

AUSTRALIAN INDIGENOUS ART COMMERCIAL CODE OF CONDUCT

CONSULTATION DRAFT

Background

In June 2007, the Senate Standing Committee on Environment, Communications, Information Technology and the Arts released a report entitled 'Indigenous Art – Securing the Future'. This Senate Inquiry was undertaken in response to reports of unscrupulous conduct in the Indigenous visual arts industry, in particular reports of unfair treatment of Indigenous artists. The report's 29 recommendations were broad ranging, reflecting the sector's diversity and complexity. Central to those recommendations was the call for an industry Code of conduct to address unethical behaviour. One of the key recommendations of this report was the introduction of an Indigenous Australian Art Commercial Code of Conduct to be developed for a two-year, self-regulatory period. If problems remain after this period, the report recommended a mandatory Code be introduced. The Australian Government response, tabled on 8 August 2008, agreed to recommendations in relation to the introduction of a Code and called on Industry to complete the Code.

This Code has been developed taking into account the Senate Inquiry's recommendations and the Australian Government response to that report. After two years of operation, this Code will be reviewed to determine whether it is an effective tool in addressing unscrupulous and unethical behaviour in the Indigenous visual arts industry.

The Code's operation

This Code aims to promote fair trade and practice in the Industry which will contribute to the wellbeing of Indigenous Australians more generally. This Code provides a detailed list of the terms that should be incorporated into agreements that relate to the trade in Indigenous artwork.

Persons or entities operating in the Indigenous Art Industry (such as dealers, agents, art galleries, auction houses and art centres, wholesalers and retailers as defined in this Code) may apply to the Code Administration Committee that administers this Code to become a signatory to this Code.

Signing up to this Code is voluntary, but in making that commitment signatories are agreeing to comply with provisions of this Code.

This Code aims to promote fair trade and practice in the Industry and provides a detailed list of the terms that should be incorporated into agreements that relate to the trade in Indigenous artwork. This Code also provides guidance for signatories on complaints handling and resolution of disputes that may arise under this Code.

Conflict with legislation

A range of existing legislation and regulations already apply to businesses and individuals operating in the Indigenous visual arts sector and will be relevant for code signatories (an indicative list follows). Where there is any conflict or inconsistency between this Code and any Commonwealth, State or Territory legislation or regulation, that legislation or regulation shall prevail to the extent of the conflict or inconsistency.

It is important to note that this Code does not seek to identify or deal with behaviour which is already illegal under existing law. Illegal behaviour or practices should be brought to the attention of the proper authorities.

Existing legislation*

A New Tax System (Goods and Services Tax) Act 1999 (Cth);
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth);
Anti-discrimination law including equal opportunity, racial vilification and disability discrimination;
Commerce (Trade Descriptions) Act 1905 (Cth);
Copyright Act 1968 (Cth);
Copyright Amendment (Moral Rights) Act 2000 (Cth)
Crimes Act 1914 (Cth)
Design Act 1906 (Cth);
Income Tax Assessment Act 1936 (Cth);
Income Tax Assessment Act 1997 (Cth);
Occupational Health and Safety legislation;
Privacy legislation;
Protection of Movable Cultural Heritage Act 1986 (Cth);
Taxation Administration Act 1953 (Cth);
Trade Marks Act 1995 (Cth);
Trade Practices Act 1974 (Cth); and
Legislation governing workplace harassment victimisation and bullying

* This is an indicative list. You should seek independent advice about what your legal obligations are in the context of your business.

The Indigenous Australian Art Commercial Code of Conduct was initiated and the first draft prepared by the National Association for the Visual Arts based on extensive art industry consultation.

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Part 1 Preliminary

1 Name of Code

This Code is the Indigenous Australian Art Commercial Code of Conduct.

2 Purpose of Code

The purpose of this Code is to regulate the conduct of participants in the Indigenous art industry to ensure:

- (a) fair and ethical trade with artists;
- (b) transparency with the promotion and sale of artwork;
- (c) a fair and equitable dispute resolution system for disputes arising under this Code.

