

## FAKE ART HARMS CULTURE SUBMISSION 2017 – BlakDance

### **Opening**

BlakDance is pleased to be able to make a Submission to the Inquiry on the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia.

BlakDance consents to the publication of this submission to the committees on the internet by a decision of the committee. The name of the person making the submission is Merindah Donnelly Executive Producer [REDACTED]

### **Introduction**

BlakDance is the national peak body for Indigenous Dance in Australia<sup>1</sup>. Our membership features hundreds of independent choreographers and community practitioners. BlakDance supports artists and communities across many forms of dance and diverse geographies of histories, songlines and protocols. BlakDance connects collaborators and communities, fuels creative exchange and builds public discourse to strengthen our art form, including best practice protocol and ethics implementation to ensure our sectors artistic and cultural sovereignty. Through research and evaluation of the sector and its allied activity and community, BlakDance develops projects and major initiatives that are rooted in supporting the growth of dancers, dance sector organisations, and audiences.

BlakDance runs *on demand* artist and presenter services, *leadership* strategies and professional development workshops, including a biennial National Indigenous Dance Forum, workshops on current issues for the sector including protocol implementation and ethical best practice, capacity building for artists and presenters to develop, mobilise and program the diversity of Indigenous dance and we provide information and resources through our popular e-news and the online resource library.

BlakDance was founded by Marilyn Miller following Creating Pathways, the National Indigenous Dance Forum held in 2005 at the National Museum of Australia. Since then, BlakDance has consistently delivered generative and transformative sector events, contributed significantly to the growth of the small to medium Indigenous dance sector and spearheaded generations of independent choreographers.

FAHC is an important campaign, a fight for doing what is right about First Nations culture and its expression. Allies like the IAC and Arts Law have used their skill to put good arguments about how Australian law could be made better, harder and fairer for First Nations people.

We worked with them, we know they respect our community and we understand that the arguments they make are as relevant to dance as it is for storytelling and for painting and for every way that Indigenous people express our culture.

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<sup>1</sup> Readers should be aware that this document may contain references to and images of members of the Aboriginal and Torres Strait Islander community who have passed away. I respect Aboriginal and Torres Strait Islander communities and cultures. These lands and waters are the location of the longest continuing cultures and civilisations in the world. This space was and is home to some 500 distinct nations and each has their own name. Therefore I acknowledge the right of all peoples to claim, control and enhance their cultural heritage and the names by which they are known. Operating across these nations, I use the words 'Aboriginal and Torres Strait Islander', 'First Nations' and 'Indigenous' interchangeably in this report to refer to the Aboriginal and Torres Strait Islander peoples of Australia, and their arts and cultures. I understand that some Aboriginal and Torres Strait Islander people are not comfortable with some of these words. I mean only respect when we use these words.

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BlakDance is crucial to connecting artists and distribution ecologies so that audiences can experience Indigenous dance, dancers can make sustainable living from their practice, and distribution ecologies can transform. BlakDance is a catalyst for making these connections by proactively working across the ecology. Currently, BlakDance identifies contemporary Indigenous dance being on the cusp of new understandings within national and international communities<sup>2</sup>.

The Australia Council's 2014 national *Arts Participation Survey* found that nine in ten Australians (92%) believe that First Nations arts are an important part of Australia's culture, and 64% have a strong or growing interest in First Nations arts. Yet only one in four (24%) attend, and less than half (46%) agree that First Nations arts are well represented in Australia. These findings highlight an opportunity to further develop audiences for First Nations arts in Australia, including through ensuring that Australians have access to a variety of high quality First Nations arts experiences.

### KEY FINDINGS

1. National mapping of the programs of 135 Australian presenters found that First Nations performing arts are under-represented in Australia's mainstream venues and festivals. They comprised around 2% of the almost 6000 works programmed in 2015 seasons.
2. Almost half of Australian presenters did not appear to program works with First Nations creative control, involvement or content in 2015, including major venues and festivals that presented over 100 works each.
3. Some presenters program a comparatively large number of First Nations works. Just 12 presenters (9%) were responsible for more than a third of all First Nations programming in 2015. Personal motivations, organisational leadership and exposure through peers are key motivations for programming.
4. The *Building Audiences* research found that audiences have a strong image of First Nations arts as 'traditional,' but that they are highly motivated to engage with 'contemporary' works. The national mapping showed that in 2015 more than eight in ten First Nations works were contemporary.
5. Over one third of works were small in scale with less than five performers. Presenters tend to select either accessible works with a known brand, or smaller works which are low cost to stage. Smaller works can enable presenters to show riskier content.
6. Presenters and producers interviewed said decision-makers can be tokenistic when considering First Nations works. Some lack the knowledge or interest to source small-to-medium works. Building sector capacity for First Nations creatives to connect to presenters through showcases and networks is critical to growing the presentation and programming of First-Nations works. Presenters called for long-term funding support for small, medium and large works, and First Nations companies.
7. According to presenters, audience satisfaction is high irrespective of box office. The artistic excellence or integrity of First Nations works are key motivations for programming. Shortfalls in box office are not about the likeability of works, but about marketing reach. There is a need to build marketing skills to reach new audiences.

