

## CASE STUDY 8

### Indigenous Arts Certification Mark\*

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Note: This Case Study was originally researched and written in 2000 and updated in 2003.

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\* The views and opinions expressed in the Case Study are those of the author, Ms. Terri Janke, and not necessarily those of the World Intellectual Property Organization (WIPO) or its Member States.

## INTRODUCTION

The National Indigenous Arts Advocacy Association (NIAAA), a representative body for Indigenous artists, developed an Australian Indigenous arts certification system in the 1990s.

The system, which comprised two certification marks registered as trade marks and a notice for use by authorised retailers, was developed in response to the many imitation products that were flooding the Indigenous arts market and was designed to assist consumers to identify authentically produced Indigenous art and cultural products. The rationale was that consumers, in the interests of buying authentic products, would purchase goods and services bearing the certification mark in preference to others, providing benefits for Indigenous artists in the form of increased sales that would in turn encourage further production.

In 2000, two certification marks registered under the Trade Marks Act of 1995 were launched for use in connection with authentic Indigenous art products:

- (i) the Label of Authenticity – for primary works made by Indigenous persons; and,
- (ii) the Collaboration Mark – for collaborative and manufactured products produced under license with Indigenous persons.<sup>1</sup>

A third facet of the labeling system was a “Notice for Use by Indigenous Arts Retailers”, which incorporated two regular trade marks.

Approximately 160 artists have used the mark since its launch. However, the Label of Authenticity has failed to gain wide support at the primary production level, particularly among Aboriginal Arts and Craft Centres that are the major producers of Aboriginal art in the regions. The majority of persons sought permission from NIAAA to use the Collaboration Mark.

The future of the mark is now in doubt as NIAAA closed their offices in 2002, due to cessation of its funding.

This case study focuses on the rationale for the national Indigenous labeling system and the process of developing and registering the certification marks. It will also report on the use of the label and issues relating to the implementation of the labeling system.

The National Indigenous Arts Advocacy Association (NIAAA) is a non-profit organization dedicated to protecting Indigenous peoples’ rights, culture, cultural respect, protocols and values through the promotion and protection of Aboriginal and Torres Strait Islander arts and crafts.<sup>1</sup> Established in 1990, NIAAA has conducted cases including the Carpets Case, *M\* v Indofurn Pty Ltd.*, for the advancement of Indigenous artists’ rights. In December 2002, the offices of NIAAA closed and the future of the organization remains uncertain.

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<sup>1</sup> The Collaboration Mark currently under examination has, however, received approval by the Australian Competition and Consumer Commission.

## BACKGROUND

A *National Aboriginal and Torres Strait Islander Cultural Industry Strategy*, undertaken by the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1997, estimated the Indigenous arts industry to be worth almost A\$200 million per year.<sup>2</sup> However, despite the lucrativeness of Indigenous art, Indigenous people are often not the ones to benefit and the percentage of returns to Indigenous people remains marginal. In 1989, the *Review of the Arts and Crafts Industry* estimated that Indigenous people received just over seven million dollars per year from the sale of art and crafts.<sup>3</sup> In 1997, the *Strategy* noted that the economic benefits to Indigenous artists had improved to approximately fifty million dollars per year, with the major portion of the benefits going to art traders rather than to the artists.<sup>4</sup>

### Practices in the Indigenous Arts Industry

The growing consumer demand for Indigenous art has given rise to many unscrupulous and questionable practices within the Indigenous arts industry including:

(i) *Copyright Infringements*

Indigenous artistic works have been copied without the permission of the artist or clan group<sup>5</sup>, for example, copying of traditional rock art from textbooks (See Case Study 6 “Unauthorized Reproduction of Indigenous Rock Art”). During the past five years, Indigenous artists have been successful in taking action for copyright infringement in the courts.<sup>6</sup> These cases have raised awareness in the industry and reduced copyright infringements significantly.

(ii) *Stylized designs of Indigenous art by non-Indigenous artists*

Non-Indigenous artists have copied Indigenous styles and passed their work off as “Indigenous”.<sup>7</sup> Many of these works have been labeled “authentic” or “genuine Indigenous products.” NIAAA estimated these types of stylized or pastiche designs deprived Indigenous artists of at least one hundred million dollars per year.<sup>8</sup>

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<sup>2</sup> ATSIC, *National Aboriginal and Torres Strait Islander Cultural Industry Strategy*, prepared by Focus with the assistance of Sharon Boil & Associates, February 1997. p. 5.

<sup>3</sup> Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee*, AGPS, Canberra, July 1989, note 69.

<sup>4</sup> ATSIC, and Office of National Tourism, *National Aboriginal and Torres Strait Islander Tourism Industry Strategy*, August 1997, p 5.

<sup>5</sup> V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, National Indigenous Arts Advocacy Association and Macquarie University, Canberra, 1996

<sup>6</sup> See for example *M\* & Others v Indofurn Pty Ltd* (1995) 30 IPR 209 and *Bulun Bulun & M\* v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

<sup>7</sup> One well reported example involved an 82-year-old non-Indigenous painter Elizabeth Durack who produced a number of paintings under the *persona* Eddie Burrup, an Indigenous male artist. Susan McCulloch, ‘Revealed: Black art scandal’, *The Weekend Australian*, 15–16 November 1997.

<sup>8</sup> Interview with Keven Francis, then Executive Director, NIAAA, October 2000.

(iii) *Fakes*

There have been several reports of artworks being sold by art dealers that were not painted by Indigenous artists as claimed.<sup>9</sup>

(iv) *Misleading labeling*

The presence of products marketed and labeled as “authentic” to indicate that the products were of Indigenous origin or had obtained the approval of Indigenous peoples is another growing concern. Some common misleading labels include “Authentic Aboriginal”, “Designed by Aboriginals” and “Royalties paid to Aboriginal artists and communities.” According to NIAAA’s investigations, many of these labels were false and misled consumers.<sup>10</sup>

(v) *Unfair contracts*

Indigenous artists often enter into contractual arrangements without legal advice and without a proper understanding of the terms and conditions<sup>11</sup> resulting in complaints of unfair terms within the licensing contracts. As a result, some Indigenous artists have entered into licensing contracts with oppressive terms and low royalties.

(vi) *Use of Indigenous styles by other Indigenous artists*

Another problem has been the appropriation of Indigenous art styles, stories and themes by Indigenous artists not associated with the particular style or dreaming stories they have depicted in their artwork.<sup>12</sup> For example, Indigenous artists from Southern states painting *rarrk* or crosshatch styles, originating from Arnhem Land, Northern Australia, and an eastern Indigenous artists painting *wandjinas*<sup>13</sup>, creation beings that originate traditionally from the north west of Australia.

### Main Objectives of an Authentication System

Since the early 1980s, Indigenous artists called for the establishment of an authentication labeling system for Indigenous arts and cultural products. NIAAA commenced consultations and research on a suitable model for a label of authenticity in 1993 and its representatives met with Indigenous artists and organizations, arts bodies and government departments. From the consultations, NIAAA derived the following main objectives for a national Indigenous Authenticity Label:

- (i) to maintain the cultural integrity of Aboriginal and Torres Strait Islander art;

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<sup>9</sup> An Adelaide art dealer was charged for dealing with 22 fake paintings passed off as the works of Indigenous artist, Clifford Possum Tjapaltjarri, Peter Gotting, “Shame of Aboriginal Art Fakes”, 17 July 2000.

<sup>10</sup> Michael McMahon, “What’s in a Label?” *NIAAA News*, 1995, page 2.

<sup>11</sup> Terri Janke, *Our Culture: Our Future - Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, Sydney 1998, written for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, page 41.

