

16 December 2021

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

By email: indigenous.arts@pc.gov.au

Dear Administrative Officer

Response to Issues paper - Aboriginal and Torres Strait Islander visual arts and crafts

The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (the **IPC**) is grateful for the opportunity to respond to the Issues Paper published by the Productivity Commission in relation to its study of Aboriginal and Torres Strait Islander visual arts and crafts (the **Issues Paper**).

As an overarching comment, the IPC wishes to acknowledge that the authors of this submission are not First Nations, or Aboriginal or Torres Strait Islander artists or people and the views and opinions expressed in this submission should be considered on that basis. While the IPC can assist the Productivity Commission as practitioners and researchers, any decision-making about reform or maintaining the status quo should only be undertaken taking into account the principles of free, prior and informed consent (**FPIC**) of the relevant First Nations peoples and their communities.

Under the United Nations *Declaration on the Rights of Indigenous Peoples*, Indigenous peoples have the right to:

...maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions....[and] the right to maintain, control protect and develop their intellectual property of such cultural heritage, traditional knowledge, and cultural expressions.

Proper and fair regulation of the market for Aboriginal and Torres Strait Islander visual arts and crafts will assist Australia to meet its obligations under international law to respect and empower our First Nations cultures and communities.

A fundamental part of this principle of self-determination is the notion of **free, prior, and informed consent (FPIC)**. FPIC is an internationally recognized principle that pertains to Indigenous peoples, allowing them to give or withhold consent to any project that may affect them or their culture. Once given, consent may be withdrawn at any stage. Furthermore, the principle of FPIC allows First Nations peoples the right to negotiate conditions under which a project will be designed, implemented, monitored and evaluated. As recently described in the *Final report into the destruction of Indigenous heritage sites*

Telephone

• *Fax*

• *Email*

GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612

Law Council of Australia Limited ABN 85 005 260 622

www.lawcouncil.asn.au

at Juukan Gorge tabled by the Joint Standing Committee on Northern Australia in October 2021, the elements of FPIC include the following:

- **Free:** The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.
- **Prior:** The consent is sought sufficiently in advance of any authorisation or commencement of activities.
- **Informed:** The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process is sufficient to fully inform peoples of the proposed project.
- **Consent:** A collective decision made by the relevant right holders and, where required, reached through a customary decision-making process of the communities.

In the view of the IPC this should be the baseline principle when considering any reform to the market for Aboriginal and Torres Strait Islander visual arts and crafts.

Against that background, the IPC has identified the following questions on which it can assist the Productivity Commission: 1,2,11,12,19,20,21,22,23,24,25,26, and 32.

1. What issues should this study focus on?

- 1.1 The Productivity Commission, with its economic expertise, has an opportunity under this study:
 - (a) to quantify the economic cost (and harm) of inauthentic art and craft in the style of First Nations peoples, and
 - (b) to examine the extent to which the Aboriginal and Torres Strait Islander visual arts and craft market is equitable and fair, is protecting the interests of artists, and reflects best practice FPIC in relation to the use of cultural and community elements.
- 1.2 Laws (and reforms) informed by FPIC require a process where First Nations peoples and/or communities can negotiate the terms where the outcome will directly affect their interests, including by withholding consent. As indicated above, the IPC believes that the Productivity Commission should adopt FPIC as a baseline standard when making recommendations that affect First Nations people and their communities.
- 1.3 As part of the study into the matters recommended by the Report, we submit the following issues fall within the Terms of Reference, and warrant specific consideration by the Productivity Commission:
 - (a) the effectiveness of the Resale Royalty Rights scheme;
 - (b) specific and express regulation of the Australian souvenir market, including both for export and import, and the role of intermediaries;
 - (c) preparing the economic rationale for amendments discussed in submissions made for the Parliamentary Report to the *Trade Marks Act 1995* (Cth);

