

Joint submission from
Arts Law Centre of Australia,
Copyright Agency and
The Indigenous Art Code Ltd.

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25 October 2022

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

Dear Productivity Commissioners

The Arts Law Centre of Australia (**Arts Law**), the Copyright Agency and the Indigenous Art Code Limited (**IartC**) are pleased to make the below joint submission to the Productivity Commission study into Aboriginal and Torres Strait Islander Visual Arts and Crafts, which builds on our previous joint submission to this study. In response to the August 2022 Draft Report released by the Productivity Commission (**Draft Report**), the below submission aims to address all issues and questions raised that are relevant to our three organisations' knowledge and experience and should be read alongside our previous submission (accessible on the Productivity Commission's website [here](#)).

We would like to acknowledge the Traditional Owners of the various lands on which our three organisations work and pay our respects to Elders past and present.

Please note that for the purposes of this submission, we respectfully use the terms 'Aboriginal and Torres Strait Islander', 'First Nations' and 'Indigenous' interchangeably to reference the Aboriginal and Torres Strait Islander people belonging to this country. Aboriginal and Torres Strait Islander readers are advised that this document may contain names of deceased persons.

Arts Law is a not-for-profit national community legal centre for the arts that has protected and advocated for the rights of artists since 1983. Arts Law's dedicated service for Aboriginal and Torres Strait Islander artists, art businesses and art organisations, Artists in the Black (**AITB**), was established in 2004. Arts Law | AITB have provided legal advice and education services nationwide, with lawyers making hundreds of trips over the years to Aboriginal and Torres Strait Islander communities to meet face-to-face, to deliver workshops and advice, and to learn firsthand about the cultural, legal and social issues that face artists today.

The Indigenous Art Code (the **Code**) is about a fair go for Aboriginal and Torres Strait Islander Artists. The Code is a voluntary industry code of conduct administered by the Indigenous Art Code Ltd. The IartC has three membership categories: Artist Members, Dealer Members and Supporter Members. See IartC [Membership Policy](#). Businesses dealing in Aboriginal and Torres Strait Islander art are encouraged to become IartC Dealer Members and signatories to the Code. Once signatories, Dealer Members are required to adhere to the Code and ensure they are using fair, ethical and transparent practices when engaging with Aboriginal and Torres Strait Islander Artists.

The Code provides clear standards for dealings between dealers and Aboriginal and Torres Strait Islander Artists to deliver:

- a) fair and ethical trade in Artwork;
- b) transparency in the process of promotion and sale of authentic Artwork; and
- c) efficiency and fairness in how disputes are dealt with.

IartC is the organisation that administers the Code, through:

- a) administering voluntary membership of the Code and overseeing compliance;

- b) coordinating, liaising, and seeking the support of governments, regulatory and legal bodies, and associations and groups with a role in the promotion and sale of Artworks;
- c) furthering the Objects of the Company with the principal object being the promotion of Indigenous visual arts.

IartC is a limited liability public company, led by a [Board of Directors](#), drawn from the Aboriginal and Torres Strait Islander Arts sector and the wider community. The Board is independent of government and administered under the Australian Corporations Act 2001.

The Copyright Agency Ltd is a not-for-profit company limited by guarantee that collects fees and distributes royalties to its creator members for the reuse of text and images. Among its members are many visual artists across the country who use a variety of services, including the Resale Royalty scheme, which the Copyright Agency was appointed by the Australian Government to manage from its commencement on 9 June 2010. On 30 November 2017, after a successful five-year partnership, the Copyright Agency merged with Viscopy, further expanding the Copyright Agency's representation of the interests of visual artists across all media in Australia and New Zealand. Copyright Agency also provides philanthropic support to Australia's cultural community through their grants program, the Cultural Fund.

In the below submission, we respond to key findings and draft recommendations of the Draft Report and offer insights, commentary and/or experience. We would like to acknowledge the assistance of Allens Linklaters and thank partners Ted Hill and Andrew Wiseman and their teams for their contributions. Arts Law, the Copyright Agency and IartC welcome further questions about our submission and are available to discuss any of the issues raised with the Commission.

Contributors

Our contributors have been informed and shaped by the hundreds of artists who engage with our organisations every year. We could not write this submission without them and our effort in participating in this study is done with the hope that the findings have impact for those artists.

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Introduction

Our initial joint submission (available on the Productivity Commission's website for the inquiry [here](#)) focused on three key reform areas which we believe would improve the security, stability, productivity, and integrity of the Aboriginal and Torres Strait Islander visual arts market. These areas are:

- a) Amendments to the Australian Consumer Law (**ACL**) to be implemented to combat the fake art market.
- b) A stronger regulatory framework to govern the market; and
- c) A *sui generis* system to provide legal protection of Indigenous Cultural and Intellectual Property (**ICIP**).

These three reform areas are modest in their scope, especially in consideration of the immediate benefit they would provide to Aboriginal and Torres Strait Islander visual artists if implemented.

1 Aboriginal and Torres Strait Islander arts and crafts generate broad cultural and economic benefits: Draft Finding 2.1

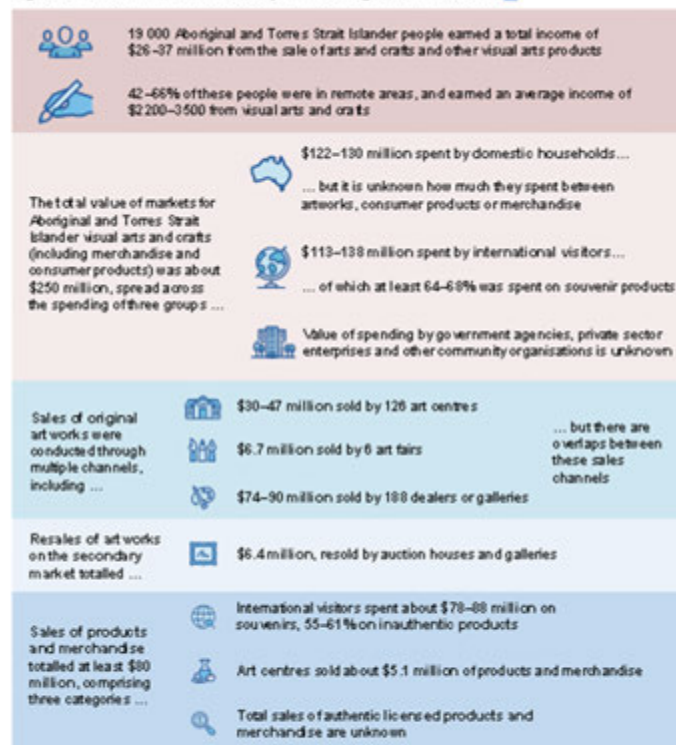
Visual arts and crafts have been central to the practice and preservation of Aboriginal and Torres Strait Islander cultures for tens of thousands of years. Arts and crafts — as expressions of Aboriginal and Torres Strait Islander people's connection to culture, Country and kin — are fundamental to the wellbeing of Aboriginal and Torres Strait Islander people, and bring wider benefits for all Australians. Aboriginal and Torres Strait Islander visual arts and crafts are foundational to Australia's national identity.

The visual arts and crafts sector generates income for artists and economic opportunities for communities, and is a major source of direct employment and income in many remote areas. It also supports complementary industries such as tourism.

We are pleased to see that the Commission has made this draft finding, which acknowledges the cultural and social significance as well as the financial benefits of Aboriginal and Torres Strait Islander visual arts and crafts. However, we are cautious not to overstate the economic benefits that flow to Indigenous communities engaging in the visual arts and crafts sector and to acknowledge that the realisation of such benefits is impeded by the existence and sale of inauthentic goods. Power asymmetry in the market also results in non-Indigenous people and businesses deriving greater financial benefit than Aboriginal and Torres Strait Islander artists, as is evidenced in the Draft Report.

While we agree with the statement of the Draft Report that '[t]he production of arts and crafts has become an important source of employment for many Aboriginal and Torres Strait Islander people, particularly for individuals in regions where economic opportunities may otherwise be limited' (p 67 of the Draft Report), it is important to acknowledge that only a very small portion of the money generated from Indigenous engagement in the arts and crafts sector ends up in the pockets of Aboriginal and Torres Strait Islander peoples. The Draft Report acknowledges this discrepancy: estimating the total annual spending on Aboriginal and Torres Strait Islander visual arts and crafts to be about \$250 million (Draft Finding 3.1), while also acknowledging that '[t]he vast majority of Aboriginal and Torres Strait Islander artists do not make a living' or even earn an income from their practice (pp 68 and 89-90 of the Draft Report) and that 'across the entire market (which includes inauthentic products), Aboriginal and Torres Strait Islander artists receive about 10-15% of the total value of sales in a given year' (p 262 of the Draft Report). The existence and sale of inauthentic Indigenous-style craft and art products inhibits the ability of Indigenous artists and communities to generate an income from the visual arts and crafts sector.

Figure 2 – Sales and income of key market segments in 2019-20^{a,b}



a. For most segments, such as income from arts and crafts, secondary market, spending by international visitors and domestic households, the estimates are for the 2019 calendar year, and have been adjusted for inflation to 2021 dollars. For art centres, art fairs and commercial galleries, the estimates refer to the 2019-20 financial year, and have been adjusted for inflation to 2020-21 dollars. b. Due to gaps in data, the estimates for individual market segments are not intended to fully align with the Commission's estimates for the total value of arts and crafts markets. In addition, there are unknown overlaps between sales channels for original artworks; for example, it is unclear how many artworks sold by commercial galleries were sourced from art centres.

We acknowledge the limitations in accessing comprehensive data to provide accurate sales and income figures, however, we wish to pose the following questions/observations regarding the information presented above in 'Figure 2 - Sales and income of key market segments in 2019-20' (p 6 of the Draft Report):

- Aboriginal and Torres Strait Islander-owned and governed art centres provide invaluable data about the value of the market for Aboriginal and Torres Strait Islander people.
- Regarding sales by dealers or galleries, we note that the Commission has acknowledged the limitations of these figures/this data, stating:

[d]ue to gaps in data, the estimates for individual market segments are not intended to fully align with the Commission's estimates for the total value of arts and crafts markets. In addition, there are unknown overlaps between sales channels for original artworks; for example, it is unclear how many artworks sold by commercial galleries were sourced from art centres.

Via the SAM database, art centres have records of sales and consignments to galleries and other dealers and while that data has not been broken down in the figures presented, it could be further refined given data does exist and is accessible from the majority of art centres using SAM. There should be a continued investment into SAM and associated digital labelling projects to ensure this data and more can be utilised for reports such as this in the future.

- How are artists who work outside of art centres captured in the future?
- Is it likely commercial galleries and dealers will ever share this information?
- How is the information in Figure 2 presented to artists so that they can identify which figures relate to their sales? It is important that information about the sale and income of key market segments is available to all artists.
- How is the \$74-90 million sold by 188 dealers calculated?
- Which supply chains are these dealers acquiring artwork through?

- Is the way the artwork is acquired (ie on consignment or dealer paying upfront) influencing whether a dealer or gallery will share artwork sales and income information?
- While the figures presented go some way in presenting information about sales and income of key market segments, ultimately, it highlights that there are gaps and obstacles in accessing data. What are the reasons dealers and galleries put forward for not sharing this information?
- Is there a different approach that can be taken to get businesses to share the information?
- The figures presented demonstrate that Aboriginal and Torres Strait Islander-owned art centres collectively provide the most transparent data, which is a reflection of the conduct of art centres.
- The figures presented do not define which % of the \$74-90 million in sales are from artists working outside of art centres. If dealers working with these artists are not forthright in sharing information, how can artists be consulted directly to access this information?
- Could there be a shared format for collating baseline data for artists working independently of the art centre model so that, in the future, their sales and income can be better identified?

2 Definition of Authenticity: Draft Finding 4.1

Visual arts and crafts are considered authentic Aboriginal and Torres Strait Islander arts and crafts if they are authored by an Aboriginal and Torres Strait Islander person, or produced under a licensing agreement: For the purpose of this study, a product or artwork is considered authentic Aboriginal and Torres Strait Islander visual art or craft if it is:

- *an original piece authored (or co-authored) by an Aboriginal and Torres Strait Islander person, or*
- *produced under a licensing agreement with the Aboriginal and Torres Strait Islander artist(s).*

Aboriginal and Torres Strait Islander visual arts and crafts that do not meet these criteria, including those that infringe the copyright of an Aboriginal and Torres Strait Islander artist's work, or are Indigenous-style arts and crafts made by non-Indigenous people without licensing agreements, are considered inauthentic.

As noted in our previous submission, defining 'authenticity' can raise complex cultural and social issues and we do not claim any cultural authority on such matters. We refer to pages 23 to 24 of our previous submission for a discussion on the complexities of proposing any legal definition of authenticity in any broader context.

