

MinterEllison

13 December 2021

Aboriginal and Torres Strait Islander Visual Arts and Crafts
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioner

Submission to the Productivity Commission into Aboriginal and Torres Strait Islander Visual Arts and Crafts

I am writing this letter in support of the submission to the Productivity Commission by APY Art Centre Collective (**APYACC**) and to offer a further submission for consideration. I understand that the Productivity Commission has been asked to examine the value, nature and structure of markets for Aboriginal and Torres Strait Islander arts and crafts, and possible policy and regulatory responses to address deficiencies in these markets.

I am a partner at MinterEllison and the firm's *Pro Bono & Community Investment* program partner. In the past year, the firm invested over 60,000 hours in pro bono legal support to individuals, not-for-profits, social enterprises and Indigenous businesses, seeking to create lasting impacts in the community and drive sustainable solutions in response to social and environmental issues. We have significant experience advising organisations in the Indigenous arts and crafts space, including APYACC, Djilpin Arts Aboriginal Corporation, Darwin Aboriginal Art Fair and Arts Law Centre of Australia.

MinterEllison support of APYACC

MinterEllison has had a longstanding working relationship with APYACC. As a firm, we have assisted APYACC on a pro bono basis to combat the exploitation of Indigenous artists by unscrupulous private dealers, known as 'carpetbaggers'.

Such assistance includes, amongst other things:

1. advising on a possible Certification Trade Mark framework to indicate that art work has been authentically created by Indigenous artists, as well as also being ethically procured (this is a critical element as work needs to be both authentic and procured in an ethical and fair manner);
2. reviewing and amending APYACC artist contracts, including to ensure that the agreement between the artist and art centre is exclusive, and the art centre could commence proceedings against a carpetbagger for inducing breach of contract;
3. preparing cease and desist letters in circumstances where a carpetbagger has induced an artist to breach their contract; and
4. advising on possible regulatory and non-regulatory solutions to combat carpetbagging and unethical procurement and its impacts on Indigenous artists, art centres and communities.

From our experience working with APYACC and others, it is evident that unethical procurement must be addressed as a matter of urgency to end the exploitation of Indigenous artists and their families and communities. We strongly support consideration of the solutions outlined in APYACC's submission. We'd be happy to meet to discuss cost effective mechanisms and solutions.

Further submission by MinterEllison

We have outlined further recommendations which aim to end carpetbagging and facilitate ethical pathways for the purchase of Indigenous art in the **attached** table.

We would welcome an opportunity to discuss the above with the Productivity Commission and provide support to the Productivity Commission and Australian Consumer and Competition Commission to develop the recommendations outlined.



Yours sincerely

MinterEllison

Keith Rovers
Partner

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Overview of Recommendations – Productivity Commission Submission

1.1 Background

- (a) The Productivity Commission (**Commission**) has been asked to examine the value, nature and structure of markets for Aboriginal and Torres Strait Islander arts and crafts, and policies to address deficiencies in these markets. The [Terms of Reference](#) indicate that in undertaking the study, the Commission will:
 - (i) examine the nature and structure of the different parts of the domestic and international markets including authentic and inauthentic products;
 - (ii) identify deficiencies and barriers in the markets and how they affect artists and other stakeholders; and
 - (iii) assess costs, benefits, governance arrangements, risks, practicalities and implementation challenges of any policy responses. In doing so, the Commission will have regard to a number of factors (including existing regulatory and non-regulatory responses to the problems in the relevant markets, impacts on Aboriginal and Torres Strait Islander artists and possible policy and regulatory responses to address the identified deficiencies in the markets).
- (b) The Commission's [Issues Paper on Aboriginal and Torres Strait Islander Visual Arts and Crafts](#) (**Issues Paper**) indicates that the Commission is interested in receiving submissions regarding the issues which arise between artists and dealers, including 'carpetbagging'.
- (c) MinterEllison is supporting APY Art Centre Collective (**APYACC**) and has prepared the submission of recommendations below to end carpetbagging and facilitate ethical pathways for the purchase of Indigenous art.

