



## Post-draft submission

## Productivity Commission

## Aboriginal and Torres Strait Islander visual arts and crafts

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# Introduction

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) thanks the Productivity Commission for its considered approach to engaging and representing the views of a wide-range of valued stakeholders on this topic, and acknowledges the meaningful input that has been provided in developing this draft report.

The Department acknowledges the patience of First Nation Australians, particularly artists who have called for action, through various inquiries, reports and reviews on the sector and appreciates the opportunity to contribute to a workable, successful outcome. The Department routinely engages with other relevant Australian Government agencies such as the National Indigenous Australians Agency and has representation on the Intellectual Property Policy Group and the Indigenous Knowledge Working Group - cross-departmental groups coordinated by IP Australia and established to assess how stand-alone legislation could support First Nations peoples to protect and commercialise their Indigenous Knowledge.

The Australian Government has collaborated with First Nations visual artists—the people at the heart of this issue—since the early 1970s. This Department currently manages the delivery of a range of initiatives, and manages programs such as the Indigenous Visual Arts Industry Support program, the Indigenous Languages and Arts program and the Indigenous Repatriation Program.

The Australian Government provided \$27.2 million in 2021-22 in support of the operations of over 80 Indigenous owned art centres, as well as a number of art fairs, regional hubs and industry service organisations that are a significant contributor to Australia's world-renowned Indigenous visual art movement. Together these organisations support approximately 8,000 artists and over 500 Indigenous arts workers, most in very remote Indigenous communities. The Indigenous Languages and Arts program contributes over \$20 million annually towards keeping cultural identity strong within local communities and enhancing First Nations people's wellbeing by funding activities that support participation in, and maintenance of, Australia's First Nations cultures through languages and arts.

The Department has considered the draft findings and draft recommendations of the Productivity Commission's draft report, published on 19 July 2022, and considers that priority should be given to draft recommendations affecting legislative protection of Indigenous Knowledge (including but not limited to visual arts and crafts) and initiatives that inform consumer decision-making in purchasing First Nations arts and crafts.

It is particularly important that any action or initiatives originate or are supported by the First Nations arts and crafts sector and are designed in formal partnership with First Nations representatives consistent with the priority reforms of the National Agreement on Closing the Gap.

Detailed responses to all seven draft recommendations are provided below.

## Response to Draft Recommendation 5.1

### A mandatory labelling scheme for inauthentic products should be developed

The Australian Government should develop a mandatory information standard to require the labelling of inauthentic Indigenous-style products to indicate to consumers that they are not created by or under licence from an Aboriginal and Torres Strait Islander person.

In developing the standard, the Australian Government should engage effectively with Aboriginal and Torres Strait Islander people.

The Department **supports this recommendation in part.**

The Department acknowledges that labelling schemes have previously been recommended as a way of achieving greater protection of First Nations arts and crafts, including Indigenous Knowledge and Traditional Cultural Expression, including in the former House of Representatives Standing Committee on Indigenous Affairs' 2018 [Report on the Impact of Inauthentic Art and Craft in the Style of First Nations People](#) (Recommendation 2).

The Department also acknowledges that unlike previous recommendations this draft recommendation focuses on a mandatory labelling scheme for *inauthentic products* with the intention of placing the administrative burden on entities acting inappropriately, rather than on the artists and producers of genuine art and craft products.

There is a concern that the labelling of inauthentic products could inadvertently legitimise their place in the market and negatively impact authentic First Nations products. Moreover, without an increase in resources for an education campaign and enforcement process, the effectiveness of specific regulation of labelling could be compromised. It is also possible that the labelling of inauthentic products will not on its own deter consumers, particularly when purchasing souvenirs.

There may be benefit in continuing the voluntary process of labelling or certifying authentic products. This would be of particular use for galleries and art centres.

The Department supports action to improve consumer awareness but suggests that while new legislative tools protecting broader Indigenous Knowledge and Traditional Cultural Expression are explored, effort focuses on existing initiatives aimed at improving customer access to information regarding authentic First Nations products.

Current initiatives include the national rollout of digital labelling for art works and products funded under the Indigenous Visual Arts Industry Support (IVAIS) program and delivered by Desart Incorporated (the peak arts service organisation for Central Australian Aboriginal Arts Centres), and the Indigenous Art Code administered by Indigenous Art Code Ltd.

