

VALUING ART, RESPECTING CULTURE

Protocols for working with the Australian Indigenous visual arts and craft sector

by Doreen Mellor
with Terri Janke (legal section)



The document was commissioned by the National Association for the Visual Arts (NAVA).

It was funded by the Aboriginal and Torres Strait Islander Commission (ATSIC); the Commonwealth Government through the Australia Council's Aboriginal and Torres Strait Islander Arts Board; and the Northern Territory Government's Department of Arts and Museums.



Limited copies of the report are available to organisations working in the sector or libraries and educational institutions. Contact NAVA if you are interested in receiving a copy. You can email NAVA at nava@visualarts.net.au. Contacts for many Indigenous art centres, funding bodies, retail outlets, artists and other reference points can be accessed via the Visual Arts Net website, Artworld section.

Following is the edited introduction and the executive summaries from the report.

Introduction

Scope

This protocols document, *Valuing Art, Respecting Culture*, continues on from the positive work undertaken by so many individuals and organisations, in providing a guide for appropriate ways to work with Indigenous Australians, in this instance, with visual artists and visual arts organisations. Given the integrated nature of Aboriginal and Torres Strait Islander cultures, the visual arts are closely related to other artforms and activities, and are frequently unable to be isolated from other functions of the community. Thus, a broad understanding of the cultures of Indigenous Australia will always assist, when approaching collaborations or business dealings within the Indigenous visual arts sector. PART 1 of *Valuing Art, Respecting Culture* provides a brief overview of Aboriginal and Torres Strait Islander cultural environments in Australia, and comments on the development of the Indigenous visual arts sector over the past few decades. Protocols guidelines are provided in PART 2.

PART 3 comprises a section on legal issues for the visual arts sector. Australian law does not always cover matters of concern within Indigenous Law, nor does it always make provision for ethical and responsible ways of dealing with Indigenous cultural matters. Where possible, the legal section and the general section of this protocols document attempt to indicate how to approach such matters responsively. While the document endeavours to cover many areas of activity within the visual arts, it is not possible to answer every question the reader might have, or to provide prescriptive answers. Indigenous cultures and communities in Australia are diverse, as are the life circumstances of Indigenous individuals. Nevertheless, where there is no specific answer or indication, approaches and directions will be found, which may translate into other contexts or more specific situations.

Background

The art of Indigenous Australia has become an important element of the Australian arts environment. Visual art forms continue to play a leading role, providing a visible Indigenous presence in many and diverse contexts. As Indigenous involvement in the visual arts sector expands, addressing cultural exchange and diversity of approach becomes more challenging.

From their earliest involvement in mainstream art environments, Indigenous artists and organisations have adapted to working with different value systems and approaches to art and they continue to do so. Conversely, with increasing acceptance of the significance of Indigenous art movements, the visual arts sector in Australia has attempted to come to grips with the way Aboriginal and Torres Strait Islander value systems operate. Failures in this process have ranged from blatant infractions of copyright to instances of thoughtless insensitivity, but there have also been many examples of fair dealings between Indigenous and non-Indigenous participants in the visual arts sector.

NAVA, the National Association for the Visual Arts, has been active in supporting the Indigenous visual arts, and through producing this protocols document, *Valuing Art, Respecting Culture*, continues to contribute to its development as part of Australian contemporary art activity.

Appropriate ways of working within the Indigenous sector are indicated in the protocol and legal sections of the document. Other sections of the document provide background information and an historical and cultural context for contemporary Indigenous visual arts practice in Australia.

Benefits

Making customs, values and cultural principles known to those outside a cultural community benefits that community in many ways. Indigenous protocols for the visual arts sector have the potential to contribute significantly to the general wellbeing of Indigenous communities, and may be of benefit to other communities in Australia in a variety of ways, including those outlined below:

- the publication of protocols means that the basis for a constructive means of communication - the first step in amicable relations between cultural groups - is able to be established;
- protocols provide a point of reference for those wishing to engage in cross-cultural transactions in an appropriate way, and a reminder of the responsibilities involved in working with other cultures;
- protocols provide a focussed body of information for those who wish to comply with and adhere to the cultural conventions of another group;
- protocols assist in the process of scrutinising cross-cultural transactions, and even if there is no means by which those transactions may be regulated, protocols may act as a deterrent for inappropriate behaviours;

- much guesswork and hearsay about how to work with or approach Indigenous communities in relation to the visual arts can be eliminated through the provision of a set of protocols. Protocols provide a focussed perspective on the sector and issues within it;
- protocols provide moral support and back-up for appropriate positions taken by individuals and organisations within the sector, and also within communities and work environments;
- a benchmark is established, from which further research and assessment of protocol positions can take place;
- Indigenous protocols provide a counterbalance for the prevalence of settler protocols and cultural principles in Australia; and
- the existence of guidelines or protocols provides a perspective on the activities of various players within the sector, making it clear which individuals and organisations are working positively to support the sector.

