

Chapter 11

Indigenous cultural and intellectual property rights

11.1 This chapter discusses issues relating to Indigenous cultural and intellectual property (ICIP) rights and Indigenous communal moral rights (ICMR). Evidence to the inquiry has suggested that current intellectual property laws and moral rights legislation may not provide adequate protection of Indigenous cultural and intellectual property and Indigenous communal moral rights.

11.2 'Intellectual property' is an umbrella term for various legal entitlements which attach to certain names, written and recorded media, and inventions. The holders of these legal entitlements are generally entitled to exercise various exclusive rights in relation to the subject matter of the intellectual property. Intellectual property can be an invention, trade mark, original design or the practical application of an idea.¹

11.3 Intellectual property laws provide creators and inventors with certain economic rights to exploit their creations and inventions. Through international treaties such as the Berne Convention, intellectual property rights are enforceable internationally in countries which have signed such treaties in recognition that intellectual property rights are important economic rights.²

11.4 The following intellectual property rights are recognised by Commonwealth legislation:

- artistic, dramatic and literary works and publications under the *Copyright Act 1968*;
- registered industrial designs relating to commercial products under the *Designs Act 2003*; and
- trade marks identifying the origin of goods and services under the *Trade Marks Act 1995*.³

Indigenous cultural and intellectual property

11.5 Indigenous cultural and intellectual property refers to the rights of Indigenous Australians to their heritage:

1 IP Australia web site, www.ipaustralia.gov.au, Accessed 29 May 2007.

2 T Janke and M Frankel, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, 1998, p. 51. Hereafter referred to as *Our Culture*.

3 Other legislation includes the *Patents Act 1990* and the *Plant Breeders Rights Act 1994*. These are not discussed in the paper as they do not relate directly to Indigenous arts issues. Other common law intellectual property rights include breach of confidence laws.

Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity.⁴

11.6 The Myer Report into the contemporary visual arts noted that for Indigenous cultures, intellectual property rights are an integral component of their cultural heritage.⁵ The nature or use of Indigenous heritage material is such that it is transmitted or continues to be transmitted from generation to generation. It is also regarded as belonging to, or originating from, a particular Indigenous group(s) or its territory.⁶

11.7 Indigenous cultural and intellectual property rights have been characterised as including the right of Indigenous people to:

- define what constitutes Indigenous cultural and intellectual property;
- own and control Indigenous cultural and intellectual property;
- be recognised as the primary guardians and interpreters of their cultures;
- authorise the use of Indigenous cultural and intellectual property according to Indigenous customary law; and
- be given full and proper attribution for sharing their heritage.⁷

11.8 Indigenous notions of cultural and intellectual property differ markedly from non-Indigenous notions of intellectual property. For instance, under Indigenous customary law, intellectual property rights are communally owned whereas under non-Indigenous laws these rights are owned by individual creators. Under Indigenous customary law, intellectual property rights are generally not transferable but transmission, if permitted, is based on a series of cultural qualifications. Under non-Indigenous laws intellectual property can be freely transmitted and assigned, usually for economic returns for a set time and in any medium. Intellectual property right holders can decide how or by whom the information can be transmitted or assigned. In addition, Indigenous customary law emphasises preservation and maintenance of culture, whereas non-Indigenous laws place an emphasis on economic rights.⁸

4 *Our Culture*, p. xvii.

5 Myer Report, p. 150.

6 T. Janke and R. Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006*, May 2006, p. 10. Hereafter referred to as the ICIP Paper.

7 ICIP Paper, p. 10; *Our Culture*, pp 47–48. Indigenous customary law is the body of rules, values and traditions that are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community.

8 *Our Culture*, pp 75–76; ICIP Paper, pp 11–12.

