

Indigenous Arts and Crafts Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
Via email indigenous.arts@pc.gov.au



New South Wales Aboriginal Land Council submission to the Australian Government Productivity Commission on the Aboriginal and Torres Strait Islander Visual Arts and Crafts Draft Report

Thank you for the opportunity to comment on the Productivity Commission Aboriginal and Torres Strait Islander Visual Arts and Crafts Draft Report **(the Report)**. The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and is the largest Aboriginal member-based organisation in Australia. The network of 120 Local Aboriginal Land Councils (**LALCs**) represent over 28,000 Aboriginal people in NSW. As elected bodies, LALCs represent not only the interests of their members, but of the wider Aboriginal community.

Our network of Aboriginal Land Councils has key roles to play in relation to the protection and preservation of Aboriginal culture and heritage. NSWALC has legislative responsibilities under the Aboriginal Land Rights Act 1983 to protect and promote the rights of Aboriginal peoples, including Aboriginal culture and heritage.

Enclosed is our submission. Should you require further information, please contact the NSWALC Strategy and Policy Unit on 02 - 9689 4444 or via e-mail:

Sincerely,

Yuseph Deen
Chief Executive Officer
NSW Aboriginal Land Council

Date: 07 November 2022

ALWAYS WAS. ALWAYS WILL BE.

alc.org.au

Introduction

The NSW Aboriginal Land Council (**NSWALC**) welcomes the opportunity to provide feedback to the Productivity Commission (**the Commission**) regarding Cultural Rights protection Legislation. NSWALC provides these comments in our capacity as the peak body representing Aboriginal peoples in NSW and as the largest Aboriginal member based organisation in Australia.

NSWALC is committed to pursuing cultural, social and economic independence for Aboriginal peoples. As a self-funded statutory corporation established under the Aboriginal Land Rights Act 1983 (**ALRA**), NSWALC has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples and communities across the state.

NSWALC also provides support to a network of 120 Local Aboriginal Land Councils (**LALCs**), with a combined membership of over 28,000 Aboriginal people. LALCs are autonomous, elected bodies representing the interests of their members as well as the wider Aboriginal community in each of their respective regions. The core business of each LALC is to protect Aboriginal culture and heritage, acquire and manage lands for cultural and economic purposes, and as compensation for dispossession.

NSWALC's comments of the Report seek to advance the human rights of Aboriginal peoples, protect and create opportunities and/or processes for Aboriginal peoples to be active participants in the intergenerational protection and management of Indigenous Knowledges.

Accordingly, NSWALC draws the Commission's attention to **Article 11** and **Article 31** of the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** which respectively state:

"1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs"

and

"1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights".

NSWALC highlights these Articles as they reference two themes that underpin this submission; Aboriginal community control and a human rights based approach to the protection and preservation of Indigenous Knowledges.

Standalone Legislation

NSWALC notes the current lack of a comprehensive legal framework (and accompanying policy framework) tailored and designed to protect Aboriginal people's Traditional Knowledges is a significant challenge when dealing with the misappropriation and misuse of Traditional Knowledges.

Responsibilities spread across various laws and government agencies, across various jurisdictions, combined with ad hoc policy responses are prime examples of an ineffectual legal framework¹. When dealing with Indigenous Knowledges, NSWALC strongly agrees with Ms. Terri Janke and the Arts Law Centre of Australia regarding the need for a coordinated national approach and Sui generis protection².

Embedding the principles of Closing the Gap and the UNDRIP are essential to the success of current and future legislation seeking to support and protect Intellectual Property (**ICIP**). Partnership with Aboriginal and Torres Strait Islander organisations in the development and implementation of legislation must be authentic to ensure the genuine and effective protection of cultural rights.

NSWALC supports efforts to address the sale and use of inauthentic Indigenous products and knowledge, as well as greater penalties for those businesses that promote inauthentic goods or market themselves with a perception that they are an Indigenous business when they are not. Noting this, it is imperative that reforms in this area must not place additional burden on Indigenous businesses and organisations, making those already under resourced unable to access any certification requirements. Additional resourcing for Indigenous businesses and organisations should be considered as part of any changes.