<sup>12</sup> *Ibid*, page 38.

<sup>13</sup> Striking figures represented by Indigenous people in the Kimberley region of Western Australia, featuring a halo effect around the face. Wandjinas are recognised as having a significant role in natural and spiritual events.

- (ii) to ensure a fair and equitable return to Aboriginal and Torres Strait Islander communities and artists for their cultural products;
- (iii) to maximize certainty for consumers as to the authenticity of Aboriginal and Torres Strait Islander-derived works, products, services;
- (iv) to maximize the multiplicity and diversity of Aboriginal and Torres Strait Islander art;
- (v) to promote an understanding both nationally and internationally of Aboriginal and Torres Strait Islander cultural heritage and art.<sup>14</sup>

### What is Authenticity?

Issues of authenticity are a major concern also for consumers interested in purchasing authentic products of Aboriginal art.<sup>15</sup> The definition of “authentic” art differs according to various perspectives - consumer perceptions, retailers, manufacturers and producers. The research phase for the Label sought to ascertain the notion of authenticity from the point of view of the Indigenous producers. The following definition was born out of the consultation phase:

“[It is] a declaration by Indigenous Australian artists of identity with, belonging to, knowledge about, respect for and responsibility towards the works of art they create.

Identity is about upbringing, beliefs, stories, cultural ways of living and thinking, and knowing what it is to be Aboriginal or Torres Strait Islander.

Belonging means to be either connected with stories about country or connected with the experiences of history in being Indigenous in Australia.

Knowledge is about the familiarity gained from actual experience and also having a clear and certain individual perception of expression.

Respect and responsibility is about having regard for and looking after culture. It is about acting in a way which is sensitive to others and which does not exploit other peoples’ identity, knowledge and belonging.”<sup>16</sup>

The development of NIAAA’s labeling model was based on this definition of authenticity.

### What type of Trade Mark?

There were several options for establishing a National Indigenous Authentication Mark, namely:

- an unregistered trade mark;
- a registered trade mark;
- a collective trade mark<sup>17</sup>;

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<sup>14</sup> Marianna Annas, “The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin, (1997) vol 3(90) *Aboriginal Law Bulletin*, pp 4 - 6.

<sup>15</sup> See Christine Alder, “Challenges to Authenticity in the Aboriginal Art Market”, Paper presented at the Art Crime Protecting Art, Protecting Artists and Protecting Consumers Conference convened by the Australian Institute of Criminology, 2 - 3 December 1999, Sydney.

<sup>16</sup> Marianna Annas, “The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin”, *Aboriginal Law Bulletin*.

<sup>17</sup> A collective trade mark is “a sign used, or intended to be used, in relation to goods and services dealt with

- a certification mark;
- a mark protected under legislation such as that introduced to protect the Olympic rings and other Olympic insignia for the Sydney Olympic Games.<sup>18</sup>

The option of a certification mark was chosen as it went beyond identifying the source of the goods and services, being the function of regular trade marks. It allowed for the denotation of the quality and characteristics of the goods and services.

### Funding for Implementation of the Authenticity Label Project

As a result of the research and planning phase, a business plan was developed. ATSIC, which provided the majority of funds for the Authenticity Label Project<sup>19</sup>, provided funding through its National Arts and Crafts Industry Support Strategy for the development and implementation of the labels of authenticity. The Australia Council for the Arts provided funds for operational costs as well as the costs associated with the employment of a Project Manager for the Labeling system.<sup>20</sup> (as noted already, this funding has since ceased).

### CERTIFICATION MARKS

A certification mark can be used prior to registration. At that stage, protection of the mark is based on copyright and passing off, rather than infringement of a registered trade mark.<sup>21</sup> However, it is a better protection measure for certification marks to be registered because the registered owner can rely on registration as proof of rights.

### Classes of Goods and Services

As with regular trade marks, it is necessary to indicate the class of goods or services for which registration is sought for the certification mark. That is, the specific goods or services within that class in connection with which the trade mark is intended to be used. The Label of Authenticity Mark and the Collaboration Mark were registered in a wide range of arts and cultural products covered by the labeling system (see Appendices 1 and 3).

### The Design of the Trade Mark

The graphic for the Label of authenticity was designed by an Indigenous artist, Peter Yandana McKenzie. It is a design of a boomerang in the colors of the Aboriginal flag<sup>22</sup> in a black triangle with a black border for the Label of Authenticity and a white border for the Collaboration Mark (see design below). The design has been criticized by Torres Strait Islanders as not being inclusive of Torres Strait Island communities.<sup>23</sup> The Torres Strait

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or provided in the course of trade by members of an association to distinguish those goods and services from goods or services so dealt with or provided by persons who are not members of the association":  
Section 162, *Trade Marks Act 1995 (Cth)*

<sup>18</sup> *Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth)*

<sup>19</sup> <[http://www.niaaa.com.au/niaaa\\_news02.htm](http://www.niaaa.com.au/niaaa_news02.htm)>

<sup>20</sup> *Ibid.*

<sup>21</sup> *Trade Marks Law*, Law Book Company, Loose-leaf Service, page 34

<sup>22</sup> The Aboriginal Flag was designed by Harold Thomas in the 1970s. He is the copyright owner of the flag.

<sup>23</sup> Discussions with Sam Pilot, previously Torres Strait Islander Cultural Development Officer, August 2000 and Aven Noah, Torres Strait Islander Media Association, August 2000.

Islander people have their own flag in the colors blue, green, white and black.<sup>24</sup> In 2000, NIAAA indicated that they planned to develop a separate label for Torres Strait Islander artists which was to incorporate the design of the Torres Strait Islanders' flag.<sup>25</sup>

### Application

After consultations and design of the marks, they had to be registered with the government agency, IP Australia. A law firm, who acted for NIAAA on a pro-bono basis, undertook the legal work of drafting the rules that would govern use of the marks and overseeing the applications.

The applications for the marks were officially lodged for examination on September 8, 1998.<sup>26</sup> The Label of Authenticity was approved and officially registered in March 2000, taking almost twenty months for registration to be finalized. The Collaboration Mark passed the authorization stage by the Australian Consumer and Competition Commission (ACCC) in July 2002 and was approved by the Registrar of Trade Marks on August 1, 2003. According to NIAAA's lawyers, the delay was due to the heavy scrutiny of the mark by the ACCC in the authorization stage.<sup>27</sup> The delay for the Collaboration Mark registration may also have been due to the cessation of funding to NIAAA.

### Examination

At the examination phase, the Trade Marks Office considered that there were grounds that might preclude the application from being registered. The most significant ground was that the NIAAA trade mark was considered to be substantially identical with, or deceptively similar to, that of Nike®. An adverse report was given to NIAAA asking them to clarify the situation.

Whilst the Registrar of Trade Marks accepted the Label of Authenticity for registration, it did so with an endorsement (limitation)<sup>28</sup> on use of the mark which limited use to "the colors black, red and yellow with a black border surrounding the triangular device, which border is in turn surrounded by a black border."<sup>29</sup>

### Opposition

Neither the Label of Authenticity or the Collaboration Mark received notices of opposition.

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<sup>24</sup> Meeting with Island Coordinating Council staff who commissioned the flag design, August 2001.

<sup>25</sup> Interview with Keven Francis, Executive Director, NIAAA.

<sup>26</sup> It generally takes approximately 6 - 9 months for the application to be examined. An applicant can apply for expedition, which was what NIAAA did in this instance.

<sup>27</sup> Meeting with Ross McLean and Rohan Singh, Baker & McKenzie Lawyers, March 2001.

