



# LAW REFORM

## The Development of an Authenticity Trade Mark for Indigenous Artists

The promotion and protection of Australian indigenous art, on a sound legal basis, has been publicly discussed by indigenous people over the last 20 years.<sup>1</sup> In 1981 the topic was the subject of a federal government inquiry.<sup>2</sup> The idea of an authenticity label was first discussed at a conference of artists and arts advisers at Nguiu in 1982,<sup>3</sup> and initial specific proposals for a certified trade mark were examined by the Aboriginal Arts Management Association in 1992.<sup>4</sup>

In 1994 an Issues Paper, 'Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples', was jointly released by the federal Ministers for Justice, for Communications and the Arts, and for Aboriginal and Torres Strait Islander Affairs.<sup>5</sup> A number of submissions were made in response to that paper, and in September 1995 the Federal Government announced that, amongst other matters, proposals for an authentication mark for indigenous artists were being examined in consultation with Aboriginal and Torres Strait Islander groups.<sup>6</sup> This work is being carried out by the National Indigenous Arts Advocacy Association (NIAAA), and this article discusses some of the issues informing the work and the potential outcomes.

### What is it?

An authenticity trade mark would not be a measure for what is 'real' in modern indigenous Australian culture as modern art. An authenticity trade mark would, however, be recognition of the authenticity, the undisputed origin or authorship of a particular work. The proposed indigenous authenticity trade mark is about promoting the buying and selling of indigenous cultural products and services. The prime aim of the trade mark is to inform consumers that certain products are made by indigenous people who claim identity, belonging, knowledge and responsibility for those products.

The ultimate benefit of the authenticity trade mark will be for indigenous artists and communities, enabling them to define and influence distribution of

their art works, with an expected improvement in returns on sales. Consumers will recognise products made by Aborigines and Torres Strait Islanders who will be enabled to define themselves and their own art traditions, styles, contemporary stories and histories.

An authenticity trade mark, which certifies in Australian law inherent qualities in indigenous culture, involves a substantial recognition of points of view and negotiation of terms based on an understanding of mutual benefit. In order for there to be mutual and ultimate benefit the authenticity trade mark must be wholly reflective of indigenous people and their definitions of terms.

### 1960 to 1980

One of the defining moral principles to emerge from the experience of the 1970s and early 1980s was the recognition of the large-scale financial exploitation of indigenous artists.

Publications such as *Art in Arnhem Land* had introduced an Australian art public to the beauty and complexity inherent in Aborigines' art and artefacts. The authors argued that the dynamic in Aboriginal society and in the production of artefacts was a continuing inner life consisting of ritual, symbolism and faith.<sup>7</sup> At the same time, the distribution of artefacts through mission retail outlets in capital and regional cities created a source of regular income for certain communities and regular access to supplies for consumers.

By 1965 subjective analysis emphasised Aborigines as artists in a cross-cultural sense; their work being seen as based on their own effort and ingenuity. Production was seen as influenced and systematically encouraged by the distribution and return of a regular income.<sup>8</sup> Ronald Berndt also acknowledged that the impetus for production was affected by market forces.<sup>9</sup>

At this time, research work with artists and community arts centres revealed the following clear evidence of the characteristics of an unstable economic base:

- in the period from 1977 to 1987 the community arts centres were seriously under-capitalised;
- the effect of under-capitalisation was that an exorbitantly high proportion of artists' returns on sales were required to be reinvested in the centres to keep the centres going;
- objective descriptions about ethnographic, traditional, and craft and tourist art caused great disparity in prices and recognition;
- as a result of these classifications women's art works were virtually ignored by distributors and galleries;
- distribution was characterised by pyramid commissions — to the detriment of artists and community arts centres;
- distribution was confused by combining sales, promotion, and education utilising stocks of art works;
- loss of collections, often of museum-quality stock, resulted from this confusion between sales and promotion; and
- at the end of the period, the rate of exchange for art pieces skyrocketed but the distribution structure prevented distribution of equitable returns.<sup>10</sup>

Aboriginal artists spoke out publicly about the need for appropriate promotion and protection of their culture<sup>11</sup> and the need for due recognition of all forms of indigenous art as art work of global significance deserving complex discussion and analysis.

### Research in the 1990s

The moral question which developed from previous research and observation was: how do we arrive at a position of exchange and mutual benefit between indigenous cultures and Australian law? This question was critical to the process of inquiry into authenticity.

Grounded theory, as a research model, encouraged the development of hypotheses and theories. Further, a methodology based on the principles of mutual definitions and exchange was easily able to be developed from the

research principles of identifying diverse perceptions; analysing which of those are shared perceptions and then, through further comparative analysis, identifying the convergent perceptions. At each stage it is possible to propose new hypotheses and, at the last stage, to propose new theories.