3 Definitions

In this Code:

agent means a person or organisation who sells artwork for or on behalf of an artist in return for a commission or fee.

art centre means a legally constituted Indigenous owned and governed organisation of which the artist is a member, primarily concerned with the production and sale of the artwork and acting as an agent for the benefit of its member artists

artist means an artist of Aboriginal and/or Torres Strait Islander descent, who identifies as Aboriginal and/or Torres Strait Islander, and is recognised as such by members of the community with which the artist identifies, and includes that artist's representative.

artist's representative means a person who has the authority to speak or act for the artist so they are considered to be the artist for the purposes of this Code.

artwork means a work of art or craft produced by an artist, whether or not incorporated into another work of art or craft produced by that artist or another person, including but not limited to painting, woodwork, ceramics, glass, jewellery, sculpture, fibre work, printmaking, photography, installation, video and multi media.

commercial art gallery means a gallery that is committed to the presenting, marketing and promoting of the artwork for sale.

commission means the percentage of the price of an artwork that the agent charges for services provided to the artist in the sale of an artwork by that artist.

community means the Aboriginal and/or Torres Strait Islander community with which the artist identifies.

culturally sensitive information means all information and knowledge of special religious, spiritual or customary significance considered to be secret, exclusive or restricted by an Aboriginal and/or Torres Strait Islander person, according to Aboriginal and/or Torres Strait Islander tradition.

dealer means:

- (a) an agent (as defined in this Code); or
- (b) a person or organisation who purchases artwork for the purpose of re-supply by means of sale, consignment or other distribution of that artwork which may include but is not limited to a wholesaler, retailer, art gallery, auction house or art centre.

Indigenous means Aboriginal and/or Torres Strait Islander descent who identifies as Aboriginal and/or Torres Strait Islander, and is recognised as such by members of the community with which the artist identifies, and includes that artist's representative.

Moral Rights is the right of attribution and the right of integrity

payment includes any form of remuneration or royalty unless otherwise stated.

provenance means the history of ownership of an artwork.

Traditional Owners means the local descent group of Aboriginal and/or Torres Strait Islanders who have common spiritual affiliations to a site on the land that place the group under a primary spiritual responsibility for that site and for the land.

4 Application

- (1) This Code is a voluntary Code that applies to a signatory to this Code.
- (2) To become a signatory to this Code a dealer must provide a written notice to the **Code Administration Committee** specifying:
 - (a) the identity of the dealer including the dealer's name and address; and
 - (b) the dealer's wish to become a signatory to the Code.
- (3) A dealer becomes a signatory to this Code upon receipt of written notification from the Code Administration Committee that they complied with the requirements of 4(2).
- (4) This Code applies to any artwork created by an artist, or dealing with an artist, on or after the day that the dealer becomes a signatory to the Code.
- (5) A dealer will ensure that any artwork agreement between an artist and the dealer that was entered into before the dealer became a signatory to this Code will be amended if required to ensure it is consistent with this Code.
- (6) The sanctions referred to in clause 20(1)(3)(c) of this Code will not apply during the first 3 months of a dealer becoming a signatory to this Code.