1.2 Executive summary

- (a) As noted in the Issues Paper, Indigenous artists (and their families and communities) experience 'carpetbagging' whereby Indigenous artists (or their families and communities) are '*paid in-kind, receive unfair financial compensation or work.*'¹ This insidious practice allows unethical dealers to prey on vulnerable members and institute a form of debt bondage or modern slavery.
- (b) Our key recommendation is that the Australian Competition and Consumer Commission (**ACCC**) increase its scrutiny and enforcement of *unconscionable behaviour* in the Indigenous arts and crafts sector. In particular, we suggest that the Indigenous Art Code (**IAC**) is made a mandatory industry code under the *Competition and Consumer Act 2010* (Cth) (**CCA**). This would ensure that all art dealers (including carpetbaggers) would be subject to the standards set out in the code, and associated sanctions for non-compliance. The ACCC can also play an educative role by ensuring that the public is made aware of the prevalence and nature of carpetbagging. This education component is highly critical to allow buyers to make informed decisions and thereby dampen the market for product that is not ethically sourced. An education campaign and associated 'mark' scheme could go a long way to reducing the size of the market and the economic incentives.
- (c) In addition to increased oversight and enforcement by the ACCC, it is important that artists and art centres are provided support to pursue remedies under intellectual property law and contract. As noted in APYACC's submission, we suggest that a cohesive information sharing system and adequate training is

¹ Issues Paper, page 11.

provided to the police force (particularly in areas where carpetbagging is prevalent), so that carpetbaggers can be readily identified and prosecuted under civil and criminal law, if necessary.

1.3 Table of recommendations

Current remedies and issues	Advantages	Disadvantages	Recommendation
<p>ACCC oversight and enforcement</p> <p><i>Refer to Question 3 & 7 & 8 of the Issues Paper</i></p>	<p>Market study or inquiry</p> <p>An in-depth market study or inquiry undertaken by the ACCC would improve the understanding of industry practices and dynamics in the Indigenous arts and crafts sector.</p> <p>A market study or inquiry is also an opportunity for the ACCC to make findings and identify options that would better place the ACCC to address material issues (eg the prevalence of carpetbagging). Likewise, the ACCC can assess whether current ACCC regulatory focus is appropriate to meet the challenges posed by carpetbagging.</p> <p>The ACCC publishes its market study or inquiry reviews in a formal report which would help educate consumers, encourage public debate over competition and consumer matters relating to Indigenous arts and crafts and inform policy consideration.</p> <p>Development of industry code</p> <p>If the IAC became an industry code under Part IVB of the CCA this would provide increased regulatory support for the Indigenous arts and crafts sector by guarding against misconduct</p>	<p>The IAC already functions as a voluntary code and as the Issues Paper noted, there is ongoing debate regarding whether the IAC functions effectively as a voluntary code.²</p> <p>In our experience and as outlined in APYACC's submission, the IAC does not provide adequate protection to artists, in part because art dealers can simply choose not to sign up to the code and therefore cannot be sanctioned through the IAC (or the code is not enforced or able to be enforced against contravening members).</p> <p>In addition, despite the prevalence of carpetbagging, the IAC has not taken significant action against art dealers who are members of the IAC and may have breached its terms. As noted in APYACC's submission, there is no evidence to suggest that any art dealer has ever been expelled as a member from the company which implements the IAC, the Indigenous Art Code Limited. This further supports the conclusion that a mandatory industry code, overseen by the ACCC is required.</p> <p>In the context of the IAC becoming an industry code under the CCA, we suggest that there are several disadvantages to the IAC operating as a</p>	<p>We suggest that the ACCC should take further action around investigation and enforcement of the law against unconscionability in the Indigenous arts and crafts industry, with the goal of increasing successful prosecutions of illegal practices in the industry.</p> <p>Such action would fit within the ACCC's enduring priorities in its 2021 Compliance and Enforcement Policy and Priorities, which states that <i>'the ACCC acknowledges that certain conduct in breach of the [Competition] Act has the potential to specifically impact on the welfare of Indigenous Australians. The ACCC also recognises that Indigenous consumers living in remote areas face particular challenges in relation to asserting their consumer rights. The ACCC will always prioritise its work in these areas while these challenges remain.'</i></p> <p>As an initial step, we recommend that the ACCC review complaints made to it and State and Territory fair trading agencies regarding carpet bagging, and consider a market study or other inquiry into systemic practices.</p>

² Issues Paper, page 12.