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<sup>2</sup> This is based on market development research and engagement through the Australian Performing Arts Market (APAM) 2012, 2014 & 2016, Dance Massive 2013 & 2015, the National Dance forum 2015 & 2017, the International Indigenous Producers Forum 2014, APACA 2012 & 2016, Black Lines presenter feedback and consultation 2014, CINARS 2016, Weesageechak Begins to Dance 2016, Talking Stick Festival 2014, YIRRAMBOI festival 2017 and Garma audience evaluation findings 2014. Indigenous practitioners continue to draw on Indigenous knowledges, to develop the forms, while increasing the production standards and tour readiness, simultaneously presenters are slowly making efforts to unpack the role of audiences and definitions of success and excellence. This is evidenced as per The Australia Council for the Arts 2010 action based research and implementation strategy for Indigenous performing arts which was prompted by the Australia Council's research, *More than Bums on Seats: Australian participation in the Arts* 2009 which demonstrated a growing demand for Indigenous arts nationally and internationally. The current international saturation of contemporary Indigenous dance demonstrates the value international markets place on our dance, dance practitioners and leaders. This leads both nationally and internationally presenters to deepen the understandings of Indigenous cultures thereby encouraging more sophisticated "readings" of Indigenous expression. Critically this also leads to market penetration.

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8. Presenters who are motivated to challenge and build their audiences are more likely to program First Nations works. Opportunities for increased audiences lie in ‘potential audiences’, ‘risk-taking audiences’ in metropolitan areas and the ‘schools market’. Regional presenters could tour popular artists, whilst investing in long-term community engagement, and works with a local angle.

9. Presenters said that financial risk is the main deterrent to programming First Nations work. Available, brand-name First Nations works are often too expensive, whilst smaller works are considered financially risky because they lack brand recognition.

10. Concerns about serious themes are both an obstacle to programming and a marketing challenge for First Nations arts. Presenters called for more entertaining and accessible works as an entry point for audiences, and new or ‘fresh’ approaches to difficult content. Some presenters spoke of ways to engage non-Indigenous audiences in works with political content or a willingness to challenge audiences.

11. Many presenters are afraid that they will get the process of selecting, staging, presenting and marketing works to audiences ‘wrong’. There is a need to build sector capacity for cross-cultural engagement both ways; between mainstream presenters, and First Nations artists and communities. E.g.,

- marketing skills and opportunities for Aboriginal and Torres Strait Islander artists and arts workers
- marketing and community engagement skills for presenters
- increasing exposure and connections between presenters, creatives and communities
- initiatives to build performing arts centres’ understanding and confidence for programming First Nations work.

12. Presenters and producers stated that Australia’s underlying race relations impact programming decisions, and are an obstacle to presenting First Nations works. Through this research, they called for:

- proactive initiatives, long-term planning and support to build First Nations representation across the sector and in programming; and
- personal, organisational and sector-wide leadership and commitment to an important two-way cultural conversation.

### Indigenous dance in recent years

The ground-breaking pre-cursor to BlakDance was the Creating Pathways forum, held in Canberra from 27-30 October 2005 at the National Museum. Over 40 dance artists from across the country and several generations created a landmark event and the foundations of a strategic plan for Indigenous dance for the next decade<sup>3</sup>. The forum targeted mid-career independent Indigenous contemporary dance artists (including dancers, choreographers and teachers).

In 2006 and 2007 Treading the Pathways was the implementation strategy from Creating Pathways recommendations including employment of a national Indigenous Dance coordinator and the development of a Dancers Directory. It was auspiced by the Ausdance National organisation.

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<sup>3</sup> Creating Pathways was a partnership initiative of the then Aboriginal and Torres Strait Islanders Arts Board with the Dance Board of the Australian Council for the Arts and Ausdance National.

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Treading the Pathways assisted mid-career contemporary independent Aboriginal and Torres Strait Islander dance artists by developing the national infrastructure for Indigenous dance. It focused on building national networks, professional development and career opportunities. It created a dedicated position that commenced in February 2007. Setting up the position entailed the formulation of a steering committee to 'bring an external sensibility to the project', and the formulation of a strategic plan. Seven independent contemporary choreographers, plus one youth company, led by Deon Hastie at Kurruru, SA, were selected for three-year development under the 'Springboard Initiative':

Gary Lang, Baru Kadal, NT	Gail Mabo, Qld
Rita Pryce, Baiwa Dance, Qld	Vicki Van Hout, NSW
Jason Pitt, NSW	Nikki Ashby, Vic

A first ever publication of Torres Strait Island Play Dances was developed as a school's resource kit for distribution through the Ausdance network and State and Territory education departments and required appropriate teacher in-servicing and/or delivery by Indigenous dance artists. A collaboration with Blackfella Films created a Dancers' Directory in 2008. Company placements of up to four one-week blocks were pursued in 2008 and 2009 with:

- The Australian Ballet – Melbourne with Indigenous Artist - Gary Lang, NT
- Chunky Move – Melbourne with Indigenous Artist - Vicki Van Hout, NSW
- Expressions Dance company – Brisbane with Indigenous Dancer Rita Pryce, Qld.

In 2008 the Indigenous Choreographers Project provided six choreographers from the 'Springboard Initiative' with the opportunity to network with a selection of International presenters attending Sydney Festival 2008.

A new organisation emerged, BlakDance, which was funded in 2009. The Australia Council supported BlakDance as a 'building' infrastructure organisation for the period 2009-2016. For over a decade, we have played a critical role in brokering opportunities, advocacy, market development, communicating protocol and leadership.