- (d) evaluation of the prohibitions and remedies in the Australian Consumer Law (**ACL**)—but also the cost and barriers to First Nations artists in enforcing that legislation in the context of arts and crafts in particular;
 - (e) whether greater education and training and/or access to legal assistance for First Nations peoples and communities is required - now, or following any reform; and
 - (f) the extent to which verification of traditional or cultural matters can affect markets.
- 2. 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?**
- 2.1 The Productivity Commission is uniquely placed to gather data, and quantify the economic harm of inauthentic Aboriginal and Torres Strait Islander arts and crafts.
- 2.2 *As the Report on the impact of inauthentic art and craft in the style of First Nations peoples tabled in December 2018 by the House of Representatives Standing Committee on Indigenous Affairs (Parliamentary Report) observed that:*
- ...almost all of the First Nations individuals, organisations and communities that spoke to the Committee during the inquiry are deeply hurt by the sale of inauthentic art and craft. Many regard this as stealing both their culture and potential earnings.¹*
- 2.3 Combining the voice and desires of First Nations peoples with further objective economic justification (and options) for reform could be a powerful impetus to propose reform, guided by FPIC principles. The IPC believes the Productivity Commission is able to make this combination and extend it through analysis of the topics identified at question 1 above. Such enhanced data and focussed analysis will be calculated to produce sound and well-based evaluation of options for reform.

Resale royalty right

- 2.4 The IPC specifically recommends that the Productivity Commission consider the operation of the Resale Royalty Right Scheme (**RRR Scheme**) as part of its study. There are several issues related to the RRR Scheme that the Productivity Commission could usefully consider as part of its review:
- Updating the review of the RRR scheme, last conducted by the Department of Infrastructure, Transport, Regional Development and Communications in 2013, for the first three years of the operation of the scheme. This outdated review makes it difficult to assess the efficacy of the RRR scheme to address current and emerging concerns of visual artists generally, let alone indigenous artists. The Productivity Commission is well-placed to carry out such a review. As part of such a review, the question of whether the \$1,000 threshold for activation of RRR should be lowered or otherwise modified should be addressed by the Productivity Commission, having regard to the potential impact of RRR on the livelihoods of indigenous visual artists.

¹ Parliamentary Report, page 2.

- A further issue to be addressed as part of such a review is s 11 of the *Resale Royalty Right for Visual Artists Act 2009* (Cth). This section restricts the application of the RRR scheme to first transfers of visual artworks after the commencement of the Act in the case of artworks in existence at the time of the Act's commencement. This disentitles a large number of works that would otherwise receive RRR. The IPC submits that this raises a serious question about the efficacy of the scheme for First Nations artists. The economic and broader cultural and social consequences of the continuing application of s 11 warrant considered investigation.²
- It is unclear why the Government has not extended the application of the *Resale Royalty Right for Visual Artists Act 2009* (Cth) to foreign visual artists whose countries recognise a corresponding right (prescribed as a 'reciprocating country' under the Regulations – s 14(1))(c). There was an announcement in June 2021 that such an arrangement was being discussed as part of the current negotiations for a free trade agreement with the United Kingdom. However, there are a number of countries with effective RRR schemes, such as France, Germany and Italy, which could be of significance to Australian visual artists, and there seems to be no good reason why these could not be declared at once to be 'reciprocating countries'. This is a matter that the Productivity Commission could usefully explore further, including seeking the views of the Australian collecting society (Copyright Agency) which is responsible for the administration of the Australian RRR scheme, and the International Confederation of Societies of Authors and Composers (CISAC) and the World Intellectual Property Organisation (WIPO), which are pursuing the promotion of RRR schemes internationally.

11. What constitutes authenticity? When does it matter?

- 11.1 The questions of what constitutes authenticity and when authenticity matters should, again, be guided by FPIC. First Nations peoples and their communities are best placed to articulate these issues. The IPC acknowledges the deep hurt felt by First Nations peoples when they see exploitation of inauthentic art and craft, and of their cultures generally.
- 11.2 The Aboriginal and Torres Strait Islander market is diverse, and there are different considerations for different segments of that market - for example, as between souvenirs and fine art. Guided by FPIC principles, we invite the Productivity Commission to consider the range of contexts in which inauthenticity might arise. For example, in the case of blatant copies or counterfeits, there is likely to be little controversy that such works are inauthentic and the existing law of copyright and the ACL prohibit the creation and sale of such works. However, the Productivity Commission should consider the extent to which procedures for the enforcement of those laws, particularly the burden of legal costs, enable First Nations artists to protect their rights.
- 11.3 Other scenarios also require consideration. These include works embodying First Nations artistic traditions by non-First Nations artists and works embodying First Nations artistic traditions by a First Nations artist who is not a member of the people or nation being the custodian(s) of the relevant traditions.

