

REGULATING AUTHENTICITY?

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This article explores the adoption and implementation of the Label of Authenticity and the impact that it has had, and may continue to have, on Indigenous artistic practices. The characteristics of the Labels and their status under the *Trade Marks Act 1995* (Cth) are defined, and the operation of the certification process is outlined. The article examines the concerns of a number of interested parties who have pointed to the key question of the certification of goods and services, and the capacity of competent certifiers to monitor and control the use of the mark. Additional issues include how the notion of authenticity relates to 'traditional' Indigenous art, which is often seen as the sole marker of authenticity, and how it will deal with the work of urban and non-traditional artists. The question of whether Indigenous artists are required to comply with Indigenous laws relating to the creation or performance of Indigenous artistic and cultural goods and services is canvassed. The article concludes by noting alternative and additional strategies that may be adopted to assist in protecting Indigenous arts and culture, including the formation of a peak body of galleries and shops empowered to develop and encourage the use of protocols and codes of ethical conduct.

Introduction

Well over twelve months have passed since the launch, in November 1999, of the Label of Authenticity by the National Indigenous Arts Advocacy Association (NIAAA). The launch of the Label was met with divided opinion between those who saw the introduction of label as a vital step towards the protection of Indigenous artists and their art work from piracy and those who 'experienced a twinge of resistance'.¹ This article attempts to trace some of the background to the adoption and implementation of the Label of Authenticity and the impact that it has had, and may continue to have, on Indigenous artistic practices.

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¹ B Croft, 'Behind the Scenes — Labelled — Buyer Be Aware', (2000) 20 *Artlink* 83.

Background to the Labels of Authenticity

In 1998, the Aboriginal and Torres Strait Islander arts and culture industry was estimated to generate around \$200 million a year.² As with many other successful arts industries, the Indigenous arts and culture industry is threatened by the growing number of fakes and rip-offs. A particular problem is the practice of non-Indigenous artistic works being passed off as if they were authentic Indigenous works.³

A number of different techniques were available to protect against the increasing number of non-Indigenous people who manufacture and sell Indigenous artefacts at the expense of the Indigenous artistic community. These included the use of registered trade marks; collective marks;⁴ certification marks;⁵ actions for passing off; actions under s 52 of the *Trade Practices Act 1974* (Cth);⁶ and the introduction of special legislation such as that introduced for the Sydney Olympic Games in 2000.⁷ While each of these

² Aboriginal Torres Strait Islander Commission (ATSIC) *NT News*, December 1998, p 23. See also T Janke, 'Protecting Australian Indigenous Arts and Cultural Expression: A Matter of Legislative Reform or Cultural policy?' (1996) 7 *Culture and Policy* 13. It is interesting to note, however, that 'the 1988 Report of the Review Committee on the Aboriginal Arts and Crafts Industry (July 1989) ... [reports that] ... retail sales of Aboriginal art in 1988 amounted to \$18.5 million, \$7 million of which was distributed to the creators of the art (approximately 5000) who are otherwise largely dependant on government assistance for their income': C Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 2 *Aboriginal Law Bulletin* 5.

³ These include: 'didjeridus/yidakis mass-produced by transient backpackers for the tourist market; imported bibs-and-bobs painted with pseudo-Indigenous designs painted by non-Indigenous people; clothing with reproductions of Indigenous artists' designs licensed under unfair contractual arrangements; clothing with designs that are slightly altered versions of Indigenous artists' designs': Croft (2000) 'Behind the Scenes', p. 85.

⁴ A collective mark is defined in s 162 of the *Trade Marks Act 1995* (Cth) as 'a sign used, or intended to be used, in relation to goods or services dealt with or provided in the course of trade by members of an association to distinguish those goods or services from goods or services so dealt with or provided by persons who are not members of the association'.

⁵ A certification mark is defined in s 169 of the *Trade Marks Act 1995* (Cth) as a 'sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade and certified by a person in relation to quality, accuracy or some other characteristic, including origin, material or mode of manufacture from other goods or services dealt with or provided in the course of trade but not so certified'.

⁶ This protects against corporations that engage in 'misleading and deceptive conduct'. This provision is mirrored in the various states' Fair Trading legislation but provides for actions to be brought against persons who engage in misleading and deceptive conduct rather than corporations.

⁷ The *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth) was designed to protect licensing revenue flowing from the Sydney 2000 Olympic Games. Protected words and phrases include: 'Games City', 'Millennium Games',

has its particular strengths, the preferred option for NIAAA was the introduction of two certification marks, referred to here collectively as the *Labels of Authenticity*. The aim of the Labels of Authenticity was to distinguish authentic Indigenous artistic goods and services from other products on the market.⁸ Somewhat paradoxically, the relative success of recent copyright actions involving Indigenous art had increased the need for such Labels.⁹ This was because in response to decisions enforcing Indigenous copyright, pirates had shifted their attention away from the copying of individual works to the reproduction of styles of works: a matter which was thought to be particularly well suited to an Indigenous certification mark.

NIAAA registered the first of two proposed national Indigenous Labels of Authenticity as a certification mark in 1999.¹⁰ In so doing, it is bringing to an end a process that began some 20 years ago.¹¹ The Labels of Authenticity will be applied to goods and services that are of Aboriginal or Torres Strait Islander origin, making it more difficult for non-Aboriginal people to pass their works off as if they were authentically Aboriginal.¹²

The first certification mark, the *Label of Authenticity*, is applied to 'products or services that are derived from a work of art created by, and reproduced or produced and manufactured by Aboriginal or Torres Strait

'Sydney Games', 'Sydney 2000' and any combination of the word 'games' and the words or numbers '2000'. See G Orr, 'Marketing Games: The Regulation of the Olympic Indicia and Images in Australia' (1997) 19 *EIPR* 504.

⁸ The protection of Indigenous artistic and cultural products by way of an authenticity label is not unique to Australia. Almost a decade ago, the Canadian government registered the symbol of the igloo as a trade mark distinguishing original Inuit art from imitations in an attempt to protect Canada's indigenous Inuit artists. The Canadian government also initiated the Co-operative movement in the North in an attempt to market arts and crafts. The artists produced their works of art and brought them to the Co-op. Once this was done, it was up to the Co-op to place the Igloo Tag on the artwork: interview with B Pottle, Research Officer, Inuit Art Centre, Ottawa, Ontario, 22 July 1999.

⁹ See, for example, *Milpurrruru v Indofurn Pty Ltd* (1995) 30 IPR 209 and *Bulun Bulun v RT Textiles Pty Ltd* (1998) 41 IPR 513.

¹⁰ With the support of the Commonwealth Department of Communication, Information Technology and the Arts through the Aboriginal and Torres Strait Islander Commission and the Aboriginal and Torres Strait Islander Arts Board of the Australia Council. An application for the second Label of Authenticity, the Collaboration Mark, was lodged with IP Australia (formerly the Australian Industrial Property Office (AIPO)) in 1999.

¹¹ The idea of such a Label of Authenticity was discussed in 1982 at a conference of artists and arts advisers at Nguuu, Northern Territory, Australia: K Wells, 'The Development of an Authenticity Trade Mark for Indigenous Artists' (1996) 21 *Alternative Law Journal* 38.

¹² Janke (1996) 'Protecting Australian Indigenous Arts and Cultural Expression', p 22. See also the National Indigenous Arts Advocacy Association (NIAAA), 'Discussion Paper on the proposed Label of Authenticity' (August 1997), p 4 (hereinafter, *NIAAA Discussion Paper*).

Islander people who satisfy the definition of “authenticity”.¹³ An artist who has successfully applied for use of the Label of Authenticity will be referred to as a *certified Indigenous creator*.¹⁴ The second certification mark is known as the *Collaboration Mark*.¹⁵ This mark will also be applied to ‘products or services derived from a work of art which has been created by an Aboriginal and Torres Strait Islander person or people who satisfy the definition of “authenticity”’. The collaboration mark label differs from the first mark in that it recognises that products and services are often ‘reproduced, produced and manufactured under licensing arrangements with non-Indigenous persons’.¹⁶ The Collaboration Mark will be applied to ‘products or services manufactured in such circumstances, so long as the licensing arrangements are fair and legitimate’.¹⁷ The Collaboration Mark is so named to reflect the collaboration that has taken place between Indigenous and non-Indigenous peoples in the production of the goods or services.