BlakDance has successfully undertaken a wide range of activities that have had measurable impact on developing choreographers and dance practice:

Examples:

- In 2011 The Lagaw Gub| Island Wind teacher workshops and screenings were held. Developed by Djon Newie with educational written component by Leesa Watego from Iscariot Media. Lagaw Gub is the first Torres Strait Islander dance education resource in Australia.
- In 2012 BlakDance produced an international showcase and presented 4 choreographers to work alongside 4 international choreographers and included 7 performances, employed 12 dancers, and supported 9 practitioners through professional development.
- This was held at the Queensland Theatre Company in Brisbane attended by 225 people. Direct outcomes in 2013: 4 practitioners programmed in the National Dance Forum, 2 works presented at KOWHITI (NZ National Indigenous Dance Festival), 1 work presented at the Centre of Contemporary Art (COCA) Cairns, and 1 choreographer commissioned for Ochres Dance Company, WA.
- In 2012/13 BlakDance continued to support mid-career choreographers facilitating access through information sharing and crucial financial and administrative support including 5 artists at APAM 2012 and 4 artists at Dance Massive 2013.

The last decade has seen the development of a small to medium Indigenous dance sector including the following companies (not a comprehensive list):

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### MPA:

- Bangarra

### S2M:

- Gary Lang, NT Dance
- Ochre Dance Company, WA
- Marrugeku, Broome WA
- Djuki Mala, NT
- Karil, NSW

### Youth Dance Companies:

- Biddigal Performing Arts, Cairns QLD
- Pryce Centre for Culture and Arts, Cairns QLD
- Kurruru Youth Performing Arts, Adelaide SA
- Wagana Aboriginal Youth Dancers, NSW

### Community Dance Groups:

- Jannawi Dance Clan, Sydney NSW
- Budja Budja, Sydney NSW
- Arpaka Dance Company, QLD
- Excelsior - QLD
- Wagga Torres Strait Islander dance company - QLD
- Jinibara Dance Troupe - Brisbane River Valley and Kilcoy region, QLD
- Nunukul Yuggera dance group, Brisbane, QLD
- Woomera Dancers – Cape York Peninsula, QLD
- Wakka Wakka Dance Group – Cherberg, QLD
- Pamagirri Aboriginal Dancers – Kuranda Rainforest QLD
- Doonooch Dance Company – Nowra NSW
- Wadumbah Dance Group - Perth WA
- Malu Kaia Mura Buai – Torres Strait, Brisbane QLD
- Muggera Dancers – NSW
- Arakwal Dancers – Byron bay, NSW
- Dhinawan Dance - NSW
- Pakana Kanaplila- Tasmania

### Independents:

Albert David  
Amrita Hepi  
Caleen Sainsbury  
Carly Sheppard  
Deborah Brown  
Deon Hastie  
Dujon Nuie  
Eric Avery  
Frances Rings  
Gary Lang  
Ghenoa Gela  
Henrietta Baird  
Ian RT Colless  
Jacob Boehme  
Jasmin Sheppard  
Jo Clancy

Joel Bray  
Joshua Pether  
Katie Leslie  
Katina Olsen  
Mariaa Randall  
Mark Sheppard  
Marilyn Miller  
Meisha Barney  
Michael Leslie  
Monica Stevens  
Nicola Sabatino  
Nikki Ashby  
Pauline Lampton  
Taree Sainsbury  
Thomas E. S. Kelly  
Rayma Johnson

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Rita Pryce  
Robert Dann  
Sermsah Bin Saad

Vicki Van Hout  
Waiata Telfer

### Training institutes:

- National Aboriginal Islander Skills Development Association (NAISDA)
- Aboriginal Centre for Performing Arts (ACPA)

### Work by leading independents and small to medium Indigenous companies includes:

- Rita Pryce and the Baiwa Dance Company; Warupaw Uu – Echo of Drums
- Garry Lang; Goose Lagoon, Mokuy, Cyclone Tracy, Inspired and recent collaboration with West Australian Ballet Milky Way
- Marilyn Miller; PopWhistleCrack
- Dalisa Pigram co-artistic director of Marrugeku new works; Gudirr Gudirr and Cut the Sky
- Vicki van Hout's interdisciplinary Indigenous dance works; Briwyant and Long Grass with Gary Lang
- Ghenoa Gela; Winds of Woerr, My Urrwai – My style, Fragments of Malungoka – Women of the sea
- Jacob Boehme and Ilbijerri; Blood on the DanceFloor
- Albert David; Morning Star performed as part of the Canberra Centenary Festival program.
- Jo Clancy; Gaurii 2015
- Deon Hastie; Hit the Floor 2013, SaltBush, Sand Song
- Rayma Johnson; Birrang the Black Dog
- Peta Strachan; Gili
- Joel Bray; Biladarung
- Amrita Hepi; Passing, 2016, This \_\_\_\_\_ May Not Protect You But At Times Its Enough To Know It Exists, An Occupation, 2017, Dance Rites 2017, At C, 2016
- Thomas E S Kelly – *[Mis] Conceive 2016*, In Development – *Jarrahs old uncle, Woolumbin, Echo, CO – EX -EN*
- Katina Olsen - Critical Path Residency for First Nations Australian artists, Bungendore, NSW
- Carly Sheppard – *Crackers with chase 2017*
- Joshua Pether – *Monster 2017*
- Monica Stevens; NEST

