



IP Australia
PO Box 200
Woden ACT 2600

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Submission to IP Australia's consultation on the Protection of Indigenous Knowledge in the Intellectual Property System.¹

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to IP Australia's consultation on the Protection of Indigenous Knowledge in the Intellectual Property System.

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. Our dedicated service for Aboriginal and Torres Strait Islander artists, Artists in the Black (AITB), was established in 2004, providing targeted legal services for Aboriginal and Torres Strait Islander artists and arts organisations across Australia. Arts Law is in the unique position of having consulted with and advised Aboriginal and Torres Strait Islander communities throughout Australia. Much of that advice has focused on ways of securing protection for Indigenous cultural heritage as expressed through Indigenous art, music and performance.

Arts Law has been active in this area for over 15 years, playing an integral role in the Fake Art Harms Culture campaign (outlined below) and has made a number of submissions to government on Indigenous Cultural and Intellectual Property (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. 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*

¹ Arts Law thanks Allens law firm for the valuable contribution to Arts Law in preparation of the Certification Trade Marks and Geographical Indications aspects of our submission <<https://www.allens.com.au>>.

Peoples in 1994,² and discussions about an Indigenous Communal Moral Rights Bill (2003).³ No legislative protection or enforceable rights have resulted from any of these previous inquiries.

Arts Law has consistently participated internationally in this space since 2007 through its observer status at the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore⁴. Arts Law recognises that the issue of Indigenous intellectual and cultural rights is a global one, and recognises that the world is watching Australia for leadership in this area. It is important to be seen to take necessary action to protect Australia's unique culture and empower its First Peoples.

Over the lifetime of the AITB project, Arts Law has assisted Aboriginal and Torres Strait Islander artists with their legal queries thousands of times. During 2018, Arts Law advised Aboriginal or Torres Strait Islander artists and arts organisations 328 times. In most instances, the advice sought by these artists and their organisations relates to the protection of their copyright, moral rights and cultural heritage. 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.

The Fake Art Harms Culture campaign

In 2016, following representations by Indigenous community members and artists, key peak bodies, the Arts Law Centre of Australia, Indigenous Art Code and Copyright Agency began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal style' art and craft products and merchandise for sale across Australia.

In response to the concerns, the 'Fake Art Harms Culture' campaign was created to address the widespread sale of works that have the 'look and feel' of being Indigenous but actually have no connection to Aboriginal and Torres Strait Islander communities. These are commercially produced goods, generally aimed at the tourist market; often made from non-traditional materials; and featuring inauthentic and culturally inappropriate designs. They range from bamboo didgeridoos, to decorative plates and key rings.

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 to prevent this proliferation of fake art products and merchandise has received widespread support. It has included presentations at numerous Indigenous Arts events, campaign letters to MPs signed by Indigenous artists and individuals, national media coverage and the backing of many dealers. In addition, a change.org petition was initiated by an individual and has drawn over 13,000 signatures.

The success of this campaign has demonstrated that the issue of inauthentic Aboriginal and Torres Strait Islander art impacts on the copyright, cultural rights and livelihoods of thousands of Indigenous people and their communities. It is

² 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>>.

³ 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>.

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

widespread and pervasive. It has also highlighted the fact that the recognition of the need for action on this problem is almost universal, amongst both the Indigenous art community and the consumers of such art.

The campaign has been very popular and attracted much attention. Arts Law is pleased at the role it has had in furthering the discussion around this issue, and continues to highlight the need to strengthen the protections of ICIP for Aboriginal and Torres Strait Islander artists and their communities.

1 Certification Trade Marks and Geographical Indications

Arts Law considers that using IP rights to promote Indigenous products has limited ability to address concerns surrounding the protection of Indigenous Knowledge. Proposal 1 suggests the establishment of certification trade marks (**CTMs**) to provide a legally enforceable system of Indigenous Knowledge protection and use of Geographical Indications (**GIs**) to benefit Indigenous communities by assisting the commercial exploitation of Indigenous Knowledge. One of the points made in favour of Proposal 1 is that it would require little or no need for changes to the law. However, this ignores the significant limitations of CTMs and GIs, including:

- the significant investment and time required to set them up;
- shifting the burden to artists and Indigenous communities; and
- relying on private enforcement.