We consider the Commission's proposed definition of authenticity to be satisfactory for the limited and specific purposes of this study. The Commission's proposed definition in Draft Finding 4.1 is largely consistent with the draft bill proposed in Schedule 1 of our previous submission, which contains a provision to the effect that to be considered 'authentic', products should either be made by, or under licence from, an Aboriginal or Torres Strait Islander artist (see also discussion at [6.59] of previous submission).

We agree that authenticity in this context should be inclusive of works created by one or more Aboriginal and Torres Strait Islander artists and should not be limited to works created solely by an individual Aboriginal and Torres Strait Islander artist. This accounts for collaborative works created by Indigenous and non-Indigenous persons, as well as communal works created by one or more Indigenous persons.

3 Detrimental effects of inauthentic visual arts and crafts: Draft Finding 4.3

The negative effects of inauthentic visual arts and crafts outweigh any benefits: *The existence and prevalence of inauthentic arts and crafts in the market has wide-ranging and predominantly detrimental effects on both Aboriginal and Torres Strait Islander people and the broader Australian community. These include personal and cultural harms (such as emotional distress, loss of identity and self) and economic harms (such as a loss of income for Aboriginal and Torres Strait Islander artists, and consumer hesitancy in purchasing Aboriginal and Torres Strait Islander arts and crafts). Inauthentic products disrespect and misrepresent Aboriginal and Torres Strait Islander cultures, and have the potential to mislead consumers.*

We refer to pages 26 to 29 of our previous submission, which echoes many of the harms recognised by the Commission in the Draft Report as flowing from the prevalence of inauthentic arts and crafts. Our previous submission acknowledged the potential disadvantage that Australian businesses who take an ethical and cultural empathetic approach to their work may face. Addressing the current market forces at play for retailers, the Draft Report states under the heading ‘Inauthentic products do provide some benefits’ (at p 154):

[S]ome retailers (who would otherwise prefer to sell only authentic products) are able to remain profitable by stocking (cheaper) inauthentic products alongside authentic products. The complementary sale of inauthentic products not only means that more businesses selling authentic products remain viable (benefitting the broader economy), but also ensures that consumers continue to be able to access and purchase authentic products without having to travel long distances. Some consumers may decide to purchase authentic products when they would otherwise choose an inauthentic product (or would not make a purchase at all) as a result of being able to directly compare inauthentic and authentic products side by side. Increased visibility and sales of authentic Aboriginal and Torres Strait Islander arts and crafts generates benefits to Aboriginal and Torres Strait Islander artists, communities and cultures, as well as the broader economy.

We agree that current market forces may mean that some market participants who only stock authentic products could be at a disadvantage relative to those businesses importing and selling cheap, inauthentic goods. However, we do not think that the ability of retailers to eradicate this disadvantage and/or bolster the sales of authentic goods through the complementary sale of inauthentic products should be phrased as a ‘benefit’. Rather, it allows retailers to avoid a potential detriment that is caused by the existence of inauthentic products in the market. A prohibition on the sale of inauthentic goods would prevent this detriment from occurring in the first place.

We respectfully disagree with the Commission’s statement that (at p 154):

Aboriginal and Torres Strait Islander communities may benefit indirectly from the sale of inauthentic products, as consumers may be encouraged to explore Aboriginal and Torres Strait Islander cultures and arts in further depth, thus opening up demand for future cultural experiences and purchases of authentic arts and crafts

Our view is that consumers’ appreciation of and demand for Indigenous cultural experiences and authentic arts and crafts is negatively affected by the misrepresentation of Indigenous culture. If a consumer’s interest in Aboriginal and Torres Strait Islander culture is sparked from the purchase of an inauthentic product, that consumer is commencing their enquiry from a misinformed position, which is detrimental to both the individual consumer and Aboriginal and Torres Strait Islander communities. Regardless of whether authentic art is subsequently purchased by the consumer, there is no guarantee that the false or culturally inappropriate belief, story or impression created by the inauthentic product will later be identified and corrected. The sale of inauthentic products only moves consumers further away from an accurate understanding and appreciation of Indigenous culture and cannot be said to indirectly benefit Aboriginal and Torres Strait Islander communities. A prohibition on inauthentic goods, on the other hand, would prevent such harm from occurring and therefore directly benefit Aboriginal and Torres Strait Islander communities.

“What these businesses are doing is stealing, it is stealing our culture. If we steal we will get punished under Australian law but if they steal our culture we can’t punish them with our customary law”

- Anon, published in Indigenous Art Code Submission 138 The growing presence of inauthentic Aboriginal and Torres Strait Islander style art and craft products and merchandise for sale across Australia, 2018

4 Factors that enable the proliferation of inauthentic arts and crafts: Draft Finding 4.4

Consumers’ lack of awareness and difficulties in identifying authentic products, as well as the legal landscape are the main enablers of inauthentic arts and crafts: Inauthentic Indigenous-style visual arts and crafts continue to be prevalent in the market due to:

- *limited legal barriers to the creation or sale of inauthentic arts and crafts under Australian law (in particular, the Copyright Act and the Australian Consumer Law)*
- *a lack of awareness and understanding of inauthenticity and its harms by producers and purchasers of inauthentic arts and crafts*
- *difficulties identifying and distinguishing inauthentic products from authentic ones.*

Our view is that the current legal deficiencies of Australian intellectual property laws and consumer law, which fail to prohibit the creation or sale of inauthentic Indigenous-style visual arts and crafts products, are the main enablers of the proliferation of such goods. A lack of awareness and understanding of the harms caused by inauthentic products and an inability to distinguish authentic goods amongst consumers and retailers exacerbates the problem. While education and awareness-raising measures are useful in promoting understanding of the problem and advocating for legal reform,¹ these measures alone are not enough to address the problem of inauthentic arts and crafts.

As detailed in our previous submission, there are three key reform areas which we believe would improve the security, stability, productivity, and integrity of the Aboriginal and Torres Strait Islander visual arts market. These areas are:

- Amendments to the ACL to be implemented to combat the fake art market (see our response to the Commission's Draft Finding 5.4 below);
- A stronger regulatory framework to govern the market (see our responses to the Commission's Draft Findings 6.1, 6.2 and 6.3 below); and
- A sui generis system to provide legal protection of ICIP (see responses to the Commission's Draft Recommendations 7.1 and 7.2 and Draft Findings 7.1 and 7.2 below).

“Responsibility should not fall on consumers to differentiate between what is fake and what is not. The audience for souvenirs is often international travellers; Do we want to promote that we have a problem with businesses selling fake Aboriginal art? It is a big ask of visitors to Australia to expect them to discern between what is authentic and what isn’t. Wouldn’t it be better not to have it on the shelves? We should be supporting and promoting artwork,

¹ As detailed in our previous submission, the Fake Art Harms Culture campaign was created in response to existing and ongoing concerns from Aboriginal and Torres Strait Islander people about the growing presence of inauthentic ‘Aboriginal style’ products and merchandise being sold across Australia. With the ongoing engagement of many Aboriginal and Torres Strait Islander people and communities across the country, the campaign has been successful in promoting awareness of this problem and has received widespread support in advocating for meaningful legal reform in this area.

products and licensed merchandise created by Aboriginal and Torres Strait Islander people, promoting the vibrant Aboriginal and Torres Strait Islander culture we rely on to promote Australia. It makes sense that Aboriginal and Torres Strait Islander people benefit from the tourist dollar. There should also be greater support for Indigenous-led organisations/individuals to develop, market and promote products and merchandise targeting the tourist market. See [AACHWA Product Development Project](#) and Desert Digital Labelling Project.”

- Gabrielle Sullivan CEO, IartC

5 Voluntary labelling schemes: Draft Finding 5.2

Voluntary industry-wide labelling schemes for authentic products are unlikely to be effective in materially reducing inauthentic arts and crafts: Notwithstanding the possible marketing benefits to participants themselves, industry-wide voluntary labelling schemes (such as certification trade marks) are unlikely to reduce the prevalence and harms of inauthentic products substantially.

To address information gaps in the market and allow consumers to distinguish between authentic and inauthentic products, voluntary labelling schemes require high levels of participation. Yet the risk of limited uptake by Aboriginal and Torres Strait Islander artists, coupled with the costs of establishing and administering an industry-wide voluntary labelling scheme, make the net benefits uncertain

We agree with the Commission that an industry-wide labelling scheme for authentic products is unlikely to be an effective or appropriate solution to counter the proliferation of inauthentic goods. Further, there remains serious questions as to whether a labelling scheme is appropriate due to the undue burden placed on Aboriginal and Torres Strait Islander artists to prove that their art or craft product is authentic.

6 Education and awareness-raising measures: Draft Finding 5.3

Education and awareness-raising measures should complement other initiatives: Education and awareness-raising measures can inform consumers and businesses about the existence and harms of inauthentic products. However, on their own their effectiveness in countering inauthentic products is limited, especially where the information used to promote and label products is confusing or inaccurate. Education measures are more effective where they accompany measures that help consumers distinguish between authentic and inauthentic products.

As detailed in our previous submission, the Fake Art Harms Culture campaign was created in response to existing and ongoing concerns from Aboriginal and Torres Strait Islander people about the growing presence of inauthentic ‘Aboriginal style’ products and merchandise being sold across Australia. The success of Fake Art Harms Culture campaign has demonstrated that the issue of inauthentic Aboriginal and Torres Strait Islander art is widespread and pervasive, impacting the copyright, cultural rights and livelihoods of thousands of Indigenous people and their communities. Campaigns like Fake Art Harms Culture have been successful in promoting awareness of this problem and have instigated inquiries such as this and the House of Representatives Parliamentary Inquiry. In addition to the Fake Art Harms Culture campaign, other education tools exist to strengthen capacity to identify unethical conduct in the industry. For example, through the process of becoming a Dealer Member of the IartC, businesses and individuals are provided with information about what fair dealing looks like. Applicants are directed to resources and other organisations, including Arts Law, Copyright Agency, the Australia Council Protocols for using First Nations Cultural and Intellectual Property in the Arts, NAVA Code of Practice and Indigenous Visual arts peak bodies to broaden their knowledge of the sector.

While we are supportive of additional measures being implemented to raise awareness of the existence and harms of inauthentic products (such as those aimed at international tourists discussed on page 169 of the Draft Report), increased consumer education is not a long-term solution as it accepts the continued existence of inauthentic art in the market. In other words, informing buyers of the existence of stolen goods in a market does not alleviate the harm of theft. In order to address the harms of inauthentic products, the long-term focus should not be on raising consumer awareness of these products, but on preventing retailers and producers from bringing these products into the market in the first place.

7 Prohibition on inauthentic products: Draft Finding 5.4

Banning inauthentic products is unlikely to be the most cost-effective response: A ban on the sale of inauthentic products could be an effective way to mitigate the economic and cultural harms they cause and prevent consumers from unwittingly purchasing inauthentic products. However, there are substantial risks in imposing a ban. A broad ban would increase the risk of costly errors (for example, authentic products incorrectly excluded from sale). A narrow ban would not resolve the harms caused by many inauthentic products. A ban would also limit choice in the market, and consumers would arguably be better served by being able to make more fully-informed choices. Therefore, the Commission considers that a ban is unlikely to be the most appropriate response.

Reducing this issue to one of cost-effectiveness is unacceptable and we ask, ***cost-effective for who?*** It is not cost effective for Aboriginal and Torres Strait Islander artists, peoples, families and communities to have two-thirds to three-quarters of Aboriginal and Torres Strait Islander souvenir-style products with a sales value of \$41–54 million in 2019/20, that is inauthentic (Draft Report, p 9). This is a culture based economic opportunity of around \$40 million a year being denied to Aboriginal and Torres Strait Islander people.

“There are eighty plus Aboriginal and Torres Strait Islander owned and governed art centres across Australia. There are also thousands of independent Aboriginal and Torres Strait Islander artists working across Australia. These artists are creating works of art which share their culture and provide economic opportunities to those artists, their businesses and their communities. Australia as a nation relies on Indigenous art and culture to promote and position itself internationally, being central to brand “Australia”. Is the promotion and sale of ‘fake’ product how Australia wants to promote its relationship with its Aboriginal and Torres Strait Islander peoples?”

- Glenn Iseger-Pilkington, Yamatji-Nyoongar curator and writer, published in *Indigenous Art Code Submission 138 The growing presence of inauthentic Aboriginal and Torres Strait Islander style art and craft products and merchandise for sale across Australia, 2018*

8 Mandatory labelling scheme proposal: Draft Finding 5.5; Draft Recommendation 5.1; Information Request 5.1

Labelling inauthentic products is a targeted and cost-effective way of informing consumers and improving the functioning of the market for Aboriginal and Torres Strait Islander visual arts and crafts: A mandatory labelling scheme for inauthentic products could be a targeted and cost-effective option for addressing the issue of inauthentic Indigenous-style products. While it would not eliminate inauthentic products, it would improve the operation of the market, by helping consumers to distinguish between authentic and inauthentic products. A well-designed labelling

scheme focused on inauthentic products would only impose minimal compliance burdens on Aboriginal and Torres Strait Islander artists.

