56.\_org\_Arts Law Centre of Australia

Name of organisation: Arts Law Centre of Australia

Freedom of Speech | Question 2–1

**Arts Law’s approach to issues related to freedom of speech**

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between competing rights and interests when considering freedom of speech, freedom of thought, access to knowledge and access to copyright material and the social benefits that flow from the recognition and protection of property rights.

Arts Law advocates in support of the freedom of expression in Australia. Arts Law is concerned to protect freedom of artistic expression in Australia and advocates against legislative changes which are prejudicial to artists. For example, Arts Law is critical of the proposals to establish a statutory cause of action for invasion of privacy which would impose a disproportionate and unnecessary restriction on artistic freedom.[[1]](%22%20%5Cl%20%22_ftn1%22%20%5Co%20%22) The central theme of Arts Law’s submission against the introduction of a statutory cause of action for serious invasions of privacy is that this would have a negative impact on artists who create artworks that use images of people in public spaces and restrict the freedom of expression available to journalists and writers. This is emphasised by the absence of enforceable rights to general freedom of expression or freedom of artistic expression in Australia. Arts Law has also advocated for amendment to the Australian Constitution to provide for protection of free speech – a topic that is outside the terms of reference for the ALRC’s Freedoms Inquiry.

**What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?**

**Summary**

In the absence of constitutional protection of free speech, the decisions of the High Court of Australia that consider whether laws are inconsistent with the implied right of freedom of political communication in the Australian Constitution provide principles or criteria to determine whether a law that interferes with freedom of speech is justified. Those principles or criteria can be summarised as:

* whether the law is reasonably appropriate and adapted to serve a legitimate end (Wotton v Queensland [1012] HCA 2, per French CJ, Gummow, Hayne, Crennan and Bell JJ at [25]); or
* the criteria of reasonable proportionality; or that the law be proportionate to its purposes (Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3; per French CJ at [44] & per Crennan and Kiefel JJ at [210]).

The common law freedom of speech many need to be balanced against other common law rights, freedoms and privileges or human rights that are set out in international covenants, declarations and conventions that Australia has signed. Therefore it is not appropriate to isolate ‘rights’ from the ‘duties’ or ‘responsibilities’ of the rights holder or the ‘legitimate interests’ of others that may be in conflict with the exercise of those rights.[[2]](%22%20%5Cl%20%22_ftn2%22%20%5Co%20%22)  The balancing approach is based on 'consequences-based' thinking as it balances ‘rights’ with the corresponding ‘duties’ and ‘responsibilities’ or to consider the ‘legitimate interests’ of people who may be impacted by the exercise of the rights being exercised.

Arts Law accepts there should be limits on the exercise of traditional rights, freedoms and privileges, such as the freedom of speech – examples are:

* defamation laws that are directed to the protection of personal reputation;
* classification and censorship laws that restrict access or prohibits possession of material as it is deemed to be obscene or offensive because it conflicts with community standards;
* racial discrimination and vilification laws;
* sex discrimination and harassment laws; and
* limits on use and communication to the general public of some Aboriginal and Torres Strait Islander traditional knowledge and intellectual property that forms part of their customary rights (which are discussed in the submissions on Chapter 6 of the Freedoms Inquiry Issues Paper).

**Detail**

Lange v ABC [1997] HCA 25 stated questions that are intended to determine whether the ‘legitimate end’ of a law is compatible with the implied right of freedom of political communication that the High Court identified in that case. The question as to whether the law is “reasonably appropriate and adapted to serve a legitimate end” would therefore help determine whether any interference to the freedom of speech is justified as it requires considering what is the “end” – the public purpose or public benefit - to which the law is directed.

The application of constitutional principles or criteria to the common law freedom of speech to help determine whether a law that interferes with freedom of speech is justified could be argued to fly in the face of the ‘parliamentary sovereignty’ of the Commonwealth Parliament.  However French CJ, in the City of Adelaide case cited above, expresses his opinion that the common law freedom of speech can be relevant to the interpretation and characterisation of laws enacted by the Commonwealth Parliament.