The introduction of the Authenticity Labels has had a number of interrelated aims. In part, the labels are designed to help to ensure that consumers are able to identify authentic cultural products. This, in turn, will improve the economic benefits that flow to Indigenous people from the commercial use of their culture.¹⁸ The labels should also educate visitors and consumers about the different styles of Indigenous art from across Australia.¹⁹ A further advantage of the labels is that they will enhance consumer confidence in the Indigenous arts and culture industry. As consumers become familiar with the characteristics that the Labels of Authenticity certify, they will be able to make better-informed choices about the Indigenous goods and services they purchase.²⁰

The Label of Authenticity was registered with respect to *goods* and/or *services* that are of Aboriginal or Torres Strait Islander origin. The *goods* may include a wide range of products such as fabrics, boomerangs, coolamons, nets, traps, seed and shell necklaces, didgeridoos and musical recordings, as

¹³ NIAAA Discussion Paper (August 1997), p 7.

¹⁴ NIAAA, ‘Artist’s Application to use the Label of Authenticity’. Certification as an Indigenous certified creator will only last for twelve months and the artist will need to apply for a certificate of renewal after that time. See Rules 3.8 and 3.9 of NIAAA’s Label of Authenticity Trade Mark Certification Rules.

¹⁵ Such marks have international support: see M Annas, ‘The Label of Authenticity: Certification Trade Mark for Goods and Services of Indigenous Origin’ (1997) 3 *Aboriginal Law Bulletin* 4, citing ‘Conserving Indigenous Knowledge — Integrating Two Systems of Innovation’, *Report by Rural Advancement Foundation International to United Nations Development Program* (1994), p 42.

¹⁶ NIAAA Discussion Paper (August 1997), p 7

¹⁷ *ibid.*

¹⁸ Letter from the Chair, K Mundine, *ibid.*, p 3.

¹⁹ *ibid.*, p 5.

²⁰ It is also hoped that that Indigenous art practices will be promoted by having community exhibitions and producing books and pamphlets about different cultural areas. See generally, *ibid.*, p 5.

well as sticks and sculptured objects. *Services* may include activities such as theatre, dance performances, concerts, educational and tourism programs.²¹ It is anticipated that the main focus of the Labels of Authenticity, particularly the *Collaboration Mark*, will be souvenirs, rather than the fine art market.²²

What are the Labels of Authenticity?

Unlike standard trade marks, the Labels of Authenticity do not function as indicators of origin.²³ Instead they indicate to the public that irrespective of their trade source the certified goods or services possess a specific quality or characteristic.²⁴ In the case of the Authenticity labels, the main characteristics (rather than specific qualities) to be certified are that the goods or services are produced by 'Aboriginal or Torres Strait Islander persons' who satisfy the definition of 'authenticity'.²⁵

Certification marks generally operate to symbolise and promote the collective interests of groups of traders.²⁶ By preventing traders whose goods

²¹ *ibid*, p 7. The application for registration of the certification mark indicates the mark will be registered in a number of classes of goods and services — including, for example, classes 2, 4, 8, 9, 14, 15, 16, 18, 20, 21, 22, 24, 25, 27, 41.

²² There is a wide range of product categories of Aboriginal art which are often reduced to two broad categories with the ultimate buyers in mind: fine art and tourist art. May divides ultimate buyers into collectors and tourist or casual buyers, 'in buying art, collectors look for ethnographic authenticity, aesthetic appeal and rarity, or some combination of these three factors. Casual buyers want something that is relatively inexpensive, but with a distinctly Aboriginal flavour.': R May (1989) 'Tourism and the Artifact Industry in Papua New Guinea', in B Finney and K Watsons (eds) (1975) *A New Kind of Sugar Tourism in the Pacific*, East West Centre, pp 127–28, cited in the Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry*, p 15. See also Janke (1996) 'Protecting Australian Indigenous Arts and Cultural Expression', p 23.

²³ The concept of a 'certification mark' dates back to the use of hall-marks by gold and silversmiths in the Middle Ages. Most trades or industries were supervised by a guild. Each guild was a federation of master craftsmen, frequently established by some form of charter, and had two main aims: to monopolise its trade in a particular town or city; and to promote the interests of the guild as a whole. Each producer or guild member was obliged to attach their mark that had previously been recorded with the guild, to their goods. C Pickering (1998) *Trade Marks In Theory and Practice*, Hart, pp 37–38.

²⁴ K Handley, 'The Commonwealth of Australia Trade Marks Act of 1955' (1955–56) 2 *Sydney Law Review* 517.

²⁵ *NIAAA Discussion Paper* (August 1997), p 5.

²⁶ 'Historically, the guild mark's purpose was to identify the craftsman who had manufactured the goods so that the origin of any sub-standard produce could be easily traced. It was a form of medieval consumer protection. A far more important consequence was that the production mark became an instrument of the guild's monopoly power. It enabled the guild to identify and exclude goods of those foreign to its territory and at the same time regulate legitimate traders. Since the very use of the mark indicated that the product bearing it conformed to a particular standard, there was no reason why the mark should symbolise individual

do not comply with the certification process from using the mark, the integrity of those traders whose goods are certified is maintained. By attesting to certain characteristics possessed by goods and services, certification marks also provide consumers with information that assists them when making decisions about which goods or services to purchase.

Part 16 of the *Trade Marks Act 1995* (Cth) deals with certification marks.²⁷ Under these provisions, a certification mark is defined as a 'sign'²⁸ used or intended to be used to distinguish goods or services:

- (a) dealt with or provided in the course of trade; and
- (b) certified by a person (owner of the certification trade mark), or by another person approved by that person, in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture;
- (c) from other goods or services dealt with or provided in the course of trade but not so certified.²⁹

The *Trade Marks Act 1995* (Cth) helps to protect consumer interests by requiring that, in order to be registered, the application for a certification trade mark must set out the rules by which the certification mark will be regulated.³⁰ The rules aim to ensure that the process by which the certification mark will be regulated is transparent to the public. The final form that the certification rules take, as well as the way they are implemented, will play an important role in

excellence.'; Pickering (1998) *Trade Marks In Theory and Practice*, pp 37–38. See also N Dawson (1988) *Certification Trade Marks: Law and Practice* Intellectual Property Publishing, p 13.

²⁷ Sections 168–183 *Trade Marks Act 1995* (Cth).

²⁸ A sign is defined to include 'the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent': s 6 *Trade Marks Act* (Cth) 1995. The definition of sign was broadened by the *Trade Marks Act 1995* (Cth) to ensure Australia complied with its obligations under the *GATT/TRIPS* agreement.

²⁹ Section 169 of the *Trade Marks Act 1995* (Cth). Section 170 of the *Trade Marks Act 1995* (Cth) provides that the provisions of the *Trade Marks Act* (with the exception of ss 8, 26, para 27(1)(b), sections 33, 34 and 41, para 88(2)(d), ss 121, 127, Part 9 — Removal of Trade Marks from Register for Non-use and Part 17 — Defensive Trade Marks) apply to certification marks and so apply as if the reference to trade marks included a reference to a certification mark: see s 27 *Trade Marks Act 1995* (Cth).

³⁰ The *Trade Marks Act 1995* (Cth) requires the owners of certification marks to file a copy of the rules which will govern the use of the certification trade mark. See s 171 of the *Trade Marks Act 1995* (Cth) and s 173 of the *Trade Marks Act 1995* (Cth) and Trade Mark Regulations Pt 16 Certification Trade Marks Regulations 16.1–16.11.

the way the Labels of Authenticity operate and the extent to which the Labels are accepted within the Indigenous artistic community.

Section 173(2) of the *Trade Marks Act 1995* (Cth) states that the rules governing use of the certification mark are to include details about:

- the persons who may be approved for the purpose of certifying goods and/or services;
- the cases in which goods or services are to be certified;
- the conditions under which an approved user is allowed to use the certification trade mark in relation to goods or services;
- the use of the certification trade mark by the owner (if he or she intends to use it) and any approved user;
- the settlement of any dispute arising from a refusal either to certify goods or services or to allow the use of the certification trade mark; and
- any other provisions that the Australian Competition and Consumer Commission (ACCC) requires or permits to be inserted.