<sup>28</sup> The Registrar may accept a trade mark subject to conditions or limitations. See Section 33(2), *Trade Marks Act 1995 (Cth)*. A limitation means limitations of the exclusive right to use a trade mark given by the registration of the trade mark including limitations of that right as to:

(a) mode of use; or

(b) use within any territory area within Australia; or

(c) use in relation to goods or services to be exported. (Section 6, *Trade Marks Act 1995 (Cth)*.)

<sup>29</sup> See trade marks 772563 (Service Mark) and 772564 (Goods).

## The Rules

An applicant for a certification trade mark must also file a copy of the Rules governing the use of the certification trade mark.<sup>30</sup> The Rules set out the application process and the process by which a person will be allowed to use the certification trade mark. The NIAAA Rules are attached at Appendix 2.

## Australian Competition and Consumer Commission (ACCC)

The Trade Marks Act of 1995 contains provisions for the Australian Competition and Consumer Commission (ACCC) to be involved in the approval process of certification marks.

Once the application for registration is filed, and the Registrar is satisfied that there are no grounds for rejecting it, the documents are sent to the ACCC. The ACCC considers the application and inspects the rules governing the use of the certification mark. The rules must set out the objective criteria for the certification process and provisions for dispute resolution in the event of refusal.

As part of the process, the ACCC consults within the industry regarding competition and whether the mark is likely to affect competition in the market. The ACCC assesses the rules and the management structure to ensure the mark is not anti-competitive. The ACCC, among other things, considers the following:

- whether the applicant (or any approved certifier) is competent to certify goods or services in respect of which the certification mark is to be registered.<sup>31</sup>
- whether the rules governing the use of a certification mark are “detrimental to the public”, and otherwise satisfactory.<sup>32</sup>

The ACCC can require or permit certain provisions to be included in the rules governing the use of a certification trade mark.<sup>33</sup> The ACCC must adopt a prescribed process.<sup>34</sup> The procedure is set out in four steps:

1. Initial assessment of the application;
2. Advertising of the initial assessment;
3. Holding of conferences if required;
4. Making a final decision on the application.

If the ACCC is satisfied that the applicant is competent to certify the goods and services and that there would not be any detriment to the public, the ACCC must give a certificate to that effect.<sup>35</sup> If the ACCC gives such a certificate, the Registrar of Trade Marks must accept the application or otherwise reject it.

In the case of the Label of Authenticity, the ACCC consulted with a range of industry bodies and government departments. According to NIAAA, the ACCC approval was the

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<sup>30</sup> Section 173, *Trade Marks Act 1995 (Cth)*.

<sup>31</sup> Section 175(2)(a), *Trade Marks Act 1995 (Cth)*.

<sup>32</sup> Section 175(2)(b), *Trade Marks Act 1995 (Cth)*.

<sup>33</sup> Section 173(2), *Trade Marks Act 1995 (Cth)*.

<sup>34</sup> Regulation 16.3 of the Trade Mark Regulations 1995.

<sup>35</sup> Section 175, *Trade Marks Act 1995 (Cth)*.



most complex part of the process. The ACCC approved the rules for the Label of Authenticity in 2000 and recently approval was given to the Collaboration Mark, as already mentioned.

### Rights given by Registration

Once a certification trade mark is registered, the registered owner of the trade mark has the exclusive rights:

- to use the trade mark; and,
  - to authorize others persons to use the trade mark,
- in relation to the goods and/or services in respect of which the trade mark is registered. The registered owner must, however, only use the certification trade mark in accordance with the rules governing its use.<sup>36</sup>

When the registered owner allows another person (the approved user) to use the certification trade mark in relation to goods and services in respect of which it is registered, the approved user has the right to use the certification mark in accordance with the rules.<sup>37</sup>

### Remedies

The registered owner of a trade mark who successfully establishes infringement has certain remedies. NIAAA, as the owner of the label, may also bring an action under the tort (delict) of passing-off and under the Trade Practices Act where the label has been copied, or otherwise used without authorization.

## THE NATIONAL LABELLING SYSTEM

The national labeling system comprises of:

- (i) Label of Authenticity – a registered Certification Mark;
- (ii) Collaboration Mark – a registered Certification Mark;
- (iii) Indigenous Arts Retail License – two registered service trade marks.

### (i) Label of Authenticity

The label of authenticity denotes that a product or service is derived from a work of art created by an Aboriginal or Torres Strait islander person or people, and has also been reproduced, or produced and manufactured, by Aboriginal or Torres Strait Islander people.

Indigenous artists wanting to sell and market their goods and services can apply to NIAAA for permission to use the Label of Authenticity. Applicants must apply on the prescribed form.

### *Applicant must be Indigenous*

An applicant must declare that he or she is an Aboriginal or Torres Strait Islander

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<sup>36</sup> Sections 171 and 20(1), *Trade Marks Act 1995 (Cth)*.

<sup>37</sup> Section 172, *Trade Marks Act 1995 (Cth)*.

person.

As part of the application process, an applicant is required to obtain two signed forms from an Aboriginal Corporation (passed at a meeting) certifying that the applicant is an Indigenous person. NIAAA has adopted the three pronged approach used by ATSIC and the Australian Government as follows:

- (a) the applicant must be of Aboriginal or Torres Strait Islander descent;
- (b) the applicant must identify as an Aboriginal or Torres Strait Islander; and,
- (c) the applicant must be accepted as such in the Indigenous community in which the applicant lives or comes from, or with which the applicant identifies.<sup>38</sup>

Once approved by NIAAA, or its Certified Approval Bodies, an approved Indigenous creator can purchase the labels and affix them to his or her art and cultural products.

### *Costs of Applying*

The cost of applying is A\$30, which gives the Indigenous creator a year's license to use the Label of Authenticity on his or her cultural products. After this time, the creator must renew the license by paying a further A\$30 per year.

### *Rules for Use*

Once approved, an applicant must comply with the rules for use of the label. The rules have incorporated terms for complying with Indigenous customary law. In particular, Rule 4.1 states that the Label can only be used for works which purport to encode, depict or reflect ceremony, legal knowledge, customs, stories, dreaming or ritual of traditional owners of land and are produced in accordance with any customs or laws of the relevant traditional owners and where permission of the traditional owners has been given for the creation of the work. This provision is aimed to alleviate the problem of Indigenous artists painting other styles that they have no claim or belonging to.

The rules also require that the Label can only be used in conjunction with information about the traditional group, language group or land the creator/artist is associated with including, if relevant to the work, "the way in which they regard the Work as reflecting their indigenous heritage or experience."<sup>39</sup>

These rules capture and implement elements of the definition of authenticity developed by Indigenous people during the consultation stage.

### *Dispute Resolution*

The Rules provide a confidential and binding dispute resolution process allowing for reconsideration or redetermination of any decision by NIAAA or an approved Certifier relating to any act or application.<sup>40</sup> An unsuccessful applicant can elect to meet with NIAAA delegates in an attempt to resolve the dispute. Should the dispute remain unresolved, the

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<sup>38</sup> See ATSIC Aboriginality Guidelines which are also adopted by other government agencies administering Aboriginal affairs and *Edwina Shaw & Anor v Charles Wolf & Ors*, [1998] 389 FCA (20 April 1998).

<sup>39</sup> Rules 4.2 and 4.3, Label of Authenticity Rules.

<sup>40</sup> Rule 9, Label of Authenticity Rules.

Rules empower the Executive Director of the Aboriginal and Torres Strait Islander Arts Board or the Australia Council to appoint a qualified independent Indigenous person or body to determine the dispute.<sup>41</sup>

(ii) The Collaboration Mark

The Collaboration Mark denotes that a product or service is derived from a work of art which has been created by an Aboriginal or Torres Strait Islander person or people who satisfy the definition, and which has been reproduced or produced and manufactured under fair and legitimate licensing arrangements with non-Aboriginal and Torres Strait Islander people.

