licensing arrangements for artworks to appear on marketing or promotional material
- the review of contracts presented to participating artists in online exhibitions, festivals, fairs, auctions and other events
- the risks of posting images of artworks online and on social media and how to minimise the risk of those images being stolen or misused without the artist's consent
- advice around scam websites or websites selling fake or inauthentic art.

ICIP and fake art legislation will assist artists to better connect with the art market by removing objects from the market that dilute the quality of the Indigenous art market and the pool of possible sales.

ISSUE 4: LEGAL PROTECTIONS

14. Is the current framework protecting Indigenous cultural expressions good enough?

The current protection mechanisms for Indigenous cultural expressions are inadequate and in dire need of reform. This is the consistent conclusion of four decades of reports and inquiries on this intractable problem, including:

- Senate Inquiry into the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (2019-20)
- House of Representatives, Standing Committee on Indigenous Affairs into "The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia (2018)
- Senate Committee Report *Indigenous Art- Securing the Future Australia's Indigenous Visual Arts and Craft Sector* (2007)
- R. Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*('**Myer Report**') (2002)
- Terri Janke *Our Culture Our Future: Report on Australian indigenous Cultural and Intellectual Property* (1998)

Indigenous Cultural and Intellectual Property ('ICIP')

ICIP refers to the inherent rights of Indigenous people to maintain, control, protect and develop their traditional cultural heritage, including their arts. ICIP encapsulates knowledge that is unique to Aboriginal and Torres Strait Islander peoples and includes both tangible and intangible cultural property, and cultural expressions such as stories, dance, languages, symbols, crafts and cosmology.

Arts Law considers ICIP to be a crucial component of intangible ACH, which is afforded almost no protection under the current framework of state and federal laws in Australia. We wish to draw specific attention to the stark reality that there is currently no legal right of ownership of ICIP that is capable of enforcement within the Australian legal system (except to the limited extent of native title and existing legislation concerning areas and objects).

The manner and form of ICIP protections under Australian law will be discussed in response to question 19 below.

Fake and Inauthentic Art

Furthermore, as addressed in our response to question 5 above, the absence of specific legislation to prohibit fake or inauthentic Indigenous art and craft products entering the market is a clear area where the current law is unsatisfactory.

15.Should there be a mandatory Indigenous Art Code? If so, how do you think that should work?

The Indigenous Art Code was first developed by the National Association for the Visual Arts ('**NAVA**') and then by the Australia Council for the Arts in close collaboration with an Industry Alliance Group of artists, art centres, public and commercial galleries, auction houses and visual arts peak bodies. The Indigenous Art Code in its current form was endorsed after a period of public consultation by the Industry Alliance Group in August 2009 and was launched publicly for membership and compliance in 2010, operated by the Indigenous Art Code Ltd.

The Indigenous Art Code is currently a voluntary opt-in framework for galleries and art dealers. At its inception, the Code lobbied extensively for the introduction of a mandatory code of conduct. At that time it was examined extensively through various submissions and inquiries, the result of which was a seeming lack of support for this option on the part of Government.

Arts Law is supportive in general of the idea that the Indigenous Art Code should become mandatory. Arts Law's CEO Robyn Ayres expressed this view most recently in 2018 as reported in the *Protecting First Nations Art* report along with representatives from the Australia Council, Warmun Art Centre and Yarrabah Arts and Cultural Precinct.[7] An effective mandatory code would require legislation as part of the Australian Consumer Law and enforcement by the Australian Competition and Consumer Commission ('**ACCC**').

We would like to emphasise, however, that questions around the introduction and compliance with a mandatory code should be raised and implemented only after amendments to the Australian Consumer Law that effectively prohibit fake Indigenous art.

We note the Committee's comment in the 2018 report that there would be a re-evaluation of the efficacy of the Indigenous Art Code with increased funding as the basis for investigating whether it should be mandatory. We would welcome this full review in due course.

We are also mindful that there has been no appetite within the current and previous Governments for a mandatory code so an alternative option at this stage would be to strengthen the current code and provide additional resources to enable it to be more effective.

[7]Protecting First Nations Art p. 60 [4.97] n 110.