To ensure that traders who produce appropriate goods or services are not denied use of the certification mark, the ACCC is required to assess all applications for certification trade marks to ensure that:

- the applicant or approved certifiers are competent to *certify* the goods or services,³¹ and
- the rules governing the use of the certification trade mark are 'not detrimental to the public'; and 'are satisfactory having regard to the principles in the *Trade Practices Act 1974* (Cth) relating to restrictive trade practices (Part IV), unconscionable conduct (Part IVA), and unfair practices, product safety, and product information'.³²

Some of the factors which will be taken into account when determining whether the granting of the mark would be detrimental to the public include the likelihood of the mark being used to restrict competition, to maintain price levels, or to limit sources of supply.³³

³¹ Section 175 (2)(a) *Trade Marks Act 1995* (Cth).

³² Section 175(2)(b) *Trade Marks Act 1995* (Cth) and the Trade Mark Regulations 16.6 (following the recommendation of the Free Report, Recommended Changes to the Australian Trade Marks Legislation (July 1992)). See also J Lahore, *Patents, Trade Marks and Related Rights*, Butterworths Loose-leaf Service at [50, 170]. It has been suggested that this criteria ensures the integrity of the certifying process and to prevent it from becoming a smoke screen for a more generalised licensing of the mark in question: S Ricketson (1994) *Intellectual Property Cases, Materials and Commentary*, Butterworths, para 1103 00.

³³ It is also possible that registration might simply be a device to attract the benefit of section 51(3)(b) of the *Trade Practices Act 1974* (Cth) and thereby avoid breach

Unless the ACCC is 'not satisfied' that the application for a certification mark complies with the relevant criteria, it must issue a certificate to that effect.³⁴ Once the ACCC issues its final assessment, the application is then passed to the Registrar of Trade Marks in IP Australia³⁵ for final approval. If the ACCC refuses to grant a certificate, the Registrar must reject the application.³⁶

NIAAA has successfully registered the first Label of Authenticity with IP Australia. The ACCC has indicated that, after some amendment,³⁷ it is satisfied that the rules comply with the statutory test and the final approval of the Registrar of Trade Marks has now been given. NIAAA has lodged its application for the second Label of Authenticity, the Collaboration mark with IP Australia.³⁸ It is expected that the rules relating to the Collaboration Mark will be handed over to the ACCC for examination in the near future.

NIAAA will be the initial owners of the Labels of Authenticity. It remains to be seen whether NIAAA will continue as owner of the labels, or whether the labels will be transferred to a body specifically created for that purpose.³⁹ The registered owner of the Labels will have the exclusive right to use and to allow other persons, known as *approved users*,⁴⁰ to use the Labels in respect of the goods and services for which they have been registered. In practical terms, the

of that Act: D Shanahan (1990) *Australian Trade Mark Law & Practice*, Law Book Co, p 231.

³⁴ Section 175 of the *Trade Marks Act 1995* (Cth).

³⁵ Formerly the Australian Industrial Property Organisation

³⁶ In addition to a mark being rejected for failure to satisfy the ACCC, a certification mark may also be rejected (or opposed) on the grounds that the certification trade mark does not distinguish the certified goods or services. s 177 of the *Trade Marks Act 1995* (Cth). There are also provisions in the *Trade Marks Act* for removal of the certification mark by way of rectification of the register where the registered owner, for example, is no longer competent to certify the goods and/or services in respect of which the mark is registered: s 181 of the *Trade Marks Act 1995* (Cth).

³⁷ The ACCC has power to require the applicant to make amendments to the rules governing use of a certification mark: s 175(3) *Trade Marks Act 1995* (Cth).

³⁸ There has been some concern expressed about the lack of priority given to the Collaboration Mark. In part, this is because the Olympics were seen as providing ample opportunity for the unscrupulous operators to profit from 'rip-offs' of Indigenous images and products. It was thought that if the Collaboration mark was available in time for the Olympics, it would dramatically improve protection for Indigenous artists from such rip-offs. D Stevens, 'Aboriginal Art: Is Protection or Education the Issue?' (1999) 30 *Copyrights* p 7.

³⁹ It has been suggested that such a body may be the Label of Authenticity Registry with an executive board, made up of representatives from regional areas across Australia. *NIAAA Discussion Paper* (August 1997), p 8. In its submission to the *Our Culture, Our Future* Discussion Paper, the Centre for Indigenous History and the Arts also recommended that a new national body be established: T Janke (1998) *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Co, p 200.

⁴⁰ Section 172 of the *Trade Marks Act 1995* (Cth).

owner of the Labels of Authenticity will have the continuing responsibility for the promotion, marketing, policing and enforcement of the Labels.

The application fee for artists who wish to use the Label of Authenticity is currently set at A\$30, with the labels costing 9 cents each. While for some the costs may be insignificant, for many Indigenous artists these costs may be prohibitive. As such, the costs may influence the relative success of the Label. It is unclear whether the costs will be borne by the artists themselves, or whether financial assistance can be provided by the regional arts centres.⁴¹ Given the growing number of Indigenous artists and the reduction in funding to regional art centres, these costs may impose an unwelcome and onerous burden.

The fees for the Collaboration Mark have not yet been released. Again, the issue of the cost of the labels is relevant to the level of their adoption. As the Collaboration Mark will be applied for in relation to the goods or services produced, the number of labels needed will be greater. As such, it is important that the fees are set at a reasonable level.

The Certification Process

In part, the success of the Authenticity labels depends on the certification process — that is, the process by which the goods and services are evaluated to ensure they possess the required characteristics. There are a number of different ways in which the certification process could be organised. One option is for NIAAA to assume sole responsibility for the certification process. Alternatively, NIAAA could authorise others, referred to in the *Trade Marks Act 1995 (Cth)* as *approved certifiers*,⁴² to certify on their behalf.⁴³ This is the preferred option for many certification trade mark owners. A third option is for NIAAA and third party-approved certifiers to act as certifiers of the Labels of Authenticity.⁴⁴

One of the main problems with NIAAA being the sole certifier relates to the fact that NIAAA is located in Sydney. As many Indigenous artists are located in remote regional areas, they may experience difficulties in accessing a Sydney-based organisation. NIAAA needs to be mindful of the issues raised by distance and isolation. They will also need to ensure that there are appropriate mechanisms in place to address any problems encountered by Indigenous artists in gaining access to the Labels.

⁴¹ In practice, most regional Indigenous artists work in conjunction with local art centres.

⁴² Section 173 of the *Trade Marks Act 1995 (Cth)*.

⁴³ For example, the internationally known Woolmark Company licenses its brands to manufacturers in over 65 countries. The Woolmark Company, Woolmark Licensing, www.wool.com.au/global/commercial.index.html

⁴⁴ See NIAAA's Label of Authenticity Trade Mark Certification Rules. Rule 7.1 gives NIAAA power 'to delegate any one or more of its powers to an appropriately qualified and independent nominee appointed in writing except that decisions as to whether an applicant is an Indigenous Person can only be delegated to an Approved Certifier'.

One way of ensuring that regional artists are not alienated by the scheme is for NIAAA to use third-party certifiers based in regional centres. NIAAA could authorise Aboriginal or Torres Strait Islander organisations such as regional land councils or community arts and cultural organisations to assess applications from Indigenous artists to use the Labels. These local bodies would become approved certifiers to which local Aboriginal and Torres Strait Islander artists and producers would apply for the right to use the label.⁴⁵ This appears to be the option preferred by NIAAA.⁴⁶

The third way in which the certification process could proceed is for NIAAA and the regional approved certifiers to certify the goods and services for the Labels of Authenticity. The issues of training and the financial implications of the certification process will again be relevant.

In deciding which option is best, an examination of the way other certification marks approach the issue may be useful. A recent example of a successful certification mark that may provide guidance is the Craftmark. This mark, which was registered as a certification mark in 1999, was designed to raise the profile of Australian crafts and to make them accessible to the business markets.⁴⁷ Where the Craftmark is applied to a craft product, this means that the item has been 'made'⁴⁸ by an accredited 'Australian craft practitioner'.⁴⁹ It also means that it satisfies certain quality standards embodied in the Craftmark accreditation process.⁵⁰ Craft Australia has appointed two approved certifiers of the Craftmark: Craft Australia and the Industry Review Advisory Panel. The members of the Industry Review Advisory Panel are self-nominating and serve on the panel for twelve months. The current panel of certifiers was elected by accredited craftspeople and retailers. The fact that one of the certifiers of the Craftmark consists of a panel which is elected by the craftspeople may serve as a useful example to NIAAA as to how the issue of who is to certify can be dealt with.