Executive Summary

The information in *Valuing Art, Respecting Culture* is organised into three main sections.

PART 1 provides a framework for understanding Indigenous cultures in Australia, and their connection with the visual arts environment. PART 2 contains protocol guidelines and information for dealing with the Indigenous visual arts sector. PART 3 concerns Indigenous visual arts and the law and consists of a legal information section describing the legalities of Indigenous visual arts. These three sections are summarised below, keeping to the format established in the full document.

PART 1: The Indigenous arts environment

1 Indigenous cultures in Australia

Indigenous Australian cultures include both Aboriginal and Torres Strait Islander cultures, involving many languages and a diverse group of cultural protocols. Both land and sea territories have profound spiritual and cultural significance to all Australian Indigenous Peoples, including those who now live in urban environments.

2 Indigenous identity

Contemporary Indigenous identity has been influenced by contact with settler cultures. Disruptive factors for Indigenous societies were: the incidental loss of food sources as land was cleared; the introduction of diseases to which Aboriginal people had no immunity; and the various recorded instances of poisonous substances being deliberately introduced into food and water sources.

Numbers of Indigenous Peoples were forcibly moved from their traditional lands, and confined in government settlements or missions run by religious groups. Deliberate separation of Indigenous children from their families was an extension of this practice, refer to 12.1 for criteria.

3 Reconciliation, reclamation and renewal

The rights of Indigenous Australians have increasingly been recognised, and in 1991 the Commonwealth government established the Council for Aboriginal Reconciliation. Native title has been legitimated through High Court rulings and legislation, and artists have become involved in dialogue and discussion surrounding land claim issues, as well as using the resources of institutions such as museums to retrieve cultural links.

4 The Indigenous arts and development within non-Indigenous frameworks

Indigenous languages in Australia do not have a directly translatable term for the word 'art', although art is an integral part of life and community activity. Art has become part of the land claim process, often used to demonstrate ceremonial links to land. In urban communities art expresses Indigenous identity, and addresses many socio-political issues. Urban, rural and remote artists working through commercial galleries, art and craft centres or cooperatives are part of the wide-ranging profile of contemporary Indigenous art in Australia.

5 Support structures

Frameworks for supporting Indigenous artists and art practice vary. The most cohesive support network is provided by remote community-based art and craft centres, funded for the most part by ATSIC (the Aboriginal and Torres Strait Islander Commission). Other centres have been established in regional and urban areas. Funding support is devolved through a number of agencies, the most important for the arts being the Aboriginal and Torres Strait Islander Arts Board of the Australia Council. Other organisations which support arts and cultural activities, are ATSIC, the federal Department of Communications, Information Technology and the Arts, and state arts ministries.

Various opportunities for income generation through marketing art works exist within the Australian arts environment, and include:

- commercial galleries;
- retail outlets;
- public galleries and museums; and
- Indigenous cultural centres.

6 Visual arts and cultural organisations in the wider community

This section provides a brief overview of the types of public institutions where collections of Indigenous art reside, or where exhibitions of Indigenous art might be shown. Museums, galleries and other cultural and arts organisations fall into this category.

6.1 natural history museums

Natural history museums have collected the material culture of Australia's Indigenous Peoples ever since first contact. In contemporary museum environments, there is a far greater awareness of the value of the cultural material held.

6.2 specialist museums

Specialist museums vary in size and nature. They may be national institutions, such as the Maritime Museum in Sydney; or state-based museums, such as the Maritime Museum at Port Adelaide in South Australia.

6.3 Indigenous Peoples and museums

Small museums are often part of, or serve, Indigenous communities. Some remote community-based art and craft centres also have museums attached to their retail operations. There are many examples of community museums, from Yarrabah in North Queensland, to Ngui on Bathurst Island in the Northern Territory, or the museum at Camp Coorong in South Australia.

6.4 art museums and public galleries

Like other museums, art museums can be large or small, national, state or regional in focus, and may have collections of Indigenous visual art. The national and state art galleries are art museums, the usual defining feature of an art museum being the collections of visual art held within the institution.

