

CONFERENCE REPORT
ART FOR MONEY'S SAKE:
PROTECTING THE CULTURAL RIGHTS IN INDIGENOUS ARTS
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Indigenous Intellectual Property Seminar, University of Melbourne, 12 July 2000.

[69] On 12 July 2000 the Aboriginal and Torres Strait Islander Commission (ATSIC) and The Australian Centre (of the University of Melbourne) jointly hosted a one day indigenous intellectual property seminar entitled *Art for Money's Sake: Protecting the Cultural Rights in Indigenous Arts*. The seminar was held at the University of Melbourne.

Keynote speeches were given by: Commissioner Marion Hansen (ATSIC Commissioner for Victoria); The Honourable Keith Hamilton (Minister for Aboriginal Affairs, Victoria); Terri Janke (solicitor and author of *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights*); Professor Marcia Langton (Indigenous Studies, University of Melbourne); and Dr Mick Dodson (Chair, Australian Institute of Aboriginal & Torres Strait Islander Studies).

Brief presentations were also made by the following people in two parallel sessions: Tim Klingender (Sothebys), Debra Jefferies and Elizabeth Jones (Arts Victoria), Gaye Sculthorpe (Museum of Victoria), the writer, Professor Tim Murray (Department of Archaeology, Latrobe University), Esmail Manahan (Koori Business Network, Aboriginal Affairs, Victoria), Bill Nuttall (Niagra Galleries), Kevin Williams (indigenous artist), Luke Cummins (indigenous artist), Gail Harradine (Koorie Heritage Trust) and Louise Terry (Tourism Victoria).

The Seminar also allowed for discussion amongst those attending, particularly by way of two parallel discussion workshops, as well as a discussion moderated by Jon Faine (ABC Radio). What follows is a report of the Seminar's proceedings.

¹ Special Counsel, Blake Dawson Waldron, and Chairperson of the Law Institute of Victoria's Intellectual Property, Trade Practices and Information Technology Committee.

Commissioner Hansen noted the unacceptable commercial exploitation of indigenous culture, was critical of the conduct of archaeologists and anthropologists, and spoke of the need for indigenous people to have control over their culture.

[70] The Honourable Keith Hamilton referred to the need for a national approach. He referred to the situation which exists today where some items cannot be sold in Victoria, but can be sold in New South Wales. Minister Hamilton called for new ideas and the need to make bridges between Australian law and indigenous law. Minister Hamilton said that Victoria had programs that informed indigenous artists of their rights, although he acknowledged that existing intellectual property laws do not give reasonable and proper protection.

Terri Janke pointed out that indigenous cultural heritage is more than just indigenous art. Indigenous cultural heritage includes music, dance, song, ceremonies, language, symbols and designs, stories, scientific, agricultural and ecological knowledge, items of moveable cultural property, immovable cultural property (such as indigenous sites of significance), cultural environment resources, indigenous ancestral remains, and documentation of indigenous people's heritage in all forms of media. Although Terri Janke called for new laws, she said that there was a need for indigenous people to be more informed about how existing legal structures can be used to protect their cultural and intellectual property rights.

Professor Langton spoke of her establishment of a research centre in the Northern Territory with Commonwealth Government funding — The Centre for Indigenous National Resources Management. The Centre's goals include incorporation of indigenous knowledge into university canon. Areas of research include traditional and ecological knowledge as well as biological knowledge. Protocols and ethics have been developed which bind all staff, students and fellows of the Centre. Professor Langton said that 'it is Centre policy that, wherever possible, the relevant indigenous community should share in the ownership of copyright in copyright material published by the centre'. Professor Langton also drew attention to the following point:

We need to acknowledge plainly and clearly that there are throughout Australia ... breaches of Aboriginal customary property and intellectual property breaches carried

out by other Aboriginal people who are not members of particular customary groups owning that property. So ... it is entirely possible ... for an Aboriginal person to say that he or she owns a design, and to reproduce it, without authority.

