

Indigenous Art Code

*A code to promote fair and ethical trade
in works of art by Indigenous artists*



Indigenous Art Code

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1. Purpose of the Code and its Application

1.1 Purpose of the Code

In 2007, a Senate Inquiry into Australia's Indigenous visual arts industry recommended the establishment of an Indigenous Art Code to guide ethical commerce in the sector. The purpose of the Code is to establish standards for dealings between Dealers and Artists to ensure:

- (a) fair and ethical trade in Artwork;
- (b) transparency in the process of promotion and sale of Artwork; and
- (c) that disputes arising under the Code are dealt with efficiently and fairly.

1.2 Application of the Code

The Code is a voluntary Code that applies to Dealers who are signatories to the Code. It applies to all dealings between a Dealer and an Artist (either directly, or through an Artist Representative) concerning Artwork, from the day that the Dealer becomes a signatory to the Code and a 'Dealer Member' of the Company (*Dealer Member*).

1.3 Becoming a Signatory to the Code

Persons or organisations who wish to become a signatory to the Code must apply for membership of the Company, in the form determined from time to time by the Directors. An application form is available on the Company's website: www.indigenousartcode.org. If the Application is accepted, the person or organisation becomes a signatory to the Code (and a Dealer Member) when registered in the register of members of the Company.

1.4 Conflict with Existing Law or Constitution

The Code applies in addition to the existing legislation and regulations that apply to participants in the Indigenous visual arts sector. If there is any conflict or inconsistency between a provision of this Code and an applicable existing law or regulation, or provision of the Constitution, then that law, regulation or provision will prevail to the extent of the inconsistency and the provisions of this Code will be construed accordingly.

2. General Standards of Conduct for Dealer Members

2.1 Dealer Members Must Act Honestly

Dealer Members must at all times act fairly, honestly, professionally and in good conscience when dealing with an Artist, whether they are dealing directly with the Artist

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or dealing with the Artist through an Artist's Representative. Examples of conduct that would not meet the required standard include, but are not limited to:

- (a) unfair or unreasonable conduct;
- (b) undue pressure or influence, including threats;
- (c) not acting in good faith;
- (d) paying an Artist by means of alcohol or drugs;
- (e) unfairly taking advantage of, or exploiting, an Artist; and
- (f) paying or agreeing to pay an Artist an amount or other consideration for the Artist's Artwork that is, in all the circumstances, against good conscience.

2.2 No Misleading or Deceptive Conduct

Dealer Members must not make false or misleading representations or engage in conduct which constitutes misleading or deceptive conduct or conduct that is likely to mislead or deceive, when dealing with a person in connection with Artwork. Examples of misleading or deceptive conduct include, but are not limited to, a Dealer Member engaging in misleading or deceptive conduct about any of the following matters:

- (a) the authenticity or provenance of an Artwork;
- (b) any sponsorship, approval or affiliation of an Artist (including an Artist's affiliation with a Dealer or an art centre);
- (c) the place of origin of an Artwork;
- (d) that an Artwork has been produced by an Indigenous Artist or Artists; and
- (e) the Artwork's exhibition history, reference notes, authenticity statements or price.

2.3 Respect for Indigenous Cultural Practices and Artist's Rights

Dealer Members must respect the rights of Artists and use their best endeavours to identify and adhere to applicable Indigenous cultural practices, including by:

- (a) respecting the Artist's Moral Rights and copyright in the Artwork, and obtaining the consent of the Artist before reproducing the Artwork (or permitting a third party to reproduce the Artwork) in any form;
- (b) not using the name and/or image of Artists who are deceased unless the Dealer Member has used their best endeavours to obtain permission from:
 - (i) that Artist, prior to their death, to use their name or image if they became deceased; or

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- (ii) the Artist's family, community or estate for the use of the deceased Artist's name and/or image; and
- (c) not marketing, promoting, displaying or selling Artwork or material (such as Tjuringas or human remains) which a reasonable person would know contains content that the relevant Indigenous community and/or traditional owners consider to be secret/sacred and/or restricted.

2.4 Care of Artwork

Dealer Members must take reasonable precautions and exercise all reasonable care in the handling and storage of any Artwork which is the property of an Artist to ensure that the Artwork is not damaged, destroyed or stolen while the Artwork is in the Dealer Member's possession or control.

3. Dealings with Artists

Dealer Members must use their best endeavours to ensure that every dealing with an Artist in relation to Artwork involves the informed consent of the Artist. The following clauses will assist Dealer Members to ensure they have the informed consent of Artists.

3.1 Provide a Clear Explanation of the Agreement

Before making an Agreement with an Artist in relation to Artwork, a Dealer Member must clearly explain to the Artist the key terms of the proposed Agreement, so that the Artist understands the Agreement (for example, using a translator if required). The explanation should be given by the Dealer Member to the Artist either directly, or through an Artist's Representative, in the manner requested by the Artist or Artist's Representative. If there is any doubt about whether the Artist fully understands the explanation, the Dealer Member must also give the Artist the opportunity to ask a third party for assistance to help the Artist to understand, and negotiate changes to, the proposed Agreement.