7 Cultural protocol documents

A number of protocol documents have been produced in recent years, to meet the needs of particular communities, organisations, sectors or situations. Five of these documents have been reviewed, including:

- *Our Culture: Our Future - Report on Australian Indigenous Cultural and Intellectual Property Rights*, 1998, written and researched by Terri Janke of Michael Frankel & Company, Solicitors, for the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), and the Aboriginal and Torres Strait Islander Commission (ATSIC);
- *mina mir lo ilan man - proper communication with Torres Strait Islander people*, produced in conjunction with *protocols for consultation and negotiation with Aboriginal people* by the Queensland government, Department of Aboriginal and Torres Strait Islander Policy and Development, 1998;
- *Taking the Time - museums and galleries, cultural protocols and communities, A Resource Guide*, 1998, produced by Museums Australia Inc. (Qld);
- *Previous Possessions, New Obligations*, a policy document produced by Museums Australia in 1994 (followed by a plain English version, with case studies) to provide a way for museums to approach Indigenous cultures; and
- *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, compiled by Alex Byrne, Alana Garwood, Heather Moorcroft and Alan Barries, and endorsed at the Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN) conferences, in December 1994 and September 1995.

PART 2: Protocols: Australian Indigenous art and artists

8 Principles

Principles underlying Indigenous protocols in the Indigenous visual arts sector are:

- respect for the values of Indigenous Peoples;
- control of Indigenous cultural heritage;
- protection of Indigenous intellectual property; and
- government support for maintenance of cultural heritage.

9 A framework for protocols

Customs and protocols vary widely across the many and diverse communities of Indigenous Peoples throughout Australia, however fundamental frameworks can be outlined and may include:

- writing and speaking about Indigenous cultures in a manner preferred by those cultures, and avoiding the use of derogatory or outdated terms;
- accepting the diversity of Indigenous experience and cultural context;
- referring to Indigenous cultures as living and evolving entities, not historical phenomena; and
- acknowledging the Indigenous custodians of country.

10 Communication, consultation & consent

Proper consultation is important in planning any activity involving another cultural group.

10.1 consultation

Communication is most effective if each group:

- is aware of the way in which their own culture affects how they see an issue;
- endeavours to understand, and builds awareness of the other culture;

- patiently unravels misunderstandings which arise out of cultural differences; and
- finds the right people within a community to speak to.

Within Indigenous communities, gender divisions of responsibility and knowledge are important. Consultation and communication processes are different for each community, and Aboriginal communities have different cultural approaches from Torres Strait Islander communities.

10.2 consent

Community consultation establishes the Indigenous cultural perspective, and it is important to accept that it is this perspective which should determine the appropriateness of a course of action which might affect an Indigenous community or group. Consent is required, and it is important to:

- allow time for a decision to be made;
- remember that decisions will be made according to internal community needs;
- be prepared to take 'no' for an answer; and
- respect the views of all factions within a community.

10.3 visiting communities

Trust is established through personal links as well as in the way work is carried out in a community. Formal permission is required for travel to many communities. In the visual arts sector, it is advisable to contact the local Art and Craft Centre for assistance.

People living in remote area communities have busy lives of their own and observers and visitors can be an imposition. Importantly:

- avoid visiting at times of the year when ceremonial activity is likely to be in progress;
- avoid visiting when responsive ceremonial activity, such as a funeral, is taking place; and
- remember that ceremony is not leisure time activity for Indigenous Peoples.

11 Works of art

Art works may be loaned, commissioned or purchased for:

- exhibitions;
- private or public collections;
- resale in a commercial outlet;
- gifts by private individuals; and
- festival activities.

11.1 purchasing Indigenous art works

Purchasing directly from Indigenous art and craft centres ensures authenticity and supports the community and the artists. In most cases, bypassing art and craft centres is an unacceptable practice.

Purchases may be made from reputable dealers and galleries around Australia, many of whom are members of industry associations such as:

- the Australian Commercial Galleries Association;
- the Indigenous Art Trade Association.

Mass produced items rarely benefit Indigenous artists. The Label of Authenticity, initiated by the National Indigenous Arts Advocacy Association (NIAAA), or other region-specific authenticity labels will assist in responsible purchasing.

11.2 Indigenous art works in exhibitions

Works for exhibition may be obtained from:

- art and craft centres and cooperatives;

- commercial galleries;
- public or private collections; and
- the artists themselves.

Permission is required from the artist concerned, if catalogues, invitations, reviews or promotional articles carry images of artwork from an exhibition featuring the artist's work.

11.3 reproducing Indigenous images and designs

Changes in technology have made it simpler to reproduce images, designs and visual symbols. However, the use of Indigenous designs or their close equivalent without permission, is not acceptable. Further detail on intellectual property rights can be found in section 3.

For permission to publish designs or images, contact a copyright society such as Viscopy or the artist, agent, gallery or art and craft centre.

NOTE: secondary reproduction fees owed to the copyright holder (usually the creator) cannot be accessed except by members of a collection society, so all visual artists would be well advised to join one. Viscopy is a collection society established to serve the visual arts.