Dr Dodson spoke of the need for there to be a central focus on the indigenous people's rights to own and control their knowledge. That knowledge includes the indigenous people's knowledge in land, environment and conservation management, biological resources and also their practices in a wide range of cultural matters including arts, dancing and ceremony. Dr Dodson went on to make the following important observation:

Within the one object, oral tradition or painting, there are parts that are considered secret, such as certain aspects of a design or theme, and there are other parts that are not considered secret. (Alternatively), something can be considered secret in one context and not in another or it may be secret to certain groups or individuals, but not others. Even then, this may vary depending on the particular stage or situation of that group or individual. The point I'm trying to emphasise is the complexity, subtlety and differential base of the cultural expression, knowledge and knowledge management within our society. Given these considerations, it is clear that our laws and customs do not fit neatly into pre-existing categories of the western legal system. One of the big problems in the western legal system is that it is always on about defining things; it has real difficulty in defining the scope of our concerns and in knowing precisely what is it in our society that needs protection. Whilst it is in that mode, it is a long way from being able to provide for such protection. *This is the conceptual difficulty with the existing legal system; it cannot embrace what it cannot define, and that lies at the heart of the problem.* (emphasis added)

Dr Dodson then went on to consider who has the right to inquire into indigenous knowledge, especially secret knowledge. He noted that once indigenous knowledge enters into the public domain it then becomes freely available to all and is treated like a marketable commodity. Then whatever cultural meanings are attached to such knowledge is lost. Dr Dodson said that there was a need for a way of enabling the secret-sacred content of knowledge to remain strictly confidential and secret.

[71] Tim Klingender referred to the *Moveable Cultural Heritage Act* which he noted

requires an export permit for an indigenous art work which is more than 20 years old and valued at more than \$10,000. He referred to the policies developed by Sothebys whereby it only accepts Aboriginal art works which are sold through Aboriginal art centres and are not less than 3 years old. The age requirement is so that sellers do not immediately profit from the resale and this reduces the risk of blatant exploitation of indigenous art works. Tim Klingender supported a resale royalty scheme in theory, but noted that it would have to be national and would have to be thought through in order to ensure that it is practical. He did warn that a resale royalty scheme would only benefit a few artists as any resale royalty scheme would need to set a workable threshold value which would have to be passed before art works could come within the resale royalty scheme. Tim Klingender noted that there were relatively few indigenous works which sold for more than \$5,000.

Debra Jefferies and Elizabeth Jones explained that Arts Victoria is a State Government arts advisory and funding body. It is involved in the provision of funding of indigenous arts development, for example through funding RMIT Arts Development, Koori Heritage Trust and Shepparton Aboriginal Arts Council. It is also involved in promoting Victorian indigenous artists, for example through its Indigenous Expressions art kit. Debra Jefferies and Elizabeth Jones identified the need to improve business, copyright and other legal information in Victoria.

Gaye Sculthorpe reported that the Museum of Victoria is planning an exhibition called 'Two Laws' which will look at indigenous systems of knowledge, law and property and how these systems differ from Western systems of knowledge, law and property. A process of consultation and approval was part of developing the exhibition. There will be over 800 photographs and over 300 objects on display, all of which had to go through a process of gaining approval to use each of them. The Museum generally buys contemporary indigenous works from artists, through commission, reputable dealers or through community controlled art centres. The Museum of Victoria has policies in place to return any ancestral remains or sacred items to communities upon request.

The writer explained how indigenous art works based upon pre-existing traditional designs could generally still be the subject of copyright protection but the underlying pre-existing traditional designs would not be protected by copyright. Whilst some

solutions may take greater intellectual and political effort, some are readily apparent and easily capable of implementation. For example:

- reporting to the Australian Competition and Consumer Commissioner (ACCC) instances where an art dealer acts in an unconscionable manner to an Aboriginal artist;
- seeking the assistance of law firms' pro bono programs where the ACCC is not prepared to take action in respect of the unconscionable conduct; and
- where major companies make objectionable use of traditional art images in promoting their commercial products, then leading members of the indigenous community ought to explain to such companies how indigenous cultural sensitivities are prejudiced by such use of the images, and what course ought to be followed (from an indigenous cultural perspective) if companies wish to make commercial uses of traditional art images.

Discussion ensued as to whether there ought to be any restrictions on Victorian indigenous people reproducing designs which are commonly [72] associated with indigenous groups in Northern Australia. It was apparent that there was no uniform view amongst the indigenous members of the audience.

Professor Tim Murray acknowledged that the relationship between archaeologists and indigenous people is a complex and at times fairly fraught one. Professor Murray said that:

I will begin ... by making two sweeping, but accurate, generalisations. First, by far the bulk of archaeologists working with indigenous communities explicitly acknowledge that indigenous people in Australia own the cultural properties (be they sites or artefacts) which have another existence as 'archaeological information'. Second, that archaeology can only be practised in Australia among indigenous communities in an environment free from coercion, based on the informed consent of communities to whatever activities archaeologists might want to carry out. These two generalisations provide an umbrella of practice which extends right across the gamut of interactions between communities and academic archaeologists.

