
ARTS LAW UPDATE:

INDIGENOUS WILLS PROJECT

by Robyn Ayres

In 2006 the Arts Law Centre of Australia ('Arts Law'), through its Indigenous service Artists in the Black, was approached by the Association of Northern and Kimberley and Arnhem Aboriginal Artists ('ANKAAA'), one of the peak Indigenous art bodies, to provide information to the Indigenous art centres in the Northern Territory and the Kimberley about the benefits of artists having wills. This request arose from problems that the art centres, particularly those in Western Australia, were experiencing after an artist had passed away. There were lengthy delays in relation to the distribution of the estate, and the art centres needed help as to their legal obligations. In addition there was often considerable conflict in communities and families as there were no clear instructions regarding what the artist wanted to happen with their paintings and their copyright income. As of 9 June 2010 there are also resale royalty rights to be distributed, with these lasting for 70 years after the death of the artist.

Not surprisingly, once Arts Law had provided the art centres with information about the benefits of having a will, most said what they really needed was for Arts Law to visit their communities and draft wills for all their artists. They were especially concerned about some of the older artists who were becoming quite frail. There are currently at least 120 Indigenous art centres scattered through regional and remote Australia. Of these, Arts Law has assisted 35 to date with their wills.

Upon further investigation it became clear that specific laws that apply in Western Australia were having a serious impact upon the artists, their families and the art centres. Section 35 of the *Aboriginal Affairs Planning Authority Act 1972* states that if you're an Aboriginal person and you die intestate, then your estate automatically vests in the Public Trustee.

Section 35 Distribution of estate of intestate person of Aboriginal descent

- (1) All property and rights of property vested in any person of Aboriginal descent who dies intestate shall vest in the Public Trustee under and subject to the provisions of the *Public Trustee Act 1941*, upon trust to pay the just debts

of the deceased and to distribute the balance amongst the persons entitled thereto according to the laws of the State relating to the administration of estates of persons dying intestate, if any of the persons so entitled can be ascertained, otherwise amongst those persons who may by regulation be prescribed as the persons entitled to succeed to the property of the deceased.

- (2) A regulation made for the purposes of this section shall, so far as that is practicable, provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death.

The Western Australia Public Trustee is still required to administer the estate, but Arts Law has found that this can take a considerable period of time whilst the Public Trustee identifies the correct beneficiaries in accordance with the *Administration Act 1903* (WA). In effect it can take years for the distribution of what is often a fairly small amount of money. In contrast, if the deceased was not Aboriginal and died intestate, then the family could apply to the Supreme Court for letters of administration. In some instances where the estate is small (under \$10 000) this is not even necessary. No doubt the legislation was intended to be beneficial, albeit paternalistic, but in reality it is discriminatory and results in Aboriginal families often having to wait a very long time to get what they're entitled to.

The regulations made under s 35(2), which appears to recognise customary law, in fact only acknowledges 'tribal marriage', the children of that union, and provides for a more restricted range of relatives than the intestacy provisions which apply to the rest of the community. In addition, if no valid claim is made within two years of the Aboriginal person's death, a beneficial distribution may be made to a person with a moral claim, or the estate may be held in trust by the Aboriginal Affairs Planning Authority to be 'used for the benefit of persons of Aboriginal descent.'

LAW REFORM NEEDED IN WA

In February 2009 Arts Law approached Freehills to provide legal advice, on a pro bono basis, concerning the application of the provisions of the *Aboriginal Affairs*

Planning Authority Act 1972 (WA) (Act) set out above relating to Indigenous persons. This is on the basis that they are inconsistent with the *Racial Discrimination Act 1975* (Cth), as they discriminate against Aboriginal persons. The automatic vesting of an estate in the Public Trustee denies the right of families to administer the estate of a deceased Aboriginal relative in contrast to the families of non-Aboriginal persons.

This issue has already been considered by the Western Australian Law Reform Commission in its final report on *Aboriginal Customary Law, Project 94*, which recommended that the laws be repealed.¹ The proposed changes had the support of the then Government, however nothing was done.

Freehills wrote to the Western Australian Attorney-General, the Honourable Christian Porter MLA, advising him that a potential test case may be brought in relation to the validity of s 35 of the Act and enquiring whether the Western Australian Government would be willing to introduce the necessary legislative change to avoid the need to bring a test case.

