

Submission from the Northern Territory Government to the Productivity Commission study into Aboriginal and Torres Strait Islander Arts and Crafts

Document title	Submission from the Northern Territory Government to the Productivity Commission study into Aboriginal and Torres Strait Islander Arts and Crafts
Contact details	Department of Territory Families, Housing and Communities
Approved by	CEO Department of Territory Families, Housing and Communities

Acronyms	Full form
NT	Northern Territory
LDM	Local Decision Making
ACL	Australian Consumer Law
ACCC	Australian Competition and Consumer Commission
DCITA	Department of Communications, Information Technology and the Arts
ABS	Australian Bureau of Statistics
NCCRS	National Centre for Culture and Recreation Statistics
IAC	Indigenous Art Code
ANKA	Arnhem, Northern and Kimberley Artists Aboriginal Corporation
ICIP	Indigenous cultural intellectual property

Contents

Introduction4

1. What is this study about?4

2. The markets for Aboriginal and Torres Strait Islander visual arts and crafts.....5

3. The role of governments6

4. What is (in)authenticity and how is it determined?8

5. What are the effects of inauthentic arts and crafts?..... 10

6. What policy options are there to address inauthentic arts and crafts? 11

7. What issues arise in the interactions between artists and dealers? 13

8. How can the contribution arts and crafts make to remote communities be sustained?..... 13

Introduction

The Australian Government's response to the House of Representatives Standing Committee on Indigenous Affairs' 2018 *Report on the Impact of Inauthentic Art and Craft in the style of First Nations Peoples* outlines actions to protect Aboriginal and Torres Strait Islander artists' economic, cultural, and intellectual property interests and to encourage a fair and ethical marketplace.¹ It commits to pursue, amongst other actions, a Productivity Commission study to examine the value, nature and structure of the markets for Aboriginal arts and crafts and policies to address deficiencies in the markets.

This is the Northern Territory Government's response to the Issues Paper released on 21 September 2021 as part of the Productivity Commission study.²

1. What is this study about?

What issues should this study focus on? Given the number of previous inquiries into the Aboriginal and Torres Strait Islander visual arts and crafts markets, what are the main contributions this study can make?

A detailed investigation into the value and structure of the current markets for Aboriginal and Torres Strait Islander visual arts and crafts would provide a basis for policy and regulatory responses and, ultimately, a baseline to measure the impact of these responses.

That there is an on-going flow of inauthentic "Aboriginal style" goods aimed primarily at the tourism market is not in dispute. Painted boomerangs, didgeridoos and other objects, made domestically or imported from China, Indonesia and India, are stylised to appear authentic and sold as souvenirs. There currently is no law against trade in such products, although under the Australian Consumer Law (ACL) to make false or misleading claims, both express and implied, about a product's origin or authenticity is illegal.³ Although many products are labelled as having been made overseas, often others are labelled with only one word, "Australia," or no words at all about the product's origin or authenticity. The result is that the consumer, either knowingly complicit or unwittingly misled, becomes a party to a transaction that denies Aboriginal and Torres Strait Islander artists and makers of income and devalues the meaning and significance of their cultural imagery.

The problem is pervasive but the issues raised are not new. A substantial body of literature going back to the 1980s examines such issues as authenticity, cultural integrity, intellectual property, pricing, the market and the structure of the Aboriginal and Torres Strait Islander visual arts industry.⁴ In recent years, Copyright Agency, Indigenous Art Code and Arts Law Centre of Australia, in collaboration with Aboriginal and Torres Strait Islander artists, peak bodies and a wide range of relevant stakeholders, have been consulting, researching and advocating for an amendment to the *Competition and Consumer Act 2010* to protect

¹ Commonwealth of Australia, 2018. *House of Representatives Report on the impact of inauthentic art and craft in the style of First Nations peoples*, tabled December 2018.

² Productivity Commission, 2021. *Aboriginal and Torres Strait Islander Visual Arts and Crafts—Issues Paper*. Available at <https://www.pc.gov.au/inquiries/current/indigenous-arts/issues/indigenous-arts-issues.pdf>.