The international human rights covenants, declarations and conventions that Australia has signed state confirm the “freedom of opinion and expression” in the Universal Declaration of Human Rights (UDHR)[[3]](%22%20%5Cl%20%22_ftn3%22%20%5Co%20%22) and the “right to freedom of expression” in the International Covenant on Civil and Political Rights (ICCPR).[[4]](%22%20%5Cl%20%22_ftn4%22%20%5Co%20%22)

However the rights confirmed by the UDHR and the ICCPR are subject to limitations so that the protected right of freedom of speech will need to be balanced against other protected rights, such as reputational rights,[[5]](%22%20%5Cl%20%22_ftn5%22%20%5Co%20%22) or generally accepted community standards or values. For example, Article 29 (2) UDHR links the exercise of rights and freedoms with “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”***[[6]](%22%20%5Cl%20%22_ftn6%22%20%5Co%20%22)*** The ICCPR also contemplates laws directed to the prohibition of racial discrimination and vilification as Article 20 (2) states “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In relation to the limits on the exercise of traditional rights, freedoms and privileges, Arts Law has previously made a submission to the ALRC's Review of the National Classification Scheme (2011) which stated:

“Although the right to freedom of expression is not so absolute that laws cannot be made in relation to defamation, racial vilification as well as laws to protect national security, public order, health and morals, any such restriction must only be to the extent “necessary" in a democratic society.”

[[1]](%22%20%5Cl%20%22_ftnref1%22%20%5Co%20%22) See the Arts Law submission of 12 May 2014 in response to the ALRC’s discussion paper on Serious Invasions of Privacy in the Digital Era.

[[2]](%22%20%5Cl%20%22_ftnref2%22%20%5Co%20%22) Debeljak has commented, in a discussion of the rights protected by the Charter of Human Rights (Vic), that “not all rights are absolute, that they need to be balanced against other protected rights and they may conflict with other non-protected values”. Julie Debeljak, Balancing Rights in a Democracy: The problems with limitation and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006 [2008] MULR 422-469 at 422.

[[3]](%22%20%5Cl%20%22_ftnref3%22%20%5Co%20%22) Article 18 UDHR (right to freedom of thought, conscience and religion) and Article 19 UDHR (right to freedom of opinion and expression).

[[4]](%22%20%5Cl%20%22_ftnref4%22%20%5Co%20%22) Article 19 ICCPR: “(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

[[5]](%22%20%5Cl%20%22_ftnref5%22%20%5Co%20%22) Article 12 of the UDHR describes rights of protection of the law against arbitrary interference with “privacy, family, home or correspondence” and upon a person’s “honour and reputation”; see also Article 19 (3) (a) ICCPR.

[[6]](%22%20%5Cl%20%22_ftnref6%22%20%5Co%20%22)Article 29 (2) UDHR “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”; see also Article 19 (3) (b) ICCPR.

Question 2–2

**Classification (Publications, Films and Computer Games) Act 1995 (Cth)**

The Classification Act 1995 has the potential to conflict with the common law freedom of speech. In the submission to the ALRC's Review of the National Classification Scheme (2011), Arts Law advocated for a national classification system which assists the arts to flourish in Australia to provide people with information about the arts content they want to access. The submission stated:

A well-tailored classification system, the purpose of which is primarily to enable adults to make an informed choice as to what they want to see, hear and read, and what to allow their children to have access to, is an effective mechanism to regulate freedom of expression provided it is not used as a means to censor material that is otherwise legal.

The submission of Arts Law to the ALRC's Review of the National Classification Scheme (2011) concluded by saying:

Since 2008 the arts industry has been disproportionately targeted in relation to censorship and classification issues primarily due to the high profile controversy generated over the work of one artist, Bill Henson. Despite the fact that both the Classification Board and the prosecuting authorities determined that his work was fairly mild in terms of the content (the Classification Board rated the images PG, and no charges were ever laid by prosecutors), there have been ongoing calls for the classification of artworks and the removal of allowances for the artistic merit of creative work. It is clear that this has had a chilling effect on the arts with some artists choosing to avoid controversial themes, particularly if they involve children. To some extent this has been exacerbated by the creation of additional bureaucratic layers, such as the protocols for working with children implemented by the Australia Council for the Arts.