### BlakDance connects dance artists with national and international markets. Examples include:

- Jacob Boehme's participation in the 17th Assitej International World Congress Sweden/Denmark in 2011
- Tammi Gissell, Rayma Johnson, Jacob Boehme, Robert Dann, Peta Strachan attended the Australian Performing Arts Market at the Adelaide Festival in 2012
- Eric Avery, Gary Lang, Tammi Gisell, Vicki Van Hout, Jacob Boehme and Patricia Pryce attended the Dance Massive forum in 2013.
- Tammi Gissell, Mariaa Randall, Jacob Boehme, Thomas E.S. Kelly, Jo Clancy, Vicki Van Hout, Waiata Telfer attended the Australian Performing Arts Market at the Brisbane Powerhouse 2014
- Indigenous choreographer's residency Dance Massive 2015; Mariaa Randall, Jacob Boehme, Ian RT Colless, Eric Avery, Pauline Lampton, Nikki Ashby and Henrietta Baird.
- Ian Colless, Amrita Hepi, Thomas E.S. Kelly participation in the Indigenous Dance Residency at The Banff Centre Canada

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- Kerry Johnson's work with the Alvin Ailey company in New York in an international dance and cultural exchange program
- Vicki Van Hout's participation in the prestigious Paris Residency at the Cite 2013 and guest presentation in New York during **Umyuangvigkaq**: PS122 Long Table and Durational Sewing Bee, 2017
- Djuki Mali national and international touring 2007-2017 across more than 100 venues nationally and internationally
- Jacob Boehme participation at the 2015 ISPA New York congress
- Amrita Hepi's participation at the 2016 and 2017 IETM plenary sessions
- Carly Sheppard's participation in the 2016 ISPA Melbourne Congress and Dancing Earth Summer Institute, New Mexico 2017
- Thomas E.S Kelly participation in the Living Ritual Global First Nations dance conference, 2017

It is vital that Indigenous people are in charge of creation and of production. BlakDance supports emerging Indigenous Producers, providing ongoing training and employment programs for the next generation of Indigenous dance producers and connects them to key industry events.

Indigenous artists need access to the skills and knowledge they need to work in markets around the country and the world so the rollout of market development skills workshops has also been a key ingredient in building both dance artists and the sector.

In 2014, BlakDance received Department of Foreign Affairs and Trade (DFAT) funding to undertake a market probe of emerging international markets with a focus on North America. BlakDance was a global fellowship recipient at the international Society of Performing Arts, ISPA, New York Congress and attended strategic planning sessions with international arts festival PuSh, Vancouver. During this time BlakDance worked extensively in North America building significant relationships with First Nations festivals and companies;

- Talking Stick Festival, Vancouver
- Weesageechak Begins to Dance, Native Earth Toronto
- Indigenous Performing Arts Alliance, IPAA
- Raven Spirit Dance, Vancouver
- Kahawi Dance, Toronto
- Emily Johnson, Catalyst Dance, New York

In 2015 BlakDance delivered key industry event *Dana Waranara* at the Judith Wright Centre of Contemporary Arts, Brisbane. *Dana Waranara* was a unique national event in two parts:

- A one-day Plenary Summit; The BlakDance Summit held to discuss and set the agenda for the upcoming 2016 National Indigenous Dance Forum. This was an opportunity for the sector to come together, to be heard, and to look to the future
- Following the plenary, the three-day Convergence saw 28 choreographers and 21 national presenters and producers, plus five international guests take part in a professional exchange around practice, protocol, choreographic expression, collaboration and transformation. It identified critical creative development and presentation challenges and opportunities for Indigenous choreographers, and challenged presenters and producers to work more proactively to broaden their understanding and programming horizons.

In November 2016 BlakDance attended CINARS. This was pivotal to BlakDance's representation at arts markets and key events, ensuring visibility at CINARS benefited the wider Indigenous dance sector through facilitating access to key buyers and taste makers. This was a game changer for the sector, enabling achievement of the long-term aspiration to

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meet new and diverse audiences, with a priority on North America. Multiple venue Canadian touring circuits were developed through this strategy and are forming the basis of Jacob Boehme and Mariaa Randall's Canadian tours for *Blood on the Dance Floor* in 2019 and *Diversity* in 2020. Benefitting from networks developed through prior investment in the North American market, BlakDance utilised key leaders as brokers at CINARS. BlakDance is now establishing a new strategy focused on New York, with key New York based producers, programmers, curators and markets. This will be umbrellled by ISPA 2018-2022.

At CINARS 2016, BlakDance achieved two major strategies:

- Build on working relationships with First Nations producers and presenters in market.
- Build working relationships with non-Indigenous presenters who require support and contacts that build their knowledge of Indigenous dance and confidence as presenters of Indigenous work.

The National Indigenous Dance Forum 2017 (NIDF) was a BlakDance gathering held in partnership with YIRRAMBOI First Nations Arts Festival. The NIDF was held on the lands of the Kulin Nation at Weelam Ngalut, the Meat Markets Melbourne, from the 5th to the 7th May. Over 180 delegates participated in the NIDF with comprehensive national representation and international guests from USA, Fiji, Canada and New Zealand. The NIDF was inclusive of the independent and small to medium sector, with diverse practitioners from; grass roots community members, choreographers, cultural educators, contemporary dancers, cultural dancers and youth dance companies.