Current remedies and issues	Advantages	Disadvantages	Recommendation
	<p>and opportunistic behaviour. An industry code could also foster long term changes by setting clearer standards for the relationship between artists and private dealers.</p> <p>The IAC could either become a mandatory industry code or a voluntary industry code enhancing the enforcement powers of the ACCC. The systemic disadvantage of Indigenous artists in their arrangements with art dealers is analogous to the systemic disadvantage of franchisees in their dealings with sophisticated franchisors which is the key rationale for the Franchising Code of Conduct being a mandatory industry code under the CCA. The IAC should also be a mandatory code.</p> <p>We suggest there are several advantages associated with making the IAC a mandatory industry code. Mandatory codes are prescribed by regulation under Part IVB of the Competition and Consumer Act to be binding on all industry participants, which would ensure that <u>all</u> art dealers are subject to the code. A wide range of remedies would become available to the ACCC in relation to breaches of mandatory codes, including issuing infringement notices or seeking pecuniary penalties and injunctions and opening the possibility of court ordered third party redress, which provide more effective disincentives for carpetbaggers.</p> <p>Voluntary codes only apply to industry participants who agree to be bound by the code. As explained in the 'Disadvantages' section, this</p>	<p>voluntary, rather than a mandatory industry code. Most notably, it would mean that art dealers are not required to sign up to the code (as is the case with the current IAC).</p> <p>In addition, while the voluntary code could include a mechanism for dispute resolution and sanctions for non-compliance, the ACCC has limited enforcement powers in relation to voluntary codes.</p>	<p>We recommend that ultimately the IAC becomes a mandatory industry code under the CCA.</p>

Current remedies and issues	Advantages	Disadvantages	Recommendation
	may mean that making the IAC a voluntary industry code is not an effective approach.		
Intellectual Property Law <i>Refer to Question 3 & 7 & 8 of the Issues Paper</i>	<p>Australian intellectual property laws protect artists' and creators' intellectual property rights in their works.</p> <p>In particular, under the <i>Copyright Act 1968</i> (Cth) (Copyright Act) an Indigenous artist may rely on copyright and moral rights to prevent certain uses and treatment of their artistic works, and assign and licence their artistic works to others.</p>	<p>Australian intellectual property laws (including copyright law) are inadequate in protecting Indigenous cultural and intellectual property (ICIP) and cultural expression.</p> <p>It is an expensive and time consuming process for an artist to prevent copyright and moral rights infringement.</p> <p>The onus rests on the artist to prove copyright and moral rights infringement under the Copyright Act.</p> <p>As Terri Janke³ and others have argued, obtaining copyright protection can also be difficult where the designs depicted in an artistic work have been passed down through the generations or have been brought into existence through communal contribution and effort.</p>	<p>There have been numerous discussion papers and proposals for reform, including proposals for the introduction of standalone legislation to protect the ICIP to assist with combatting inauthentic art and recognising communal ownership of art and cultural expression.⁴ As noted in the Issues Paper, many artists, art centres, legal experts and arts industry organisations consider that existing Australian intellectual property laws are not a suitable mechanism for the protection of ICIP, and IP Australia is currently considering standalone legislation to protect ICIP.⁵</p> <p>We recommend that the proposals in relation to standalone ICIP legislation are implemented, Further to this, additional support should be provided to art centres to support artists seeking to enforce their rights under stand-alone ICIP legislation, intellectual property laws more generally, and more specifically the Copyright Act.</p>

³ Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) ; Terri Janke, *True Tracks: Respecting Indigenous knowledge and culture* (2021).