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.*

Information Request:

- *How might a mandatory labelling scheme for inauthentic products operate in practice and what should be considered further in its design?*
- *Is the suggested approach to product coverage workable? Are there ways to provide greater certainty about coverage without unduly narrowing its scope?*
- *Are the authenticity criteria for the scheme appropriate? Do they pose any unintended consequences? If so, how could these be addressed?*
- *Are there any other considerations about the design and implementation of the standard?*

Summary of position

Mandatory labelling is not an adequate response to the harms caused by fake art. As discussed above, a ban on the sale of fake art is essential.

Mandatory labelling does not address the harms caused by fake art

The Commission is to be commended for the careful explanation that it provides of the harms caused by fake art. It is helpful to recap the harms identified by the Commission and to consider the extent to which they would be addressed by the proposed mandatory labelling scheme.

1. Personal hurt and challenging of Aboriginal and Torres Strait Islander identity

The Commission states that:

Aboriginal and Torres Strait Islander people have powerful connections to their ancestors, Countries, communities and cultures, including through visual arts and crafts (chapter 2). As such, when their cultures and cultural expressions are misappropriated — including through the creation and sale of inauthentic arts and crafts — the effects can be deeply personal, and experienced collectively.

The Commission then quotes a number of individuals about the harms they have personally encountered as a result of inauthentic arts and crafts. For example:

It hurts us when people make fake Aboriginal art because that breaks our Law, our rights to our ampere [land] and our atweye [family]. When Aboriginal Law and our Ancestors are disrespected we feel terrible pain and fear for ourselves and our family. We don't know how to make it right, to heal the pain and protect the Law again, unless we get support from the wider community in solving this problem. (Jane Young from Tangentyere Artists quoted in Desart, sub. 4, p. 10)

This harm is not adequately addressed by the mandatory labelling proposal. Fake art will continue to be sold, enabling the personal hurt identified by the Commission to continue.

2. The broader effect on Aboriginal and Torres Strait Islander cultures as a whole, including the theft of culture and the masking of the diversity and dynamism of Aboriginal and Torres Strait Islander cultures

The Commission states that:

Inauthentic products made and sold that embody Aboriginal and Torres Strait Islander cultural expressions cause substantial cultural harm ... participants in this study as well as the HoRSCIA Inquiry (2018) have raised the significant theft and loss of culture that results from inauthentic arts and crafts ...

Again, the Commission quotes from a number of individuals about harms caused to culture as a whole:

Martumili stores our life or stories that have been handed down through generations that we have ownership of. It's also a gift that's been given to us and we're here as we live our lives daily. We are maintaining these stories that we put on [canvas] to maintain our history. No other people can make these designs that they have no understanding of. Those who fake these designs, it doesn't mean anything to them. To them, it's all about greed, fast money. It's also about ripping our way of life and our stories that belong to this place --- Australia. (Taylor, Martumili Artists, HoRSCIA 2018, public hearing 10 April 2018, p. 3)

Also emphasised was the loss of ownership, responsibility and control of Aboriginal and Torres Strait Islander peoples' cultures:

The fake product misappropriates or exploits Aboriginal and Torres Strait Islander culture, violating the stories, the imagery, the knowledge and heritage which are embodied in authentic works. Ownership, responsibility and control by Aboriginal and Torres Strait Islander peoples of their cultural heritage is crucial. (Bana Yirriji Art Centre, sub. 25, p. 2)

Again, this harm is not adequately addressed by the mandatory labelling proposal. The sale of fake art would continue, continuing to cause harm to Aboriginal and Torres Strait Islander cultures.

3. The economic effects of inauthentic arts and crafts products are multifaceted and overall negative

The Commission notes that:

As a result of the prevalence and pervasiveness of inauthentic arts and crafts products in the market, Aboriginal and Torres Strait Islander artists and communities are likely to experience economic harm.

This is because the economic benefits from the use of Aboriginal and Torres Strait Islander cultures in inauthentic arts and crafts do not flow on to Aboriginal and Torres Strait Islander communities. Inauthentic products provide benefits to their producers, sellers and consumers, but these are likely small and a sizeable share accrues overseas.

Again, this harm is not adequately addressed by the mandatory labelling proposal. At best, the proposal may lead to a reduction in the volume of fake art sold. How significant that reduction would be is, however, unknown. Each item of fake art sold benefits non-Indigenous, often offshore, producers at the expense of Aboriginal and Torres Strait Islander artists.

4. Inauthentic products mislead consumers and undermine market confidence

The Commission notes that:

The existence of inauthentic arts and craft products not only misleads consumers about what they are purchasing, but can also negatively effect on broader market confidence.

The mandatory labelling proposal could address this harm. Provided there is compliance, mandatory labelling would ensure consumers are not misled into thinking they are purchasing genuine arts and crafts when they are in fact buying fakes. However, as discussed below, there are serious doubts surrounding the level of compliance with the mandatory labelling proposal.

In summary, the Commission's mandatory labelling proposal could address concerns about inauthentic products misleading consumers. It would do nothing, however, to address the most significant harms identified by the Commission, namely the cultural harm experienced by both individuals and communities more broadly, and the misappropriation and economic detriment experienced by Aboriginal and Torres Strait Islander artists and communities.

Mandatory labelling may exacerbate the harms caused by fake art

Not only will a mandatory labelling scheme fail to address the harms caused by fake art, but it may in fact exacerbate these harms for Aboriginal and Torres Strait Islander peoples and cultures. A mandatory labelling scheme risks legitimising fake art, sending a clear, harmful message to First Nations people.

Under a government mandated scheme, the sale of fake art would be permitted, provided that a government approved label is fixed to the art being sold. This communicates to First Peoples' communities that the sale of fake art is legitimate and approved by Government, provided there are labels to ensure consumers are not misled. It says that, while consumers' interests need to be protected, Aboriginal and Torres Strait Islander cultures do not.

Mandatory labelling does not present any advantages compared to a ban

A mandatory labelling scheme has no advantages over an outright ban. If a product can be identified as fake with sufficient certainty so as to be labelled as such, then it can be banned.

The Commission gives two principal reasons for preferring mandatory labelling to a ban, which we summarise, and respond to, below.

1. Promoting transparency without impeding consumer choice

The Commission comments that whilst mandatory labelling:

may not be as effective in reducing trade in inauthentic products (and the associated cultural harms) ... it would help ensure that consumers are informed about the inauthenticity at the point of sale, while not restricting consumer choice.

There are two clear issues with this line of thinking. First, this seems to suggest that consumer choice (ie, the choice to purchase fake art) should be prioritised over the acknowledged cultural harms. This prioritisation is, in our submission, fundamentally misplaced given the seriousness of the cultural harms caused by fake art, as so clearly identified by the Commission. The harm caused to culture greatly outweighs any possible benefit consumers might derive from being able to buy fake art, strongly suggesting a ban is appropriate.

Second, this reasoning assumes that transparent labelling will mitigate some of the harms caused by the sale of inauthentic Indigenous art. It suggests that some consumers, upon reading the relevant label, will make ethical purchasing decisions, opting not to purchase fake art. This, however, overlooks the fact that many consumers, as the Commission itself acknowledges, will be indifferent towards, or unaware of, the associated cultural harms. It is unrealistic to expect that education alone can overcome this issue.

2. Minimal costs associated with mandatory labelling

The Commission also states that mandatory labelling:

carries a lower risk of errors and unintended costs and consequence, including for Aboriginal and Torres Strait Islanders.

The basis of this statement appears to be an assumption that, under either scheme, errors will be made that result in authentic Indigenous art either being banned or labelled as inauthentic. In our view, the harm caused by such errors is equally serious under both a mandatory labelling scheme and a product ban, but can be avoided through appropriate regulatory discretion and enforcement priorities. As the Commission itself notes in its discussion of the mandatory labelling scheme:

Regulator discretion and focus should mean that enforcement would be focussed on sales of mass produced Aboriginal and Torres Strait Islander souvenirs and other consumer products, where the prevalence of inauthentic products is high and the direct involvement of Aboriginal and Torres Strait Islander artists is relatively low. (page 178).

There is no reason why such discretion and focus could not equally apply to an outright ban.

Comparing a product ban with the mandatory labelling proposal

In Table 5.2 of the Draft Report, the Commission sets out a comparison, weighing up the two proposals – mandatory labelling and an outright product ban.

That table, together with our comments on each point raised by the Commission, is set out below.

Table 5.2 – Labelling or banning inauthentic products – weighing up the options

	A product ban	Labelling inauthentic product	Comments
What is it?	Specified products not created by Aboriginal and Torres Strait Islander artists (or produced under licence) banned from sale.	Specified products not created by Aboriginal and Torres Strait Islander artists (or produced under licence) labelled as such.	The position is identical under both proposals. If inauthentic products can be labelled as inauthentic, they can just as easily be banned.
Product coverage	Specified products containing Indigenous Cultural Expressions.	As per ban, but potentially broader to include more products that contain designs or styles of Aboriginal and Torres Strait Islander origin. c	There is no reason why product coverage should be broader under a mandatory labelling scheme. We also note that the Law Council's suggestion that the reasonable person test, which will be used under either proposal to determine whether a product contains Indigenous Cultural Expressions, gives rise to ambiguities. In most cases, it will be obvious that a product contains Indigenous Cultural Expressions. A visit to a souvenir shop will demonstrate this. Items are being sold and purchased because of their use of Indigenous designs when, in fact, they have no connection to an Aboriginal or Torres Strait Islander artist. As the Commission notes, it is likely that enforcement action will focus on fake art that clearly uses Indigenous Cultural Expressions, such as mass produced items in the souvenir market. In essence, the risk of errors should not be overstated and could be addressed through appropriate regulator discretion. The position is identical under both proposals.
Authenticity criteria	Authorship (creation) by an Aboriginal and Torres Strait Islander person.	As per ban.	The position is identical under both proposals.
Impacts on consumers	Specified inauthentic products removed from marketplace limiting consumer choice.	Easier for consumers to distinguish between authentic and inauthentic products at point of purchase.	As discussed above, this seems to be prioritising consumer choice over cultural harm, which is fundamentally misplaced.

			As the Commission notes, some consumers may be indifferent to, or unaware of, the cultural harms caused by fake art. Given the significance of the international tourist market, it is unrealistic to expect that education alone is going to overcome this issue.
Impacts on Aboriginal and Torres Strait Islander artists	Increase in demand for authentic products. People that cannot or choose not to prove Indigeneity may be prevented from selling their work. May reduce commercial opportunities for some Aboriginal and Torres Strait Islander artists if ban is extended to restrict use of certain symbols or practices, such as licensing of offshore manufacturing.	Some increase in demand for authentic products. Potential instances where proving Indigeneity may be difficult.	We agree that a ban would increase demand for authentic products and provide economic benefits to First Nations people. Our proposal would not prevent licencing of offshore manufacturing. A ban would not necessitate Aboriginal and Torres Strait Islander artists proving their Indigeneity and, like the Commission, we expect regulator focus would be on clearly fake art, particularly in the imported mass produced segment.
Impacts on non-Indigenous producers	Reduced commercial opportunities, including potentially for some products not intended to replicate authentic Aboriginal and Torres Strait Islander art.	Cost of labelling products. Uncertainty about whether a label is required for some products. Some reduction in demand for labelled products.	There would be an impact on non-Indigenous producers of fake art. In our view, any costs to such producers is clearly outweighed by the cultural harms encountered by Indigenous persons through the sale of fake art. There is no reason to expect that there would be materially reduced commercial opportunities for producers of products that do not falsely replicate authentic Aboriginal and Torres Strait Islander art.
Limits on effectiveness	Some inauthentic products outside scope of ban may still be sold. There is a risk producers may superficially engage Aboriginal and Torres Strait Islander artists to circumvent ban.	Inauthentic products can still be sold. Some consumers will remain indifferent or unaware of problems caused by inauthentic products. May still be incentive to superficially engage Aboriginal and Torres Strait Islander artists to avoid labelling, but likely less pronounced than the ban.	As the Commission notes, a ban would be most effective in ensuring fake art is not sold. The risk that producers may superficially engage Aboriginal and Torres Strait Islanders to circumvent a ban is equally a risk with mandatory labelling. As identified by the ACCC and the Law Council, there is a significant risk of non-compliance with a mandatory labelling scheme given that labelling will be a cost and will reduce product sales, creating a strong incentive not to comply.
Enforcement and compliance issues	Difficulties will arise at the margins, either where it is not clear if	As per product ban. However, inadvertent non-compliance can	As the Commission notes, difficulties in relation to enforcement are likely to arise at