³ ACCC, 2017. Submission 54, *Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*. Accessed 9/11/2021 at <https://www.aph.gov.au/DocumentStore.ashx?id=edf2e88f-393d-4ef5-9d26-392357c32dde&subId=561504>

⁴ Altman J & Ward S (eds), *Competition and Consumer Issues for Indigenous Australians*. A Report for the Australian Competition and Consumer Commission by the Centre for Aboriginal Economic Policy Research (CAEPR), Australian National University, September 2002, p. 64.

Aboriginal and Torres Strait Islander arts and cultural practice against infringement, and the Northern Territory Government supports this position.⁵ Continued consultation at this stage may be seen to offer little added value and to prolong the exploitation of Aboriginal and Torres Strait Islander culture by purveyors of inauthentic art.

2. The markets for Aboriginal and Torres Strait Islander visual arts and crafts

What data is available on production and sales of souvenirs and other merchandise (licensed or otherwise)? We know that some Indigenous-style arts and crafts are produced and sold without the authority of Aboriginal and Torres Strait Islander artists and communities. How can we estimate the extent of this type of market activity?

Between July and December 1997, the Bureau of Tourism Research conducted a survey⁶ which collected information on the purchase of arts and crafts by the 2 million international visitors to Australia aged 15 years and over. The survey found that more than 90% of those visiting in the six-month period had been shopping while in Australia and, of these, 41% had spent some money on art and handcraft. Arts were purchased by 7% of shoppers and handcrafts by 39% (5% purchased both). Expenditure on art in the six-month period totalled \$10.1 million, while total expenditure on handcraft equalled \$137.4 million. Handcrafted clothing (\$63.6 million) and leather goods (\$38.5 million) were the main items purchased. Over half the expenditure on art and handcraft was for Aboriginal items (\$77.7 million out of \$147.5 million). It is not known how much of this product was produced domestically and how much was imported from overseas. There have been no subsequent surveys on the purchase of arts and crafts by international visitors sufficient to document trends.

The 2003–04 Household Expenditure Survey⁷ found that total annual expenditure on visual arts and crafts was \$670 million. Total annual expenditure on paintings, carvings and sculptures was \$282 million, while \$202 million was spent on studio and other professional photography and \$186 million on arts and craft materials.⁸ The 2009–10 Household Expenditure Survey⁹ found that total expenditure on visual arts and crafts had increased by 55% to \$1.04 billion. Total annual expenditure on paintings, carvings and sculptures was \$547.4 million, while \$245.2 million was spent on studio and other professional photography and \$249.6 million on arts and craft materials. It was not reported how much of this expenditure was on authentic or inauthentic Aboriginal and Torres Strait Islander product.

CHOICE, a leading Australian consumer advocacy group, conducted fieldwork and a survey of 1,029 Australian households in January 2018 to gather evidence on consumers' views of inauthentic art and craft.¹⁰ The results show that "this is an issue consumers care about," with a majority (62%) of Australians of the view that Aboriginal and Torres Strait Islander artists, community and culture "are being undermined by the abundance of fake Aboriginal style art."¹¹ The majority of those surveyed stated that they have difficulty

⁵ Arts Law Centre of Australia, 2021. *Fake art harms culture* website. Accessed 11/11/2021 at <https://www.artslaw.com.au/fake-art-harms-culture/>

⁶ DCITA, *Cultural Trends in Australia No. 7: Art and Craft Purchases*, 1997, prepared for DCITA by the NCCRS of the ABS.

⁷ ABS, 2005. *Household Expenditure Survey, Australia: Detailed Expenditure Items, 2003-04* (cat. no. 6535.0.55.001)

⁸ The ABS advises that the figures for "paintings, carvings and sculptures" and "studio and other professional photography" have a relative standard of error of 25% to 50% and should be used with caution.

⁹ ABS, 2010. *Arts and Culture in Australia: A Statistical Overview* (cat. no. 4172.0)

¹⁰ Australian Consumers' Association (CHOICE), 2018. *Submission 145, Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*. Accessed 8 November 2021 at <https://www.aph.gov.au>

¹¹ Ibid.

distinguishing between authentic and inauthentic products and are confused about how best to identify ethically produced art and craft.