## Response to Draft Recommendation 7.1

### An Indigenous Cultural and Intellectual Property Strategy is needed to coordinate regulatory measures

The Australian Government should develop and publish an Indigenous Cultural and Intellectual Property (ICIP) strategy that sets out how policy and regulatory measures will address different aspects of ICIP. The development of the strategy should be led by the Minister for Indigenous Australians, in partnership with state and territory governments and Aboriginal and Torres Strait Islander people.

The Department **supports this recommendation in principle.**

The Department appreciates the complexity of existing and potential future policy and regulatory measures to recognise and protect Indigenous Culture and Intellectual Property. It also acknowledges the leadership role of the Minister for Indigenous Australians, supported by the National Indigenous Australian Agency and its commitment to implement the Government's policies and programs to improve the lives of all Aboriginal and Torres Strait Islander peoples.

It is supported on the basis that development of such a strategy would be concurrent with exploration of legislation to protect Indigenous cultural rights (Recommendation 7.2) in order to expedite outcomes.

## Response to Draft Recommendation 7.2

### New cultural rights legislation should be introduced to recognise and protect cultural assets in relation to visual arts and crafts

To address the issue of Indigenous Cultural and Intellectual Property being used in visual arts and crafts without authorisation from traditional owners, the Australian Government should introduce new legislation that formally recognises the interests of Aboriginal and Torres Strait Islander communities in their traditional cultural assets.

To achieve this, the legislation should create a new cause of action that specifies that a traditional owner's rights are infringed if a person uses a cultural asset to create a cultural expression, such as a piece of art or craft, without the authorisation of a traditional owner, unless an exception applies.

The Department **supports this recommendation.**

It is generally acknowledged that current Australian legislation protecting copyright in works by individual artists does not apply well to Indigenous Knowledge because of factors such as ongoing community rights and ownership.

The Government has committed to protecting authentic Indigenous visual art to support Indigenous artists and businesses, including their cultural rights and economic interests.

Support for new legislation has been recommended in a number of reviews including the former House of Representatives Standing Committee on Indigenous Affairs' 2018 [Report on the Impact of Inauthentic Art and Craft in the Style of First Nations People](#) (Recommendation 8).

The Department notes that while theft and misrepresentation of Indigenous Knowledge is apparent in visual arts and crafts, Indigenous Knowledge is not limited to visual arts and crafts and it is anticipated that new legislation would consider intellectual property relating to other cultural elements such as skills, language, symbols, genetic resources, stories and dance.

This is anticipated to be a complex project requiring leadership by First Nations peoples and significant engagement and consultation with a wide variety of stakeholders including artists and art collectives, communities, academics and the business sector. The Department acknowledges the significant amount of work already undertaken on this issue including the [Protocols for using First Nations Cultural and Intellectual Property in the Arts](#) developed in 2002 (revised in 2007 and 2019) by Dr Terri Janke and Company on behalf of the Australia Council for the Arts.

## Response to Draft Recommendation 10.1

### The Indigenous Art Code can be strengthened through a joint commitment of government and industry

The Australian Government, in partnership with state and territory governments, should modestly increase funding to Indigenous Art Code Limited to support key priorities, including:

- an enhanced dispute resolution process, with a referral pathway to independent review of decisions and public reporting of deidentified dispute outcomes.
- more detailed performance indicators to inform evaluation of the Code's effectiveness, alongside public reporting of progress.

Additional funding should be subject to ongoing monitoring and evaluation of the Code's effectiveness. Commensurately higher membership fees from dealer members should also be levied to co-fund these improvements.

The Department **notes this recommendation.**

The Indigenous Art Code Limited (the Code) establishes standards for commercial dealings between dealers and Aboriginal and Torres Strait Islander artists to support fair and ethical trade in artwork, transparency in the process of promotion and sale of artwork, and that disputes arising under the Code are dealt with efficiently and fairly. It also has a role in educating artists, art centre staff and art dealers to encourage best practice in commercial dealings.

While as a self-regulated, voluntary code there are limits to the impact that the Code can make. The Department recognises that an increase in funding would assist the Code to undertake additional functions such as an enhanced dispute resolution process as suggested in the draft report.

## Response to Draft Recommendation 10.2

### Artists should be aware of and able to access legal support services

The Australian Government should ensure that legal support services for artists are accessible. Referral pathways should be comprehensive and accessible to independent artists, and promoted such that artists are aware of them.