	<p>a product is covered or not, or where the Indigeneity of the creator is difficult to verify.</p> <p>May not neatly fit into ACL and require separate legislation.</p>	<p>potentially be addressed less onerously by retrospective labelling (rather than be withdrawn from sale under a ban).</p> <p>Utilise existing provisions of the ACL.</p>	<p>the margins in relation to either a ban or a labelling scheme. We expect enforcement focus, however, would not be at the margins, but rather on clearly fake art.</p> <p>There is no reason why a ban on fake art could not be included in the ACL. As discussed in our previous submission, the <i>Competition and Consumer Act 2010 (Cth)</i> (CCA) already contains a number of sections dealing with specific industries that are enforced by the ACCC (eg telecommunications, electricity, shipping and franchising).</p> <p>The introduction of legislation banning the sale of fake art would send a strong signal to Aboriginal and Torres Strait Islander peoples and the Australian community more broadly about respect for Aboriginal and Torres Strait Islander cultures.</p>
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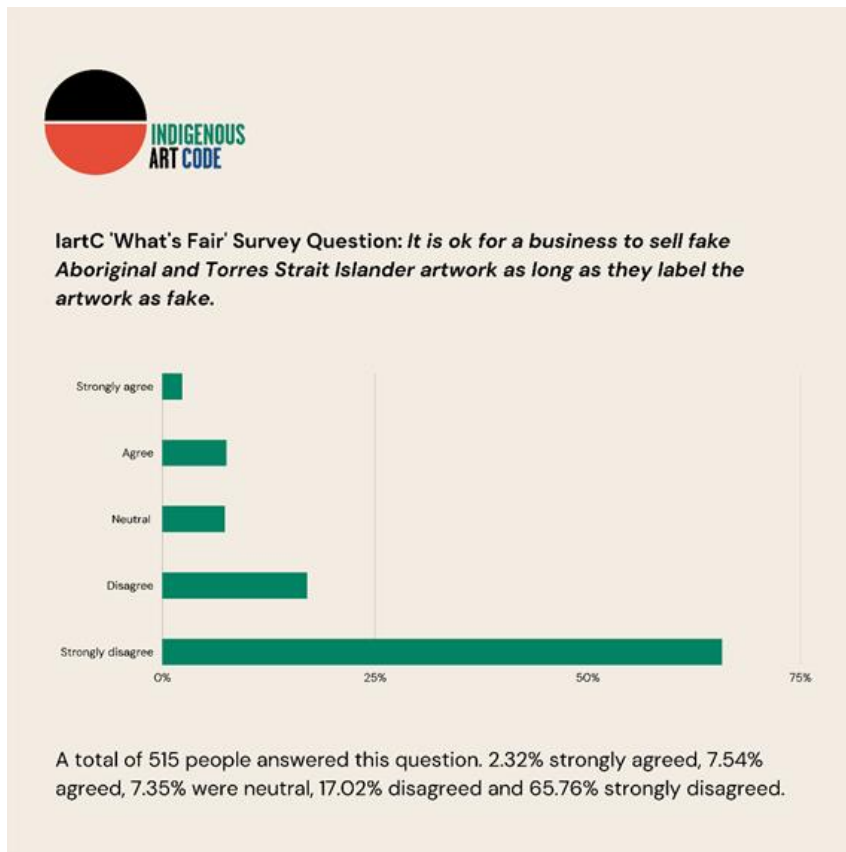
Other suggested alternatives are not appropriate

We note that the ACCC's submission has raised three alternatives – mandatory labelling under an ACL information standard, a mandatory certification scheme under the ACL, and a deeming provision in the ACL to work in conjunction with existing prohibitions against false or misleading representations. In each of these alternatives, however, fake art can still be sold provided there is clear labelling. Even in the deeming provision alternative, the ACCC indicates that the deeming only creates a presumption that can be rebutted:

Whilst suppliers would be able to avoid the application of the deeming provision, they could only do this by making clear and unambiguous disclosure to the contrary.

Ultimately these alternatives allow the continued sale of fake art, failing to address the fundamental concern about harm to culture. A deeming provision that could not be rebutted would be akin to a ban on the sale of fake art, but would be a very indirect way of achieving that outcome.

Indigenous Art Code recently conducted a survey titled '[What's Fair?](#)'. The survey was promoted at Darwin Aboriginal Art Fair, Desert Mob and through our social media channels. Survey respondents were asked if they agreed or disagree with the statement: It is ok for a business to sell fake Aboriginal and Torres Strait Islander artwork as long as they label the artwork as fake. Of the 515 responses, 65.76% of people strongly disagreed with this statement and a further 17.02% disagreed suggesting that 82.78% of respondents are against labelling as a strategy to combat inauthentic Aboriginal and Torres Strait islander art and products.



9 Proposal for a stronger regulatory framework to protect ICIP: Draft Findings 6.1, 6.2 and 6.3

Indigenous Cultural and Intellectual Property has intrinsic value: Indigenous Cultural and Intellectual Property (ICIP) refers to all dimensions of Aboriginal and Torres Strait Islander heritage and cultures, from languages and performances to traditional scientific and ecological knowledge. It has intrinsic value to Aboriginal and Torres Strait Islander people and is a unique national asset that forms an important part of Australia's identity.

Expressions of ICIP in the form of visual arts and crafts are often more than creative outputs. They can play a role in transmitting and thereby preserving laws, history, culture and customs of Aboriginal and Torres Strait Islander people.

Existing laws do not directly protect Indigenous Cultural and Intellectual Property in Aboriginal and Torres Strait Islander visual arts and crafts: Current laws provide some protection of Indigenous Cultural and Intellectual Property (ICIP) in visual arts and crafts. But these protections are piecemeal and do not enable Aboriginal and Torres Strait Islander people and communities to directly control whether and how their ICIP is used in visual arts and crafts. This means that Aboriginal and Torres Strait Islander ICIP is often used in inappropriate contexts without the consent of the relevant Aboriginal and Torres Strait Islander people and communities. There is a strong case for examining how legal protections for ICIP in visual arts and crafts could be strengthened to reduce misappropriation and help to protect and preserve ICIP in visual arts and crafts.

Dedicated legal protections may assist in addressing misappropriation of Indigenous Cultural and Intellectual Property in visual arts and crafts: Minor amendments to existing laws could improve protection of Indigenous Cultural and Intellectual Property (ICIP) in visual arts and crafts, but gaps would remain. Larger-scale amendments are likely to be incompatible with the frameworks or

objectives of existing legislation. Dedicated legislation has the potential to provide stronger recognition and more fit-for-purpose protection for ICIP used in visual arts and crafts. Legislation directly focused on ICIP in visual arts and crafts would provide a framework for negotiation and presents an opportunity to do so in a way that promotes a fair allocation of benefits.

Our organisations welcome the Productivity Commission's recognition that ICIP is intrinsically valuable to Aboriginal and Torres Strait Islander people and the broader Australian community. ICIP is integral to Aboriginal and Torres Strait Islander knowledge sharing and cultural practices, and can provide economic benefit for Aboriginal and Torres Strait Islander people through the sale of visual art and craft.

There is, however, a need for a stronger regulatory framework to protect ICIP. Our organisations have consistently advocated for a ban on the sale of inauthentic art, to be included in the ACL as the first step in the legislative response. Our organisations also support subsequent introduction of standalone ICIP legislation, which requires further community consultation. Whether as part of the ACL or standalone ICIP legislation, we consider that a ban, enforceable by an independent regulator, should be a permanent feature of legislation.

Current legislation does not offer adequate protection

As acknowledged in the Draft Report, current laws do not provide sufficient protection to prevent ICIP from being misappropriated or used without the consent of relevant Aboriginal and Torres Strait Islander people and communities. Misuse of ICIP can degrade Aboriginal and Torres Strait Islander heritage and culture; causing spiritual, relational, cultural and economic damage for Aboriginal and Torres Strait Islander people and communities. Our detailed views on the deficiencies of the current legal protection in Australia can be found in Submission 31 – Joint submission from Arts Law Centre of Australia, Copyright Agency, and The Indigenous Art Code (our **Previous Submission**), in particular sections 6.16 to 6.31.

Considering the proposed legislative responses

(a) Amending existing intellectual property laws

We reiterate our view that amending existing intellectual property laws is not the most appropriate solution to address the issue of inauthentic art. The production, distribution and sale of inauthentic Aboriginal and Torres Strait Islander art is not limited to one area of intellectual property law; therefore, amendments would be piecemeal and inefficient.

(b) Amending the ACL to include a product ban

As previously stated, amending the ACL to prohibit the sale of inauthentic art would do more to prevent the proliferation of inauthentic art and reduce the burden other proposed legislative changes place upon Aboriginal and Torres Strait Islander artists (see 6.36-6.48 of our Previous Submission for details).

Amending the ACL is the quickest and simplest way to offer protection for ICIP and does not preclude sui generis ICIP legislation that could provide a more comprehensive system of protection. We support amending the ACL as the first step. Taking action to prevent the sale of inauthentic art in an expeditious manner is imperative. With each sale of an inauthentic art product, economic benefit is syphoned away from Aboriginal and Torres Strait Islander artists, and a significant risk of cultural and social harm is created. Standalone legislation will take time to develop and require significant community consultation. While we strongly support sui generis ICIP legislation (as discussed below and in section 10), amending the already operational ACL could reduce the current and continuing harms caused to Aboriginal and Torres Strait Islander people and communities in the most efficient manner.

A criticism of amending the ACL concerns the fact that the ACL focuses on protecting the interests of consumers, rather than the cultural rights of Aboriginal and Torres Strait Islander artists who own the particular ICIP (Draft Report, page 215). As the *Birubi* case and other enforcement activity by the ACCC illustrates, there is indeed considerable consumer harm associated with inauthentic art. Furthermore, the ACL, and the CCA more broadly, already contain provisions designed to protect small businesses and provisions that focus on specific sectors of the economy. A provision that protects both consumers and First Nations artists would not be out of place. Therefore, despite this concern, we consider that amending the ACL remains appropriate.

(a) Sui generis ICIP legislation

We also strongly support the introduction of standalone ICIP legislation. Our support for sui generis ICIP legislation is discussed in greater detail in section 10 below.

“The ecosystem, the environment we live in is full of natural resources. Our art is our resource, it belongs to us we use it in a ceremonial context; it is a resource for our survival. If control of that resource is taken away from us, we cannot meet our cultural obligations; we cannot use it for our families benefit. Exploiting our resource needs to be negotiated on our terms; we need to be in control of how that’s done”.

- Dr B Marika, Yolngu Artist, published in *Indigenous Art Code Submission 138 The growing presence of inauthentic Aboriginal and Torres Strait Islander style art and craft products and merchandise for sale across Australia*, 2018

10 Proposal of a sui generis system to provide legal protection of ICIP: Draft Findings 7.1 and 7.2; Draft Recommendations 7.1 and 7.2; Information Requests 7.1-7.4

There are advantages to taking a multi-pronged approach to protecting Indigenous Cultural and Intellectual Property: Given its multi-faceted nature, it is not clear that stronger legal protection for all aspects of Indigenous Cultural and Intellectual Property (ICIP) could be pursued through a single regulatory measure. A multi-pronged approach to protecting ICIP would enable regulatory responses to be tailored to specific types of ICIP, resulting in more nuanced and fit-for-purpose protections. It would also take the pressure off any single measure to solve all issues relating to ICIP and give implementation bodies the licence to focus on specific policy issues

A cultural rights regime must balance the interests of traditional owners and those seeking access to cultural assets: The recognition of cultural rights needs to strike the right balance between the interests of traditional owners and the interests of those seeking to access and use cultural assets. This will help ensure that the preservation and maintenance of culture does not come at the cost of preventing traditions and culture from evolving or adapting over time. To achieve this, checks and balances should be built into the legislative regime — including by specifying criteria for: what is protected under the legislation; who can take action to assert cultural rights; and what uses of cultural assets require authorisation.

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.

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.

Information Requests:

- *What should be protected by the new cultural rights legislation?*
 - *What is the best way to define what should be in scope for protection?*
 - *Should there be limits on protection, such as conditions on when protections apply or threshold criteria for what is protected? If so, what should they be?*
- *How should the legislation deal with the issue of standing to bring a cultural rights action?*
 - *What criteria should determine whether a claimant has standing?*
 - *What is the best way to recognise communities or groups as having standing?*
 - *What are the merits, drawbacks and challenges of giving a government regulator the power to bring cases in relation to cultural misappropriation?*
- *What types of conduct should be considered an infringement of a traditional owner's cultural rights?*
 - *What types of uses of cultural assets should be recognised as having the potential to be infringing? For example, should there be a requirement for the use to be in material form or a substantial use?*
 - *How should a court determine whether a user has been granted authorisation to use a cultural asset in a certain way?*
 - *Should there be exceptions when cultural assets are used for certain purposes? If so, what should those exceptions be?*
- *What should the legislation say about remedies for infringements of cultural rights?*
 - *What suite of remedies are needed to achieve fair and just outcomes?*
 - *What should the new cultural rights legislation say about how remedies are awarded?*
- *What institutional arrangements are needed to support a new cultural rights regime?*
 - *What types of dispute resolution options should be available? What is needed to ensure that dispute resolution processes are responsive to the needs of Aboriginal and Torres Strait Islander people and communities?*
 - *Is there a case for a statutory Cultural Authority? What would its remit, functions and powers be?*

Our organisations strongly support the introduction of sui generis ICIP legislation protecting ICIP rights in the form of cultural expressions and traditional knowledge more broadly. We agree with the Commission that the introduction of dedicated cultural rights legislation to protect tangible expressions of ICIP in visual arts and crafts could provide stronger, more fit-for-purpose ICIP and provide greater clarity around cultural rights. However, our view is that this framework should not be limited to ICIP in visual arts and crafts as this would miss a key opportunity to protect other forms of traditional knowledges (eg language, medicine etc). Additionally, any proposed legislation should be cautious not to limit protection to 'traditional' or historic cultural expressions. Living Aboriginal and Torres Strait Islander cultures are not fixed but continuously evolving, with new expressions of those cultures being developed over time.