CASE STUDY 1: Making didgeridoos c.1999

12 Artists: approaches to working with Indigenous artists

12.1 Who are Indigenous artists?

The questions continue to be asked - what is Indigenous art? Who are Indigenous artists? The answers are complex yet simple.

Artwork which is produced by an Indigenous person is Indigenous art. The content encompasses the reflections and life experience of the particular person - the search for cultural identity; a political stance; or a requirement to reflect ceremonial responsibilities in the work produced.

There is debate however, about the use by urban-based and regional/rural-based artists, of designs and symbols which evoke Aboriginality, in order to make a statement about cultural identity. There is a fine line between such exploration, and the appropriation of others' identity and culture.

challenging identity

How should a challenge to an artist's Indigeneity be handled? The ATSIC definition of Aboriginality requires:

- the person to identify as an Aboriginal;
- that the person is of Aboriginal descent; and that
- the community of origin or the community in which he/she resides accepts the person as Aboriginal

Organisations dealing with a challenge to an artist's Aboriginality, will be required to ask the artist in question to provide evidence that he/she meets these three conditions.

working with Indigenous artists

Non-Indigenous and Indigenous artists, art workers or other interested parties may wish to:

- collaborate with an Indigenous artist;
- include works by an Indigenous artist in an exhibition;
- generate an exhibition of work by an Indigenous artist or group of artists;
- include an image of a work by an Indigenous artist in a publication;
- include an Indigenous artist as a speaker on a panel;

- invite an Indigenous artist to address an interest group or students;
- involve an Indigenous artist as a speaker in a professional development program; or
- interview an Indigenous artist as part of research or journalistic activity.

12.2 collaborating with Indigenous artists

Artists may be contacted through various agencies - through art and craft centres, or the galleries which represent them. An approach to an artist in regard to collaboration may be met with enthusiasm or lack of interest - as with any artist, the response will depend on the individual concerned.

contacting Indigenous artists

Contact with the artist may not need to be arranged through an agency such as an art and craft centre if a personal relationship with an artist or group of artists already exists. However, the agreement or understanding entered into with the particular artist/s does not necessarily extend to other artists or communities.

CASE STUDY 2: Collaboration c.1994

12.3 inviting Indigenous artists to exhibit

Art and craft centres or galleries may facilitate contact with an artist or assist with selection of an appropriate artist. Prior background research will ensure the approach is made to an appropriate artist or centre, and that the process of collating information does not involve the resources of the artist or the centre unnecessarily. The payment of exhibition or artist loan fees is a recognition of an artist's potential loss of income while work is on exhibition in a non-selling context, and should be a separate payment from artist's fees (for time spent creating a work), travel per diem and payments to cover material costs. The National Association for the Visual Arts (NAVA) publishes guidelines on fees for artists and art workers.

12.4 Indigenous artists as public speakers

There are various ways to locate an artist to address an audience or lead a workshop. The provision of transport, childcare and other services, which will facilitate the process, should be taken into account.

12.5 interviewing Indigenous artists

Artists may be interviewed:

- as part of preparatory research for exhibitions;
- as part of academic research; or
- for journalistic purposes in a media setting.

Ethical approaches to research are necessary. Some background information should be gained before interviewing takes place.

CASE STUDY 3: Background briefing c.1997

13 Artists' voices

Indigenous artists from different parts of the country and working in diverse situations have been asked to put their thoughts about protocol issues on record. The artists are:

- 13.1 Julie Dowling (WA);
- 13.2 Banduk Marika (NT); and
- 13.3 Clinton Nain (VIC).

14 Exhibitions: the display of Indigenous works of art

14.1 presenting exhibitions of Indigenous works of art

cultural implications

Cultural implications should be considered, before artists are approached, or purchase/loan of art works arranged. If artists are present at an exhibition, it is courteous to acknowledge them publicly, and to offer hospitality and support.

CASE STUDY 4: Exhibition: a case study c.1999

14.2 curating exhibitions of Indigenous art

Indigenous curatorial input

It is important to involve an Indigenous curator, consultant or reference group in curatorial work. Indigenous curators, or other people involved in the arts can be contacted through State arts ministries, art and craft centres, or through Rachel and Hope Perkins' *The Black Book - Indigenous Arts & Media Directory*.

