



# DREAMTIME ART

## CREATIVE CONSULTANCY

### **Submission to the Productivity Commission in response to its draft report on Aboriginal and Torres Strait Islander Visual Arts and Craft**

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#### ***About Dreamtime Art Creative Consultancy***

Dreamtime Art Creative Consultancy (**DACC**) engages in collaborative projects that promote supplier diversity, Aboriginal and Torres Strait Islander businesses and knowledge about Arts & Culture. DACC strategy improves corporate and government business engagement with Aboriginal and Torres Strait Islander businesses. We assist in the longevity and success of artists and our fellow Aboriginal and Torres Strait Islander business owners whilst educating and sharing knowledge about Aboriginal and Torres Strait Island cultures through the Arts.

We aim to provide cultural relevance and strong collaborative partnerships with a focus on the protection of artists' intellectual property and Indigenous Cultural Intellectual Property (**ICIP**). The individuals behind DACC have backgrounds in Cultural heritage management, Indigenous studies, community development, sales and marketing, and business advertising.

As a stakeholder in this industry, DACC welcomes the opportunity to respond to the Productivity Commission's draft report on Aboriginal and Torres Strait Islander Visual Arts and Crafts (**PC Report**). DACC hopes its submissions will be of assistance to the Productivity Commission (**PC**).

#### ***Priorities for the protection of Indigenous Cultural and Intellectual Property in Australia***

##### ***First, a comment on process***

The opportunity provided by the PC Report and its ambition is to develop a key protection regime specific to First Nations peoples' arts and culture. This important work must be undertaken with care, consideration and in collaboration. To achieve the right outcomes, DACC feels it is imperative that communities drive the conversation around the subject matter of the PC Report and its recommendations. This will assist to ensure that structures are in place for First Nations peoples to be the primary beneficiaries of their culture and ICIP, to grow and enhance the sector in a way which is First Nations-led.

Further comfort could be provided to First Nations people by revisiting the process by which the PC Report was developed and how it determined its current recommendations, including by further roundtables.

### **Summary of submission**

The priority for any reform in respect of First Nations arts, including for the development of a protective system for ICIP, is that it is informed and led by First Nations peoples and Traditional Owner Groups. DACC encourages any recommendation from the PC for further consultation with First Nations people, with an unlimited scope that seeks to embrace ideas that will be genuinely considered. For example, DACC believes that legislation dealing with First Nations people's culture (including ICIP) should only be established through direct consultation with communities, allowing those communities to lead each phase of the journey.

In reviewing and responding to the PC Report, DACC has engaged with its questions, addressing key aspects thematically. These are:

#### **(1) Fostering the Indigenous arts sector and promoting growth**

DACC strongly advocates for First Nations-led approaches to considering reform of the First Nations arts industry and developing a protective ICIP framework. Such an approach empowers First Nations peoples in respect of their ICIP and ensures First Nations voices are loudest and are central to the reform.

#### **(2) Protection of ICIP**

DACC has concerns that mandatory labelling of inauthentic art could legitimise its creation and sale. Instead, DACC feels that it would be more appropriate to deal with 'fake art' through protective ICIP legislation that prohibits appropriation. DACC welcomes the creation of a protective ICIP legislation, but careful consideration is required for its creation and implementation, including through further and extensive consultation with First Nations communities.

#### **(3) Bolstering the business tools and support available to artists**

Adequate resourcing and skills development are vital to the self-determination of emerging First Nations artists; however allocation of resources must be directed to the whole of the arts sector (including but not limited to art centres). More funding and opportunities should be made available to independent artists, including those who are unable to access the resources of art centres (for geographical and a host of other reasons).

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### **1 Fostering the Indigenous arts sector and promoting growth**

*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 (information request 10.1)?*

- 1.1** DACC considers that there are several relationship models that could be implemented to allow Traditional Owner Groups and the Australian Government to work together to protect ICIP. Its first and strongly preferred choice is for any decision-making partnership with Government to be First Nations-led, but DACC considers co-design as a possible secondary option. DACC expands on these options below.