Part 2 Professional conduct

Division 2.1 Dealings with artists

5 Not engage in unconscionable conduct

- (1) A dealer must not engage in unconscionable conduct towards the artist or an artist's representative.
- (2) A dealer must not engage in any of the following types of conduct for the purposes of clause 5(1):
 - (a) harsh and/ or oppressive conduct which is so unreasonable that it goes against good conscience;
 - (b) unconscientiously taking advantage of the artist, or exploiting the artist, who is under a special disadvantage due to illness, ignorance, inexperience, impaired faculties, financial need, substance abuse, poor reading, writing or numeracy skills, lack of confidence in cross-cultural interactions, or other circumstance affecting the artist's ability to conserve their own interests;
 - (c) an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour;
 - (d) exerting undue influence, duress, coercion or pressure or using unfair tactics when signing up an artist or during the on-going relationship with the artist;
 - (e) not acting in good faith, which could include acting capriciously, or promoting the dealer's interests to the detriment of the artist;
 - (f) not giving an artist an opportunity to understand any documentation, ask questions or obtain advice;
 - (g) allowing the artist to rely on an incorrect assumption;
 - (h) requiring the artist to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the dealer;
 - (i) refusing or not being willing to negotiate the terms and conditions of any agreement entered into with the artist;
 - (j) remunerating an artist for their artwork by providing the artist with drugs or alcohol.

Division 2.2 Agreements with artists

6 Requirement to have an artwork agreement

A dealer must not enter into an oral or written agreement with an artist for the supply or acquisition of artwork (**artwork agreement**) unless the requirements of this Part are met.

7 Minimum terms of artwork agreement

An artwork agreement must specify the matters set out in Annexure A to this Code. [Note: *Annexure A will be a style template to be developed*]

8 Before entering into artwork agreement

All artwork agreements

- (1) Before a dealer enters into any artwork agreement with an artist for the purposes of this Code, a dealer must explain the nature, substance and key terms of the artwork agreement to the artist and what it means for the artist, including but not limited to:
 - (a) whether the dealer is acting as an agent or dealer in some other capacity;
 - (b) whether the agreement is exclusive or non-exclusive;
 - (c) delivery terms, including quantity of artwork required;
 - (d) payment terms, including method of payment and timeframes;
 - (e) timeframes for finishing the artwork;
 - (f) protocols for dealing with the artwork or reproducing the artwork;
 - (g) cooling-off period and terms;
 - (h) complaint handling.

Additional requirements for agent agreements

- (2) Where a dealer will be acting as an agent under the artwork agreement, then before the dealer enters into the artwork agreement with an artist for the purposes of this Code, the dealer must explain the nature, substance and key terms of the artwork agreement to the artist and what it means for the artist, including but not limited to the matters referred to in clause 8(1) and:
 - (a) whether the agreement is for full or part representation;
 - (b) the services to be provided by the agent;
 - (c) the artist's rights for approval of any contracts or other arrangements that may be negotiated by the agent on the artist's behalf;
 - (d) right of ownership of artwork until the artwork is sold;
 - (e) arrangements in relation to the Intellectual Property Rights relating to the artwork covered by the agreement;
 - (f) payment of commissions if any relating to the award of prizes;
 - (g) pricing and commissions if any relating to donations;
 - (h) the documentation and reporting to the artists on promotional activities to be undertaken by the agent on the artist's behalf;
 - (i) delegation of the agent's obligations.

Additional requirements - art gallery agreements

- (3) Where a dealer is an art gallery under the artwork agreement, then before the dealer enters into the artwork agreement with an artist for the purposes of this Code, the dealer must explain the nature, substance and key terms of the artwork agreement to the artist and what it means for the artist, including but not limited to the matters referred to in clause 8(1), and if applicable in clause 8(2), and:
- (a) how the artist's agent and/or artist's art centre will be acknowledged in labelling, catalogues, and other supporting material;
 - (b) responsibility for the installation, removal and disposal of an artwork that will be included in an exhibition;
 - (c) in so far as the agreement relates to any installations of the artwork in an art centre or public gallery or other gallery:
 - (i) a timeline including:
 - a. the due dates for artwork, material for catalogue, and publicity;
 - b. the hours to be invested by the artist to create the artwork (if relevant);
 - c. a payment schedule for payments to be made to the artist;
 - d. the date of the exhibition opening;
 - e. duration of the exhibition;
 - f. promotional activities and requirements;
 - g. for time defined artworks, the duration, frequency, timing and public notification of that timing for audio visual performance;
 - (ii) condition reports of the gallery space before installation;
 - (iii) liability for any damage that may occur during the period the artwork is on exhibition;
 - (iv) that the cost of any repairs to the venue after removal of the installation are to be borne by the gallery.
- (4) Before a dealer enters into any artwork agreement with an artist for the purposes of this Code, a dealer must:
- (a) provide the artist with a written statement that reflects the matters referred to in clause 8(1) and must be set out in the form at Annexure A (referred to as the ***artwork proposal***); [*Note: Annexure A will be a style template to be developed*]
 - (b) provide the artist with a copy of this Code when they provide the artist with artwork proposal;
 - (c) take reasonable steps to assist the artist to understand the nature and terms of the artwork agreement and the artwork proposal, such as but not limited to using a translator if required;