3.2 Agreements with Artists

An Agreement between a Dealer Member and an Artist in relation to Artwork (whether written or verbal) must cover the following key terms:

- (a) a description of the relevant Artwork(s), including the quantity and nature of the Artwork(s);
- (b) any limitation on the Artist's freedom to deal with other Dealers or representatives;
- (c) whether the Dealer Member is acting as an Agent or in some other capacity;

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- (d) the cooling-off rights (which must be in accordance with clause 3.3) and how the Agreement can otherwise be changed or terminated;
- (e) costs and payment terms for the Artwork (which must be in accordance with clause 3.4);
- (f) details about any exhibition in which the Artwork is to appear, and any associated promotional activities; and
- (g) any other information determined by the Directors and notified to signatories to the Code from time to time.

3.3 Artist's Cooling-off Rights

- (a) An Artist or Artist's Representative may terminate an Agreement within:
 - (i) 7 days after entering into the Agreement; or
 - (ii) such longer period as is agreed between the parties.
- (b) A Dealer must not require the Artist to pay any fees, charges, penalties, compensation or other costs as a result of the Artist exercising cooling-off rights under this clause 3.3.

3.4 Payment for Artists

An Agreement must also cover the following in relation to each Artwork:

- (a) the amount of the payment and the means by which the payment will be made;
- (b) the date by which payment to the Artist will be made which (unless otherwise agreed) must be:
 - (i) where the Dealer Member is acting as an Agent, no later than 30 days after receiving funds for the Artwork; and
 - (ii) where the Dealer Member buys Artwork directly from the Artist, no later than 30 days after the Dealer Member takes possession of the Artwork;
- (c) if the Dealer Member is acting as an Agent, the amount of the Dealer Member's commission;
- (d) any factors known to the Dealer Member that could affect the payment terms; and
- (e) the cost of any goods and services (e.g. canvas, paint, paintbrushes, framing, etc) to be deducted from the payment to the Artist (if any).

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4. Record Keeping

4.1 Record Keeping by Dealer Members

- (a) A Dealer Member must keep records of all dealings with Artists, providing clear evidence of the key terms, and performance of those key terms, of any Agreement between the Dealer Member and Artist (the **Records**).
- (b) If the Dealer Member is an Agent, the Dealer Member's Records should also include:
 - (i) details of Artwork held by the Dealer Member for sale;
 - (ii) the dates of sale of Artwork by the Dealer Member; and
 - (iii) the type and quantity of Artwork sold by the Dealer Member and:
 - (A) the price received by the Dealer Member for the Artwork sold; and
 - (B) details of the payment to the Artist (including the amount, date and method of payment) and details of each amount deducted by the Dealer Member from the sale price of the Artwork (for example, the Dealer Member's commission on the sale).
- (c) If the Dealer Member purchases Artwork and subsequently on-sells the Artwork, the Dealer Member's Records should also record the price the Dealer Member was paid for the sale of that Artwork.

4.2 Request for Dealer Member's Records

A Dealer Member must provide a copy of the Dealer Member's Records that relate to an Artist or Artwork to the Artist within 7 days of a request by the Artist (either directly or through an Artist's Representative), provided that the Dealer Member is not obliged to make the same Records available to an Artist more than once every 30 days. The Dealer Member must provide a copy of the Dealer Member's Records to the Company, in response to a request in writing by the Company.

5. Code Certificates

5.1 Requirement for Code Certificates

- (a) Subject to clause 5.2, a Dealer Member who receives Artwork directly from an Artist must create a Code Certificate for that Artwork.
- (b) A Code Certificate must:
 - (i) state that it is an 'Indigenous Art Code Certificate';

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- (ii) name the Artist or Artists who created the Artwork;
 - (iii) to the extent known, identify where and when the Artwork was created;
 - (iv) provide a description of the size and medium of the Artwork and of the title (if any) attributed by the Artist to the Artwork;
 - (v) identify the Dealer Member and state that they are 'Signatory to the Indigenous Art Code'; and
 - (vi) contain a signed declaration from the Dealer Member confirming the accuracy of the details set out in the Code Certificate.
- (c) For the avoidance of doubt, a Code Certificate may be created only by a Dealer Member and it should accompany the relevant Artwork when sold.

5.2 Exemption from Requirement for Code Certificate

A Code Certificate is not required to accompany Artwork when sold if:

- (a) the Artwork is sold for less than \$250 or any other amount specified by the Directors from time to time; or
- (b) the Dealer Member who dealt with the Artist (either directly, or through an Artist Representative) can demonstrate that the Artist did not want a Code Certificate to be created for that Artwork.