***Best practice is First Nations-led***

- 1.2 It is ultimately up to First Nations groups to determine how their ICIP should be protected. DACC considers that any decision-making relationship between First Nations people and the Australian Government would need to be First Nations-led.
- 1.3 DACC is not aware of any examples of First Nations/Government relationships that are led by First Nations groups in Australia. In its experience, many First Nations-led advisory groups or bodies that have been established in the past do not engage in long term projects as they are generally only supported for limited periods of time. Funding and other support can be revoked easily by government and result in the disempowerment of the Traditional Owner Group.
- 1.4 A satisfactory relationship would involve Traditional Owner Groups beginning the design process for protecting their ICIP, with ongoing roundtables between Traditional Owner Groups and the Australian Government. The intention here is to allow the conversation to be driven by Traditional Owner Groups. This contrasts with a consultation process where policy (and legislation) is ultimately developed by the Australian Government, with infrequent input by a representative sample of First Nations people and Traditional Owner Groups.
- 1.5 DACC considers some people with the relevant industry expertise would be appropriate for inclusion in the consultation process. DACC suggests that this process be led by Dr Terri Janke, a Wuthathi/Meriam woman, lawyer and authority on ICIP, with Government assistance from the Minister for Indigenous Australians, the Honourable Linda Burney MP and Minister for the Arts & Minister for Employment and Workplace Relations, the honourable Tony Burke MP. DACC also suggests that an independent auditor be appointed to ensure accountability in the relationship's governance, and specifically that Traditional Owner Groups are being afforded the resources, trust, and authority to shape policy with respect to the protection of ICIP. The process, including collection of viewpoints, stories and data, should adhere to best practice in relation to principles of Indigenous Data Sovereignty.
- 1.6 DACC acknowledges that the process of designing such a relationship may require some experimentation in the first instance due to a lack of precedent. However, DACC encourages the PC and Government to engage with a new approach to developing a First Nations-led collaboration for the development of ICIP, despite any difficulties it faces in developing this ground-breaking approach.

### ***Alternative is co-design***

- 1.7 Alternatively, if DACC's first preference cannot be achieved, then Traditional Owner Groups and the Australian Government could work under a co-design system. Although not specific to First Nations groups, one example of a recent co-design process that has worked well is the Victorian Chamber of Commerce and Industry 2050 Roadmap.<sup>1</sup> This initiative used a co-design process which included a range of individuals from varying industries (tourism, manufacturing, entertainment, sport, environment, automotive, retail, finance, export, utilities, transport, health, arts, hospitality), the corporate sector, education, government, and not-for profit

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<sup>1</sup> Victorian Chamber of Commerce and Industry, 'About the Summit' *Victoria Summit 2021*  
<https://victoriasummit.com.au/playbook/about/about-the-summit/>.

organisations. DACC considers that this approach involved an appropriate representation of people. All participants came together through a series of forums, workshops, and consultations to provide insight into challenges, successes, and predictions for Victoria over the next 30 years. The results of this process gave the Victorian Government a “plug and play handbook” of 189 initiatives across 10 pillars designed to set a collaborative vision for Victoria to 2050.

- 1.8 If this approach is used for the development of ICIP protections in Australia, it is important to ensure all decision making and policy drafting is truly co-designed. There is concern that such an approach could lead to the development of ICIP protection by the Government, with the results being pitched to Traditional Owner Groups for comment or approval from pre-selected options as an afterthought. Careful checks and balances need to be maintained throughout the process to ensure this outcome is avoided.

*Does the sector support the development of a national peak organisation to advocate on behalf of the sector (information request 10.1)?*

- 1.9 DACC considers that advisory groups or First Nations council groups have in some instances worked effectively in the past, for example where First Nations reference groups have been developed to advise government departments on economic and employment development to inform both strategy and policy.
- 1.10 One concern that DACC holds with respect to an advisory group or peak body model is that often these groups do not represent the whole, instead focusing on one particular voice. Too great a focus on one aspect of the arts sector has the capacity to be divisive, overlook the needs of other parts of the sector, and potentially undermine consumer confidence in the groups or individuals who are not represented or voices not heard.
- 1.11 For example, in DACC’s experience there is currently a common approach promoted by advisory groups regarding the appropriate way to establish ethical supply for First Nations art. Specifically, it is often stated that First Nations art purchased from art centres is ethical (and consequentially, by inference, more authentic and traditional). However, such statements undermine other First Nations artists not associated with art centres, but who also create and sell authentic and traditional First Nations art.
- 1.12 In summary, this type of representative approach can displace parts of the First Nations arts industry. Focus given to the contribution of art centres is evident from the PC Report, in text as well as the cited levels of funding previously provided to art centres as opposed to the rest of the sector (being 84% as set out in Figure 9.2). This focus on art centres has the potential to harm independent artists, who also form an equally valuable and important part of the First Nations arts industry. These artists are often from regional and urban areas and may not have physical access to art centre representation. Many are also independent and should not be overlooked especially as this approach is frequently a means of self-determination.

