



**NATIONAL
ASSOCIATION
FOR THE
VISUAL ARTS**

20 December 2021

Mr Romlie Mokak
Commissioner
Productivity Commission
4 National Circuit
Canberra Act 2600

Dear Commissioner,

Thank you for the opportunity to meet on 9 November with your team, NAVA's Chair Clothilde Bullen and Board Members Bianca Beetson and Rohin Kickett. Further to that meeting, NAVA welcomes the opportunity to provide a submission into the inquiry on Aboriginal and Torres Strait Islander Visual arts and craft currently being undertaken by the Productivity Commission.

The National Association for the Visual Arts (NAVA) is the peak body representing the professional interests of the Australian visual and media arts, craft and design sector, comprising of 50,000 practitioners, galleries and other art organisations. Through the Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector, NAVA sets best practice standards for the industry.

Since its establishment in 1983, NAVA has been influential in bringing about policy and legislative change to encourage the growth and development of the visual arts sector and to increase professionalism within the industry. It has had a long commitment to ensuring Aboriginal and Torres Strait Islander peoples rights are protected. This has included the commissioning and publication of *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector* written by Doreen Mellor and Terri Janke. This document provides background information and a historical and cultural context for contemporary Indigenous visual arts practice in Australia and identifying the appropriate ways of working with First Nations practitioners. NAVA has used the terms Indigenous, First Nations and Aboriginal and Torres Strait Islander throughout and recognises that not all people are comfortable with some terms. NAVA in practice seeks clarity from the individuals that it works with to correctly attribute cultural affiliation and connection.

NAVA plays an important role in advocating for the protection of artists' economic and moral rights both in law and in practice. NAVA has also been a vigorous advocate for the introduction of both Moral Rights and Resale Royalty rights legislation in Australia and was a key contributor to the development of Viscopy (which merged with the Copyright Agency in 2017) as well as the Indigenous Art Code. NAVA has a subscriber base of over 26,000 artists and art workers. According to a 2020 survey of approximately 17,000 subscribers, 3% identify as Aboriginal and Torres Strait Islander. NAVA is currently undergoing a Reconciliation Action Plan and is committed to improving its resourcing, support and professional development for First Nations artists. NAVA provides the following responses against each section of the September 2021 Discussion Paper.

MARKETS

The understanding of markets is complex, particularly for independent First Nations practitioners not working through an arts centre. There are many artists living and working in metropolitan, regional or remote areas across the Australian Capital Territory, New South Wales, Tasmania and Victoria without the infrastructure of an Aboriginal Art Centre or peak body. NAVA and the Indigenous Art Code (IartC) are approached regularly with queries around how to price artwork for sale; the difference between wholesale and retail prices; what does commission mean; what does consignment mean; and what rates to charge for public artwork commissions, particularly for community and collaborative based projects such as murals for local council, hospitals etc. While art centres often have a clear pricing model based on artist seniority, size and scale of the work as well as medium, there is not, at this stage, a clear industry standard pay scale for independent First Nations practitioners.

NAVA currently provides general advice for the visual arts sector on pricing your work outlining various models such as cost-based pricing, competition-based pricing and demand-based pricing and through the Code of Practice for the Professional Australian Visual and Media Arts, Craft and Design Sector, NAVA set best practice industry rates for artists' fees. However, these models do not adequately take into consideration cultural knowledge, investment and responsibility and NAVA does not have the funding and resources to properly expand its services to better assist independent Aboriginal and Torres Strait Islander artists in accessing specifically tailored information and guidance to build their capacity to reach wider markets and generate sustainable incomes.

There could be greater support for organisations like NAVA or First Nations peak bodies to develop a First Nations 'building your career as a professional artist' research project to help guide independent artists. In addition, further research to define the First Nations art market segments and access points would be a valuable tool for artists and government. The IartC could take on a much more active role in setting best practice conditions in the marketplace if it received appropriate funding to do so.

The challenges faced by many First Nations artists in relation to unscrupulous behaviour such as upfront payments and other buying approaches are not equally experienced by non-Indigenous artists. The market must therefore be considered from multiple perspectives, both in how First Nations artists sit within the existing visual art market and challenges faced by First Nations artists directly related to being Indigenous and the greater social inequity that exists. We have explored this in more detail under policy and government (below), however it is worth noting that there is no replacement for education of non-Indigenous dealers, galleries and buyers in the broader solutions to support First Nations artists and market development. In fact, education for the buyers is of particular importance and one that has not had nearly enough focus. The ongoing investment in education of best practice conditions through IartC and NAVA for Aboriginal and Torres Strait Islander art is crucial.