² There is a further question to be considered here in relation to visual art works that may be entitled to claim protection in Australia in due course and this relates to the general non-retrospectivity provision in article 18 of the *Berne Convention for the Protection of Literary and Artistic Works*.

- 11.4 In this context, the Productivity Commission should consider, in consultation with First Nations artists, the extent to which artistic freedom, and the tradition of artists taking inspiration from other cultures, affects this issue. It may be that full disclosure of an artist's background is necessary. It will be a matter for the relevant First Nations communities as to whether that is sufficient.
- 11.5 Laws and reforms in this area should be informed by FPIC and consultation with our First Nations cultures and communities.

12. What criteria should be used to determine authenticity?

First Nations peoples and their communities are best placed to determine what is “authentic” using the baseline principles of FPIC. The IPC suggests that consideration of this question by First Nations communities will be assisted by consideration of the various scenarios outlined above, among others. Application of FPIC principles will require an informed identification of the relevant First Nations communities and of who is empowered to give or withhold consent on behalf of those communities. It should not be assumed that there is a single First Nations position on these issues.

19. 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?

- 19.1 Intellectual property law is a broad category of laws which are ‘negative in character’.³ These rights are generally limited in time, limited to discrete material expressions, personal, and mostly proprietary. The IPC acknowledges that as such, there are real perceptions of a conceptual “gap” between how Australian law protects intellectual property, and the needs of First Nations people to control and protect their Indigenous Cultural and Intellectual Property (ICIP). As acknowledged by the Parliamentary Report, adopting many submissions made to the committee, “*Australian intellectual property (IP) laws, including copyright, do not have specific provisions to protect Indigenous cultural expressions.*” The relevant gaps between conventional protection of intellectual property law and the desires of First Nations people and communities to protect their arts and craft have been canvassed by many of the submissions made and reported on in the Parliamentary Report.
- 19.2 For example, and most relevantly, the *Copyright Act 1968* (Cth) is understood to protect the form or way an idea or information is expressed, not the idea or information itself. Generally speaking, protection is granted automatically at the time of creation—when the copyright material is fixed in “material form” and lasts 70 years after an artist's death, subject to many exceptions and qualifications. Under the Copyright Act, copyright owners, such as artists, have the exclusive right to reproduce or copy, publish, perform and amend their own work (and authorise others to do so). For other individuals or organisations to do the same, permission must be sought from the owner of the copyright.
- 19.3 As the IPC presently understands, many of these principles do not correspond neatly with the cultural context and obligations that inform Aboriginal and Torres Strait Islander arts and crafts, or culture generally. ICIP rights are collective; cultural expression and knowledge originate from a community and are passed on

³ *JT International SA v Commonwealth of Australia* [2012] HCA 43 at [36]. As Laddie, Prescott and Vitoria describe: Intellectual property is ... a purely negative right ... if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself.

from generation to generation. Culture can be expressed continuously by communities, and in a variety of formats, with an associated diversity of permissions and restrictions. Due to the continuing nature of First Nations culture, ICIP also includes physical items created based on First Nations cultural heritage, existing beyond the limits of copyright duration.

- 19.4 A related area is moral rights. Moral rights protections extend to the guaranteed acknowledgment of individual authors (i.e. artists) but they do not extend to communities. Moral rights protections against false attribution, and against derogatory treatment of works or subject-matter operate on prejudice to the author's honour or reputation but not on prejudice of those and other values of the author's community.⁴ Consents to actions which might otherwise be an infringement of moral rights are granted by individuals, again not to their communities.
- 19.5 The IPC does not have a concluded view on whether amendments to intellectual property laws will specifically remedy the issues identified in the Issues Paper and the Parliamentary Report.
- 19.6 The IPC submits that the submission of the Indigenous Art Code in the Parliamentary Report, which outlined how First Nations artists often have a limited understanding of the intellectual property rights presently available to them, warrants considered review by the Productivity Commission. In the IPC's view, in some instances this would be likely to compound the barriers to individual First Nations artists being able to participate in the arts and craft market freely and equitably. Any consideration of the adequacy of intellectual property rights should include the present economic cost of a lack of understanding and knowledge by the market's participants.
- 19.7 Similar to our submission below in relation to the ACL, reforms to intellectual property remedies are only as useful as the capacity of artists to access them, and the extent to which they are known by market participants.
- 19.8 Reform to intellectual property law and formal recognition of ICIP practices can only be improved by robust economic analysis. Data is required. As noted at 2.1 above, the IPC submits that the Productivity Commission is uniquely placed to examine the economic aspects of ICIP. To that end, we invite the Productivity Commission to collect extensive data, both qualitative and quantitative, to examine the issues raised by stakeholders to date and to evaluate and rationalise proposals for reform.
- 20. 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?**
- 20.1 Existing ACL provisions proscribing unconscionable conduct (section 20), misleading or deceptive conduct (section 18) and certain false or misleading