The Indigenous artist and the producer or manufacturer must jointly apply to use the Collaboration Mark for manufactured products incorporating the work or contribution of the Indigenous artist. The terms of the license provide that the Collaboration Mark be used in accordance with the Rules.

*Copyright Production Agreement*

The producer/manufacturer must enter into a written agreement with a Certified Indigenous Creator for licensed use of the copyright in a particular artist's work or works. With respect to the Collaboration Mark, it must be shown by the applicants that the goods are to be commercialized pursuant to a "written Agreement on fair trading terms."<sup>42</sup>

What are "fair trading terms"? Rather than having NIAAA or its representatives vet every single agreement, the rules set out criteria where NIAAA or its approved certifier shall have regard to in determining this. The criteria include:

- whether the Indigenous person who contributed to the work had the opportunity to obtain independent advice from NIAAA, an Arts Law Center or a legal adviser before signing the agreement;
- whether the Indigenous person is required to assign their intellectual property rights in the work without additional payment of consideration.<sup>43</sup>

According to NIAAA, this allowed Indigenous artists the freedom to negotiate terms as they saw fit whilst at the same time providing a checklist of some measure of protection.<sup>44</sup>

*License Agreement*

Once approved, the Licensee must enter into a written license agreement with NIAAA to use the Collaboration Mark in relation to the licensed goods and services on set terms and conditions. The agreement specifically states that the Collaboration Mark is to be used as part of labeling and packaging of Licensed Goods and "accompanied by information as to the identity of the Indigenous artist, the Indigenous community, language group and land to which he or she belongs."<sup>45</sup> There are also terms that allow NIAAA to terminate the rights

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<sup>41</sup> Rules 6.3, Collaboration Mark Rules.

<sup>42</sup> Rule 3.1(i), Collaboration Mark Rules.

<sup>43</sup> Appendix D of Collaboration Mark Rules sets out Trading terms.

<sup>44</sup> Collaboration Mark Rules.

<sup>45</sup> Clause 3.2 of Licence Agreement.

should the Licensee fail to comply with the terms.<sup>46</sup>

#### *Costs for Use of Collaboration Mark*

To use the Collaboration mark, the applicant must pay a non-refundable fee of A\$50. Once the application is approved, the applicant can purchase the labels for use on the relevant goods.

There is a sliding scale for cost of production of the Label for the Collaboration Mark, depending on the number required. For instance, for goods with a wholesale price of A\$20 or less, the costs to use the level for 2000 or more labels is A\$250. In most cases the manufacturer bears the cost of production of the mark, although some manufacturers pass this cost onto the artists. Companies with access to technology for electronic production can produce the Collaboration Mark at a reduced cost.<sup>47</sup>

In this way, the Collaboration Mark aims to encourage tradition-based creativity on fair terms and to improve the returns to Indigenous artists on sales of Indigenous derived arts and cultural products and services.

#### *Dispute Resolution*

If NIAAA refuses to approve or renew the Licensee's license to use the Collaboration Mark, reasons for refusal must be provided in writing.<sup>48</sup> The Rules contain dispute resolution provisions similar to those established for Indigenous applicants for the Label of Authenticity.

#### (iii) Indigenous Arts Retail Licences

To complement the certification marks, NIAAA also registered the Label of Authenticity logo and the Collaboration mark logo as registered trade marks.<sup>49</sup> The registered marks provide a third aspect of the system - the Notice for use by Indigenous Arts Retailers. The Notice reproduces both the Label and the Collaboration marks in the form of a sticker to be affixed onto shop windows or doors. The Notice indicates to consumers that the retailer supports users of the Label of Authenticity and the Collaboration Mark and is supplied with products for sale under a licensing arrangement with NIAAA. It recognizes retailers and point of sale outlets as traders in Indigenous works or goods that had been created by Certified Indigenous Creators under the Label of Authenticity and the Collaboration Mark.

#### *Costs for Retailers*

Once approved, Retailers are granted the rights to display the Notice on their premises, for a cost of A\$250 per shop for a twelve months license.

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<sup>46</sup> Clause 6 of Licence Agreement.

<sup>47</sup> Interview with Keith Hall and Chris Harrison, NIAAA Staff, 2 March.2001

<sup>48</sup> Rule 3.0, Collaboration Mark Rules.

<sup>49</sup> Marks 77253 and 772564 – Classes 35 and 42 – Services.

## BENEFITS OF THE LABELLING SYSTEM

There are many benefits for Indigenous artists, their communities, the art community, and the tourism industry. NIAAA lists the following benefits to be gained from the implementation of the labeling system:

- (i) Indigenous artists will receive a fair and improved return on sales from Indigenous derived arts and cultural products and services;
- (ii) consumers will recognize products originating from Indigenous people who are speaking in the proper way about their stories;
- (iii) visitors will learn more about the different Indigenous traditional and contemporary styles of art and stories from across Australia;
- (iv) wholesalers and retailers will be encouraged to buy and sell authentic products created by Indigenous people;
- (v) manufacturers and distributors would be encourage to enter into licensing arrangements with Indigenous artists;
- (vi) consumers will identify goods and services of Indigenous origin in preference to “copy-cat” products.<sup>50</sup>

At the launch of the Label, the Chair of NIAAA, the late Dr. Perkins stated that the label was the first step towards preventing Aboriginal paintings, music, dance, poetry and tourism services from being exploited. For too long the power had been in other levels of the market. According to Dr. Perkins, the Label gives power and control back to the Indigenous artists and creators.<sup>51</sup>

## HOW THE SYSTEM PROGRESSED

Due to the ceasing of funding to NIAAA in 2002, the future of the Label of Authenticity system is uncertain. Whilst both marks remain registered, and are owned by NIAAA, there is presently no office to administer the label and implement the certification system.

During the two years in which the system operated, the Collaboration mark and retail license were the most successful components of the system. Approximately 160 Indigenous artists, mostly located in New South Wales from areas that were not serviced or represented by Aboriginal Arts and Craft Centres, registered to use the Label of Authenticity. However, many Indigenous artists considered that the A\$30 registration fee was prohibitive as a significant part of the artist community consisted of hobby artists whose income was insufficient to warrant the registration fee for the Label of Authenticity. Another factor contributing to the low uptake could have been the administrative nature of the application process.

However, of all the applications received, the majority were approved by the Committee and there has been only one unsuccessful application.

Active campaigning, via advertising and direct association with Indigenous artists, was

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<sup>50</sup> NIAAA, “The Label of Authenticity for the Indigenous Arts”, *NIAAA Newsletter*, September 1999

<sup>51</sup> Dr. Perkins at Launch of Label.

conducted by NIAAA to encourage more applications from Indigenous artists. Some funding was obtained to assist artists to join through artists associations such as Desert, the Rainbow Serpent and ANKAAA.<sup>52</sup>

NIAAA envisaged continued marketing of the Label. During the Olympics, material on the Label was distributed to incoming tourists. In 2000, NIAAA staff noted that they would like to see increased funding support to enable a sustained marketing campaign for the Label. It was evident that there was a need for a strong marketing promotion for labels of this kind to work effectively.

With respect to the certification mark, NIAAA issued licenses to approved manufacturers of mass produced items. A handful of Indigenous artists have entered into agreements with manufacturers who now use the Collaboration Mark. For example, Leanne Hunter, an Indigenous artist, used the Collaboration Mark for a range of children's clothing manufactured and sold through Country Target in 2001.

