

19th March 2009

Response to the call for comment on the Australian Indigenous Art Commercial Code of Conduct Consultation Draft - December 2008.

Submission by the National Association for the Visual Arts (NAVA)

Background

The National Association for the Visual Arts (NAVA) is the peak body representing and advancing the professional interests of the Australian visual arts, craft and design sector, including Indigenous artists and their art support organisations.

NAVA has about 3,000 individual and organisational members and 1,000 student affiliates.

NAVA advocates on behalf of the sector, sets best practice standards and works to increase professionalism within the industry. It also provides direct service to members through offering expert advice, representation, resources and a range of other services. Since its establishment in 1983, NAVA has been very influential in bringing about policy and legislative change to encourage the growth and development of the visual arts, craft and design sector. This has included both general issues that apply equally to all Australians, and work specifically focused on Indigenous issues.

A. Comments on the draft Code's development process and potential effectiveness

1. Contraction of purpose and potential effectiveness.

NAVA maintains that by contracting the areas of responsibility for best practice business activity only to focus on commercial dealers and agents, the current draft of the Code neglects the reality of the Australian art industry. That is, that the Indigenous art industry, like the broader Australian art industry, is a complex mix of transactions between commercial, not for profit, public and private entities, and therefore, fair trade and the sustainability of the art industry can only be achieved if all entities adhere to agreed ethical standards.

In the background document to the draft Code, released as an attachment, the Australia Council and DEWHA have stated: "Submitters are strongly encouraged to provide comment on how a code can support the minimum standards described above."

By asking respondents to the draft Code only to address the limited concepts embraced by this version of the Code it could be argued that the stated purpose and perceived usefulness of the Code is being undermined. In other words, as highlighted by some members of the Industry Alliance Group¹, there is now industry disagreement about the fundamental question of the scope of the project which cannot be resolved under the current consultation approach.

It appears that the rationale for the decision to contract the Code's scope has been determined outside of the industry feedback received. NAVA understands that an "Issues Paper" is being prepared in association with the Code. NAVA reserves its judgement on whether the issues raised by industry will be adequately acknowledged and dealt with through this process.

¹ The group convened by the Australia Council to consider its redrafting of the Code.

2. Lack of clear guidelines within the draft Code to ensure ethical dealings.

2.1 Omissions

The background document states the following aims for the Code:

- the conditions artists work under are ethical
- full and fair payment is made to artists
- consumers have a means to track authenticity
- works can be tracked from artist to buyer.

The draft Code does not provide sufficiently rigorous standards and processes to meet these aims.

The following omissions from this draft, delivers a Code that will have very little impact on bad practice:

- the lack of guidance regarding best practice payment methods
- the lack of guidance about what is an ethically and commercially reasonable commission rate for a dealer or agent to charge
- the removal of an obligation for a documented agreement.

2.2 Industry advice not followed

These issues were discussed at two Industry Alliance Group meetings and the current draft does not reflect these discussions. The Industry Alliance Group was quite strongly opposed to the drafting relating to payment methods and the omission of an acceptable commission rate, but this has not been acknowledged or followed through in the draft or associated documentation.

The draft Code does not make it mandatory for an agreement to be written. However, it does place responsibility on dealers and agents to explain key terms and concepts. In NAVA's experience, whilst it is common for art industry agreements not to be written, and while we acknowledge there are particular issues around written agreements for the Indigenous art industry, it is preferable generally, and fundamental to the intent of this Code, that agreements in relation to commercial transactions between artists and agents/dealers be written documents.

We note that the submission being made by the Arts Law Centre of Australia specifically addresses some ways in which the issues could be handled around documenting agreements and ensuring that artists understand these agreements.

The minutes from the two Industry Alliance Group meetings show that several other recommendations and priorities proposed by participants were ignored in the current drafting.

3. Consultation re Annexure A.

In addition, the draft Code does not include Annexure A which will set out the minimum terms of an artwork agreement. Given that in a previous draft, Annexure A was 5 pages and included some matters of substance, including issues that were contested by members of the Industry Alliance Group, the lack of provision of this part of the document substantially compromises the current consultation process.

NAVA would like to know when will the detail of Annexure A be decided, by whom, with what industry input?

4. Code developed in line with the ACCC voluntary code model.

At this point it could be argued that an ACCC model of a voluntary industry code was never going to adequately meet the objectives that the art industry identified and set itself when the Code was initiated (which was prior to the Senate Inquiry in 2007).

The particular areas of the Indigenous art industry which the Code is trying to assist are not operating under the usual business conditions of other Australian businesses. There are significant cross cultural, social and geographic issues that affect the industry and which need to be acknowledged and addressed. The ACCC itself has in the past acknowledged the need for special strategies to meet the needs of Indigenous businesses. The ACCC voluntary code model may not be the vehicle through which fair treatment and equity can be achieved for the Indigenous art industry.

It was felt by many people consulted, both in the Code's first and second drafting phases, that the voluntary nature of the Code undermines any real capacity to affect change in bad business practice.

The Government's insistence that the voluntary model be tried first by industry before it takes more regulated action may not be useful in the long run. It is highly likely that substantial resources and time will be wasted to no real effect. In addition it is not clear how the efficacy of the Code will be measured in order to judge whether it is having any impact on dealing with the problems which were the catalyst for this venture.

