

Draft Indigenous Australian Art Commercial Code of Conduct Feedback on the discussion paper

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You can enter your feedback on specific points raised in the discussion paper into the draft Indigenous Australian Art Commercial Code of Conduct below.

Once completed, email to Lydia Miller, executive director Aboriginal and Torres Strait Islander arts, Australia Council for the Arts at l.miller@australiacouncil.gov.au

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Part 2 Application of the Code

Discussion point:

1. What factors should be taken into consideration in promoting the adoption of the Code and to raise awareness of the Code within the Indigenous visual arts industry?

Response:

The cost to promote to industry. What assistance is available to galleries and dealers- for example ready made template?. The cultural issues to ensure Indigenous artists and art centre boards in communities understand the Code.

2. Are there any other specific criteria or requirements that you consider a dealer should meet before they are accepted by the Code Administration Committee as a signatory to the Code?

Response:

The dealer should disclose prior offences or disciplinary action taken against the dealer under the Code or other legislation for misleading and deceptive conduct.

3. Do you consider that a specific list of criteria (based upon with the Committee could accept or reject an application to become a signatory) should be established and made available to potential signatories?

Response:

Yes – Including the requirement to disclose prior offences outlined in question 2.

4. In the event that a dealer’s application to become a signatory to the Code is refused, should the dealer have the opportunity to provide further information to the Committee and, on the basis of that additional information, request that the Committee review its decision?

Response:

Yes – To accord with principles of natural justice the Committee should inform the dealer that the Committee has, based on the criteria for acceptance, made a preliminary decision to refuse the dealer as a signatory. The Committee should afford the dealer a reasonable timeframe to respond and provide information relating to reasons for refusal to be admitted.

5. What should be the most effective means for the Code Administration Committee to monitor the effectiveness of the Code in meeting its objectives (for the two year period following its introduction)?

Response:

- *Number of signatories.*
- *Number of complaints received and resolved without disciplinary action.*
- *Number of disciplinary actions.*

6. How could a dealer’s compliance with the requirements of the Code best be monitored and reviewed?

Response:

Sample interviews and random checks for dealers including galleries.

Part 3 Dealings with Artists

Discussion point:

7. Are there any gaps in the minimum standards that the Code sets for ethical representation of Indigenous art and artists?

Response:

Minimum standards are sufficient and can be reviewed for effectiveness after two years.

8. While the list is not an exhaustive list, are there any other relevant specific types of unconscionable conduct that you consider should be added to the list of examples of 'unconscionable conduct' provided in Clause 5?

Response:

No further examples. Code should allow Committee to consider and include types not specifically stated by the Code.

9. Are there any types of conduct that you consider should not be included in the list of examples of 'unconscionable conduct' provided in Clause 5?

Response:

The Code should maintain the current examples as stated in Clause 5.

10. Are there arrangements for payment for artworks, other than cash remuneration, that you consider would be acceptable under the Code?

Response:

Legal tender via cash, electronic funds transfer, or cheque would be acceptable.

Part 4 Artwork agreements

Discussion points:

11. Are there any other minimum terms (not listed in clause 8(1) of the Code) that you consider should be incorporated into the 'template' artwork agreement?

Response:

The minimum standards contained in clause 8(1) of the Code are sufficient.

12. Are there any minimum terms (listed in clause 8 1) of the Code) that you consider should be removed (i.e. not included in the 'template' artwork agreement)?

Response:

There are no minimum terms that need to be removed in the first two years. A possible review after two years may reveal if any should be removed.

13. Do you consider it necessary and practical that the dealer be required to provide the artist with a copy of the Code or should this only be done upon request from the artist?

Response:

It is sufficient that the dealer provide the Code on request by the artist.

14. What do you consider would constitute 'reasonable steps' in terms of the requirement that the dealer explain to the artist the nature and terms of the artwork agreement and the artwork proposal (as required by clause 8(4)(c) of the Code? Do you consider that a record of the steps that are taken should be kept? If so, what form should this record take?

Response:

Reasonable steps taken by the dealer would need to be considered/ defined on the circumstances of each case. The dealer would need to demonstrate genuine steps taken in good faith to explain the nature and terms of the agreement and artwork proposal. It should be encouraged but not a requirement that a record of the steps be taken in written form.

15. If a translator is required, which party should pay for the costs of these services? Should the details of who will bear these costs be required to be specified in the agreement?

Response:

It is preferable that the dealer should pay for these services. However, at a minimum it would also be acceptable for both parties to bear a shared cost. The details of who bear the costs should be specified in the agreement.

16. Should there be a time limit imposed on the opportunity that is provided to the artist to read and obtain advice about any written artwork agreement? Should the artist be required to sign a statement which confirms that they were given the opportunity to read and obtain advice before entering into the agreement?

Response:

There should be a reasonable time limit for the artist to read and obtain advice. To assist the artists there should be a general number to call to seek assistance. There also should be a consideration of whether a cooling off period is appropriate for an agreement that has been entered into by an artist.

17. How should the Code Administration Committee monitor the agent's compliance with these requirements?

Response:

Random checks on agents including discussions with artists.

18. Do you consider that the dealer (when acting as an agent) should be required to keep a written record which states that the agent has explained these matters to the artist? If yes, what form should this record take (e.g. should it be a document signed by the agent and the artist which is witnessed by a third party)?

Response:

Yes the agent should maintain written records (via a general template) of documents signed by both the agent and the artist witnessed by an appropriate third party.

19. It is likely that the Australian Taxation Office will require evidence of non-monetary transactions, including evidence of the value of goods. What documents and records could be kept to verify such non-monetary transactions?