Important insights into the production of authentic artworks is available through Stories Art Money (SAM), an online artwork management system that Desart developed for art centres and which is now used by most Aboriginal and Torres Strait Islander art centres across Australia.¹² SAM is the administrative tool that art centre workers use to catalogue and label art works, document their provenance, make sales and consignment transactions, issue certificates of authenticity and artist biographies, control the art centre's stock, and facilitate online purchases. Recent data show that after four years of falling sales, from 2007–08 to 2011–12, art centre sales have experienced steady growth, reaching sales, on average, of \$503,401 in 2018–19, representing growth averaging 5.6% per year.¹³

The production of inauthentic products is less well understood. An understanding of the scale of the opportunity to expand the market for authentic product, either original or produced under license, could be possible if the trading of all products were tracked through appropriate import/export product classification codes. If both authentic and inauthentic product were able to be monitored at the point of entry or departure, data could be generated to map the prevalence of inauthentic art and craft products and merchandise coming from overseas, to focus Australian research and investment, and to capture the impact of any legislative and policy responses.

Although more data is needed, it is important that the lack of data does not become a red herring that delays action to address the problem, particularly when the tools to gather comprehensive data on the market for inauthentic goods have not yet been developed. Qualitative feedback provided by Aboriginal and Torres Strait Islander owned art centres, their representative bodies and prior submissions to related inquiries document that the issue of inauthentic art impacts on the rights and livelihoods of thousands of Aboriginal and Torres Strait Islander people and their communities, and that the need for action is almost universally recognised by the arts community and also by a majority of consumers of such art.

3. The role of governments

How effective are government investments in independent artists and artists working with art centres, such as grant funding programs administered by the Australia Council and State Governments? How effective are programs administered by the Office for the Arts and State Governments to support art centres? How can government programs be improved?

The Northern Territory Government recognises the significance of Aboriginal and Torres Strait Islander arts and craft to the economy and as an expression of an authentic living culture that is integral to Australia's history, identity and future. Recurrent operational funding and art worker employment funding through the Australian Government Indigenous Visual Arts Industry Program is leveraged by art centres to produce, market and generate income from arts sales. This funding is critical to sustaining core operations and to support art centres and artists to innovate, attract and develop a new generation of younger artists, develop new online audiences and markets and to be more resilient and flexible, such as in response to the pandemic and its impacts on production and direct sales.

¹² SAM, 2017. *Welcome to SAM: Your Stories Art and Money Database*. Accessed on 2/12/2021 at <https://sam.org.au/>

¹³ Desart Inc, 2020. *Financial Snapshot of Aboriginal and Torres Strait Islander Art Centres – 2004/05 > 2018/19*. Accessed on 2/12/2021 at <https://desart.com.au/wp-content/uploads/sites/40/Financial-Snapshot-of-Aboriginal-and-Torres-Strait-Islander-Art-Centres-FYE-2019.pdf>

There are more than 100 community art and cultural centres, galleries, museums and keeping places across the Northern Territory, including 53 Aboriginal owned arts and cultural centres.¹⁴ Increasing demand in the Territory and across Australia and internationally for authentic, accessible Aboriginal experiences has catalysed a major investment by the Northern Territory Government in cultural assets as part of the \$100 million commitment to the Arts Trail initiative. This initiative delivers much needed infrastructure upgrades to existing regional art centres, galleries and cultural centres to assist them to become “tourist-ready” and bring them to a quality and standard which will build the Northern Territory’s reputation as an arts and cultural destination. The Arts Trail initiative also invests in strategic development for Aboriginal owned art and cultural centres to support Aboriginal leadership, capacity building and planning to achieve sustainable and viable businesses. This investment is aimed at maximizing art and culture outcomes; growing employment and entrepreneurialism in the arts and cultural sectors, attracting tourists to the Territory as an art and culture destination with world class facilities and opportunities to experience first-hand authentic and accessible Aboriginal art and culture.

The centrepiece of the Arts Trail will be a National Aboriginal Art Gallery and a National Indigenous Cultural Centre to be built in Alice Springs. Regional culture and art centres in Katherine, Tennant Creek and Arnhem Land are also being upgraded with a \$30 million investment through the Arts Trail Gallery Extension Program. Significant progress has been made on the design and construction of six projects to date with the new Mimi Aboriginal Art and Craft Gallery in Katherine anticipated to be completed and open in early 2022. A three-year Arts Trail Regional Stimulus Grants Program, completed in 2020, directed more than \$4.9 million in grants to 70 capital and strategic development projects for regional and remote arts and culture organisations across the Territory, providing opportunities to upgrade and improve arts and cultural facilities to be fit for purpose, diversify revenue opportunities, grow visitation and improve the visitor experience.