**Racial Discrimination Act 1975**

**Summary**

The Racial Discrimination Act 1975 has the potential to conflict with the common law freedom of speech. However, as discussed earlier in this submission, the freedom of speech needs to be balanced against other rights, duties, responsibilities or those community standards or values that are recognised in the international conventions, declaration and covenants that Australia has entered into.

Arts Law supports s. 18C of the Racial Discrimination Act (offensive behaviour because of race, colour or national or ethnic origin) as being an appropriately justified limitation of the freedom of speech as it is consistent with Articles 19(3) and 20(2) of the ICCPR and is the implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (1969).

Arts Law’s view is that the interaction of ss. 18C & 18D maintains the appropriate balance of rights and responsibilities related to freedom of speech and freedom from racial discrimination and vilification as the balancing of rights and responsibilities is essential to constructing and preserving a healthy, civil society in Australia.

Arts Law supports the ‘artistic purposes’ exception set out in s. 18D(a) as it implements the “right to freedom of expression” that is set out in Article 19 (2) ICCPR, which includes expression “in the form of art, or through any other media”.

**Detail**

The commitments in the International Convention on the Elimination of All Forms of Racial Discrimination (1969) are reflected in the Racial Discrimination Act which is summarised in Kelly-Country v Beers [2004] FMCA 336 (21 May 2004) [117] as being that “Article 4 of this Convention condemns racial vilification; ideologies based on racial superiority; and institutionalised racial discrimination; in any form.”

Arts Law note that the justification for the Racial Discrimination Act was described in Kelly-Country v Beers, which considers the application of the exceptions that are set out in s. 18D:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

     (a)  in the performance, exhibition or distribution of an artistic work; or

     (b)  in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c)  in making or publishing:

(i)        a fair and accurate report of any event or matter of public interest; or

(ii)     a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The potential conflict between ss. 18C & 18D is addressed by Federal Magistrate Brown who commented that the case raised “the balance between the prohibition of racial vilification on the one hand, and the protection of freedom of expression on the other, within Australian society. Two essential prerequisites to the existence of an open and democratic society but which may, from time to time have a tension between them. In protecting a person's entitlement to freedom of expression, section 18D recognises that this freedom must be exercised reasonably and in good faith by those who hold it”;[[1]](#_ftn1) and held that Mr Beers is entitled to the protection of the exemption provided by section 18D of the Racial Discrimination Act.

[[1]](#_ftnref1) Kelly-Country v Beers [2004] FMCA 336 (21 May 2004 [115]. Federal Magistrate Brown had earlier quoted from His Honour Justice French in Bropho v Human Rights and Equal Opportunities Commission [2004] FCAFC (6 February 2004) [3].

Freedom of Religion | Question 3–1

Question 3–2

Freedom of Association | Question 4–1

Question 4–2

Freedom of Movement | Question 5–1

Question 5–2

Property Rights | Question 6–1

**Arts Law’s approach to issues related to property rights**

The discussion of vested property rights raises questions as to how any property rights comes into existence, or is ‘vested’ in the owner of that property right. Arts Law acknowledges that copyright is a statutory right, confirmed by s. 8 Copyright Act 1968, which vests in the owners as described in the Copyright Act 1968.

Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. The recognition and protection of property rights are argued to be essential for promoting the intellectual and cultural development of society. The generally accepted rationale for those property rights is that the income that can be generated from copyright material is the incentive to innovation and creativity.