### Methodology in practice

The work to develop an authenticity label has entailed thorough consultation with indigenous communities across Australia to elicit diverse perceptions. In order to find a common language, samples of comparative labels, trade marks, community organisations' common seals and promotional publications were distributed. People communicated their experiences and previous encounters of defining cultural economy, identity and market.

Shared perceptions were established by inviting people to share their stories with other people and communities across Australia on the condition of a mutual sharing and return of information. At the end of the initial period of research, overwhelmingly, the shared perceptions centred on the meanings and priorities of community art practice.

'Convergent perceptions' may be described as those which were held in common from the shared perceptions. The process of future consultations was discussed and defined by communities on the condition of discussing the shared story with a full community meeting on the basis of their authority to approve and ratify from the shared perceptions.

The initial hypothesis to emerge formed a new moral issue for researchers in addressing indigenous art and the market. Definitions of terms for authenticity must be acceptable and appropriate across indigenous and Australian law, societies, and culture.

### Defining authenticity

The research revealed a need for a complete reworking of the definitions used to describe authenticity in terms of indigenous art and culture. 'Authenticity' comes from late Latin, *authenticus* meaning 'coming from the author' which was from Greek *auto*, self and *hentes*, a doer, one who acts (independently). For indigenous artists, questions as to the responsibility for identifying the source of a work; who is identified as author; and how people express the origin of their work, inevitably arise and this is different from the Western concepts of self as author. Nev-

ertheless, authenticity is valued extremely highly by consumers who are looking for authentic indigenous art products as a reflection of their experience, understanding of, and respect for an indigenous sense of Australia as 'country'.

Indigenous people in communities around Alice Springs, the Top End and the Kimberley defined their identity, their belonging to stories and country, as the key parts in their meaning of authenticity. At a conference early in 1995, Murriss in Queensland defined their sense of belonging as being part of a group with defining historical experiences. In addition, Kooris from the Murray Riverine, Gippsland, Central Highlands and Western Victoria identified their sense of heritage and access to distribution as crucial issues in identifying and defining authenticity. Other Koori artists ascribed responsibility in creation, depiction, and the publication and distribution of art works as another part of what they defined as authenticity.

In the next few months, indigenous people in Queensland, southern Western Australia, South Australia and Tasmania, and a large range of regional areas in New South Wales, will be visited by NIAAA.

### Community art practice

Authenticity can only be supported if community art practice is nurtured. 'Nurturing' means supporting communities with knowledge and expertise; recognising authority where that is appropriate; and supporting the exchange of good practice.

Yet, in the last three years there has been a 20 to 30 percent decline in funding for arts centres. The current emphasis in indigenous arts on administrative training and sales profits, without equal emphasis on nurturing investment, runs the risk of creating the same unstable economic base of the 1980s. An arts industry at a community level has people, skills, equipment, and knowledge of its country and materials as its source of wealth. These all require investment to nurture community art practice.

The growth area of Aboriginal participation and employment in the arts industry is in the area of artistic development and conservation, ahead of administration. Artistic development is a continual educational process about both techniques and materials, in terms of both artistic practice, conservation of materials, and gallery exhibitions. Very importantly, archival and conservation requirements must be steadily and

slowly developed in accordance with community wishes.

In addition, artists' access to advice on administrative and legal process and legal issues is important in providing confidence in the authenticity trade mark.

### Attachment of trade mark

The attachment of the label bearing the registered trade mark is critical. The responsibility for deciding who has this authority could be an Art Mark Association made up of respected Aboriginal and Torres Strait Island elders. People and community art organisations wanting this authority would apply to the Association.

In return for using the trade mark on their own community labels, community arts organisations and regional areas would benefit from the display, and the national and international promotion, of the trade mark.

The trade mark attached to a label would not necessarily mean the overall protection of Aboriginal and Islander definitions of cultural integrity. Special legislation would be needed if rock art, unpublished clan designs, performance pieces, and intellectual copyright are to be respected. Copyright, folklore, performance, and language are all areas of importance to NIAAA members. Education about copyright and sales issues will be promoted through exhibitions NIAAA is planning in an alliance with schools and institutions.

It is expected that there will be a negotiation of terms to create a partnership between Australian law and indigenous definitions of indigenous culture. The Australian Industry Property Office, the federal Attorney-General's Department and the Aboriginal and Torres Strait Islander Commission will be negotiating with NIAAA and its solicitors about the acceptance of terms. The authenticity trade mark will be based on both indigenous definitions of culture and a guarantee of inherent quality in an individual art work certified under Australian law. The government bodies have a critical role to play both in securing this partnership between the Australian Government and Australia's indigenous people and in supporting the enforcement of the status and standing of an authenticity trade mark.