11.9 Submissions and other evidence argued that there is inadequate protection of ICIP, which has a detrimental impact on both cultural and financial outcomes for artists. Ms Ayres, Executive Director of the Arts Law Centre of Australia, stated that:

One big issue that always comes up when we are talking to Indigenous artists, particularly in the workshops that we give, is the need for the better protection of Indigenous culture and intellectual property. The Australian legal system just does not provide adequate protection.⁹

11.10 The Arts Law Centre of Australia identified some of the major concerns in relation to ICIP:

- lack of copyright protection of art and craft works produced by Indigenous communities;
- lack of protection for the traditional knowledge of communities contained within art and craft works;
- lack of understanding by non-Indigenous people of the collective ways in which some Indigenous artworks may be produced which may potentially affect authenticity; and
- the potential for non-Indigenous interests to exploit Indigenous words, names, symbols and other aspects of culture without redress being available to Indigenous custodians.¹⁰

11.11 Submissions argued that existing intellectual property laws are inadequate in recognising and protecting Indigenous cultural and intellectual property and these issues are discussed below. The Myer Report recommended that the relevant Commonwealth departments take action in relation to Indigenous intellectual property issues, including the misappropriation of Indigenous cultural imagery and iconography.¹¹

Copyright

11.12 Copyright is a set of specific rights granted by statute to creators of artistic and cultural material. The law protects categories of works under the *Copyright Act 1968* from unauthorised use and dissemination.

11.13 Copyright protects the creative works of Indigenous visual artists and craft practitioners to the same extent that it protects material created by non-Indigenous artists. However, there are gaps between the protection given to cultural material under the Australian legal system, and the rights and obligations in relation to cultural material under Indigenous customary law.

9 Ms Robyn Ayres, Arts Law Centre of Australia, *Committee Hansard*, 23 February 2007, p. 78. See also Mr Kim Willison, Artmark Australia, *Committee Hansard*, 11 April 2007, p. 50.

10 Arts Law Centre of Australia, *Submission 36*, p. 9.

11 Myer Report, p. 158.

11.14 The following requirements must be met for copyright to exist in a work. As noted below, much Indigenous cultural material does not meet these criteria.

- Originality – for copyright to exist in a work, the work must be original. This may pose problems for Indigenous art works. As a continuing expression of culture, many Indigenous people draw on their cultural heritage by, for example, painting pre-existing clan designs which have been handed down from their ancestors. It is this nature of Indigenous art that has raised the question of whether a new Aboriginal work, based on, or derived from, a traditional pre-existing theme, could satisfy the copyright requirement of originality.
- Material form – a work must be written down or recorded in some permanent, tangible form. Some forms of Indigenous art are ephemeral such as body painting and sand paintings. These may not be protected under copyright.
- Identifiable author – there must be an identifiable author, or authors, for copyright to exist in a work. Given the nature of Indigenous art an individual person or persons may not always be identifiable. For example, in rock art painting it may not be possible to identify a single artist or group of artists and copyright cannot be claimed.¹²

11.15 Copyright protection does not protect styles, methods or ideas. By way of contrast, Indigenous communities generally recognise ongoing rights in relation to particular images and styles.¹³

11.16 The duration of copyright protection is generally the life of the artist plus 70 years. The Act does not recognise any continuing right of Indigenous custodians to their ICIP after the term of copyright protection has expired. Yet cultural works remain part of an Indigenous group's culture and are of great significance to their traditional custodians in perpetuity.¹⁴ The Myer Report noted that the current time limit on copyright protection is inconsistent with Indigenous concepts of cultural heritage and traditional knowledge and that in any future review of the term of copyright, the particular needs of Indigenous visual artists should be taken into consideration.¹⁵

11.17 Various reforms to the Copyright Act were suggested. NAVA argued that the Copyright Act should be amended so that the copyright in works produced by Indigenous artists under certain employment arrangements should remain with the

12 T. Janke and R. Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, Law Reform Commission of WA, 2005, pp 458–459. Hereafter referred to as Background Paper. See also ICIP Paper, pp 52–55.