14.3 viewing exhibitions of Indigenous art

Indigenous involvement in making exhibitions accessible

Seek assistance from Indigenous artists, curators or educators to make exhibitions of Indigenous art accessible to viewing audiences.

accessibility means access for Indigenous Peoples also

Aboriginal and Torres Strait Islander Peoples should feel welcome in galleries and resource centres, and this includes providing a relaxed environment, approachable staff and where possible, the presence of Indigenous staff members.

talking about art in exhibitions

Educators and guides in art museums require cultural awareness training sessions by Indigenous people, and an introduction to Indigenous protocols before speaking about Indigenous art in exhibitions.

writing about art in exhibitions

Writing about Indigenous art in exhibitions includes writing:

- wall text and labels;
- advertising copy and media releases; and
- catalogue essays.

It is courteous to consult with the artist/s involved, an Indigenous reference group, an Indigenous curator, a curator experienced in working with Indigenous artists and art work, or someone with direct knowledge of the particular community. There are conventions for label and caption text layouts in exhibition and museum settings. Some examples can be found in Appendix 4.

deceased artists and display of artworks (protocols)

The display of Indigenous artwork should be undertaken according to appropriate cultural protocols.

- some communities will request that *artwork* by a deceased artist not be displayed for a time after the artist's death;
- some communities will request that an *artist's name* not be used for a time after the artist's death;
- some communities will request that *images of an artist* not be displayed for a time after the artist's death.

Ensure that the artist's family or community is consulted, so that the appropriate measures can be taken.

authenticity

It is important that the authenticity of Indigenous works displayed in an exhibition is established. The label of authenticity may be of use in an exhibition context.

CASE STUDY 5: Authenticity c.1999

15 Public collections: Indigenous art, and its management

15.1 acquiring art work for public collections

Due care, and verification of the provenance of Indigenous art works at the time of purchase, will assure their authenticity.

15.2 care of collections

Indigenous reference groups or researchers and employees should be part of the team which cares for major Indigenous public collections.

15.3 appropriate archival description and cataloguing terms for collections

Descriptions of objects and artworks held in public collections should be acceptable to Indigenous people.

15.4 restricted materials

It is unlikely that materials in a public collection of art works are intrinsically of a confidential or sensitive nature, unless they pre-date the 1980s. Early works are usually to be found in very large public galleries and natural history museums, most of which have instituted responsible policies for managing such items.

The Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services outlines three steps for handling of secret, sacred or sensitive materials, which transfer well to any sector. They are:

- the identification of such material in collections;
- the determination of appropriate policies for handling of this material once it is identified; and,
- the strict implementation and observance of those policies in the day-to-day operation of the holding institution,

15.5 access to collections

For Indigenous people it is important that there is access to collections by the artists, their relatives or members of their community who may have a cultural link to acquired works, and that they feel their presence is welcomed.

CASE STUDY 6: Indigenous access c.1998

16 Research in the Indigenous visual arts sector

There are many sources of ethical guidelines for researching Indigenous culture, including aspects of culture involving the visual arts.

Recommendation 51 of the Royal Commission into Aboriginal Deaths in Custody outlines an appropriate approach to research. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has published a set of ethical guidelines and protocols for Indigenous research. The essential principles relate to:

Valuing Art, Respecting Culture. Protocols for working with the Australian Indigenous visual arts and craft sector. National Association for the Visual Arts, 2001. This information was downloaded from www.visualarts.net.au and brought to you by NAVA, representing the interests of Australia's visual and craft artists.

- *informed consent* to the research by the community in which the research is to be carried out;
- *benefit to the community concerned* as well as benefit to the broader Aboriginal and Torres Strait Islander community;
- *recognition of Indigenous cultural and intellectual property rights* in the material gathered for the research project; and
- *appropriate use of research results* as agreed with the community.

Ethical guidelines, policies and protocols for research relating to Indigenous Australian culture are produced by most Universities. An example is the document compiled by CINCRM, the Centre for Indigenous Natural and Cultural Resource Management at the Northern Territory University.

17 Management in the Indigenous visual arts sector

17.1 governance and management

The involvement of Aboriginal and Torres Strait Islander people in the governing, advisory and management operations of organisations which hold substantial collections of their work, is essential.

17.2 staffing

It is important that Indigenous people are employed wherever possible, in institutions holding collections of Indigenous art. Indigenous people may also be involved in the selection of candidates for employment. Indigenous staff members should be trained, supported, and mentored.

17.3 culturally appropriate management

An organisation which employs Indigenous staff members, has a responsibility to recognise and respond to their cultural needs and obligations.

17.4 managing visual arts events

The presence of Indigenous artists is often desired as part of the recognition of cultural meaning attached to art works. When members of more than one community are present, some negotiation may be needed in regard to cultural activity. Material which is appropriate for one group of people to display publicly, may be difficult and even distressing for another group to view.

18 Funding in the Indigenous visual arts sector

18.1 funding from Aboriginal and Torres Strait Islander sources

Funding from Aboriginal and Torres Strait Islander sources is available as a support for Indigenous artists and organisations. Requests for funding from these sources, by non-Indigenous organisations, should be premised on the maximum inclusion of and benefit to Indigenous artists, curators, organisations and communities.