We are cautious of supporting the introduction of 'copyright-style exceptions', which were not designed to protect ICIP rights. For example, the education system in Australia has a track record for utilising ICIP without appropriate consents and if we remove the need to request permission for use for the purposes of study or education, this will damage the integrity of the protections.

While we otherwise broadly agree with the Draft Report's statements on implementing standalone legislation and with the questions posed in the Draft Report, community consultation will be necessary to ensure that the interests of Aboriginal and Torres Strait people and communities will be met by any proposed legislation. For example, whether the different forms of ICIP are protected under one or multiple legislative instruments is a matter to be decided by community consultation. If a 'multi-pronged approach' is to be preferred (see pp 222-223 of Draft Report), we encourage such laws to be developed in tandem to achieve consistency and to avoid the prioritisation of one form of traditional knowledge over the other. The adoption at a federal level of a national ICIP strategy led by the Minister for Indigenous Australians could be one means of achieving such coordination within a multipronged cultural rights regime (pp 225-226 Draft Report).

As a first step, and as explained in more detail in section 9 above, we consider that amending the ACL is appropriate. In parallel, we support undertaking the appropriate consultation and other steps involved with developing sui generis ICIP legislation. Our organisations are committed to this process long term and to providing ongoing input, guided by our experiences and those of our stakeholders. One of the questions that will need to be considered long term is whether a product ban remains in the ACL, or is instead covered by sui generis ICIP legislation. Either way, our organisations support a ban on the sale of inauthentic art, enforceable by an independent regulator, as a permanent feature of legislation.

To illustrate the importance of maintaining a product ban as a permanent feature of legislation (whether in the ACL or sui generis ICIP legislation), consider the following. The Commission proposes that '[t]he [standalone ICIP] legislation should create a new cause of action for traditional owners to assert their rights in relation to their cultural assets. In particular, it should specify that a traditional owner's rights are infringed if a person uses a cultural asset to create a cultural expression without the authorisation of the traditional owner, unless an exception applies' (p 230 Draft Report). Under this model, a particular claimant will need to demonstrate a connection to the cultural asset in question. This is unlikely to be possible where generic Indigenous styles or designs are exploited, which is a common occurrence, particularly in the international tourist market. Fake art not tied to a specific group may not be protected. In its consideration of how the legislation would apply in practice, the Commission itself acknowledges this as an inevitable result:

Scenario: An artist uses an Indigenous-style motif in her artwork, but the motif is generic and cannot be traced back to any particular traditional owners. The artist has not sought any permissions to use the motif.

Outcome: There are no identifiable traditional owners and therefore the artist has not infringed any cultural rights (under the legislation).

While a traditional owner may not be able to demonstrate a sufficiently strong connection to the asset in question, the harms resulting from the sale of that piece remains, including, cultural harm; economic loss for Aboriginal and Torres Strait Islander communities arising from diverted revenue; consumer harm in being misled into purchasing inauthentic products; and consumer mistrust in the Indigenous art market.

We therefore urge the Commission to consider, upon consultation with the community, how this concern could be addressed. An overarching product ban, whether as part of the ACL or otherwise, is likely to capture these instances that are not currently covered by the Draft Report's proposed ICIP legislation.

Alongside the development of sui generis ICIP legislation, consideration should be had for how individuals and communities access remedies under such laws. The Draft Report at 7.2 states that the proposed legislation would not prohibit the unauthorised use of cultural assets but would enable traditional owners to take legal action against such behaviour. Commencing legal proceedings is a costly exercise. This expense is likely to dissuade many individuals and communities from seeking to enforce their rights. Arts Law is the only community legal centre specialising in legal services for artists, including Aboriginal and Torres Strait Islander artists. Demand for Arts Law's services will significantly increase as artists and others seek to enforce their ICIP rights unless another cost appropriate service is established. Providing an avenue for a government regulator to have standing and making the claims

process sufficiently comprehensive to allow for beneficiaries to be self-represented may also reduce the burden placed on traditional owners and community organisations.

In addition, multilingual education and resources should be made available so that Aboriginal and Torres Strait Islander people and communities understand how any new law would operate and how it can be used by them to seek justice.

11 Some artists encounter unfair and unethical conduct and face difficult accessing justice: Draft Findings 8.1 and 8.3

Unethical conduct towards Aboriginal and Torres Strait Islander artists still occurs:

Longstanding and serious allegations continue to be made of exploitation of Aboriginal and Torres Strait Islander artists in some remote areas of Australia. There are also examples across the country of unfair contract terms, copyright infringement and plagiarism, which affect the rights, wellbeing and economic returns to Aboriginal and Torres Strait Islander artists and their communities.

Artists face difficulties accessing justice and other support services: *Key legal protections, including copyright and the prohibition on unconscionable conduct, can be difficult for artists to access. There are also gaps in support services for independent artists, including those working outside of areas served by art centres and regional peak organisations.*

The allegations and examples of unethical conduct received and collated by the Commission (in chapter 8 of the Draft Report) are generally consistent with reports received by Arts Law, IartC and Copyright Agency. As stated in our previous submission (see section 7), our combined experiences are of a market in which many if not most dealers behave fairly and ethically most of the time, but where there are nonetheless a great many instances each year of artists being subject to problematic behaviour such as:

- Artists being underpaid and misled as to the value of their art;
- Dealers paying artists upfront a small amount of money then selling the artwork for significantly higher prices;
- A lack of transparency around how artists are remunerated for their work;
- Unfair licensing arrangements;
- Dealers failing to return outstanding consignments;
- Dealers not paying for artworks they have sold;
- Dealers failing to notify art centres of artwork sales;
- Dealers failing to pay invoices on time;
- Unauthorised use of images on social media platforms;
- Dealers forcing artists to remain in the studio for long periods of time, in order to be remunerated; and
- Dealers exploiting family relationships.

In addition, unethical conduct can occur between businesses, such as instances where bad actors issue unjustified complaints against competitors.

We note that instances of carpetbagging are not limited to private art dealers (as p 258 of the Draft Report suggests) but to anyone who seeks to obtain art well below a reasonable market price with the intention of selling it on at a substantial profit and can occur anywhere in Australia. As addressed in our previous submission (see discussion at [7.15]-[7.17]), generally ‘carpetbagging’ is understood to mean an outsider who seeks power or success presumptuously. In the inquiry into Australia’s Indigenous visual arts and craft sector in June, 2007 chapter 8.15 included the following reference to carpetbagging:

The term carpetbagger can be applied to particular individuals, backyard dealers, commercial gallery owners, private agents, or persons operating other legitimate businesses such as car yards or motels. Such a person is usually not Indigenous and seeks to obtain art from an artist at a price well below what that person knows or ought to know is a reasonable market price, with the intention of selling it on at a substantial profit.²

We agree with the Commission that it is difficult to accurately estimate the prevalence of such conduct and that, in general, unethical conduct in the sector is ongoing and likely to be under-reported (pp 263-264 of Draft Report). In the most serious cases of allegations of misconduct, including artists that find themselves in coercive or even abusive interactions with dealers, the repercussions they may face if they do seek justice can be the biggest barrier. They may not have anonymity, the process with authorities may not see them being treated respectfully, or it could bring attention to a precarious legal situation involving either themselves or a family member.

We support the Commission in framing fair and ethical engagement with Aboriginal and Torres Strait Islander artists in terms of the following key aspects: respectful and safe treatment; free, prior and informed consent; and fair remuneration (p 257 of Draft Report).

We agree with the Commission's draft finding that key legal protections can be difficult for artists to access and that gaps exist in support services for independent artists. We agree with the Commission that access to justice has a material influence on the ongoing prevalence of unethical conduct (p 280 of Draft Report) and that the legislative avenues of protection from such conduct are not always accessible to Indigenous artists, particularly those in remote areas or who are operating without the support of an art centre. It could be argued that if artists working independently of art centres had access to even some of the support and advocacy that art centres provide their member artists, the market would be fairer, as independent artists are more susceptible to unfair and unethical conduct (as stated at p 267 of Draft Report). Based on the requests made by independent artists for advice and support, some of which fall outside the remit of the IartC, Arts Law, and the Copyright Agency, we recommend that support services similar to those facilitated by art centres be accessible to independent artists. To ensure the success of any service targeting independent artists, the artists themselves, peak bodies, and organisations working with independent artists must be consulted and codesign the service.

12 Adoption of an ACCC-enforced mandatory or voluntary code to prohibit unfair treatment of artists: Draft Finding 10.1

Although there is some indication of ongoing unethical conduct in some remote areas of Australia, there is inadequate evidence that this conduct is sufficiently widespread to justify an ACCC-enforced voluntary or mandatory code of conduct for the Aboriginal and Torres Strait Islander arts and crafts industry. An industry-wide code risks being a blunt and costly tool that would not necessarily address existing shortcomings.

Overview

As in our original submission, we do not wish to advocate for or against a mandatory code at this time.

We do, however, wish to comment on some of the reasons given by the Productivity Commission in recommending against the introduction of an industry-wide, ACCC-enforced voluntary or mandatory code. In particular, despite acknowledging the ongoing unethical conduct in the Aboriginal and Torres Strait Islander arts and crafts industry, the Commission found this conduct not to be sufficiently widespread to justify the introduction of an ACCC-enforced code. In our view this conduct is, unfortunately, very widespread.

² 'Indigenous Art – Securing the Future,' 2007, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenousarts/report/index>.

Widespread unethical conduct in the Indigenous art sector

We wish to firstly commend the Commission's acknowledgement of the varied types of unethical conduct experienced by artists.

The Commission acknowledges that:

Unethical conduct includes a range of unfair and/or unconscionable conduct. It includes circumstances where one party violates another's rights (including their copyright), engages in threatening or deceitful conduct, or otherwise takes advantage of another party — particularly one in a disadvantaged position.

While we support these acknowledgements, we disagree with the Commission's assessment that:

Although there is some indication of ongoing unethical conduct in some remote areas of Australia, there is inadequate evidence that this conduct is sufficiently widespread.

In our view, the 'large body of anecdotal evidence that Aboriginal and Torres Strait Islander artists face unfair or unethical conduct' acknowledged by the Commission is consistent with the reports received by Arts Law, IartC and the Copyright Agency and justifies the assertion that unethical conduct is widespread. As noted in our original submission:

Arts Law, IartC and the Copyright Agency all receive regular contact from artists, artists' families, and art centre managers reporting unfair and unethical dealings across the country, across all art forms, and across the market for works of all values. Our combined experiences are of a market in which many if not most dealers behave fairly and ethically most of the time, but where there is nonetheless a great many instances each year of artists who have been exploited, unpaid, or underpaid for their work, or otherwise mistreated or disrespected by dealers, clients, commissioners or employers.

The Commission's own analysis that only a very small proportion of income actually flows back to Indigenous artists across the whole sector provides further inference of widespread unfair conduct occurring. The Commission states that:

... across the entire market (which includes inauthentic products), Aboriginal and Torres Strait Islander artists receive about 10-15% of the total value of sales in a given year ...

This is partly due to unethical conduct as well as a lack of access to information flowing back to artists in order for them to make informed choices about the arrangements they choose to enter.

Unethical conduct in the sector is also likely to be more widespread than might be apparent due to the fact that instances of unfair treatment are undoubtedly underreported. According to the Commission:

In general, unethical conduct is likely to be under-reported: artists may not report unethical behaviour if they are concerned about losing future business opportunities, are ashamed of being exploited, or lack an accessible pathway to draw attention to unethical conduct. They may fear retribution from dealers, or being implicated in the behaviour (Arts Law, Copyright Agency, IartC, sub. 31, p. 49). The ACCC agreed that the majority of alleged conduct that might violate the Australian Consumer Law (ACL) is not reported to the ACCC or other ACL regulators (sub. 13, p. 3)

13 Resourcing of Indigenous Art Code (IAC): Draft Finding 8.2; Information Request 8.1, Draft Recommendation 10.1

Enforcement of the IAC is constrained by resourcing: *The IAC is one of the key mechanisms used to mediate interactions between artists and the market. However, the company enforcing the code is under-resourced and overstretched.*

The IAC can be strengthened through a joint commitment of governance 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 2007 Senate inquiry highlighted the worst of the conduct in the sector, and bad conduct persists, but we believe the majority of businesses are committed to doing business fairly.