***What would be required to develop a national peak organisation (information request 10.1)?***

- 1.13 Any advisory group or peak body will need to be representative of, and advocate for, all interests within the arts sector. Specifically, an effective advisory group would be made up of First Nations peoples only and would likely include the following groups:
- (a) self-represented and independent artists;
  - (b) art distributors;
  - (c) creative agencies;
  - (d) art centres;
  - (e) artist managers;
  - (f) the Australia Council for the Arts; and
  - (g) Office for the Arts.

**2 Protection of ICIP**

- 2.1 DACC supports the PC Report's recommendation to develop a protective ICIP regime. DACC notes that it previously made submissions to IP Australia in response to its Indigenous Knowledge Consultation Paper published in 2021, in which it stated that "Indigenous Knowledge would in fact be best protected by a standalone legal framework which sits next to the current IP rights schemes".<sup>2</sup>

***How might a mandatory labelling scheme for inauthentic products operate in practice and what should be considered further in its design (information request 5.1)?***

- 2.2 DACC does not consider a mandatory labelling scheme to be the most appropriate way to resolve the issue of 'fake art'. DACC is concerned that such a scheme may pave the way for the gradual legitimisation of inauthentic art, which is harmful to First Nations people's cultural rights and inheritance, and damaging to the efforts of the sector to move to educate the public at large.
- 2.3 Instead, inauthentic art can be addressed through protective ICIP legislation that prohibits such art, and increases consumer awareness – serving an educational function, to safeguard the future of First Nations art. It may also be appropriate for the PC to consider a voluntary labelling scheme that provides Traditional Owner Groups with responsibility and administration as an alternative way to authenticate First Nations art. Each of these protective strategies and their ability to address the creation and supply of inauthentic art are discussed further below.

***Protective ICIP legislation and mandatory labelling for inauthentic art***

- 2.4 DACC considers that all aspects for protecting ICIP, including clarity on infringement (which will encompass inauthentic art), should be addressed in protective ICIP legislation. If a mandatory labelling scheme for inauthentic art were to be implemented (which DACC does not consider to be appropriate, see above at

<sup>2</sup> DACC submission to IP Australia dated 31 May 2021, p 2.

paragraph 2.2), any such scheme should not be implemented until protective ICIP legislation is developed and enacted. Accountability mechanisms, protections and punitive measures relating to the mandatory labelling scheme need to be addressed in the protective ICIP legislation.

- 2.5 While it is easy to consider appropriated works or styles as ‘fake art’, the scope of the term ‘inauthentic art’ remains unclear. DACC is concerned that the focus of the PC’s proposed scheme is largely on the appropriation of First Nations people’s cultural rights. It does not, however, address the fundamental issue relating to contracting of ICIP or consider the potential of the slow but long-term diminishing effect it will have on the significance of cultural stories for the artists and their communities and how industry and government engage in these arrangements. Further support for education of the public (consumers), First Nations artists, businesses, organisations and Government to encourage ethical and more even business and licensing negotiations would assist to decrease the prevalence of ‘fake art’ in Australia, and enhance First Nations art and artists’ standing in the sector.

### ***Education on ICIP***

- 2.6 Rather than providing legitimacy to inauthentic art that seeks to appropriate First Nations people’s cultural rights, Australian consumers should be empowered to become advocates for the protection of authentic art. To assist in the reduction of inauthentic art, education should be provided to First Nations people and artists, as well as the public (end consumers). Examples of programs and initiatives already engaging in this area of education:
- (i) Indigenous Art Code, Aboriginal Art Association of Australia (AAAA) for buyer advice and advocacy;
  - (ii) Dr. Terri Janke – True Tracks; and
  - (iii) DACC provides webinars to our clients for introspective arts and Cultural workshops.
- 2.7 DACC would like to see more of this education related to ICIP and further education in the areas of:
- (iv) collateral development that is targeted towards First Nations artists and targeted towards end consumers speaking to the importance and social value-chain of buying art from a First Nations person or legitimate First Nations business;
  - (v) shifting the mindset of end consumer to encourage them to be active caretakers of First Nations arts; and
  - (vi) changing buyers understanding so they can take on more accountability for the entire life cycle of art and the social impacts of purchases.
- 2.8 DACC would like to see this education to impact people’s interaction with First Nations art, which should be achieved through a coordinated and strategic approach from government, industry, media to end customers.