13 Myer Report, p. 151.

14 Background Paper, pp 459–461.

15 Myer Report, p. 153.

artist. NAVA suggested that Indigenous artists employed under CDEP schemes, for example, should retain copyright in the works they produce.

11.18 In addition, NAVA suggested that the Government develop guidelines for determining under what circumstances it is appropriate for an employer to own the copyright to a work produced by an Indigenous artist. These guidelines should acknowledge restrictions on ownership of culturally important material and knowledge.¹⁶

11.19 An alternative approach was advocated by Janke and Frankel. They argued that specific legislation which protects all Indigenous cultural and intellectual property is preferred over amendments to the Copyright Act. The specific legislation would recognise Indigenous cultural ownership in Indigenous visual arts and craft, and literary and dramatic works; and 'provide rights in that material which allow Indigenous people the rights of prior consent and to negotiate rights for suitable use'.¹⁷

Registered designs

11.20 Under the *Designs Act 2003* 'design' is defined in the following terms:

'Design' in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.

11.21 The designs laws protect designs as they are applied to products and items. Under Indigenous customary laws, a design or motif belongs to a certain Indigenous cultural group, and there are laws that govern who can use and reproduce this material. The designs law applies to Indigenous designs as it does to all designs that meet the requirements for protection. There is, however, no special protection for Indigenous designs or cultural material under the Designs Act.

11.22 A design can only be registered in relation to a 'product' – it is not possible to register a design itself. A 'product' is 'a thing manufactured or hand made'. Certain Indigenous designs such as clan insignia may not be commercially applied to a product, therefore they are not registrable as a design under the Designs Act.¹⁸

11.23 Under the Act, protection for registered designs exists for a maximum of 10 years. Once design protection expires the registered designs are able to be used by any person.

11.24 Indigenous peoples' right to use their communally-owned designs, and to exclude use by others under their customary law, is a cultural practice that continues in many Aboriginal communities:

16 NAVA, *Submission 27*, p. 10.

17 *Our Culture*, p. xxix.

18 Background Paper, pp 471–472; *Our Culture*, pp 63–64.

The limited term of protection for designs limits the rights of Indigenous cultural custodians to control the use of their sacred motifs or clan identified designs outside this period. Once the period has expired, any person, either inside or outside a cultural group, can use an Indigenous motif or design without seeking proper consent under customary law.¹⁹

11.25 Under the Act, generally, the person who creates the design or a person who employs the creator may register a design. There is no recognition of the communal ownership of the design as belonging to a cultural group or groups which is more applicable to Indigenous groups.

11.26 The Act protects certain items for industrial or commercial purposes. One study noted that it would be difficult to use the designs law to protect Indigenous designs that are protected under customary laws – 'protection under the Act is focussed on the commercial production of products and it would be necessary to be the producer of such products'.²⁰ The study noted however, that the Act may offer some protection for commercially applied Indigenous peoples' designs that meet the registration requirements.²¹

11.27 Reform of the Designs Act was suggested by some submitters. NAVA argued that the Designs Act should be amended to include provisions for the registration of Indigenous cultural designs, and that the period of protection for such designs should be in perpetuity or the life of the Indigenous owner community.²²

11.28 Janke and Frankel argued that specific legislation which protects all Indigenous intellectual property is preferred over amendments to the Designs Act. However, the authors argued that to the extent that the Designs Act can provide protection for Indigenous communities who wish to commercially exploit their designs, the Act and its registration process:

...should allow for registration of group interests so that Indigenous communal ownership of cultural designs is recognised. This might be done by allowing trusts and other group entities to become the registered proprietors of a registered design.²³

Trade marks

11.29 A trade mark is a sign used to indicate the trade origin or source of goods or services. Some Indigenous groups and individuals have complained about the use of Indigenous cultural material as business names and trade marks by non-Indigenous people and businesses.

19 Background Paper, p. 473.

20 Background Paper, p. 475.

21 Background Paper, p. 475.

22 NAVA, *Submission 27*, p. 10.

23 *Our Culture*, p. xxx.