⁴ In some instances, subjecting copyright material to treatment that is prejudicial to the honour and reputation of the community or culture of an author might also be prejudicial to that individual author, depending on the circumstances, but this is not express and is untested.

Section 195AK of the *Copyright Act 1968* (Cth), for example, provides that "derogatory treatment", in relation to an artistic work, means: (a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or (a) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or (c) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation. As Perram J recently observed in [401] of *Boomerang Investments Pty Ltd v Padgett (Liability)* [2020] FCA 535, "the test for honour is therefore both subjective and objective", finding in that decision that a change of lyrics to a song was prejudicial to the songwriter's honour.

representations about goods or services (section 29) regulate only some aspect of the supply of arts and crafts which First Nations people may regard as inauthentic. Unconscionable conduct, while a broad prohibition, has a high-threshold of egregious conduct required. It can be difficult to investigate, prove, and prosecute. Provisions directed against misleading or deceptive conduct, or false and misleading representations, have been relied on (with some success) concerning counterfeits and some inauthenticity scenarios. Again, while broad and remedial, they require proving discrete implied or express misrepresentations, and can involve technical questions such as the relevant class of consumer.

- 20.2 As the ACL currently stands, the general proposition is that inauthentic arts and crafts can continue to be sold so long as consumers are not misled about 'authenticity' and the manner of supply does not involve unfair contract terms or unconscionability. Further, enforcement of the consumer protection provisions of the ACL relies on private litigation or prosecution by the ACCC, which acts as an impediment to enforcement and deterrence.
- 20.3 If some First Nations-accepted notion of authenticity can be resolved under FPIC principles, amending the ACL to include a blanket prohibition on the sale of inauthentic products may provide clarity about classes of prohibited goods and, as a result, a clear signal to manufacturers, traders and consumers in this market that the supply of these goods must stop. A blanket prohibition may also make it easier for private litigants and the ACCC to prevail against suppliers by doing away with the need to prove various express or implied representations. This may in turn make litigation less expensive and risky.
- 20.4 Practically speaking, however, reforms to the ACL alone may not be effective to restrict the supply of inauthentic arts. Laws must also be enforced, and people must understand them to rely on them, or to comply with them. To this end, we submit that ACL reform would require additional budgetary support to be effective, **as:**
- (a) the ACCC would require greater funding to increase its scrutiny of the Indigenous arts industry, and to also conduct educational programs for consumers;⁵
 - (b) the ACCC itself has indicated that it does not have the capacity or the expertise to undertake the requisite training required to properly enforce this prohibition;
 - (c) there is likely to be a lengthy transition period between enacting the amendments and them being enforced in practice; and
 - (d) there are time and costs associated with bringing an action through the Federal Court of Australia.
- 20.5 There are limited resources and opportunities to mediate or resolve disputes under the existing provisions of the ACL without formal intervention by the Courts.
- 20.6 In addition, the consumer-focused regime of the ACL may not be the most appropriate avenue to achieve a prohibition on inauthentic products. Despite its recognition as an 'economy-wide law',⁶ the predominant focus of the ACL is retail-centric and is largely concerned with protecting consumers, rather than traders –

⁵ The Senate, Standing Committee on Environment, Communications, Information Technology and the Arts, 'Indigenous Art – Securing the Future' (June 2007).