16. Do you like the idea of a certification trade mark scheme for authentic products? How do you think it should work?

Arts Law's concern with any certification trade mark scheme for authentic products is that it will share the same fate as the 'Boomerang Tick' or 'Label of Authenticity' owned and implemented by the National Indigenous Arts Advocacy Association ('**NIAAA**') and used from 1999 to 2008. Under that program, artists registered with NIAAA if they identified as Aboriginal or Torres Strait Islander, if they could show permission from the relevant community to make their artwork, and if they paid the relevant fee. There was also a Collaboration Mark that indicated co-creation between Indigenous and non-Indigenous people.

In line with our submissions relating to ICIP protections, we believe that as much of the onus should be removed from artists and art centres as possible. If a certification scheme places the obligation on artists and art centres to become certified and maintain their certification, the administrative burden will be significant and potentially prohibitive for many individuals and organisations. As reported by IP Australia, one of the key reasons for the failure of the 'Label of Authenticity' was the approvals procedure which "were onerous and frequently caused offence".[8] Other key issues were the need to reapply every 12 months, and that the licence fee to obtain the certification fell "on the artists who are actually doing the right thing."[9]

Furthermore, the success of any certification trade mark scheme would require a high degree of consultation and collaboration in advance of its implementation, and the creation of an agency responsible for a high level of engagement, education and support for participants, stakeholders and consumers. These steps would address another key cause for the NIAAA Label's eventual decline, which was adopted at the national level but failed to garner effective regional and local support.

17. Do you like the way the Resale Royalty Scheme works?

Arts Law has consistently supported the Resale Royalty Scheme and advocated for its introduction as recommended under the Myer Report in 2002. The major reasons behind Arts Law's support for the scheme then and now are:

- to provide an additional income stream to some artists and their families
- to recognise the ongoing value of artists to Australian society
- to confer upon Australian artists an internationally recognised right.

It is important that the Copyright Agency has sufficient powers under the Act to ensure compliance of art market professionals with their legal obligations.

[8]Terri Janke and Laura Curtis, *Indigenous Protocols and Processes of Consent relevant to Trade Marks*, IP Australia Discussion Paper 6.3, pp. 34-35.
[9]Ibid.

18. Is there more that could be done to increase awareness of moral, cultural and intellectual property rights?

Arts Law and its Artists in the Black program play a critical role in educating arts and cultural communities about moral, cultural and intellectual issues relevant to ICIP. This takes the form of legal advice and education sessions, both for Indigenous artists and communities to inform them of their legal rights, and also for non-Indigenous people and organisations so they know how to engage responsibly and appropriately with traditional knowledge and culture on a best practice basis. The most successful delivery of these sessions is face-to-face, a particular challenge during COVID-19 pandemic restrictions. Given the size of the Indigenous arts community, both numerically and geographically, Arts Law continues to be under-resourced to deliver the tailored programs and resources that will change attitudes and behaviours nationally.

We acknowledge the work of IP Australia in their obligations to develop understanding of IP registration systems (trademarks, designs and patents), and of Terri Janke and Company for their work in the development of organisational ICIP protocols and education. It is of paramount importance that awareness of these issues is spread by as many organisations appealing to as many different target audiences as possible. With increased resourcing, Arts Law would be able to draw on its decades of experience as a community legal centre for the arts to produce further resources and conduct more education sessions to reach as many artists, businesses, not-for-profits, government departments and Aboriginal corporations as possible.

19.How do you think that Indigenous Cultural Intellectual Property protections could work in practical terms?

Arts Law maintains its position that the most effective mechanism to achieve sustainable and suitable recognition and protection of ICIP in Australia is through the introduction of comprehensive *sui generis* legislation at the federal level to mandate the automatic recognition of ICIP without any registration requirements. Arts Law considers that within such a legislative framework, ICIP must be recognised as an automatic right vested in Aboriginal and Torres Strait Islander communities with ownership of the relevant traditional knowledge. This is an issue of local, national and international significance with successful precedents in other countries with diverse Indigenous and local populations such as India and Peru.[10]

Arts Law made a submission to the Joint Standing Committee on Northern Australia in July 2020, a core component of which was the need for *sui generis* national legislation to automatically recognise

[10]See Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies*, Edward Elgar Publishing, 2020.