The full NIDF report can be found here: <https://www.blakdance.org.au/gatherings-1>

Key Outcomes from NIDF relevant to this submission

### **1.1. Use of localised knowledge as protocol within cultural education throughout the national education system**

The compulsory regulation of cultural education delivery in schools, prioritising of localised knowledge and getting local permission and how people access it. The issue is how people go through teaching culture from another country. The use of localised information and knowledge that is rarely involved in school's programs. Instead information and knowledge is being shared from other areas. The session thought that if other First Nations people off country come to share, they need to consult with local people. It was noted that Education Departments seem to think using an Indigenous person (from anywhere) is enough BUT it must be determined by local elders and authorities. The group thought that we need to build partnerships with local schools, we need to set up agreements with local schools and we need a set of guidelines for schools on what the issue is and how to do things properly i.e. how to engage local Indigenous people to teach culture. One resonant statement was that "Money should not move you. If it's not right do not do it."

### **1.2. Cultural responsibility of any organisations companies, groups with cultural content** Nominated by Kirk Page seconded by Rita Pryce

The focus of the session was about the cultural responsibility of organisations, festivals, dance groups etc when they have cultural content. When tutors or cultural knowledge keepers the onus should be on them to tell students that the responsibility with learning the cultural dance as well as it's not just movement and song. Delegates share that a lot of places are failing to do that:

- We hope BlakDance will help us write protocols from each and every nation.
- Maybe there is one agency like the National Indigenous Arts and Cultural Authority, policing the graduates cultural practice - a watch dog.
- Matt Doyle noted that at the end of the day it is all about respect and its up to us to teach the next generation.



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- The other solution was creative information sessions and workshops for children, practitioners and performing artists.

**3.6 Information sessions/workshops for performers and artists on intellectual property and copyright** about how to educate and inform people about IP and ICIP because people are not aware of it.

***Question 1 - How does Fake Aboriginal and Torres Strait Islander Art effect you and your community? Why is it important to do something about this?***

### ***Affects***

Fake Aboriginal and Torres Strait Islander Art effects BlakDance and the wider community in a number of ways. It is widely reported that research undertaken by Arts Law and Indigenous Art Code estimates that an astonishing 80% of visual arts souvenirs are fake.

What BlakDance understands is that the presentation of Indigenous dance by non-Indigenous parties is often done under false or misleading parameters which is akin to fraud. In some cases Indigenous performers are encouraged to and asked to present work over which they do not have authority ie to falsely present work which is also fake.

Indigenous cultures should be represented using Indigenous cultural values. This includes respect, authority and appropriate informed consent to use of material and sharing of returns. In short fake art defies Indigenous cultural protocol. It denies Indigenous dance practitioners and recipients of economic, intellectual and spiritual enrichment in material and other realms.

Ignorance of Indigenous cultural protocol is invalid. For 229 years Indigenous people have been willing and eager to explain and share understanding of protocol with other peoples, The Australia Council for the Arts Cultural Protocol guides were first published in 2002 and are shaped by nine principles: Respect, Indigenous control, Communication, consultation and consent, Interpretation, integrity and authenticity, Secrecy and confidentiality, Attribution and copyright, Proper returns and royalties, Continuing cultures, and Recognition and protection.

The guides reflect the complexity of Indigenous Australian culture, and provide information and advice on respecting Indigenous cultural heritage. Although each of the guides address cultural protocols specific to an Indigenous artform, they are shaped by the same underlying principles – the backbone of the protocols. The five guides in the series are:

- writing cultures
- performing cultures ie drama/dance
- visual cultures
- song cultures
- new media or experimental cultures.

For example, a cultural protocol to action the underlying principle of respect is to acknowledge the Indigenous custodians of country at the site of each exhibition, installation, performance, event launch and on inscriptions that accompany public art on permanent or temporary display.

*Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures*

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*and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources*

*Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,*

*Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*

*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions*

*Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.*

*Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature*

Terri Janke - Protocols for producing Indigenous Australian performing arts Performing arts  
<http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>

*Australia's premier Indigenous dance company, Bangarra Dance Theatre, has a strong commitment to cultural protocols in the development of dance. For instance, Bangarra developed a formal agreement with the Munyarrayun language group of northeast Arnhem Land for permission to perform and adapt the language group's dances.*

*Many Indigenous dance steps and combinations of dance forms belong to particular language groups. Permission from language group owners is required to perform those steps and dances.*

*There are many examples of failure to consult and seek consent prior to use. The result is misappropriation of dramatic works, including stories and dance steps.*

*e.g. Woomera successfully sued a recording company which illicitly copied and distributed Mornington Island songs recorded by the corporation. Many years were spent in reaching a settlement. Woomera's intellectual property policy will include procedures that enforce the strict limitation of recording (and photographing) dance performances.*

*Comment: Rhoda Roberts, The Dreaming Festival There must be three months set aside for protocols and discussions with community. No collaborative productions should occur without the knowledge and permission of the cultural custodians.<sup>68</sup>*

*'Teaching Torres Strait Island dancing must be done with close regard to accuracy and context. For educating – you have to get it right.*

*72 It is not enough just to give an exhibition of the dance; it must be accompanied by the history and acknowledgment of the traditional custodians of the dance'.<sup>73</sup>*

The National Aboriginal and Torres Strait Islander Arts Policy is widely used by Indigenous arts organisations and artists as a useful framework. The Policy was endorsed by the Australia Council for the Arts in May 1997. The Policy maps a coherent plan for arts development, regional cultural development, intellectual property and moral rights, as well as

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increased exposure of Indigenous arts in regional, national and international markets. The Policy can be found on the Council website.