Arts Law acknowledges that the rights of artists and other creators should be balanced with the interests of all Australians to access, use and interact with that material. In 2012 & 2013, in response to the ALRC’s Copyright and the Digital Economy Inquiry, Arts Law provided submissions on the recognition of the rights of authors and creators and in relation to the exceptions to infringement of copyright, Arts Law described how the Copyright Act 1968 should provide fair and reasonable access to copyright material in ways that are consistent with the international copyright conventions and treaties and the moral rights of authors and creators that are recognised by the Copyright Act 1968. Arts Law submits that the existing fair dealing exceptions (criticism and review, research and study, parody and satire, and reporting the news) enable the use and communication of copyrighted material to enable free speech on matters of public interest, while meeting the “the legitimate interests of the author” (as described in Article 9(2) of the Berne Convention), which include both the economic rights (the exclusive rights of creators) and non-economic rights (which include the moral rights of creators) provided in Article 6bis of the Berne Convention.

**Customary and common law property rights of Aboriginal and Torres Strait Islander people**

**Summary**

It is the view of Arts Law that the Native Title Act 1993 should be amended and extended to provide appropriate recognition of the traditional knowledge and traditional cultural expressions of Aboriginal and Torres Strait Islander people.

Arts Law’s position is that Native Title Act does not adequately recognise the vested customary and common law property rights of Aboriginal and Torres Strait Islander people in their traditional knowledge and traditional cultural expressions and that the Act should provide for the maintenance, protection and prevention of the misuse of cultural knowledge and cultural expressions, for example:

* the use of styles of ceremonial painting that are identified with specific cultural groups. For example, rarkk (cross-hatching) has origins as ceremonial art that is specific to Arnhem Land; and
* the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives.

Arts Law’s view is that Aboriginal and Torres Strait Islander people also have a native title right to take and use native fauna and flora that is recognised by the common law of Australia and as described in ss. 211 and in the discussion of the expression “native title rights and interests” in s. 223 of the Native Title Act.

**Detail**

Australia’s commitments to provide protective measures for cultural activities (including Indigenous cultural and intellectual property) are located in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)[[1]](#_ftn1) to which Australia became a party on 18 September 2009; and the United Nations’ Declaration on the Rights of Indigenous People (2007) which states that Indigenous people have a right to control their traditional knowledge and traditional cultural expressions.[[2]](#_ftn2) Traditional knowledge and traditional cultural expression that is relevant to Aboriginal and Torres Strait Islander artists covers an extensive range of matters and includes: secret and sacred material or information, which under Aboriginal and Torres Strait Islander customary law is restricted in relation to who can view the material or learn the information; styles of ceremonial painting that are identified with specific cultural groups;[[3]](#_ftn3) and other aspects of traditional cultural expression that Arts Law can discuss with the Australian Law Reform Commission.

Many Aboriginal and Torres Strait Islander communities rely on customary law to control their traditional knowledge and traditional cultural expressions among members of the community. However the difficulty for those communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws.

The ALRC’s report Recognition of Aboriginal Customary Laws (ALRC Report 31) noted that the categories of customary rights recognised by the common law are not closed.[[4]](#_ftn4) However the existing case law shows that establishing that the common law recognises customary rights can be deeply complex and costly and leads to the conclusion that the common law of Australia may not adequately recognise traditional laws relating to traditional knowledge and traditional cultural expressions.[[5]](#_ftn5) The Native Title Act 1993 provides a process of establishing the native title rights and interests, with s. 223(3) setting out the requirement of connection with the land. However the High Court in Western Australia v Ward [2002] held that the recognition of a right to maintain, protect and prevent the misuse of cultural knowledge is not a right in relation to land of the kind that can be the subject of a determination of native title under the Native Title Act 1993.[[6]](#_ftn6)

Aboriginal and Torres Strait Islander people have the right to keep secret their sacred and ritual knowledge in accordance with their customary law. While sacred and ritual knowledge can be protected by the common law under the equitable principles of confidential information,[[7]](%22%20%5Cl%20%22_ftn7%22%20%5Co%20%22) the ALRC Report 31 comments that these remedies “clearly cannot cover all situations where revealing information may itself be a breach of customary laws.”[[8]](%22%20%5Cl%20%22_ftn8%22%20%5Co%20%22) As a consequence there are many situations where Aboriginal and Torres Strait Islander people have no effective legal remedies and therefore no absolute right to keep secret their sacred and ritual knowledge or prevent the use of their traditional knowledge and traditional cultural expressions by others who do not have a customary right to use the knowledge or expressions in artwork.