Whatever scheme is adopted, to ensure that the certification system works effectively and fairly, it is important that a mechanism be set up to ensure that any disputes arising from a refusal to certify goods or services or to allow the

⁴⁵ NIAAA Discussion Paper (August 1997), p 8.

⁴⁶ ACCC Press Release, 'No Objection to Indigenous Certification Trade Mark', 4 November 1999.

⁴⁷ In 1997, the Australian Attorney-General and Department of Communications and the Arts' survey on crafts and markets found that in the three months prior to interview, 696 500 Australians (aged over 18) spent \$317.5 million on Australian-made crafts: M Cater, 'Crafting an Image Fit for the Boardroom', *The Australian Financial Review*, 1-2 May 1999, p 2.

⁴⁸ 'Made' means the object has been created using the specialised skills of a professional crafts practitioner: Interview with J Mors, Craftmark Australia.

⁴⁹ 'Australian craft practitioner' means a professional, skilled in the techniques of their craft medium, who is a citizen or resident of Australia, (whether in Australia or whilst studying or living overseas): Conditions of Use of Craftmark Australia.

⁵⁰ Conditions of Use of Craftmark Australia, Paragraph 2: Definitions.

use of the mark are settled in a fair and efficient manner.⁵¹ Ideally, an independent person appointed by the unsuccessful applicant and the certifier would be the appropriate person to assist in the dispute resolution process.⁵²

Competency to Certify

An important issue that arises with respect to the certification process is whether the certifier is competent to certify the goods or services.⁵³ Given that certification marks serve as reliable indicators of the characteristics that are certified, the person certifying the goods or services must be competent to do so. Competence to certify is usually a question of the applicant's ability to monitor and control approved users of the mark, augmented where necessary, by inspection and sampling to ensure compliance.⁵⁴

A program for the training of certifiers is needed to ensure that certifiers are adequately trained to certify that the goods and services to which the labels are attached possess the desired characteristics. This is the case whether NIAAA or third parties are the certifiers. While training programs will require resources that may not be readily available, a percentage of the application fees paid for use of the Labels may offset some of the costs associated with setting up such a program.

It is unclear whether NIAAA would undertake such training or whether the regional bodies would be responsible for the training necessary to ensure that the artists' goods and services possess the desired characteristics.⁵⁵ Such training, along with the certification process more generally, will have obvious financial consequences. It is unlikely that regional bodies such as land councils or local art centres would be in a position to undertake the certification process without additional financial assistance. The apparent lack of infrastructure has also been of concern, particularly in remote regional areas where many of the

⁵¹ Section 173(2) *Trade Marks Act* 1995 (Cth) sets out what the rules governing the certification mark must contain to ensure the public interest is met.

⁵² With respect to the Craftmark, any dispute that arises from a refusal to grant use of the Craftmark, after discussion with the Craftmark Manager, is referred to an Industry Review Advisory Panel: Interview with J Mors, Craftmark.

⁵³ It has been suggested that competency has two elements here. On the one hand, the applicant must find a mechanism by which it can ensure that the certification trade mark will only be used on goods which possess the certified characteristic. This will involve a system of check and examination of samples of goods. This might be described as the 'internal competence' to certify — an ability to find the means within its own organisation to run a fair and advantageous certification scheme. On the other hand, the applicant must also show 'external' competence — that is, that a large number of persons in the trade are willing to accept that applicant as a certifying authority. In short, the applicant should have 'the confidence of the trade': Dawson (1988) *Certification Trade Marks*, pp 30–31.

⁵⁴ See *ibid.* pp 30–31. See also *Union Nationale Inter-Syndicale des marquis Collectives' Appn* (1922) 39 RPC 97 at 102–103, 105 and 107 (UK Reg) affirmed (1922) 39 RPC 346. See also Shanahan (1990) *Australian Trade Mark Law & Practice*, p 230.

⁵⁵ Shanahan (1990) *Australian Trade Mark Law & Practice*, p 230.

cultural products are produced.⁵⁶ The question of where the additional financial resources needed to fund a regionally based scheme will come from remains unanswered. One possibility is that state-based art bodies could provide financial assistance. Alternatively, some of the registration fees paid to NIAAA could be diverted to the regional centres to provide funding assistance for the certification process that is undertaken. Despite the burdens that may be placed on regional and local organisations undertaking the certification process, this approach is advantageous in that it may alleviate some of the concerns that regional artists have about a Sydney-based label.⁵⁷

The relevant certifiers will also have to inspect premises where the Labels of Authenticity are used to ensure proper use of the Labels. Again the Craftmark provides some guidance as to how this issue could be addressed. A number of criteria are taken into account in deciding the suitability for accreditation for use of the Craftmark.⁵⁸ These are the commercial track record of the business; their recognition within the industry; promotion of self and work; training and qualifications; and collections and exhibitions in which their work has featured.⁵⁹ Given the nature of the characteristics to be certified for the Labels of Authenticity these may, however, be more difficult to determine.

The Characteristics to be Certified

To be able to certify goods and services, NIAAA and/or their approved certifiers must be satisfied that the characteristics to be certified are present in

⁵⁶ Stevens (1999) 'Aboriginal Art', p 7.

⁵⁷ See Janke (1998) *Our Culture, Our Future*, pp 200–201.

⁵⁸ Applicants apply to the Craftmark Australia Accreditation Assessor via the accreditation form. Applicants need to be able to provide a spread of answers across the five categories in the questionnaire to qualify for accreditation. Answers are translated into point ranges. An applicant must reach a minimum of 100 points to gain accreditation by means of the application questionnaire. If they are awarded fewer than 100 points, their application and slides of their work are submitted to an industry panel for a decision: Craftmark Australia, Conditions of Use of Craftmark Australia.

⁵⁹ Accreditation lasts for three years from the date of the launch of the campaign, provided that the quality of the work remains consistent or unless there is a radical change in the production direction and the applicant does not seek accreditation for the new work. If an applicant is unsuccessful, the decision will be communicated to them in writing. If appropriate, the letter will contain feedback from the panel as to what they could do to make accreditation more likely in the future. The letter may invite them to reapply in twelve months: Conditions of Use of Craftmark Australia para 5. In contrast, the question of who can use the Woolmark is a simple one. The Woolmark Corporation lays down technical standards that must be met before a licence is granted. The criteria for application are that an application form is completed, the necessary fees are paid and the product samples must meet the technical standards set. So long as these criteria are met, an applicant will be entitled to use the Woolmark label: Conditions of Application for a Woolmark Licence.

the goods or services. Under the labelling scheme, there are three criteria that need to be complied with:

- The applicant must show that ‘the products or services are derived from a work of art created by, and reproduced or produced and manufactured by “Aboriginal and Torres Strait Islander people”’.
- The applicant must satisfy the relevant definition of ‘authenticity’.
- With respect to the Collaboration Mark, it must be shown that the goods or services are produced under ‘fair and legitimate licensing arrangements with non-Aboriginal and Torres Strait Islander people’.⁶⁰

Each criterion will be examined in turn.

*Who is an ‘Aboriginal or Torres Strait Islander Person’?*⁶¹

The first criterion that needs to be complied with is that the applicant must show that ‘the products or services are derived from a work of art created by, and reproduced or produced and manufactured by “Aboriginal and Torres Strait Islander people”’. In turn, this gives rise to the question of who is an ‘Aboriginal or Torres Strait Islander person’.⁶² In answering this question, NIAAA has adopted a three-pronged approach similar to that used by the Commonwealth government in other contexts.⁶³ This approach takes into account whether the applicant is a person of Aboriginal or Torres Strait Islander descent, identifies as an Aboriginal or Torres Strait Islander, and is accepted as such in the Indigenous community in which the applicant lives or comes from, or which the applicant identifies with.⁶⁴ The applicant may trace

⁶⁰ NIAAA Discussion Paper (August 1997), p 7.

⁶¹ See generally P Wolfe (1999) *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*, Cassell, p 179.

⁶² The importance of this issue is shown as follows: ‘In Australia, in recent years, there are several thefts of Aboriginal cultural identity which mocks Aborigines in their struggle for acceptance and equality in the art world. For example, Colin Johnson now known as Mudrooroo, also Elizabeth Durack known as Eddie Burrup and Leon Carmen a white writer who assumed the name of Wanda Koolmatrie’: R Van den Berg, ‘Intellectual Property Rights for Aboriginal People’ (1998) *Oceania Newsletter* p 20.