### ***Other options for protecting ICIP - voluntary labelling***



- 2.9 Another option that may be appropriate for the protection of ICIP is a voluntary labelling system. While DACC appreciates that the PC Report raises previous attempts in Australia to establish certification trademarks for First Nations art (at section 5.2), it still considers the concept of a voluntary labelling scheme appealing in the context of developing a protective ICIP legislation.
- 2.10 Previously, the NIAAA Label of Authenticity Mark registered by the National Indigenous Arts Advocacy Association was implemented to allow First Nations artists to identify their work as authentic. While this failed as a central and single certification trademark for authentic First Nations art, such an approach could be successful if it acknowledged the diversity amongst First Nations people and artists.
- 2.11 DACC suggests administering a voluntary labelling scheme (for example, a certification trademark) through Aboriginal co-operatives and collectives as Traditional Owner Groups. There is also an educational role to play about provenance and connection with those named Traditional Owner Groups. Our First Nations people and Traditional Owner Groups are generally connected to their own communities (including artists), which would enable a voluntary labelling scheme to be administered more easily by each community. Even where independent artists are not directly connected to their community, this method would encourage those who are seeking to build on their cultural identity to reconnect with their own groups for authentication of their artwork. This approach would need to be funded appropriately.
- 2.12 The intention of a voluntary labelling scheme would be for Traditional Owner Groups to issue, authenticate, monitor and store data (for example, QR codes and authentication numbers) in order to demonstrate authenticity. This process would adhere to best practice in relation to Indigenous Data Sovereignty, and would allow record keeping and direct association of an artist and their works, using codes and numbering. For example, each work could have the identification of the Traditional Owner Group, the artist, and a number for that piece of work. This information would be available on the art and recorded in a central system which is First Nations-led and held.
- 2.13 Further considerations would need to be worked through to ensure that Traditional Owner Groups do not deny access for artists by create a space of control whereas artists no longer have access to create works using knowledge, stories, systems, ICIP or artists are no longer recognised by Traditional Owner Groups through nepotism, harassment or lateral violence. In addition, those artists or community members from 'other' Traditional Owner Groups that have been granted prior access from different Elders within groups.
- 2.14 DACC considers that a new agency or governing body would be an appropriate tool for administering a voluntary labelling scheme and authentication. The new agency or governing body would deal with application, compliance and auditing commitments, meaning that sufficient funding and resourcing would be a required support from government. It is also important that when administering the voluntary labelling scheme, there is access and support for independent First Nations artists.
- 2.15 In DACC's experience it would not be appropriate to implement a voluntary labelling scheme through art centres. Such an approach could be damaging from a community and consumer perspective as it would support the narrative that ethical supply of art

is only through art centres. As mentioned above at paragraph 1.11-1.12, many independent artists do not engage with art centres, either by choice, or due to location in urban, regional, and remote communities. In this way, art centres do not represent or include all First Nations artists in Australia; artists working under the self-determination model are using their choice, determination, and autonomy to create their own economic wealth and financial freedom. This important approach should be respected and supported. DACC believes that First Nations community and Traditional Owner Group engagement in the creation and implementation of a voluntary labelling scheme would assist to create a more unified marketplace for First Nations art and improve market competition.

- 2.16 The voluntary labelling scheme would also be assisted by whistle-blower protections, which would enable First Nations artists and others to report any misuse of the scheme. For this to enhance a voluntary labelling scheme, it will be important to keep whistle blower identities protected.

*What should be protected by the new cultural rights legislation (information request 7.1)?*

- 2.17 DACC considers a wide range of intellectual property and knowledge could and should be covered by the new protective ICIP legislation, including IP, ICIP, traditional and contemporary knowledge, knowledge systems, foods and fibres, art, stories, narratives, designs, iconography, song, dance, music, medicines, languages, cultural protocols, dreaming and creation, air, sky, land and sea, water, and resources.
- 2.18 The legislation should also dictate how industry, corporate entities, government and education interact with First Nations people and cultural knowledges and knowledge systems, which is discussed further at paragraphs 2.19-2.21.

*What is the best way to define what should be in scope for protection (information request 7.1)?*

- 2.19 As stated above at paragraphs 1.2-1.6, it is important to engage with First Nations peoples and Traditional Owner Groups to ensure that an First Nations-led approach is used to develop protective ICIP legislation in Australia, including to establish the scope of protection. Given the diversity of Australia's First Nations people, it is not possible for one (or even a few) groups to identify all the relevant ICIP. Instead, it should be a community response with a broad representation, to discuss and consider what needs to be protected. This would include, for example, considering what are negotiables and trade-offs, what are priorities for the short, medium, and long term and what type of agreements, usage rights and partnerships with Traditional Owner Groups' ICIP is permissible.
- 2.20 Further details of this approach are set out below:
- (vii) A complex and rigorous series of roundtables and discussions regarding this issue needs to be established within First Nations communities to discuss what should be protected by the ICIP legislation. This should be supported by a whole-of-government approach and include financial resources, and other support such as logistics (e.g. meeting spaces all around Australia).



