



27 February 2015

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Via email: web@alrc.gov.au

Re: Review of the Native Title Act 1993

The Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts. Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries. Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law provides an Indigenous arts law service - *Artists in the Black* (AITB) <<http://www.aitb.com.au>> and provides information and advice to Aboriginal and Torres Strait Islander artists and community arts centres. The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. We therefore feel we are in a unique position to address the concerns of Aboriginal and Torres Strait Islander artists and community arts centres as to the adequacy of protocols to manage 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP).

Submission of the Arts Law Centre of Australia

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 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 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 and other aspects of traditional cultural expression that Arts Law can discuss with the Australian Law Reform Commission.

¹ The Convention entered into force three months after Australia became a party on 18 September 2009.

² 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 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/>

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 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

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

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 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

⁴ *Recognition of Aboriginal Customary Laws* (ALRC Report 31) [62].

⁵ 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 *Western Australia v Ward* [2002] HCA 28 (8 August 2002) [57]-[62].

⁷ 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 ALRC Report 31 [468].



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.

FURTHER INFORMATION

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. Arts Law can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully,

A handwritten signature in black ink that reads "M H Averill". The signature is written in a cursive style with a horizontal line through the middle of the letters.

Dr. Morris Averill

Senior Solicitor

Arts Law Centre of Australia