⁶³ H McRae et al (1997) *Indigenous Legal Issues, Commentary and Materials*, LBC Information Services, p 72. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70; *Gibbs v Capewell* (1995) 128 ALR 577; *Ward v Western Australia* (1998) 159 ALR 483 (recently appealed to the Full Court of the Federal Court of Australia) and *Yanner v Eaton* (1999) 161 ALR 258.

⁶⁴ Rule 3.2 of the NIAAA Label of Authenticity Certification rules provides that the application form for the Label of Authenticity must be accompanied by the application fee and ‘an Aboriginal or Torres Strait Islander Confirmation of Aboriginality or Torres Strait Islander Descent Form or Label of Authenticity Confirmation of Aboriginality or Torres Strait Islander Form or other evidence that the application is an Indigenous Person’.

descent from a different Indigenous community from that with which they identify or in which they are accepted.⁶⁵

Many Indigenous artists have expressed concern at having to prove their indigeneity for yet another purpose. Croft suggests that ‘an aspect of the “Label of Authenticity” is reminiscent of the old “Dog Tag” system. Only a few decades ago if an Indigenous person wished to move about relatively unhindered by the authorities, they were required to hold a government pass — the “Dog Tag”, which stated that they were fit to be considered a full citizen of Australia.’⁶⁶ Croft asks: ‘Does not the Label fulfill a similar purpose, asking [Indigenous people] to confirm their status yet again?’⁶⁷

What is Meant by ‘Authenticity’?

The second criterion that needs to be complied with for a successful application to use the Label of Authenticity is that applicants must ensure that they satisfy the relevant definition of ‘authenticity’. The way authenticity is defined is of fundamental importance to the acceptance and success of the national certification marks. This criterion raises issues similar to those raised when determining who is an Indigenous person for the purpose of the Labels. Whatever route is chosen to decide the difficult question of the authenticity and/or the cultural integrity of Indigenous goods and services, there is clearly a need for the definition to be ‘accepted by Indigenous people nationally as reflecting their notions of what constitutes an authentic Indigenous cultural product’.⁶⁸

NIAAA has suggested that the authenticity of Aboriginal and Torres Strait Islander artists should be determined in relation to:

their identity with, belonging to, knowledge about, respect for and responsibility towards the works of art which they produce. “Identity” is defined in relation to upbringing, belief, stories, cultural ways of living and thinking and knowing what it is to be Aboriginal or Torres Strait Islander. In turn, “belonging” means to be either connected with stories about “country”, or connected with the experiences of being Indigenous in Australia. “Knowledge” is both about familiarity gained from actual experience and also having a clear and certain individual perception of expression. “Respect and responsibility” is about having regard for and looking after culture. It is about acting in a way which is sensitive to others and which does not exploit other peoples’ identity, knowledge and belonging.⁶⁹

The attempt to define authenticity with respect to Indigenous goods and services raises a number of complex issues. One concern that arises is how the

⁶⁵ NIAAA, The National Label of Authenticity seminar, 6 October 1999, p 5. See also the ACCC Press Release, ‘No Objection to Indigenous Certification Trade Mark’, 4 November 1999 <http://www.accc.gov.au/media/mr-213-99.htm>

⁶⁶ Croft (2000) ‘Behind the Scenes’, p 84.

⁶⁷ *ibid*, p 85.

⁶⁸ Janke (1998) *Our Culture, Our Future*, p 77.

⁶⁹ *NIAAA Discussion Paper* (August 1997), p 5.

notion of authenticity will relate to 'traditional' Indigenous art. Here the concern relates to the fact that there is a tendency to see Aboriginal art that employs traditional techniques, materials and imagery, such as well-known dot paintings, as if it *alone* was authentically Aboriginal. To see Indigenous art in these terms does many artists a disservice and also reinforces public misconceptions about Indigenous art.⁷⁰ It is also problematic in that it may exclude much urban Aboriginal art from the general classification of Aboriginal art. For urban and non-traditional Aboriginal artists, the way authenticity is defined raises the problem that they may be stigmatised for not being 'real' or 'authentic' Aboriginal artists.⁷¹ An example of the difficulties that such categorisation may lead to is given by Judy Watson, a well-known Indigenous artist. When asked by the leading auction house Sotheby's to categorise her work as either 'Aboriginal' or 'Contemporary', her response was that it was up to her to define herself, not someone else.⁷² It has been suggested that if the label is initially aimed at tourist art rather than the fine art market, any 'danger of confusing the market distinction between tourist and fine art and obfuscating the importance of differences between regional art styles and the work of individual artists' may be avoided.⁷³

Another issue that arises in this context is whether, in order to satisfy the definition of authenticity, Indigenous artists need to comply with customary law. This arises from the fact that, when painting Indigenous stories or reproducing cultural images, artists must also comply with and respect customary laws.⁷⁴ As Janke explains:

⁷⁰ Department of Aboriginal Affairs (1989) *The Aboriginal Arts and Crafts Industry*, Report of the Review Committee, July 1989, AGPS, p 290.

⁷¹ S Gray, 'Black Enough? Urban and Non-traditional Aboriginal Arts and Proposed Legislative Protection for Aboriginal Art' (1996) 7 *Culture and Policy* 3, pp 29–30, 34 citing P Anderson, 'Aboriginal Imagery: Influence, Appropriation or Theft?' (1990) 12 *Eyeline* 8. An overly restrictive interpretation of what are 'authentic' indigenous goods or services may have the unintended consequence of creating a barrier to those producing works that do not fall within the definition. A consequence of any such restrictive interpretation is that the ACCC may be concerned that the Label of Authenticity does not satisfy the second limb of the statutory test — that is, the public interest test.

⁷² Croft (2000) 'Behind the Scenes', p 85.

⁷³ Department of Aboriginal Affairs (1989) *The Aboriginal Arts and Crafts Industry*, p 314. Again, the way in which other certification marks have approached this issue may be of assistance. The Igloo Mark required that artwork be handmade for it to be eligible to be certified. At first all artwork produced by Inuit was 'handmade' using axes, files etc by a very small group of people. Now the communities have grown along with the groups of artists, thus leading to new techniques, styles and tools being brought into the communities. The artists have started to explore these new techniques creating works of art other than the totally 'handmade': interview with B Pottle, Research Officer, Inuit Art Centre, Ottawa, Ontario, 22 July 1999.

⁷⁴ 'Traditionally, indigenous cultural expression is not created or performed for commercial sale, but rather for its significance as a vehicle for cultural and religious expression. According to Indigenous Australian beliefs, Indigenous arts

under customary laws, the right to reproduce pre-existing designs, themes or stories is vested in the traditional custodians. Rights to this knowledge and the authority to disclose it to others are governed by a complex social system based on a series of qualifications, depending on descent, kinship and marriage. The Aboriginal author of a work based on a traditional pre-existing design, theme or story holds the knowledge embodied in a work in trust for the rest of the clan. In this way, the knowledge is collectively owned by the clan. The author must be careful not to distort or misuse this knowledge. Although he or she is the creator of the work, he or she cannot authorise reproduction of the artwork, song or story without observing Aboriginal customary law.⁷⁵

The recent decision of *Bulun Bulun*⁷⁶ reinforces the importance of the relationship between the Indigenous artist and their community. This case involved an action for copyright infringement relating to a painting, *Magpie Geese and Water Lilies at the Waterhole*, created by Johnny Bulun Bulun. As well as finding that Bulun Bulun's copyright had been infringed, the Federal Court of Australia also held that Bulun Bulun owed his community a fiduciary duty in relation to the stories depicted in the painting. This was because of the 'trust and confidence' that arose when Bulun Bulun was given permission to use the community's traditional ritual knowledge in the painting.⁷⁷ Had Bulun Bulun not taken action to protect the knowledge, the Court suggested that, because of the fiduciary relationship that existed between Bulun Bulun and his community, the elders of the community may have stood in his place and brought the action. However, as Bulun Bulun had already taken action to protect the knowledge, there was no need for the Court to pursue the notion of the custodian's interest any further.⁷⁸

The *Bulun Bulun* decision recognises that information which is drawn from the body of Indigenous knowledge and imparted to an Indigenous person as part of their ceremonial and artistic training is done so in the belief that it will not be used in a manner which is inconsistent with Indigenous laws.⁷⁹ Applying general equitable principles, where there is a fiduciary relationship

and other forms of cultural expression are artistic manifestations of ancestral spirits, ancestral events or tracts of land associated with ancestral spirit or an ancestral event. Such forms of cultural expression have been handed down through the generations, providing Indigenous people with cultural information concerning their ways of life. The many stories, songs, dances, paintings and other forms of cultural expression define the relationships between the land, the people, plants and animals. Arts and cultural expression are therefore important aspects of Indigenous cultural knowledge, power and identity': Janke (1996) 'Protecting Australian Indigenous Arts and Cultural Expression', p 15.