**What general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified?**

**Summary**

The general principles or criteria that should be applied to help determine whether a law that interferes with vested property rights is justified can be the application of the balancing process described by French CJ in the Plain Packaging case,[[9]](%22%20%5Cl%20%22_ftn9%22%20%5Co%20%22) which is assess whether the “public purposes to be advanced and the public benefits” that are to be derived from that law “outweigh those public purposes and public benefits which underpin” the vested property rights.[[10]](%22%20%5Cl%20%22_ftn10%22%20%5Co%20%22) This balancing process is subject to the property rights protection that is set out in s. 51(xxxi) of the Constitution. The effect of the constitution protection is that any acquisition by the Commonwealth of an interest that ‘proprietary in nature’ must be made on ‘just terms’.

The criteria should also include considering the question whether the implementation of the law that ‘interferes’ with vested property rights is implemented and operated in practice in the optimum way available. It is possible that what are otherwise justified public purposes and public benefits to be gained from an ‘interference’ with vested property rights are not implemented or operated in the optimum manner possible in the circumstances.

**Detail**

There is case law on the acquisition of property for the purposes of s. 51(xxxi) of the Constitution which provides principles or criteria that could be applied to help determine whether a law that interferes with vested property rights is justified. The effect of the Constitution protection is that any acquisition of an interest that is ‘proprietary in nature’ by the Commonwealth must be made on ‘just terms’. However s. 51(xxxi) of the Constitution directs the inquiry to the specific question as to whether there has been an ‘acquisition’ by the Commonwealth of a property interest. The Freedoms Inquiry Issues Paper directs attention to whether a law that ‘interferes’ with vested property rights is justified.

Notwithstanding the difference between an ‘acquisition’ of property rights and an ‘interference’ with property rights, the s. 51(xxxi) case law draws attention to the existence of  significant public interest values that may justify the interference with vested property rights. For example, in the Plain Packaging case,[[11]](%22%20%5Cl%20%22_ftn11%22%20%5Co%20%22) which is discussed in the Arts Law submission to the ALRC’s Copyright and the Digital Economy Inquiry,***[[12]](%22%20%5Cl%20%22_ftn12%22%20%5Co%20%22)*** French CJ stated that the “restrictions and prohibitions” imposed by the plain packaging law “reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs.”[[13]](%22%20%5Cl%20%22_ftn13%22%20%5Co%20%22)

[[1]](#_ftnref1) The Convention entered into force three months after Australia became a party on 18 September 2009.

[[2]](#_ftnref2) Article 31 of the UN Declaration on the Rights of Indigenous Peoples (2007) refers inter alia to “the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.

[[3]](#_ftnref3) The Australian Council for the Arts, provides examples of a style of ceremonial painting: “rarkk (cross-hatching) is recognised as art from Arnhem Land, and has origins as ceremonial art. Arnhem Land artists find it offensive to see their ceremonial styles copied by other Indigenous artists, or non-Indigenous artists, with no attachment or belonging to these styles. It is also offensive to copy images of creation beings such as Wandjinas and Mimis without proper claim under Indigenous laws.” Australian Council for the Arts, Visual Arts: Protocols for producing Indigenous Australian Visual Arts (2nd edition, Page 16) <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>

[[4]](#_ftnref4) Recognition of Aboriginal Customary Laws (ALRC Report 31) [62] (citations omitted).

[[5]](#_ftnref5) See discussion by Joseph Githaiga, Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge, 5 (2) Murdoch University Electronic Journal of Law (June 1998) <http://www5.austlii.edu.au/au/journals/MurUEJL/1998/13.html>

[[6]](#_ftnref6) Western Australia v Ward [2002] HCA 28 (8 August 2002) [57]-[62].