Response:

It is recommended that only legal tender should be used for payment. However, if there are to be non-monetary transactions, then there should be written record as evidence of the transaction.

20. How should the Code Administration Committee monitor an art gallery's compliance with these requirements?

Response:

Random sample interviews with art galleries and their artists.

21. Do you consider that the art gallery should be required to keep a written record which states that the agent has explained the key terms of the artwork agreement to the artist? If yes, what form should this record take (e.g. should it be a document signed by the agent and the artist and is witnessed by a third party?)

Response:

Yes the art gallery should maintain written records (via a general template) of documents signed by both the agent and the artist witnessed by an appropriate third party.

22. How should the Code Administration Committee monitor a dealer's compliance with the provisions in the Code relating to payments made to artists be monitored? Should the dealer be required to produce relevant financial records to the Code Administration Committee upon request?

Response:

The Committee could random sample a number of dealers to monitor compliance. Yes the dealer should be required to maintain and produce relevant financial records to the Committee upon request.

23. If the Code Administration Committee received reports that an artist has not received payments (or has been paid outside of the 30 day timeframe) should the Committee pursue the debt on behalf of the artist? If so, how would this operate?

Response:

No the committee should not pursue the debt on behalf of the artists. The committee should issue a show cause notice for why disciplinary action should not be taken under the Code for non payment to the artist. The Committee should refer the artist to an appropriate support/ legal service to pursue the debt.

24. If the dealer does become liable for the bad debt of the purchaser, what amount of the proceeds should be paid to the artist (i.e. should the dealer be able to recover any funds to compensate the dealer for the time and effort spend in selling the artwork)?

Response:

In the situation of a bad debt, the artist should receive their payment as negotiated under the artwork agreement. This should be a priority over the dealer's compensation.

25. In the event that the purchaser of an artwork does not pay for that artwork (i.e. there is a bad debt) should the dealer be allowed the option of returning the artwork to the artist (if this can be recovered from the purchaser)?

Response:

Yes, the dealer should be allowed to return the artwork.

Part 5 Dealings with Artwork

Discussion points:

26. Noting that the list is not exhaustive are there any additional matters that should be added to the list in clause 13(2) (i.e. matters about which a dealer should not make a representation without having reasonable grounds)?

Response:

No further matters to add.

27. What would constitute 'reasonable grounds' for the purposes of the operation of this clause? (i.e. could reasonable grounds be that the dealer 'honestly believed that the artwork was of a certain origin', or would the dealer be required to take additional steps to confirm the origin of the artwork (such as obtaining written statements from the artist, previous owner, etc)?)

Response:

It should be reasonable on a case by case basis. There should be a minimum step to confirm the origin of the artwork from the artists or previous owner.

Part 6 Record keeping and reporting

Discussion points:

28. Are there any additional details that you consider should be included in the statements to be provided by the dealers?

Response:

No further details required.

29. What is the minimum level you consider necessary to meet the requirement for a record on the sale of artwork?

Response:

Written document outlining date sold, purchaser details, artist details, art work description, amount paid and by what means it was paid.

30. Should dealers be required to provide copies of these statements to the Code Administration Committee upon request?

Response:

Yes, the dealer should be able to provide statements upon request.

Part 7 Code Administration Committee and Sanctions

Discussion points:

31. How do you think members of the Code Administration Committee should be selected, i.e. should the Committee include industry representatives, dealers, artists etc? Should the Code prescribe a particular mix of industry representation?

Response:

The Committee should preferably combine a mix of experienced industry representatives, including dealers and artists. It may be ideal to include a representative with legal experience on the Committee. Ideally these members should be invited through an Expression of Interest to apply for membership to the Committee and be officially appointed by the Commonwealth Minister for the Arts. Alternatively, the Commonwealth Minister for the Arts could simply invite selected representatives to sit on the Committee.

32. Do you think it would be useful to include additional details about the role, powers and operation of the Committee or the appointment of its members? If yes, what details should be specified?

Response:

Yes - the process to appoint Committee members, their powers and operation (including terms) should be specified.

33. Do you consider that the Code should state that the Committee can request that a dealer provide written information that relates to their compliance with Code (including financial records?)

Response:

Yes - as long as this is necessary. The Committee should explain to the dealer why these records and information are necessary. The Committee should try to minimise where possible the burden on a dealer to produce information and records by indicating specific types of information required, and relevant periods for any records required.

34. How often do you consider the Committee should be required to meet to consider applications by dealers to become signatories and other matters?

Response:

The committee should meet quarterly at a minimum.

35. If a dealer breaches the Code and their name and details of the breach are published on the website, should the time period that this information will remain on the website be specified or should it remain there indefinitely?

Response:

The time period should be determined by the Committee on a case by case basis. A dealer should stay on the website if they have not rectified the breach.

However a dealer's name and details should not remain indefinitely on the website if they have rectified any breach. There could be a maximum timeframe stipulated e.g. 6 months that the dealer can remain on the website if the breach has been rectified by the dealer.

36. If a dealer is removed as a signatory to the Code, should the dealer be allowed to become a signatory of the Code again? If so, process and criteria should apply?

Response:

Yes – the dealer would need to have rectified any prior breaches and have satisfied any conditions imposed by the Committee (when removed) before being allowed back as a signatory. The Committee should be allowed to grant conditional signatory status – e.g. probationary period with reporting requirements.

Part 8 Definitions included in the Code

Discussion points:

37. Does the definitions section (Part (1)(3)) of the Code adequately define the terms used in the Code?

Response:

Yes.

38. Are there any additional terms used in the Code that need to be defined?

Response:

No.

39. Are there any definitions in the Code that you consider should be amended on the grounds that they are unclear or inaccurate?

Response:

No.