In November 2009, the Western Australian Attorney-General and the Deputy Premier advised that they strongly supported Freehills and Arts Law's contention that the intestacy provisions of the Act require legislative amendment.² Whilst this positive response was encouraging, we note that 12 months has elapsed and Aboriginal clients of Arts Law continue to be affected by these discriminatory provisions whilst we wait for the snail-like pace of change.

OTHER AUSTRALIAN INTESTACY LAWS

Another issue arising under the intestacy laws in every state is the strict order in which the assets are required to be distributed. Arts Law's experience after drafting hundreds of wills for Indigenous clients demonstrates that the order beneficiaries are listed under the intestacy laws (spouse and de facto partners first, then children, parents, brothers and sisters, grandparents, aunts and uncles) is usually not in accordance with Aboriginal views as to who should be entitled to their assets. For example, Aboriginal testators rarely leave the whole of the estate to their spouse. In the vast majority of cases the testator does not consider they have any obligation to make provision for their spouse at all, being far more concerned with making provision for their children, grandchildren and any other children they have reared. Whilst in some instances it is possible for an individual who has been left out to apply under the *Inheritance (Family and Dependents Provisions) Act* (WA)³, it may not properly

account for Aboriginal kinship structures whereby certain people would be considered 'children' under Aboriginal customary law but not under Australian law.

By way of contrast, in the Northern Territory there are provisions dealing with intestate estates of Aboriginal people, which allow for a distribution plan to be submitted to the court whereby Aboriginal customary laws and kinship relationships may be taken into consideration in the distribution of an intestate estate.⁴ It was recommended by the NSW Law Reform Commission in *Report 116 (2007) - Uniform Succession Laws: Intestacy*⁵ that other States adopt similar provisions.⁶ This has recently been done in NSW in the *Succession Amendment (Intestacy) Act 2009*, s 133.

INDIGENOUS WILLS PROJECT

In the meantime, Arts Law instituted the Indigenous Wills Project to assist the arts centres and their artists to draft wills as the majority of Indigenous Australians die intestate. This work was important not only to overcome the difficulties caused by the *Aboriginal Affairs Planning Authority Act* in Western Australia, but also to minimise the conflicts that can arise in communities after an artist dies, and to give artists control over who will benefit from their estate after they have gone. Arts Law has not received any government support for this project and the wills work has been dependent upon obtaining philanthropic funding (notably from the Myer Foundation and Copyright Agency Ltd in 2007-08), support from the art centres themselves as well as their peak bodies (for example Desert and Ananguku Arts in 2010). Arts Law has also been assisted by the pro bono support of several law firms, which have seconded lawyers to work with Arts Law on country when they have visited communities to draft wills. In 2010 DLA Phillips Fox provided three lawyers over two trips to the western desert in Western Australia and the Anangu Pitjantjatjara Yankunytjatjara Lands in South Australia.

To date Arts Law has drafted about 400 wills primarily in Western Australia and the Northern Territory although more recently Arts Law visited Lockhart River Art Centre in the Cape York Peninsula in Queensland.⁷ In view of the importance of this project and the practical difference it can make to Indigenous art centres, the artists and their families, this work will continue in 2011 with the support of the Copyright Agency Ltd.

SOLID ARTS – RESPECTING AND PROTECTING INDIGENOUS INTELLECTUAL PROPERTY

BACKGROUND TO THE SOLID ARTS PROJECT

In 2001, the Cultural Ministers Council agreed to develop an Indigenous intellectual property ('IIP') toolkit to:

- Promote greater links between business and Indigenous communities about IIP;
- Raise awareness in Indigenous communities, consumers and commercial operators of the need to protect IIP; and
- Enhance coordination of existing networks of Indigenous and non-Indigenous organisations working in the area of IIP.

The CMC's initiative was in response to Council of Australian Governments ('COAG') Framework on Reconciliation. An Indigenous Intellectual Property Toolkit Implementation Working Group ('IIP TIWG') was established, chaired by the Australian Government. Other participating jurisdictions are Queensland, Western Australia, South Australia, and the Northern Territory. COAG is also represented on the working group.

An initial project of the IIP TIWG was the development of a set of fact sheets explaining different facets of IIP. This resource was developed in 2008 by Indigenous lawyer Robynne Quiggin.