In our view, these limitations are such that any CTM or GI scheme is likely to be ineffective, and that legislative change will be required in any event to ensure the adequate protection of Indigenous Knowledge.

Proposal 1 mentions 'learning from past experiences', which is presumably a reference to the Label of Authenticity established in 2000 by the National Indigenous Arts Advocacy Association (**NIAAA**), which only existed for two years. Arts Law understands that the issues associated with that scheme were:

- reluctance of artists to have to prove the authenticity of their works,
- registration fees (although low) being prohibitive for many Indigenous artists and Indigenous communities,
- difficulty accessing the scheme for those living outside metropolitan areas, and
- lack of funding and poor administration of NIAAA.

While Proposal 1 appears to favour industry-specific and regional CTMs over a national scheme, it does not explain how an industry-specific or regional approach would address the limitations associated with CTMs and GIs generally.

Despite some enthusiasm for a CTM or GI scheme from some legal and non-Indigenous commentators, our understanding from wide consultation is that most Indigenous people and communities oppose such a scheme.

1.1 Significant investment and time

Setting up a CTM or GI requires significant investment and is a drawn out process, which shifts the onus in the first instance to the artist or community or a person acting on their behalf. A CTM requires:

- An entity to apply to the Registrar of Trade Marks at IP Australia for a CTM. The application must provide a set of rules on how to use the CTM.
- The Registrar assesses the CTM against the general trade mark requirements. If it meets these requirements, the ACCC is asked to consider the application.

- The ACCC assesses the application according to eligibility requirements and to ensure that the rules are not to the detriment of the public or likely to raise any concerns relating to competition, unconscionable conduct, unfair practices, product safety and/or product information.

GIs are also registered using the CTM system and therefore require these same steps, with the additional requirement that the rules relate to (at least) the geographical origin of the goods.

Proposal 1 appears to suggest establishing a number of CTMs and GIs to cover different industries or types of products, and different regions. While this approach may be appealing in some respects, ultimately it will increase the already significant costs associated with establishing and complying with CTMs and GIs. While Arts Law is also opposed to any proposal for a national CTM scheme, decentralised CTMs are likely to be even more problematic. Aside from the additional investment required to successfully apply for each individual CTM or GI, Indigenous artists will also be faced with the question of which (or which combination of) CTM or GI is most appropriate.

1.2 Shifting the burden to artists and communities

Once up and running, a CTM or GI shifts the burden and costs of complying onto artists and communities, and many artist and communities will have neither the resources nor the understanding to comply with and effectively use the system.

The success of a CTM or GI ultimately depends on a large number of providers of authentic products using them. If some do and some do not, this affects the efficacy of the CTM or GI to distinguish authentic and inauthentic products. Reliance on a range of CTMs and GIs is likely to result in even less take up than a national or centralised CTM. The regime also has the potential to affect detrimentally the providers of authentic products that do not use a CTM or GI.

1.3 Relying on private enforcement and limitations on effectiveness of CTMs and GIs

Enforcement under a CTM or GI regime would still largely rely on private enforcement, unless someone uses the CTM or GI in an unauthorised way. This is likely to constitute misleading or deceptive conduct, such that the artist or traditional knowledge holder would need to rely on the ACL. GIs or product-specific CTMs may be particularly difficult to enforce, as this would require the resources of a single region or industry only.

1.4 Other limitations on effectiveness of CTMs and GIs

Despite the great investment required, a CTM or GI regime is likely to achieve limited effectiveness. This is for a number of reasons.

- It relies on consumers recognising what the CTMs or GIs are meant to represent. This will require significant resources, including an education campaign for each CTM or GI. Even with resources and education, a large proportion of purchasers of Indigenous style art are tourists, who will be incredibly difficult to educate about what the CTMs or GIs mean given language limitations and the short time they are in the country.
- It also relies on CTMs or GIs communicating that the artwork bearing them are authentic, compared with artwork that does not bear a CTM or GI. However, some artists may not be able to arrange to have a CTM or GI on their work. Relying solely on CTMs or GIs ignores that the placement of artworks within a store can shape consumers' ideas of authenticity, and the lack of a CTM or GI on the artwork will be unlikely to dispel the dominant impression already created because of placement.

