WHEN IS A FORGERY NOT A FORGERY

TANIA JOHNSON [*]

INTRODUCTION

For more than a decade, interest in Aboriginal art has grown exponentially, and correspondingly, so has the value of Aboriginal art. This interest is at once aesthetic, cultural and commercial. Now that Indigenous art is a rich field for investment, it is also ripe for exploitation. Wherever there is money, there tends to be greed and the potential for dishonesty. My contention is that the massive burgeoning of the Aboriginal art market, together with the matters explored within this paper, requires that Parliament now take an interest in the legal structure within which the Indigenous art market operates.

For centuries, the common law has been applied in the investigation and prosecution of matters involving allegations of dishonest and fraudulent conduct. As a consequence, there are well-established laws reproving fraud and fraudulent conduct, and these principles are reflected in criminal law legislation in all Australian States and Territories. Fraudulent behaviour including 'passing-off' has been a feature of the art market since its inception. Despite this, a lacuna exists in Australian legislation when it comes to the forgery of artworks, as opposed to forgery of literary work, or breaches of copyright. Obviously a painting can be forged, but the criminal justice system does not provide for the prosecution of a forged painting as a forgery, or recognise a painting as an instrument capable of being forged.

There is another sense in which the question 'when is a forgery not a forgery?' arises. Cross-cultural misunderstanding becomes an issue when considering the nature of art fraud within the Indigenous art market. The established practice of collaboration with family members in tradition-based Aboriginal art[1] does not accord with Western notions of authorship and authenticity.[2] Consequently, an artwork that is *not* a forgery can be regarded as one because Indigenous principles of authorship are not recognised legally. It is suggested that laws arise within specific social and cultural contexts, and the rigid application of those laws to sub-cultures with different social systems and

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[*] Tania Johnson is a solicitor with the New South Wales Office of the Director of Public Prosecutions. She has a strong interest in the administration of criminal justice and civil rights.

[1] For the purposes of this paper the term 'tradition-based Aboriginal art' is to be understood as 'the kind of Aboriginal art that is firmly rooted in the classical, pre-European past of Aboriginal tradition', see P Sutton, (ed.), (1988) *Dreamings: The Art of Aboriginal Australia*, Viking, Penguin Books, Australia at 213.

[2] This was recently confirmed in an article examining the artist Possum's life, with reference to his relationship with Dr. Vivien Johnson, his biographer. In the article Johnson was quoted as saying, 'Western Desert art, even before it was called art, had been collaborative', see S Meacham, 'Celebration of an artist who took on the world', *Sydney Morning Herald*, 10 May 2004 at 17.

cultural values may well lead to unsatisfactory results and misconceptions about the authenticity of a work.

In the case of *DPP v O'Loughlin* (2000)[3] paintings attributed to the high profile and celebrated Indigenous artist, Clifford Possum Tjapaltjarri, were passed off as being original works. However, the paintings were, at most, only partly his work, or, as I would submit, were not his at all but that of John O'Loughlin.

The outcome of the matter corresponds with the title of this paper: when is a forgery not a forgery? In this case, although there was evidence establishing the paintings as fakes, there was never any resolution of the issue by the courts. The artist's personal, spiritual and financial interest in the integrity of his work was arguably not protected or reflected, as it should have been in the result of the proceedings.[4] This failure is referable to the law of fraud and the fact that as an Indigenous artist he operated outside Western concepts of artistic identity and authorship. Although the sentencing judge endeavoured to be sympathetic to the Indigenous ethic, in the end, the charges did not correspond well to the criminality, and insufficient evidence was before the judge to enable a proper understanding of the relationship between Possum and O'Loughlin.

The outcome of *O'Loughlin*, and the committal proceedings, identify a need for the legal system to respond to the complexity of the cultural matrix within which Western Desert Aboriginal art is created, as well as to address the lacuna that does not allow for the acknowledgement of the forgery of paintings generally.

The conclusions of the author have been drawn from the practical experiences of former Commercial Crimes Agency Detective Paul Baker, the Brief of Evidence he collated for the proceedings, and papers he has since written based on his investigations into the allegations against O'Loughlin. Analysis of court documents from *O'Loughlin*, in particular the transcripts from the committal and sentencing hearings, has provided an illustration of the issues discussed. Academic literature considering authenticity and authorship in Indigenous art, the scope for cross-cultural misunderstanding, and theories examining cross-cultural communication between Indigenous and non-Indigenous peoples, has also been sourced to formulate an argument for culturally sensitive law reform to address the anomalies of the existing law of forgery.

Structure of Paper

The paper is structured as five sections: Section One outlines the rise of the Aboriginal art market, in particular Western Desert 'dot' paintings, and the conflict inherent in Indigenous and non-Indigenous notions of authorship.

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[3] February 23, 2001, District Court of NSW, Penrith (Unreported), Hereinafter referred to as *O'Loughlin.*

[4] Australian Broadcasting Corporation, Four Corners, *Dot for Dollar*, TV Program Transcript 31 May 1999, <http://www.abc.net/4corners/stories/s2/931.htm> at 14 March 2004.

Section Two summarises *O'Loughlin*, identifying the key issues and proceedings, with brief consideration of the outcome. This leads to Section Three, which develops the observations of the preceding chapter, analysing the question 'when is a forgery not a forgery?' through a discussion of the difficulties and reasoning in the prosecution of O'Loughlin. This discussion concludes that law reform is necessary to address the anomaly in the law of fraud that is highlighted by *O'Loughlin*. Section Four considers the cross-cultural issues evident in *O'Loughlin*, illustrating the need for specific reform to acknowledge the complexities of Indigenous communication, and for the development of guidelines that require awareness by the judiciary and practitioners of the socio-cultural context of communication between Indigenous people. In Section Five, suggestions are made as to what reform is necessary and the issues that need to be considered in enacting such change.

1.1 The rise of the Aboriginal Art Market

Since the late 1980s, Australian Indigenous art has been a sought after commodity amongst galleries and art dealers within Australia and internationally. In 1988 the Department of Aboriginal Affairs commissioned a Review Committee to look into the state of the Aboriginal Arts and Crafts Industry.[5] Their report, handed down in July 1989, observed that 'Aboriginal art appears to have made the transition to the arts investment market. It is now shown in mainstream commercial galleries and sold by major auction houses, like Sotheby's Australia and Christie's'.[6]

In the early 1990's the market for Western Desert 'dot' paintings exploded, both in Australia and overseas.[7] In the 1970s and '80s, government funded art centres had been established in remote communities to prevent commercial exploitation of Aboriginal artists, maintaining quality at the production end and maximising returns to the artists and their communities from the proceeds of their art making.[8] Despite the success of the art centres, they could not meet the new level of demand for the 'dot style' paintings.[9] This unfulfilled demand gave rise to a trend for artists to sell works independently to private dealers and galleries, 'with no art centre in the background to keep a watching brief over their careers and pricing structures'.[10]

Around the world, Indigenous art from the Western Desert 'dot' painting school is coveted, now accounting for a large portion of the Australian art

[5] The terms of reference for this inquiry involved particular attention to issues of safeguarding the cultural integrity of Aboriginal art – see Department of Aboriginal Affairs, *Report by the Review Committee into the Aboriginal Arts and Crafts Industry*, (1989) Government Publishing Service, Canberra, iv.

[6] Department of Aboriginal Affairs, *Report by the Review Committee into the Aboriginal Arts and Crafts Industry* (1989), Government Publishing Service, Canberra at 17.

[7] V Johnson, *Clifford Possum Tjapaltjarri*, Art Gallery of South Australia, (2003) Adelaide, at 194.

[8] Ibid, 192.

[9] Ibid, 194.

[10] Ibid, 194.

market. Figures from a Sotheby's auction held in July 2003 confirm this assertion: it was reported that the works attracted bids worth more than 7 million dollars, with an estimated 70% of the auctioned works being sold to international buyers.[11] In a paper written in October 2000, the Australian Institute of Criminology acknowledged that:

> …the Aboriginal art industry, with a turnover of hundreds of millions of dollars every year, constitutes a major component of the Australian art market, particularly in terms of overseas demand for Aboriginal works.[12]

It is suggested that there are two facets to the Australian Aboriginal art industry – tourism art and fine art.[13] This paper will not consider issues arising from the reproduction of Indigenous culture for the purposes of tourism.[14] This issue was brought to the attention of the Federal Court of Australia in *George Milpurrurru v R&T Textiles Pty Ltd & Minister for Aboriginal and Torres Strait Islander Affairs and Another.*[15] As a result of this case, and others like it,[16] common law principles and federal legislation now acknowledge Indigenous copyright of traditional Aboriginal designs and the collective ownership of them by the custodians of the designs and Dreamings. In contrast to the attention given to the tourism industry, the fine art market has remained virtually unregulated, and has not been subject to scrutiny or political attention. The influence of such political attention is evident in the development of the National Indigenous Arts Advocacy Association's Label of Authenticity, which was timed for release in 2000, to coincide with the Sydney Olympics. [17]

As the market for 'dot' paintings continued to expand, Aboriginal artists found themselves having to assimilate to the 'obsession of western art collectors-investors for works by the 'hand of the master''.[18] Traditional collaborative practices amongst artists and family members became

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[11] J Berry, 'Aboriginal art at record highs', *The Age*, (July 30, 2004), <http://www.theage.com.au/articles/2003/07/29/1059244620062.html> at April 20 2004.

[12] M James, 'Art Crime', *Trends and Issues in Crime and Criminal Justice No. 170*, Australian Institute of Criminology, (2000), <http://www.aic.gov.au> at December 10 2003 at 3, citing Polk, K, 'Art Crime and Prevention: Best Practices', A *paper presented at the Art Crime, Protecting Art, Protecting Artists and Protecting Consumers Conference, convened by the Australian Institute of Criminology*, 2 – 3 December 1999, Sydney.

[13] This dichotomy is made in the Department of Aboriginal Affairs, above n 5, 15.

[14] Please note that many artists produce for both markets, and that Aboriginal art can take many forms.

15 (1994) 54 FCR 240; see Ellinson, D.A., 'Unauthorised Reproduction of Traditional Aboriginal Art', (1994) 17 *University of New South Wales Law Journal* 327.

16 *Bulurru Australia v Oliver* [2000] NSWSC 580*; John Bulun Bulun & Anor v R &T Textiles Pty Ltd* [1998] AILR 39.

[17] The label is no longer in operation as a means of ensuring the authenticity of Aboriginal products: see D Jopson, 'Aboriginal seal of approval loses it's seal of approval', December 14, 2002, *Sydney Morning Herald*, <www.smh.com.au>, at May 15 2004

[18] Johnson, *Clifford Possum Tjapaltjarri*, above n 7, 202.

controversial, giving rise to several 'Black art scandals',[19] which generated considerable media coverage.