ICIP rights. We regret that the interim report of that inquiry did not make any mention of ICIP reform in its List of Recommendations.

The Way Forward: National legislation for the automatic recognition of ICIP

As Arts Law submitted to the Juukan Gorge Inquiry, *sui generis* legislation must enshrine the automatic recognition of ICIP for the following reasons:

- ICIP covers a broader range of creative, intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright or land law will be artificial and incomplete

- ICIP is an intergenerational right which evolves and develops over time, and which is fundamentally different from western constructs of intellectual property in that it is a communal right, albeit with individual custodians

- Any attempt to deal with ICIP within the context of pre-existing laws prefaced on western understandings of intellectual property and cultural heritage will therefore be artificial and incomplete, and

- Aboriginal and Torres Strait Islander communities, and by extension ICIP, traverse state borders. A piecemeal approach whereby only aspects of ICIP registered under state-based Aboriginal cultural heritage legislation is protected is therefore problematic and well below the rights envisaged in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (‘**UNDRIP’**).

We set out below proposed features of such federal legislation:

Arts Law opposes any registration system for intangible Aboriginal Cultural Heritage

In this regard, we refer to our previous submissions on the New South Wales *Aboriginal Cultural Heritage Bill* 2018[11] (**Draft Bill**) dated 20 April 2018, attached as **Appendix 1** to these submissions, that were also annexed to our submission to the Juukan Gorge Inquiry. The Draft Bill proposes a system of registration to deal with intangible ACH. As previously raised in those submissions, we reemphasise that Arts Law is strongly opposed to any scheme that requires Aboriginal or Torres Strait Islander people (or groups) to register their traditional knowledge before being able to protect it.

[11] See Arts Law’s *Submission in Response to the New South Wales Aboriginal and Cultural Heritage Bill (2018) Public Consultation* (2018).

It is Arts Law's position that intangible ACH rights should apply automatically by the nature of their existence, in the same way that copyright is determined. If a person writes a song or produces an artwork, copyright exists automatically upon the creation. It is our view that ICIP should be recognised in the same way. A requirement to register a songline or story in order to create legal rights is antithetical to this principle. A community's right to control and exploit its cultural heritage should not depend on whether such ACH is registered.

Further, it is impractical and unreasonable to expect Aboriginal people and communities to register all 60,000 years (plus) of cultural heritage. Such heritage is indivisible and interconnected, unable to be apportioned into registrable pieces. It is a multi-layered, complex web of story, knowledge, belief and culture. Traditional knowledge can also take on various adaptations across different communities and a story or songline can exist within the culture of more than one group.
This is especially concerning if a registration system is implemented at a state level, because while it is possible that multiple owners of intangible ACH could be registered, it will be difficult for state-based legislation to properly deal with aspects of ACH that extend across state borders.

Arts Law is also concerned that the creation of a register of intangible ACH will require the disclosure of ICIP which might be sacred, secret or vulnerable to misuse by those with access to the register (for example, by the ACH Authority or other authorised persons). Even if access to the register is restricted, these problems could not be wholly mitigated. This will be culturally inappropriate and damaging in many situations.

Arts Law opposes decision-making power in relation to ACH being vested in an ACH authority or Minister

The Standing Committee on Indigenous Affairs recommended that the Australian Government begins a consultation process to develop a stand-alone legislation protecting ICIP, including traditional knowledge and cultural expressions.[12] As part of its recommendation, the Standing Committee on Indigenous Affairs supported the establishment of a National Indigenous Arts and Cultural Authority ('**NIACA'**). The feasibility of a NIACA is currently being explored by the Australia Council for the Arts.[13]

[12]Standing Committee on Indigenous Affairs, House of Representatives, *Report on the impact of inauthentic art and craft in the style of first nations peoples* (2018) 76.
[13]See Australian Council for the Arts 'A proposed National Indigenous Arts and Cultural Authority (NIACA)' (Public discussion paper, 8 October 2018).

Arts Law endorses the recommendation that the Australian Government begin developing stand-alone legislation to protect ICIP and supports the establishment of a NIACA to help develop and implement ICIP rights. We are firmly of the view however, that any institution that is established should not have a role in determining ICIP rights or require the registration of ICIP.

