

16 December 2009

**Indigenous Heritage
Law Reform**

Heritage Division

Department of the Environment, Water, Heritage and the Arts

GPO Box 787

CANBERRA ACT 2601

By mail and to atsihpa@environment.gov.au

Submission in Response to the Indigenous Heritage Law Reform Discussion Paper

The Arts Law Centre of Australia (**Arts Law**) through the Artists in the Black (**AITB**) service has provided targeted legal services to Indigenous artists and their organisations and communities for the last six years. Much of that advice has focussed on ways of securing effective protection of Indigenous cultural heritage as expressed through Indigenous art, music and performance given the acknowledged deficiencies in the current level of legal protection for Indigenous cultural heritage.

Arts Law has considered the Discussion Paper in the context of the legal issues affecting Indigenous artists in communities throughout remote, regional and urban Australia, and across all art forms.

The Discussion Paper considers the reform of existing legislative arrangements as they apply to traditional areas and objects. Our overriding response is that laws restricted to a focus on 'places' or 'things' can only provide a very limited, piecemeal and unsatisfactory protection which fails to recognize the true nature of Australian Indigenous cultural heritage and is inconsistent with notions of cultural heritage at international law.

Recent developments at international law make clear that notions of cultural heritage encompass language, stories, spiritual knowledge, ancestral remains, medical and scientific traditions, music, literature and performance traditions as well as sacred places and objects. Arts Law believes that the reform of existing cultural heritage laws should be undertaken hand in hand with the Government's commitment to the implementation of Article 31 of the *Declaration on the Rights of Indigenous People* and its ongoing participation in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**) which is looking at the development of an international instrument to protect Indigenous cultural heritage.

Arts Law supports the establishment of a comprehensive legal framework designed to recognise and protect Indigenous cultural heritage (sometimes referred to as Indigenous Cultural and Intellectual Property or ICIP). Such an objective requires reform on a holistic level well beyond that contemplated by the Discussion Paper. The Paper provides a useful starting point for discussion but should, we respectfully suggest, be used as a stepping stone to more comprehensive reform.

There is currently no general legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of Indigenous cultural heritage capable of enforcement by the Australian legal system (except to the limited extent of native title and existing legislation concerning areas and objects).

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the *Declaration on the Rights of Indigenous People* to "take effective measures to recognise and protect the exercise of ... rights" 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.

Why sui generis legislation is needed

Arts Law believes that adequate protection can only effectively be achieved by separate *sui generis* legislation for the following reasons:

- Indigenous cultural heritage covers a broader range of creative and intellectual and cultural concepts than those protected under the existing heritage and intellectual property 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;
- Indigenous cultural heritage is fundamentally different from traditional legal constructs of property in that it is a communal not individual right albeit with individual custodians;
- Indigenous cultural heritage is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
- Indigenous cultural heritage evolves and develops over time unlike traditional property rights which focus on fixing a point in time at which the property which is protected is defined;
- Indigenous cultural heritage stands beside existing intellectual property rights – it is not an extension of them as it is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;

Alternatives

Arts Law believes that the alternatives which have been canvassed for the protection of Indigenous cultural heritage¹ and believes each of those alternatives has shortcomings:

¹ For example see the recent article by McKay, Erin, *Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach*, UNSW Law Journal 2009, vol 32(1)

- Reform of existing cultural heritage legislation is limited to a focus on places and things – it does not address the fundamental premise of what constitutes cultural heritage but relies on a flawed assumption that a focus on areas and objects gets most of the way.
- Amending the *Copyright Act* – this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered in the Copyright Act. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of traditional knowledge;
- Treaty – agreement at international level is not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation;
- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression are thoughtful and comprehensive but rely on good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;
- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a band aid solution to address the lack of relevant legislative protection. Again it relies on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the *Declaration on the Rights of Indigenous People*.

Please do not hesitate to contact me if you require further information.

Yours sincerely



Delwyn Everard
Senior Solicitor