⁷⁵ *ibid.*

⁷⁶ *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

⁷⁷ *ibid* at 529.

⁷⁸ See generally, C Golvan, 'Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments' (1999) *EIPR* p 599.

⁷⁹ Janke (1996) 'Protecting Australian Indigenous Arts and Cultural Expression', p 18.

between the parties, it may be necessary for third parties who deal with cultural symbols or images contained in a work to have *notice* of the custodians' interest if that interest is to be preserved.⁸⁰

The principles established in *Bulun Bulun* in relation to Indigenous communities' interest in the proper use of images and stories are relevant to the Labels of Authenticity. Given the impact that customary law potentially has upon Indigenous art and culture, it would be preferable if artists were only able to use the Label of Authenticity on their works where it can be demonstrated that customary laws have been complied with.⁸¹ Despite the fact that NIAAA is mindful of the issues that relate to customary laws and the rights to use Indigenous images and stories, it has recognised that it is not in a position to certify as to the proper use that should be made of such cultural symbols. The rules governing use of the Label of Authenticity provide that, where works or services purport to depict or reflect ceremony, law, knowledge, dreaming or ritual of the Indigenous owners of the land in question, then the Label of Authenticity must only be applied where they were produced in accordance with any customs or law of the relevant traditional Indigenous owners and where the necessary permission has been obtained by the Indigenous artist.⁸² Accordingly, a certified Indigenous creator may lose the right to use the Label of Authenticity if they make use of stories, symbols, styles or the like without obtaining the necessary permission from the Indigenous people of the relevant country.⁸³ One way elders of Indigenous communities may ensure customary law is upheld is to address this issue when indicating (for the three-pronged approach referred to above) that the artist is someone who belongs to and is accepted by that Indigenous community.

⁸⁰ See M Hall, 'Case. *Bulun Bulun v R & T Textiles*' (1998) 3 *Copyright Reporter* 129. It has been suggested that notice of a custodian's interest could take the following form:

Notice of Custodial Interest of the [Name] Community

The images in the artwork embody traditional knowledge of the [name] country. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the [name] community, and may also breach the *Copyright Act 1968* (Cth). For enquiries regarding permitted reproductions of these images, contact [community]. (S McCausland, 'Protecting Communal Interests in Indigenous Artworks After the *Bulun Bulun* Case' (1999) 4 *Indigenous Law Bulletin* 4).

See also N Blackmore, 'The Search for a Culturally Sensitive Approach to Legal Protection of Aboriginal Art' (1999) 2 *Copyright Reporter* 57.

⁸¹ Croft (2000) 'Behind the Scenes', p 86.

⁸² NIAAA's Certification Rule 4.1.

⁸³ NIAAA has provided in its application form for use of the Label of Authenticity as follows: 'If your work depicts or reflects ceremony you need to have authority from the community to use it. If you do not get authority you could be deregistered and lose your right to use the Label of Authenticity.'

For some Indigenous groups, the notion of authenticity is far more complex than has been suggested by the definition adopted by NIAAA. For example, some groups consider that for a didgeridoo to be truly authentic, it would need to be produced in the Kimberley region by an Indigenous person who has the authority of that community. This is because, historically, didgeridoos belong to that particular area. A similar concern may arise in relation to styles of paintings, such as the well-known dot paintings that emanate from central Australia and the Western Desert region.

A further concern raised by Indigenous artists is that the labelling of certain works as 'authentic' may suggest that goods or services *not* bearing the Labels of Authenticity are somehow not authentic.⁸⁴ As Croft suggests, 'a number of my colleagues — with extensive experience with in the Indigenous visual arts/cultural industry — have expressed concern at the suggestion that all Indigenous artists should be encouraged, or even placed under obligation, to purchase the Label, which is being promoted as some kind of panacea for all the industry's problems'.⁸⁵ This is potentially problematic in that artists who choose not to use the Labels risk the chance of being associated with bogus or fake products.⁸⁶ The problem here is that there may be a number of reasons why artists choose not to use the label. For example, they may believe that their existing trade marks sufficiently distinguish their goods and services, or that they may not be able to afford the labels. NIAAA has attempted to address this issue in the rules that govern the use of the mark. Rule 10.1 provides that:

nothing in these rules is intended to be used to suggest that works in respect of which the Label of Authenticity is not used necessarily involve any misrepresentation as to their origin or authorship of that their quality or worth is necessarily inferior to works in connection with which the Label of Authenticity is used pursuant to and in accordance with these Rules. NIAAA does not authorise or condone the making of such representations, statements or suggestions whether by Certified Indigenous Creators or others.

Despite the existence of Rule 10.1, the Label of Authenticity may have a negative impact on those Indigenous artists who choose not to use the labels.

It is important to note that, for many Indigenous artists, the notion of authorship — the way people express the origin of their works — and questions as to the responsibility for identifying the source of a work may be different from the concepts of authorship employed in intellectual property law.⁸⁷

⁸⁴ A related concern was raised by British traders in *Union Nationale Inter-Syndicale des marqus Collectives' Appn* (1922) 39 *RPC* 97, 102–103, 105 and 107 affirmed (1922) 39 *RPC* 346. See Dawson (1988) pp 17–18.

⁸⁵ Croft (2000) 'Behind the Scenes', p 84.

⁸⁶ J Sexton, 'Authenticity Gets a Tick', *The Australian*, 5 November 1999, p 19.

⁸⁷ K Wells, 'The Development of an Authenticity Trade Mark for Indigenous Artists' (1996) 21 *Alternative Law Journal* 39. Indigenous artists and communities often

What is Meant by the Term 'Fair and Legitimate Licensing Arrangements'?

The third criterion that needs to be complied with — which only applies to the Collaboration Mark — is that it must be shown that the goods or services are produced under 'fair and legitimate licensing arrangements with non-Aboriginal and Torres Strait Islander people'.⁸⁸ What is meant by this phrase remains to be seen. However, it may be assumed that, when deciding whether the licensing arrangements are 'fair and legitimate', the inquiry should not only focus on the remuneration paid to the artist, but also consider whether the licensing contract is written in a language that is able to be understood by the artist.⁸⁹

Relationship with Existing Trade Marks

Many Indigenous regional bodies already have registered their own trade marks to reflect the distinctive nature of the goods and services that they produce. For example, the Western Australian Aboriginal Business Council has developed an authenticity label for Indigenous products. Its authenticity label is a standard trade mark that can be used on any product painted, crafted, designed and produced by people indigenous to Western Australia.⁹⁰

The extent to which the Labels will be adopted by Indigenous artists who already use a trade mark to distinguish their goods and services remains to be seen.⁹¹ When consulted about the idea of a national Label of Authenticity, some Indigenous artists indicated that they would prefer to use their own certification mark controlled by appropriate groups recognised at the state level, rather than national marks administered by a national body.⁹²

There is no doubt that the introduction of the Labels of Authenticity will have an impact upon those trade marks which have already been registered for Indigenous goods or services. Understandably, the owners of the existing marks are concerned that the reputation and value of their marks may be

define authenticity according to what authorship means, and how they describe the origin from their art. *NIAAA Discussion Paper* (August 1997), p 5.

⁸⁸ *NIAAA Discussion Paper* (August 1997), p 7

⁸⁹ There are hundreds of languages spoken by Australian Aborigines. For a useful map of Indigenous Australia showing languages and different groups see www.aboriginalaustralia.com/homemap.htm

⁹⁰ See Department of Aboriginal Affairs (1989) *The Aboriginal Arts and Crafts Industry*, p. 315, cited in Janke (1998) *Our Culture, Our Future*, p 195.

⁹¹ S Farquhar, 'Certification and Authentication Trade Marks and Industrial Property of Arts and Cultural Expression', a paper presented at the International Conference on Artistic and Cultural Expressions, Traditional Knowledge and Protection of Heritage, 27–29 September 1996, University of Queensland, Brisbane.

