

**AUSTRALIAN ARTS LAW UPDATE**  
**FINDINGS AND RECOMMENDATIONS OF THE MYER REPORT**

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[135] In September 2002, Rupert Myer's *Report of the Contemporary Visual Arts and Craft Inquiry* (the Report) was published.<sup>2</sup> The Inquiry consulted widely and received submissions (190) from many arts organisations, practising artists, galleries, and educational institutions. The 400 page report includes the following chapters and has a total of 20 recommendations, many of which are multifaceted:

- *Valuing Artists*: examines issues such as artists' income; education and training; new technologies; funding for artists; as well as the issues canvassed in more detail below by Arts Law.
- *Strengthening the Infrastructure*: discusses contemporary art organisations and craft and design organisations; major art museums; university and regional galleries; art and craft centres; artist-run initiatives; and membership service or national/representative organisations.
- *Expanding the market*: covers audiences; commercial markets; promotion and touring; major events; international promotion and exchange; and Artbank.
- *Resourcing the sector*: looks at the role of governments; policy objectives; private sector support; and broadening funding.

[136] Some of the intellectual property issues, raised by the contemporary visual arts and craft sector, and the relevant findings that emerge from the Inquiry, are outlined below. It is noted that a recent meeting of the Australian Cultural Ministers Council<sup>3</sup> considered the recommendation of the inquiry and unanimously supported the findings of the Report. The Commonwealth indicated its intention to give close consideration to the recommendations relating to taxation, superannuation, copyright protection and resale royalties for artists.

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<sup>2</sup> Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry*, Commonwealth of Australia (2002) 135–6.

<sup>3</sup> 16th Meeting of the Cultural Ministers Council, 28 March 2003.

### **Government Copyright**

Under the *Copyright Act 1968 (Cth)* (the *Copyright Act*) where the artistic work is created or first published under the direction or control of the Commonwealth, or a state or territory government, the government will own the copyright in the material produced unless the artist can get the government to agree that the artist retains the copyright. The Report notes that in the *Review of the Intellectual Property Legislation under the Competition Principles Agreement*, the Intellectual Property and Competition Review Committee (IPCRC) found that the government should not benefit from preferential treatment under the *Copyright Act* and recommended that the Act be amended so that governments are in the same position as others under the Act.

The Report notes the government's partial acceptance of the IPCRC's recommendation to amend the *Copyright Act* in relation to preferential treatment that the government considers unjustified, but rather than amending the legislation, the government's position is that it would be better to develop '*best practice policy guidelines for Crown ownership in Commonwealth's agencies that could be more immediately effective and serve as a model for other jurisdictions*'.<sup>4</sup> The Inquiry endorsed this approach.

### **Digital Licensing**

The *Copyright Amendment (Digital Agenda) Act 2000 (Cth)* gives the owner of copyright the legal right to control how their work is electronically transmitted to the public or made available online. A creator or copyright owner may now license someone to reproduce, publish or communicate a work of art to the public in both offline and online environments. A number of issues were raised with the Inquiry about the licensing of copyright material online. These included what terms should apply to licences; how payment should be determined and the protection of the moral rights of authors/artists/creators.<sup>5</sup> The Inquiry stated the view that a consistent industry wide approach to licensing would aid in protecting creators and ensure others adequately remunerate artists for use of their works online.<sup>6</sup> The Report notes that

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<sup>4</sup> Myer, above n 2, 136, fn 307.

<sup>5</sup> Ibid 136.

<sup>6</sup> Ibid.

collecting societies have developed a draft code of conduct, which covers digital licensing.<sup>7</sup>

The Inquiry recommends that the Commonwealth Government should commence consultations with key stakeholders in preparation for a review of the Digital Agenda (due 4 April 2004) and this should include consideration of the effectiveness of the voluntary code of conduct for collecting societies in standardising digital licensing practices (R 3.1).

It is noted that on 1 April 2003 Darryl Williams, the Commonwealth Attorney General, announced that the law firm Phillips Fox, had been appointed to analyse the Digital Agenda Copyright reforms.

#### [137] **Moral Rights**

The Inquiry found that there is uncertainty as to:

- the extent to which artists can contract to waive their moral rights,
- the extent to which the reasonableness defence is available for the infringement of moral rights and its application, and
- the need for the artist to assert their moral rights.<sup>8</sup>

The *Copyright Amendment (Moral Rights) Act 2000* (Cth) does not require that the moral rights be asserted by way of contract to be enforceable, but the Inquiry notes that it is becoming industry practice in both contracts in Australia and with overseas jurisdictions.<sup>9</sup>

The Inquiry recommends that the Government monitor the impact of the moral rights consent provisions and the defence of reasonableness on the visual arts and crafts sector. It also recommends that the Government should consider including a legislative provision deeming artists to have asserted their moral rights, to limit the unnecessary practice of moral rights being addressed in contracts (R 3.2).