The third stage of the system for retailers was developed in 2000. During 2000 to 2002, approximately 11 retailers used the Indigenous Arts Retail License.<sup>53</sup>

#### Developments and Directions in 2000

In 2000, NIAAA reported that regulating the use of the Label of Authenticity was aimed at pursuing excellence in the marketing and the promotion of Indigenous art and culture.<sup>54</sup> NIAAA considered that the process would require further refinement and envisaged that the use of the marks be monitored to gauge success, with adjustments being made if necessary. Once the Label developed an adequate income stream, NIAAA considered the establishment of an independent not-for-profit body to manage and take over the ownership of the Label of Authenticity.

Marketing all aspects of the Labeling system was seen as a priority by NIAAA to ensure its successful development.

Monitoring of the labeling system to locate any copying or misuse of the Label was also identified as an important consideration for the future. As Wiseman noted, the enforcement of the rights under the Label was seen as part of increasing consumer confidence in the Label as a method of authentication.<sup>55</sup>

#### *Comments*

The implementation of the Indigenous Authentication Labeling System is evidence of the economic value arts and culture has not only to Indigenous peoples but also to the Australian economy generally. The system has potential to provide a means by which Indigenous artists can strengthen their positions. To be effective, there is a need for a public education and awareness program to be conducted for the labels. The main focus of the certification system was the manufacturing area and a distinction was drawn in the industry

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<sup>52</sup> Interview Keven Francis, NIAAA.

<sup>53</sup> *Ibid.*

<sup>54</sup> See NIAAA, *Op Cit.*

<sup>55</sup> Leanne Wiseman, "The Protection of Indigenous Art and Culture in Australia: The Label of Authenticity" [2001] E.I.P.R Issue 1 at 22-23.

between souvenir arts and fine arts. The Label provided protection for commercial sales and manufacturing of Indigenous arts and cultural products.

There is still, however, a need for new laws to protect Indigenous Cultural and Intellectual Property rights including the recognition and protection of communally owned works, and works which under copyright are considered to be in the public domain.

The success of the Label will depend on how well the system is implemented and monitored. Additional issues that still need to be addressed include:

(i) Effect on Arts Market

In 2000, some Indigenous artists considered that labeling system could potentially interfere with the creative process, even leading to comments of the label being a “dog-tag”<sup>56</sup>, and that its value in the fine arts market may be limited. The focus was on use of the Collaboration Mark for mass-produced items, in particularly the souvenir market.

Some Indigenous artists were apprehensive about the possibility that the work of Indigenous artists not participating in the labeling system would be perceived within the market as unauthentic. The marks are not the only means of identifying authentic Indigenous artistic and cultural work. There are other means of identifying authentic works – for instance, the production of artistic works from Aboriginal arts centres. These centres adopt logos and trade marks of their own to denote authenticity of origin (see, for example, Case Study 7 on the Desert trademark and copyright licensing scheme). The Label’s rules also expressly state that this is not an intended function of the Label.<sup>57</sup>

(ii) Regional and Local Access

In 2000, regional organizations such as Desert and the Association of Northern Kimberley and Arnhem Aboriginal Artists (ANKAAA), have developed regional labeling systems (as mentioned, see Case Study 7). Furthermore, individual arts center also use their own distinctive labeling systems. One issue was how the label would fit alongside the many existing labels used by arts centres. Will the artists from arts centres and regional organizations want to use the NIAAA label in addition to their own systems? According to NIAAA, the label could be used alongside regional or local labels. It would provide the consumer with certainty that what they are about to purchase has been through two systems of validation for authenticity.

There were relatively small numbers of artist applying for the label in regional and local bodies. Many regional bodies are already using their own trade marks and logos to sell and distribute their art via Aboriginal arts center networks. Many centers feel they do not need to apply for the NIAAA mark to show that their products are “authentic.” Moreover, the costs of the mark may preclude use by Indigenous artists, who have to pay for the cost of applying the label to their works.

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<sup>56</sup> Terri Janke, “Money for Arts Sake,” *Alternative Law Journal*, Vol 25, No 4, August 2000, page 190. The “dog tag” is the term used by Aboriginal people for the certificates issued exempting them from restrictive legislation and practices, and entitling them to vote.

<sup>57</sup> Rule 10.1, Label of Authenticity Rules.

Another issue was that the use of the Aboriginal colors only on the marks dissuades use by Torres Strait Islander artists. In 2000, NIAAA was hoping to overcome the problem by incorporating the Torres Strait Islander colors into the marks. Discussions had commenced with the Torres Strait Islander Coordinating Council, however, since funding has ceased, this possibility has not progressed.

(iii) Copyright Licensing Education

In attempting to protect the contractual interests of Indigenous artists, NIAAA had included rules that the Collaboration Mark be used only with “fair and equitable contracts.” For this to work, artists needed access to independent legal advice regarding contract law and copyright law as well as royalty terms and manufacturing standards, which they don’t always have or can afford.

(iv) Marketing

Marketing is the key to the success of the national label of authenticity system. For the system to work, consumers must know about the labels and care enough about “authenticity” to seek out the products that bear the marks.

(v) Continuing Policy

In 2000, NIAAA had also hoped to support the Label with its wider arts policy. For instance, in 1996, NIAAA developed the following policy statement concerning non-Indigenous artists painting Indigenous designs:

“...NIAAA strongly urges non-Indigenous artists, writers and performers to respect the cultural and spiritual significance of Indigenous people and refrain from incorporating elements derived from Indigenous cultural heritage into their works without the informed consent of the traditional custodians. It is important that Aboriginal and Torres Strait Islander people have control over the development of their own forms of artistic and cultural expression, as well as its interpretation and use by others.”<sup>58</sup>

Status of the Certification Marks in 2003

In December 2002, NIAAA closed its offices.<sup>59</sup> Its major funding bodies, ATSIC and the Australia Council, ceased funding in 2002, leaving many Indigenous artists concerned. Mundara Koorang, ex-Director of NIAAA, stated in the *Koori Mail*, “(t)he Label of Authenticity has now taken giant steps backwards and its resurgence, if possible, will be an uphill battle.”<sup>60</sup>

Since 2000, there has been a growth in the number of regional arts centres registering trade marks. According to Cathy Craigie, Director of the Aboriginal and Torres Strait Islander Arts Board of the Australia Council, “this allows for the each region to authenticate and promote their own works rather than have their works authenticated by a national body.

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<sup>58</sup> NIAAA Policy Statement 1996.

<sup>59</sup> Debra Jopson, “Aboriginal seal of approval loses it seal of approval,” *Sydney Morning Herald*, 14 December 2002

<sup>60</sup> Mundara Koorang, “The Time Has Arrived,” *Koori Mail*, 11 December 2002, page 5



This appears to be more appealing to artists than having their works and identities assessed by a national Committee they are not familiar with.”<sup>61</sup> The development of regional marks is growing and these marks are now gaining market recognition. However, those areas that are not represented by funded Arts and Crafts Centres have no authenticity labeling system and are disadvantaged. There is value in having an integrated systems that allows for local, regional and state differences.<sup>62</sup>

The Label has at least been an inspiration to other Indigenous groups in the Pacific region. In 2002, the New Zealand Toi Iho™ Maori Made Mark, which is based on the Label of Authenticity, was launched. The registered trademark was developed by Te Waka Toi, Creative New Zealand’s Māori Arts Board, in consultation with Māori artists. The Mark is currently being used with reported success. Whilst modeled on the Australian model, a different feature for the Maori Made mark is that artists who apply for it must also meet criteria of quality. This has raised concerns from artists whether “quality” can be judged objectively.<sup>63</sup> Despite this the mark appears to be in use and is sought after by Maori artists to use on their arts and craft products. Among the first 38 Māori artists to be awarded the “toi iho™” Maori Made Mark are carvers, sculptors, a fashion designer, a furniture designer, weavers, jewelers and multimedia artists.<sup>64</sup>

[Appendix 1 follows]

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<sup>61</sup> Telephone attendance on Cathy Craigie, 5 September 2003.