- (d) inform the artist that the artist has an opportunity to read and obtain advice about any written artwork agreement, artwork proposal or other documentation relating to the artwork agreement and provide the artist with that opportunity;
- (e) provide an artist with an opportunity to negotiate the terms of the artwork agreement.

9 Cooling-off period

- (1) An artist may terminate an artwork agreement within:
 - (a) 14 days of entering into the artwork agreement; or
 - (b) such longer period as is agreed between the parties to the artwork agreement and specified in the artwork agreement.
- (2) Any artwork that was supplied to the dealer under the agreement before the termination is governed by the terms of the agreement.
- (3) Any payment that was made for artwork that would have been supplied to the dealer, is to be returned to the party who made the payment within 14 days of the termination of the agreement.

10 Payment for artists

- (1) A dealer must agree within 7 days of delivery of the artwork to the dealer the following matters that relate to the artist's payment, which must be consistent with the other provisions of this Code:
 - (a) the amount of the payment to the artist;
 - (b) the dealer's commission, if the dealer is acting as an agent;
 - (c) the means by which the artist will be paid;
 - (d) if the payment is to be provided in the form other than cash then a reasonable market value of the remuneration must be stated; [*Note: advice to be obtained regarding non-cash payments*]
 - (e) whether remuneration will be determined by the quantity or quality of the artwork, and if so, how the remuneration is to be determined;
 - (f) whether the cost of any goods and services (e.g. canvas, paint, paintbrushes, framing, etc) are to be deducted from the remuneration to the artist;
 - (g) when the artist will be remunerated and whether there are any factors known to the dealer, or ought to have been known to the dealer, that could affect when the artist will be remunerated.
- (2) If the dealer is acting as an agent, the dealer must ensure that the artist receives prompt remuneration to which the artist is entitled to under an agreement in respect to the proceeds from the sale of artwork, but no later than 30 days after those proceeds were received by the dealer.
- (3) A dealer, who is not an agent, must pay the artist for artwork delivered under the agreement within the period specified in the agreement, but no later than 30 days after the dealer purchased the artwork.

11 Agent's liability for bad debt

- (1) The agent is liable to the artist for any **bad debt**.
- (2) **Bad debt** means any amount to be paid by a purchaser to the agent after the time it was required to be paid, for the artist's artwork where:
 - (a) the agent arranged for the purchaser to buy that artwork;
 - (b) the purchaser has taken possession of the artwork.

12 Inconsistency

If a term of an artwork agreement conflicts with this Code then this Code prevails.

Division 2.3 Dealings with artwork

13 Misleading or deceptive conduct

- (1) A dealer must not make false or misleading representations or engage in misleading or deceptive conduct, or conduct that is likely to mislead or deceive.
- (2) For the purposes of clause 13(1), a dealer must not make a representation about any of the following matters, unless they had reasonable grounds for making the representation at the time the representation was made:
 - (a) the provenance of an artwork;
 - (b) any sponsorship, approval or affiliation (including an artist's affiliation with a dealer or an art centre) or an artist;
 - (c) the place of origin of the artwork;
 - (d) an artwork has been produced by an Indigenous artist or artists;
 - (e) the artwork's exhibition history, reference notes, authenticity statements or price.