In particular, we refer to our previous submissions on the NSW Draft Bill in relation to the establishment of an ACH authority to make decisions in the context of an intangible ACH registration system. The owner of any Indigenous knowledge is the community or group it comes from. They are the only people that can ethically approve or reject the use of their cultural knowledge. An ACH authority or panel, no matter how it is appointed, will consist of people from different communities and, under this proposal, will have ultimate decision-making as to whether an item of Indigenous knowledge can be registered. This is not culturally appropriate, or even realistic, in this context.

We also note that the Draft Bill included responsibilities for the Minister responsible for the ACH Act to make declarations of ACH, based on the ACH's recommendations. On this point, Arts Law's position is that the Minister is afforded too much discretion in relation to pivotal decisions in that the Minister's discretion is absolute with no binding criteria to consider, and unlike other decisions there is no timeframe for the Minister to make a declaration (despite the fact that without clear accountability, cultural heritage nominations could take years to process). Furthermore, under the Draft Bill, there is no merits review provision for Aboriginal and Torres Strait Islander people or communities who are not satisfied with the Minister's decision. While the Draft Bill protects Aboriginal and Torres Strait Islander objects, ancestral remains and places currently listed, anything else is ultimately subject to the Minister's discretion. It should not be within the Minister's power to determine the content of ACH.

This detracts from the object of the Draft Bill in terms of giving Aboriginal and Torres Strait Islander people genuine control over their cultural heritage (and by extension, ICIP). The above concern is particularly relevant in light of the fact that Rio Tinto received ministerial consent to destroy the Juukan Gorge caves pursuant to the *Aboriginal Heritage Act 1972* (WA).

Free, prior and informed consent of Aboriginal communities

We submit that any ICIP legislation should have regard to:

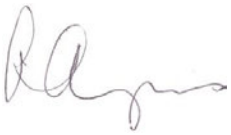
(a) articles 8, 17 and 18 of the Convention on Biological Diversity relating to the use of traditional knowledge (which refer to state obligations to implement procedural (participatory) rights as well as benefit-sharing); and

(b) the principles set out in the UNDRIP and in particular, Australia's obligations as a party to the UNDRIP under Article 31 to secure the rights of Indigenous peoples to "*maintain, control, protect and develop their cultural heritage, traditional knowledge*

and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures."

We submit that any sui generis ICIP legislation needs to incorporate the concept of 'free, prior and informed consent' of Aboriginal and Torres Strait communities to decision-making in relation to ICIP.

Yours sincerely



Robyn Ayres
Chief Executive Officer

Appendix 1

Arts Laws' submissions on the proposed New South Wales Aboriginal Cultural Heritage Bill dated 20 April 2018

NSW Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

20 April 2018

Dear Secretariat

Arts Law's Submission on the proposed New South Wales Aboriginal Cultural Heritage Bill.

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to the public consultation on the proposed Aboriginal Cultural Heritage Bill 2018 (**the Bill**).

Public Consultation

Arts Law is concerned with the very short public consultation period since the release of the draft Bill (11 September 2017 to 20 April 2018), especially given that the development of this Bill has taken over four years. There needs to be ample time allocated to public consultations to be certain that all stakeholders are given the chance to understand what is proposed and to have their voices heard. It is unclear who was approached to give their input or to attend the public information sessions.

Arts Law representatives attended the Penrith workshop on 12 March 2018. There was very limited information provided and all feedback was within the framework of pre-organised activities that did not allow for free and open discussion. Whenever open discussion was engaged in, it was time-limited and the day progressed very quickly without the opportunity for real engagement. There were a small number of Aboriginal people present which raises the question of what engagement has been attempted with Aboriginal communities and organisations. From the information provided it does not appear that there has been specific engagement with Aboriginal people and communities. It is imperative that extensive consultation is completed before the Bill is to be put to the Parliament. There must also be a genuine effort to amend the Bill in line with feedback received during such engagement.

Intangible Aboriginal Cultural Heritage

During the Penrith workshop, there was little information offered regarding the introduction of intangible Aboriginal Cultural Heritage (ACH), and no feedback sought on this type of ACH. This is very concerning given that it is probably the largest change proposed in this Bill.

