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ARTS LAW CENTRE OF AUSTRALIA

TENTH ANNIVERSARY FUNCTION

THURSDAY 8 JULY 1993

TEN YEARS OF ACHIEVEMENT

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Justice Michael Kirby

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**THE ARTIST'S LIFE OF SUFFERING**

It is probably true that the Australian community expects a great deal of suffering from its artists. The average income of artists has not improved greatly in the ten years since the Arts Law Centre was established. A speech I gave at that time recorded that only 20% of artists were able to spend their full-time work on their artistic pursuits. Their incomes tended to fluctuate markedly. Most had to pursue other jobs to survive. The image of the impoverished artist was not confined to the theatre, stage or to Puccini's *La Bohème*. Things have not improved greatly in that regard over the past ten years. But there is a limit to artists' suffering. Indeed in times of prolonged recession the hardships faced by the artistic community in Australia have increased significantly. For these reasons the artists present should not be required to suffer at the end of a heavy day of cogitation and artistic creativity and at the hands of a judge.

I was told that I was to speak for nearly an hour on this occasion. But I have taken pity. My personal contribution to the

reduction of artistic suffering will be to confine my remarks to a much shorter compass.

It is fair to say that the Arts Law Centre of Australia has, since its establishment, has made its unique contribution to reducing legal suffering and increasing awareness of the law and legal rights amongst artists in Australia. The Centre was established with the support of the Australia Council in 1983. It was fortunate to secure as its Foundation Director a flamboyant descendent of Barnham and Bailey, Mr Shane Simpson. Not only was he a good promoter of the Centre's free national legal service to the arts community of Australia.

- \* He wrote a very well regarded text on legal principles as they affect artists;
- \* He expanded the legal help of the Centre to taxation and accounting assistance; and
- \* He also acquired the Centre's first premises in a suitably run down, turn-of-the-century building which projected an image of chaste poverty and empathetic self-deprivation.

The Centre's next two Directors, Ms Natasha Cerventy and Mr Michael McMahon, pushed the service forward into new ventures:

- \* The provision of free and low cost standard contracts for artists as well as booklets, manuals and basic advice on common problems;
- \* The development of the early programme for a wide range of educational services on legal and related issues affecting the arts community through lectures, workshops, seminars, conferences and publications; and
- \* Attention to new and unexpected problems facing the arts

community. One of these was the advice to artists living with HIV/AIDS concerning the preparation of wills, estate planning and proper provision for partners and dependants of artists living with AIDS.

The present Director, Mr Ian Collie, is carrying on this fine tradition. He has already:

- \* Overseen the transfer of the Centre's facilities to these centrally located and ever-so-fashionable new premises in a complex of arts-related bodies which will provide a new venue for artists - I would say a "Mecca" for artists except that to do so probably breaches the *Anti-Discrimination Act*;
- \* Supervised the establishment of the Arts Law Centre Mediation Service which was launched on 23 June last by the new Federal Minister of the Arts, Senator Bob McMullan;
- \* Pushed forward with the Monday legal advice night which is provided with the assistance of volunteer solicitors who specialise in the law relating to arts and entertainment; and
- \* Has taken part in the launch of the Arts Insurance Handbook on 19 May, 1993.

Apart from the directors and hard-working staff and volunteers of the Centre, it has been supported and encouraged by a Board with a succession of judges at the helm to add a suitable touch of respectability. I was succeeded in the chain by Justice Elizabeth Evatt. She, in turn, was succeeded by Justice Jerrold Cripps and Justice Jane Mathews. Justice Evatt followed me in the Law Reform Commission. Justice Cripps is now a Judge of Appeal. Justice Mathews is to take over from me as a Trustee of the AIDS Trust of Australia. We seem to be following each other around. But I am proud to be in their company and to share with them this association

with a remarkably successful venture of lawyers helping a specially admirable and vulnerable community who have not, in the past, been well supplied with legal services.

**NIGGLING WORK? NOT AT ALL**

On 9 June I noticed that this ten year celebration of the Centre was marked in the *Sydney Morning Herald* with the by-line "10 Years of Nigglings". Nigglings? Not at all. Ten years of practical help to the artistic community of Australia in all of its variety.

The following typical cases illustrate the down-to-earth work which the Centre has performed. They are just a cross-section of the practical problems which can confront artists and upon which the Centre and its lawyers can offer help and guidance. Only the names have been changed (as the saying goes) to protect the innocent.