These priorities and others are underpinned by the NT’s *Creative Industries Strategy 2020–2024* (co-developed by industry and government), which supports the vision of an innovative sector that celebrates the Territory’s cultural distinctiveness while enhancing liveability, attracting visitors and growing the economy.¹⁵ Injecting around \$735 million into the local economy each year and employing almost 2400 Territorians directly and indirectly, the creative industries are a key economic driver in communities throughout the Territory. The visual arts and crafts sector economic contribution was estimated at \$168 million in 2018 and the sector is one of the largest employers in the creative industries after the screen, radio and broadcasting sector, with 462 full time equivalent employees. The Strategy sets forth goals, actions and measures to guide Government investment in people, places, markets, pathways and policy, along with a number of industry-led initiatives to strengthen and grow the sector, invest in our creative talent and support Territorians in taking on jobs in the creative industries.

The Strategy includes *Goal 2: to prioritise Aboriginal workforce and enterprise development focussing on regional and remote locations across the NT*, to “increase the number of Aboriginal people employed in the creative industries”.¹⁶ During the consultation to develop the Strategy, the Northern Territory Indigenous Visual Arts Industry identified that more work needs to be done in collaboration with government agencies to develop policies and programs that support appropriate training and genuine career pathways to actual and sustainable employment for Aboriginal and Torres Strait Islander artists and arts workers.

¹⁴ Based on information from Desart and ANKA found at desart.com.au and anka.org.au, respectively.

¹⁵ Northern Territory Government, 2020. *Creative Industries Strategy 2020–2024*. Department of Territory Families, Housing and Communities. Available online at https://tfhc.nt.gov.au/__data/assets/pdf_file/0009/888975/creative-industries-strategy-nt-2020-2024.pdf

¹⁶ Ibid

In addition to funding a range of strategic initiatives under the Visual Arts and Crafts Strategy commitments, including markets for authentic Aboriginal and Torres Strait Islander Arts, such as the annual Darwin Aboriginal Art Fair and the Desert Mob event in Alice Springs, the Northern Territory Government provides base operational support to Indigenous Visual Arts and Crafts industry peak bodies, ANKA and Desart, to support industry best practice and cultural priorities for Aboriginal owned art centres and to provide professional development opportunities for over 13,000 Aboriginal artists and arts workers, most living in remote or very remote communities in the Northern Territory, South Australia and Western Australia. The art centres provide the infrastructure, cultural and industry connections that support artists to create new art, generate income, develop professional skills and engage with the commercial art market through partnerships with dealers and galleries, online sales and marketing strategies.

Government policy development and service delivery in the Northern Territory must account for its unique geographic, demographic and cultural characteristics which frequently necessitate unique and regionally-specific programs and solutions. The *Everyone Together* Aboriginal Affairs Strategy is based on the belief that empowering people to determine their own futures and ensuring people and place are at the centre of government policy design and service delivery are essential.¹⁷ One size does not fit all, and the evidence shows that engagement at the local level is increased when communities are empowered to contribute and take ownership of the initiatives impacting them. As a result, the Northern Territory Government has a commitment to Local Decision Making (LDM) as the driver to provide opportunities to transfer government service delivery to Aboriginal Territorians and organisations based on their community aspirations. An example of this in 2021 is the transition of the Desert Mob event in Alice Springs to Aboriginal ownership and management from 2022. Essentially, LDM provides a pathway, guided by a 10-year plan, so that communities can have more control over their own affairs, including training and jobs. Cultural and creative industry aspirations are also included in regional economic development plans and Tourism Destination Management Plans in a coordinated approach between business, government, tourism, creative industries and communities to guide management, priority actions and investment decisions.¹⁸

The Australian Government Indigenous Visual Arts Industry Support program, informed by the *Indigenous Art Centre Plan*,¹⁹ is an effective funding program providing stability and development opportunities for a strong, ethical and innovative Indigenous visual arts industry that supports over 80 art centres (45% in the NT), 8,000 professional artists and 300 arts workers, with the majority living in regional and remote Australia. Provision of ongoing operational funding to Aboriginal-led peak bodies and art and culture centres is an important investment in these critical assets and organisations that empower Aboriginal and Torres Strait Islander people; provide intergenerational cultural learning and engagement; and offer training, employment and income opportunities for artists and arts workers through the production and marketing of art and cultural products and experiences.