<sup>62</sup> Terri Janke, *Our Culture: Our Future*, page 207

<sup>63</sup> Discussions at Indigenous Art and Heritage & the Politics of Identify Conference held at Massey University, 8 July 2002, Session “Branding Indigenous Art and the implications for Intellectual Property Rights.”

<sup>64</sup> See <[www.toiioho.com](http://www.toiioho.com)>.

Case Study 8

APPENDIX 1

The Label of Authenticity

**LABEL OF  
AUTHENTICITY**



Certification Mark 772564

Certification Mark 772564

**Class No: 2**

Goods: Dyes for clothing, paints and paint boxes.

**Class No: 4**

Goods: Candles

**Class No: 8**

Goods: Hand tools and implements including artists tools such as chisels

**Class No: 9**

Goods: Recordings (whether on compact disc, video tape, software or any other medium) which feature Aboriginal art or craft works.

**Class No: 14**

Goods: Jewelry, precious stones and objects made of precious stones, watches and clocks, other works of art made of or with precious metals in this class, ornaments in this class

**Class No: 15**

Goods: Musical instruments including indigenous instruments.

**Class No: 16**

Goods: Paper, cardboard and goods made from these material, printed matter, photographs, stationery, artists materials, paint brushes, instructional and teaching material, works of art or craft made of or on paper, lithographic works of art.

**Class No: 18**

Goods: Leather goods, art or craft works made on or with animal skins or hides, walking sticks, whips harness and saddlery.

**Class No: 20**

Goods: Furniture, mirrors, picture frames, works of art or craft made of or with wood including bark paintings, spears, shields, woomera and indigenous weapons, works of art or craft made of or on reed, bone, shell, mother of pearl and substitutes for these materials, wax plaster or plastic

**Class No: 21**

Goods: Household or kitchen utensils and containers, combs and brushes (except paint brushes) brassware, porcelain and earthenware including works of art or craft made of or on porcelain, terra-cotta or glass.

**Class No: 22**

Goods: Works of art or craft made of or with ropes, string and other fibrous textile materials, fishing nets and baskets within this class.

**Class No: 24**

Goods: Textiles and textile goods, works of art or craft made on or with textiles.

**Class No: 25**

Goods: Clothing, footwear and headgear.

**Class No: 27**

Goods: Carpets, rugs, mats and matting, wall hangings.

[Appendix 2 follows]

## Case Study 8

### APPENDIX 2

#### NIAAA's Label of Authenticity trade mark\*

#### Certification Rules

##### **1. NIAAA and the Label of Authenticity**

The National Indigenous Arts Advocacy Association is a non profit organisation dedicated to protecting Indigenous Australian peoples' rights, culture, cultural respect, protocol and values throughout the promotion and protection of indigenous arts and crafts. The label of Authenticity is a trade mark that was developed to enable the protection of Australian indigenous art, cultural products and cultural performances by way of a national certification system for the authentication of the works of Indigenous people. The Label of Authenticity enables people to easily identify products and performances as authentic works of Indigenous Australians and will help educate consumers about the diversity of traditional and contemporary Indigenous artistic expression, art and stories. Any indigenous Australian who meets the standards set by these Rules may apply for certification entitling that person to use the Label of Authenticity in relation to their works and to reap the benefits of the certification system.

The certification system is a two tiered system consisting of the Label of Authenticity and the Collaboration mark. The Label of Authenticity which is the subject of these Rules can only be used in relation to a work or service which is created, authored or produced wholly by an Indigenous person. The Collaboration mark can be used where the work or service is authored, created or produced by an Indigenous person with the assistance or input of a non-indigenous person or where a product or service incorporates the work of an Indigenous person, and the product or service is to be commercially exploited under a written agreement on fair trading terms.

##### **2. Definitions**

2.1 The following words and phrases will have the following meanings when used in these Rules unless the context otherwise dictates:

- (a) "Annual Fee" means the fee payable on application for renewal of certification as set out in the Annexures C to these rules.
- (b) "Application Fee" means the fee payable on application for certification as set out in Annexure C of these Rules.
- (c) "Approved Certifier" means those persons appointed in writing by NIAAA from time to time to consider applications for certification under these Rules. An Approved Certifier must:
  - (i) be a non-profit incorporated Indigenous community arts and/or cultural organisation, or an ATSIC-funded organisation or other organisation of a similar nature approved by NIAAA; and
  - (ii) have knowledge of Indigenous communities within the area in which they are entitled to certify applicants.

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\* The Label of Authenticity Rules. Drafted by Baker and McKenzie Lawyers, Sydney Ross McLean and Rohan Singh, 2000. © Baker and McKenzie. Produced with permission from Ross McLean.

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Appendix 2, page 2

- (d) “Certified Indigenous Creator” means and includes any person/s who has been certified in writing by NIAAA or an Approved Certifier as an Indigenous Person.
- (e) “Indigenous Person” means a person of Australian Aboriginal or Torres Strait Islander descent, who identifies as an Australian Aboriginal or Torres Strait Islander, and is accepted as such in an indigenous community.
- (f) “Label of Authenticity” means the trade mark which is the subject of Australian Trade Mark Application 772565 as depicted in Annexure “A” to these Rules
- (g) “NIAAA” means the National Indigenous Arts Advocacy Association Inc or any not-for profit organisation which it appoints as its successor for the purpose of the Label of Authenticity and these Rules, upon that appointment receiving any necessary Australian Competition and consumer commission or other approval and becoming effective.
- (h) “Register” means the national database of Certified Indigenous Creators, to be kept by NIAAA and its Approved Certifiers, which will be available to the public for inspection upon request.
- (i) “Rules” means these Rules as amended from time to time, those amendments being effective after any necessary Australian Competition and Consumer Commission or other approval has been obtained by NIAAA.
- (j) “Work” means and includes any artwork, craftwork or other product or subject matter within the specification of goods for which the Label of Authenticity is from time to time registered as a trade mark in Australia, whether in electronic form or other media.
- (k) “Services” means and includes performances; lectures; productions (including the production of videos, films and television shows); providing information on the Internet or in other media; or other services within the specification of services for which the Label of Authenticity is from time to time registered as a trade mark in Australia, whether in electronic form or other media.

2.2 In this Agreement, unless the context requires another meaning:

- (a) a reference to:
  - (i) the singular includes the plural and vice versa;
  - (ii) legislation is a reference to that legislation as amended, consolidated, supplemented or replaced.

### **3. Who can use the Label of Authenticity?**

3.1 The Label of Authenticity can be used in accordance with these Rules only by Certified Indigenous Creators on Works which they alone conceive and create, or in relation to Services which they alone conceive, create, perform or otherwise present in public.

3.2 All applications must be made in the form attached as Annexure “B” to these Rules or in such other form as NIAAA may reasonably require or allow, and be accompanied by;

- (i) the Application Fee; and
- (ii) an ATSIC Confirmation of Aboriginality or Torres Strait Islander Descent Form or Label of Authenticity Confirmation of Aboriginality or Torres Strait Islander Form or other evidence that the applicant is an Indigenous Person; and

be supplemented by any further documents or information that NIAAA or its Approved Certifiers may reasonably require in order to decide whether or not the applicant is an Indigenous Person.