14 Provenance

- (1) A dealer must not supply artwork to another dealer or person unless the dealer provides a certificate of provenance for the artwork to accompany the artwork at the time of supply.
- (2) A **certificate of provenance** for the purposes of this Code means a document that provides a record of the history of ownership of the artwork, including the identity of the artist or artists to whom it is attributed.
- (3) A certificate of provenance must identify:
 - (a) the artist or artists who created the artwork;
 - (b) where and when the artwork was created;
 - (c) a description of the size of the artwork;
 - (d) the name, location and contact details of the person or association that is identifying the work;

- (e) an authorising signature from a person representing the person or association that is identifying the work;
- (f) the dealer who acquired the artwork from the artist.

15 Respect for Indigenous cultural practices and artist's rights

- (1) A dealer must respect Indigenous cultural practices by:
 - (a) using their best endeavours to identify and adhere to applicable Indigenous cultural practices;
 - (b) correctly attributing the artist or artists in accordance with the artist's Moral Right of Attribution;
 - (c) taking steps to ensure that an image that is displayed on their website without a copyright licence does not infringe an artist's Moral Right of Integrity;
 - (d) obtaining the consent of the artist before causing the artwork to be reproduced;
 - (e) obtaining prior permission from the artist's family or community for the use of names and images of deceased artists;
 - (f) not marketing, promoting or selling secret/sacred and/or restricted artwork or material (such as Tjuringas or human remains). **Secret/sacred** artwork or material means artwork or material that contains information which is considered to be secret or sacred by the community to which it pertains.

16 Care of artworks

- (1) While an artist's artwork is under the control of a dealer, that dealer must take reasonable precautions and exercise all reasonable care in the handling and storage of artwork to ensure the artwork is not damaged, destroyed or stolen. Reasonable precautions includes having adequate insurance.
- (2) A dealer must use clear labelling and packaging to correctly identify the artist or artists who created the artwork.
- (3) A dealer must obtain written approval from an art centre before using that art centre's name or logo.
- (4) A dealer must obtain written approval from an Indigenous organisation or group before using the name or logo of that Indigenous organisation or group.
- (5) If an artwork is damaged whilst in the control of a dealer, that dealer is to consult the artist in the first instance and give the artist first option to repair the artwork or approve a conservator to repair the artwork at no cost to the artist.
- (6) A dealer must advise a potential purchaser or seller of culturally sensitive artwork regarding:
 - (a) the nature of the artwork, the relevant law, protocols and the conditions of this Code;

- (b) possible ethical means of ownership transfer including consulting, and acting in accordance with the wishes of the current traditional owners.
- (7) A dealer must disclose to the artist any insurance they hold in relation to an artist's artwork under their control.

Division 2.4 Record keeping and reporting

17 Agent must provide a statement to artist

- (1) An agent who has entered into an agreement with an artist for the purposes of this Code must give the artist a statement for the reporting period referred to in the agreement, specifying the artist's artwork received by the agent during the reporting period including:
- (a) the date or dates of the sale of the artwork by the agent;
 - (b) the type and quantity of the artwork sold;
 - (c) the price received for the artwork sold;
 - (d) details of each amount deducted by the agent from the sale price of the artwork;
 - (e) the time and date at which the artwork was delivered to the agent;
 - (f) details of any amounts of the artwork received by the agent during the period and not sold by the agent during that period;
 - (g) details of any amounts of the artwork not sold by the agent that is held by the agent at the end of that period;
 - (h) if artwork that is delivered to the agent during the period is not sold by the end of the period, the reasons why the artwork was not sold.

18 Dealers (other than agents) must provide a statement to artist

- (1) A dealer who is not an agent and has entered into an agreement with an artist for the purposes of this Code must give the artist a statement for the reporting period referred to in the agreement, specifying the artist's artwork received by the dealer during the reporting period including:
- (a) the quantity and quality of the artwork purchased by the dealer;
 - (b) the date or dates of the purchases;
 - (c) the price paid for the artwork.