11.30 Once a trade mark is registered, the registered owner will be granted a type of property right to use that trade mark in association with the trade in question. Trade marks are personal property and can be licensed, assigned and transmitted. Once registered, the trade mark is protected for 10 years, which may be renewed, in sets of 10 years, for as long as the registration is kept current.²⁴

11.31 One study noted that in this respect trade mark registration is continuous and can be used to protect Indigenous cultural material for longer periods of time, even beyond the copyright period – 'this feature of trade marks law makes it more flexible than copyright, designs and patents for protecting Indigenous rights because the problem of the public domain may be avoided'.²⁵

11.32 The *Trade Marks Act 1995* allows third parties to oppose the registration of a trade mark. Grounds for opposition include that the trade mark does not distinguish the applicant's goods and services from the goods and services of others; is scandalous or contrary to law; or is likely to deceive or cause confusion.²⁶

11.33 One study noted that Indigenous people may be able to make use of the restrictive provisions under the Trade Marks Act to challenge culturally offensive trade marks that are scandalous or contrary to law:

It is arguable that trade marks which make use of sacred material are scandalous and contrary to Indigenous customary laws. Perhaps there is scope for an Indigenous community to challenge marks that are against customary laws as scandalous marks. It may at least be possible to draw offensive use to the attention of the registrar [of trade marks].²⁷

11.34 One study argued that amendments to the Trade Marks Act should be considered. These would provide that Indigenous and non-Indigenous persons and/or companies would be able to obtain registration of marks containing Indigenous designs, words or symbols with the consent of the particular Indigenous community and if other conditions regarding cultural appropriateness are met.²⁸

Certification marks

11.35 The Trade Marks Act has provisions that allow for the registration of certification marks. Certification marks are trade marks which are used to distinguish goods or services which possess a certain quality, accuracy or characteristic. A mark

24 *Our Culture*, pp 68–71; Background Paper, pp 475, 477.

25 Background Paper, p. 477. The notion of the public domain refers to what is freely available for use and reproduction without the need to obtain permission from the intellectual property owner.

26 *Our Culture*, pp 70–71; Background Paper, p. 476.

27 Background Paper, p. 476.

28 *Our Culture*, p. xxxi.

or label verifying that a product or service is authentically Indigenous could be registered as a certification mark under the Trade Marks Act.

11.36 An example of this approach is the National Indigenous Arts Advocacy Association's (NIAAA) label of authenticity system launched in 2000. NIAAA registered two certification marks – an authenticity mark and a collaboration mark. The label of authenticity is the primary mark that, when affixed to goods or services, denotes that a product or service is created wholly by an Indigenous person. The collaboration mark denotes that a genuine Indigenous work has been reproduced under a legal licensing agreement. The label of authenticity scheme is discussed further in chapter 10.

Need for specific legislation

11.37 As noted above, some submissions and studies argued for the introduction of *sui generis* (specific) legislation to protect ICIP. The Arts Law Centre of Queensland (ALCQ) argued that attempts to use the Trade Marks and Designs laws to protect Indigenous cultural expression 'are unlikely to be a suitable means of protection'. The ALCQ argued that the Government should enact a new intellectual property law, separate but complementary to existing intellectual property laws, to provide for Indigenous cultural expression.²⁹

11.38 Ms Winikoff, Executive Director of NAVA, also stated that 'in the longer term, *sui generis* legislation is needed because the whole concept of collective intellectual property is one that is not dealt with well by existing copyright law'.³⁰

11.39 The Arts Law Centre of Australia argued that *sui generis* legislation would provide 'significant, tailored protection' for ICIP and should legally recognise the following:

- communal ownership;
- artistic styles;
- intangible forms;
- time limitations; and
- protection against Indigenous cultural materials being used without the appropriate consent of Indigenous custodians.³¹

11.40 Janke and Frankel also argued for the introduction of *sui generis* legislation. Similar to the Arts Law Centre proposal cited above, they proposed that the legislation provide protection for works that are intangible – there need not be a requirement of

29 ALCQ, *Submission 45*, p. 3.

30 Ms Tamara Winikoff, NAVA, *Committee Hansard*, 23 February 2007, p. 19.

31 Arts Law Centre of Australia, *Submission 36*, pp 14–15.

material form. Rights should also exist in perpetuity. Any rights granted should ensure that there are no time limits on protection.