⁶ Senate Report on the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019.

or in this case artists. We consider that one of the key rationales for prohibiting the sale of inauthentic arts and crafts is to similarly protect Indigenous cultural and communal expression, and accordingly the essential protection of cultural heritage may fall well outside the ambit of a law that governs retail transactions. As stated in the Senate Report:

...it would be inappropriate...for deeply cultural matters to be dealt with under consumer legislation. This is not about consumption; this is about people's culture.⁷

21. What have been the barriers to implementing any of these initiatives to date?

21.1 There are practical and equitable barriers to relying on intellectual property law and consumer law alone to remedy perceived issues in the First Nations arts and craft market. Many of the remedies (existing and proposed) rely on formal mechanisms, access to which can be limited by economic, structural and practical barriers. We invite the Productivity Commission to consider those barriers, such as:

- to what extent are First Nations people, communities, and organisations aware of the ACL, or intellectual property law;
- whether First Nations peoples and their communities have satisfactory access to free or affordable legal advice to navigate their rights under the ACL;
- whether First Nations peoples and their communities have equitable and practical barriers such as geography, language, and time to accessing Courts to enforce their rights, if they are unable to negotiate or mediate disputes;
- whether the rules of Courts in relation to costs, particularly the ordering of security for costs, and where “*costs follow the event*”, discourage applicants from enforcing their rights or the ACL;
- the level of public interest litigation funding available to First Nations people and communities to litigate their rights, where required; and
- whether Commonwealth and State/Territory regulators are adequately resourced to enforce the ACL presently, or any recommended revisions to the ACL.

21.2 The communal nature of some ICIP rights embedded within First Nations arts and crafts also presents a practical enforcement barrier. Classical procedural barriers of standing (who can sue) intersect with cultural obligations and permissions (who should sue). Occasionally, the interests of individual artists can theoretically diverge from those of their communities. Regulators themselves can be at risk of engaging in enforcement action without FPIC. Genuine engagement with First Nations people and communities is required in that context, in order to ensure FPIC.

21.3 On this question 21, the IPC again submits that the Productivity Commission is uniquely placed to engage in an economic analysis of these issues. To that end, we invite the Productivity Commission to collect extensive data, both qualitative

⁷ Senate Report on the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019.

and quantitative, to examine the issues raised by stakeholders to date, and to evaluate and rationalise proposals for reform.

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

22.1 The IPC is aware of at least the following useful examples of other countries' efforts, which we invite the Productivity Commission to consider:

- In **South Africa**, the *Intellectual Property Laws Amendment Act 2013*, while awaiting proclamation and unimplemented, amends copyright law to extend protection to "*indigenous cultural expressions or knowledge*"; which is defined broadly as any form in which "*traditional culture and knowledge are embodied [and] passed on between generations*," including (but not limited to) art and craft, music, dance, ceremonies, and so forth (**ICEK**). Copyright in such Indigenous works exists in perpetuity under this amendment (in contrast to the standard term of copyright). "*Indigenous communities*" are recognised as the owners of ICEK. To use protected subject matter one must gain the "*community's prior informed consent*" and negotiate "*benefit-sharing agreements*", which is evocative of European guarantees of fair compensation.
- In the **United States**, the *Federal Indian Arts and Crafts Act 1990* aims to prevent sale of inauthentic products and has the objective of promoting the "*economic well-being of American Indians*." The legislation makes it illegal to sell goods and products "*in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organisation*." Multiple violations can result in penalties such as a fine of US\$1,000,000 or up to 15 years in prison.
- In **Panama**, *Panama Law No 20* is *sui generis* legislation protecting Indigenous intellectual property rights. This 2000 law gives indigenous groups "*exclusive, collective and perpetual rights to their creations, inventions and traditional expressions*." The legislation requires registration and applies to collective rights only; individual artists do not obtain protection. The subject-matter protected is defined widely as "*all Indigenous creations capable of commercial use*" including art, symbols, old carved stones and inventions. Interestingly, enforcement is handled by the Kuna National Congress (a representative of the Indigenous people). The Panamanian Government also has express legal obligations to "*promote and disseminate Indigenous cultures through compulsory public education*."

23. 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?

The diversity in size and context of participants in the Aboriginal and Torres Strait Islander arts and craft market makes it difficult to answer this question in general terms. However, again, the IPC invites the Productivity Commission to consider the principles of FPIC as a baseline rule in determining what might constitute 'fair' and 'ethical' dealings.

24. 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?