Much of the bad conduct in selling Indigenous art is immoral (depending on how an individual's moral compass is calibrated) but not illegal. Frustrations with the efficacy of the Code are frequently in response to the IartC's lack of powers (regulatory) to stop some of this conduct and publicly scrutinise some dealers' practices.

While increased resourcing would further the work of the IartC, including assisting artists with disputes with art dealers (commercial galleries, private art dealers, art centres and businesses who license artists' work), it would not result in the IartC having regulatory powers. For more information about voluntary and mandatory codes, see paragraphs [\[7.75\] to \[7.110\]](#) of our previous submission.

IartC has a [complaints-handling process](#) in response to disputes between artists (whether members or non-members) and Dealer Members of the IartC. This is an effective dispute resolution mechanism when artists raise matters with the IartC about dealers who are signatories to the Code. IartC complaints handling extends to artists to address unfair dealing by businesses that are not signatories to the Code. While getting non-member dealers to be responsive is challenging, the IartC persists and also makes referrals for artists to seek support from other relevant organisations and services, namely Arts Law, for legal advice. The existence of the IartC means that business is aware that there is an organisation observing conduct in the sector and advocating for artists. Awareness of the IartC is evidenced in the contact we receive from businesses who are not usually engaged in working with artists but in the instances when they do, they seek guidance from the IartC, particularly about licensing an artist's work.

Increased resourcing of the IartC would allow the IartC to promote and support more artists through complaints handling; however, the IartC's objective is to see few, if any, complaints against dealers who are signatories to the Code. A strengths-based approach would see the IartC have an increased capacity to work with dealers to support fair and transparent dealing to avoid artists needing to complain about dealers who are Code signatories.

The size and nature of businesses that are Dealer Members of the IartC vary, with individual small traders and large and small Aboriginal and Torres Strait Islander owned businesses, all with different resourcing and capacity. The IartC's membership fees are pitched to be accessible to our varied members and are mindful of the expense many members incur through the application process, including seeking legal and other professional advice. While it is likely that membership fees will increase incrementally with consideration of CPI and inflation, the IartC will always be mindful of a fee schedule that is affordable and accessible. With increased capacity, the IartC will consider non-government fundraising activities.

Increased capacity would also see IartC continue its work with artists, ensuring artists are supported to gain access to the information they need to make informed choices about the commercial negotiations and agreements they enter with dealers regardless of whether they are signatories to the Code. The IartC will contact any dealer at the request of an artist to access information about their commercial arrangements; some dealers who are not IartC members are responsive and provide the information as requested by the artist. Others do not and are outraged at the audacity of the code to request such information. Most issues raised by artists are about the conduct of dealers who are not signatories to the Code.

Not all approaches from artists to the IartC are complaints about art dealers. Requests for assistance are usually about access to information. Dealers might not have ripped off an artist or behaved

unconscionably, but it is not uncommon for dealers to not share information with artists. For artists to make informed choices about the arrangements they enter, they need access to information and feel empowered to negotiate. Often an artist will want to continue working with a business under fairer and more transparent circumstances. It doesn't mean an artist seeks to dissolve a relationship with a dealer they have been or intend to work with.

A transaction where the dealer knows the artist will say yes, regardless of the terms, is unfair.

Too many artists find themselves in unfair arrangements with dealers because they refuse to negotiate, telling the artist to take what has been offered or risk missing out.

This conduct is not remedied through any complaints handling or dispute resolution process because the artist does not raise the issue, or if they do, they often ask that the IartC not pursue the matter. Sometimes contact with the IartC is about discussing what has occurred, seeking advice, understanding how it could be done differently and avoiding similar situations in the future.

While the IartC cannot pursue a dispute brought to us by a third party when an artist has expressly asked us not to, there are other compliance actions the IartC will take when the matter involves a Dealer Member, including reviewing the information provided to the IartC at the time of applying for membership, through the annual membership renewal process and by seeking additional information from Dealer Members to ensure their conduct adheres to the Code.

Increased resourcing will drive compliance activities by the IartC, initially through a dedicated staff position focussed on this area. Compliance activities need to be undertaken with a solution focussed approach. They are educating members about what is required to comply with the Code. The strength of IartC membership is members' commitment to fair and ethical dealing with artists and a more equitable market for the exhibition, promotion and sale of Aboriginal and Torres Strait Islander art. IartC's work must encourage members to do more and strive for best practices.

The IartC (in consultation with Members) will explore ways to strengthen the Code, with consideration being given to the requirement for best practice written agreements, further examination of supply chains and clauses that are artwork licensing specific.

While IartC is in support of increased resources to enhance the work of the IartC, we do have some reservations around expectations of a disputes handling mechanism with an independent review process in addition to the work already undertaken by the IartC and the existing independent referral pathways available to artists for advice, namely those accessible free of charge via the Arts Law Centre of Australia.

There are continually new organisations created to fill gaps in the sector rather than adequate funding to stabilise and expand the capacity of the organisations that already exist.

The IartC frequently refers artists to the Arts Law Centre of Australia for legal advice. While a majority of matters about IartC Dealer Members raised with the IartC can be addressed without legal advice for the artist, some cannot. Legal referral processes are confidential.

While not stated explicitly in the Draft Report, it is our interpretation that a deny list is being suggested. IartC has concerns that any public register of disputes, even if de-identified, would be identifiable by the parties involved based on the circumstances of the information released. IartC believes such a register would be counterproductive to increasing artist empowerment and building consumer confidence. If there were a serious breach of the Code by an IartC member, that business would no longer be a member. Most complaints received by the IartC are about dealers who are not signatories to the Code. The IartC cannot create a publicly available list of businesses it is alleged are not treating artists fairly.

The graphic representations in Appendix I show the Indigenous Art Code's current membership as of 30 September 2022. IartC has a majority Artist Membership base. Of our total membership, which includes Artists, Dealers and Supporters, Aboriginal and Torres Strait Islander members make up 84%. Additionally, 51% of our Dealer Members are Aboriginal and Torres Strait Islander-owned businesses.

We agree that increased resourcing will enable IartC to better collect and report metrics on the work of IartC, such as which demographics of the sector are contacting us and how we are supporting them. We understand the Productivity Commission has struggled to access key metrics on some groups, particularly when it comes to artists working outside of art centres. Given our membership base (see Appendix I), IartC could play an important role in collating and sharing more data sets, but current under-resourcing means that systems to collect baseline data and ongoing metrics cannot be prioritised. Increased resourcing would allow IartC to provide data and reports for the benefit of the sector, rather than the deficit approach of complaint outcome reporting.

Currently, much time is spent speaking with artists who contact IartC for advice and support, often resulting in introductions and referrals to other organisations along with the support IartC can provide directly. Some requests for support remain firmly within the IartC remit, while others do not. When a request falls outside of the IartC remit, IartC refers artists to other organisations and services that can support them. The problem is that many artists who need support (particularly early-mid career artists working outside the art centre model) are not there. While creating a pseudo-art centre model for artists who work outside art centres is not the solution, there do need to be ways to extend some of the services and support offered through the art centre model to artists working independently.

This requires a multi-pronged approach, and it is unlikely that any single organisation could provide it in its entirety. Instead, we think that increased support for organisations like the IartC, Arts Law, and Peak Bodies, as well as community-led organisations like Aboriginal Culture, Heritage and Arts Association Inc and Regional Arts Alliances with the remit to support artists who work independently to extend the work they do to more artists. A greater understanding of the roles and capacity of organisations operating in this space would also be helpful. The competitive nature of arts organisations relying on government funding can contribute to a scarcity mindset, limiting collaboration. This does not deliver the best outcomes for artists.

14 Artists' awareness and access to legal support services: Draft Recommendation 10.2; Information Request 8.1

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.

In assessing artists' awareness and access to legal support services, the study should assess what legal support services exist and whether they are sufficient, not just the referral pathways to them. We note that Arts Law is the only national community legal centre for artists and arts organisations and provides dedicated support to Aboriginal and Torres Strait Islander visual artists through the 'Artists in the Black' (AITB) program. The Productivity Commission noted (on page 272 of the Draft Report) that 'Arts Law is partly funded by government grants; in 2020, it received \$920 000 in grant funding'. It is important to note that this figure for grant revenue is not all received for the AITB Program but rather reflects all grants awarded to the organisation as a whole to carry out all of its functions (ie supporting artists and arts organisations, not just Indigenous artists, and across all art form areas, not just the visual arts sector).

IartC identifies artists who require legal advice and assists with the logistics. For artists working outside the art centre model (particularly in regional and remote areas), IartC provides significant resources and

assistance in referring them to Arts Law and providing ongoing engagement with artists during these processes when required.

The following are just some issues that we identify as barriers to artists' awareness and access to legal support services:

- Artists can be wary about accessing legal support and the repercussions of losing opportunities and damaging relationships resulting from making a complaint.
- Support services are overstretched and under-resourced.
- Seeking legal support and advice can be a long, drawn-out process. While there are free services, resources are limited so there may be long wait times. Further, there is a commitment of time required on the artists behalf to pursue the matter.
- Lack of resourcing for face-to-face outreach, particularly in regional and remote settings.
- Barriers for artists in accessing technology, which hinders their ability to pursue legal support. Phone reception, internet and office equipment such as computers and scanners are integral to pursuing legal support, given that the support services are not regularly on-the-ground in community.
- Due to client confidentiality, other artists who may be affected by the conduct can't be approached directly and encouraged to seek advice.
- Arts Law doesn't have a regulatory role and rather responds to direct queries for advice.
- Barriers to Arts Law dispute resolution, such as the costs involved in appointing a mediator. In addition, dispute resolution is not mandatory or binding for parties unless clause in contract requiring it.
- Complex queries may require advice from different legal specialists (eg. Arts Law can advise on contractual disputes and intellectual property issues but not criminal matters for example).
- Instances of coercive control in the sector which current support services are not qualified to assist with as they are beyond the scope of our support services and often cross-jurisdictional.
- Pro bono support relies on the private sector to carry out a function that is integral to artists. Success of pro bono support is often dependent on assistance from Art Centres – which is much more difficult for independent artists to acquire.
- There are significant costs and time involved in briefing up the pro bono support services and communicating with artists to facilitate the advice.

Suggestions of what could help resolve these issues:

- Increased funding for support services.
- More opportunities and support for in-person outreach in regional and remote areas by support organisations.
- Consistency around referrals for advice so that there is centralised data about key issues in the sector.
- Shared understanding across the sector of what the appropriate referral pathway is and the different services offered across organisations and the limitations of organisations.
- Collaboration and dialogue between organisations working in the sector to share details around key issues.

Information Request:

Are there shortcomings in the processes that governments, large corporations and nongovernment organisations use to purchase Aboriginal and Torres Strait Islander art and design services?

Yes, there are shortcomings in the processes that governments, large corporations and non-government organisations use to purchase Aboriginal and Torres Strait Islander art and design services.

Firstly, how are these opportunities promoted to artists? What is the application process, the access requirements and the procurement guidelines required for artists to become a vendor? What is the scale of the government procurement opportunities, and of what nature are they, ie the purchase of original artwork, commissions of major public art, graphic design of RAP plans and reports. We ask for a better understanding of the scale and value of said opportunities to better advise.

Governments and corporate entities need to give consideration to what they are trying to achieve through the procurement of Aboriginal and Torres Strait Islander art and artistic services, and consideration to what supports may be required to achieve these outcomes. Investment is needed to get artists ready to take on these opportunities, this might include upskilling, education and training and the allocation of appropriate time and money for the artist.

Overall, procurement processes require the same approach to ethical purchasing of Aboriginal and Torres Strait Islander art that we promote to consumers, and should meet the minimum industry dealer conduct requirements as outlined by the Code, whether they are IartC members or not. They should act fairly, honestly and professionally at all times when dealing with artists, (whether directly or through an artist representative) in both the purchase of original art and/or licenced products and merchandise, they should not engage in misleading or deceptive conduct and show respect for Indigenous cultural practices and artist's rights. Consideration should be given to Indigenous owned businesses who uphold these principles.

As stated in our previous submission to the Productivity Commission, there is currently no requirement under the Cultural Gifts Program (CGP) for information about how the artist was paid for the first sale of the artwork. A review of the CGP is necessary to address shortcomings in the acquisitions made by state and territory museums and institutions, universities and local, state and federal governments.

Ascertaining the fairness of this first artist transaction relies on the integrity and calibre of the valuer, namely their ability to discern provenance and authenticity by way of their knowledge of a particular artist's exhibiting and selling history, and knowledge about what constitutes good provenance for each artwork. However, the consideration of provenance and authenticity is separate from the question of fairness of an artwork's creation, as an otherwise authentic work made by the hand of the artist could nonetheless have been made in unfair or unethical circumstances, including where an artist was underpaid or otherwise exploited. Please refer to further points raised in paragraphs [7.53] – [7.56] of our previous submission.