[[7]](%22%20%5Cl%20%22_ftnref7%22%20%5Co%20%22) ALRC Report 31 [468]. Case cited:  Re Nationwide Publishing Proprietary Limited Trading As the Centralian Advocate v Rosie Furber [1984] FCA 104; 3 FCR 19 (13 April 1984); Foster v Mountford & Rigby Limited (1976) 14 ALR 71; Pitjanyatjara Council Inc & Nganingu v Lowe & Bender (1982) 4 ALB 11.

[[8]](%22%20%5Cl%20%22_ftnref8%22%20%5Co%20%22) ALRC Report 31 [468].

[[9]](%22%20%5Cl%20%22_ftnref9%22%20%5Co%20%22) JT International SA v Commonwealth of Australia [2012] HCA 43, (2012) 86 ALJR 1297 (the Plain Packaging case).

[[10]](%22%20%5Cl%20%22_ftnref10%22%20%5Co%20%22) The Plain Packaging case [43].

[[11]](%22%20%5Cl%20%22_ftnref11%22%20%5Co%20%22) In the Plain Packaging case the HCA reject the claim that the Tobacco Plain Packaging Act 2011 (Cth) infringed s 51(xxxi) of the Constitution of Australia.

[[12]](%22%20%5Cl%20%22_ftnref12%22%20%5Co%20%22) Submission 706, [2.24]-[2.29], pages 13-15.

[[13]](%22%20%5Cl%20%22_ftnref13%22%20%5Co%20%22) The Plain Packaging case [43].

Question 6–2

**Personal Property Security Act 2009 (Cth)**

**Summary**

The Personal Property Security Act 2009 (PPSA) is legislation that encroaches on property rights by determining the circumstances in which an owner of personal property may be deprived of their vested property rights in commercial transactions that are deemed to be arrangements for personal property securities.

Arts Law submits that a critical examination of the PPSA establishes that the encroachment upon vested property rights in the artwork of individual artists and Indigenous Art Centres is not appropriately justified in the way in which the PPSA implements a complex registration system in order to secure a security interest over the artwork when dealing with galleries or dealers in commercial consignment arrangements.

**Detail**

The focus of Arts Law is on the impact of the PPSA on individual artists and Indigenous Art Centres.[[1]](#_ftn1) The commercial consignment arrangement with a gallery or dealer results in the artist needing to register a ‘security interest’ in that art in order to have the protection provided by the PPSA.[[2]](#_ftn2) The PPSA is subject to the review by Bruce Whittaker**, Review of the Personal Property Securities Act 2009**, (the “**Whittaker Review**”), with a final report expected to be tabled in the parliament by the Federal Attorney General by no later than 18 March 2015.[[3]](#_ftn3)

The Explanatory Memorandum to the Bill for the PPSA states as an introductory remark concerning the object of the Bill, that it creates a “single national law governing security interests in personal property. This would result in more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties." The PPSA is anything but a “more certain, consistent, simpler and cheaper” way to manage commercial consignment arrangements with a gallery or dealer involving the delivery of artwork for sale by the gallery or dealer on behalf of an artist.

The Whittaker Review, Consultaton Paper 1 (22 September 2014) refers to the operation of the PPSA in relation to other forms of bailment and provides the example of an artist who store works with a professional storage company.[[4]](#_ftn4) Consultation Paper 1 also refers to the operation of the PPSA in relation to commercial consignments in relation to bailment or floor plan financings of motor vehicles, which is described as a common financing tool in Australia.[[5]](#_ftn5) The public purposes and public benefits to be gained from managing security interests in relation to sophisticated financing transactions, such as floor plan financings of motor vehicles may be obvious. However in relation to consignment arrangements with a gallery or dealer the public purposes and public benefits to be gained from deeming these arrangements to be personal property security transactions are less obvious. The effect of extending the PPSA to cover transactions between artists and Indigenous Art Centres with galleries or dealers places the artists and Indigenous Art Centres at risk of losing their property interest in the paintings delivered on consignment to a gallery or dealer, in the event of the insolvency or bankruptcy of the gallery or dealer.