1.2 Case Studies: 'Black Art Scandals'

1.2.1 Kathleen Petyarre

In 1997 Aboriginal artist Kathleen Petyarre, winner of the 1996 Telstra 13th National Aboriginal and Torres Strait Islander Art Award, became the subject of a 'Black art scandal'.[20] Her right to the award was challenged when her former partner Ray Beamish, a Welsh-born Caucasian, claimed primary authorship of the award-winning work, in addition to several other works sold as original works by Kathleen Petyarre. The Museum and Art Gallery of the Northern Territory, who sponsored the award, held an inquiry into the allegations. It was determined that the 'authorship of collaborative works could legitimately be assigned to the senior artist or Dreaming custodian, irrespective of who held the brush'.[21] Petyarre was exonerated, with her entitlement to the award affirmed by the Inquiry.[22]

1.2.2 Turkey Tolson Tjupurrula

In 1999, The Weekend Australian exposed another 'Black art scandal', revealing in a front page story that an affidavit had been prepared in which Aboriginal artist Turkey Tolson Tjupurrula admitted that 'scores of works sold under commission from an art gallery owner were in fact painted by his daughter and daughters-in-law, and then signed by him'.[23] The 'scandal' was complicated by a second affidavit sworn in the days following the initial story, contradicting the assertions of the first affidavit. Eventually, the 'scandal' was laid to rest but highlighted the need for resolution on the issue of what such practices meant for the authenticity of Indigenous art.

1.3 Issues raised by the 'Black Art Scandals'

The question that arises from these 'scandals' is, what is authenticity when it is considered in the context of traditional Aboriginal cultural practices? In particular, does the practice of an established artist, who is custodian of a

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[19] The expression 'Black art scandal' was coined by Susan McCulloch, Aboriginal Arts writer for *The Australian* when she broke the Kathleen Petyarre case in 1997: see S McCulloch, 'Revealed: Black Art scandal', *The Australian*, November 15, 1997 at 1.

[20] C Alder, 'Challenges to Authenticity in the Aboriginal Art Market', *A paper presented at the Art Crime, Protecting Art, Protecting Artists and Protecting Consumers Conference, convened by the Australian Institute of Criminology*, 2 – 3 December 1999, Sydney – <http://www.aic.gov.au>, at February 8 2004, 3.

[21] Johnson, *Clifford Possum Tjapaltjarri*, above n. 7, 20.

[22] S Smith, 'Culture Vultures', *Grafico Arts* (1999) See: <http://www.grafico-qld.com/exhibtion/abart_comment.htm>, at 15 March 2004.

[23] Ibid.

Dreaming,[24] signing works produced by culturally appropriate others, constitute 'counterfeiting' as it is understood within the dominant Western system?[25] It may be that in this instance, what one sub-culture perceives as a forgery is in fact not a forgery within another sub-culture.

As some commentators have pointed out, authorship in Indigenous art is complicated by the 'likelihood that within many Aboriginal communities the actual painting of a particular work may involve the active collaboration of persons other than the artist who is the custodian of the story and the principal in the design and execution of the painting'.[26] The distinction between Western and Indigenous concepts of authenticity lies in the fact that, 'for members of the Aboriginal community the "ownership" derives from the relationship of the individual and family to the Dreaming, and the participation of others in the actual creation of the work may be for communal, social, socialisation or recreation purposes'.[27]

To understand how this system operates, Nicholls explanation is of assistance:

> Under Centralian and Western Desert Indigenous law the owner or 'boss' of a Dreaming has a perfect right to 'subcontract' the actual painting of an artistic work to the co-owners of the Dreaming but to sign it as their own. Traditional Centralian and Western Desert Indigenous law stipulates that all ownership of Dreamings and therefore authorship of artistic works is by definition based on a principle of complementarity and is therefore vested in a group rather than an individual. Ownership is never an individual matter, as it is in the dominant culture…Furthermore, there is no requirement for these 'owners' to have physically worked on the creation of the work, so long as they retain control over the process. This complex form of communal ownership of Dreamings, and therefore ownership of specific tracts of land, and the paintings associated with that land, is not to be confused with the faking of artworks, which is forbidden in both traditional Indigenous culture and the dominant culture.[28]

Therefore, Indigenous concepts of authorship find that:

> … if the artist approves of a family member painting a work that draws upon the artist's form/style or uses motifs, or storyline, the product may still be conceived of as

[24] 'Custodian of a Dreaming' refers to the custom whereby 'each person is identified with the ancestral beings associated with the sites in the region of their birthplace and entrusted with the ritual re-enactment of the events that occurred there during the Dreaming. As far as the artists of the Western Desert are concerned, their paintings are simply the expression, in another form, of the cultural traditions of their people. Through them, they assert their right and obligation, as custodians of particular Dreamings, to sustain those traditions': see V Johnson, *Dreamings of the Desert: A history of Western Desert Art 1971 – 1996*, (1996), Art Gallery of South Australia, Adelaide at 16.

[25] James, above n 12, 3.

[26] L Aarons, D Chappell, and K Polk, *Art Crime in Australia: A Market Analysis*, (1998), <http://www.lawlink.nsw.gov.au/lawlink/bocsar/bocsar.nsf/files/aarchapolk.pdf/$FILE/aarchapolk.pdf> at 12 April 2004.

[27] L Aarons, D Chappell, and K Polk, above n 26.

[28] C Nicholls, 'What is Authorship?' (2000) 25 (4) *Alternative Law Journal* 187 at 187.

> the artist's ***responsibility***. It is an issue of cultural context of the art production, not individual effort.[29]

This responsibility justifies the attribution of a work to one artist, rather than identifying it as a collaborative work, pursuant to principles of Indigenous law.[30]

Sloggett suggests that context is a key element in understanding authenticity, as 'a work that is authentic in one context, may not be authentic in another'.[31] This statement has relevance when considering the question 'when is a forgery not a forgery?' Cross-cultural conflict arises when Indigenous concepts of authorship are placed in the context of the non-Indigenous art market, as some may interpret culturally appropriate collaboration as evidence of possible fraud.[32]

O'Loughlin provides an example of this cross-cultural conflict, and demonstrates the difficulties that the courts can experience when considering allegations of Indigenous art fraud, and traditional Indigenous artistic practices. In this case, O'Loughlin, as a non-Indigenous Australian man, exploited Indigenous collaborative practices for his own financial gain, to the detriment of Possum's reputation and credibility as an artist. As will be discussed in Chapter Two, the District Court, in sentencing O'Loughlin, accepted evidence from O'Loughlin that he honestly believed that he had an entitlement to collaborate on Possum's works, by virtue of an 'initiation' that gave him family status with the Possum family, and therefore an entitlement to collaboration. The sentencing judge, without requesting verification from Possum of the truth of this assertion, accepted this evidence, and sentenced O'Loughlin on the basis of the extenuation.

2.1 Summary of the matter of *DPP v O'Loughlin* (2000)

On February 26, 1999, the artist Clifford Possum Tjapaltjarri viewed twenty-two paintings displayed in what purported to be a Clifford Possum Tjapaltjarri retrospective exhibition.[33] Of the twenty-two paintings attributed to him at art dealer Patrick Corbally-Stourton's gallery, Possum identified eighteen as 'not mine'. Subsequently, the artist was shown five works attributed to 'Clifford Possum' held at the Art Gallery of NSW, of which Possum declared two to be 'not mine'. Possum similarly denounced another five works held at the Museum of Contemporary Art, all of which were

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[29] James, above n 12, 3.

[30] Indeed in the Petyarre example, for the principal custodian to have cited Beamish as co-author would have been a breach of Indigenous law.

[31] R Slogett, 'All that glitters…', A *paper presented at the Art Crime, Protecting Art, Protecting Artists and Protecting Consumers conference, convened by the Australian Institute of Criminology,* 2 – 3 December 1999, Sydney – <http://www.aic.gov.au> at 13 February 2004.

[32] L Aarons, D Chappell, and K Polk, above n 26; see also James above n.12, 3.

[33] Interview with Paul Baker, 8 March 2004: Ethics Approval was obtained for this interview.

attributed to 'Clifford Possum'.[34] Most of the works held by Corbally-Stourton and the two galleries were signed on verso with the name 'Clifford Possum'.

Statements obtained by the Commercial Crime Agency[35] during their investigation suggested that the source of the forgeries was Adelaide, South Australia. Of those dealers Possum dealt with from Adelaide, Police were most interested in John O'Loughlin, an Adelaide Indigenous art wholesaler.[36] O'Loughlin and Possum had a commercial relationship that had commenced in the late 1980s and continued up until the mid 1990s. Corbally-Stourton advised Police that the source of the paintings in his February 1999 exhibition was O'Loughlin.[37] Investigations revealed that Dr. Ronald Fine, an art collector based in Sydney, had donated the 'Clifford Possum' paintings held by the Art Gallery of NSW and the Museum of Contemporary Art. Dr Fine advised NSW Police that he too had purchased these paintings from O'Loughlin.[38]

In May 1999, Investigating Detectives Paul Baker and Paul Simonsson of the Commercial Crimes Agency travelled to Adelaide and Alice Springs as part of their investigation to interview a number of people in relation to the inquiry. At this time O'Loughlin was interviewed and advised Police that he obtained all of the paintings that he was shown directly from Possum.[39] He could not provide receipts or approximate times or dates that he purchased these paintings.[40] During this interview, O'Loughlin identified certain paintings as being works by Possum, but these were later shown to be otherwise.[41]

During the same visit, Police interviewed a former associate of the defendant, Mr. Geoffrey McMillan, who told Police that both he and O'Loughlin painted a number of Aboriginal 'dot' style paintings when they both lived in Alice Springs in the late 1980s and early 1990s.[42] McMillan supplied a photograph to Police of O'Loughlin painting an Aboriginal painting in 1993 in the style of Eunice Napangardi, an established female Aboriginal artist from Alice Springs.[43]

In giving his statement to police, Possum was open about his involvement in the suspicious paintings. Referring to an occasion in 1997 when O'Loughlin approached him, Possum stated:

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[34] *Commercial Crime Agency Brief of Evidence: John Douglas O'Loughlin,* compiled 1999. Hereinafter referred to as *Brief* for the purpose of footnotes.
[35] Hereinafter referred to as CCA.
[36] Brief, above n 34.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid. The issue of whether O'Loughlin had paid the requisite taxes was never an issue in the prosecution.
[41] O'Loughlin pleaded guilty to five counts of 'Make False and Misleading Statements to obtain benefit' pursuant to section 178BB of the *Crimes Act 1900* (NSW), in relation to representations he made during this interview.
[42] Brief, above n.34: Statement of Geoffrey McMillan.
[43] Ibid. This photograph was not allowed in as evidence because it was not a photograph depicting O'Loughlin painting a painting in the style of Possum's works, which was the subject of the allegations.

> He give me fifty dollars for signing canvas with painting…. **not my work**. **I have never seen painting.** He take me way out in the bush, way out, 30 or 40 miles out. I was scared he might be too bad for me.
> The second time he come back in 97, bring a roll of canvases and find me walking in street in Alice Springs and he take me bush and tell me, "I pay you to sign em". He tell me "Your painting from long time", I was thinking in my heart you lie…**that not my work**. I sign…don't know…probably big one, must be ten, eleven paintings…because I was drunk. Once every canvas he take my picture as I sign, I was frightened…. you know I was scared. I remember there were round ones and square ones…**I remember not mine because they not my story.** I was thinking that the fella might get rid of people that far out.[44] [author's emphasis]

Here, Possum is trying to say in the clearest terms possible with his limited English, that the paintings he signed for O'Loughlin were forgeries, in both the Western Desert and Western art senses of forgery. Possum asserts that they are not his work and that he has never seen them. The indicator for this is that they are not his stories and therefore not his paintings.