### **Significance**

Consider what our operating environment actually is. The lands and seas of Australia are home to hundreds of distinct and diverse living cultures, which are the longest on the planet. Australia's communities have been colonised. We posit that to some extent every community continues to be colonised.

Creating and sharing art happens in a cultural framework. People familiar with economics may already be familiar with a framework that describes the development and distribution of work and services also referred to as a value chain of production and consumption.

In culture the framework has more components than simple economics. BlakDance recommends the inquiry use an Indigenous cultural framework as a more sophisticated approach than the western economic 'value-chain' as a frame of reference. Readers from non-Indigenous cultural backgrounds may find the inclusion of land law culture and heritage unusual. Some have asked if these elements are "a given" or "implicit". In a monoculture this may be a convenient assumption. However in a culturally diverse place and community these elements are not uniform. By consciously and explicitly acknowledging we honor these elements in all cultures - Indigenous and other.

*A United Nations statement describes culture as 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs. (Mexico City Declaration on Cultural Policies 1982).*

*(Post colonial) Australian public policy is notable for its long-standing lack of a commonly accepted definition of 'culture' or a serious policy or public discussion about culture.*

### **Question 2 - Should the Federal Government change the laws relating to Fake Art? What changes do you suggest?**

Recognition and protection Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights. There are currently no special laws dealing with Indigenous heritage cultural material. The Copyright Act has been criticised for not recognising the communal ownership of heritage material and the continuing right of traditional custodians to control the use of this material.

Terri Janke has previously noted that 'Indigenous arts are worth more than \$500 million dollars to the Australian economy, but there are still some gaps in the general understanding of how cultural practices and Australian copyright law interact,' 'A lot of Indigenous culture is oral and performance based. It's handed down from generation to generation and then communally owned. Acknowledging cultural sources, and respecting the integrity of these important works isn't enshrined in copyright laws.'

Australia's current legal framework provides limited recognition and protection of heritage rights.

This can be informed by the National Aboriginal and Torres Strait Islander Arts Policy was endorsed by the Australia Council for the Arts in May 1997. The Policy maps a coherent plan for arts development, regional cultural development, intellectual property and moral rights, as well as increased exposure of Indigenous arts in regional, national and international

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markets. It is about the cultural vibrancy of First Nations people. The Policy can be found on Council's website.

### Laws

Why is there no Law in place to protect Indigenous cultural materials? E.g. Recognition and protection Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights. There are currently no special laws dealing with Indigenous heritage cultural material. The Copyright Act has been criticised for not recognising the communal ownership of heritage material and the continuing right of traditional custodians to control the use of this material. (taken from Terri Janke)

Have Laws in place to protect Indigenous cultural materials, help educate more non-Indigenous people about the Fake Art.

Australian law has begun to recognise two or more laws operating in this land mass. A great deal of material is already available to the Federal Government on how to change the laws relating to Fake Art.

The document "Visual Cultures" for example aims to formally identify issues arising from the interaction between Indigenous cultural concerns and the law protecting the rights of artists. The Australian legal system incorporates some but not all of these concerns. While protocols differ from legal obligations, Visual Cultures outlines the current copyright law framework. The process of following the protocols supports the recognition of Indigenous heritage rights. It encourages culturally appropriate working practices, and promotes communication between all Australians with an interest in Indigenous visual arts and craft.

In Australia, Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people have a living heritage. Their connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, music, performing arts, visual arts and media arts, are some of the mediums for transmitting Indigenous cultural heritage.

On 13 September 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Australia signed in 2008. BlakDance would recommend the Australian Government take active steps to legislate to give effect to its articles<sup>4</sup>.

The World Intellectual Property Organisation (WIPO) established an intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore to discuss intellectual property issues that arise in the context of:

- access to genetic resources and benefit sharing
- protection of traditional knowledge, innovations and creativity
- protection of expressions of folklore.

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<sup>4</sup> Articles 11 and 31

Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 31

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such a cultural heritage, traditional knowledge, and traditional cultural expressions.

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Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2022. The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture establishes ‘traditional cultural rights’ for traditional owners of traditional knowledge and expression of culture. The prior and informed consent of the traditional owners is required to:

- Reproduce or publish the traditional knowledge or expressions of culture
- Perform or display the traditional knowledge or expressions of culture in public
- Make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expression of culture
- Use the traditional knowledge or expression of culture in any other form.

At the agency level there are many reforms available to the federal government. For example the role of the [Australian Competition and Consumer Commission](#) has been widely critiqued in respect to its coverage ie that it acts when a large scale of mischief is achieved. When one dance artist’s work is unfairly exploited it is not considered to be of a scale to warrant ACCC action.

Secret and sacred material the reproduction or unauthorised use of sacred or secret material may be a transgression of Indigenous law. ‘Secret and sacred’ refers to information or material that, under customary laws, is:

- made available only to the initiated
- used for a particular purpose
- used at a particular time
- information/ material that can only be seen and heard by particular community members (such as men or women or people with certain knowledge).

### ***Question 3 - What can we do to better promote and support the creation of authentic Aboriginal and Torres Strait Islander Arts?***

#### **Protection of Indigenous Heritage**

In Indigenous cultures the artist is a custodian of culture, with obligations as well as privileges. Indigenous people’s right to own and control their cultural heritage is known as ‘Indigenous cultural and intellectual property rights’ (ICIP).