**Kathryn Wells**

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*References on p.41.*

and the Law held in Melbourne only two weeks before Di got the national media interested in the issue. Conference participants heard that defence demands for access to counselling files have been on the increase in Australia and other jurisdictions. The keynote speaker for the conference, Prof. Elizabeth Sheehy, a Canadian legal academic, reported that the practice was now routine in Canada. Counselling services there had responded by shredding files and demanding legal protection for the privacy of their clients. In Australia we are waiting on a clear statement from the NSW court deciding Di's case, or some principled people in the Parliament to commemorate her brave act with some swift legislative intervention.

## SEXUAL ASSAULT CONFERENCE A SUCCESS

The First National Conference on Sexual Assault and the Law — *Legalising Justice For All Women*, held in Melbourne in November, was hailed as a success by both organisers and participants. The organising committee of national representatives wanted the conference to represent the diversity of women's experience of sexual assault and the law, and from all accounts this was achieved with good measure.

When pressured for a short-list of her personal highlights of the conference (apart from the closing session which signalled that it was almost time for her to have her life back), co-convenor Melanie Heenan cited:

the inspirational papers delivered by Canadian key-note speaker Prof. Liz Sheehy and Koori academic Marie Andrews, (who has a special gift for delivering a serious message and making you laugh at the same time);

the courageous and emotionally compelling voices of the women who spoke on the panel of victims/survivors (they received a standing ovation and brought many of the audience to tears);

the heart-warming performances by *Somebody's Daughter* and the *Macedonian Women's Choir*; and

the energy in the workshops on how the law can improve victim/survivors' experiences of the criminal justice system.

The conference proceedings will be published later in 1996. Watch this space for details on how to order a copy.

## THE STOLEN GENERATION

*Girlie* is pleased to advise that a Human Rights and Equal Opportunity Commission *Inquiry into the Separation of Aboriginal and Torres Strait Islander Children* commenced in Hobart on 4 December 1995 and moved on 29 January to Melbourne. It then proceeds to travel around the country. The Inquiry hearings are being conducted by three commissioners, Sir Ronald Wilson, Michael Dodson and an Aboriginal woman from each State and Territory. They will spend their time collecting written and oral submissions and prepare a report by December 1996. The Inquiry's aims are to inquire into the separation of indigenous children from their families; to reflect on the past relationship between indigenous and non-indigenous Australians; and to reveal the impact of government policies on the lives of the people who were removed from their families. In reaching these aims the Commission will depend heavily on the voices of the mothers, fathers, children and relatives telling their stories of personal loss and the impact on their lives, families and communities. The final report will cover what should now be done to rectify the damage caused by the separations and consider the justice of compensating those affected. It will also report on the present situation for indigenous children and, in particular, examine the welfare and justice systems in light of the principle of self-determination.

An Advisory Committee has been established which consists of indigenous people already working in this field, in the hope that this will ensure that the Inquiry will be conducted with an indigenous voice at its heart.

Here is an example of a once official attitude towards the policy of separation:

Every administration has trouble with half-caste girls. I know of 200-300 girls, however, in Western Australia who have gone into domestic service and the majority are doing very well. Our policy is to send them out into the white community, and if the girl comes back pregnant our rule is to keep her for two years. The child is then taken away from the mother and sometimes never sees her again. Thus these children grow up as whites, knowing nothing of their own environment. At the expiration of the period of two years the mother goes back into service. So that it really doesn't matter if she has half a dozen children.

[From *Telling Our Story*, Aboriginal Legal Service of Western Australia (Inc.), 1995, p.73.]

*Girlie* wishes the Inquiry well and hopes that it paves the way for compensation for all who suffered and continue to suffer because of protectionist welfare policies.

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## References from Law Reform column, p.39

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3. Chips Mackinoly, personal communication.
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5. See Hawkins, Catherine, 'Stopping the Rip-offs', (1995) 20(1) *Alt.LJ*, pp.7-10.
6. See 'Update', (1995) 3(76) *ALB*, pp.2-3.
7. Elkin, A.P. and Berndt, Ronald and Catherine, *Art in Arnheim Land*, University of Chicago Press, Chicago, 1950, pp.6, 15.
8. See, for example, Kupka, Karel, *Dawn of Art. Painting and Sculpture of Australian Aborigines*, Angus and Robertson, 1965; Duguid, Charles, *No Dying Race*, Adelaide, 1963, p.131.
9. Berndt, Ronald M. (ed.), *Australian Aboriginal Art*, Ure Smith, Sydney, 1964, pp.73-74.
10. Wells, Kathryn, *Aborigines Trading Artefacts in a Non-Aboriginal Market*, Report to the Minister for Aboriginal Affairs, 1987.