Following up on a lead derived from an intercepted telephone conversation between O'Loughlin and an unidentified caller in April 1999, on 29 June 1999, Detectives Baker and Simonsson, with Detectives from the South Australian Serious Fraud Investigation Branch, executed a search warrant at a property about 10 kilometres south of Adelaide, near the township of Willunga.[45] This property was believed to be the farm referred to by O'Loughlin in the intercepted conversation, in which he had advised an unidentified caller that he had nothing in the house, and that all items were up at the farm.[46] During the search a number of items relevant to the investigation were located in a tin shed on the property. Items seized included some completed and partially completed 'dot' paintings, as well as a variety of paints and brushes.[47]

On 11 October 1999, O'Loughlin was arrested and charged with twenty-two NSW first instance warrants.[48] Detectives Baker and Simonsson from the CCA travelled to Adelaide, applied for the extradition of O'Loughlin and escorted him to NSW where he was charged with three counts of 'Use False Instrument',[49] and nineteen counts of 'Obtain Money by Deception'[50] ('the committal charges'), pursuant to the *Crimes Act 1900* (NSW).[51]

2.2 Committal Proceeding: To be or not to be indicted?

[44] Brief, *supra* fn. 34 - Statement of Clifford Possum Tjapaltjarri.
[45] Brief, *supra* fn. 34.
[46] Paul Baker, discussing his investigations into the allegations against O'Loughlin, spent months going through the transcripts from the intercept to identify and locate which property O'Loughlin was referring to when he said 'that all items were up at the farm' – Interview with Paul Baker, March 8, 2004
[47] Brief, *supra* fn. 34.
[48] Brief, *supra* fn. 34.
[49] Section 300 (2) of the *Crimes Act 1900* (NSW).
[50] Section 178BA of the *Crimes Act 1900* (NSW).
[51] Interview with Paul Baker, March 8, 2004; Hereinafter referred to as *Crimes Act.*

On 11 July 2000 the committal charges were heard before Magistrate Ian Barnett at the Downing Centre Local Court, Sydney. O'Loughlin did not give evidence at the committal, placing the onus on the prosecution to present sufficient evidence to substantiate the allegations against him. Many of those who had provided statements to the police during their investigation, including Possum, were called as witnesses for the prosecution and were subject to lengthy cross-examination by O'Loughlin's counsel.

In particular, Possum was repeatedly cross-examined on the issue of the signatures on many of the paintings that were the subject of the charges.[52] In cross-examination, Possum admitted to signing paintings that were not his own, and when asked: 'Why did you sign them [paintings] if you knew they were not yours?' he answered: 'I got shame and I was drunk'.[53] When asked the same question for a second time, Possum responded, 'Well, I was frightened something might have happened to me, I might have got shot or whatever'. [54] Throughout his cross-examination, which continued over the four days of the hearing, Possum maintained that he accompanied O'Loughlin to locations out of Alice Springs and signed paintings that he knew were not his, because he was drunk and frightened of what might happen if he did not comply with his demands. [55]

Possum was also cross-examined on the extent of involvement by family members in the creation of his works, in conformity with traditional collaborative practices. In the re-examination of Possum, the Crown Prosecutor qualified the involvement of family members in the production of his paintings:

> Q: And the paintings that Heath and Michelle had done, were there any that you hadn't helped with?
>
> A: Yeah I remember helping them. What I mean by helping is I used to show them and tell them how to.[56]

This can be compared to the information contained in his police statement where Possum states that the paintings O'Loughlin asked him to sign were 'not my work…because they are not my story'.[57] In this statement is the distinction between Indigenous collaboration and forgery. Here, Possum is using the Western Desert approach to authentication – the interpretation and ownership of the story depicted in the painting.

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[52] The issue of the signatures was not pursued and there was never any resolution of the question of authenticity of the signatures.

[53] Downing Centre Local Court Committal transcripts, July 11, 2000 – Cross-Examination, Clifford Possum Tjapaltjarri, Mr. P. Waye (Defence) at 12. Hereinafter referred to as Committal for the purpose of footnotes.

[54] Ibid, 15.

[55] Ibid, 14 – 16.

[56] Downing Centre Local Court Committal transcripts, July 11, 2000 – Examination-in-Chief, Clifford Possum Tjapaltjarri, Mr. S. Higgins (Crown) at 43.

[57] Brief, above n. 34: Statement of Clifford Possum Tjapaltjarri.

Dr Vivien Johnson, as expert witness, gave her opinion of whether the suspect paintings were authentic Clifford Possum paintings. Commenting on the issue of collaboration, she stated:

> If this is a painting which Clifford as the senior custodian of these Dreamings has supervised or maybe painted parts of and allowed them to do the background dotting, that is quite a different situation from somebody who's painting a painting, various elements of which indicate it is done without Clifford Possum's supervision, without his knowledge and consent.[58]

2.2.1 Determination of Magistrate Barnett

In addressing the issue of whether the prosecution had presented evidence capable of satisfying beyond a reasonable doubt that O'Loughlin had committed an indictable offence, pursuant to section 41(2) of the *Justices Act 1902 (NSW)*, Magistrate Barnett concluded:

> The evidence concerning the defendant's involvement in these alleged deceptions, in my view, is strong. The prosecutor has pointed out those matters that the prosecution rely on. Of course, in addition to those matters, is the evidence given by Mr Possum himself, in relation to what he says the defendant made him do when the defendant took him to a place outside of Alice Springs, got him drunk and for a sum of money had him sign the back of paintings.[59]

Magistrate Barnett then referred to evidence given by McMillan, which in his view confirmed O'Loughlin's involvement in the allegations:

> Exhibit 14 is a note made by Mr McMillan who was here and who was cross-examined about the matters, of a telephone conversation that he had with the defendant on Friday 25 February this year where the defendant allegedly said to him, "I just want to know why you are trying to shaft me". To which it is alleged that Mr McMillan said, "What do you mean?" And it is alleged that the defendant said, "I've just read your statement to the cops and you have rolled over on me". And Mr McMillan allegedly said, "What in the statement is not true?" To which it is alleged the defendant said, "Nothing, it's all true but a mate wouldn't do that to another mate". And so the conversation went on. It's very damning in my view.[60]

At the completion of the committal hearing, O'Loughlin was indicted on all twenty-two counts. However, before filing an indictment the DPP made a plea offer which O'Loughlin accepted.[61]

2.3 Sentencing of O'Loughlin

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[58] Downing Centre Local Court Committal transcripts, July 14, 2000 – Cross-examination, Dr. Vivien Johnson, Mr. P. Waye (Defence) at 15.

[59] Downing Centre Local Court Committal Transcript, July 14, 2000 per Magistrate Barnett at 20.

[60] Committal, above n 59, 20.

[61] Information obtained from court file at the District Court of NSW, Downing Centre, Sydney.

On February 23, 2001 at the Penrith District Court, O'Loughlin pleaded guilty before the Honourable Judge Norrish Q.C. to five counts of 'obtain money by false and misleading statements',[62] with an additional five counts included within a Form One.[63] The indictment did not mirror the matters on which O'Loughlin had been committed, as in the process of plea negotiations, significantly less serious charges were agreed to. O'Loughlin was sentenced on the basis that representations he had made to Detectives Baker and Simmonson during police interviews and to Mr. Corbally-Stourton and Dr. Fine, were false and misleading, that is 'that each work of art the subject of a charge had been entirely painted by that artist [Clifford Possum Tjapaltjarri]'.[64]

Counsel for O'Loughlin introduced an extenuating circumstance, which operated to mitigate the culpability of O'Loughlin. O'Loughlin was examined on whether he believed he had 'authority', by virtue of an 'initiation', to assist Possum in his paintings as well as to reproduce Dreamings for which Possum was custodian:

> Q: You partook in a ceremony which entitled you to be regarded as a family member, a cousin I think?
> A: He gave me a skin name and made me his cousin.[65]

O'Loughlin gave evidence that because Possum had given him a skin name[66] during a 'ceremony', he was initiated and considered Possum's cousin.[67] He testified that this meant he was permitted to finish and work on Possum's paintings, in accordance with Indigenous collaborative practices prevalent in tradition based art, such as Possum's.[68] Counsel for O'Loughlin

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[62] Section 178BB of the *Crimes Act 1900* (NSW).

[63] Section 32 (1) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) provides that a prosecutor may file in court a list of additional charges 'that specifies other offences with which the offender has been charged, but not convicted, being offences that the offender has indicated are offences that the offender wants the court to take into account when dealing with the offender for the principle offence'. This list is known as a 'Form 1' because it is contained in Schedule One of the *Crimes (Sentencing Procedure) Regulation* 2000 (NSW) as 'Form 1'.

[64] Penrith District Court Sentencing Remarks, February 23, 2001 per Norrish J at 1. Hereinafter referred to as Remarks for the purpose of footnotes.

[65] Penrith District Court Sentencing Submissions Transcript, February 23, 2001 at 9. Hereinafter referred to as Submissions for the purpose of footnotes.

[66] The skin name O'Loughlin claimed to have been given was 'Tjupurrula'. 'Tjupurrula' are not cousin to 'Tjapaltjarri' but are in fact father-in-law. Therefore, Possum could not have given this skin name to O'Loughlin as it is incorrect. If Possum did in fact give O'Loughlin a skin name and declared him to be his cousin, he would been bound, by the skin name system, to call him 'Tjampitjinpa' - see V Johnson, 'The Innocence of Clifford Possum Tjapaltjarri', in *The Money Belongs to the Ancestors*, (2001) unpublished manuscript, at 15.

[67] Submissions, above n 65, 8 – 9.

[68] M Videnieks, 'Art fraud claim: Possum asked me to', *The Australian* January 24, 2001 at 3; It was asserted by counsel for O'Loughlin that this was in accordance with O'Loughlin's understanding of collaborative practices amongst family in Aboriginal art, which is acceptable within certain Aboriginal communities. Refer to Chapter One at page x for discussion of such practices.

suggested that 'while the conservative art world may be outraged by other artists contributing to an individual's work, it was common practice in Aboriginal art for family members or trusted friends to help artists finish their work'.[69] In his remarks on sentence, Judge Norrish made reference to the 'ample evidence to support the proposition that Indigenous artistic practice and ownership acknowledges the concept of assistance in the production of art works'.[70] Without any evidence to the contrary[71], His Honour accepted O'Loughlin's evidence:

> I accept that the prisoner had a belief that because of his relationship with the artist he was entitled to make some contribution to the production of art works which represented the artist's dreaming.[72]

By accepting O'Loughlin's plea at face value, the court effectively overrode the authority of Possum, and his right to pronounce on the principles of his culture: it should not have been sufficient to make this finding on the basis of O'Loughlin's belief; by virtue of the importance of Possum's art to his cultural identity, Possum should have been granted a chance to comment on O'Loughlin's suppositions.