- (viii) After the establishment and development of protective ICIP legislation, there should be bi-annual events held with First Nations communities to further consider the regime and discuss what is working and what is not. This should allow for market-corrections and to hear about the needs and challenges of First Nations people and artists from lived experiences.
- (ix) An ongoing 'all corners' of industry representative panel should be established to consider the effectiveness of the protective ICIP legislation. This panel should be made up of First Nations people only, with a sub-panel that has representation for 'all of industry'. A recent example of this is the Indigenous Reference Group established to implement the National Roadmap for Indigenous Skills, Jobs and Wealth Creation.<sup>3</sup> The membership of this council consists of First Nations people only, including First Nations business leaders and entrepreneurs and is chaired by two First Nations people, Darren Godwell and Mikayla Jade.

2.21 DACC is concerned that if the discussion regarding what should be in scope for protection is not driven by First Nations peoples, First Nations peoples may not have the opportunity to adequately convey the importance of what must be protected. The consequential risk is that the relevant protections will not be included, and First Nations peoples' cultural rights may be subject to exploitation.

*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 (**information request 7.1**)?*

- 2.22 DACC considers that the most critical issue is to ensure that the usage of ICIP assets and knowledge is done with consent from First Nations people and Traditional Owner Groups. The protective ICIP legislation should ensure there are mechanisms to prevent unethical and exploitative usage of ICIP. As such, it should include requirements to engage with ICIP transparently, respectfully, fairly, ethically, in a way that is mutually and financially beneficial, and not exploitative. Requiring these types of transparent negotiations as part of the protective ICIP legislation will assist Traditional Owner Groups to maximise their own commercial realities and economic futures. The protective ICIP legislation should also provide mechanisms that react to conduct in contravention of these requirements, with triggers for legal clawback and damages that would rectify the conduct.
- 2.23 Compliance with these requirements should also include active monitoring through ongoing reviews of transactions to ensure there has been free, prior and informed consent and equitable remuneration. DACC recommends establishing an agency to handle dispute resolution, whistle-blower protection, prosecution of appropriation (and other ICIP infringement), as well as reviewing agreements involving ICIP. Such an agency should give priority access to Traditional Owner Groups and First Nations peoples.

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<sup>3</sup> The Hon Ken Wyatt AM MP, 'Indigenous Reference Group convenes on National Roadmap' (Media Release, 2 March 2022).

*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 (**information request 7.2**)?*

- 2.24 DACC recognises this is a difficult issue that extends beyond ‘who’ should have standing, to the issue of how First Nations people will get access to justice regardless of the criteria determined. For First Nations people to have the ability to access protective ICIP legislation, rather than just the opportunity, there will need to be significant education and support across the industry.
- 2.25 As a preliminary point, DACC submits that there needs to be better coordination of services to assist First Nations people with their claims in respect of their ICIP rights. The ICIP legislation and access to enforcement should also recognise independent First Nations artists that are self-determining their own careers in the industry. There should be an ability for all First Nations people to engage with a review and investigation process for their claim, which is not unduly difficult or time consuming.
- 2.26 Given the complex nature of ICIP and any proposed legislation, Traditional Owner Groups might not always realise the infringement of their cultural rights, or even if they do, it may seem too difficult and time-consuming to achieve a short-term goal. Therefore, it is important that protection of ICIP does not fall solely to Traditional Owner Groups. DACC recommends establishing an organisation with the ability to address infringements and contraventions of the protective ICIP legislation on behalf of Traditional Owner Groups and First Nations people. This organisation may be similar to the ACCC in respect of its enforcement of the *Competition and Consumer Act 2010*. DACC considers that this organisation, along with, individual First Nations person and the Traditional Owner Group whose ICIP rights are in issue, should have standing to assert those rights under the ICIP legislation.
- 2.27 Beyond First Nations people, Traditional Owner Groups and an independent organisation prosecuting claims under the ICIP legislation, it would also assist to rely on the wider community to raise issues of misuse in respect of ICIP. Education to the public on what custodianship means as public stewardship would assist to empower them to call out instances of misuse for investigation or prosecution by a central organisation.
- 2.28 The legislation should also provide the opportunity and protection for whistle-blowers who might contribute to the enforcement of ICIP legislation by indicating where claims may arise.