B. Comments on specific clauses in the draft Code

Part 1. Preliminary

Clause 2. Purpose of the Code

Unless the scope of the Code is expanded as indicated in comments under A in 1 above, the purpose should make it clear that this Code relates only to dealings between artists and commercial dealers and agents.

Section 2. (a) Fair and ethical trade with artists

It is unclear how adhering to this Code will regulate the industry in these matters because the Code does not state what is fair and equitable. One possibility is including in the Code the international standard for a fair commission rate for agents to charge or alternatively to refer to the relevant sections of the Code of Practice for the Australian Visual Arts and Craft Sector.

Clause 3. Definitions

Artist

In stating that when clauses relate to the artist this can also mean the artist's representative, the draft Code fails to recognise the complexity of relationships between artists and people who 'represent them'. As discussed at the Industry Alliance Group meeting, the two are NOT always interchangeable and there are times when an artist and his/her representative are not in agreement. The Code should differentiate between an artist and his/her representative as applicable to each clause.

Other definitions which need to be more clearly and correctly written are:

Indigenous

Moral Rights

Traditional Owners

Clause 4. (4) and (5) Application of the Code

The rules in the draft Code should apply to any agreement or dealing as per this statement, however it should be made clear that the Code would have effect for any artwork regardless of when it was created. Otherwise, Clause 4(5) and its implication for 4(4) is accepted as is.

Part 2. Professional Conduct

Clause 7. Minimum terms of artwork agreement. Annexure A.

See our comments in the summary section point 3 above.

Clause 8. Before entering into an agreement

8. (2) Many of the clauses in this section rely either on the agent or artist understanding either the legal or best practice behaviour in relation to the clause's implementation. This cannot be assumed to be the case for example in relation to (e) regarding Intellectual Property. NAVA does not agree with a statement that implies that a commercial dealer or agent may reproduce artists' work on its website without gaining permission from the artist and without adhering to any terms the artist may require. Instead it implies that legal requirement for a copyright fee to be paid can be bypassed.

(d) would be better expressed as "the ARTIST'S right of ownership of artwork until the artwork is sold".

8. (3) Additional requirements – art gallery agreements

The clauses in this section are somewhat confusing in purpose given that the overall intention of this draft of the Code is to be applied only to commercial agents and dealers. Part (c) includes art centres and public galleries and part (g) refers to time defined artworks and audio visual performance which are rarely sold through commercial entities.

We recommend that this section be rewritten in line with the actual requirements of the proposed Code signatories, which, as stated previously, need to be expanded beyond commercial entities.

Clause 10.1 (e), (f), (g) Payment for artists, determining remuneration.

The idea of an artist sending work to an agent or dealer who will only agree to a sale price once the work is received is problematic.² However, we note that it was the agents and dealers of the Industry Alliance Group who wanted the clause to reflect this.

It would seem, however, that this immediately raises the issue of what happens if the financial return proposed by the seller is not accepted by the artist or is not fair by industry standards. There are no guidelines in the Code as to what happens in this situation, other than the notion of the artist and dealer entering into a 'dispute' and following the consequent dispute resolution processes which potentially involve significant costs for artists.

Therefore, at the very least, we would recommend that parts (e), (f), and (g) should not form part of a clause that says the dealer has 7 days after delivery of work to advise the artist. In principle, NAVA would advise that issues about how payment will be determined, deductions allowable from that payment and the timeframe of that payment need to be agreed before the work is sent.

Clause 15 (c) and (d) Respect for indigenous cultural practices

Re part (c), see again comments relating to 8. (2) (e) above.

Parts (c) and (d) need to be clearer about the cultural protocols around Indigenous image reproduction. Without clarifying information, the intention and requirements of these clauses is confusing.

Part 3. Code Administration

The Code's usefulness to the industry would be enhanced if there were mechanisms associated with it that required reporting on prescribed systems and actions by signatories to the Code. At present the Code administration is centred around the Code Committee becoming aware of a Code breach and of signatories responding to a complaint. The reliance on complaint as the only way of monitoring activity in the industry may not be sufficient. In other industries signatories are committed to providing reports against prescribed

² We make a distinction between this and an artist working with an agent or dealer to determine an artwork's price. Also note that our confidence in the role of the seller when determining prices is greater for agents since the relationship between the artist and agent means that the higher the sale price the greater the return to the agent.

performance indicators. NAVA recommends that this type of reporting should be required for signatories to this Code.

Clause 22.(2) Payment for mediation split between parties.

NAVA continues to have great concern that by expecting artists to bear half of the cost of mediation, the major 'remedy' in the Code will not be able to be taken up by artists. We recognize that this is a difficult issue, however, we would strongly recommend that the Australia Council and DEWHA investigate what other systems might be better suited to this industry and Indigenous artists' circumstances.

We note that the Arts Law submission suggests that dealer signatories to the Code might be charged a registration fee from which the costs of mediation for artists could be covered.

Finally

The Code's name at the bottom of each page is incorrect. The 'Indigenous' word is missing.

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