Through its review of the Indigenous Art Code Limited, the Australian Government should assess whether it is the best organisation to undertake this role. Depending on the outcome of that review, the Australian Government should provide funding to the responsible organisation to maintain these referral pathways.

The Department **supports this recommendation in part.**

The Department acknowledges the legal support services that the Australian Government currently provides artists. It notes that increasing awareness of these services could be beneficial but that awareness of services is likely to be only part of the issue and that other issues could include location, capacity limits of current service providers, and complexity of legal processes.

Relevant support services provided by the Australian Government include:

- The Arts Law Centre of Australia's (Arts Law's) Artists in the Black (AITB) program supported under the IVAIS which provides specialised free or low-cost tailored legal assistance for Aboriginal and Torres Strait Islander artists. The AITB program includes brokering significant

pro-bono legal support for more complex cases and the Adopt a Lawyer program for art centres;

- The Indigenous Art Code (the Code) establishes standards for commercial dealings between dealers and Aboriginal and Torres Strait Islander artists to support fair and ethical trade in artwork, transparency in the process of promotion and sale of artwork, and that disputes arising under the Code are dealt with efficiently and fairly. It also has a role in educating artists, art centre staff and art dealers to encourage best practice in commercial dealings; and
- The IVAIS funded network of Indigenous art centres and service organisations provides significant support and protection for artists in relation to unethical dealing.

Early benefits could potentially be realised through funding the development of model contracts or contract clauses to assist protecting artists' rights in sales and licencing negotiations, especially if accompanied by training for art centre managers and arts workers.

## Response to Draft Recommendation 10.3

### Australian Government funding should be evaluated to inform future arrangements

The Australian Government should commission an independent evaluation of the effectiveness of Australian Government expenditure directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector. The scope of the review should include the Indigenous Visual Arts Industry Support (IVAIS) program, the National Indigenous Visual Arts (NIVA) Action Plan and relevant Australia Council programs.

This evaluation should be undertaken in partnership with Aboriginal and Torres Strait Islander representatives of the sector, in accordance with the principles of the Productivity Commission's *Indigenous Evaluation Strategy*, and be completed by December 2025. The evaluation should consider:

- how effectively funding has met existing objectives, and whether these objectives are the right ones
- whether and what additional support is required to help meet sector priorities (for example, whether a sector-wide Aboriginal and Torres Strait Islander workforce strategy is required)
- what aspects of the NIVA Action Plan, such as support for independent artists, should be maintained as part of ongoing government funding to the sector.

The Department **supports this recommendation**.

The **IVAIS** program, as it is now known, was established in 2012 and was developed to address a lack of arts infrastructure and support in remote and very remote communities. A review in 2017-18 found that the program outcomes continued to be relevant and appropriate, and that it was achieving its intended outcomes and a further evaluation was suggested for four years' time (2021-22).

The Department welcomes the recommendation to be included in a Government-wide review of expenditure directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector.

## Response to Draft Recommendation 10.4

### Aboriginal and Torres Strait Islander people should be part of shared decision-making in setting objectives for government funding for visual arts and crafts

Under the National Agreement on Closing the Gap, governments committed to build and strengthen the structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments. The current approach to determining funding objectives in the Aboriginal and Torres Strait Islander visual arts and crafts sector is not characterised by shared decision-making between governments and Aboriginal and Torres Strait Islander people.

The Australian Government (led by the Australian Government's Office for the Arts) should establish a formal shared decision-making partnership with Aboriginal and Torres Strait Islander artists and art organisations to help identify funding priorities and strategic initiatives to support growth across the sector.

The Department **supports this recommendation.**

The Department supports government policies relating to First Nations peoples including the National Agreement on Closing the Gap, the implementation of the Uluru Statement from the Heart and the right to self-determination for First Nations peoples.

It acknowledges that shared decision-making can be improved and embraces the opportunity to establish a formal shared decision-making partnership with First Nations artists and arts organisations. Further, the Department will continue to engage with the National Indigenous Australians Agency (NIAA) and seek further advice on utilising any existing engagement pathways.

We note the approaches suggested by the Productivity Commission and look to the Sector for informed guidance on the strengths and weaknesses with each approach, as well as any other models suggested.