18.2 funding agencies

A number of agencies provide funding through programs directed towards the support of Indigenous arts and cultural activity, including:

- the Aboriginal and Torres Strait Islander Arts Board of the Australia Council; (the principal arts funding agency)
- the Aboriginal and Torres Strait Islander Commission (ATSIC);
- the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS); and
- State ministries for the arts and culture.

PART 3: Indigenous visual arts and the law

Introduction

Visual art is central to the continuing cultural survival of Indigenous Peoples. It is important for Indigenous artists to know how the law impacts on their obligations in Indigenous society. The law has a marked impact on the cultural life of an Indigenous artist and his or her community. This legal section provides advice to Indigenous artists, and visual arts organisations dealing with them.

19 What is Copyright?

Copyright is a package of rights recognised under the Copyright Act 1968 (Cth). The artist, as copyright owner has the exclusive right to use and reproduce his or her copyright works and to authorise others to use and reproduce his or her copyright works. These are important rights for Indigenous artists.

20 Copyright protects:

- Original artistic works; that is, works created by artists that are not copied from other sources; and
- Works of artistic craftsmanship refer generally to hand-made goods and goods with an aesthetic quality.
- Copyright protects works that are in material form.
- Copyright does not protect patterns or styles.
- Copyright protects the expression and not the underlying idea.
- Copyright provides rights to a recognised individual author – so to enforce rights the author must be identified.
- Copyright does not provide communal rights to traditional designs or styles.
- Whilst copyright protects works of joint ownership, the rights only attach to artists who have contributed hands on to the creation of a piece of artistic work. The contribution of generations of artists is not viewed as a collaborative effort.
- Connecting factors must also be met for copyright to protect the works. That is, the creator must be a citizen or resident of Australia or the work must be first published in Australia.

21 Duration of Copyright

The duration of copyright protection is 50 years after the death of the artist. When this period expires, the works fall into the public domain where they can be freely copied. However, under Indigenous law, many artistic works cannot be reproduced or disseminated without proper consent of the relevant custodian. Even though a work is out of copyright, consent procedures may need to be followed.

22 Who owns copyright in an artistic work?

The artist who creates the work is generally recognised under the Copyright Act as being the owner of the copyright in the created work. However, there are some exceptions to this rule. For instance, copyright in works produced under a contract of employment vest in the employer. Also, if there is a written agreement that states copyright should vest in the commissioning body.

LEGAL CASE STUDY 1: Employment Examples

With photographs, commissioned photographs for private and domestic purposes and portraits, copyright will be owned by the person who commissioned the work. Other photographs, copyright will belong to the photographer. This may raise issues for Indigenous people, who have expressed concerns about the use of their photographs commercially without their proper permission.

LEGAL CASE STUDY 2: Unauthorised Photography, Galarrwuy Yunupingu Case c.1998

The Crown may also assert copyright in artistic works that are made by or under its direction and control.

23 Copyright Owner's Exclusive Rights

The copyright owner of an artistic work has the exclusive right to do all or any of the following:

- i. to reproduce the work in a material form
- ii. to publish the work
- iii. to include the work in a television broadcast
- iv. to communicate the work to the public.

24 Infringement of copyright in an artistic work

It is an infringement of copyright in an artistic work to:-

- Copy the work
- Import the work for sale or hire

LEGAL CASE STUDY 3: M v Indofurn (The Carpets Case) c.1996*

24.1 remedies for infringement of copyright

- injunction to stop the unauthorised reproduction
- damages, or account of profits
- criminal liability for large scale piracy
- orders of seizure
- delivery up

25 Some Exceptions for Infringement

It is not an infringement of copyright in a sculpture or a work of artistic craftsmanship placed on permanent display in a public place to reproduce that work in paintings, drawings or in photographs.

Incidental filming is also an exception.

Further, there are fair dealing exceptions which include research or private study and use for the purposes of criticism or review.

The government may use a copyright work without permission of the copyright owner where the use made is for the services of the Crown.

There are library and educational copying provisions also.

26 Digitisation Issues

The new right of communication to the public provides copyright owners with the right to control their artistic works in the digital form and its electronic transmission on the internet. However, libraries, archives, galleries and museums will be able to digitise the material in the collection to make it available on an internal computer system for staff use only.

27 Moral Rights

Moral rights are:

- the right of attribution of authorship; or
- the right not to have authorship falsely attributed; or
- the right of integrity of authorship.

The rights apply to authors of literary, dramatic, musical and artistic works and authors of cinematograph films.