4. What is (in)authenticity and how is it determined?

What constitutes authenticity? When does it matter? What criteria should be used to determine authenticity? Who should have the authority to make judgments regarding the authenticity of Aboriginal and Torres Strait Islander

¹⁷ Northern Territory Government, 2020. *Everyone together: Aboriginal Affairs Strategy 2019–2029*. Office of Aboriginal Affairs. Available at https://dcm.nt.gov.au/__data/assets/pdf_file/0010/799219/everyone-together-aa-strategy.pdf

¹⁸ Northern Territory Government, 2021. *Destination Management Plans*. Accessed on 29/11/2021 at <https://www.tourismnt.com.au/research-strategies/destination-management-plans>

¹⁹ Australian Government, 2018. *Indigenous Art Centre Plan*. Accessed on 7/12/2021 at https://www.arts.gov.au/sites/default/files/indigenous-art-centre-plan-.pdf?acsf_files_redirect

arts and crafts? What processes should there be for artists to obtain permission from the relevant cultural authorities when needed?

Desart is the peak industry body for 42 Aboriginal community art centres representing approximately 8,000 artists across the Central Desert region of Australia. Desart defines authentic art as “artworks, craft items and artefacts which are the legitimate expression of Aboriginal and Torres Strait Islander culture,” which requires that the ‘author’ or ‘creator’ must be an Aboriginal or Torres Strait Islander artist or group of artists.”²⁰

Similarly, the Arnhem, Northern and Kimberley Artists Aboriginal Association (ANKA), peak body and support agency for over 5,000 Aboriginal artists and 47 Aboriginal-owned and -operated art centres in the Top End of the Northern Territory and Western Australia, defines authentic Aboriginal and Torres Strait Islander art and craft as “any art or craft produced by an Aboriginal or Torres Strait Islander artist(s) or craftsperson(s). The definition would also include art and craft products (and merchandise) made pursuant to a license with an Aboriginal or Torres Strait Islander artist (s) with their full authority.”²¹ Further, “an Aboriginal or Torres Strait Islander artist or craftsperson is an artist or craftsperson who (a) Identifies as Aboriginal and/or Torres Strait Islander and (b) is recognised as Aboriginal and/or Torres Strait Islander by the community or group with which the artist identifies.”

These definitions are consistent with the criteria for authenticity outlined by the Indigenous Art Code (IAC), which defines authentic artwork as a creative expression in a material form, including art, craft, products and merchandise, that includes an 'Indigenous Cultural Expression' that is either:

- hand crafted by an Aboriginal or Torres Strait Islander person; or
- a licensed reproduction of an artwork created by an Aboriginal or Torres Strait Islander person. In which case the original artwork or licenced reproduction must attribute the artist or artists who created the original artworks.²²

The IAC has proposed that an 'Indigenous Cultural Expression' be defined to mean an expression of Aboriginal and Torres Strait Islander people's culture (whether through images, form or any other medium) that:

- has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an Aboriginal and Torres Strait Islander peoples community;
- has its origins in an Aboriginal or Torres Strait Islander peoples community;
- is made by an Aboriginal or Torres Strait Islander artist; or
- is derived from, or has a likeness or resemblance to, one or more Indigenous Cultural Expressions mentioned previously.

The Northern Territory Government supports the concept advanced by the IAC that to be considered 'authentic' products should either be made by, or under licence from, Aboriginal and Torres Strait Islander artists. It considers it important that to be classified 'authentic' any merchandise being made by non-Indigenous people, including merchandise made overseas, must be made with the full authority of Aboriginal

²⁰ Desart Incorporated, 2017. Submission 87, *Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*, pg. 2. Accessed 23/11/2021 at <https://www.aph.gov.au>

²¹ ANKA, 2017. Submission 132, *Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*, pg. 7. Accessed 23/11/2021 at <https://www.aph.gov.au>

²² Indigenous Art Code, 2017. Submission 138, *Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*. Accessed 22/11/2021 at <https://www.aph.gov.au>

and Torres Strait Islander artists/people and with an income being returned to the artists. This would require that:

- the artist is attributed, including reference to the original artwork;
- the integrity (moral rights) of the artist has been respected;
- the artist has received a fair licensing fee /payment under a transparent licensing agreement;
- the artist has had the opportunity to access legal advice on the terms of the contract or agreement; and
- a process is put in place to determine which objects are prohibited from production by anyone other than Aboriginal and Torres Strait Islander people.

