



Moral lip service

Government hard hit at the art market is a soft form of redress, writes **Jane Raffan** (BAHons '89, GradDip (EnvLaw) '09)

Since the 1970s, a significant rise in Indigenous rights debates and protocols on the world stage has occurred in tandem with dramatic growth in the appreciation of Aboriginal art. Over the same period the federal government has introduced legislation and regulatory schemes to protect cultural heritage and further the cause of Indigenous rights, which culminates in three policy regimes that directly impact the art market. At present, the Resale Royalty Right for Visual Artists Bill 2008 (Cth) has been

passed by the Senate, the Protection of Moveable Cultural Heritage Act 1986 (Cth) is under reform, and the Government has driven the adoption of a national Indigenous Australian Art Commercial Code of Conduct.

This political framework effectively represents a Government agenda to co-opt the art market in redressing wrongs to the Indigenous peoples of Australia. As strategy, this has enabled the Commonwealth to adopt a moral stance towards its recognition of Indigenous rights, while avoiding meaningful

participation in sovereignty debates and legal reform; in addition to deflecting and ameliorating criticism of their fractured and ineffective approaches to addressing Indigenous social injustice in other portfolios.

This year Australia will introduce a *droite-de-suite* or what is commonly known as a resale royalty scheme. Under the scheme, vendors will pay artists 5 per cent of the price of the second transfer/sale of a work acquired after July 2010. All artists will benefit, although a specific intent to assist Indigenous artists was expressed in its formulation, and emotive examples of artists living in poverty while their early works are traded for millions on the secondary market were utilised to give the legislation moral authority. Critics argue that it will necessitate costly administration and create confusion for buyers, and Michael Fox, from leading arts accountancy firm Lowenstein's, is adamant it will damage the Aboriginal art industry. This view is shared by auction houses, which are already burdened with recouping copyright charges from vendors on behalf of the agency Vi\$copy, and are concerned that the scheme will function as an anti-stimulus package and deter buyers. Non-Indigenous artists are also alarmed – at the prospect of their sales on the primary market dropping, with reported grumblings to the media of “special causes making bad law”.

Scrutiny of economics modelling suggests the scheme would have returned \$774,432 to Aboriginal artists in 2007, the peak year for Aboriginal art sales. Dealer/auctioneer Adrian Newstead notes that this sum would have largely benefited a tiny group, with only 70 from 3500 Aboriginal artists receiving up to \$1500 annually. Clearly payments at these levels will not alter the serious disadvantages evident in remote communities. Moreover, the value of the Indigenous art market has purportedly almost halved since 2007, from \$23 million to \$12 million, further undermining the validity of the measure as a form of redress.

The Protection of Moveable Cultural Heritage Act 1986 (Cth) was designed to prevent the permanent export of culturally significant material. Drafted to balance national interest with property rights, it was assumed that works refused export permits would be acquired

Jane Raffan, behind her: Eileen Napaltjarri, Pintupi (born 1956); *Untitled (Designs Associated with the Rockhole and Soakage Water Site of Tjiturrulpa)*, 2005; acrylic on linen, 122x61cm. Provenance: Papunya Tula Artists Pty Ltd, NT

by institutions, or in the case of Aboriginal material, returned to the community. As early as the Whitlam Government years, when legislative policy was in development, commentators cautioned against the possible effects on the market.

The Act was amended in 1998 to accommodate market value changes and the age limit trigger for requiring an export permit for Aboriginal art was reduced from 30 to 20 years, bringing all the formative paintings from the birth of the modern movement at Papunya Tula in the 1970s into the net. As expected, the need to have permits for an increased volume of material created notable vexation for auction houses. Between 2003 and 2007, nearly 600 export applications were made under the Act, and almost all in the fine art categories were by auction houses for Aboriginal art.

Under the Act, an endowed National Cultural Heritage Fund was implemented to assist acquisition, but a review of the fund to date indicates that only one work from Papunya Tula has been acquired using the fund's resources, while in the period 2001–2003 alone, 10 Papunya Tula paintings were denied export. It is now clear that the Act has negatively impacted the market, with Sotheby's reporting that "countless" high end sales to foreign collectors have been stymied, in tandem with a significant drop in pre-sale interest. Sale prices for much of this work appear to have peaked, corroborating a general fall in interest.