15 Proposal for a strategic approach to building the industry workforce: Draft Findings 9.5 and 9.6; Information Request 9.1

A strategic approach to building the Aboriginal and Torres Strait Islander arts workforce is lacking: Art centres and other art organisations continue to face significant difficulty recruiting and retaining skilled art workers, especially in remote areas. There is no strategic approach at the national level to build the pipeline of Aboriginal and Torres Strait Islander visual arts and crafts workers — and leaders — in remote, regional and urban areas. The Aboriginal and Torres Strait Islander arts sector was not included as an area of focus under the National Roadmap for Indigenous Skills, Jobs and Wealth Creation, and there is a risk that strategic opportunities will be missed as a result. With a number of Aboriginal and Torres Strait Islander art and cultural institutions being built across the country, investment in career pathways and traineeships is required to ensure Aboriginal and Torres Strait Islander people lead — and are employed by — these institutions, and to meet broader policy goals as agreed by governments on Aboriginal and Torres Strait Islander employment, self-determination, leadership and empowerment.

Appropriate training and professional development opportunities appear limited: Governments provide funding for professional development and training for workers in the visual arts and crafts sector. However, only a limited number of targeted training, professional development and support programs are available to existing and aspiring Aboriginal and Torres Strait Islander visual arts and crafts workers and artists. In particular, it is not clear how adequate or accessible professional development opportunities are for independent artists.

Information request:

- *What are the barriers facing Aboriginal and Torres Strait Islander people wishing to develop the skills required for leadership and senior management positions in the visual arts sector? For example, is funding support to study or gain accreditation while away from home a barrier?*
- *Is there merit in establishing an accreditation that formally recognises the practices, skills and knowledges learnt from Elders on Country? Are the professional development programs offered to arts workers (and independent artists) by art centres, industry service organisations and regional hubs delivering the skills required by the industry?*
- *Are these programs over-subscribed? If so by how much? If not, how can art workers be supported to attend?*

We support additional funding and initiatives to strengthen capacity development at all levels of employment in the Aboriginal and Torres Strait Islander arts sector. Fostering and establishing clearer pathways for professional development and suitable training programs in the industry, particularly for Aboriginal and Torres Strait Islander people, will likely lead to sustainable long-term careers for Aboriginal and Torres Strait Islander artists and art workers as well as better strategic outcomes. For example, appropriate, long-term solutions for Indigenous communities in the art sector are more likely to be implemented and sustained where leadership and senior management roles in the sector are occupied by Aboriginal and Torres Strait Islander people. We are supportive of providing professional development and training opportunities for both independent artists as well as artists facilitated with art centres.

Failing to take action to ban inauthentic Aboriginal and Torres Strait Islander style products from being sold in Australia when this can be done is a barrier to Aboriginal and Torres Strait Islander people engaging in meaningful employment in the sector. Devaluing the art devalues the position of the artists and arts workers in the sector. Aboriginal and Torres Strait Islander people need to see their art and culture valued in order to bring their intrinsic value to organisations and institutions as employees. When the figures presented in the Productivity Commission Draft Report show how little of the money from this high value sector ends up with Aboriginal and Torres Strait Islander artists (as outlined in sections 1, 4 and 11 of this response), families and communities, many are apprehensive to become involved in a sector that appears exploitative.

A lack of education and employment opportunities in remote communities sees young children and teenagers having to fulfill their Western secondary education in city boarding schools away from their families and communities at a time when they need the most cultural guidance. Strategies are required to keep families together, honour two-way learning and programs and opportunities are needed for young people that bring them back into community.

One of the most common barriers to developing Aboriginal and Torres Strait Islander staff into leadership roles is the under resourcing of small to medium and grassroots arts organisations across the board. A lack of consistent and appropriate levels of funding has seen organisations needing to achieve more with less, and overworked and underpaid arts professionals are experiencing burnout at alarming rates. Nurturing Aboriginal and Torres Strait Islander staff and creating a culturally safe workplace is rarely prioritised in a highly stressed and sometimes toxic or competitive work

environment. Larger organisations and for-profit business with better employee support structures, including HR departments, professional development opportunities, and higher remuneration standards, tend to perform better in creating career pathways and supporting Aboriginal and Torres Strait Islander staff through them into leadership roles.

Aboriginal and Torres Strait Islander artists and arts workers should be encouraged and supported by employers and funded in professional development opportunities to spend time learning from Elders and on Country in a self-determined way. Placing an accreditation structure on a 60,000-year-old continuous cultural practice is a colonial approach and suggests a lack of trust in self-determined individual and community approaches to cultural learning which Indigenous people need to be justified to non-Indigenous peers, organisations and institutions in the sector. Education and a perspective shift are required for non-Indigenous staff and leaders in the arts to recognise non-Western modalities of education and professional development and what they can bring to an organisation or initiative. It is not accreditation that is required, but employment that allows Aboriginal and Torres Strait Islander artists and arts workers paid time for cultural learning and obligations, recognised as personal and professional development relevant to their career. If organisations seek to employ Aboriginal staff for the unique perspective, knowledge and networks they bring, they need to allow them to BE Aboriginal.

There are a number of excellent professional development programs for arts workers delivered by Indigenous art peak bodies, which mainly focus on supporting arts workers working within their member art centres in roles that are funded by IVAIS. In addition to professional skills development, a large part of these programs is offering participants insight to the sector through travel and visitations to galleries, museums, conservation departments, art fairs etc to understand the arts sector as an entire ecosystem, of which they are a part. This is knowledge and networking, particularly with their peers from other communities, regions and cities, and is incredibly empowering and confidence building for artists and arts workers.

There are extremely limited opportunities for Aboriginal and Torres Strait Islander artists working outside of the art centre model to have access to similar opportunities, with very few organisations doing this work and none of them properly resourced to undertake comprehensive programming and development support for independent artists. Independent artists have expressed barriers including, but not limited to: not knowing what opportunities are out there and where to start, how to work with galleries, where to sell their work, access to affordable studio spaces, what their rights are and a lack of confidence and experience with grant writing, exhibition proposal and budget development, reporting and the inevitable administration of professional arts practice. There is also a lack of cultural awareness with many non-Indigenous arts organisations who may offer an artist an opportunity not understanding the cultural, ceremonial and family responsibilities that may mean a deadline is not met, which in their view reinforces stereotypes that Aboriginal and Torres Strait Islander artists are 'unreliable' and 'difficult to work with'. Leaders of institutions, organisations and government departments in the arts and cultural space would benefit from cultural mentoring by relevant Elders for a top-down approach, with cultural awareness and mental health training from a First Nations lens required across all levels of organisations as having a better understanding of where someone has come from will help you guide them to where they are going.

The direct levels of support and guidance that can be offered to participants from art centres, who have an art centre manager and studio staff as liaison and support, to engage in professional and creative development programs makes it an easier channel to fund and deliver. We are not suggesting that art centres and Indigenous Visual Arts Peak bodies necessarily need to take on any further responsibilities and expectations in support of independent artists – these are already under-resourced and overcommitted organisations and we do not encourage further pressures being placed on an already strained model. We are also not suggesting that the art centre model needs to be replicated for independent artists, but they are in desperate need of access to many of the educational resources, support services and industry knowledge and networks provided by art centres to its member artists. The delivery and access requirements will be different and highly individualised.

It is also imperative that artist support programs, services and advice remain free from commercial conflicts of interest.

16 Proposals to strengthen the sector: Draft Recommendations 10.3 and 10.4; Information Request 10.1

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.*

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.*

Information request:

- *What is the best approach to bring together the range of perspectives of the sector to establish a formal shared decision-making partnership with government?*
- *Does the sector support the development of a national peak organisation to advocate on behalf of the sector?*
- *What would be required to develop a national peak organisation? How should governments support this process?*

The Australia Council is hosting *Purrumpa*. <https://australiacouncil.gov.au/advocacy-and-research/events/purrumpa/> This gathering and following discussions with Aboriginal and Torres Strait Island people should be considered in a response to development of a national peak organisation and any formal shared decision-making partnership with government. Attendance and participation at Purrumpa is constrained due to resourcing. Further consideration with direct consultation for artists and communities is required to ensure representation from across the Indigenous visual arts sector.

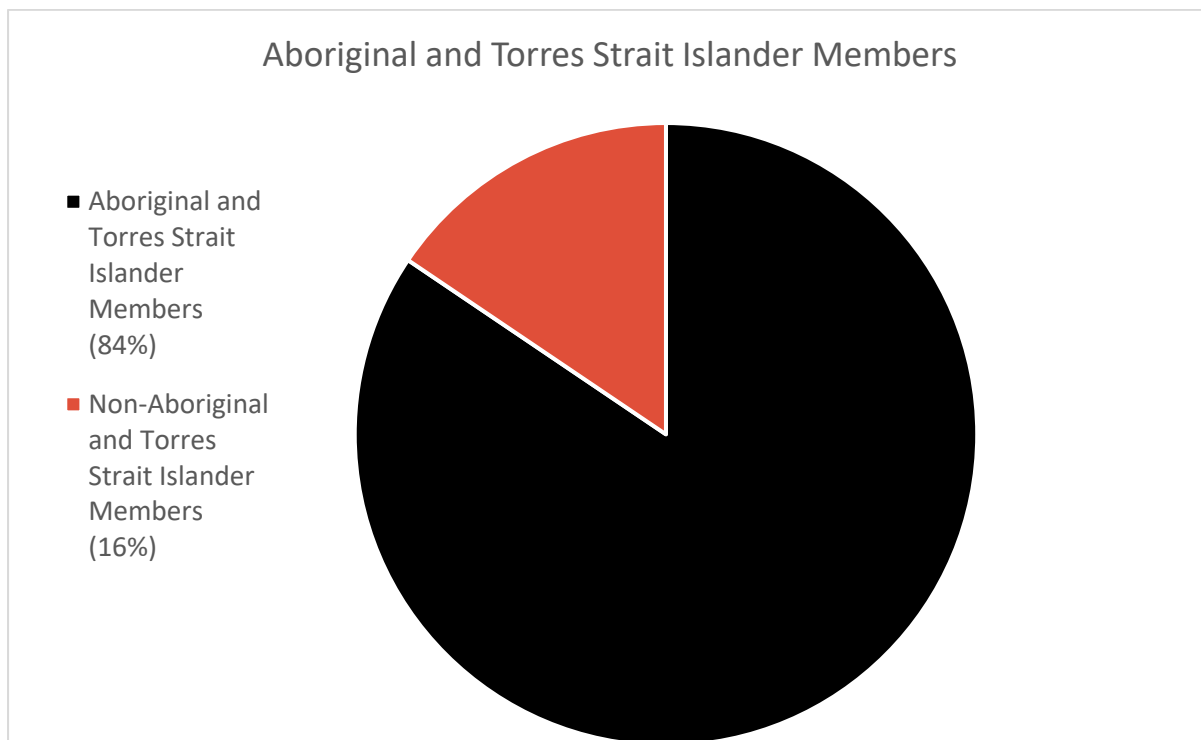
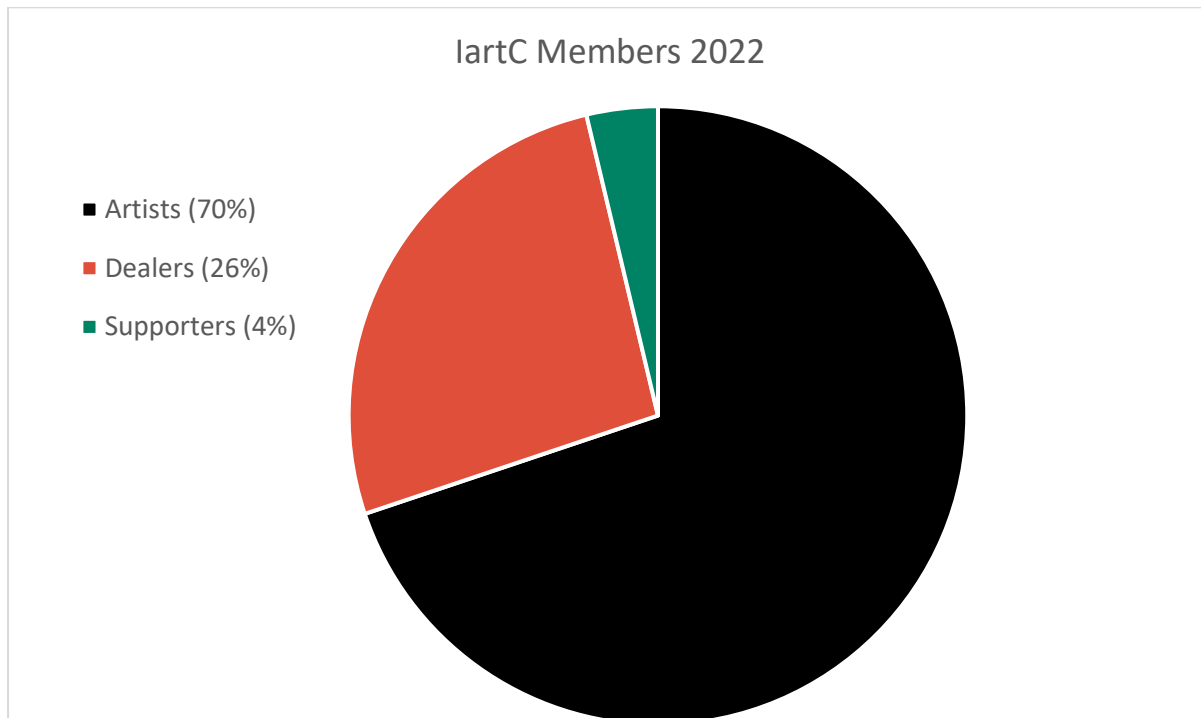
17 Inspection rights

The Draft Report acknowledges the Resale Royalty Right is one of the key legal rights for artists (p 278); it also acknowledges the income generated for First Nations artists since the scheme was introduced (p 114). In our previous submission (at [7.59] to [7.65]) we requested inspection rights to support the management of the scheme. We reiterate this request as it will strengthen the sector by supporting compliance for the scheme, providing a level-playing field for the market and, most importantly, increasing royalties to artists and providing them with greater transparency and understanding of their arrangements with art market professionals and the way their works move through the art market.