To further mitigate his culpability, O'Loughlin suggested in evidence that he had assumed when making the misleading representations to Corbally-Stourton and Dr. Fine that they were sufficiently knowledgeable in Aboriginal art to have been familiar with collaborative art making practices within Western Desert art and to have known that Possum may have been assisted in painting the work.[73] Therefore, he had felt that he was under no obligation to advise them, as purchasers, that he had worked on the painting.[74]

On the issue of the renounced paintings which were signed 'Clifford Possum', Judge Norrish did not accept Possum's evidence that he had signed paintings which he knew were not of his authorship because he had been threatened by O'Loughlin and did so under duress:

> I have difficulty accepting that the artist would have signed paintings that were not his ignorant of the provenance of the work in question…I do not believe the artist would sign a work to which he had made no contribution unless he was signing that work as a reflection of his relationship with the author of the painting.[75]

Here, Judge Norrish prefers the evidence of O'Loughlin over that in Possum's police statement in which it was clearly indicated that paintings

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[69] Ibid, 3.
[70] Remarks, above n 64, 16.
[71] Possum was never given an opportunity to refute the evidence that O'Loughlin had been initiated and given a skin name, or that he had given O'Loughlin authority to paint his stories according to the laws of his culture, as he was not present at the sentencing hearing.
[72] Remarks, above n 64, 18.
[73] Submissions, above n 65, 11.
[74] Remarks, above n 64, 17.
[75] Remarks, above n 64, 22 – 23.

O'Loughlin asked him to sign were not by his hand, and did not depict stories for which he was custodian.

In sentencing O'Loughlin, Judge Norrish rejected the Crown's suggestion that he approach the sentencing of the defendant with the objective of general deterrence in mind, for the following reasons:

> It is not a matter where the concept of general deterrence looms large, primarily in my view because of the amount of money involved and the circumstances in which the offences were committed with regard to the longstanding relationship the prisoner had with the artist.[76]

The remarks of Judge Norrish identify a shortcoming in the Crown's sentencing submissions, in that Mr Possum was not present to provide information which would have clarified and assisted His Honour in determining 'whether the works in question were ever painted either in part by Clifford Possum and whether any authority had been given to the prisoner [O'Loughlin] to represent those paintings in his possession as the work of the artist'.[77] Judge Norrish never determined the question of whether the paintings were in fact "counterfeit". This is because O'Loughlin's plea was a plea of guilt for making false and misleading statements to Detectives Baker and Simmonsson, Corbally-Stourton and Dr. Fine that the paintings were paintings by Possum only.

The deceptive element of O'Loughlin's conduct was fundamental to the charges of 'obtain money by false or misleading statements', to which he pleaded guilty. However, the issue of whether the paintings were in fact counterfeit was ultimately immaterial to his conviction, the decisive factor being whether O'Loughlin knew his statements to be false or misleading, and not whether he had forged the suspect paintings.[78] Hence, the title of this paper: when is a forgery not a forgery? Although the paintings were forgeries in that they purported to be Possum's works when they were not, there was no acknowledgement of this fact in the outcome of the proceedings.

Ultimately, O'Loughlin was sentenced pursuant to section 9 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, and received a sentence of a Good Behaviour Bond for the period of three years.[79] As a result of the plea negotiation, the charges to which O'Loughlin pleaded guilty carried a significantly reduced maximum sentence of five years, which undoubtedly would have influenced the severity of O'Loughlin's sentencing. Out of the original twenty-two charges, O'Loughlin was held accountable on only ten charges, five of which were not recorded as convictions.

[76] Remarks, above n 64, 8.
[77] Remarks, above n. 64, 16-17.
[78] Remarks, above n 64, 17 –19.
[79] Incidentally, this Bond expired on 23 February 2004.

3.1 Difficulties encountered by Commercial Crimes Agency in charging O'Loughlin

Following on from the above case study, this chapter will consider the experience of the CCA in charging O'Loughlin, in light of the lacuna in the existing law pertaining to art fraud, specifically the forgery of paintings. The essence of the complaint implicating O'Loughlin involved a species of fraud that the Australian legal system has not yet had to address.[80] In *O'Loughlin* the absence of any charge for 'art crime' or 'art fraud' under the *Crimes Act* meant that Detective Baker had to appropriate existing provisions to the unusual circumstances of the allegations.[81] Careful consideration was given as to what charges could be drawn from the *Crimes Act*.[82] As there are no express provisions relating to the forgery of artworks or paintings, it was determined, after consultation with a Legal Officer of the CCA, that the relevant sections of the *Crimes Act* that could be appropriated were section 178BA, 'Obtain benefit by Deception', and section 300(2), 'Use False Instrument'.[83]

The discussion of the reasoning in the CCA advice that follows reveals the inadequacy of existing legislation for the prosecution of art forgery, and specifically the prosecution of counterfeit paintings. It will be suggested that the interpretation of the scope and applicability of the relevant sections by the CCA Legal Officer was flawed and did not consider the special character of tradition-based Aboriginal art. The conclusions of the advice were founded on outdated common law principles, which in my view have no relevance to an allegation of art forgery in the contemporary Australian society.

3.2 Interpretation of Relevant Sections

3.2.1 Section 300 (2) – Use False Instrument

> A person who uses an instrument which is, and which the person knows to be, false with the intention of inducing another person:
>
> (a) To accept the instrument as genuine; and
> (b) Because of that acceptance, to do or not to do some act to that other person's, or to another person's prejudice is liable to penal servitude for 10 years.

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[80] This is with the exception of a 1977 prosecution of Melbourne art dealer Peter Cornelius Sparnaay in the County Court of Victoria. Sparnaay was convicted of five counts of 'dishonestly obtain money' by selling counterfeit Russell Drysdale drawings, which he passed off as genuine, but knew to be false. Research was undertaken to find out the citation for this case, with correspondence sent to the County Court of Victoria requesting this information. At the time of submission of this paper, a reply had not yet been received – see Baker, P, (1999), 'Policing Fakes', *A paper presented at the Art Crime, Protecting Art, Protecting Artists and Protecting Consumers conference, convened by the Australian Institute of Criminology, 2 – 3 December, Sydney*, <http://www.aic.gov.au>, at 9 February 2004.

[81] P Baker, 'Legal Issues surrounding Clifford Possum Tjapaltjarri Art Forgery', (2003), unpublished at 1.

[82] Ibid.

[83] Ibid.

The decisive element of this offence is that the offender uses an 'instrument' to commit the offence.[84] Section 299 of the *Crimes Act* defines 'instrument', and includes in s299 (a), 'a document, whether of a formal or informal character'.[85]

The definition of 'document' is further expanded in the *Evidence Act 1995 (NSW)*[86] and is more expansive in the scope of 'document' than that in the *Crimes Act*. The Dictionary of the *Evidence Act*, defines a document as 'any record of information', and includes 'anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them'[87] or 'a map, plan, drawing or photograph'.[88]

To interpret section 300, reference to section 299 of the *Crimes Act* clarifies what constitutes a 'false instrument'. Relevant to the allegations made by Possum are subsections 299(a), (b) and (e). Specifically, these subsections set out that an instrument is false if it purports:

> Section 299(a) to have been made in the form in which it is made by a person who did not in fact make it in that form, or
> Section 299(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or
> Section 299(e) to have been altered in any respect by a person who did not in fact alter it in that respect.[89]

Possum's assertions that the paintings were 'not mine', and that O'Loughlin was never given authority to reproduce his works, clearly brought the suspect paintings within section 299 (b) of the *Crimes Act*, in that Possum had not 'authorised' O'Loughlin to paint the paintings in his style.

3.2.2 Section 178BA – Obtain Benefit by Deception

> Whosoever by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years.
> Deception means deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including:
> (a) a deception as to the present intentions of the person using the deception or of any other person, and
> (b) an act or thing done or omitted to be done with the intention of causing:
> (i) a computer system, or
> (ii) a machine that is designed to operate by means of payment or identification,

[84] Ibid, 2.
[85] Section 299, *Crimes Act.*
[86] Hereinafter *Evidence Act.*
[87] Part One of the Dictionary of the *Evidence Act 1995 (NSW).*
[88] Ibid.
[89] Section 299, *Crimes Act.*

> to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.

The key element of this offence is 'that the cause of the payment of the money or the handing over of the valuable thing was the deception used by the accused'.[90] A sufficient connection is necessary between the deception and the obtaining, to establish that the deception is the operative cause of the obtaining.[91] The term 'financial advantage' is broadly constructed and given its plain meaning.[92]

The concept of 'dishonesty' was reviewed by the High Court of Australia in *Peters v R.*[93] It was held 'that if the act of the accused is to be dishonest according to ordinary notions it is sufficient that the jury be instructed that the accused's actions are to be considered according to the standards of ordinary decent people'.[94] The majority determined that the decision in *R v Salvo*[95]applies to specific provisions of the *Crimes Act* 1958 (Vic), and the definition of 'dishonesty' as it is expressed in *Salvo* is not a standard test for dishonesty.[96] The NSW Criminal Practice and Procedure Manual states that 'section 178BA is similar to the provision considered in *Salvo* and, therefore, it would seem that the section should be construed in the same way'.[97] Thus, the effect of the decision in *Peters* is that the question of dishonesty is to be determined by reference to an objective standard, and not subjectively.[98]

3.2.3 Sentences

It is relevant to note that these two alternative charges carry different maximum sentences. The degree of criminality involved in committing either offence is reflected in the severity of sentence. Section 300 (2), 'Use False

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[90] NSW Criminal Practice and Procedure, Butterworths Online at [8-s 178BA.5] – <http://www.butterworthsonline.com.au> at 3 May 2004. See also *R v Ho* (1989) A Crim R 145; *R v Clarkson* (1987) 25 A Crim R 277.

[91] *R v King and Stockwell* [1987] QB 547 – this view is confirmed by academic literature on the issue of authenticity in art. See Dutton, D, (2003) 'Authenticity in Art', in Levinson, J (Ed.) *The Oxford Handbook of Aesthetics*, Oxford University Press, New York, in which he writes that 'the concept of forgery necessarily involves deceptive intentions on the part of the forger or seller of the work: this distinguishes forgeries from innocent copies or merely erroneous attributions', <http://www.denisdutton.com/authenticity.htm> at 15 March 2004.

[92] NSW Criminal Practice and Procedure, above n 90.

[93] (1998) 192 CLR 493.

[94] NSW Criminal Practice and Procedure, Butterworths Online at [8-s 178BA.20] – <http://www.butterworthsonline.com.au> at 3 May 2004.

[95] [1980] VR 401 – This case has application in NSW under the authority of R *v Love* (1989) 17 NSWLR 608.

[96] C Donnells, 'The Elements of Criminal Fraud – Recent Developments', 22 *Criminal Law Journal* 140 at 143 - 145; A Steel, 'The Appropriate Test for Dishonesty', (2000) 24 *Criminal Law Journal* 46 at 50 – 51.

[97] NSW Criminal Practice and Procedure, above n 90.

[98] Donnells, above n. 96, 141- 142; Steel, above n 96, 47.

Instrument', as the more serious charge, carries a maximum imprisonment term of 10 years. This can be compared to the maximum term of 5 years for section 178BA, 'Obtain Benefit by Deception'. Obviously, charging O'Loughlin, and future art forgers, with the more serious charge would be in accordance with the sentencing objective of general and specific deterrence,[99] as it would serve as an acknowledgement of the seriousness of art fraud, and as such would influence the approach to sentencing that a court will adopt when dealing with allegations of this nature. It is acknowledged that Norrish in sentencing O'Loughlin rejected the proposition that general deterrence was a relevant consideration. However, given the scale of the Indigenous and non-Indigenous art market and its significance to Australia's economy and cultural identity, this position is open to dispute.

3.3 Can a painting be a document? The common law position

As stated above, Detective Baker sought advice from a CCA Legal Officer to determine which charges under the *Crimes Act* were suitable for the paintings involved in the allegations against O'Loughlin, and the degree of criminality engaged in committing the offences.

