

Codifying Culture: Indigenous Australian Art Commercial Code of Conduct

by Lan Pham and Terri Janke

In 2007, an Inquiry was held by the Senate Standing Committee on Environment, Communications, Information Technology and the Arts to report on the widespread occurrence of unethical trade practices in the Indigenous visual arts industry.¹ The key recommendation from the Inquiry was the introduction of an Indigenous Art Commercial Code of Conduct to set minimum national standards for appropriate and ethical trade.² The Code would aim to specify best practice for the industry and to clearly define the terms of trade for agreements between artists, dealers and agents. It is hoped that the Code will protect the rights and integrity of Aboriginal artists and their communities. The Australia Council's Aboriginal and Torres Strait Islander Arts Board ('ATSIAB') is responsible for drafting the Code, taking over from the National Association for the Visual Arts ('NAVA'). ATSIAB released a draft version of the code in December 2008³ ('the Draft').

The Draft has been established as a voluntary guideline and is intended to be used in the formation of agreements between artists, agents and dealers. The focus of the Draft is to protect each party's respective commercial interests and to regulate their mutual dealings and professional relationships.⁴ A division of the Draft specifically sets out agent and dealer responsibilities to protect Aboriginal and Torres Strait Islander artists from exploitation and unfair treatment and includes provisions for a 'minimum terms' template agreement.⁵ Another section deals with agreements with artists and identifies key points that the dealer must disclose to the artist, including the capacity in which the agent or dealer is acting, terms of payment, as well as associated timeframes for their production and delivery.⁶

The Draft indicates that artists entering into agreements with art galleries must be thoroughly informed of the terms and processes when making agreements and that they must be given the opportunity to seek advice if necessary.⁷ Respect for Indigenous cultural practices and artists' rights is also included, requiring dealers to follow applicable Indigenous cultural practices and ensuring that artists are correctly attributed, and that permission is properly obtained for the use of photographs on websites. The Draft specifically establishes that secret and sacred works ought not be marketed, promoted or sold.⁸ The Draft also has provisions for dispute resolution.⁹ By clearly setting out each entity's rights and responsibilities in concluding trade agreements, the Draft attempts to protect the integrity of Indigenous artists and to assist them in negotiating fair terms of an agreement.

In 2009, development of the Draft continues. ATSIAB has released a discussion paper¹⁰ explaining its key substantive provisions and seeking industry comment and response. ATSIAB has received 20 formal submissions and has conducted public forums across Australia to gather further feedback. The main issues emerging from the discussion paper and national consultations are discussed below.

To Whom Should the Code Apply?

The Draft currently only applies to commercial relationships between artist, agent and dealer. In our opinion, this could limit its effectiveness. As the National Association for the Visual Arts ('NAVA') comments, the Indigenous visual arts industry is a complex network of relationships, extending beyond this traditional three party paradigm to include 'transactions between commercial, not for profit, public and private entities.'¹¹

In reality, all affected entities should be adhering to the ethical standard if fair trade and the sustainability of the art industry are to be achieved. Whilst it is not their core business to resell artworks for profit, publicly funded galleries ought to develop an acquisitions policy that operates within the prescribed ethical standards.¹² Further, there is no code of conduct applicable to music or the performing arts; the Draft could be further expanded protect artists working within these spheres. Extending the Draft to include all industry players will lead to better protection of the rights and integrity of all artists.

Can a Voluntary Code be Effective?

The Draft depends for its effectiveness on the diligence and commitment of its signatories. The Senate Inquiry has indicated that the Code would be voluntary initially but would be evaluated two years after its implementation. At that time, the Code could become a prescribed code of conduct under the Trade Practices Act.¹³ For this reason, the Draft Code has been prepared in line with the Australian Competition and Consumer Commission's ('ACCC') best practice principles for voluntary codes. Notably, the Draft does not offer a monitoring system to govern the behavior of dealers and galleries. Nor does it stipulate strict sanctions for breaches of the terms and conditions of formulated agreements.