*What is the best way to recognise communities or groups as having standing (**information request 7.2**)?*

- 2.29 Noting DACC’s submission at paragraph 2.26 that a new organisation entrusted with addressing infringement of ICIP legislation, along with the relevant First Nations person and Traditional Owner Group, should have standing, the approach for recognising Traditional Owner Groups’ standing should be achieved through consultation with each Traditional Owner Group. These groups should be allowed to develop their own policies and guides on standing.

*What are the merits, drawbacks and challenges of giving a government regulator the power to bring cases in relation to cultural misappropriation (**information request 7.2**)?*

- 2.30 The Government has an important role to protect culture, while also not assuming the ownership or guardianship of culture. Those rights belong to First Nations people and Traditional Owner Groups. Instead, the Government must develop a way to protect and manage complaints and take action, while being careful not to assimilate ICIP (including culture) into a larger legal framework of government. Currently, the steps to access assistance for cultural misappropriation (where to go and how to take action) are difficult and confusing. Allowing a regulator to bring cases in relation to cultural misappropriation would demystify the process.
- 2.31 As stated above at paragraph 2.24, DACC considers it appropriate to establish a regulator to bring cases in relation to cultural misappropriation. However, it is important that there is a mechanism for the regulator to learn from its mistakes and receive feedback from First Nations people to improve its enforcement of ICIP rights. Such a regulator would also require ongoing input from First Nations communities to understand their lived experience and daily challenges.
- 2.32 One consideration that would be relevant to any regulator enforcing ICIP rights is to be aware of possible ICIP contraventions between Traditional Owner Groups, where iconography and imagery are being taken from one Traditional Owner Group to another, resulting in appropriation between communities.
- 2.33 Again, education for the public (and for First Nations people) would be required to enable understanding of the regulator, their process, purpose and remit.

*What types of conduct should be considered an infringement of a traditional owner's cultural rights (information request 7.3)?*

- 2.34 DACC considers the following types of conduct should be considered with bearing to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) drawing context and relevant to the infringement of Traditional Owner Groups cultural rights (and should be developed in consultation with Traditional Owner Groups):
- (a) if the conduct is exploitive in nature;
  - (b) if the conduct infringes ICIP;
  - (c) if the conduct plagiarises cultural icons, motifs, ideas, stories and design;
  - (d) if the conduct resulted in unfair and inequitable outcomes for the First Nations person involved, or there is a lack of shared-benefits underpinned by poor economic outcomes;
  - (e) if there is stolen ICIP or IP through legal contracts (licensing arrangements) and procurement;
  - (f) if third parties are selling First Nations art that has not been acquired properly and at the expense of First Nations artists and Traditional Owner Groups;
  - (g) if the transactions have been poorly planned or discontinued financial payments for the commercial and non-commercial use of language, design, business and architectural, place-making, digital or signage (i.e. ongoing contractual terms that are exploitative); and
  - (h) if the transaction failed to involve free, prior and informed consent.

*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 (**information request 7.3**)?*

- 2.35 DACC considers it necessary to apply a requirement for negotiations in relation to the use of ICIP, to ensure benefit sharing between users of ICIP, Traditional Owner Groups and artists. This would assist to ensure the supply chain and value chain are a fair exchange. In DACC's experience, often in the arts industry, the value for the purchase of First Nations art is held by the purchaser. The First Nations art may be purchased for a minimal amount (unethically), to be commercialised by the purchaser. For example, purchasing art in a corporate or government setting with extensive transfer of ICIP, IP and copyrights from the artist to client, but only with one fee payable to the artist. The artwork is then unfairly applied across the many of the purchaser entity's assets, including brand identity packs, digital art, murals, stationery, clothing, social media, presentation decks, vehicles and other areas of the purchaser entity's marketing and branding. This is done with minimal or no further payments to the First Nations artist, outside of the original artwork purchase. This context is usually promoted under the guise of engagement in the First Nations space that is meant to promote social conscience and reconciliation.
- 2.36 DACC considers that it would assist First Nations artists and those engaging with ICIP to have a guide on how assets can be fairly used. Conduct outside of this should be considered unethical and made public, by register.