In accordance with established common law principles and statutory interpretation of definitions contained in the relevant legislation, the conclusion of the advice was that a painting was not a document, and therefore not an instrument.[100] This meant that O'Loughlin could not be charged with section 300(2), the more serious charge. In answering the question whether a painting can be forged under common law principles of what is a document, the 1857 case of *R v Closs*[101] was relied on, in which it was held at common law that forgery could only be of a document or writing, and not of a painting:

> A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his.[102]

The secondary resource that the CCA Legal Officer based the conclusions on was a 1948 journal article written by Glanville Williams, titled, 'What is a document?'[103] The article considered *Closs,*[104] as well as an 1858 case of *R v Smith,*[105] in which the House of Lords reaffirmed the principles enunciated in *Closs.* Together these cases were perceived as affirming the proposition that at common law a painting cannot be a document.

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[99] M Findlay, S Odgers, and S Yeo, (1999) *Australian Criminal Justice,* (2nd Ed.), Oxford University Press, Australia at 240.
[100] Baker, (2003) above n 81 at 3.
[101] (1857) 169 ER 1082. In this case a picture dealer was indicted on a charge of uttering a forgery and purporting an artwork to be a John Linnell painting, when in fact it was not.
[102] Baker, *above* fn. 81 at 3, quoting from advice given by CCA Legal Officer.
[103] (1948) 11 *Modern Law Review* 150.
[104] (1857) 169 ER 1082.
[105] (1858) 169 ER 1122.

Therefore, the advice concluded that at common law:

> 1. Every document is a writing, so that a painting, photograph, plan, map or drawing is not a document, unless of course, it contains sufficient writing to make it a document. A photocopy of a writing would be a document, and so, presumably would a pictorial photograph attached to and referred to in what is otherwise a document. Thus tampering with a photograph on a passport would be capable of being a forgery; and
>
> 2. If a thing is not otherwise a document, the addition of a name cannot make it one.[106]

Further legal advising was given after it was discovered that O'Loughlin had drawn maps on the backs of three of the twenty-two suspect works, in addition to explanations of the story depicted in the painting.[107] In light of this, section 300(2) 'Use False Instrument' was re-determined as being appropriate for these three paintings as the presence of the maps on the back of the canvas corresponded with the statutory definition contained in the Dictionary of the *Evidence Act*.[108]

3.4 Is an Aboriginal painting a document?

In the CCA advice, it was observed that:

> People who have the ability to read Aboriginal paintings can interpret the message that is represented in the symbols (this would perhaps give the paintings 'some' symbolic utility). Those who cannot read the painting would receive only an aesthetic or emotional response. However, the paintings in this case have not been painted by Clifford Possum. The identity of the artist is not known – they could have been created by person or persons who are not even Aboriginal. It would appear that the paintings were never intended to have symbolic utility, being created for aesthetic or emotional purposes only (i.e. they look good for sale). Thus, the paintings may not contain any message or information and be incapable of being read at all – having aesthetic or emotional value only.[109]

This reasoning fails to consider customary collaborative practices with family within traditionally oriented Western Desert Indigenous communities. Although at the time the advice was given the authorship of every painting was unknown, police investigations had shown that members of Possum's family, including his daughters and son-in-law, had been collaborating with him in the production of his paintings for some time.[110] This was confirmed in statements

[106] Baker, (2003) above n. 81, 4, quoting from advice given by CCA Legal Officer.
[107] Ibid, 5.
[108] Part One of the Dictionary of the *Evidence Act 1995* (NSW).
[109] Baker, above n 81, 5.
[110] Brief, above n 34: See statements of Gabriella Possum Nungurrayi, Michelle Possum Nungurrayi, and Heath Ramsam.

obtained from his family by Detectives Baker and Simonsson in their investigations.

This collaboration does not operate to extinguish the 'symbolic utility' of the work, or the ability to 'read' the imagery and symbolism of the painting, as suggested by the CCA Officer. On the contrary, on a spiritual and cultural level, collaboration with family members enhances the overall connection that an artist has with their paintings, in that it is more representative of their culture, family, and traditions.

As discussed earlier, authorised collaboration does not mean that the artist, whose Dreaming it is, is not responsible for the work. Furthermore, the treatment of the issue of whether the paintings can still be interpreted if a non-Indigenous person has painted them is inaccurately addressed. Assuming that O'Loughlin did produce the suspect paintings, he would have been sufficiently knowledgeable in Aboriginal art, such that the paintings would depict imagery and symbolism that tells a story, even if, that story was incorrect according to Possum's stories of the Dreaming. Therefore the paintings could still be 'read', by virtue of their symbolic utility.

The observation that the paintings have 'symbol utility' clearly brings the paintings within the confines of the *Evidence Act* definition. The definition in Part B provides that a document can be 'anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them'.[111] This corresponds with tradition based Indigenous 'dot' style paintings, since they convey, through the use of symbols and iconography, stories of the Dreaming that are capable of interpretation. The inclusion of 'map' in Part D of the *Evidence Act* definition also has application to certain Indigenous art, as some tradition-based paintings can be likened to a title deed, indicating kinship and connection with specific sites and Dreamings within the artist's country. Johnson, writing on Possum's 'map paintings', finds that 'these paintings of Dreaming sites and stories are maps of country, sufficiently accurate in European terms to be effectively deeds of title to the land'.[112] This clearly corresponds with Western notions of 'map', and therefore complies with the statutory definition.

3.4.1 Analysis of Advice

The advice given by the CCA Legal Officer assumed that the 'legislature envisaged the common law definition of document to continue to have application to interpret the definition contained within the *Evidence Act*'.[113] On this basis it was determined that 'anything on which there is writing cannot be a document unless it is intended to have symbolic utility'.[114] As

[111] Part One of the Dictionary of the *Evidence Act 1995* (NSW).
[112] C Nicholls, 'Clifford Possum Tjapaltjarri at the Art Gallery of South Australia, Adelaide', (2000) 169 *Art Monthly Australia* 21 at 23, commenting from Johnson's biography for Possum.
[113] Baker, above n 81, 4, quoting CCA Legal Advice.
[114] Ibid, 5, quoting CCA Legal Advice.

neither statutory definition made explicit reference to 'paintings', it was concluded that it was the legislature's intention at the time of enacting the legislation to exclude paintings from being 'documents', and therefore 'instruments'.[115]

The effect of the narrow interpretation by the CCA Legal Officer of the scope of statutory definitions was to limit the criminal charges to be preferred against O'Loughlin, and this interpretation may be applied to future allegations of art fraud.[116]

It is submitted that the advice given by the CCA Legal Officer was erroneous and relied unnecessarily on English authorities and secondary resources that are anachronistic. The unusual circumstances of the allegations and special character of tradition based Indigenous 'dot-style paintings', like Possum's works, presented an opportunity for the Australian judiciary to consider the application of existing common law principles relating to art fraud, and revise them so that they are current with contemporary circumstances. The conclusion that the courts would be reticent to overturn the precedent in *Closs* because it had been law for over 140 years failed to take into consideration the cultural and societal changes since 1857, when the decision was handed down. The symbolism of Aboriginal 'dot' paintings supercedes the purely aesthetic imagery that dominated at that time. It is submitted that the translation of Indigenous sacred sites and Dreamings into visual language on canvas, which only emerged in the 1970s, was beyond the scope of knowledge of art and its forms that would have been possessed by an English court in the late 19th Century.

Furthermore, it is noteworthy that the word 'document' derives from the Latin verb, '*docere*', meaning 'to teach'.[117] Indigenous art is a means of teaching younger generations and non-Indigenous peoples about Aboriginal law, culture, tradition and the Dreamings[118], consistent with the origin of the word 'document'. Given that the conclusions of the CCA Legal Officer were based on authorities dating back to 1857, it is suggested that the origin of the word, as it is understood by the common law, is relevant to the determination of whether a painting is a document. Such an argument, when considered in light of the purpose of Indigenous art to Indigenous peoples, is arguably persuasive, and may have operated to strengthen Crown submissions for charging O'Loughlin with twenty-two counts of 'Use False Instrument'.

To speculate, had O'Loughlin been indicted on twenty-two counts of 'Use False Instrument' pursuant to section 300(2) of the *Crimes Act 1900 (NSW)*, the proceedings may not have had the same result given the seriousness of this charge. Speculation aside, the difficulties encountered by Detective Baker, and the conclusions in the CCA Legal Officer's advice, reveal a lacuna

[115] Ibid.
[116] Ibid, 6.
[117] T.F. Hoad, (ed.), *The Concise Oxford Dictionary of English Etymology*, Oxford University Press, (1996) Great Britain at 131.
[118] Alder, above n 20, 3.

within Australian law relating to the forgery of a painting, as it would appear that a painting cannot be prosecuted as a forgery.

It is my contention in this chapter that even without this lacuna in the legislation, the CCA Legal Officer did not adequately avail himself of the charges available under the existing law. It is suggested that the difficulties encountered in *O'Loughlin* identify an inadequacy in the current legislation in the area of art forgery. Therefore, law reform in this area is advocated and will be discussed in Chapter Five. Further, the cross-cultural nature of the Indigenous art industry and the difficulty of cross-cultural understanding evidenced in *O'Loughlin*, gives rise to the need for awareness of the characteristics of Indigenous verbal communication by the legal system, to resolve effectively allegations of Indigenous art forgery.

4.1 Cross-cultural issues arising in *DPP v O'Loughlin* (2000)

Throughout his lifetime, Possum had little exposure to the processes of the Australian legal system. Possum was a traditionally initiated man,[119] and was regarded as a senior member amongst his Anmatyerre countrymen and women.[120] As a child, Possum did not attend English school and in his adult life acquired a rudimentary knowledge of the English language, through his contact with white Australians as a stockman, and later as an artist.[121]

As a consequence of Possum's limited carriage of English, his understanding of the court proceedings and what was required of him as a witness was confused. Generally, Possum was perplexed with the way in which O'Loughlin's counsel was treating him during cross-examination, as he perceived himself to be the 'victim', and not the one on trial.[122]

To ensure Possum's comprehension, at every stage of the investigation and throughout the committal proceedings, a translator was provided to assist his understanding of the questions being asked of him, and why the information being sought was necessary. However, as shall be discussed, the assistance of a translator does not necessarily guarantee that the question being asked of an Aboriginal witness will be understood.

Discussion of the cross-cultural issues in *O'Loughlin* identifies the need for legislative reform to acknowledge the socio-cultural contexts of communication of traditionally oriented Indigenous Australians when dealing

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[119] Initiation is to be understood as when the person has gone through secret ceremonies of unknown antiquity involving large numbers of people that make the person an adult member of Indigenous society – see Horton, D, (Ed.) (1994) Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Encyclopaedia of Aboriginal Australia, Volume 1: A – L*, Aboriginal Studies Press, Australia at 493.

[120] Johnson, above n 7, 15.

[121] Ibid, 32

[122] This conclusion is drawn from observations while listening to the tape recordings of the committal proceedings, and was not evidenced in the transcript of the proceedings. It has been confirmed by Dr. Vivien Johnson, who attended the proceedings, that Possum was puzzled by the way in which he was being spoken to and did not understand why he was being asked so many questions when he had been told that O'Loughlin was the one on trial.

with Indigenous related matters. This is especially the case when the matter relates to Indigenous art.