3.3 In deciding whether an applicant is an Indigenous Person, NIAAA may require an applicant to clarify or

provide further evidence establishing that the applicant is a person of Australian Aboriginal or Torres Strait Islander descent, identifies as an Australian Aboriginal or Torres Strait Islander and is accepted as such in an indigenous community in which the applicant lives, or comes from or with which the applicant identifies. The applicant may trace his/her descent from a different indigenous community from the indigenous community with which they identify or in which they are accepted as indigenous.

3.4 An applicant must specify in the application the Works and/or Services in respect of which it intends to use the Label Of Authenticity, and inform NIAAA of any expansion of those Works or Services from time to time in writing in order for NIAAA to keep the Register accurate and to assist NIAAA in monitoring use of the Label of Authenticity. It is not necessary for a Certified Indigenous Creator to file a new application for additional Works or Services.

3.5 If NIAAA or its Approved Certifier is satisfied that an applicant is an Indigenous Person entitled to be certified as a Certified Indigenous Creator, it will issue a Certificate confirming that the applicant is certified to use the Label of Authenticity and will enter the applicant's name on the Register.

3.6 If NIAAA or its Approved Certifier is not satisfied that an applicant is entitled to be certified as a Certified Indigenous Creator, it will issue a written notice of its decision giving reasons for its refusal to certify the applicant.

3.7 NIAAA or its Approved Certifier should, within one month of the date of an application in an approved form, issue to the applicant either:

- (i) a Certificate confirming that the applicant is certified to use the Label of Authenticity; or
- (ii) a request for further evidence that the applicant is an Indigenous Person;  
or
- (iii) a written notice refusing to certify the applicant.

3.8 Each Certified Indigenous Creator is authorised to use the AuthenticityMark, in accordance with these rules, for 12 months from the date of the written Certificate issued under clause 3.5 of these Rules.

3.9 At the expiration of each twelve (12) months, a Certified Indigenous Creator who wants to continue to be authorised to use the Label of Authenticity in accordance with these Rules, may apply in writing to NIAAA or an Approved Certifier. Provided that the Certified Indigenous Creator's right to use the Label of Authenticity has not been terminated in accordance with clause 8 of these Rules, the request is in writing and the Annual Fee is paid, NIAAA or its Approved Certifier will issue a Certificate of Renewal confirming that the Certified Indigenous Creator is entitled to use the Label of Authenticity for a further twelve (12) month period. It is not necessary to provide evidence that the Certified Indigenous Creator is an Indigenous Person, within the meaning of these Rules.

3.10 If NIAAA or an Approved Certifier refuses to authorise the Certified Indigenous Creator to use the label of Authenticity for a further twelve (12) month period, it must provide the Certified Indigenous creator with its reasons for refusal in writing.

#### **4. How must the Label of Authenticity be used?**

4.1 In the case of Works or Services which purport to encode, depict or reflect the ceremony, law, knowledge, customs, stories, dreaming or ritual of the traditional Indigenous owners of particular land or to in some other sense belong to that land, the Label of Authenticity will only be used in connection with those Works or Services if they were produced in accordance with any customs or law of the relevant traditional indigenous owners of the land in question and if the Certified Indigenous Creator(s) who authored the Works or presents the Services has obtained any necessary permissions or approvals required under those customs or law for the creation, publication, sale and performance or other proposed dealing in the Works or Services.

4.2 In the case of Works, the Label of Authenticity can only be used as part of a label, package, covering, or other thing in which the Works are provided or which is applied to, woven in, impressed on or affixed to the Works if that thing also includes or is accompanied by information as to the identity of any Certified Indigenous Creator, the traditional indigenous people, language group and land to which he or she belongs, where they were

living when the Work was authored if relevant to the production of the Work and the way in which they regard the Work as reflecting their indigenous heritage or experience.

4.3 The Label of Authenticity can only be used in relation to Services if any program, promotional material or other written or electronic material produced about or in connection with the Services also includes or is accompanied by information as to the identity of any Certified Indigenous Creator, the traditional indigenous people, language group and land to which he or she belongs, where they were living when the Services were authored if relevant to the authorship or production of the Service and the way in which the Certified Indigenous Creator regards the Service as reflecting their indigenous heritage or experience.

4.4 The Label of Authenticity must only be affixed to a Work or used in relation to a Service by its Certified Indigenous Creator or by those authorised on their behalf to do so with respect to that particular Work or Service. A Certified Indigenous Creator cannot licence, authorise or consent to others affixing the Label of Authenticity to Works which are authored, or produced in whole or in part by non-Indigenous persons, or in the case of Services, those which are presented or performed in whole or in part by non-Indigenous persons.

4.5 The Label of Authenticity must always be represented in the manner in which it has been registered or applied for as a trade mark without change to its features, colours, proportions or other characteristics. Other trade marks (including regional marks), features, stickers or other matter may be used with the Label of Authenticity provided that the Label of Authenticity is not obliterated or obscured in whole or part.

4.6 The Label of Authenticity must not be used in a way which is misleading or deceptive or otherwise contrary to any applicable law or regulation. Without limitation, any use must not be accompanied by any claim or representation that Certified Indigenous Creator enjoys the sponsorship, approval or endorsement of NIAAA or any of its delegates.

## **5. Ownership and Enforcement of the Label of Authenticity**

5.1 NIAAA owns the Label of Authenticity and Certified Indigenous Creators who are authorised to use it by and under these Rules acquire no property or other rights in the Label of Authenticity. NIAAA derives and owns all goodwill and reputation created in the label of Authenticity through its use.

5.2 The Label of Authenticity comprises a logo, the copyright in which is owned by NIAAA. It is of the utmost importance to NIAAA and to the protection of the Label of Authenticity that all reproductions of the Label of Authenticity be consistent, of the highest quality and conform with the specifications for the label of Authenticity prescribed by NIAAA from time to time. Nothing in these Rules is intended to confer on a Certified Indigenous Creator the right to reproduce the label of Authenticity in any form. The Label of Authenticity can only be reproduced by NIAAA or by or on behalf of a Certified Indigenous Creator with the express written permission of NIAAA.

5.3 No application to register the Label of Authenticity or any similar trade mark, or any mark (brand or logo) which incorporates the Label of Authenticity or any similar mark, will be filed or made by a Certified Indigenous Creator.

5.4 No Certified Indigenous Creator will claim ownership or any other right or interest in the Label of Authenticity other than the right to use the Label of Authenticity pursuant to and in accordance with these Rules, or challenge the ownership of the Label of Authenticity by NIAAA.

5.5 If any Certified Indigenous Creator becomes aware of any unauthorised use of the Label of Authenticity or any similar mark it will bring this to the attention of NIAAA which will take such action as it decides is appropriate to enforce or protect its rights in that mark. No Certified Indigenous Creator may commence any infringement or other action in connection with the use of the label of Authenticity or any similar mark, name or brand by other persons but will provide any cooperation or assistance that is reasonably requested by NIAAA, at its expense, in support of any infringement or other such action that it decides to bring.

## **6. Compliance with these Rules**

6.1 Within 14 days of receiving a request from NIAAA, a certified Indigenous Creator must provide

information concerning their use of the Label of Authenticity on any Work or in relation to any Service including information on the creation and production of that Work or Service, details of where it is being sold or presented or performed, how the Label of Authenticity has been used in connection with the Work or Service and any other information reasonably necessary to enable NIAAA to check that the label of Authenticity is being used in accordance with these Rules.

6.2 A Certified Indigenous Creator must, upon the written request of NIAAA or an Approved Certifier giving not less than 48 hours notice:

- (i) provide samples of its use of the Label of Authenticity on its Works or in relation to Services;
- (ii) permit a delegate to enter its premises to inspect the use of the label of Authenticity on its Works, permit a delegate to view a presentation or production of the Service; and
- (iii) provide any other access reasonably necessary to enable NIAAA or its Approved Certifiers to be satisfied that the Label of Authenticity is being used in accordance with these Rules.