Finally, in relation to markets, organisations such as Create NSW are undertaking work in new markets such as major infrastructure, transport and broader design. NAVA recommends a commitment by all areas of government investment to ensure they are engaging with authentic, local and culturally appropriate Aboriginal and Torres Strait Islander art. The expansion of infrastructure funds to support the Aboriginal art market locally as well as the broader commercial art markets such as branding, publishing and design, infrastructure and major works, environmental investment and other key government expenditure areas could greatly enhance and support the broader independent market for artists across the country. This would need oversight and clear cultural engagement principles, such as the United Nations Declaration on the Rights of Indigenous People, the Australia Council's Protocols for Using First Nations Cultural and Intellectual Property in the Arts and NAVA's Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector¹.

<https://visualarts.net.au/code-of-practice/>

THE ROLE OF GOVERNMENTS

As discussed at our 9 November meeting, NAVA recommends that authenticity be addressed and defined in legislation, noting it should be the artists' and communities' decision on how authentic art and craft products and merchandise are represented, as they are the custodians and creators.

Authenticity is a complex subject that requires greater support, professional development and resourcing for artists and communities. For example, a senior artist may be the custodian of a story but family members may help paint or create the artwork. There needs to be trained people in the community who can oversee issues of authenticity.

Government has the capacity to create, fund and implement broad community driven employment programs to meet the growing need for trained custodians within the community who are empowered to manage authenticity. This program could be funded through the existing IVAIS program but would require First Nations leadership to develop a program that would reflect the different needs across Australia.

We also support calls by organisations in the central desert area for federal help to safeguard and manage issues related to authenticity and carpetbagging. NAVA supports initiatives that work for each community, rather than a one-size-fits-all solution. With that in mind, the government must implement best practice project management ensuring First Nations leadership from each language group or community is guiding the best solution for that community. We support taking advice from the key First Nations led bodies for each area on how specific challenges to that region can be addressed.

WHAT IS AUTHENTICITY AND HOW IS IT DETERMINED

Under the Copyright Act, there is only an obligation to obtain permission from the copyright owner – there is no obligation to obtain permission from a First Nations community whose customary laws apply to uses of a work or style of work. Because copyright does not protect ideas, methods or styles, it does not prevent people using styles belonging to and readily identifiable to certain First Nations communities, such as dot painting.

NAVA raised concerns regarding stylistic and conceptual appropriation of Aboriginal and Torres Strait Islander art and designs results in both cultural and economic harms. In our meeting, Rohin Kickett gave examples of non-Indigenous artists appropriating Aboriginal styles, winning prizes and benefiting financially at the expense of Aboriginal artists. Appropriation also takes away Aboriginal and Torres Strait Islander artists' voices and power. Aboriginal and Torres Strait Islander people should own our arts and culture. Mr Kickett has prepared a supplementary paper on this which is provided for your consideration. (Attachment 1)

Further to this, and in response to the notes in the paper regarding both foreign and locally produced pieces in the style of Aboriginal art, NAVA again asserts the urgent need for stopping the practice of inauthentic Indigenous art, or fake art. We recommend that it should be the artists' and communities' decision on how authentic art and craft products and merchandise are represented, as they are the custodians and creators. This should be an integral inclusion in any proposed definition or changes to existing laws and practices. It must ensure that all products made and sold have the permission of Aboriginal and Torres Strait Islander artists and that the artists are earning an income from this.

WHAT POLICY OPTIONS ARE THERE?

Codes of practice and legislative changes can help address problems with authenticity and appropriation, but it also requires investment in education and training. There are proportionally few Aboriginal and Torres Strait Islander people trained and experienced to work in art centres,

galleries and as judges in competitions. Many more need to be trained and employed. Non-Indigenous staff also need to be better trained and to become more culturally competent. NAVA recommends support, investment, and programs at all levels of government to create First Nations led education and training programs.

The challenge with policy options relates to scale, often programs are announced and are too limited in scope and therefore can only benefit a very small number of people leaving out large communities or groups. The National Indigenous Visual Arts Action Plan 2021-2025² provides an example of this narrow approach in its recommendations. While there is clear support for art centres and other organisations in the broad recommendations, in the detail of delivery investment is limited to 8 Indigenous art centres increasing jobs, 2 Indigenous art organisations receiving governance support and only up to 3 annual mentorships for art workers and artists through CPA. The policy outcomes need to be broader in scope and First Nations led. They must also have clear principles ensuring that programs that are funded are adaptable to enable multiple solutions to achieve goals, rather than a one size fits all solution.