⁴ HoRSCIA (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*, Canberra; Office for the Arts, *Consultation Paper on Growing the Indigenous Visual Arts Industry*, (2020) Canberra; IP Australia, *Indigenous Knowledge Project*, (2021) <https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/indigenous-knowledge/indigenous-knowledge-project>; IP Australia, *Study Into Stand-alone Legislation for Indigenous Knowledge*, (2021) https://www.ipaustralia.gov.au/sites/default/files/study_into_stand-alone_legislation_for_indigenous_knowledge.pdf.

⁵ Issues Paper, page 10.

Current remedies and issues	Advantages	Disadvantages	Recommendation
Contract <i>Refer to Question 7 & 8 of the Issues Paper</i>	<p>Implementing exclusive contracts between artists and art centres can allow art centres to commence proceedings against carpetbaggers for inducing breach of contract (in circumstances where a carpetbagger knowingly and intentionally persuades an artist to breach its exclusive contract with an art centre by undertaking work for the carpetbagger).</p> <p>As noted in the Issues Paper, there is research to suggest that artists working with art centres are more likely to be treated fairly than those working in communities without art centres.⁶ Art centres, unlike private dealers, operate as not-for-profits and are required to adhere to protocols around transparency and accountability through their rules of incorporation under the Office of the Registrar of Indigenous Corporation.</p>	<p>It is an expensive and time consuming process for an art centre to enforce a breach of contract against a carpetbagger, and likely requires an art centre to secure legal representation.</p> <p>The onus rests with the art centre to prove each element of the tort:</p> <ul style="list-style-type: none"> that the carpetbagger intended to induce the artist to break its contract with the art centre (eg that the carpet bagger knew of the contract and knew that the particular act by the artist would be a breach of the contract); the carpetbagger did in fact induce the artist to break its contract; and the art centre suffered loss due to the breach of contract. <p>It is only the party who loses assurance of the contract who can bring proceedings and obtain relief, meaning that only the art centre may bring an action for inducing breach of contract, rather than the artist.</p> <p>This cause of action does not adequately deal with the systemic exploitation of Indigenous artists, as it focuses on individual claims.</p>	<p>While it is important to ensure that, as much as possible, agreements between artists and an art centres are exclusive, this measure in isolation is insufficient to combat the systemic nature of carpetbagging.</p> <p>It may also be valuable to ensure that artists, dealers and communities are aware of the exclusive arrangements between art centres and artists. This may reduce the likelihood of carpetbagging and make it more difficult for carpetbaggers to successfully claim that they were not aware of the existence of a contract between the artist and art centre.</p>
Criminal Law (Police Taskforce) <i>Refer to Question 7 & 8 of the Issues Paper</i>	<p>Police have significant enforcement powers (including the powers of search and seizure) which could be used to investigate and potentially prosecute carpetbaggers.</p>	<p>We understand from APYACC that in recent years there has been a lack of interest from local police in and around APY Lands regarding serious incidents of carpetbagging. This may</p>	<p>As noted in the APYACC submission, a coordinated police taskforce across Australian jurisdictions must be established as a matter of urgency to support better communication between police departments.</p>

⁶ Issues Paper, page 11 (citing Bartleet et al. 2019).

Current remedies and issues	Advantages	Disadvantages	Recommendation
	<p>As noted in APYACC's submission, in 2010 there were several individuals who worked for the police force in Western Australia and on the APY Lands with expertise and experience in this area and provided valuable support to communities.</p>	<p>mean that reliance on local or regional police enforcement is ineffective.</p> <p>In addition, unethical and unscrupulous behaviour by carpetbaggers falls into different categories and is not necessarily always 'illegal' (meaning that that some forms of unconscionable practices by carpetbaggers would be outside the police force's remit).</p> <p>We recognise that the police force is constrained by limited resources and at times challenging relationships with Indigenous communities.</p>	<p>A cohesive system of information sharing will increase the capacity and capability of the police force to identify and investigate carpetbaggers.</p> <p>In addition, police working in areas where carpetbagging is prevalent should be provided with appropriate training and education regarding the nature of carpetbagging and its impact on communities.</p>

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