5. What are the effects of inauthentic arts and crafts?

What are the negative effects of inauthentic art? Do they vary between different types of misuse or inauthentic product? What does respectful, meaningful and mutually beneficial collaboration across different cultures look like?

The Northern Territory Government concurs with the views of Desart and ANKA, which assert that effective solutions to address the prevalence of Aboriginal 'style' art are critical to protect the livelihoods of Aboriginal people living on country and the wider economic viability of our internationally renowned Aboriginal Australian art movement. As ANKA notes, "confusion about authenticity at the tourist level of the market filters through and impacts the credibility of the wider Australian Indigenous art market."²³

Creative practitioners in the Northern Territory who work with Aboriginal and Torres Strait Islander artists and their intellectual property or who engage with Aboriginal cultural heritage in grant-funded projects are required to comply with protocol requirements as a condition of funding. The protocols followed are those developed by the Australia Council for the Arts, first published in 2002 and updated in 2019, *Protocols for Using First Nations Cultural and Intellectual Property in the Arts*.²⁴

The National Association for the Visual Arts (NAVA) has also produced a protocols document, *Valuing Art, Respecting Culture*, as a guide to appropriate ways, culturally and legally, of working within the visual arts sector, along with historical background and cultural context for contemporary Aboriginal and Torres Strait Islander visual arts practice in Australia.²⁵ This publication was followed in 2002 by *Visual Cultures: Protocols for Producing Indigenous Australian Visual Arts and Crafts*,²⁶ which was prepared by the Aboriginal and Torres Strait Islander Arts Board and the Australia Council for the Arts. These protocols have guided the development of place- and program-specific protocols for exhibitions, events and arts projects in jurisdictions across Australia. The Indigenous Art Code, which was launched in 2010 in response to the recommendations of the 2007 Senate inquiry report, *Indigenous Art: Securing the Future*, provides a legal framework and standards for dealings between dealers and artists to ensure fair and ethical trade in artwork, transparency in the process of promotion and sale of artwork, and efficient and fair resolution of disputes

²³ ANKA, *supra*, pg. 6

²⁴ Australia Council for the Arts, 2019. *Protocols for Using First Nations Cultural and Intellectual Property in the Arts*. Available online at [protocols-for-using-first-nations-cultural-and-intellectual-property-in-the-arts](https://www.visualarts.net.au/protocols-for-using-first-nations-cultural-and-intellectual-property-in-the-arts)

²⁵ NAVA, 2001. *Valuing Art, Respecting Culture: Protocols for working with the Australian Indigenous visual arts and craft sector*. Accessed 26/11/2021 at <https://www.visualarts.net.au>

²⁶ ATSIAB and Australia Council for the Arts, 2002. *Visual Cultures: Protocols for Producing Indigenous Australian Visual Arts and Crafts*. Accessed 29/11/2021 at <https://www.wipo.int>

arising under the Code.²⁷ These frameworks serve as the foundation for services and support provided to Indigenous visual arts industry peak bodies, their member organisations and artists. However, as Desart has noted, laws and protocols are “woefully inadequate” in addressing inauthentic product. For example, copyright lasts for 70 years, which inadequately protects ancient rock art images from cultural appropriation. Contract law can be used to drive unfair agreements with artists who lack relevant knowledge and experience, and the burden of taking legal action falls to the victim who more often than not lacks access to the resources needed to seek redress.²⁸

6. What policy options are there to address inauthentic arts and crafts?

How effective have previous initiatives been at reducing the incidence and negative effects of inauthentic art? What gaps and problems have they encountered? When are approaches to verify or demonstrate authenticity inappropriate? What else could be done to increase consumer awareness and demand for ethically produced art? Would further education campaigns be effective? What about labelling schemes or requirements?