The visual arts is an unregulated industry. The only sector-wide resource that practically addresses issues for Australian artists, organisations, institutions and policymakers is the NAVA Code of Practice. We urge the government to consult with NAVA regarding the Code and our current major revision work. The new Code of Practice, once implemented, will reflect the variety and specificity of contemporary practices and the needs specific to First Nations practitioners and further promote the development of a robust arts ecology that can sustain and support artists' careers while preparing organisations, institutions and policymakers for working with and for artists in financially transparent, culturally competent and ethical ways.

WHAT ISSUES ARISE BETWEEN ARTISTS AND DEALERS

There are a variety of issues that can arise between artists and dealers. NAVA recommends clear and transparent contracting ensuring the rights of the artist are enshrined in a contract. As part of NAVA's work in revising the Code, we have prepared a discussion paper on commercial galleries. Below are excerpts from that paper that are useful for all artists. It would be advantageous for the final Productivity Commission report to reference relevant sections of the Code, including fees and wages, set for release in the second half of 2022.

'Like most business transactions, the relationship between the artist and the gallery is one that principally relies on trust. For those who choose to enter a contractual relationship, it is appropriate to ensure that both parties to the agreement:

- are open about the reasons for entering into the relationship
- understand their financial obligations as well as how any payments owed will be calculated and distributed,
- have fully discussed all the details of their ongoing relationship, and
- are completely aware of their respective responsibilities.

A written agreement is a useful way of clarifying the responsibilities of both artist and gallery. While it has not always been common practice to formalise the artist/gallery relationship in a written contract or letter, the current Code largely assumes that there is a written contract in place. Ideally, a discussion would be had between the parties about the contents of an agreement, and this would be resolved before undertaking any business. It is also best practice for artists to seek their own independent legal advice before signing any written agreements.'

² <https://www.arts.gov.au/what-we-do/national-indigenous-visual-arts-action-plan-2021-25>

By way of advice, Arts Law can provide direct advice on artists contracts and on all legal advice. When First Nations artists are engaging in contracts there may be cultural and language barriers to take into consideration. Issues related specifically to First Nations artist may include:

- a lack of clarity around appropriate commissions or relationships with art centres. NAVA recommends that where an artist is represented by an art centre, there needs to be transparency with any external contracts. The APY Collective suggests greater processes around oversight of central desert contracts. Other geographic regions may have alternative requirements. This should be a bespoke arrangement sensitive to the needs led by the community.
- There are a small number of unscrupulous non-Indigenous dealers engaging in unsafe procedures such as upfront payments made in second-hand vehicles, accommodation and goods or, in some cases, made to family members of established artists. This approach is treated as a debt which is then expected future paintings created by the artist. This behaviour undermines the art centres and puts the artist in unsafe and unfair situations. This must be stopped immediately through policy and oversight.

In general, relationships with dealers can be positive. NAVA recommends communication and transparency to ensure both parties are protected. Independent artists often require support, professional development and support in working towards gallery representation. NAVA recommends investment, through NAVA and the state based First Nations peak bodies in career development, particularly for those artists working outside of the art centre context.

HOW CAN THE CONTRIBUTIONS ARTS MAKE TO REMOTE COMMUNITIES BE SUSTAINED

Art centres play an important role in remote communities. In addition to acting as agent, studio, retailer and supplier, art centres are also social hubs in remote communities. Organisations such as Desart, ANKAAA, AACHWA and other peak First Nations bodies have made multiple submissions over the years indicating the essential role of art centres.³ NAVA recommends endorsing the submissions of First Nations peak bodies in making recommendations and considerations for sustainability and future planning.

FINAL THOUGHTS

NAVA exists to lead advocacy, policy and action for the visual art sector and, at its core, for artists. The thriving and growing First Nations visual art sector is vital and important to support. The unique needs for this sector are on the top of NAVA's agenda for future policy work and professional development. As an organisation with a 40-year history supporting artists, we see our investment in First Nations artists as vital to our future. There are many areas that haven't been included in this submission such as digital growth in the visual arts through NFTs, the return of the international art market for First Nations artists, greater control of intellectual property and ICIP and the broader social benefits of a thriving First Nations visual arts market.

NAVA is committed to this important work and would welcome ongoing conversations regarding pragmatic outcomes to benefit the sector.

Sincerely,

Mimi Crowe
Co-Director

Penelope Benton
Co-Director

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenouarts/report/c04