5.3 Due Diligence Where No Code Certificate

Before a Dealer Member acquires Artwork from a person other than the Artist who created the Artwork and for which there is no Code Certificate, the Dealer Member must carry out reasonable due diligence to ensure that the relevant provenance, credibility and authenticity details are confirmed. If those details cannot be confirmed, the Dealer Member must not deal with that Artwork.

5.4 Notification of Deficient Code Certificate

If a Dealer Member becomes aware of a Code Certificate that does not meet the requirements of clause 5.1, the Dealer Member must immediately notify the Company of that deficient Code Certificate.

6. Code Promotion and Branding

A Dealer Member is entitled to publicly display the Company logo in connection with the Dealer Member's business, including:

- (a) at the physical place(s) of business where the Dealer Member deals in Artwork;

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- (b) on any business website of the Dealer Member which relates to dealings in Artwork; and
- (c) on any promotional material created by or for the Dealer Member in relation to dealings in Artwork,

which public display is intended to signify that the Dealer Member is acting in accordance with this Code. For the avoidance of doubt, a Dealer Member who is subject to a sanction imposed under clause 7.2 is not entitled to publicly display the Company logo, unless the Directors decide otherwise.

7. Complaints Handling

7.1 Complaints Handling

Dealer Members must use best endeavours to resolve any complaint in relation to Artwork made against them fairly and promptly.

Where the Company receives a complaint made against a Dealer Member, the complaint will be dealt with in accordance with the Complaint Handling Procedures, the Code and the Constitution.

7.2 Sanctions

- (a) A Dealer Member who is in breach of the Code or whose conduct, in the opinion of the Directors, is prejudicial to the Code, may:
 - (i) have conditions imposed on their status as a signatory to the Code (in which case, the same conditions will apply to the Dealer Member's membership of the Company in accordance with the Constitution);
 - (ii) be suspended as a signatory to the Code (in which case, the Dealer Member's rights and privileges of membership of the Company will also be suspended in accordance with the Constitution); and/or
 - (iii) be removed as a signatory to the Code (in which case, the Dealer Member will also cease to be a member of the Company in accordance with the Constitution).
- (b) In dealing with a complaint against a Dealer Member or in circumstances where the Directors become aware that a Dealer Member may not be acting in accordance with the Code, the Directors may conduct, or commission, a review of the activities of the Dealer Member in so far as those activities may be relevant to the requirements of the Code and may require the Dealer Member to provide

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information and substantiate any claims or representations they make in so far as may be relevant to the requirements of the Code.

8. Definitions and Interpretation

8.1 Definitions

In this Code:

Agent means a person or organisation who sells Artwork for or on behalf of an Artist in return for a commission.

Agreement means a written or verbal agreement between a Dealer Member and an Artist for the supply or acquisition of Artwork.

Artist means an artist, whether living or deceased, of Aboriginal and/or Torres Strait Islander descent who identifies, or who, prior to their death, identified, as Aboriginal and/or Torres Strait Islander, and is, or, prior to their death was, recognised as such by members of the community with which the artist identifies or identified.

Artist Representative means a person who is authorised by the Artist to speak or act for the Artist, but does not include an Agent.

Artwork means a work of visual art or craft produced by an Artist, whether or not incorporated into another work of visual art or craft produced by that Artist or another person, including but not limited to painting, drawing, artists' books, woodwork, ceramics, glass, jewellery, sculpture, fibre work, printmaking, photography, installation, video and multimedia.

Code Certificate has the meaning given in clause 5.

commission means the percentage of the price of an Artwork that the Agent charges directly or indirectly for services provided to the Artist in relation to the sale of an Artwork created by that Artist.

Company means Indigenous Art Code Limited (ACN 139 788 711).

Complaint Handling Procedures means procedures determined from time to time by the Directors for handling complaints arising under the Code, which are to be available to Dealer Members upon a request in writing to the Company.

Constitution means the Constitution of the Company.

Dealer means an Agent or other person or organisation who acquires Artwork, or who carries on a business involving the acquisition of Artwork, for re-supply by means of sale or other distribution.

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Dealer Member means a Dealer who is a member of the Company and a signatory to the Code.

Director means a director of the Company.

Moral Right(s) has the meaning provided in section 189 of the *Copyright Act 1968* (Cth) and includes the right to have an Artwork attributed to its Artist, the right of integrity of authorship (which protects against derogatory treatment of an Artwork) and the right not to have an Artwork falsely attributed to another artist.

8.2 Interpretation

- (a) A reference to a clause is a reference to a clause of this Code unless otherwise specified.
- (b) A reference to conduct includes an omission, statement or undertaking, whether or not in writing.
- (c) A reference to legislation, an agreement or a document (including a reference to this Code) is to the legislation, agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this Code or that other agreement or document.