What are the limits of the existing intellectual property protections? How can existing intellectual property laws be amended to improve protections for Indigenous Cultural and Intellectual Property or do we need standalone legislation? What are the merits of, and concerns about, amending the Australian Consumer Law to prohibit the sale of inauthentic arts and crafts? Are there more effective ways to restrict the supply of inauthentic arts and crafts? What have been the barriers to implementing any of these initiatives to date?

What can we learn from other countries' efforts to protect First Nations people's legal rights over their arts and cultures?

An essential role for government is to support and promote ethical and authentic art transactions in line with best practice protocols and to develop policies and strategies to achieve this. Options include:

- Improving the availability of authentic products in the marketplace
- Raising consumer awareness through domestic and international educational campaigns
- Developing and implementing best practice Government procurement guidelines
- Establishing requirements or incentives for authentic, ethically-sourced artwork to receive preference in government-funded promotional collateral
- Strengthening the art centres themselves through:
 - targeted resourcing for business development based on sustainable, ethical licensing models of Aboriginal and Torres Strait Islander art for merchandise and souvenir products
 - market development to drive product and income diversification.
 - improved engagement/collaboration of government and peak bodies in policymaking
- Increasing the resourcing for organisations such as the Artists in the Black program through Arts Law

²⁷ Indigenous Art Code Limited, 2019. *The Indigenous Art Code*. Accessed 29/11/2021 at <https://indigenousartcode.org/the-indigenous-art-code/>

²⁸ Desart, *supra*, pg 4.

- Resourcing and support for a National Aboriginal and Torres Strait Islander Arts Advisory Body to strengthen the sector; to undertake policy, advocacy and representation; and to develop a framework for safeguarding Indigenous cultural intellectual property, as proposed by Terri Janke of Terri Janke and Company.²⁹

Policy responses, while essential, may not be sufficient on their own to address the issue of inauthentic Aboriginal and Torres Strait Islander 'style' merchandise. For example, educational campaigns may not effectively reach the tourists who comprise the major market for such merchandise. Art centres and non-government organisations do not have the market or jurisdictional reach needed to undertake a comprehensive approach.

Consequently, the Northern Territory Government supports legislative and regulatory options through amendment to the *Competition and Consumer Act under Australian Consumer Law* (Section 50) that relate to Unfair Practices as an intermediate response to the problem of inauthentic art until comprehensive, standalone legislation to protect cultural and intellectual property, addressing not only visual arts and craft, but also languages, dances and performances, can be enacted. This approach—to impose a prohibition on the sale of inauthentic products at all levels of the supply chain—has been recommended by Arts Law as the most achievable and efficient approach to address the problem.³⁰ The prohibition would make it an offence to supply or offer to supply an artwork, artefact or ceremonial object that includes an "Indigenous cultural expression" that is not either handcrafted by an Aboriginal or Torres Strait Islander person or been appropriately licensed for reproduction.

Expanding the market for authentic product is supported in the Northern Territory through training and skills development, such as through the Department of Industry, Tourism and Trade Aboriginal Workforce Grants,³¹ and funding through the Aboriginal Business Development Program to artists who are seeking independent business opportunities.³² The initiatives outlined in the *National Indigenous Visual Arts Action Plan 2021–25*, which sets the Australian Government's priorities to support the visual arts sector, are also strongly supported. Initiatives identified in the Action Plan address capital investment, market development, digital infrastructure, business development, product labelling and royalties.³³

Finally, both policy and legislative options can be augmented and strengthened by improved digital infrastructure and technological innovations in the areas of provenance and traceability, such as through the research and development in blockchain testing undertaken through Desart and art centre exploration of non-fungible tokens (NFTs) as an avenue to mint, authenticate and sell digital work.

²⁹ Janke, T. 2009. *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd, Sydney, p. 17; Ms Ayres, Committee Hansard, 6 March 2018, Sydney, p. 34.