The problems identified in the Law Council of Australia submission to the Whittaker Review include:

* One of the main concerns we have experienced from a small business perspective is the lack of awareness of the impact of the Act on everyday transactions, which lack of awareness is not remedied by information sheets published by the PPSR.[[6]](#_ftn6)
* the Act is difficult to interpret;[[7]](#_ftn7) such as the definition of ‘interest’ in section 10;[[8]](#_ftn8) the meaning of ‘PPS lease’ in section 13;[[9]](#_ftn9) and the understanding of what is a registrable security interest under section 151, in relation to which the Law Council commented:

“It is considered that section 151 is unnecessary and inhibits secured parties and their advisors from registering a security interest when they are not sure whether or not it is a security interest.  This affects small businesses that do not have the resources to obtain professional advice as to their entitlement to register security interests, for example businesses in the art world in relation to consignments.”[**[10]**](#_ftn10)

The submission of the NSW Young Lawyers pointed that the PPSA resulted in an expansion of the transactions in which registration of a security interest is necessary as registration is now necessary for “common, low-value, commercial transactions that are undertaken by small business and individuals who do not have any intention to create a security interest”.[[11]](#_ftn11) The NSW Young Lawyers’ submission identifies that non-registration means that small businesses or individuals risk “being deprived of their property in favour of an all-assets secured creditor or unsecured creditors on the insolvency of the grantor”.  The NSW Young Lawyers’ submission notes existence of exclusions in the PPSA and proposed that “it would be a logical extension to include a carve-out for low value transactions generally.”[[12]](#_ftn12)

**Environmental Protection and Biodiversity Conservation Act 1999 (Cth)**

**Summary**

Arts Law submits that a critical examination of the Environmental Protection and Biodiversity Conservation Act 1999 (EPBCA) establishes that the encroachment upon the customary property rights of Aboriginal and Torres Strait Islander people is not appropriately justified in the way in which the EPBCA limits the collection, use, exhibition and export of native fauna and flora protected under the EPBCA.

Arts Law acknowledges that the EPBCA was enacted so that Australia would comply with commitments made under CITES (the Convention on International Trade in Endangered Species of Fauna and Flora). Arts Law also acknowledges that there are specific species and specimens that have been exempted from export regulations by the responsible Federal Department.[[13]](#_ftn13) Arts Law also acknowledges that there is a list of excepted native plant and animal specimens that may be commercially exported without a permit.[[14]](%22%20%5Cl%20%22_ftn14%22%20%5Co%20%22)

Therefore while the collection and use of some species and specimens as part of the traditional use in artistic works and works of artistic craftsmanship (‘artworks’) may be exempt from the restrictions imposed by the EPBCA, there is no general exemption for the use of such specimens in the creation of artworks and any overseas shipment of artworks may require a permit under the EPBCA.

It is Arts Law’s position that s. 211 of the Native Title Act 1993 and the EPBCA should be reviewed and amended in order to recognise the customary and common law rights of Aboriginal and Torres Strait Islanders to collect and use native species and specimens in artworks.

* There should be general exemption for the use of native species and specimens, or the material derived from those species and specimens, in the creation of artworks (including any use for commercial purposes), where the use does not threaten the viability of the species and specimens;
* The process to obtain a permit to use native species and specimens in artworks should be simplified; and
* The process to obtain a permit to export artworks containing native species and specimens should be simplified.[[15]](%22%20%5Cl%20%22_ftn15%22%20%5Co%20%22)

A possible change to the Native Title Act is to proscribe additional classes of activity, as authorised by s. 211(3)(e), to include uses in the creation of artworks (including any use for commercial purposes) where the use does not threaten the viability of the species and specimens.

**Detail**

The relationship between the Native Title Act 1993 and the EPBCA is implied in the note to s. 211(2), which states that “[i]n carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.” This note can be interpreted to include the EPBCA as a law of general application.