11.41 Under the proposal the legislation would include provisions which prohibit the wilful destruction of cultural material; address misrepresentations of the source of cultural material; and provide for payment to Indigenous owners for the commercial use of their cultural material. Disputes would be mediated through an Indigenous Cultural Tribunal, comprised of Indigenous custodians, specialists in Indigenous law and community elders. The legislation would include offences such as fines for unauthorised use of cultural material and criminal sanctions for more serious offences.

11.42 The authors noted that the framers of the legislation would also need to consider how the proposed legislation would interact with existing copyright and intellectual property laws. They suggested that the legislation should apply only to cultural works outside the copyright period – where copyright does not exist. The authors emphasised the importance of extensive consultation with Indigenous people concerning the introduction of any proposed legislation.³²

COAG initiatives

11.43 Evidence pointed to the need for education and awareness strategies for Indigenous people and the wider community on ICIP rights issues.³³ As part of the COAG Framework on Reconciliation, in 2002 the Cultural Ministers Council (CMC) agreed to give priority to Indigenous Intellectual Property (IIP) issues. In 2003, CMC agreed that the key objectives for CMC in terms of IIP should be:

- 'promoting greater links between business and Indigenous communities about IIP to enhance greater economic independence;
- raising awareness in Indigenous communities, consumers and commercial operators of the need to protect IIP; and
- enhancing coordination of existing networks of Indigenous and non-Indigenous organisations working in the area of IIP'.³⁴

11.44 CMC allocated \$100 000 for an Indigenous Intellectual Property Toolkit (IIP Toolkit) project to further these aims. The WA Department of Culture and the Arts (DCA) is managing the development of the Toolkit. The project involves assessing existing information and resources in the Indigenous intellectual property area to ascertain the extent of the resources available; and developing and piloting an IIP Toolkit aimed at artists, consumers and dealers, which caters for regional differences. The project commenced in November 2005 and has an 18-month timeline.

32 *Our Culture*, pp xxxvi-xxxviii.

33 *Our Culture*, p. xlv; NAVA, *Submission 27*, p.10; Viscopy, *Submission 44A*, p. 19.

34 DCITA, *Submission 50*, pp 9–10.

11.45 DCA indicated that Stage One of the development of the Toolkit entailed consultation with over 600 individuals and organisations, including artists and arts organisations, private and public galleries, auction houses and consumer groups across Australia. Stage Two is currently under way and involves the development of a prototype model to be piloted with representatives of major identified target groups – artists, consumers and dealers – to gather feedback on the efficacy of the product.³⁵

11.46 The Department stated that:

The national Indigenous Intellectual Property Toolkit, specifically targeting Indigenous artists, commercial operators and consumers will provide significant benefits by increasing understanding and respect for Indigenous culture, improving relationships between the sectors and maximising ethical economic opportunities.³⁶

Indigenous communal moral rights

11.47 Submissions argued for the introduction of Indigenous communal moral rights legislation arguing that existing moral rights legislation does not provide adequate protection for Indigenous people.³⁷

11.48 Moral rights were introduced into the Copyright Act under the *Copyright Amendment (Moral Rights) Act 2000*. Moral rights include the right of an author to be identified as the author of a particular work; the right not to have authorship falsely attributed; and the right of integrity of authorship. This later right provides that an artist may bring an action if the work is subjected to derogatory treatment. Moral rights are individual rights only. Currently, an Indigenous clan group or community cannot generally assert moral rights collectively.³⁸