27.1 the right of attribution

The artist has a right to be identified as the author of his or her work. The author is entitled to be attributed where his or her work has been used in a certain way. For example, the author of an artistic work is entitled to be attributed where his or her work is reproduced in material form, published, exhibited or transmitted.

27.2 the right of false attribution

An author has the right not to have authorship of a work falsely attributed. It is an offence to deal with an artistic work, reproduce an artistic work, or transmit an artistic work, where the attributor knows that the name affixed is not that of the author.

27.3 the right of integrity

The author has the right of integrity of authorship in respect of the work. This right provides that an artist may bring an action if the work is subjected to derogatory treatment. The right of integrity is not infringed if it can be proved that the treatment was reasonable in all the circumstances, or if the author consented to the treatment.

28 Resale Royalty

This section discusses the resale royalty or “droit de suite” which is the right of an artist to receive a percentage of the resale price of an original artistic work. Indigenous artists have received very modest returns from the first sale of their work especially in the light of the relatively early resale of their artistic works at much higher prices. If a greater share of the later resale of works were returned to Indigenous artists the benefit to Indigenous arts and communities would be substantial.

29 Indigenous Cultural and Intellectual Property rights

Indigenous Peoples seek certain rights to their cultural heritage material in order for them to continue their cultural practices. Visual arts, like other aspects of heritage, are inter-related to all

aspects of Indigenous life. Indigenous cultural and intellectual property rights are important rights for cultural maintenance.

29.1 why protect Indigenous cultural and intellectual property?

There is a need to preserve and maintain Indigenous cultures so there is something to pass on to the future generations. There is also the economic rationale. If Indigenous cultural material is being exploited for commercial gain, Indigenous peoples should be in control of the consent process and share in the benefits from any authorised commercialisation.

29.2 what rights do Indigenous peoples want recognised?

The report *Our Culture: Our Future* sets out a list of rights that Indigenous peoples seek to their Indigenous Cultural and Intellectual Property. These include:-

- The rights to own and control Indigenous Cultural and Intellectual Property;
- The rights to prevent the derogatory, offensive and fallacious use of Indigenous Cultural and Intellectual Property;
- The right to benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property including the right to negotiate terms of such usage; and,
- The right to maintain secrecy of Indigenous knowledge and other cultural practices.

29.3 legal protection of Indigenous cultural and intellectual property

Australian laws do not adequately protect Indigenous Cultural and Intellectual Property, hence there is a need for greater measures including respecting protocols and use of contract law to protect and enforce rights of Indigenous artists.

Copyright law does not provide adequate recognition or protection of Indigenous Cultural and Intellectual Property rights. For instance, rights only last for 50 years after the death of the artist and there is no special protection for sacred knowledge.

29.4 communal ownership

Indigenous traditional ritual knowledge is communally owned for the benefit of the source community or clan group. This notion of communal ownership is not recognised at law. However, recent Australian case law recognised the existence of a fiduciary obligation between the artist and the clan group where works incorporate traditional ritual knowledge.

LEGAL CASE STUDY 4: Bulun Bulun v R & T Textiles c.1998

Indigenous custodians should give clear and express notice of any communal and customary rights to artistic works.

30 Dealings in copyright

30.1 selling copyright

When a painting is sold, the copyright remains with the artist. For copyright to be assigned, there must be some form of writing. Once assigned, the purchaser is the copyright owner and can exercise all rights under copyright, with the exception of the moral rights which remain with the artist. Given the need for Indigenous artists to control their works for cultural purposes, the assignment of copyright in works is not recommended. Where possible, assignments should be avoided, and licenses should be given for limited purposes.

30.2 licensing copyright

A copyright licence is a grant of rights to deal with the copyright of a work. Artists can seek to negotiate rights for use of their artistic works under terms and conditions including:-

- purpose
- exclusive or non-exclusive rights
- territory
- time

30.3 licensing issues and Indigenous art

There may be certain considerations to be taken into account when licensing works. Indigenous artists should ensure that any licensed rights granted to the licensor are not likely to conflict with personal or cultural obligations. Any conditions on use should be clearly notified and included as terms of a written agreement.

LEGAL CASE STUDY 5: Yumbulul v Reserve Bank c.1998

30.4 Viscopy

Viscopy is a collecting society for visual artists. Viscopy has many Indigenous artists as members. Copyright clearances can be obtained from Viscopy.

31 Contracts

Each transaction involving the copyright of an artistic work is a contract. To ensure that there is understanding of the terms, it is recommended that such contracts be in writing.