Part 3 Code administration

19 Code Administration Committee

- (1) There will be a Code Administration Committee (***the committee***) to administer this Code.
- (2) The role of the committee is to:
 - (a) implement and oversee the application of this Code;
 - (b) maintain a register of signatories to the Code (***Code register***);
 - (c) deal with issues relating to compliance and sanctions for non-compliance of signatories to this Code;
 - (d) report on the operation and effectiveness of this Code in achieving its objectives.
- (3) The committee will be comprised of an odd number of representatives of the Indigenous visual arts industry and each member of the committee will have equal voting rights regarding any decisions made by the committee.

20 Sanctions

- (1) In the event that the committee becomes aware that a signatory may have breached the requirements of this Code, the committee may:
 - (a) give written notice to a signatory that the committee is concerned that the signatory may have:
 - (i) failed to comply with their obligations under this Code;
 - (ii) ignored a direction of the committee to remedy non-compliance, or failed to do so within a reasonable time;
 - (iii) failed to comply with an undertaking given to the committee.
- (2) The notice provided to the signatory must state the period within which the signatory has to respond to the notice of the committee.
- (3) Following the receipt of a response from the signatory, or in the event that a response is not received, the committee may:
 - (a) advise the signatory in writing that they need to take further steps to ensure compliance with the Code and report back on those measures to the committee;
 - (b) conduct a review, or require a review to be conducted, for the purposes of providing the committee with supportable verification as to the extent to which the dealer is complying with the Code;
 - (c) following the review, publish the name of the signatory and the details of the breach on the committee website; and/or remove the signatory from the code register.

21 Complaints Handling System

- (1) Signatories to this code will:
 - (a) commit to the efficient and fair resolution of complaints by developing detailed procedures for complaint handling within their operations;
 - (b) adopt these complaint handling procedures as a clear message of their commitment to efficient and fair resolution of complaints;
 - (c) publish the complaints handling procedures where they can be readily seen and accessed by staff, artists, other dealers and other interested parties;
 - (d) nominate and appoint a Complaints Coordinator whose responsibility will include ensuring complaints are handled efficiently and effectively;
 - (e) document and keep records of the steps taken to adopt the complaints handling procedures.
- (2) The duties of the Complaints Coordinator will be to:
 - (a) ensure that complainants are promptly provided with a copy of the signatory's complaints handling procedures upon request;
 - (b) ensure that all relevant staff and representatives are given all necessary information, training and guidance on how to properly receive and refer a complaint to the Complaints Coordinator;
 - (c) assist any person who wishes to make a complaint to do this;
 - (d) receive and promptly investigate complaints (while keeping appropriate records);
 - (e) respond to the complainant in writing within 7 calendar days of the complaint being received. If it is not possible to provide a final response within this timeframe, a preliminary response should be provided. This should advise that the complaint has been received, and provide some detail as to the steps that will be taken to investigate the complaint. If possible, a timeframe as to the completion of the investigation should also be provided to the complainant;
 - (f) keep a summary of the complaints received (e.g. the name of the person who made the complaint, subject of the complaint, nature of the complaint, outcome of the matter) which should be included in the annual report to be provided to the committee;
 - (g) review the overall operation of the complaints system on a regular basis and make improvements where necessary.

22 Dispute Resolution

- (1) In the event that no agreement to resolve a complaint or dispute can be reached between the parties, the complaint may be referred to a mediator recommended by the committee, if this is agreed to by both parties to the dispute.

- (2) The cost of the mediation will be borne equally by the parties to the mediation, and all issues relating to costs and payment for the mediation will be agreed upon prior to the commencement of the mediation process.
- (3) The appointed mediator will determine the procedures and requirements of the mediation session.
- (4) The mediator is to provide a report to the committee on the outcome of the mediation within 21 calendar days of the mediation.