4.1.1 'Aboriginal English': the need for cross-cultural awareness when communicating with Indigenous Australians

Indigenous Australians from remote Central and Western Desert communities often speak little or no Standard English. If they do speak English, it is regarded as 'Aboriginal English',[123] a form of English language spoken amongst Indigenous Australians, 'which is mutually intelligible with standard English'.[124] Aboriginal English is characterised by variances in communication style and concepts that attach to certain words, which reflect Aboriginal culture and identity.[125] These variances occur throughout the dialects of Aboriginal Australia.[126] It has been suggested that the differences between Aboriginal and Standard English create a paradoxical situation: while the differences 'frequently result in miscommunication between Aborigines and non-Aborigines', the 'similarity between the two dialects creates the illusion of communication'.[127]

Dr. Diana Eades, a prominent researcher on the subject of 'Aboriginal English', has identified features of Aboriginal communication which can lead to misunderstanding between Aboriginal and non-Aboriginal peoples when communicating. In particular, the method of eliciting information through the use of questions, as is the norm in an adversarial court proceeding, is highly regulated in Aboriginal culture.[128] There is a knowledge economy, by which access to information is restricted and determined on the basis of sex, seniority and ancestry.[129] Questions are regularly used in Aboriginal conversations, but

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[123] Dr. Diana Eades is attributed with developing the term 'Aboriginal English' in her book, *'Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners'*, Continuing Legal Education Department of the Queensland Law Society, 1992.

[124] D Eades, 'Aboriginal English: communicative clashes', included in J Gibbons, (ed.) (1994) *Language and Law*, Longman Publishing, London at 237.

[125] Faculty of Law, University of Wollongong, *Cross cultural Communication and the Law Series 2: I tried to tell them*, Booklet, (1997) Wollongong, 8.

[126] It is important to note that a large majority of Aboriginal people are biculturally competent and 'can communicate in an Aboriginal way in Aboriginal interactions, and in a non-Aboriginal way in non-Aboriginal interactions' - quoted from Eades, (1994) above n 124, 239.

[127] A Alter, 'Aborigines and Courtroom Communication: Problems and Solutions', in *Australian Human Rights Centre Working Paper 2004/2*. See: <http://www.ahrcentre.org/Publications/Adam_Alter.htm>, at 28 April 2004.

[128] Eades, above n 124, 239-240.

[129] Von Strumer further qualifies this knowledge system as 'not [being] a question of knowing; it is a question of who is entitled to display or perform the knowledge. Such entitlements are culturally determined (though in more complex ways than classifications of knowledge into male/female, old/young, etc., would suggest) and legitimated'. Von Strumer, (1987) at 11-12, quoted in M Walsh, 'Interactional styles in the courtroom: an example from Northern Australia', in Gibbons above n 124, 225.

under this knowledge system, 'there are constraints on their use which serve to protect individual privacy'.[130]

In contrast, the focus of criminal legal process in Australia revolves around questions and answers, from the police interview through to all stages of the judicial process, with an emphasis on the duty to provide information.[131] Eades asserts that Aboriginal people are 'seriously disadvantaged by the question-answer method of establishing truth'[132] for several reasons, including:

- The structure of an 'either/or' question which is prevalent in Court proceedings is rarely found in the linguistic structure of traditional Aboriginal languages or Aboriginal varieties of English.[133]

- Official legal transcripts of police interviews and court proceedings do not record or convey any uncertainty, reluctance, or confusion an Aboriginal witness may experience answering the questions put to them to the best of their ability. In this, the cross-cultural misunderstandings of the Aboriginal witness are lost.[134]

- The prevalence in the police and courtroom interviewing of Aboriginal people of 'How-where-when-type' questions, which seek specific information.[135] Eades has found that 'an Aboriginal witness could easily provide quite different answers at different times to the same question', and insists that 'such differences in answers to the question seeking specific information should not be interpreted as indicative of an unreliable witness', but rather viewed as 'a dialectical difference between Aboriginal English and Standard English and the unfamiliarity with, and a lack of competence, among Aboriginal people in handling precise quantification'.[136]

The most serious disadvantage is caused by the Aboriginal conversational pattern of agreeing with whatever is being asked, even if the speaker does not understand the question.[137] This phenomenon often arises in the direct questioning of Aboriginal witnesses, and is described as 'gratuitous

[130] Eades, above n124, 240.
[131] Ibid, 241: although the right to silence for accused persons is enshrined in the criminal process, as a fundamental doctrine and legislatively, this privilege does not generally extend to witnesses, as they are required to provide information. The provision for a charge of contempt of court is an example of this expectation and duty of disclosure.
[132] Ibid, 242.
[133] Ibid, 243.
[133] Ibid.
[135] Ibid, 247.
[136] Ibid, 248.
[137] Ibid, 244.

concurrence'.[138] An American scholar, Dr Kenneth Liberman, explains gratuitous concurrence as:

> … a strategy of accommodation [that Aboriginal people have developed] to protect themselves in their interaction with Anglo-Australians. Aborigines have found that the easiest method to deal with White people is to agree with whatever it is that the Anglo-Australians want and then continue on with their own business. Frequently, one will find Aboriginal people agreeing with Anglo-Australians even when they do not comprehend what it is they are agreeing with.[139]

4.1.2 Anunga Guidelines

Before Liberman conceived the expression 'gratuitous concurrence' in 1981, Northern Territory Supreme Court Judge Forster in the 1976 case, *R v Anunga*,[140] recognised the difficulties of cross-cultural communication between non-Indigenous peoples and Indigenous people with little understanding of English, or English language concepts:

> Aboriginal people often do not understand English very well and, even if they do understand the words, they may not understand the concepts which English phrases and sentences express. Even with the use of interpreters this problem is by no means solved. Police and legal English sometimes is not translatable into the Aboriginal languages at all and there are no separate Aboriginal words for some simple words like 'in', 'at', 'on', 'by', 'with' or 'over', these being suffixes added to the word they qualify. Some words may translate literally into Aboriginal language but mean something different. 'Did you go into his house?' means to an English-speaking person, "Did you go into the building?", but to an Aboriginal it may also mean, "Did you go within the fence surrounding the house?". English concepts of time, number and distance are imperfectly understood, if at all, by Aboriginal people, many of the more primitive of whom cannot tell the time by a clock. One frequently hears the answer, 'Long time', which depending on the context may be minutes, hours, days, weeks or years. In case I may be misunderstood, I should also emphasize that I am not expressing the view that Aboriginal people are any less intelligent than white people but simply that their concepts of certain things and the terms in which they are expressed may be wholly different to those of white people.[141]

This quote, together with the 'Anunga Guidelines' formulated by Judge Forster in his judgment, stands as judicial recognition of the intrinsic differences between communication strategies of Indigenous and non-

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[138] In 1936 linguist T.G. Strehlow in a paper titled 'Notes on native evidence and its value', remarked 'the White man putting questions will usually receive answers which are calculated either to avoid trouble or to excite pleasure: he will be given the information which he desires to get'. This tendency was also acknowledged by anthropologist A.P. Elkin , who commented in a paper examining Aboriginal evidence and justice in North Australia that 'for here [in court], too their fundamental aim is to satisfy the questioner, to tell him what they think he wants to be told' – see Eades, above n 124, 244 .

[139] Ibid, 244, quoting K Liberman, 'Understanding Aborigines in Australian courts of law', *Human Organization*, (1981), 40 – 247 – 55, 248 – 9.

[140] (1976) 11 ALR 412.

[141] (1976) 11 ALR 412 at 412 – 413 per Forster J.

Indigenous persons. The Guidelines aim to thwart the tendency for gratuitous concurrence and inherent misunderstanding of 'Aboriginal English' speaking Aborigines.

In addition, the Guidelines acknowledge the need for legal practitioners to employ certain principles when questioning an 'Aboriginal English' speaking Indigenous Australian. Although, the Guidelines are generally only applicable to Aboriginal defendants, and not witnesses, it is proposed that the standards should apply to Aboriginal witnesses, as often the technique of cross-examination also can lead to a belief that they are the one being prosecuted, and would be further exacerbated by incomprehension of the nature of court proceedings under the adversarial system.[142]

4.2 Examples of Cross-cultural Misunderstanding in the Testimony of Possum

From the outset of his examination, Possum was puzzled by the presence of a signature attributed to him on the police statement being tendered as evidence. What seems to be a relatively simple question: 'Is that your signature that appears at the bottom of each page of that statement?'[143] bewilders Possum and consequently, the question is withdrawn.[144] This confusion is indicative of Possum's general incomprehension of the circumstances in which he finds himself.

Throughout his cross-examination, Possum does not appear to understand the questions put to him, or the information that defence counsel is seeking to extract by asking it. Analysis of his cross-examination at the committal proceedings suggests that Possum was gratuitously concurring with the questions asked of him, rather than actually providing his own answers to the questions. The following is an example of this:

Q: Do you know John O'Loughlin?
A: Yes.
Q: You've known him for how long?
A: Since '91.
Q: May you have known him the year before in 1990?
A: Excuse me.
Q: May you have met Mr. O'Loughlin first in 1990?
A: Yeah I remember him going to Giles Creek.
Q: Did he have an art gallery?
A: No.
Q: Did Mr. O'Loughlin at Alice Springs have an art gallery in the Sheraton Hotel?

[142] Eades, above n 124, 244.
[143] Downing Centre Local Court Committal transcripts, July 11, 2000 – Examination-in-Chief, Clifford Possum Tjapaltjarri, Mr. S. Higgins (Crown) at 5.
[144] Downing Centre Local Court Committal transcripts, July 11, 2000 – Examination-in-Chief, Clifford Possum Tjapaltjarri, Mr. S. Higgins (Crown) at 5.

A: Yeah I remember that one yeah.[145]

It can be observed in the above passage that Possum changes his answers to the questions after he is asked the same, or a similar, question for a second time, possibly because he perceives his first answer to be incorrect. This implies gratuitous concurrence. As a result of Possum's 'gratuitous concurrence' in giving evidence, the reliability, and therefore probative value, of his evidence to the final determination of the proceedings is diminished. This is not by any fault of Possum, but rather an oversight by the court with respect to the cross-cultural issues inherent in communication with a traditional Aboriginal man.