31.1 licensing agreements

A written licence agreement sets out the terms and conditions of a licensing arrangement. These can include:-

- payment
- grant of rights
- nature of licence
- purpose
- time
- no alteration
- attribution

31.2 agency agreements

To reduce the likelihood of confusion between agents and artists, it is recommended that a written agency agreement be entered into which sets out the terms of the relationship including:-

- exclusive or non-exclusive
- term
- nature of agency
- territory
- commission

31.3 prior informed consent

The principle of prior informed consent should be observed when proposing commercial use of Indigenous cultural material. It is recommended that artists seek professional legal advice prior to signing written agreements.

32 Trade Marks

32.1 What is a trade mark?

A trade mark is a sign used to indicate the trade origin or source of goods and services. Registration under the Trade Marks Act 1995 (Cth) can assist artists enforce their rights to protect artistic works.

32.2 Indigenous use of trade marks

Many Indigenous arts centres use logos and trade marks to identify their artistic products and services from those of others. They are also used to show the authenticity of the products. Some of these marks are registered whilst others are not.

32.3 certification marks

A certification mark is a sign used to distinguish goods or services which possess a certain quality, accuracy or characteristic. Certification marks can be registered under the Trade Marks Act 1995. The National Indigenous Arts Advocacy Association has developed and adopted a national Indigenous Authentication Labelling System that uses two registered certification marks to protect the rights to Indigenous creators - the Label of Authenticity and the Collaboration Mark.

33 Registered designs

Under the Designs Act 1906, a person may register a design to protect the visual appearance of manufactured products. A registered design gives the registered owner the legally enforceable exclusive right to use it to gain a marketing edge and to prevent others from using the design without permission.

34 Selling fakes

The sale of Indigenous arts fakes has received media attention. Such conduct may amount to a criminal offence, or at least infringe trade practices law and sale of goods legislation. The issue of fakes, where a work is not produced by or under the control of the artist, is to be distinguished from the issue of collaborative works where an artist allows others to assist in creation of a work as part of a culturally acceptable practice.

35 Trade Practices and Passing Off

There are laws that make it an offence to engage in misleading and deceptive conduct in the course of trade. These provisions, although focussed on consumer protection and competition issues, may provide some protection against false labelling and marking practices of Indigenous art.

36 Native title and rights to land

The right to paint certain images in Indigenous cultures is linked to Indigenous Peoples' rights to land. In the native title process, artistic works and information about these may be disclosed to

the court to show connections with land. Protecting these rights and dissemination of this information should be discussed at the outset of any litigation.

37 Export of Indigenous cultural heritage items

The Protection of Moveable Cultural Heritage Act 1986 protects the control of historical, literary, artistic, scientific or technological objects. Some objects cannot be exported at all. The Act controls the export of significant Indigenous Cultural Heritage that fall into listed categories of a National Cultural Heritage Control List.

37.1 National Cultural Heritage Control List

Indigenous art may fall into categories of protected items of the National Cultural Heritage Control List such as Objects of Australian Aboriginal and Torres Strait Islander Heritage: Archaeological Objects: Objects of Aboriginal and Torres Strait Islander Fine or Decorative Art or objects relating to famous and important Aborigines or Torres Strait Islanders and objects made on mission and reserves that are more than thirty years old.

37.2 penalties

Where a person exports an Australian protected object otherwise than in accordance with a permit or certificate, the object is forfeited. There are sanctions for the attempted export of protected objects without a proper permit.

37.3 obtaining permits and certificates

Permits can be obtained from the Department of Communications, Information Technology and the Arts. This section outlines the process of applying for permits and certificates.

37.4 overseas buyers

An overseas purchaser of Indigenous art and heritage objects which come under the National Heritage Control List will require a permit or certificate to export Aboriginal and Torres Strait Islander heritage objects.

38 Wildlife import and export controls

Indigenous artistic works that include parts of Australian plant or animals may be subject to wildlife export and import controls. These laws should be checked when clearing customs for international exhibitions or sale of works.

39 Estate planning and wills

Copyright in an artistic work lasts for 50 years after the death of an artist. It is important for Indigenous artists to plan for the management of their artistic works after their death. Where applicable, estate planning should observe Indigenous customary laws and practices.

40 Proposals for change

40.1 stopping the ripoffs

In 1996, an issues paper released by the Commonwealth Government elicited responses on the need for greater protection at law, for Indigenous arts and cultural expression. This paragraph discusses the paper generally.

40.2 *Our Culture: Our Future*

In 1997, ATSIC and the Australian Institute of Aboriginal and Torres Strait Islander Studies commissioned a major study on the needs of Indigenous peoples for the protection of Indigenous Cultural and Intellectual Property; analysis of current legal protection and strategies for the greater protection of Indigenous cultural and Intellectual Property. This paragraph discusses the findings in brief.