- The system is too easy to circumvent. Unauthorised products can be badged with the relevant CTM or GI improperly (ie, despite being unauthorised).

In addition, a CTM or GI regime would not:

- prevent suppliers from also supplying such products; and
- educate consumers as to the harm caused by purchasing such products.

2 Protocols

Arts Law recognises cultural protocols as being helpful guides with an educative function, while also having the ability to be binding on parties when incorporated into contracts. However, as stated in previous submissions by Arts Law⁵ there are difficulties with the enforcement of protocols as their application relies on the good will of the parties wanting to do the right thing. Absent the force of legislation, such protocols are not binding and provide no enforcement avenue against those who choose to disregard them.

3 Template Contracts

Arts Law agrees that template contracts (or agreements) are useful tools to assist in protecting Indigenous Knowledge. Arts Law has developed best practice contract templates for the arts industry, including templates specifically for Indigenous artists and arts organisations.

4 Free, Prior and informed consent

Arts Law strongly supports the requirement of free, prior and informed consent. We also believe this is an essential requirement for government-funded research.

5 Database

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. It is our position that protection of Indigenous Knowledge 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 Indigenous Knowledge should be recognised the same way.

Further, Arts Law has serious concerns regarding the use of a database to protect Indigenous Knowledge. We have previously expressed our concerns in our submission to the NSW Office of Environment and Heritage public consultation regarding the proposed New South Wales Aboriginal Cultural Heritage Bill 2018 (ACH Bill).⁶

5.1 Impracticality

In that submission,⁷ we emphasised that it is impractical and unreasonable to expect Aboriginal or Torres Strait Islander people and communities to register all 60,000 years (plus) of Indigenous Knowledge. Traditional Knowledge does not always exist in registrable “chunks” and it may not be able to be divided. A particular pieces of Indigenous Knowledge can also take on various adaptations across different communities.

⁵ Arts Law’s *Submission in Response to the Indigenous Heritage Law Reform Discussion Paper* (2009); Arts Law’s *Submission in Response to Indigenous Knowledge Consultation: Have Your Say* (2012); Arts Law’s *Submission in Response to the New South Wales Aboriginal and Cultural Heritage Bill (2018) Public Consultation* (2018).

⁶ Arts Law’s *Submission in Response to the New South Wales Aboriginal and Cultural Heritage Bill (2018) Public Consultation* (2018).

⁷ *Ibid.*

5.2 Disclosure and misuse of sacred Indigenous Knowledge

Arts Law is also concerned that the creation of a database requires the disclosure of Indigenous Knowledge which might be sacred, or vulnerable to misuse by those with access to the register, even if the register is restricted-access. This will be culturally inappropriate (and damaging) in many situations.

5.3 Culturally inappropriate

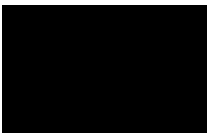
The owner of any Indigenous Knowledge is the community or group it comes from. They are the only people that can ethically approve or reject the use of its cultural knowledge. An authority or panel, no matter how it is appointed, will consist of people from different communities and, under this proposal, 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.

6 Training and Legal Support

Arts Law believes that training and legal support are important to level the playing field. Indigenous artists and communities need access to legal support and training, which is not cost prohibitive. Training and legal support should also be budgeted for by the Australian Government.

Arts Law does not support the establishment of Certification Trade Marks or Geographical Indications. We advocate for national, sui generis legislation that would enshrine automatic recognition of Indigenous Traditional Knowledge, without the requirement for registration. Protection of Indigenous Traditional Knowledge should be recognised as an automatic right vested in the Aboriginal and Torres Strait Islander community with ownership of the relevant Traditional Knowledge over generations.

Yours sincerely



Robyn Ayres

Chief Executive Officer