From the definition proposed, Arts Law considers intangible ACH to be the same concept as Indigenous Cultural and Intellectual Property (ICIP). It is Arts Law's view that the protection of such traditional knowledge is more appropriately addressed within the Intellectual Property framework and requires the establishment of a comprehensive sui generis legal framework at a national level designed to recognise and protect Indigenous cultural heritage.[1]

We understand that the OEH wishes to steer clear of any overlap with Intellectual Property law, however no details on how this is to be achieved has been offered. We also understand that the OEH has modelled this draft Bill on the Victorian *Aboriginal Heritage Act* 2006. This legislation was introduced without consultation and Arts Law considers this legislation extremely problematic for the same reasons outlined in this submission.

Registration system incompatible with intangible Aboriginal Cultural Heritage

Arts Law is vehemently opposed to any scheme that requires Aboriginal or Torres Strait Islander people (or groups) to register their traditional knowledge before being able to protect it. We have been working in this area for over a decade and have made submissions to other government inquiries in this area at a federal level[2] and international level[3]. It is our position that intangible ACH rights should apply automatically by nature of its existence, in the same way copyright is determined. If a person writes a song, or produces an artwork, copyright exists automatically upon the creation. It is our view that ICIP should be recognised the same way. A requirement to register a songline or story in order to create rights is antithetical to this principle. A community's right to control and exploit its cultural heritage should not depend on whether such ACH is registered.

Further, it is impractical and unreasonable to expect Aboriginal people and communities to register all 60,000 years (plus) of cultural heritage. Such heritage does not exist in registrable "chunks". It cannot be divided into separate items. It is a multi-layered, complex web of story, knowledge, belief and culture. Traditional knowledge can also take on various adaptations across different communities. How will the registration system deal with a situation where a story or songline exists within the culture of more than one group?

Whilst we understand that Aboriginal people would not be compelled to register ACH under this proposal, the practical effect would be that there is no recourse for a person or group in the event that their ACH is used commercially without permission, unless that ACH has been registered.

Impracticality of registration system for intangible Aboriginal Cultural Heritage

Arts Law is also concerned that the creation of a register of intangible ACH requires the disclosure of ICIP which might be sacred or vulnerable to misuse by those with access to the register (ie. the ACH Authority, Local ACH Consultation Panels and other persons), even if the register is restricted-access. This will be culturally inappropriate (and damaging) in many situations.

We are also concerned that there may be potential or actual conflicts of interest within the committee itself. It is not clear as to what happens in a situation where more than one group claim ownership over an item of ACH, or a group wishes to challenge the registration of an item.

Similarly, the registration of intangible ACH is conditional upon the ACH Authority being satisfied under section 36(2)(a) that the heritage "is not widely known to the public and should be protected from unauthorised commercial use." Why should the ACH be "not widely known to the public"? Does this mean that important ACH that has become widely known is not deserving of protection? This seems to be a completely inappropriate and insulting proposition. Additionally, the requirement that the ACH Authority should be satisfied that the heritage "should be protected from unauthorised commercial use" suggests that there is some intangible ACH that should not be protected from such use. Why would this be so, and what would make heritage undeserving of protection from unauthorised commercial use.

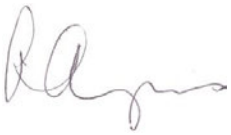
Broader implications of establishment of a regime to recognise ACH rights

The proper recognition and protection of ACH is an issue of both national and international significance. Most recently it has been raised by the House of Representatives inquiry into the proliferation of inauthentic Indigenous arts and crafts.[4] As noted above, Australia needs a legislative scheme which protects ACH and fulfils our obligations under Article 31 of the *Declaration of the Rights of Indigenous Peoples*. We note that this is also an issue being considered by the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC).

The owner of any ACH is the community it comes from. The community is the only body that can ethically approve or reject the use of its cultural heritage. An ACH Authority, no matter how it is appointed, will consist of people from different communities and, under this proposal, will have ultimate decision-making as to whether an item of intangible ACH can be registered. This is not culturally appropriate, or even realistic, in this context.

We submit that the Bill in its final form should enshrine automatic recognition of intangible ACH, without the requirement for registration. Intangible ACH should be recognised as an automatic right vested in the Aboriginal community with ownership of the relevant cultural heritage over generations.

Yours sincerely



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