In 2009 the Government delivered its discussion paper on reform of the Act, which includes increased Indigenous input in appraisals and changes to the cultural significance assessment process. Notable submissions by prominent academics and curators proposed adding all secret/sacred paintings from 1971–2 to the Control List of prohibited exports, as well as allowing the Minister to make prohibition declarations for objects outside existing date limits. The latter is specifically targeted towards Aboriginal art, important examples of which have often been painted in flourishes by elders who had relatively short periods of production. This amendment would make it possible for any major work to potentially be denied export.

Trade to foreign collectors has mainly occurred at the elite end of the market where, at its peak, they

reportedly captured as much as 50 per cent of high-end auction sales. Government actively developed the international market throughout the 1970s and 1980s, yet under current regulatory regimes this arena will decline without new government strategies to direct interest towards more contemporary works and away from early material caught under the Act's date limits. Austrade (formally the Australian Trade Commission) has made tentative moves in this direction, but its investment has been small; meanwhile exhibitions promoting early Papunya Tula work continue to travel across the US with great fanfare.

Future Act reviews will likely see the Government needing to respond to growing criticism of its restrictions on the market by considering procedures in place elsewhere. For example, UK legislation requires that works denied export licences must be purchased, otherwise granted permits. In acknowledgement of the National Cultural Heritage Fund's failure to assist with acquisition of targeted material, common suggestions in current submissions cite the need to link the fund to the tax system, either through direct deduction, or via the Cultural Gifts Program as it operates in Canada.

Aside from legislation, codes and protocols recognising Indigenous culture and rights are now prevalent in the operations of the Indigenous arts sector. Over the years, various federal governments have instigated inquiries into the sector in response to ongoing complaints of abuses. The 2002 Myer Report for the Visual Arts and Crafts Sector recommended greater sector oversight, and in 2007 a Senate Standing Committee Inquiry into Australia's Indigenous Visual arts and Craft Sector generated the seeds for the new voluntary Indigenous Australian Art Commercial Code of Conduct.

Apart from a couple of high profile criminal cases involving fake paintings, to date, the bulk of investigations into industry abuses have focused on misleading representation at the tourist end of the market and have been carried out by the Australian Competition and Consumer Commission supported by the legal framework of the Trade Practices Act 1974 (Cth). There is, however, growing interest and scrutiny in auction house practices

with regard to declarations of provenance by this body.

The Indigenous Art Trade Association (Art.Trade – a membership-based body of art dealers) considers that fraudulent activity or unethically supplied paintings represent less than one per cent of sales through galleries or dealers. Art.Trade dealers have severely criticised the Code's scope, declaring it will prejudice those who don't sign up, and prejudice the market toward material carrying art centre provenances. The Code will be reviewed in two years with threats from the Government of mandatory adoption if its success is not affected by voluntary membership, although actual markers for measuring success have not been formally set out.

The stated intent of the Code is to protect vulnerable artists from exploitation, and as such, the art market has become a morality playground. Nicholas Rothwell, who writes on Indigenous art for *The Australian*, has said that the Code's formulation is "part of the intense moralisation of the Indigenous art selling space". Much earlier, anthropologist Fred Myers posited that Aboriginal art is an "objectification of the moral ambiguity of the boundaries of blacks and whites", and this is echoed by Professor Marcia Langton, Indigenous commentator and anthropologist, who also sees Aboriginal art as a means to reconcile personally with the colonial burden. Interestingly, it is precisely this phenomenon that now increasingly appears to be a key determinant of the value of Aboriginal art, with the rhetoric around provenance and ethical buying shaping debates.

In 2007 the Northern Territory Government estimated the Aboriginal art market was worth \$400 million annually, up from \$100–300 million in 2002. From that Government's perspective, the art market is an important arena for artists to substitute self-determination for welfare dependence, and to this end we can expect further machinations and manipulation in the guise of redress and recognition of rights, as policy in other portfolios is strangled by government inaction due to fears over the loss of resource wealth via Native Title claims. **SAM**

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