11.49 The Myer Report noted that the current moral rights legislation does not provide adequate protection for Indigenous art and crafts practitioners given the social, economic and community responsibilities of artists under Indigenous customary law.³⁹ The report recommended that as part of Commonwealth action in relation to Indigenous intellectual property issues generally, that the Commonwealth extend moral rights to Indigenous groups.⁴⁰

11.50 The Myer Report noted that the rights of Indigenous communities to assert moral rights are important due to the way in which cultural property is viewed in Indigenous communities:

35 DCA, *Submission 18*, p. 8.

36 DCA, *Submission 18*, p. 8.

37 Arts Law Centre of Australia, *Submission 36*, p. 11; NAVA, *Submission 27*, p. 9.

38 Background Paper, pp 466, 468.

39 Myer Report, p. 152.

40 Myer Report, p. 158.

The Indigenous 'world-view' gives priority to the interests of the community over the interest of individuals. Under customary law, ownership of cultural property, imagery and folklore is a collective, rather than individual phenomenon. The value accorded to cultural property is based upon both the aesthetic qualities of the work and the degree to which the work reflects the livelihood and culture of the community. The artist is a custodian of the cultural property, and any use, alteration or reproduction of the work will need to be approved by community elders.⁴¹

11.51 In December 2003 the Government drafted proposed amendments to the Copyright Act for Indigenous communal moral rights to extend these rights to Indigenous groups. The draft bill was intended to give effect to the Government's 2001 election policy commitment and to a commitment made to Senator Aden Ridgeway when the Moral Rights Bill was passed in December 2000.⁴² The Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 was distributed to a number of organisations and individuals for comment.

11.52 The draft bill proposed that for Indigenous communal moral rights to be recognised they must be a copyright work or film. The bill proposed that a number of conditions would need to be met before ICMR will arise: the work must be made; the work must draw on the traditions, beliefs or customs of the community; the work must be covered by an agreement between the author and the community; the Indigenous community's connection with the work must be acknowledged; and written notice of consent would have to be obtained by the author (or their representative) from all people with an interest in the work. It was also proposed that communal moral rights would exist alongside individual moral rights. Indigenous communal moral rights would exist in a work for the duration of the copyright period.⁴³

11.53 The draft bill was criticised as being 'highly complicated and legalistic'.⁴⁴ The Arts Law Centre of Australia argued that the bill was 'seriously flawed' making it 'too difficult' for communities to secure the protection the legislation was intended to provide. The Centre noted, for example, that the bill did not protect works where copyright has expired or elements of ICIP in which copyright subsists.⁴⁵ Ms Winikoff, Executive Director of NAVA, stated that 'we have some reservations about its form [the bill] but not about the fact that one is needed'.⁴⁶

11.54 The Northern Territory Government also expressed reservations, arguing that:

41 Myer Report, p. 152.

42 Background Paper, p. 468; ICIP Paper, p. 13.

43 ICIP Paper, pp 14–18.

44 See, for example, Background Paper, p. 470.

45 Message Stick ATSI web site, *Indigenous Communal Moral Rights Bill Seriously Flawed: Arts Law*, <http://www.abc.net.au/message/news/stories/s1702624.htm>, Accessed 29 May 2007, See also ICIP Paper, pp 14–18.