1. A client contacted the Centre with respect to a breach of his contract by the other party. The contract gave the client the right to direct the next production of the play. Another director was chosen for the play. The client and the other party had always respected each other in the past. It was important to the client that their relationship be maintained if possible. This issue was, however, a difficult one as the client stood to lose income of over \$6,000 from this contractual breach. The Centre assisted the client to draft his own letters and negotiate his claim - a claim which was amicably settled for \$4,500 without resorting to legal action. The client wrote to the Centre stating:

*"I wish to express my appreciation for the Centre's assistance in enabling me to successfully negotiate and resolve my complaint of a breach of contract ... Your advice and knowledge were of great value in this matter."*

2. A client contacted the Centre about a debt of approximately \$9,000 owed to him by a commercial gallery which was having financial difficulties. The Centre negotiated a reasonable instalment payment arrangement with the Gallery which was adhered to by the Gallery - much to the client's delight and surprise. (The client had previously been "put off:" many-a-time by the Gallery whenever the issue of the outstanding monies was mentioned);
3. A client contacted the Centre when he found that his artwork (a painting) had been reproduced in a book without his permission. The client had contacted the publishing company about this infringement of copyright only to receive a letter from the company's managing director which stated:

*"It is not clear to me that you have a claim. I understand that the painting in question is the property of [the author of the book]"*

The publishing company promptly paid the appropriate fee of \$500 to the artist after receiving the Centre's letter explaining the law of copyright and referring the company to its own publication, *The Visual Artist & the Law* by Shane Simpson. (You guessed it - the publishing company in question was a major law publisher!;

4. A client (a dance organiser and promoter) contacted the Centre about problems with a dance venue he had hired for a public dance party where blasting mega decibels were apparently needed. The electricity supply would automatically shut down whenever the sound of the band exceeded a particular (and previously undisclosed) level. Needless to say, many of the dance party patrons were unhappy. They had to endure an evening in the silences of their own minds. The fiasco

- resulted in a large number of ticket price refunds being demanded (and met by the client). The Centre assisted the client to obtain \$2,500 damages from the venue owners for the loss of income to the client resulting from this situation;
5. The Centre assisted an institutional Curator of Art to resolve a moral rights issue arising in relation to the artwork of an artist which had been commissioned for a specific site on the campus. The institution wished to change the location of the work to another location which the artist felt would affect the integrity of the artwork and the artist. The Centre assisted the Curator of Art to lobby the institution on this issue resulting in a decision being made that the work "remain at its present location in accordance with the wishes of the artist". The institution's Curator of Artworks wrote to the Centre stating:

*"I am relieved decision has been made by the University which acknowledges the rights of the artists and stands as a positive example for the public to follow ... I would like to thank you for your whole-hearted support and assistance with this issue."*

6. A client contacted the centre after his artwork was damaged whilst on exhibition in a Gallery. He was having difficulty obtaining compensation for the damaged work. The Centre assisted the artist to obtain full compensation for the damaged work;
7. A matter was referred to a Centre referral lawyer in order that litigation be commenced to recover an outstanding debt. The client (a painter) was unable to pay the full legal fees and a "payment in kind" arrangement was negotiated between the lawyer and the client. The Centre referral lawyer advises us that the work of art they received in payment for the legal work now

- holds "pride of place" within their offices - and has commenced, what will no doubt be, a great art collection;
8. The Centre was involved in advising on the meaning of s 183 of the *Copyright Act*. Section 193 provides that the Crown does not need to obtain the permission of an artist before a reproduction of that artist's work is made, but that a fee must be paid. Some time ago the Federal Department of Health commissioned a poster for AIDS education in Northern Australia. The poster described a Phantom-like figure called Condo-Man, with the words "play it safe". This Condo-Man poster was used in Northern Australia for safe sex education, but unfortunately the New York owners of the copyright in Phantom threatened to sue. Would this be an appropriate use for the Crown copyright - s 183 of the *Australian Copyright Act*? Or should the government have obtained permission of the owners of Phantom in the first place? Happily, the "ghost who walks" recognised the good intentions of the Department of Health - allowing Condo-Man back into our deep North where he continues to do battle against the public enemy AIDS;
9. In March 1990, the Centre found itself involved in its first Federal Court Appeal. The Federal Court considered the test which had to be applied to decide if ceramic platters and spherical objects were works of art under the *Sales Tax Act* in the test case of *Commissioner of Taxation v Murray*. The Commissioner agreed to pay the Mr Murray's reasonable costs of defence in the appeal after the Administrative Appeals Tribunal found that the items were entitled to the exemption under item 68(2) ("works of art ...") of the First Schedule of the *Sales Tax Assessment Act (No 1) 1930*. The Commissioner argued that the Tribunal had applied an incorrect test in determining



whether the items in question were "works of art".