WHAT IS SOLID ARTS?

In 2010, Arts Law was contracted through the Cultural Ministers Council to further develop the Indigenous intellectual property toolkit resource over three years (2010–12). This project has been titled *Solid Arts* and will include:

- The Solid Arts website, which will include case studies and provide a portal for users wanting information about IIP. The website was launched in December 2010;
- Short audio recordings (MP3s) suitable for radio play

in Indigenous languages about various IIP issues. These will also be available for download through the website;

- A DVD dealing with a range of IIP issues again using various case studies that will also be available through the website. This will be developed in 2011;
- Posters for Indigenous artists on IIP issues (2011);
- Information for consumers and commercial operators (2011); and
- A face to face education program for key stakeholder groups (2012).

Arts Law engaged in a consultation process to ensure that all the relevant IIP issues were identified. Arts Law was also interested in identifying the gaps in information about IIP issues and the resources that people found useful so as to avoid duplication, and then direct people to helpful information that was already available. The consultation also looked at what were the most effective methods for communicating IIP information to Indigenous artists, consumers of Indigenous art and commercial operators working in Indigenous arts.

The consultation was done through a series of mail outs, surveys and forums on a national basis. The research identified the following key issues in descending order:

- Copyright;
- Moral rights;
- Protection of Indigenous cultural heritage;
- Information for specific user groups eg, Indigenous musicians, writers etc;
- Contracts for artists/dealers/consumers;
- Licensing and assignment (transfer) of copyright;
- Employment issues for artists;



Arts Law's Robyn Ayres with Margaret Donegan and Nyanu Watson at Ninuku Arts in the APY Lands SA. Photo by Iain Morton © Ananguku Arts 2010

- Online issues eg, putting work on websites and social networking sites;
- Provenance and authenticity issues;
- Resale rights;
- Trade marks;
- Design;
- Collecting societies;
- Wills and administration of estates for artists; and
- Consumer protection issues.

The consultation process revealed that the community is seeking easily accessible information that not only deals with the topics identified in the above chart but also provides information about:

- Specific art forms eg, music, craft, design;
- Collaborative projects and working ethically;
- Enforcement issues in relation to IIP;
- Helping artists to negotiate good outcomes;
- Pricing information for artists and arts organisations; and
- The need for case studies which simply illustrate the issues.

SOLID ARTS WEBSITE

The website will provide a hub that directs users not only to new resources created as part of the *Solid Arts* project (eg, audio recordings and video) but will also direct users to the many useful resources already in existence. The website will organise the information by art forms (eg, visual arts, dance and literature) and legal topics (eg, copyright, moral rights, contracts). It will include case studies, information

about working ethically (protocols, best practice for work on collaborative projects), hot topics including what is happening in Australia and overseas, as well as a guide to useful organisations.

FEEDBACK

Arts Law is eager for people with an interest in IIP issues to provide the project with feedback and to inform us of any new initiatives which should be included. If you would like to receive updates or let us know about a new initiative (or something that may have been overlooked), then email Arts Law on artslaw@artslaw.com.au with *Solid Arts* in the subject line.

Robyn Ayres is the Executive Director, Arts Law Centre of Australia.

- 1 WA Law Reform Commission, *Aboriginal Customary Laws*. Report No 94 (2006) <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter_6.pdf>.
- 2 Ante Golem, *Freehills Advises on the Aboriginal Affairs Planning Authority Act*, *Art+Law*, March 2010 <<http://www.artslaw.com.au/artlaw/Current/09FreehillsAdvises.asp>>.
- 3 There is equivalent legislation in each State and Territory.
- 4 *Administration and Probate Act 1969* (NT) s 6(1).
- 5 NSW Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007).
- 6 *Ibid*, recommendation 45, <http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_r116chp14#H4>.
- 7 See ABC Radio National 'Where There's a Will, There's a Way', *The Law Report* 26 October 2010 (Damien Carrick) <<http://www.abc.net.au/rn/lawreport/stories/2010/3047172.htm>> for further information about the wills work in Lockhart River Queensland.

Big Red
Megan Cadd

*Digital print featuring collage and drawing
560mm x 410mm*

This print depicts the life of a traditional Aboriginal woman and her relationship with land and ceremony.