The Arts Law Centre of Australia submission doubts whether a voluntary code can inhibit the unethical behavior of dealers and galleries. Unscrupulous dealers are unlikely to sign voluntarily.¹⁴ Without statutory sanctions and proper evaluation of the Code's efficacy, any attempt to protect the commercial interests of artists may be hindered. Nevertheless, a voluntary code can assist consumers who wish to purchase artworks from galleries and dealers that adhere to the standards set by the Code. To that end, industry-wide endorsement will be pivotal to its success.

The Use of Written Agreements

The Draft does not require agreements between parties to be concluded or evidenced in writing. The use of written agreements and the presence of a third witnessing party could ensure that settled terms of an agreement are not later varied; such a measure could also assist in future dispute resolution.

But for written agreements to have any impact, their key terms, definitions and concepts need to be understood by Aboriginal and Torres Strait Islander artists so they can make

ethical and informed choices. For this to happen, artists need access to appropriate resources. A clear understanding of the terms of an agreement may also be fostered by translating the Code into Indigenous languages.¹⁵ Commitment to proper understanding is essential to transparent negotiation processes; only when parties stand on equal footing can business practices shift to protect artists' commercial interests in a way that is fair and ethical. A national education program would need to be undertaken to ensure that Indigenous artists, dealers and galleries all properly understand the Code and its implications for their practice.

The Exclusion of a Pricing Benchmark

The exclusion of a price and commission standard may limit the Code's practical value. Artists have a right to be appropriately remunerated for their work and this right is compromised by the Draft's lack of clear guidelines as to what constitutes appropriate market payment. The Arts Law Centre's submission suggests that independent verification for the value of an artwork will assist artists to negotiate fair remuneration.¹⁶

Copyright, Authenticity and Indigenous Cultural and Intellectual Property

The ethical representation of artists and their work is another aspect of the Code. To cover moral rights, the Draft specifies minimum standards for the treatment of works in sale, promotion and reproduction,¹⁷ stating that authenticity of an artwork, its history and place of creation, should each be attributed to the artist.¹⁸ However, the Draft does not require dealers to respect protocols governing Indigenous Cultural and Intellectual Property ('ICIP'). ICIP refers to Aboriginal and Torres Strait Islander people's rights to their heritage, including arts, dances, stories, languages, designs and knowledge. Importantly, these rights belong to a *community* rather than any one individual. Accordingly, Indigenous artists who depict ICIP in their art may have special duties and responsibilities to their communities.

While ICIP rights are not yet recognised in Australia, they are gaining momentum internationally. The World Intellectual Property Organisation is currently examining the status of traditional cultural expression rights under intellectual property law.¹⁹ Further, Article 31 of the *Declaration on the Rights of Indigenous Peoples*, provides that Indigenous artists have a cultural right to 'maintain, control, protect and develop' their cultural heritage, including the way in which their work is used, made available to the public and adapted. While not binding under Australian law, the Federal Government's formal endorsement of the Declaration in April this year demonstrates recognition of its validity. Accordingly, the finalised Code should provide proper protection for ICIP to strengthen this emerging right. Requiring compliance with ATSIAB protocols relating to ICIP is one way of approaching this.²⁰

Dispute Resolution

The Draft sets minimum standards for the resolution of complaints and disputes.²¹ Again, as there are very few sanctions stipulated by the Draft, fair and equitable dispute

resolution may not always be provided to parties in disagreement. The Draft states that sanctions are not applicable for the first three months during which an agreement is in force.²² Clearly, this exemption may compromise an artist's rights where a breach has occurred within that timeframe. The Draft also states that mediation costs ought to be divided equally between the parties involved.²³ Ostensibly in pursuit of equitable dispute resolution, this provision does not reflect the often unbalanced financial resources of the parties. Strict enforcement of such a requirement could compromise effective and efficient dispute resolution where artists cannot afford mediation. The Arts Law submission suggests that dealer registration fees be used for this purpose.²⁴

Looking Forward

While the introduction of a formal system of ethics could lead to a fairer standard of business trade in the visual arts sector, the issues discussed above require further attention before final implementation of the Code. On a practical level, appropriate resources should be made accessible to artists so they can gain a comprehensive understanding of the Code, the way it operates and its implications.