⁹² The Tasmanian Aboriginal Land Council suggested that Tasmanian Aboriginal people would prefer to use their own Label of Authenticity instead of a national mark. There has in fact been support for a multi-level labelling system that makes use of state, regional and local Indigenous structures. See Janke (1998) *Our Culture, Our Future*, p 201.

diluted by the introduction of the Authenticity Labels.⁹³ The introduction of the new labels may have the unintended consequence of creating a division between those Indigenous artists who adopt the use of the Label of Authenticity and those who continue to use their own trade marks to distinguish their goods and services.

Given that there are already a number of registered trade marks for Indigenous products, NIAAA has suggested that there be a dual labelling system with respect to Indigenous goods and services. In addition to the Label of Authenticity or the Collaboration Mark, NIAAA has proposed that Indigenous goods or services may have a second label attached to them. The second label would usually be a trade or business name, or a trade mark that indicates the product's source and quality of authenticity.⁹⁴ It appears that the other trade mark, name or promotional material may be required to include 'a description of the work of art and product or service on which it is reproduced; the name of the artist or artists and their country, language or place or residence'.⁹⁵

Regulation of the Labels of Authenticity

A successful certification mark can bring a number of benefits to the owner of the mark and the trade more generally. The potential value that it brings to its traders cannot be under-estimated. The relative effectiveness of the Labels of Authenticity will depend on how the marks are implemented and the way the labelling scheme will operate. Another factor that will influence the relative success of the certification mark is the way the mark is policed. If not done effectively, the value of the certification mark may be lost.

The more successful the mark, the more likely it is that there will be attempts to take advantage of the mark's reputation by fraudulently copying the mark.⁹⁶ It is not uncommon to see existing labelling on pirated goods

⁹³ The fact that there is government support for the Labels of Authenticity may be of concern to the owners of existing trade marks for Indigenous goods who have most likely funded the application for, and the marketing of, their trade marks themselves.

⁹⁴ *NIAAA Discussion Paper* (August 1997), p 4.

⁹⁵ Rule 4.2 provides that, 'in the case of works, the Label of Authenticity can only be used as part of a Label of Authenticity package, covering, or other thing in which the works are provided or which is applied to, woven in, impressed on or affixed to the works if that thing also includes or is accompanied by information as to [the] identity of any Certified Indigenous Creator, the traditional people, language group and land to which he or she belongs, where they were living when the work was authored if relevant to the production of the work and the way in which they regard the work as reflecting their Indigenous heritage or experience.' See also the *NIAAA Discussion Paper* (August 1997), p 6.

⁹⁶ This is evidenced by the number of fake woolmarks that are regularly attached to garments that do not qualify for Woolmark protection. Around the world, each woolmark region assigns its own body to regularly check retail outlets and test samples from manufacturer to ensure the products comply with the Woolmark rules. Criminal cases have recently been commenced in India with police raids

designed to confuse the unsuspecting buyer. It is commonly accepted that 'often labels state that the artwork on the item is "influenced" or "inspired" by Indigenous culture. Company names frequently have a suitable Indigenous sounding but generic ring to them.'⁹⁷

It is highly likely that pirate copies of the Labels of Authenticity will be made in an attempt to represent non-Indigenous goods and/or services as being authentically Indigenous. NIAAA will need to monitor the industry to ensure that fake labels are identified and that those responsible are dealt with appropriately.⁹⁸ Once consumers, certified Indigenous creators and members of the arts and cultural industries are educated about the Labels, they may also be in a position to assist NIAAA to help stamp out fake and bogus labels.⁹⁹ While there is currently no official intention to register the Labels of Authenticity as certification marks outside of Australia, the possibility of foreign goods or services claiming to be Indigenous being imported into Australia is a real one. One avenue that could be pursued is for the owner of the labels to form links with Indigenous organisations outside Australia to control the misuse of Indigenous art and culture.

As with any trade mark, there is a possibility that the owner of the Labels may need to take legal action to stop others from taking unfair advantage of the reputation built up in the mark. In this context, the owners need to be concerned not only with the potential misuse by the public, but also with potential misuse by approved users. Once it is widely known that action will be taken against people who use the Labels of Authenticity in an improper way, consumers will be in a better position to place their trust in the Labels.¹⁰⁰ It will also serve as a deterrent to others.

To ensure that the Labels are only used by those who are eligible to do so, the owner of the Labels of Authenticity have a number of options available to them. Where there has been use of an Authenticity label that is 'substantially identical with' or 'deceptively similar to' NIAAA's Label of Authenticity, one

uncovering evidence of improper use of the Woolmark: NewsNet, The Woolmark Company, www.wool.com.au/news/global/gwool23.htm

⁹⁷ Croft (2000) 'Behind the Scenes', p 84.

⁹⁸ In the rules governing use of the labels, NIAAA has provided that only NIAAA can reproduce the Label of Authenticity. An Indigenous Certified Creator may reproduce the Label of Authenticity, but only with the express written permission of NIAAA (Rule 5.2).

⁹⁹ The Woolmark Corporation, for example, relies upon a network of informants who are vigilant and can identify improper uses of Woolmark. Rule 5.5 provides that, where a Certified Indigenous creator becomes aware of any unauthorised use of the Label of Authenticity, it will bring it to NIAAA's attention. No action may be taken by a certified Indigenous creator but it is expected that assistance will be given by them to NIAAA to bring infringement or other actions.

¹⁰⁰ It has been suggested that 'there would appear to be considerable difficulty in administering such a scheme and its policing': Department of Aboriginal Affairs (1989) *The Aboriginal Arts and Crafts Industry*, p 314.

avenue is to sue for infringement of the certification mark.¹⁰¹ Where there is direct copying of the Labels, or an attempt to pass off goods and services as if they were produced under the Labels, NIAAA may also be able to bring an action for passing off, or for misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) or under the relevant state Fair Trading legislation.¹⁰²

To ensure the success of the labels, NIAAA should not assume sole responsibility for ensuring that the Labels are used properly. The art and culture industries and the approved users (including the certified Indigenous artists) more specifically will also have to take responsibility for maintaining proper use of the Labels. Care must be taken to ensure that the Labels are only applied to those goods and services that have been certified.

A practical issue that faces certified Indigenous creators is the ability to protect their labels from misuse by others.¹⁰³ This is particularly the case in relation to artists who are located in remote regional areas with little infrastructure and who may have difficulty storing and protecting the labels once these are granted to them. In this situation, precautions need to be taken to ensure that other artists do not misuse them. One possible solution is for regional art centres to assist in the storage of the labels. However, this again has resource implications.

Another method NIAAA may use to strengthen the control they have over the way the Labels are used is for them to specify the situations where the Labels of Authenticity *cannot* be used. This is a technique successfully used in relation to the Craftmark. For example, to ensure that consumers are not

¹⁰¹ Section 120(1) of the *Trade Marks Act 1995* (Cth) provides that a person infringes a registered trade mark if the person uses as a trade mark a sign that is substantially identical with or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered. Note also ss 120(2) and (3) *Trade Marks Act 1995* (Cth) and the defences contained in s 122. Remedies are provided for in s 126 of the *Trade Marks Act* which include an injunction and damages or an account of profit.

¹⁰² Section 52 of the *Trade Practices Act* (1974) (Cth) provides that: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' The state *Fair Trading Acts* provision mirrors s 52 but applied to conduct by individuals rather than conduct engaged in by corporations. A potential infringer though may raise an interesting defence and that is, that Pt 16 of the *Trade Marks Act 1995* (Cth) dealing with Certification Marks may be constitutionally unsound. See, for a discussion of this point, B Elkington et al. (1999) *Trade Marks Law in Australia*, Butterworths, pp 192-93, J Lahore, *Patents, Trade Marks and Related Rights*, Butterworths Loose-leaf Service [50,225] and S Ricketson (1984) *The Law of Intellectual Property*, Law Book Co, p 659. However, contrast the recent High Court decision of *The Grain Pool of Western Australia v The Commonwealth of Australia & Anor* (2000) 46 IPR 515.

¹⁰³ NIAAA's Certification Rule 4.4 provides that a Certified Indigenous Creator cannot license, authorise or consent to others affixing the Label of Authenticity to works which are authored, or produced in whole or in part by non-Indigenous persons.

confused or misled, the rules governing the use of the Craftmark provide that the Craftmark should not be used when products are on sale at a street or community market, or if the items produced differ greatly from the work for which the practitioner is known at the time of accreditation.¹⁰⁴ The Craftmark rules also provide for a number of items to be specifically excluded from displaying the Craftmark Australia label. These include products not made by an Australian citizen or resident, products that are entirely factory made and items copied from another person's designs without authorisation.¹⁰⁵ Perhaps NIAAA could identify other circumstances (as has been done in Rule 4.1) where it would be inappropriate for the Labels to be used to further control uses of the mark.