46 Ms Tamara Winikoff, NAVA, *Committee Hansard*, 23 February 2007, p. 19.

...proposals relating to so-called Indigenous Community Moral Rights, as they are currently framed, will [not] provide the kinds of protection for Aboriginal visual arts that its proponents claim. On the contrary, there are arguments that such legislation has the potential to promote division amongst and between Aboriginal groups, for no real benefit to artists, especially individual practitioners.⁴⁷

The Attorney-General's department advised the committee that it is aware of concerns raised by some stakeholders and is working on options to 'simplify the drafting of the bill'.⁴⁸

11.55 There were criticisms of a perceived lack of consultation with Indigenous groups. The Arts Law Centre of Queensland commented on the 'very limited circulation of the draft bill for public comment'.⁴⁹ The Arts Law Centre of Australia indicated that the organisation along with a few other organisations and individuals were provided with a copy of the bill on a confidential basis and made submissions to Government on the proposed legislation.⁵⁰ One study noted that the confidentiality surrounding the bill restricted the free flow of discussion on the proposed legislation. As a result there was only limited consultation with Indigenous people, communities and artists – those very groups supposed to benefit from the legislation.⁵¹

11.56 The Attorney-General's Department advised the committee that the Government initiated a consultative process on the draft bill in December 2003 that extended into the first half of 2004. The consultation process was 'targeted' so that the Government could obtain the views of a range of groups, including Indigenous groups, artists' representatives, art galleries and museums as well as Commonwealth and state government agencies. The department indicated that the Government received 'extensive feedback' from these groups. In addition, the Attorney-General met with some stakeholders to discuss the draft bill.⁵²

11.57 The Attorney-General's Department advised that the Copyright Amendment (Indigenous Communal Moral Rights) Bill is listed for introduction in the 2007 winter sittings – 'however, introduction of the bill will depend on whether the Government decides that further consultation is required'. The department indicated that it has met with some stakeholders this year to discuss the draft bill.⁵³

47 NT Government, *Submission 57*, p. 22.

48 Attorney-General's Department, *Correspondence*, 24 May 2007.

49 Arts Law Centre of Queensland, *Submission 45*, p. 3.

50 Arts Law web site, *Indigenous Communal Moral Rights Legislation*, <http://www.artslaw.com.au/documents/files/ICMRLetterAndExecutiveSummary2006.pdf>; see also Arts Law Centre of Queensland, *Submission 45*, p. 3.

51 ICIP Paper, p. 19.

52 Attorney-General's Department, *Correspondence*, 24 May 2007.

53 Attorney-General's Department, *Correspondence*, 24 May 2007.

Recommendation 24

11.58 The committee recommends that as a matter of priority the government introduce revised legislation on Indigenous communal moral rights.

Conclusion

11.59 Evidence to the inquiry argued that existing intellectual property laws are inadequate in recognising and protecting Indigenous cultural and intellectual property rights. The committee believes that current legislation generally fails to take into account the very different notions of cultural and intellectual property that form the basis of Indigenous society and cultural identity.

11.60 The chapter has discussed specific inadequacies in the current copyright, designs and trademarks legislation. Various proposals have been suggested to address these deficiencies. The committee considers that the Commonwealth should introduce legislation to protect Indigenous cultural and intellectual property rights. It notes that protection for Indigenous cultural and intellectual property could be implemented either by amendments to existing legislation or the introduction of specific legislation. The committee believes that specific legislation would probably provide the most effective form of protection given the difficulties associated with amending a variety of current laws.

11.61 Earlier chapters noted that there has been limited success in using laws to ensure the integrity of the Indigenous art market. The drafting of new laws should be conducted with particular attention to the specific situation and disadvantages faced by Indigenous artists in seeking to assert their property and contractual rights.

Recommendation 25

11.62 The committee recommends that, recognising the complexity of the issues in this area, the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights, that the legislation be drafted to ensure prosecutions of breaches will have a realistic chance of success, and that the Australian Customs Service be given an appropriate role in assisting the protection of these rights in relation to imported and exported goods.

11.63 Evidence also argued that existing moral rights legislation does not provide protection for Indigenous communal moral rights. The committee believes that action to implement the extension of communal moral rights to Indigenous groups is desirable. At the same time it believes that the individual moral rights of all artists, including Indigenous artists, should be protected on equal terms. The committee is pleased to note that the Government intends to introduce the Copyright Amendment (Indigenous Communal Moral Rights) Bill in the 2007 winter sittings.