The case determined that the test to be applied was whether the artist had applied skill and taste to the production of the artwork with the main object of creating something which had an appeal to the aesthetic tastes of others, even if it had a utilitarian character. It was determined that if an objective examination of the article might deny that the work is a work of art, it is important to then look at the purpose of the maker, that is, whether the intention was to create an art object.

Thus, the Commissioner's argument (that in order to qualify as a work of art, an article which is both aesthetic and utilitarian must be predominantly aesthetic) was rejected. The Centre assisted and guided the Murray's through "the legal jungle; and

10. The centre was once again involved in lobbying the Australian Taxation Office (ATO) to extend their narrow interpretation of "works of art" for the purposes of sales tax exemption legislation.

In 1992, Peter Callas (whose work appears on the Centre's 10th Anniversary Address invitation) sought the Centre's assistance in seeking sales tax exemption for computer equipment which he would use to produce his computer generated artworks.

The artist had repeatedly applied and been refused this exemption.

The Centre attended meetings at the ATO with the artist to lobby for this important change to the narrow construction of "works of art" as being limited to "paintings, sculptures and the like".

As a result of the ATO decided that computer generated images

stored and shown on video can fall within the "work of art" exemption for sales tax purposes.

If this is niggling, I hope the Centre will niggle away a lot more.

#### BLINKY BILL & MORAL RIGHTS OVER IMAGINATIVE CREATIVITY

I was glad to see that Senator McMullan indicated at the launch of the Mediation Service two weeks ago that, once again, consideration was being given to the legal protection of the moral rights of artists in Australia. I do not doubt the Senator's good intentions. But we have become used, in Australia, to repeated promises of the Promised Land.

Consideration of moral rights for artists in Australia has been on the political agenda for at least the past ten years. Speeches are made and press releases issued which promise action. Hopes are raised. Praise is given for the politician's forward-looking vision. In the end, however, nothing gets done. From the point of view of the political process, this is ideal. People remember the promise. They tend to forget the reality.

A topical case in point teaches the utility of protecting an artist's moral rights over his or her creation. The proposed use of "Blinky Bill" in a political campaign for the republic is, I think, more the slick product of Madison Avenue than a genuine Australian idea for our constitutional debates. Of course, discussion of republicanism is entirely legitimate in a free society. But is it legitimate to use a familiar children's character, and effectively and to take possession of it for a political cause? Has anybody behind this move even asked themselves whether this is something Dorothy Wall would have wanted? After all, Blinky Bill was a creature of her imagination. She offered Blinky to all the children of Australia. Now, it seems, Blinky is to be commandeered, taken

over and associated with a particular political cause.

Perhaps the Australians who support the Constitution will now take over the Magic Pudding. Our Constitution is, after all, a sort of pudding. It grows and changes shape and constantly renews itself. Magically it generally works well enough. The Labor Party for its part will probably claim Snuggle Pot and Cuddle Pie. The Liberals will declare that the Prime Minister is the Big Bad Banksia Man. The Nationals may reach back into the Grimm's Fairy Tales or perhaps Snow White or Skippy the Kangaroo. The Democrats - or will it be the Greens - will certainly assert Bunyip Bluegum belongs to them. I suggest that great care must be taken in unilaterally identifying creative works with political causes. Art is above politics. Planting subliminal messages in children's characters should be left to advertising toys, soap suds or breakfast cereals. Our legitimate public debates over politics should not in my view ride on the backs of artistic endeavour and creation - at least without the consent of the artist concerned.

These are, of course, just personal reactions to a story of the day. Perhaps not all of you would share them. But I venture to think that the creator of Blinky Bill would certainly have been shocked to have been told that her character would turn out to be ashamed to carry the Australian flag he proudly did with the creator's full consent in earlier times. Do the latterday political movers and shakers - and advertising gurus - have the right to take over such a character and turn it to their own private cause? Or should Blinky Bill be left where Dorothy Wall put him - in the imagination and hearts of all Australian children. Australia has a long way to go, I fear, in respecting the moral rights of the creative artist and being respectful of the integrity of the product of the artist's imagination. Monarchy can be artistry and mystery

and magic and beautiful. In a bleak world of boring economists that is why it just might survive.

But whether we are republicans or support our present system we can all say unanimously: in defence of legitimate moral rights, in advancing law reform, as well as in defending the interests of artists in the practical ways I have shown, the Arts Law Centre will continue to play a leading rôle. It will go from strength to strength.

I congratulate the Centre on the achievement of the last ten years. The best years lie ahead!

Nigglers of the world unite. You have nothing to lose but your claims!