*How should a court determine whether a user has been granted authorisation to use a cultural asset in a certain way (**information request 7.3**)?*

- 2.37 DACC suggests that there should be mechanisms for contractual review – especially in respect of unfair terms or circumstances.
- 2.38 In the first instance, a review of the relevant contract (if it exists) should be conducted. It would also be relevant to find out whether any reporting or financial regimes are in place that allow for full disclosure and transparency in negotiations and financial reporting acquittals, as well as the steps taken by parties and details of how the consent provided may have been prior and informed consent.
- 2.39 It is important that the legislation considers instances where contract negotiations are found to have significantly favoured the party seeking to leverage First Nations people's cultural assets. In these circumstances, an automatic right for the First Nations artist to 'refresh' the contract may be appropriate.
- 2.40 DACC considers it would also be invaluable to include the ability for Traditional Owner Groups and First Nations people to terminate a contract without repercussion if they are found not to have properly understood the contract and its negotiations at the time of signing. The legislation should seek to protect First Nations people that have been led into inequitable contracts.
- 2.41 Benchmarking and precedence should form the standards of engagement. Examples of past proper usage and engagement should be considered in the court of law as benchmarks for comparison and ideal outcomes.

*Should there be exceptions when cultural assets are used for certain purposes? If so, what should those exceptions be (information request 7.3)?*

- 2.42 DACC does not think there should be exceptions where cultural assets are concerned. However, if an exception is to be considered, the process of approval must be provided by the relevant First Nations people through Traditional Owners Groups and Traditional Owner Groups.

*What should the legislation say about remedies for infringements of cultural rights (information request 7.3)?*

- 2.43 Generally, DACC considers the measures should be similar to those currently available for trademark, copyright, patent, and design infringements, including, declarations, injunctions, damages (or an account of profits), and additional damages.
- 2.44 DACC suggests that the legislation can take inspiration and guidance from existing models in other jurisdictions and assess what works well and what could be improved in respect of remedies for infringement of cultural rights. Cultural heritage protections are evident in other jurisdictions, including through geographic indications, for example, 'Protected Designation of Origin (DOP)' in Italy, Champagne in France, and 'Mānuka' honey in New Zealand.
- 2.45 It would also be beneficial for the public to be made aware of any infringement as an incentive for wider cultural and behavioural changes. This may take the form of a notice that is published more broadly where there has been a finding of infringement.

### **3 Bolstering the business tools and support available to artists**

*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 (information request 9.1)?*

- 3.1 DACC welcomes the opportunity to comment on the ways in which First Nations artists might be better equipped to succeed within the arts industry.
- 3.2 Developing skills such as licensing, digitisation, and negotiation is key to ensuring self-determination of First Nations artists and preventing exploitation. For that reason, it is vital that all First Nations artists can access adequate training and resources.
- 3.3 At the moment, art centres receive the greatest portion of funding and resources to deliver professional development programs usually within their own regions. While it is positive that many artists can access these services, artists who sit outside the arts centre model are missing out on this opportunity (for example, those who are self-represented including a growing number of artists who predominantly market and promote themselves via social media and other channels). These First Nations artists that often choose to be independent (as a means) to self-determination should also be provided with access to education. DACC is aware that increasingly, First Nations artists who are unrepresented by arts centres are growing their digital art practices.
- 3.4 DACC considers that skills development programs should be developed independent of the art centre model. This could be done in collaboration with a variety of government supported agencies such as the Australia Council for the Arts or the

Indigenous Business Australia so that both arts training and business skills development can be provided. The programs could be run by current trailblazers in the First Nations arts sector with transfer of knowledge and knowhow. This model would facilitate an overall uplift in the market, where established artists, who would be remunerated for their services, are leading the development of a new generation of First Nations artists including First Nations digital artists.

- 3.5 A centre of excellence needs to be developed for skills training and uplift of First Nations artists. In addition, developing careers of First Nations artists with business acumen, an understanding of business development, market development, client expectations, licensing, contracts, distribution channels, and marketing, is required to improve artists' ability to act independently. DACC suggests that the centre adopt a 'hub-and-spoke' delivery model whereby a national centre is put in place with smaller outreach deliveries into urban, regional, and remote areas which would improve access to artists that otherwise would be unable to engage in these opportunities. The centre should deliver governance and art leadership education, and assist in identifying future trends for the industry, including emerging markets and emerging technologies.