- 24.1 To date, IPC understands that there is only limited and often anecdotal information available to measure the prevalence of unfair and unethical dealings between artists and dealers. This Inquiry is an important opportunity for the Productivity Commission to gather that data in its consideration of the issues raised by the Terms of Reference.
- 24.2 Many of the costs in enforcing consumer law are “hidden”, particularly in relation to enforcement. Those artists who are able to identify problematic use of their culture often rely on pro bono legal support, assuming they are able to access it. Those who provide legal support to such artists must do so against the practical and structural barriers of geography, language, and culture. Organisations such as the Arts Law Centre of Australia and their pro bono partners may have data in relation to the level of assistance provided to First Nations artists and art organisations. Subject again to FPIC principles, access to the data may assist to indirectly quantify the scale of harmful practices.

25. What are the merits and costs of amending the Australian Consumer Law to prohibit unfair treatment of artists?

- 25.1 The IPC invites the Productivity Commission to examine international practice, including those examples given in our answer to question 22.
- 25.2 The ACL is a generally well-understood and national law that has a pervasive effect on legal relationships and transactions in Australia. Beyond their legal effect, amendments to the ACL would send a compelling message to consumers, suppliers and markets about the importance of authentic Aboriginal and Torres Strait Islander arts and crafts.
- 25.3 That being said, as submitted at para 21 of this submission, amendments to the ACL alone are unlikely to achieve holistic change to the issues identified in the Parliamentary Report. A general prohibition against conduct would involve significant complexity in relation to its interpretation and application, reducing its efficacy for many First Nations artists, including for the reasons identified in our submissions on questions 19 and 20. Our preliminary view is that prohibitions directed to more specific conduct would have greater normative and legal effect. Alternatively, the development of industry codes can be used in conjunction with the ACL to prohibit practices or conduct which are unfair to First Nations artists and their communities.
- 25.4 Using data gathered throughout this process, we invite the Productivity Commission to consider whether ancillary and supportive reforms are needed to increase education and awareness of ICIP, improve access to justice, and provide First Nations peoples and their communities with fair avenues for redress. We have identified some of the ancillary issues in our submissions to question 21.

26. 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?

Mandatory codes are powerful normative tools in regulating market conduct. The Indigenous Art Code is a best practice example, but only applies in limited circumstances and is voluntary. IPC understand that Indigenous Art Code Limited has finite resources to enforce the application of the Code. Any proposal for a mandatory code, or any expansion of the Indigenous Art Code, should include a recommendation that a regulator assume responsibility for its enforcement, or that the Indigenous Art Code Limited be given substantial resources to enforce the provisions of the Code.

32. How and who should we engage to maximise individual and community input to this study?

- 32.1 The Productivity Commission's study provides an important opportunity for engagement with First Nations peoples and their artists, story tellers and elders. Primarily, the response to the legal issues should be informed by and dependent upon the input from First Nations artists and groups. Engagement with First Nations peoples at each stage of the study will be fundamental to its success.
- 32.2 As mentioned above, FPIC should be the baseline principle when considering any reform to the market for Aboriginal and Torres Strait Islander visual arts and crafts, including consultation with our First Nations cultures and communities. Consideration should be given as to the manner in which consultation occurs, such as methods of communication, accessibility of information and location (e.g. "on country") to ensure the FPIC principle is adopted.
- 32.3 The nature and extent of consultation in these situations is critical (although need not be prescriptive). While substantial consultation can have a positive reconciliatory effect, a lack of engagement can exacerbate harm.
- 32.4 Where the Productivity Commission collects or holds data about or from First Nations people, we invite it to consider whether it can do so in accordance with the principles of Indigenous Data Sovereignty.
- 32.5 We invite the Productivity Commission to consider engaging at least the following groups:
- (a) First Nations artists;
 - (b) First Nations representatives/advocates;
 - (c) Custodians;
 - (d) Members of the Indigenous community;
 - (e) Indigenous Elders;
 - (f) International and domestic consumers;
 - (g) Tourists;
 - (h) Retailers;
 - (i) Distributors;
 - (j) Tourism organisations;
 - (k) Academics;
 - (l) Art exhibitors;
 - (m) Art Centres;
 - (n) Arts industry organisations;
 - (o) Legal experts;

- (p) Advertisers;
- (q) Manufacturers;
- (r) Both Government and non-Government bodies; and
- (s) Prominent authoritative bodies (i.e. IAC, CA, NIAAA etc).

Conclusion and further contact

The IPC would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee Matthew Swinn on _____ or at _____, if you would like to do so.

Yours faithfully

Philip Argy
Chairman
Business Law Section