Education

To ensure the effectiveness of the mark, the owner of the Labels will be responsible for public education campaign necessary for acceptance of the mark.¹⁰⁶ It is important that the public, the relevant industry bodies and consumers come to know the characteristics that the certification mark represents. To this end, the owners of the Label of Authenticity will need to embark on both international and national campaigns to educate consumers who want to purchase Indigenous art and cultural products and services.¹⁰⁷ The ultimate success of the Labels of Authenticity may only be seen in the rate of adoption of the Labels by Indigenous artists. Since the Labels were launched at the end of 1999, there currently appears to be little evidence of the labels' presence in the art market. Whether or not this is a fair reflection of the level of adoption is difficult to say.

¹⁰⁴ For example, if they cease to be a glass artist and begin to make furniture: Conditions of Use of Craftmark Australia, Paragraph 4.

¹⁰⁵ Conditions of Use of Craftmark Australia, Paragraph 4.

¹⁰⁶ For example, The Woolmark Company has a worldwide network of offices and offers extensive services to its licensees such as consumer advertising and promotion, product and range developments, colour and yarn, fabric and style forecasting, ticketing and labelling, quality assessments and control, international consumer and market research information, commercial testing and environmental services: The Woolmark Company, Woolmark Licensing, www.wool.com.au/global/commercial.index.html

¹⁰⁷ C Bonney, 'A Label of Authenticity' (1998) *NIAAA News* 1. The Label of Authenticity Registry proposes to develop marketing and promotional strategies which could include pamphlets, television commercials, programs, videos and small booklets to be distributed to community art centres, arts and cultural centres, ports of entry for all incoming tourists, tourist information centres, retail outlets which agree to stock goods and services using the Label of Authenticity, international embassies, industry and trade commissions and major art and cultural events: *NIAAA Discussion Paper* (August 1997), p 8.

Conclusion

While the introduction of the Labels of Authenticity is seen by some as an important step forward in the struggle for better protection for Indigenous art and culture in Australia, for others there is concern that the Label may have the unintended consequence of introducing divisiveness within the Indigenous artistic and cultural community by institutionalising 'Indigenous art' into authentic and non-authentic Indigenous art. It is clear that the Authenticity Labels have the potential to control the trade in non-authentic Indigenous arts and culture and to strengthen the position of Indigenous artists. In so doing, the Labels may increase the economic returns to Indigenous communities, as well as heightening public awareness and consumer confidence in Indigenous art and culture. Ultimately, however, the success of the labels will depend upon level of acceptance and take-up rates within Indigenous communities — and this still remains to be ascertained.

While it is likely that the Labels of Authenticity may help to raise the profile of Indigenous artists and ensure that they are appropriately remunerated,¹⁰⁸ it has to be recognised that the Labels will only provide limited protection to Indigenous artists. Their primary role will be as a tool to educate the public about Indigenous art and culture. It is unlikely that, by themselves, the Labels would be able to stop the production, importation or export of forgeries.¹⁰⁹ Therefore it is necessary for other strategies to be employed alongside the Labels to strengthen the position of Indigenous artists.

One suggested strategy that may assist in increasing the protection of Indigenous arts and culture is for galleries and shops selling Indigenous works to form a peak body to regulate the industry.¹¹⁰ One of the problems associated with fakes and rip-offs of Indigenous culture is that some shop or gallery owners knowingly present Indigenous works for sale as if they were authentic when it is known they are not.¹¹¹ If a peak body was established to oversee the Indigenous cultural industry, responsibility could be given to it to introduce protocols or codes of conduct to ensure that ethical practices are upheld within the galleries. If an industry organisation is formed, one option would be for it to register its own collective mark. The purpose of such a collective mark could be to show that the products sold in the galleries are made by Indigenous

¹⁰⁸ Annas (1997), 'The Label of Authenticity', p 5.

¹⁰⁹ S Farquhar, 'Certification and Authentication Trade Marks and Industrial Property of Arts and Cultural Expression', a paper presented at the International Conference on Artistic and Cultural Expressions, Traditional Knowledge and Protection of Heritage, 27–29 September 1996, University of Queensland, Brisbane Australia.

¹¹⁰ Janke (1997) *Our Culture Our Future*, Discussion Paper, pp. 75–76

¹¹¹ Such an organisation could be known as the Indigenous Cultural Industry Association: see Janke (1997) *Our Culture Our Future*, Discussion Paper, pp 75–76, citing S Bellear, 'Guarding Our Past Facing Our Future', paper presented to the Conference of Indigenous Peoples Intellectual and Cultural Property, 26 November 1997.

producers who are members of an Indigenous cultural organisation.¹¹² The mark would not necessarily endorse the level of quality of services provided by members of such an association, other than indicating that the requirements of the association had been met.¹¹³ However, where the association has some sort of qualitative criteria for entry as a member (such as Industry standards, protocols, or codes of conduct), the collective mark might also function as a guarantee of quality that is assured by the rules governing membership of the association.¹¹⁴ Put simply, a collective mark may also function as a certification mark where the association has certain standards that must be attained before membership to that association is granted.

Another strategy that may assist in the regulation of the industry is for the introduction of gallery or shop accreditation. A gallery or shop that is able to gain accreditation may be relied upon by consumers as being a reliable source of Indigenous artistic products. One situation where shop accreditation has been successfully used is in relation to the Craftmark. For a shop or gallery to qualify for Craftmark accreditation, its business and the craft work it sells must be marketed effectively. In addition, the shop or gallery must have Australian craft as 25 per cent or more of its total arts/craft turnover and 25 per cent or more of its total stock. The shop or gallery must also stock work made by Craftmark-accredited craftspeople and be in a position to provide the names of three referees who can verify the turnover and goods in stock and comment on the business's viability and professionalism. Accreditation is recognised by the use of the Craftmark sticker, labels and signage that are either attached to the craft or on display at the point of sale.¹¹⁵ If shops and galleries selling legitimate Indigenous products could be accredited, it is likely that the number of outlets where fake Indigenous products are sold would reduce over time.

Another option worthy of consideration is for Indigenous groups and the industry as a whole to lobby for legislative change. Rather than re-examining the more traditional means of protection, such as copyright and heritage laws, perhaps an additional legislative approach is needed. One option may be to introduce legislation that requires products or services that imitate Indigenous arts or culture to be labelled as such. Under such a scheme, the onus of labelling would fall on the pirates rather than the Indigenous artists. For

¹¹² 'The function of a certification mark is to indicate that goods or services comply with certain objective standards (concerning, for example, material safety or quality); whereas the function of a collective mark is to indicate who is entitled to use the mark (for example, members of the association which owns the mark)' R Annand and H Norman (1994) *Blackstone's Guide to the Trade Marks Act 1994*, Blackstone, p 225.

¹¹³ Janke (1997) *Our Culture Our Future*, Discussion Paper, pp 75–76.

¹¹⁴ Annand and Norman (1994) *Blackstone's Guide to the Trade Marks Act*, p 225.

¹¹⁵ The Craftmark is used on individual craft items, advertising, promotion, retail outlets, stationery, marketing materials and journal articles. The size requirements of the CTM are governed by the articles or establishment upon which the CTM is displayed; limitations are placed on the reproduction of the CTM in specific PMS colours as registered. The cost of using of the CTM is \$135 for retailers and \$35 for practitioners: Interview, J Mors, Program Manager of Craftmark, Australia.

example, in Canada both the Department of Indian Affairs and Northern Development and the National Indian Arts and Crafts Corporation have investigated possible legislation to ensure that imitations of Inuit art are labelled as such.¹¹⁶ Similarly, in the United States, producers of native American products succeeded in having new legislation introduced which requires that material resembling older American Indian products state the country of origin on the label.¹¹⁷

¹¹⁶ Anon, "The Igloo Tag" (1992) 5 *Inuit Art Quarterly* 57.

¹¹⁷ One possible disadvantage of this legislation is that, while it would protect the producer from foreign imitations, it would not protect the producer from fakes that were produced within the United States: *ibid.*