*Is there merit in establishing an accreditation that formally recognises the practices, skills and knowledges learnt from Elders on Country (**information request 9.1**)?*

- 3.6 DACC does not feel that formal accreditation aimed at recognising the practices, skills, and knowledge learnt from Elders on Country would be appropriate. An accreditation process would necessarily need to dictate what it means to be a First Nations person. The requirement to comply with these rules to establish identity and knowledge of culture has the potential to re-traumatise First Nations people and have a significant impact on an individual's sense of identity.
- 3.7 The sharing of knowledge and culture within First Nations groups is about connecting to culture as opposed to claiming a First Nations identity. DACC does not believe a formal accreditation would assist to develop the strength of ICIP in the broader community. Instead, education on First Nations people's cultural rights to the broader public would assist to protect ICIP rights and ongoing intergenerational respect for Elders of First Nations communities in the broader social landscape.

*Access to legal support services (**Draft Recommendation 10.2**)*

- 3.8 In addition to skills development, DACC also considers that bolstering the availability of legal support services is necessary. Access to legal support will be vital in assisting First Nations artists to assert their rights in their ICIP once protective legislation is in place.
- 3.9 Although there is currently some support available, for example the Artists in the Black service and NAVA, artists attempting to access these services often experience long wait times or can face language barriers. Further funding and improved access (e.g. with language diversity) will be required.



*Are there shortcomings in the processes that governments, large corporations and non-government organisations use to purchase Aboriginal and Torres Strait Islander art and design services? What changes could be made to enable artists to better engage with these procurement processes (**Information Request 8.1**)?*

- 3.10 DACC highlights the importance of changing procurement contracts which contain clauses that redirect the ownership of IP, copyright and other key rights, from First Nations artists to purchasers. This also includes clauses that provide purchasers with exclusive, worldwide, royalty-free IP rights to use in perpetuity that undermine the earning capacity of First Nations artists in the long term and drive them from their potential economic realisation from their own art and culture.
- 3.11 Competitions and Expressions Of Interest (EOI) for First Nations art often include these clauses as standard form in contracts, which require the complete transfer of IP and ICIP, in exchange for a small payment, or prize money, whether or not the artist is selected as the 'winner' or not. This process results in a loss of control over the First Nations art and the First Nations artist's asset and invites an unfair economic exchange where the purchaser has complete freedom to commercialise, improve their reputation and profit from the artwork. This result is exploitive in its nature and cannot be measured.
- 3.12 DACC advocates for a clearer understanding by First Nations artists and the broader community (especially those engaging with the usage of ICIP) of the fact that the value creation should remain with the First Nations artist. Using culture to tell stories about good-will, social responsibility, social license to operate also means many artists are being tricked into undervalued 'opportunities' in the guise of promises that the transaction will be 'great for your career', increase visibility, provide promotional opportunities, or potential future opportunities, all of which may never eventuate.
- 3.13 One example of this is where Traditional Owner Groups are working with stakeholders to conceptualise and develop First Nations art for art integration projects in place-based urban design. The Traditional Owner Groups are paid consultation fees, sometimes as low as \$400 for 50-year art integration projects. There is an imbalance between using First Nations culture to tell a story and build a sense of belonging, providing benefits to others, at the expense of First Nations people and stories. The community then takes a share in the successes of Traditional Owner Groups, but not the struggles of those groups.
- 3.14 Another issue arising from the processes used by organisations engaging with ICIP occurs when companies use First Nations art and other ICIP to sell their own products. This approach to a business' sales undermines the First Nations artists (and their businesses) that are trying to build legacy, scale and access market channels. In DACC's experience, it can also reduce the opportunities created from policies that offer targets for First Nations artists (for example, the targets for volume and value of contracts under the Indigenous Procurement Policy). This approach is used by organisations because they are able to more quickly scale projects, access the market, and engage the work they require. As a result, the opportunities for First Nations artists are taken away from them through a 'fast fashion' approach to engaging with ICIP at a commercial level. In these instances, First Nations artist engagement is singular, one artist is engaged for a single work which may be used

by the entire organisation often with rights exchanged. It's important that organisations commit to developing the economic channels to ICIP through First Nations artists, First Nations businesses and Traditional Owner Groups, which will then result in a more circular approach to ICIP engagement and its economy. This preferred approach supports the purpose behind the target policies in the first place (including the Indigenous Procurement Policy); to uplift social outcomes and create opportunities for self-determination.

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DACC is pleased that the Productivity Commission is taking an active approach to considering much needed changes to acknowledge the Traditional Owners of ICIP. Our peoples have for so many years been deprived of the opportunity to economically participate in Australian society and reap the benefits of their ICIP. The PC Report is one step towards a better system.

DACC is available for, and welcomes any, questions from the Productivity Commission in respect of its submissions and the PC Report.

Founders

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