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid 137.

<sup>9</sup> Ibid 137–8.

### **Term of Copyright**

The Report notes that a number of submissions from the visual arts and craft sector proposed the extension of the term of copyright in Australia to 70 years after the death of the creator.<sup>10</sup>

The Inquiry noted the lack of support by the IPCRC for extending the term of copyright. Their objections included:

- the lack of evidence that an extended term would provide an incentive for creators;
- the public interest in copyright works entering the public domain; and
- the creation of additional barriers to access and innovation.<sup>11</sup>

The Inquiry notes the pressure from the contemporary visual arts and craft sector to increase the term of copyright to the life of the artist plus 70 years and recommends an independent review to assess the impact of increasing the term of copyright (R 3.3).

### **Duration of Copyright in Photographs**

Unlike other artistic works, copyright in photographs taken before 1 May 1969, lasts for 50 years from the end of the year in which the photograph was taken and for photographs taken on or after that date, copyright continues until 50 years after the end of the year that the photograph was first published. Submissions to the Inquiry said that there is no justification for a distinction between the protection that should be given to a painting, sculpture or drawing and a photograph.<sup>12</sup>

[138] The Inquiry agreed and recommends the extension of the duration of copyright in photographs to match other copyright media (R 3.4)

### **Use of Copyright Materials by Artists and Fair Dealing**

The Inquiry discussed the submission from the Arts Law Centre of Australia which stated that many contemporary visual artists wish to use existing copyright materials

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<sup>10</sup> Currently, with the exception of photographs, copyright endures until 50 years after the death of the creator. Ibid 138.

<sup>11</sup> Ibid 138–9.

<sup>12</sup> Ibid 139.

for the purpose of parody or social comment.<sup>13</sup> Under current laws, to use copyright materials without a licence is an infringement of the copyright. The fair dealing exception does not extend to parody, social comment or appropriation. Arts Law also noted the problem for artists wanting to incorporate registered trade marks into their works. Where the artists wish to use the copyright material for such a purpose, the copyright owner may be unwilling to grant a licence. Arts Law suggested:

- a defence of artistic exception for a claim of trade mark infringement or defamation of a corporate entity; or
- a bill of rights to protect freedom of expression, particularly artistic expression; or
- broadening the existing defence of fair dealing.<sup>14</sup>

The Report sets out two other reviews that have considered these issues. It notes that the Copyright Law Review Committee (CLRC) in its report on *Simplification of the Copyright Act* recommended that the existing fair dealing provisions be reviewed and relaxed.<sup>15</sup> However, the IPCRC report concluded that the benefits to the community of the proposed new scheme did not outweigh the potential costs of the uncertainty that it would create and the Government accepted the IPCRC's finding.<sup>16</sup> The Inquiry concludes that this is an issue that should be monitored closely by the Government.<sup>17</sup>

### **Sculptures and Craft Works on Public Display**

Currently sculptures and craft works on public display, unlike other types of visual art, can be photographed, drawn, painted, filmed or broadcast and these images can be published or sold without any infringement of the copyright.<sup>18</sup> A number of submissions to the Inquiry called for the repeal of these provisions noting the inconsistency between the rights of copyright owners in different media.<sup>19</sup> Whilst the

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<sup>13</sup> Ibid 140.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid and fn 330; Copyright Law Review Committee, Commonwealth Parliament, *Simplification of the Copyright Act 1968* (1998) [6.10].

<sup>16</sup> Ibid 140.

<sup>17</sup> Ibid 141.

<sup>18</sup> *Copyright Act 1968* (Cth) ss 65, 68.

<sup>19</sup> Myer, above n 2, 141

difficulty of enforcement of copyright in public art was acknowledged, the Inquiry was not convinced that there were compelling reasons for retaining the provisions.<sup>20</sup>

The Inquiry recommends that the Government considers the viability and implications of repealing the provisions dealing with copyright in such public art (R 3.5).

## **Indigenous Cultural and Intellectual Property**

### ***Moral Rights***

The Report finds that the moral rights legislative scheme provides inadequate protection for Indigenous visual arts and craft practitioners given the way in which cultural property is viewed by [139] Indigenous communities. The Report explains that rather than being individualistic, the Indigenous 'world view' gives priority to the interests of the community and that the ownership of cultural property, imagery and folklore is collective rather than individual.<sup>21</sup> The artist has the role of the custodian and any use, reproduction or alteration of the work needs to be approved by community elders.<sup>22</sup> Whilst the right of attribution may allow an artist to provide attribution to the community, it does not give Indigenous communities the right to require attribution themselves. The Report notes the proposals made by Arts Law (and similarly by Terri Janke in *Our Culture Our Future*):

- that the right of attribution be extended to attribution to the clan if the work embodies its traditional ritual knowledge;
- with respect to the right of integrity, derogatory treatment of an artistic work embodying traditional ritual knowledge should be extended to include treatment that causes harm to the clan.<sup>23</sup>

The Report recommends that relevant Commonwealth Government departments take action in relation to this issue and that moral rights should be extended to Indigenous groups (R 4).