Since 1998, when *Our Culture: Our Future* by Terri Janke was first published, the term ‘Indigenous heritage rights’ has gained more favour in the international arena in the development of rights.

Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people’s heritage is a living heritage. An Indigenous person’s connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, song, the visual arts and more recently, new media, are ways of transmitting Indigenous cultural heritage.

As primary guardians and interpreters of their cultures, Indigenous people have well-established protocols for interacting with their cultural material. New situations also require cultural protocols.

Responsible use of Indigenous cultural knowledge and expression will ensure that Indigenous cultures are maintained and protected so they can be passed on to future generations. It is important to note the diversity and complexity of Indigenous culture and that ways of dealing with issues and cultural material may differ from community to

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community. There are many Indigenous cultures in Australia and there are many different protocols across the diversity of urban, rural and remote communities. While it is not possible to prescribe universal rules for transacting with Indigenous people and their communities, there are some fundamental principles within which to conduct respectful work.

### Protecting Culture

In *Our culture: Our future*, Terri Janke recommended significant changes to laws, policy and procedures to protect Indigenous cultural knowledge and expression. Including:

- authorise or refuse to authorise the commercial use of Indigenous cultural and intellectual property, according to Indigenous customary law
- maintain the secrecy of Indigenous knowledge and other cultural practices
- full and proper attribution
- control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill, and teaching of the culture.

### Current protection of heritage

Indigenous artists and their communities have particular needs in relation to intellectual property rights, and Indigenous cultural protocols are required to ensure integrity and respect of Aboriginal and Torres Strait Islander arts and cultures. Moral rights and the provision of economic incentives for the creation of work are particularly important in protecting the intellectual property of Indigenous artists, custodians and communities. These rights and incentives can be upheld and delivered, consistent with the UN Declaration on the Rights of Indigenous Peoples. This includes considering establishment of a National Indigenous Cultural Authority and introduction of specific legislation to protect Indigenous Cultural and Intellectual Property -ICIP.

Again, the Australia Council protocol guides for working with Indigenous Australian artists, are a leading model for promoting ICIP by outlining appropriate ways of using Indigenous cultural material and engaging with Indigenous artists and communities.<sup>5</sup>

The Australia Council commissioned a report in 2006 by Terri Janke and Robynne Quiggin, *Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006*.

One foundational principle underlies development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways. In order to positively contribute to the integrity of Indigenous cultural life, arts infrastructure must support Indigenous control of ICIP management. An essential part of this support is acknowledgement of local community authority, communal rights over cultural heritage material, and engagement of Indigenous people through consultation and prior informed consent mechanisms. This must be balanced with acknowledgement of the authority of individual artists and encouragement of creativity and innovation.<sup>6</sup>

Whilst copyright laws provide rights to individual Indigenous artists, the communal rights of Indigenous clans and groups to their ICIP needs further consideration.<sup>7</sup> These issues have

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<sup>5</sup> The Australia Council's protocol guides for working with Indigenous Australian artists are available at the following link: <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>

<sup>6</sup> Janke T and Quiggin R (2006), *Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006*, 9. Available at: [http://www.australiacouncil.gov.au/workspace/uploads/files/indigenous\\_cultural\\_and\\_intellectual\\_property.pdf](http://www.australiacouncil.gov.au/workspace/uploads/files/indigenous_cultural_and_intellectual_property.pdf)

<sup>7</sup> Janke T and Dawson P (2012), *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*

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been explored by *Milpururru v Indofurn* and *Bulun Bulun v R & T Textiles*. Indigenous artists have obligations to their communities through the customary law to deal with ICIP. However this obligation is not sufficiently recognised through the broader intellectual property framework.

Terri Janke's 2009 work, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*, discusses how Australia's intellectual property arrangements do not effectively protect Indigenous cultural and intellectual property rights. Currently there is no legal right for Indigenous communities to control, maintain and protect their traditional cultural expression, which is primarily communal. This includes songs, stories, dances and cultural knowledge, which is passed down through the generations, but may fall outside the current intellectual property framework as it is not in material form, and may be considered to be in the public domain.<sup>8</sup>

Indigenous artists and communities need their cultural and intellectual property rights to be upheld so they can continue and maintain the integrity of their culture and protect it from misappropriation. A system for collective cultural consent and consultation could address this. The establishment of a National Indigenous Cultural Authority would enable Aboriginal and Torres Strait Islander peoples to oversee and protect their ICIP rights.<sup>9</sup> This could also enable Indigenous people to negotiate agreed terms, including sharing of benefits. With recognition of ICIP rights, there would be incentive for Indigenous people to collaborate and share their traditional cultural expression, contributing to a culturally strong and innovative Australia.

Introduction of specific legislation to protect the cultural and intellectual property rights of Indigenous communities could address gaps in the current framework. Janke and Dawson outline the form that specific legislation could take in *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, which was developed in response to consultation undertaken by IP Australia in 2012.<sup>10</sup>

The introduction of specific legislation to protect the intellectual property rights of Indigenous communities would be in line with the UN Declaration on the Rights of Indigenous Peoples, which Australia announced support for in 2009. Article 31 of the Declaration states that Indigenous peoples "have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions." This is also in line with Article 32 of the Declaration: "States<sup>11</sup> shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."<sup>12</sup> The term resources encompasses Indigenous arts and culture.