The following extract further encapsulates the cross-cultural misunderstanding that can result from language differences between Aboriginal and English languages. In his cross-examination, O'Loughlin's counsel asks Possum:

Q: When you made the paintings did you sign them? Put your name? Possum Clifford or Possum on them?
A: I only put my signature on there if I'm being paid, I only put my names on the paintings when they pay me.
Q: How much do you charge to put your signature on the painting?
A: Sometimes a thousand dollars. Sometimes seven hundred or five hundred.[146]

Here, Possum has interpreted the translation of the question to apply to when he signs his paintings generally, not the paintings the subject of the committal, and does not realise the implications of his answer. The second question, seeking to reveal how much he gets paid to sign paintings, is again misinterpreted by Possum, and is answered in terms of how much he sells his paintings for, not how much he 'charges' to sign any painting put before him. The ramifications of this misunderstanding are potentially grave to Possum's credibility, as what Possum is in fact referring to is the common practice amongst artists of not signing a work until it is sold.[147]

Despite the assistance of a translator, it is maintained that the transcripts from the committal proceedings suggest that Possum was confused by the extent of questioning he was required to answer. It is important to note that the translator provided to Possum for the committal was of the Luritja language,[148]

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[145] Downing Centre Local Court Committal transcripts, July 11, 2000 – Cross-Examination, Clifford Possum Tjapaltjarri, Mr. P. Waye (Defence) at 7.
[146] Downing Centre Local Court Committal transcripts, July 11, 2000 – Cross-Examination, Clifford Possum Tjapaltjarri, Mr. P. Waye (Defence) at 10.
[147] Dr. Vivien Johnson, biographer and personal friend of the artist, who was present at the court proceedings, provided Possum's interpretation of this question.
[148] It is the author's view that it is noteworthy that in the scandal surrounding Aboriginal artist Turkey Tolson Tjupurrula , the translator used to obtain the material for the first affidavit was not of his first language, but of the common language Luritja. The second statement claimed that Tolson had not understood the representations of the first statement because it had been taken in Luritja – see V Johnson, (2001), ''Black Art Scandal' Scandal', in *The Money Belongs to the Ancestors*, unpublished manuscript at 23.

not Possum's native language of Anmatyerre.[149] It is accepted that Luritja is a common language, and an interpreter of this language was believed to be sufficient for Possum to communicate.[150] However, bearing in mind Eades's views on the differences of conceptualisation in Aboriginal language, and the variances amongst Aboriginal dialects, the fact that the translation was in Luritja could be significant to the interpretation of the questions put to Possum, and more importantly, the translation of his answers. Indeed, Eades's theories confirm that Possum did not fully comprehend the questions, even when translated into Luritja, for on the most part they were How-where-when-type questions, or required Possum to give specific quantifications.

It would appear that Magistrate Barnett was not swayed by the vigorous cross-examination of Possum, or the somewhat incriminating answers of Possum. He indicted O'Loughlin on all twenty-two counts at the conclusion of the committal. However, on sentence, Judge Norrish Q.C. only had the transcripts to read, and therefore could not necessarily realise the extent of Possum's confusion and misunderstanding of the questions put to him, irrespective of the presence of a translator. This may explain his reasoning in not accepting Possum's evidence of duress.

4.3 Section 41 of the Evidence Act 1995 (NSW)

Relevant to the cross-examination of Possum, and specifically the repetitive questioning by defence counsel, is section 41 of the *Evidence Act*. This section 'regulates the propriety of questioning in cross-examination', and gives the court the power to disallow 'inappropriately robust cross-examination'.[151] In particular, subsection 41(2)(a) is applicable to Possum's personal background: 'any relevant condition or characteristic of the witness, including age, personality and education'.[152] During cross-examination, Possum professes his lack of educational qualifications:

> Q: Can you count?
> A: Because I can't read and write. I don't know numbers.[153]

Despite this admission, O'Loughlin's counsel put questions to Possum that required him to give quantifications, including how many paintings he would have painted in his lifetime.[154] Had the Crown made submissions

[149] The reason for this is that despite efforts to locate an interpreter qualified in the Anmatyerre dialect, they were unsuccessful in their attempts – information sourced from V Johnson, (2001), 'Innocence of Clifford Possum Tjapaltjarri', in *The Money Belongs to the Ancestors*, unpublished manuscript at 16.
[150] Johnson, ''Black Art Scandal' Scandal' n 148, 11.
[151] J Anderson, et al, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts*, (2002) LexisNexis, Butterworths, Australia, 92.
[152] Section 41 (2) of the *Crimes Act*
[153] Downing Centre Local Court Committal transcripts, July 11, 2000 – Cross-Examination, Clifford Possum Tjapaltjarri, Mr. P. Waye (Defence) at 9.
[154] Downing Centre Local Court Committal transcripts, July 11, 2000 – Cross-Examination, Clifford Possum Tjapaltjarri, Mr. P. Waye (Defence) at 23.

advising the court of Possum's education and limited carriage of the English language, and requesting the exercise of the discretion under section 41(1), the method of cross-examination may have been averted, with more accurate evidence obtained, instead of the responses given to appease defence counsel.

In addition, Crown submissions warning the Magistrate and counsel of the tendency for 'Aboriginal English' speaking Indigenous persons to employ 'gratuitous concurrence' when under cross-examination, may have prevented the quality of Possum's evidence being undermined by his lack of understanding and 'gratuitous concurrence' with the questions put to him. If the court is mindful of the discretion under section 41, and the principles of the Anunga Guidelines, the exercise of this rule should reduce the tendency for cross-cultural misunderstanding when cross-examining Indigenous witnesses.

4.4 Recommendations

The discussion of the cross-cultural issues evident in *O'Loughlin* as a result of Possum's 'Aboriginal English' language competency, obliges the legal system to take further notice of the socio-cultural complexities that shape forms of communication between Indigenous Australians.[155] The literature examining the phenomenon of 'gratuitous concurrence' recognises that misunderstanding occurs more frequently with Indigenous Australians from remote Aboriginal speaking communities,[156] whence the majority of Indigenous artists from the Western Desert School originate. Thus, there is a need for specific legislative provisions that take note of these issues when responding to dishonest and fraudulent dealings with Indigenous art, if the artists themselves are to be given the opportunity to testify against their alleged counterfeiter.

Judge Forster's recognition in *Anunga*, and his formulation of Guidelines to address the disparity between forms of conceptualisation in Aboriginal language when questioning Aboriginal witnesses, demonstrate the active role a Judge can assume to counteract cross-cultural misunderstanding in matters involving traditionally oriented Aborigines.

It is emphasised that Judges should have a significant role in determining the matrix of questions that will be used in proceedings involving Aboriginal persons, so that questions put to Aboriginal witnesses will elicit the necessary information, rather than confuse and obscure information needed by the court to resolve the legal concern, as was the case in *O'Loughlin*. Inquiries should be made by both the party introducing the witness as well as the Judge, as to the educational standard of the Aboriginal witness and their competency with the English language. Awareness of the differences in conceptualisation and the determination of questions that overcome any cross-cultural misunderstanding would help to ensure that the responses were more accurate.

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[155] D Eades, *'Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners'*, (1992), Continuing Legal Education Department of the Queensland Law Society at 31.

[156] Eades, above n 124, 31.

It is insisted that the provision of a translator in an Aboriginal person's first language be compulsory, despite any difficulties that may be incurred in securing an interpreter fluent in the language. This is necessary to address any difference between Aboriginal dialects in terms of how each language is conceptualised. By following these principles, accurate and persuasive evidence will be obtained, as compared to answers shaped by gratuitous concurrence.

For future instances of Indigenous art fraud to be prosecuted successfully and fairly, the courts, legal practitioners and investigative bodies must be conscious of the cross-cultural issues identified by Judge Forster in *Anunga*, otherwise misunderstanding in court proceedings for the prosecution of counterfeiters will continue.

5.1 When is a forgery not a forgery? Why there needs to be law reform

The preceding discussion has established that the existing legislation and common law principles applicable to art forgery are insufficient. Furthermore, *O'Loughlin* illustrates the cross-cultural aspect of Indigenous art forgery and the need for specific reform to acknowledge the special character of tradition-based Aboriginal art, and the processes involved in its creation.

This need is manifested in the fact that in sentencing O'Loughlin, Judge Norrish Q.C. was not required to resolve the issue of whether the suspect paintings were in fact 'forgeries' of Possum's art. This was because O'Loughlin's prosecution was fitted into existing provisions under the *Crimes Act 1900 (NSW)*, which did not address the issue. In his sentencing remarks, Judge Norrish Q.C. seemed reluctant to address the issue of the authorship of the suspect paintings, perhaps because of the cultural complexities inherent in resolving this question due to possible collaboration on Possum's works by other family members.[157]

Thus, the initial allegations against O'Loughlin, that he had 'forged' works in the style of Possum, which were later signed by Possum under duress, were never tested beyond the committal proceedings. The DPP must be taken to have decided that it was an adequate sanction of O'Loughlin's conduct to prosecute him under the alternative charges.

That there was never any determination of whether the paintings were 'counterfeit' highlights the anomaly in the current law relating to forgery, when applied to circumstances where a painting is the subject of an alleged forgery. As discussed in Section Three, there is no doubt that a *document* can be forged and prosecuted as a forgery of a document.[158] However, there is doubt surrounding the question of whether a *painting* can be forged and prosecuted as a forgery. Hence, the title of this paper: when is a forgery not a forgery? It is suggested that the outcome of *O'Loughlin* is an example of a forgery was not being acknowledged as a forgery, despite the cogent evidence presented to establish the paintings as forgeries.

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[157] Penrith District Court Sentencing Remarks, February 23, 2001 per Norrish J at 17.
[158] See Section Three at 18.

5.1.1 Is there really a need for law reform?

It is conceded that it is possible to facilitate the prosecution of art forgery in NSW through the utilisation of alternative provisions contained in the *Crimes Act*. These include sections under Part 4, Division 1 relating to the receipt of money under 'false pretences', 'by deception' or, 'false or misleading statements'.[159] Part 5 of the Act, which contains provisions in respect of forgery and false instruments, are also applicable to instances of fraudulent conduct.[160] In respect of Commonwealth jurisdiction, section 137.1 of the *Criminal Code 1995* (Cth) is applicable where a forged painting has been sold to a Commonwealth body.

Thus it is arguable that reform is not necessary. However, it is my contention that such reform is critical when one considers the significance of the Indigenous art to the Australian art market and export industry. It is only sensible that Parliament take steps to legislate in order to minimise the opportunities for dishonest and fraudulent conduct and maintain the integrity and reputation of the industry. As McCausland points out, 'rumours and allegations over the authenticity of paintings can rebound on buyer confidence in Indigenous artists whose works are called into question'.[161]

It is obvious that the notoriety that results from 'Black Art Scandals' and the art industry's general ignorance of the cultural importance of Indigenous collaborative artistic practices is detrimental to both sides of the Aboriginal art industry. It is important to remember that the Aboriginal art industry not only accounts for a considerable portion of the Australian economy, but also plays a significant economic role for many Aboriginal people, particularly in remote communities in Central Australia where employment opportunities for Indigenous Australians are otherwise almost non-existent.[162] Law reform establishing that a painting can be forged, and instating the legitimacy and place of Indigenous collaboration, is imperative to ensure the continued profitability of Indigenous art within the Australian and International art market.

It is submitted that the existing legal principles in respect of forgery have developed in such a way that cultural bias exists in terms of what is understood to be a document. It is the author's view that this should no longer be the case; for the reasons cited in Chapter Three tradition-based Indigenous

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[159] See Sections 178BA – 181, in addition to provisions under Part 5 of the *Crimes Act 1900* (NSW).

[160] Section 250 of Part 5, Division 1 of the *Crimes Act 1900* (NSW) defines forgery as 'the counterfeiting, or altering in any particular, by whatsoever means effected, with intent to defraud, of an instrument, or document, or of some signature, or other matter, or thing, or of any attestation, or signature of a witness, whether by law required or not to any instrument, document, or matter, the forging of which is punishable under this Act'.

[161] S McCausland, 'Adelaide Art Dealer Charged over Clifford Possum Paintings', (1999) 24 (4) *Indigenous Law Bulletin* 19 at 19.

[162] Alter, above n 127.

[163] See Chapter Three at 27 – 29.

paintings, like Possum's works, are documents as set out in the *Evidence Act*.[162]

5.2 What can be learnt from *DPP v O'Loughlin* (2000) for future prosecutions of art fraud: Baker's perspective

Based on the difficulties encountered when investigating the complaint against O'Loughlin and collating the Brief of Evidence, Baker has advocated that legislative consideration be given to art fraud. My research of the case, and the related issues it raises, lead me to agree with Baker's position.