## **7. Powers of NIAAA**

7.1 NIAAA has the right to delegate any one or more of its powers under these Rules to an appropriately qualified and independent nominee appointed in writing except that decisions as to whether an applicant is an Indigenous Person can only be delegated to an Approved Certifier. The decision of any such delegate will be binding and effective under these Rules in the same way as if it had been made by NIAAA.

7.2 NIAAA or its delegate must give reasons in writing for any decision that an applicant is not a Certified Indigenous Creator, or that a person's rights or status as a Certified Indigenous Creator are terminated pursuant to and in accordance with these Rules. All other powers, decisions, actions and notices can be given or made under these Rules without the need to give reasons.

## **8. Termination of Rights to use the Label of Authenticity**

8.1 If any Certified Indigenous Creator makes any use of the Label of Authenticity in breach of these Rules then, in addition to any other rights or remedies that it might have whether arising under statute, common law or otherwise howsoever, NIAAA may give notice of the breach requiring that where possible the breach be remedied within 14 days or, if that is not possible, requiring that a written undertaking be given not to repeat that breach.

8.2 If the breach is not remedied or the written undertaking given (as the case may be) within 14 days, or any past undertaking given by that Certified Indigenous Creator is breached, then NIAAA may immediately give a written notice to the Certified Indigenous Creator terminating his or her right to use the Label of Authenticity on any Works created or produced after the date of the notice or any Services to be performed or presented after the date of the notice. From that date, that person will cease to be a Certified Indigenous Creator for the purpose of these Rules.

8.3 If NIAAA is made aware of new evidence which suggests that a Certified Indigenous Creator is not an Indigenous Person, and is satisfied after giving that person a reasonable opportunity to respond to that evidence that they are not an Indigenous Person for the purpose of these Rules, then NIAAA may immediately give written notice both of this decision, including its reasons, and of the termination of that person's right to use the Label of Authenticity from the date of the notice. From that date, that person will cease to be a Certified Indigenous Creator for the purpose of these Rules.

8.4 If the right of a Certified Indigenous Creator to use the Label of Authenticity is terminated in accordance with these Rules, NIAAA may require the Certified Indigenous Creator to deliver up, destroy or dispose of, in a manner approved by NIAAA, any labels, tags, bags or other items or materials on which the Label of Authenticity is affixed or otherwise appears.

8.5 NIAAA is not bound to accept any later application by any person, whose right to use the Label of Authenticity has been terminated, to be recognised or reinstated as a Certified Indigenous Creator.



8.6 If a person ceases to be a Certified Indigenous Creator, NIAAA or its Approved Certifier will remove that person's name from the Register.

8.7 The rights of NIAAA under clause 8.1 are in addition to any right that it may have to bring an action for trade mark infringement or any other action in respect of any use of the Label of Authenticity other than in accordance with these Rules and to seek or obtain injunctions, damages, an account of profits or other remedies in respect of that infringement or other action.

## **9. Dispute Resolution**

9.1 A Certified Indigenous Creator or applicant for certification may request reconsideration of any decision of NIAAA or an Approved Certifier which relates to any act or application by them in connection with these Rules, by written notice to NIAAA.

9.2 Within 14 days of receiving a written notice, one or more delegates of the management of NIAAA will meet with the complainant to try to resolve the dispute at the Office of NIAAA or an office of an Approved Certifier.

9.3 If the dispute is not resolved at a meeting between the Certified Indigenous Creator/applicant and a delegate of NIAAA, the parties agree to appoint, within one month of the meeting referred to in clause 9.2, an appropriately qualified independent indigenous person or body to determine the dispute. In the event that the parties cannot agree on such a person to determine the dispute, the current Executive Director of the Aboriginal and Torres Strait Islander Arts Board, of the Australia Council will appoint such a person. The parties agree that any decision by an appropriately qualified independent indigenous person or body under this clause will be confidential and binding.

## **10. Other matters**

10.1 Nothing in these Rules is intended or shall be used to suggest that Works in respect of which the Label of Authenticity is not used necessarily involve any misrepresentation as to their origin or authorship or that their quality or worth is necessarily inferior to Works in connection with which the Label of Authenticity is used pursuant to and in accordance with these Rules. NIAAA does not authorise or condone the making of any such representations, statements or suggestions whether by Certified Indigenous Creators or others.

10.2 NIAAA does not warrant or represent that the use of the Label of Authenticity is guaranteed to confer any financial or other benefit on the user and to the full extent allowed by law excludes any liability for any loss, damage or liability suffered or incurred by any person who uses the Label of Authenticity under these Rules, however that loss, damage or liability is caused (whether by the negligence of NIAAA or its servants or agents or otherwise). To the extent that any liability of NIAAA is not excluded by this clause it is limited, to the full extent allowed by law, to an obligation to supply the relevant services that it has provided under these Rules.

10.3 While NIAAA will use its reasonable best efforts to ensure that all uses of the Label of Authenticity are in accordance with these Rules it will not be responsible for any damage caused to any one Certified Indigenous Creator by the breach of these Rules by any other Certified Indigenous Creator or by any other person.

10.4 Certified Indigenous Creators who use the Label of Authenticity pursuant to these Rules do not do so as agents of NIAAA. NIAAA accepts no responsibility for their acts and omissions.

10.5 The coming into effect of these Rules, and any amendment to them, is subject to them being approved by the Australian competition Consumer Commission as required by section 178 of the *Trade Marks Act 1995*.

[Appendix 3 follows]

The Collaboration Mark Trade Mark

**COLLABORATION  
MARK**



Certification Mark 772566

**Class No: 2**

Goods: Dyes for clothing, paints and paint boxes.

**Class No: 4**

Goods: Candles

**Class No: 8**

Goods: Hand tools and implements including artists tools such as chisels

**Class No: 9**

Goods: Recordings (whether on compact disc, video tape, software or any other medium) which feature Aboriginal art or craft works.

**Class No: 14**

Goods: Jewelry, precious stones and objects made of precious stones, watches and clocks, other works of art made of or with precious metals in this class, ornaments in this class

**Class No: 15**

Goods: Musical instruments including indigenous instruments.

**Class No: 16**

Goods: Paper, cardboard and goods made from these material, printed matter, photographs, stationery, artists materials, paint brushes, instructional and teaching material, works of art or craft made of or on paper, lithographic works of art.

**Class No: 18**

Goods: Leather goods, art or craft works made on or with animal skins or hides, walking sticks, whips harness and saddlery.

**Class No: 20**

Goods: Furniture, mirrors, picture frames, works of art or craft made of or with wood including bark paintings, spears, shields, woomera and indigenous weapons, works of art or craft made of or on reed, bone, shell, mother of pearl and substitutes for these materials, wax plaster or plastic

**Class No: 21**

Goods: Household or kitchen utensils and containers, combs and brushes (except paint brushes) brassware, porcelain and earthenware including works of art or craft made of or on porcelain, terra-cotta or glass.

**Class No: 22**

Goods: Works of art or craft made of or with ropes, string and other fibrous textile materials, fishing nets and baskets within this class.

**Class No: 24**

Goods: Textiles and textile goods, works of art or craft made on or with textiles.

**Class No: 25**

Goods: Clothing, footwear and headgear.

**Class No: 27**

Goods: Carpets, rugs, mats and matting, wall hangings.

**Class No 41**

Goods: Educational and training services relating to Indigenous arts and crafts; entertainment, cultural activities or events relating to Indigenous arts or crafts.

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