The government may wish to consider the work of the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in developing an intellectual property rights-based approach for the protection of Indigenous cultural material.

Australia's current legal framework provides limited recognition and protection of the traditional owners of traditional knowledge and expression of culture rights. Our Culture: Our Future recommended significant changes to legislation, policy and procedures.

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<sup>8</sup> Janke, T (2009), *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*

<sup>9</sup> Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*

<sup>10</sup> Janke and Dawson, *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, 25

<sup>11</sup> In this context "States" refers to nation states

<sup>12</sup> United Nations (2007), *UN Declaration on the Rights of Indigenous Peoples*

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Much of the rights recognition has been done at an industry and practitioner level, through the development of protocols and use of contracts to support the cultural rights of Indigenous people.

Across the world, Indigenous people continue to call for rights at a national and international level.

Indigenous people are developing statements and declarations which assert their ownership and associated rights to Indigenous cultural heritage. These statements and declarations are a means of giving the world notice of the rights of Indigenous people. They also set standards and develop an Indigenous discourse that will, over time, ensure that Indigenous people's cultural heritage is respected and protected.

### ***Question 4 - What else can we do as a community to stop Fake Art?***

As a community there are many things that can be done to stop Fake Art.

The wrong people are profiting from a culture that they have no connection to, making it harder for Indigenous people to produce their art and be recognized as authentic. This is a violation of their laws, traditions and customs.

Dances, songs, ceremonies are very important and significant to aboriginal and Torres Strait islanders peoples. There needs to be more understanding that it is not ok for certain dances, songs etc to just be taught to anyone, especially by a non indigenous person that does not have permission to do so.

- ***Government has a role to play at local state/territory and national levels.***

As described above governments have an extensive range of opportunities in law to make change to improve the situation in relation to fake art. It also has an opportunity to enrich our social and cultural environment so that everyone in Australian society can appreciate genuine cultural expression and therefore also identify fake art. One area is for education curriculum development to include Indigenous arts and culture including dance.

- ***The community or not for profit sector can play many roles***

Across Indigenous communities and those people who engage with First Nations people and cultural material the need for the establishment of National Indigenous Arts and Cultural Authority continues to register. At the recent BlakDance national dance forum this issue rose to the top of the priorities for many people. Equally, and related, some workshops at the forum identified the need to establish local arts eldership councils and to provide knowledge, authority and cultural protocols.

Community organisations (and others) have the opportunity to promote and support existing assets such as First Nations controlled Festivals and cultural organizations such as the Cairns Indigenous Art Fair, Tarnanthi, Blakdance, Darwin Aboriginal Art Fair and Garma (etc) as well supporting the creation of new First Nations owned and run infrastructure in the arts sector. There are also benefits in supporting and endorsing authorized non-First nations retailers, distributors and producers.

- ***The business community can most certainly take a driving seat.***



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Another common theme in the national Indigenous dance forum held by BlakDance was providing better information and education for consumers – both domestic and international visitors. This could take the form of an advertising campaign and branding with airports and A framework for non-Indigenous presenters and venues to better understand our customs in dance and other artforms. Inbound tourism surveys and research demonstrate that Australia has one resource that is considered absolutely unique – Indigenous people and culture. There is great scope for cultural awareness tourist packages to build and extend the value of cultural tourism into Australia.

- ***Communities of faith have a important cultural role to play***

The communities of Australia would be well served by a more informed and rich understanding of what constitutes culture.

A number of statements about Aboriginal and Torres Strait Islander Culture are relevant in BlakDance's work including:

The United Nations Declaration of Human Rights, UNDHR, which states that 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

The Mexico City Declaration on Cultural Policies 1982<sup>13</sup> notes that 'culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.' It continued 'The main related issues are cultural identity; cultural dimension of development; culture and democracy; cultural heritage; artistic and intellectual creation and art education, arts education; relationship of culture with education, science and communication; planning, administration and financing of cultural activities; and international cultural cooperation.'

The Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights, in Article 8, urges Indigenous people to 'develop a code of ethics which external users must observe when recording -visual, audio, written- their traditional and customary knowledge'.

Internationally, the World Intellectual Property Organisation established an intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore to discuss intellectual property issues that arise in the context of:

- access to genetic resources and benefit-sharing
- protection of traditional knowledge, innovations and creativity
- protection of expressions of folklore.

The United Nations Declaration on the Rights of Indigenous Peoples Article 11 states that 'Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature' ... 'States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'.

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<sup>13</sup> [porta.unesco.org/culture/en/files/12762/11295421661/mexico\\_en.pdf/...](https://portal.unesco.org/culture/en/files/12762/11295421661/mexico_en.pdf/...)

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**Question 5 - Would you like to add anything else?**

BlakDance would stress that this inquiry must focus on both classical and contemporary forms of cultural expression. The development of new forms of expression is an important part of contemporary Indigenous culture. Dynamic cultures are often influenced by different styles, but care must always be taken when interpreting or adapting traditional or contemporary dance forms. In the case of traditional dance, it is essential to identify the person with authority to speak for that dance, consult with them for permission to use their dance, and follow their directions.

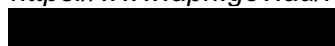
<http://artsfront.com/fake-art/>

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Indigenous\\_Affairs/The\\_growing\\_presence\\_of\\_inauthentic\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_style\\_art\\_and\\_craft](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft)

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