Concerns with draft paper recommendations

In the draft report released July 2022, the Commission's draft recommendations have proposed standalone legislation that provides legal recourse for the protection of Indigenous Cultural and ICIP in Visual Arts and Crafts. While NSWALC supports increased measures for the protection of ICIP, there are concerns that the drafted recommendations lack safeguards and accountability measures to ensure the legislation's effectiveness and propose measures that burden Indigenous groups.

The draft report recommends a mandatory labelling scheme for non-authentic artwork. While this does not require Indigenous artists to verify their own work, it does place the onus on Indigenous peoples to police the selling of non-authentic works. The draft report states:

"The legislation would not prohibit the use of cultural assets without authorisation per se, it would enable traditional owners to take legal action in relation to such behaviour" p 228

The enforceability of this mandatory labelling system for non-authentic works is of concern.

It is important that processes to protect ICIP are easily accessible for Aboriginal people and that any introduced administration or related costs do not preclude Aboriginal people from being able to protect their cultural assets. The capacity for First Nations artists and Indigenous groups to take

¹ Janke, T. (1999) *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report) Michael Frankel and Company

² Janke, T., & Sentina, M. (2018). *Indigenous Knowledge: Issues for Protection and Management*; Arts Law Centre of Australia (2012), *Indigenous Knowledge Consultation*, Available: https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_arts_law_centre_of_australia.pdf

potential breaches of this legislation to court is limited by their resources. This concern was raised in the recent webinar with the Productivity Commission, and the suggested use of pro-bono legal aid was short-sighted and ignorant. Reliance on limited, charitable services does not promote genuine access to this means of recourse.

Additionally, the potential requirement for a claimant to prove their ownership of a cultural asset to bring a claim has the potential to become a lengthy and exclusionary process. The Label of Authenticity administered by National Indigenous Arts Advocacy Association (NIAAA) in the early 2000s was unsuccessful, partly due to requirements for certification as “the test for Aboriginality was complex, with over 75 percent of applicants failing to meet the requirements”³. There have also been issues internationally, with schemes in Canada being criticised “for testing artists’ ancestry, rather than their training and cultural status”⁴. It is essential that the process designed for protecting ICIP is not in effect exclusionary.

The determination of cultural assets and a claimant’s connection to them should be placed in the hands of Indigenous peoples. NSWALC would support the establishment of an independent First Nations body to establish definitions and determined rights to cultural assets.

The creation of a First Nations ‘cultural rights regulator’ to enforce alleged infringements on behalf of First Nations peoples and the establishment of a mechanism to audit the legislation and safeguard against breaches would also contribute to the protection of ICIP.

NSWALC would also support the exploration of a supporting legal fighting fund for the protection and management of Indigenous intellectual and cultural property rights. Such a fund could provide financial, legal and professional assistance to Aboriginal and Torres Strait Islander peoples needing to engage with this legislation. Further, NSWALC encourages the provision of training and legal support to Aboriginal communities as this will facilitate informed decision making.

NSWALC supports a national Government funded redress scheme for Aboriginal artists, individuals and/or communities who have had their IP rights infringed upon. This proposed scheme would have a long-term view to be administered by a National Indigenous Arts and Cultural Authority (NIACA). Such an initiative would serve two primary purposes; firstly, to justly compensate those Aboriginal persons who have been wronged by inadequate legal protections and secondly, to serve as a deterrent to those who would seek to impinge upon the rights and interests of Aboriginal peoples and communities.

If the Productivity Commission has any further questions or comments regarding the content of this submission, please contact NSWALC's Strategy and Policy Unit on (02) 9689 4444 or

³ [caepr_final_report_on_ik.pdf \(ipaaustralia.gov.au\)](#), p21

⁴ [caepr_final_report_on_ik.pdf \(ipaaustralia.gov.au\)](#), p21