³⁰ Arts Law Centre of Australia and Indigenous Art Code, 2017. Submission 149, *Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*, pg 14. Accessed 29/11/2021 at <https://www.aph.gov.au>

³¹ Northern Territory Government, 2021. *Aboriginal Workforce Grants*. Department of Industry, Tourism and Trade. Accessed on 2/12/21 at <https://nt.gov.au/industry/business-grants-funding/aboriginal-workforce-employment>

³² Northern Territory Government, 2021. *Aboriginal Business Development Program*. Department of Industry, Tourism and Trade. Accessed on 2/12/21 at <https://nt.gov.au/industry/business-grants-funding/aboriginal-business-development-program-abdp>

³³ Department of Infrastructure, Transport, Regional Development and Communication. *National Indigenous Visual Arts Action Plan 2021–25*. Office for the Arts. Accessed on 2/12/2021 at <https://www.arts.gov.au/what-we-do/national-indigenous-visual-arts-action-plan-2021-25>

7. What issues arise in the interactions between artists and dealers?

What do 'fair' and 'ethical' dealings between artists and dealers look like? How can best-practice ethical trade of Aboriginal and Torres Strait Islander arts and crafts be nurtured? How prevalent are unfair and unethical dealings between artists and dealers? What information sources can we draw on to estimate the scale of harmful practices?

What are the merits and costs of amending the Australian Consumer Law to prohibit unfair treatment of artists? How well is the Indigenous Art Code working? How could it be improved? What are the pros and cons of moving to a mandatory code?

How well are other educative and advocacy initiatives working? What limitations do these face? What else should be done?

Arts Law and the Indigenous Art Code define best-practice fair and ethical trade as requiring that dealers act honestly in interactions and arrangements with artists and refrain from misleading or deceiving consumers about the authenticity, artist or place of creation of an artwork. It also requires that dealers respect the cultural practices of Aboriginal and Torres Strait Islander artists, including beliefs about non-sellable items, receive informed consent from artists and pay artists fairly for their work.³⁴

The current legal framework to protect the supply of authentic art is based on contract, copyright, moral rights and the Australian Consumer Law; however, as noted, these are inadequate to deal with suppliers of inauthentic product who have no interest in "best practice." Contracts are used by unscrupulous dealers to take advantage of Aboriginal and Torres Strait Islander artists, and cheaper inauthentic product sold to tourists can crowd out authentic artworks. As Desart notes, more than 90% of art centres and the artists they represent have been adversely affected, with the three most significant impacts being:

- More than 60% finding it harder to compete in the market due to the prevalence of lower-priced inauthentic product;
- More than 50% finding it more difficult to get access to retail and wholesale outlets; and
- More than 50% reporting that their artists were distressed and upset by what is seen as a gross lack of respect for their culture not only by those who sell such products but by the lack of any government response to protect them³⁵.

8. How can the contribution arts and crafts make to remote communities be sustained?

What government investments in the Aboriginal and Torres Strait Islander arts and crafts sector are working well to support communities? Are there better ways for governments to use these investments in arts and crafts to support Aboriginal and Torres Strait Islander communities?

How well is the art centre model working in supporting artists and communities? What could be done to improve the model? Where are the gaps? Is there insufficient focus on independent artists, or artists in particular regions?

³⁴ Ibid.

³⁵ Desart Incorporated, 2017. Submission 87, *Parliamentary Inquiry: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product*.

Can you point us to any examples of art or art centres being used to facilitate broader social, health and community objectives?

How can the economic, social and cultural contributions that arts and crafts make to communities be maximised?

Art centres across the Northern Territory and elsewhere play an indispensable role in remote regions as a source of Aboriginal cultural leadership, language, identity and creativity; as a link to the mainstream art market; as centres for community engagement and participation; and as the provider of a range of needed services in local communities that yield benefits in mental and physical health, social cohesion, cultural maintenance, creative thinking, problem solving skills, literacy and numeracy and more. Government funding can provide stability and surety from which art centres can leverage income from other sources to achieve their vision and purpose.

The contribution arts and crafts makes to remote communities can best be sustained by:

- Increasing access to global markets, through retail outlets in population centres, tourist hotspots and online;
- Culturally appropriate strategies to expand product ranges and diversify income streams;
- Continued research and innovation in the areas of Cultural and Intellectual Property;
- Closing gaps in critical supply chains to improve resilience in an uncertain economic environment; and
- Providing management education to staff and professional training to artists to maintain competency and support career development and pathways to actual employment. More work needs to be done by government and industry to create pathways to actual employment in remote communities and the creative and cultural sectors and in recognising the important role of arts and creativity in developing relevant workforce skills and capabilities that can also be transferred to other industries.