The use of written agreements will be necessary if the Code is to have a real effect on the industry. A future revision of the Draft is to include a template agreement setting out acceptable terms and conditions.²⁵ Whether this element of the Code is likely to be effective depends entirely on the substance and detail of each clause. To reset standards, and ensure wide use in the Indigenous visual arts industry, the agreement must be drafted in plain English, following a logical and straightforward structure. To further assist relationships between the artist and dealer, the Code could provide case studies or minimum standards to guide pricing; it may be that an independent commission is the best mechanism to ensure that artists receive fair remuneration for their work.

In its final form, the Code has enormous potential to protect the rights of Indigenous artists and their communities but, as it is currently a voluntary standard, this will require industry-wide support and promotion. A comprehensive education program for artists, agents, dealers and consumers about the Code will set it on a strong path. However, to implement the Code at all levels, and to encourage dealers to take on more onerous commercial standards, requires an adequately resourced team. The *Indigenous Australian Art Commercial Code of Conduct*, if effectively administered and supported, will be key to fostering the development of a system that promotes fair and ethical business trade.

Lan Pham graduated from Sydney University with a BA majoring in Film Studies and History. Lan is Professional Assistant to Terri Janke.

Terri Janke is Solicitor Director at Terri Janke and Company, a law firm that specialises in Indigenous Cultural and Intellectual Property. Terri is currently completing a PhD at the Australian National University.

¹ Australia Council, Aboriginal and Torres Strait Islander Arts Board ('Australia Council'), *Indigenous Australian Art Commercial Code of Conduct Consultation Draft*, (2009) <<http://www.australiacouncil.gov.au>>.

² Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* (2007) <http://www.aph.gov.au/Senate/committee/ecita_ctte/indigenous_arts/report/report.pdf>

³ Australia Council, above n 1.

⁴ Ibid.

⁵ Ibid, 8-11.

⁶ Ibid, Division 2.2, Clause 8, 8.

⁷ Ibid, 9 - 10.

⁸ Ibid, Division 2.3, Clause 15, 13.

⁹ Ibid, Clause 22, 17.

¹⁰ Australian Council for the Arts ('ACA'), *Discussion Paper: Indigenous Australian Art Commercial Code of Conduct March 2008*, (2009) Sydney <<http://www.australiacouncil.gov.au>>.

¹¹ National Association for the Visual Arts('NAVA'), *Response to the Call for Comment on the Australian Indigenous Art Commercial Code of Conduct Consultation Draft-December 2008*, (2009), 1 <<http://www.visualarts.net.au>>.

¹² Australia Council, above n 1. 8.

¹³ Ibid, 1.

¹⁴ Submission to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, Canberra, 25 March 2009, 1 (Robin Ayres, Arts Law Centre of Australia), <<http://www.australiacouncil.gov.au>>.

¹⁵ Submission to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, Canberra, 25 March 2009, 17 (D Cullen) <<http://www.australiacouncil.gov.au>>.

¹⁶ Ibid 5.

¹⁷ Australia Council, above n 1, 17.

¹⁸ Ibid, 12

¹⁹ See World Intellectual Property Organisation, 'Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge'

<http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html>.

²⁰ Australia Council for the Arts, *Visual Arts: Protocols for Producing Indigenous Australian Visual Arts*, (2nd edition, 2008),

<http://www.australiacouncil.gov.au/publications/indigenous/visual_arts_protocols_for_producing_indigenous_australian_visual_arts>.

²¹ Australia Council, above n 1, 17.

²² Ibid.

²³ Ibid.

²⁴ Ayres, above n 14.

²⁵ Australia Council, op cit.