In his paper, Baker suggests three options to 'effectively address future art fraud and forgery matters'.[164] These are:

1. Amendment of the current definition of 'document' in section 299 of the *Crimes Act*; or
2. Legislate a new section within the NSW Crimes Act specifically for art fraud or counterfeiting art; or
3. Enact an entirely new Commonwealth Act addressing art crime comprehensively.

All of these proposals have merit and the practical experience of Baker in seeking to charge O'Loughlin identifies the necessity of law reform for future prosecutions of art forgery, and specifically Indigenous art forgery. Of these suggestions, the first two are feasible in terms of State law reform. However, enactment at federal level is preferable in the long term, to reflect the transborder nature of the Indigenous art market.

5.2.1 Reform at State level

- ***Amend the definition of 'Document' in Section 299 of the Crimes Act 1900 (NSW) to include a specific Indigenous art category i.e. tradition- based Aboriginal art***

The CCA Legal Officer's narrow interpretation of the statutory definition, and the ramifications of the advice to O'Loughlin's prosecution, identifies a shortcoming in Parliament's explanation of what is to be understood as a 'document' for the purposes of the *Crimes Act* 1900 (NSW*)*. Amending the definition of document to include this category of Indigenous art would enable a forged Aboriginal painting to be prosecuted, and acknowledged in law as a forgery by virtue of being a false instrument. This amendment is necessary if future allegations of Indigenous art fraud are to be prosecuted through the existing provisions of the *Crimes Act 1900* (NSW). As stated, this reform would bring the *Crimes Act 1900* (NSW) into line with the definition of 'document' contained in the *Evidence Act*.

Furthermore, amending the statutory definition of document to include this category of Indigenous art would expand the provisions available under the

[164] Baker, above n 81, 7.

Crimes Act for perpetrators of art fraud. For example, section 300(1), '*Make False Instrument*', could be utilised for persons who create forged artworks, whereas section 300(2), '*Use False Instrument*', would be 'preferred against handlers and middlemen of counterfeit art works'.[165] Amendment of the definition of 'document' would mean that Police and Prosecutors would be able to differentiate between the stages of production in the forging of artworks, and thus assess the degree of criminality involved in perpetrating the offence.[166]

- ***Legislate a new Division into the Crimes Act1900 (NSW) to provide for art crime, and specifically art fraud***

Insertion of a new Division into the *Crimes Act 1900* (NSW) is the preferred response to the lacuna in the existing law which does not recognise art crime, or specifically provide for the counterfeiting of art.

This type of reform would effectively provide a statutory 'umbrella' under which the various aspects of art forgery, including forgers of artworks and provenances, middlemen and handlers of forged works (e.g. galleries and auction houses), and conspirers could be prosecuted.[167] This approach to reform could also encompass other criminal acts relating to art crime, such as theft. There would be no reason to discriminate between styles and authorship of paintings, and expressly provide for paintings, in a general sense, as a subject to which the provisions apply.

Reform to the *Crimes Act 1900* (NSW*)* would only be NSW specific, so theoretically, forgers and handlers of fraudulent art works would be 'immune' from prosecution unless it could be established that an element of the offence(s) occurred in New South Wales.[168] Addressing the existing anomaly in NSW legislation through the insertion of a new Division specifically to provide for art crime and art fraud would ensure consistency in future prosecutions. Allegations of such illegal conduct in respect of art can be dealt with under the provisions of one act, rather than a mismatch of existing provisions that are not specifically designed for the prosecution of art crime and fraud.

This response would serve to address the existing lacuna in NSW law that does not allow for a painting, Indigenous or non-Indigenous, or other forms of art, to be prosecuted explicitly as a forgery.[169] When combined with implementation of similar amendments to all Crimes Acts/Criminal Codes across Australia, any future instances of art fraud could be prosecuted as forgery and ensure consistency in the treatment of this type of unlawful conduct.

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[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Ibid.
[169] The existing provisions contained in other Crimes Acts/Criminal Codes are similar in wording and definitions to NSW legislation, as a result of the ongoing standardisation of legislation across Australia: Baker, *above* n 81, 7.

5.2.2 Specific protection for Indigenous artists: why should Indigenous artists be privileged?

In addition to the above proposal for law reform in respect of art crime generally, the inclusion of a provision acknowledging the place of collaborative practices within traditional Indigenous artistic production is advocated. A provision stipulating that collaborative works produced under the supervision of the artist are not forgeries if they are created with culturally appropriate persons in accordance with principles of Indigenous law is recommended. The experience of O'Loughlin's unauthorised appropriation of Possum's right to collaborate with family members when translating his Dreamings into paintings identifies the importance of introducing cross-cultural legislation, which provides Aboriginal artists with protection from the exploitation of their culture and traditional artistic practices. Relevant to this argument is Nicholls' assertion that the treatment of collaboration by the art industry and media 'highlight[s] the need for law reform which would enable Aboriginal art to continue to be created within its own cultural terms, not those imposed by the dominant, white culture'.[170]

In support of such reform, is the consequence of the Western art world's obsession with the 'hand of the master' for younger generations of Indigenous communities. This obsession 'exerts a good deal of hidden, but nevertheless, intense, assimilatory pressure on Aboriginal artists to conform to its strictures'.[171] Media coverage representing Indigenous collaborative practices as scandalous, combined with the intolerance for the tradition by the Western art market, has forced Indigenous artists to abandon collaborative practices and convert to the 'artist-as-individual', in order to maintain their reputation and generate an income from the sale of their artworks.[172]

By forcing Indigenous artists to conform to the expectations of the dominant Western art market, employment opportunities and processes of knowledge transmission within those communities are lost.[173] Dr. Vivien Johnson explains the importance of collaboration to Possum's family, and to the social and cultural fabric of Indigenous communities generally:

> That [family painting] is how traditional skills are passed down from generation to generation in Western Desert culture…. it was Tjapaltjarri's responsibility to instruct his children in this new way of painting which he had mastered – and it was his right in terms of his own culture to allow them to paint his Dreamings for him. To criticise these processes of knowledge transmission is to undermine the means of cultural reproduction in Western Desert society.[174]

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[170] Nicholls, above n 28, 187.
[171] Ibid, 188.
[172] Johnson, *Clifford Possum Tjapaltjarri*, above n 7, 21.
[173] Ibid, 10.
[174] Johnson, 'Innocence of Clifford Possum Tjapaltjarri', above n 149 at 12.

Aboriginal artists have a strong cultural connection to their paintings; they are 'more than just art'.[175] The language of the Dreaming is visually expressed in accordance with principles of Indigenous law. By inserting a provision into the existing *Crimes Act 1900* (NSW) recognising and promoting the traditional practice of collaboration with those whom the custodian of the Dreaming deems appropriate, principles of Aboriginal Customary Law are being recognised and upheld by Parliament, and ultimately by the dominant legal system. By failing to acknowledge the tradition of collaboration in certain Indigenous communities, the status and relevance of Indigenous law to Aboriginal people is undermined.

5.3 Reform at Federal level

Baker also advocates the enactment of Commonwealth legislation with the focus of art, culture and heritage crimes.[176] Enactment of Commonwealth legislation would establish art forgery, and its associated aspects, as Commonwealth offences.

It is contended that federal response to the existing anomaly would provide the most significant and effective option, as it would remove any limitations that may render reform at State level ineffective. Furthermore, federal reform would afford greater protection to Indigenous artists as the growth of the Aboriginal art industry has given artists mobility that they did not have before the market developed, and much art is created and sold outside of NSW.

However, this response requires further research to determine whether it is possible to expand the powers of the Commonwealth so that it is possible for art and provenance fraud and forgery, the handling of counterfeit or forged artworks, and the protection of other cultural and heritage items to be within federal jurisdiction.[177] Whether this could be introduced under section 51 of the Australian Constitution is an issue that should be examined. Commonwealth legislation would overcome jurisdictional problems encountered by State and Territory reform, and acknowledge the importance of art generally, and Indigenous art, to Australia's national identity. It is hoped that this paper will inspire attention by others in the legal field to consider reform at federal level, and the standing on which such reform could be advanced.

CONCLUSION

This paper has exposed the lacuna that exists in the law of forgery, which does not acknowledge a painting as being capable of forgery or

[175] Johnson, *Clifford Possum Tjapaltjarri*, *above* n. 7, 18.
[176] Baker, above n 81, 8.
[177] Ibid.

prosecution as a forgery. Hence the first meaning of the title of this paper: when is a forgery not a forgery?

As the law currently stands, a forged painting cannot be prosecuted as a forgery, regardless of the fact that a painting can clearly be forged. The discussion and analysis of *O'Loughlin* has illustrated the anomaly that prevents a forged painting from being pronounced as counterfeit, despite evidence establishing this fact. Thus, it is the author's contention that there is a need for Parliament to address the current status of the law, in the absence of any reason why a painting should not be prosecuted explicitly as a forgery.

Suggestions have been made in Chapters Four and Five as to how such reform should be approached. The insertion of a new Division into the *Crimes Act* dealing with art crime generally, with provisions for art forgery, is the author's preferred approach to reform. This approach would be comprehensive, offering consistency in future prosecutions of art crime, and address the anomaly which currently prevents the law adequately protecting artists, both Indigenous and non-Indigenous, from exploitation of their art and art-making processes.

The cross-cultural aspect of Indigenous art fraud must also be considered when proposing reform of the laws relating to art forgery. In addition to advocating legislative reform to address the anomaly which does not allow for a painting to be prosecuted as a forgery, the incorporation of provisions into NSW legislation mirroring the Anunga Guidelines is also recommended. It is envisaged that these provisions will apply when questioning Aboriginal witnesses and defendants from tribal backgrounds, and will operate to ensure that the courts are aware of the socio-cultural contexts of communication between Indigenous peoples.

Through awareness of the cross-cultural allegations of forgery which relate to Indigenous art can be resolved in a just and culturally appropriate manner, with the artist given the opportunity to be heard.

The discussion of *O'Loughlin* has sought to demonstrate that the potential for exploitation is significantly increased with tradition-based Aboriginal art, which is often produced in collaboration with culturally appropriate family members. Therefore, any reform must acknowledge this practice and give it standing in law as a legitimate practice not affecting the authenticity of an artwork.

The struggles experienced by the CCA in prosecuting *O'Loughlin*, and the court in determining the question of authorship, identify a need for Parliament to enact legislative provisions which address the socio-cultural context in which tradition-based Aboriginal art is created. It is concluded that legislative reform recognising collaborative practices in tradition-based Aboriginal art will resolve the art industry's concerns about how such practices interact with the authorship and authenticity of a work.

This is the other sense in which the title of this paper applies. Arguments have been offered as to why specific protection for Indigenous artists is necessary. In particular, they justify legislative reform acknowledging the role

of collaborative practices in Indigenous communities where such traditions are still current.

As tradition-based forms of Aboriginal art, such as the works of Possum, are ‘more than just art’, so a forgery of such an artist’s works is much more than just a forgery, it is also a crime against the laws of the artist’s own culture. It is in accordance with the highest aspirations of Western law that Aboriginal customary law and practices are upheld and acknowledged as being important to Indigenous Australians’ self-identity and culture. Therefore culturally sensitive legislation that gives traditional collaborative practices legitimacy and standing in Australian law is imperative and timely.

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