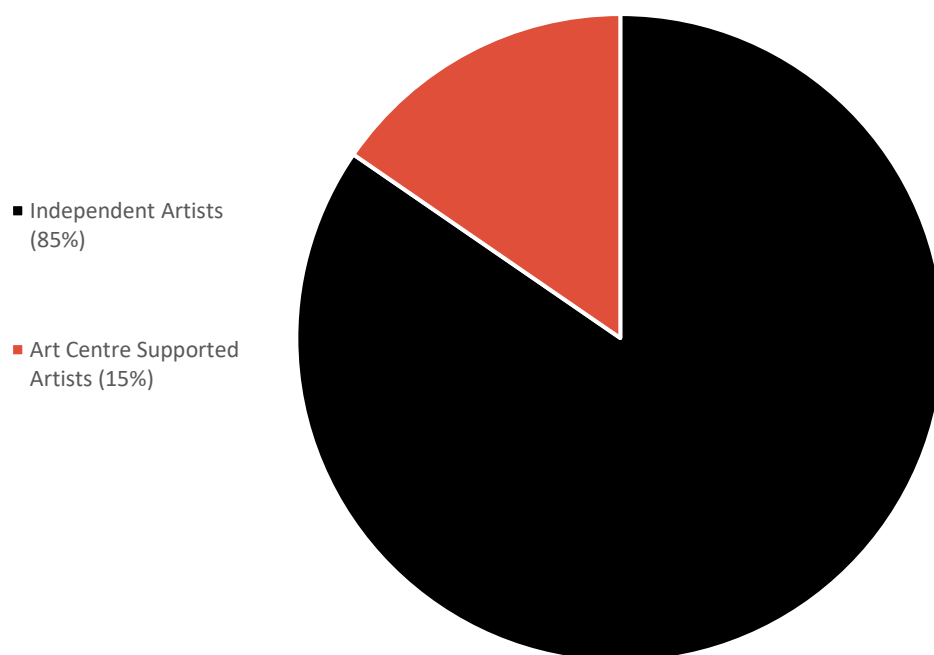
Copyright Agency welcomes the opportunity for discussions regarding how inspection rights would work, noting their experience with similar rights in managing the statutory licensing schemes.

Appendix I

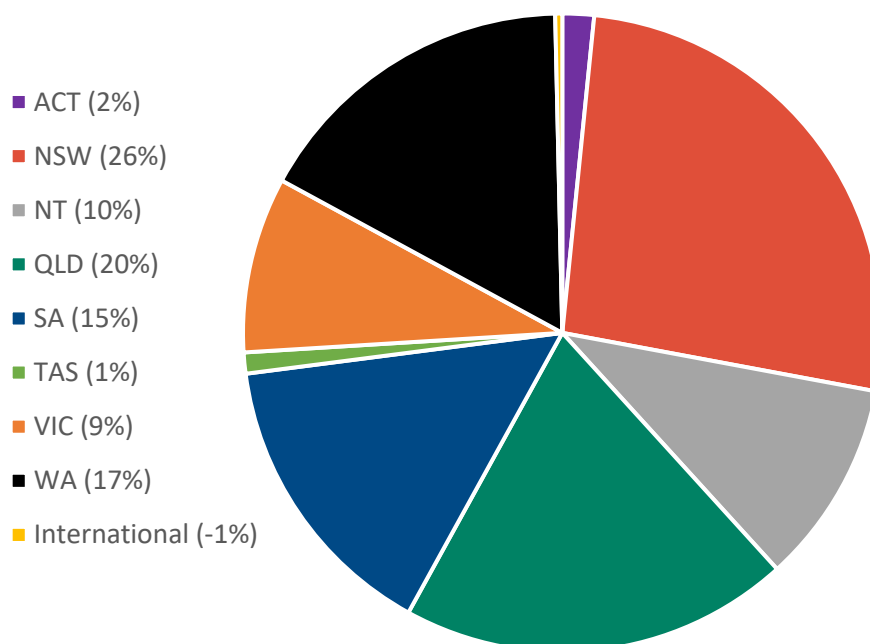
Indigenous Art Code Limited (**lartC**) Membership statistics at 31 August 2022



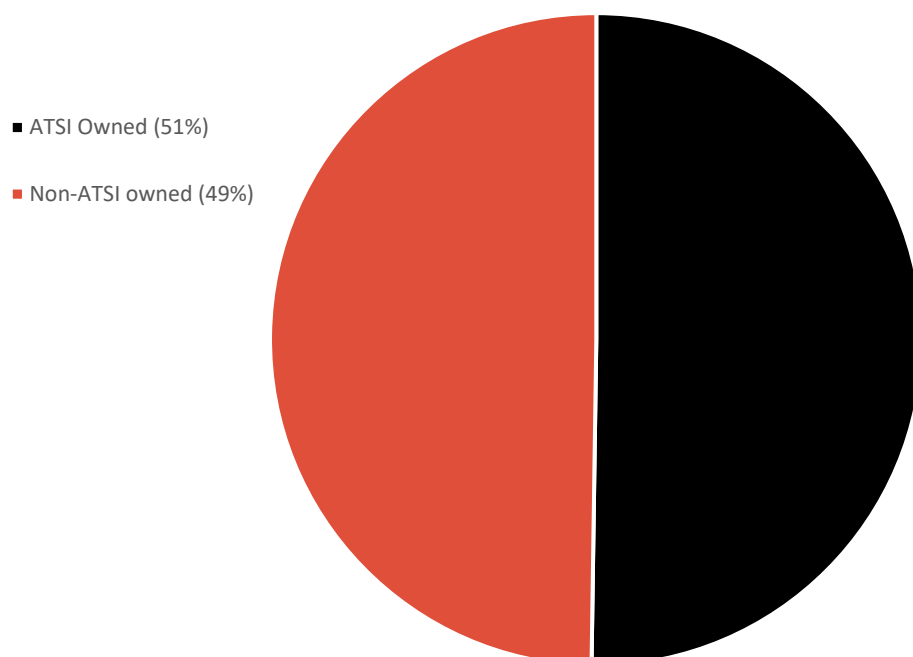
Artists Member Type



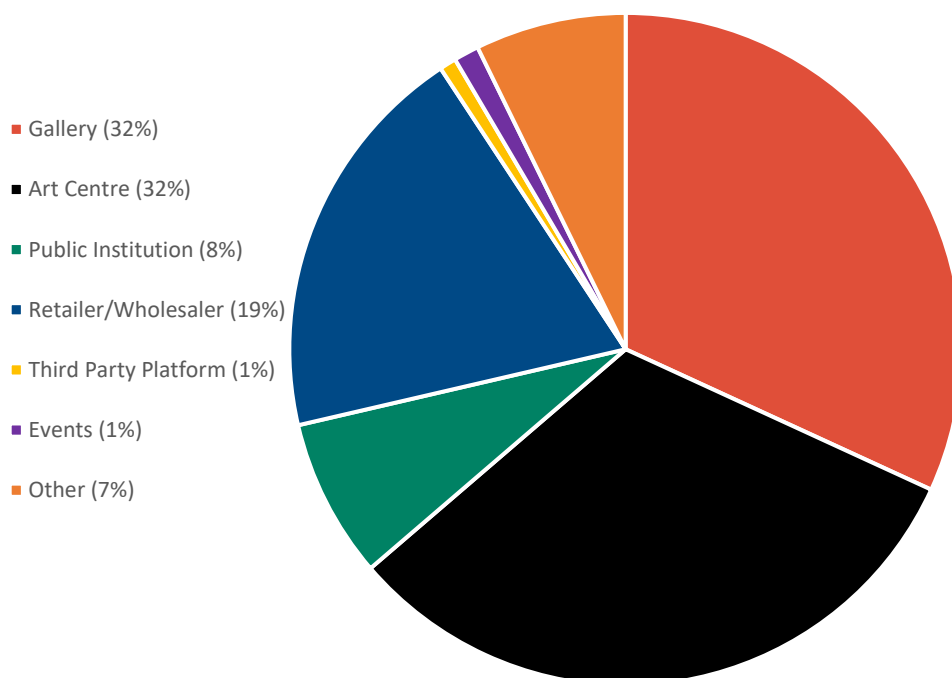
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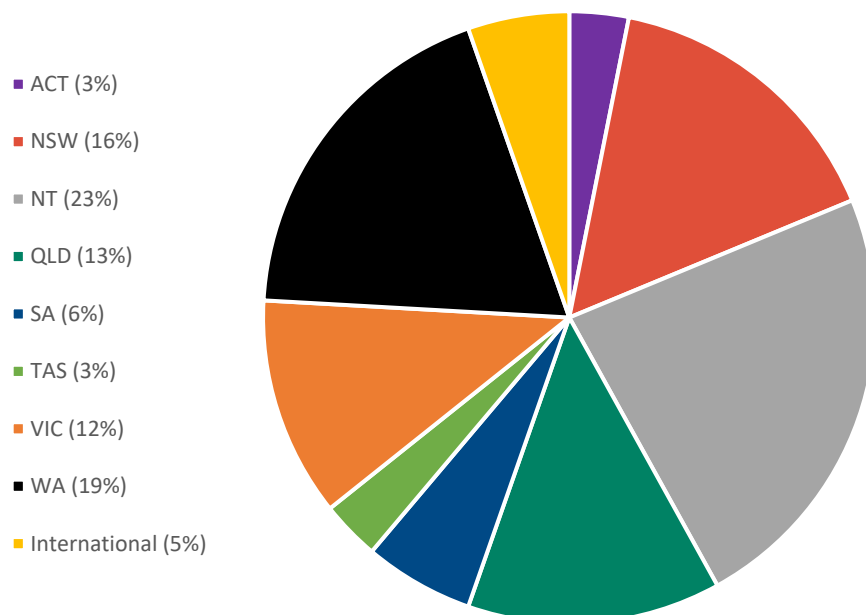
Dealer Members - Aboriginal and Torres Strait Islander Owned



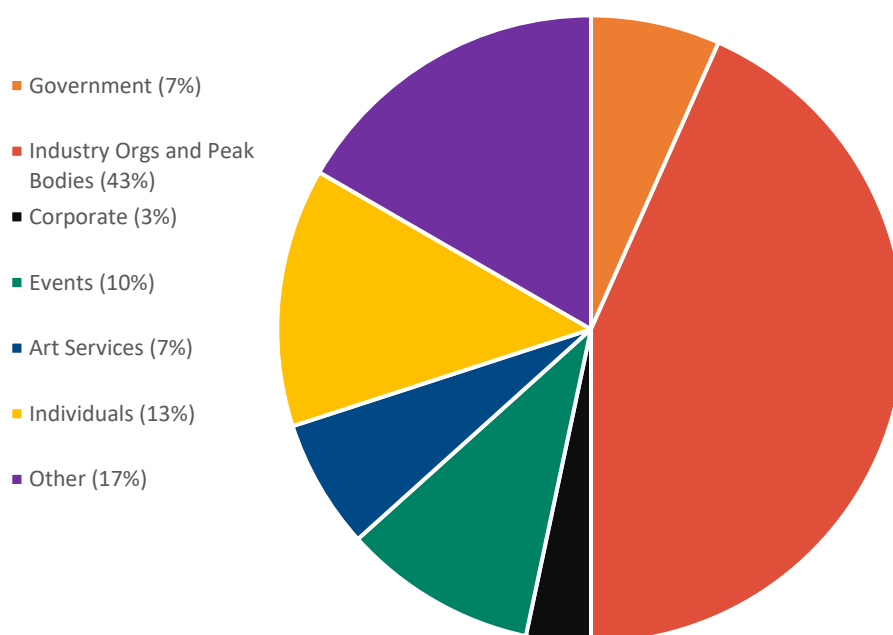
Dealer Member Business Type



Dealer Members by State



Supporter Member Type



Supporter Members by State