The EPBCA is legislation that encroaches on vested property rights to the extent that it deprives Aboriginal and Torres Strait Islanders of their customary and common law rights to take and use native fauna and flora. The focus of Arts Law is on the impact of the EPBCA on individual Aboriginal and Torres Strait Islander artists and Indigenous Art Centres on their ability to collect, use and exhibit native fauna and flora in artworks and to export those artworks. The artworks created by Aboriginal and Torres Strait Islander artists may include samples or specimens of native Australian species, such as shells, fur, feathers or parts of native plants.

The nature of ‘property’ in wild native fauna and ss. 211, 223 of the Native Title Act 1993 was considered by the High Court of Australia in Yanner v Eaton [1999].[[16]](%22%20%5Cl%20%22_ftn16%22%20%5Co%20%22) The decision in Yanner v Eaton supports the proposition that Aboriginal and Torres Strait Islander people have a native title right to take and use native fauna and flora that is recognised by the common law of Australia and as described in ss. 211 and in the discussion of the expression “native title rights and interests” in s. 223 of the Native Title Act.[[17]](%22%20%5Cl%20%22_ftn17%22%20%5Co%20%22)

[[1]](#_ftnref1) Described in: PPSR, Indigenous artists and art centres: What does the new law mean for you? <http://www.ppsr.gov.au/AsktheRegistrar/FactSheets/Pages/IndigenousartistsandartcentresWhatdoesthenewlawmeanforyou.aspx>

[[2]](#_ftnref2) Described in: PPSR, Artists – What you should know about the PPS Register <http://www.ppsr.gov.au/AsktheRegistrar/FactSheets/Pages/default.aspx>

[[3]](#_ftnref3) Statutory review of the Personal Property Securities Act 2009 <http://www.ag.gov.au/Consultations/Pages/StatutoryreviewofthePersonalPropertySecuritiesAct2009.aspx>

[[4]](#_ftnref4) Consultation Paper 1 (22 September 2014​) – Reach of the Act – Paragraph 4.4.4 - Should the Act apply to bailments? (page 32).

[[5]](#_ftnref5) Consultation Paper 1 (22 September 2014​) – Reach of the Act – Paragraph 4.3 – Commercial Consignments – (pages 27-29). See also Paragraph 4 - Deemed Security Interest - 4.1 Policy Rationale - The "ostensible ownership" explanation (pages 16-18).

[[6]](#_ftnref6) Law Council of Australia submission (6 June 2014) paragraphs 7 & 8.

[[7]](#_ftnref7) Law Council of Australia submission (6 June 2014) paragraph 11.

[[8]](#_ftnref8) Law Council of Australia submission (6 June 2014) paragraphs 22-24.

[[9]](#_ftnref9) Law Council of Australia submission (6 June 2014) paragraphs 25-31.

[[10]](#_ftnref10) Law Council of Australia submission (6 June 2014) paragraph 43.

[[11]](#_ftnref11) NSW Young Lawyers submission (2014) page 13.

[[12]](#_ftnref12) NSW Young Lawyers submission (2014) page 14.

[[13]](#_ftnref13) The list of exempt native specimens (LENS) is a list of native specimens that are exempt from export regulations: <http://www.environment.gov.au/epbc/about/lists.html>

[[14]](%22%20%5Cl%20%22_ftnref14%22%20%5Co%20%22) Commercial export of native plant and animal specimens <http://www.environment.gov.au/biodiversity/wildlife-trade/natives/exporting-non-live-australian-natives>

[[15]](%22%20%5Cl%20%22_ftnref15%22%20%5Co%20%22) Wildlife import and export permit information <http://www.environment.gov.au/biodiversity/wildlife-trade/permits>

[[16]](%22%20%5Cl%20%22_ftnref16%22%20%5Co%20%22) Yanner v Eaton [1999] HCA 53; 201 CLR 351; 166 ALR 258; 73 ALJR 1518. Considers the taking of estuarine crocodiles.

[[17]](%22%20%5Cl%20%22_ftnref17%22%20%5Co%20%22) Yanner v Eaton, ibid. [123].

Retrospective Laws | Question 7–1

Question 7–2

Fair Trial | Question 8–1

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Client Legal Privilege | Question 11–1

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Other comments?

File 1

File 2