Professor Murray went on to say that:

Although a formal recognition of ownership and control of indigenous cultural heritage by indigenous peoples still awaits us, in practice archaeologists and indigenous communities are hammering out agreements which are premised on such an acknowledgement. Although conflict can (and certainly does) occur, there is a strong sense that a positive relationship (based on the recognition of rights and interests) is evolving.

Esmail Manahan spoke of the need to inform Aboriginal artists of copyright issues and ways to avoid being exploited. The Koori Business Network has been involved in developing workshops and seminars at the community grass roots level and talking to Aboriginal artists about these issues. One of the other issues that Esmail Manahan mentioned was

that artists in Victoria have difficulty getting recognition for their work given that in most of the galleries in Victoria the work which is exhibited is predominantly from Northern Australia. Some part of the role of the Koori Business Network is to educate and work with galleries and show them the beauty of the art that exists in Victoria.

Bill Nuttall spoke from the perspective of a commercial gallery operator. Kevin Williams outlined his work as an indigenous artist. Luke Cummins said that it was important for Koori youth to identify with imagery from their own country, to balance the many images from other Aboriginal people's country. Gail Harradine spoke of the Koorie Heritage Trust's collection of art works from south-eastern Australia, and the Trust's involvement in the return of ancestral remains. Louise Terry outlined how Tourism Victoria seeks to ensure that the integrity of indigenous culture is maintained whilst it responds to the demand of international visitors to experience indigenous culture.

Two parallel discussion workshops were held, and the issues raised in them were further discussed at the final session of the day which was a discussion session moderated by John Faine. The issues discussed included:

- the Label of Authenticity which is presently in existence;

- a possible resale royalty scheme which could cover both indigenous and non-indigenous art;
- the inadequate recognition and support (for example, by commercial art galleries) of Victorian indigenous art;
- the need for better access to legal advice by indigenous artists and an effective education program for indigenous artists regarding the sale and resale of their art works;
- the need for contemporary Victorian indigenous artists to undertake research into the original images and designs from their area of the country, thereby revitalising those images, but acknowledging the difficulties in doing so;
- the desirability of having a future seminar on non-visual arts aspects of indigenous culture particularly [73] given the primary focus in this Seminar, and many others, being on the visual arts; and
- the need for a conference at which indigenous people can talk about the issues amongst themselves.

To the writer, several interesting issues emerged from the Seminar. Four of them are set out below.

First, it is widely assumed, and this was evident at the Seminar, that the Label of Authenticity authenticates only that an indigenous person is involved in the creation or production of the work. However, the Authenticity Mark Certification Rules also contains the following rule (Rule 4.1):

In the case of Works or Services which purport to encode, depict or reflect the ceremony, law, knowledge, customs, stories, dreaming or ritual of the traditional Indigenous owners of particular land or to in some other sense belong to that land, the Authenticity Mark will only be used in connection with those Works or Services if they were produced in accordance with any customs or law of the relevant traditional Indigenous owners of the land in question and if the Certified Indigenous Creator(s) who authored the Works or presents the Services has obtained any necessary permissions or approvals required under those customs or law for the creation, publication, sale and performance or other proposed dealing in the Works or Services.

Secondly, there is significant disagreement amongst indigenous people (for example, between indigenous people from South-Eastern Australia, and indigenous people from Northern Australia) as to the rights that South-Eastern indigenous people have to reproduce images and designs which are commonly associated with Northern Australia.

Thirdly, there is the difficulty identified by Dr Mick Dodson that 'the existing legal system cannot embrace what it cannot define'. Later in the discussion phase of the Seminar Dr Dodson said that the 'law needs to shift its paradigm and cannot keep asking Aboriginal people to define their need in European legal terms'. Even without taking account of political considerations, the prospect of providing indigenous people with legislative control over the reproduction of indigenous art (beyond that which is provided in the existing copyright law and in the proposed moral rights law) seems a long way off when the choice is between, on the one hand, formulating a legislative solution which addresses the requirement for adequate definition, given the apparent current lack of progress towards that end, and, on the other hand, the law shifting its paradigm in the way suggested by Dr Dodson.

Finally, it is apparent from the Seminar's presentations, particularly those of Professor Marcia Langton, Professor Tim Murray, Tim Klingender and Gaye Schulthorpe that non-legally binding policies, protocols and ethics (which do not require the same degree of definition as legislative solutions) are being developed in a variety of areas to attempt to address indigenous cultural sensitivities.