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<sup>20</sup> Ibid 142.

<sup>21</sup> Ibid 152.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 512, fns 372, 373, 374.

### ***Term of Copyright***

The Report notes that the current time limitation imposed on copyright protection is inconsistent with Indigenous concepts of communal ownership of traditional cultural and intellectual property.<sup>24</sup> Many Indigenous artists and communities consider that rights to culture should last forever and that they should not lose protection if they have been passed down over generations therefore having passed into the public domain.<sup>25</sup> Whilst the Report acknowledges that the issues have significance across all art forms and have the potential to have an impact on all copyright industries, Indigenous and non-Indigenous, the Inquiry finds it requires detailed consideration in any future review of the term of copyright.<sup>26</sup>

### ***Appropriation of Indigenous Imagery and Designs***

The Report notes the level of concern to the Indigenous community over the wrongful appropriation of Indigenous images and designs for use in mass merchandising and the difficulty is accessing any remedies for such ‘cultural defamation’, particularly where the community rather than an individual, is harmed.<sup>27</sup> The report notes the harm to the value of, and respect for, Indigenous culture but also how it compromises Australia’s international reputation in the tourism market.<sup>28</sup> Initiatives such as protocols and the label of authenticity are discussed and the Inquiry finds that the protocols, whilst not legally enforceable, have an important role in raising public awareness, establishing industry standards [140] and encouraging discourse regarding protection of ICIP (Indigenous Cultural and Intellectual Property).<sup>29</sup> Some of the perceived problems with the label of authenticity are mentioned.

The Inquiry recommends Government action in relation to misappropriation of Indigenous cultural imagery and iconography (R 4).

### ***Cultural Heritage Legislation***

The Report notes the submission made by Sotheby’s raised the issue of the permits required under the *Protection of Moveable Cultural Heritage Act 1986* (Cth) for the

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<sup>24</sup> Ibid 153.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 154.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

exportation of objects of Aboriginal and Torres Strait Islander heritage if the work is more than 20 years old and was purchased for more than \$10 000.<sup>30</sup> The National Cultural Heritage Committee considers applications for export permits. Sotheby's submits that the current provisions are too broad and encompass works which are not necessarily of cultural significance.<sup>31</sup> The Inquiry notes the aspiration in the indigenous community for greater level involvement in the decision-making regarding cultural heritage matters. The Report recommends that in any future review of the Commonwealth and state cultural heritage legislation the needs of Indigenous peoples be considered in detail and decision-making processes be designed to operate in a consultative and culturally sensitive manner.

### ***Resale Royalty Right***

The Report considers whether it is desirable, and viable, to introduce a resale royalty into Australia.<sup>32</sup> Noting that the *Berne Convention* establishes a framework for resale royalties and that the harmonisation directive of the European Parliament and European Union which requires member countries to apply a resale royalty to works of living artists by 2006 and to all artistic works, including works of deceased artists from 2012,<sup>33</sup> it observes that the EU is campaigning to make the resale royalty compulsory under the *Berne Convention*.<sup>34</sup>

The Report examines the impact of resale royalties in Australia and concludes that, if introduced, a substantial amount of benefit would be enjoyed by artists, an estimated \$6.75 million per year, plus royalties payable under reciprocal arrangements with other countries.<sup>35</sup> The Report considers the impact upon the art market and concludes that it is unlikely that resale royalties would have an impact on the market over time. The Inquiry examined the case of Indigenous artists and concludes that in their case the case for resale royalties is particularly strong.<sup>36</sup> The Report examines some of the alternatives such as contract law but finds them unsatisfactory.<sup>37</sup>

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<sup>30</sup> Ibid 156.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 158.

<sup>33</sup> Ibid 159–60.

<sup>34</sup> Ibid 160.

<sup>35</sup> Ibid 164.

<sup>36</sup> Ibid 167.

<sup>37</sup> Ibid 168–9.

The Report makes a strong recommendation for the introduction of a resale royalty and that it be done through:

- the establishment of a working group to analyse the options for introducing a resale royalty right;
- conduct a tender to determine the appropriate body to administer the right; and
- Allocate \$250 000 for the development of an implementation strategy.<sup>38</sup>

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<sup>38</sup> *Ibid* 170.