



Aboriginal and Torres Strait Islander Visual Arts and Crafts

Draft report



This is a draft report prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

The Productivity Commission acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their Cultures, Country and Elders past and present.

Aboriginal and Torres Strait Islander people should be aware that this publication may contain the names of people who have passed away.

The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

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Publication enquiries:

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Opportunity for comment

The Commission thanks all participants for their contribution to the study and now seeks additional input for the final report.

You are invited to examine this draft report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by Monday 29 August 2022.

Further information on how to provide a submission is included on the study website:
www.pc.gov.au/inquiries/current/indigenous-arts

The Commission will prepare the final report after further submissions have been received and it will hold further discussions with participants. The Commission will forward the final report to the Government in November 2022.

Commissioners

For the purposes of this study and draft report the Commissioners are:

Romlie Mokak	Commissioner

Lisa Gropp	Commissioner

Terms of reference

I, the Hon Josh Frydenberg MP, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake a study into the nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in these markets.

Background

The Australian Government recognises that art is an important way for Aboriginal and Torres Strait Islander peoples to tell stories, share and strengthen cultures and connection to Country, promote understanding of history, strengthen communities, and expand economic opportunities. Aboriginal and Torres Strait Islander art is a vital part of Australia's identity and makes a large contribution to the economy.

A significant and increasing proportion of products in the 'style' of Aboriginal and Torres Strait Islander arts and crafts that are sold in Australia are imitations that do not have any connection to Aboriginal and Torres Strait Islander peoples and provide no economic benefit to their communities. These products cause offence and harm to Aboriginal and Torres Strait Islander peoples and cultures and mislead consumers.

The House of Representatives *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (the Report), tabled in 2018, found that there is a lack of information and analysis on the markets for Aboriginal and Torres Strait Islander arts and crafts. Recommendation 1 of the report stated: The committee recommends as a matter of urgency that the Productivity Commission conducts a comprehensive inquiry into the value and structure of the current markets for First Nations art and crafts.

The Government Response to this Report was tabled in Parliament on 2 September 2020. The Government agreed to Recommendation 1 of the Report, stating: The Government will commission a Productivity Commission study into the nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in these markets.

Scope of the inquiry

The Productivity Commission is asked to examine the value, nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in the markets.

In undertaking the study, the Commission should:

1. examine the nature and structure of the different parts of the domestic and international markets including authentic and inauthentic products
2. identify deficiencies and barriers in the markets and how they affect artists and other stakeholders
3. assess costs, benefits, governance arrangements, risks, practicalities and implementation challenges of any policy responses. In doing so, the Commission should have regard to:
 - 3.1 both regulatory and non-regulatory responses to the problems in the relevant markets, including education and social marketing measures, labelling and other certification arrangements, industry codes and the role of existing consumer and intellectual property laws

- 3.2 the impacts on Aboriginal and Torres Strait Islander artists, and more broadly, the Australian Indigenous and the wider community from policy and regulatory reform
- 3.3 the advantages and disadvantages of current initiatives that intend to remedy problems in the Aboriginal and Torres Strait Islander art and craft markets, and the lessons that can be learnt from them
- 3.4 proposing possible policy and regulatory responses to address the identified deficiencies in the markets
- 3.5 where it is feasible, indicate any quantitative estimates of the benefits, costs and commercial impacts of policy reforms.

In undertaking this research, the Commission should also consider:

- 4. House of Representatives Standing Committee reports, including the *Indigenous Affairs inquiry into the impact of inauthentic art and craft in the style of First Nations peoples* and submissions received as part of the development of the Indigenous Visual Arts Industry Action Plan being led by the Australian Government and to be released in the first half of 2021.

Process

The Commission is to consult broadly, particularly with Aboriginal and Torres Strait Islander peoples, communities and organisations. The final report should be provided within 15 months of the receipt of these terms of reference.

The Hon Josh Frydenberg MP
Treasurer

[Received 5 August 2021]

Disclosure of interests

The *Productivity Commission Act 1998* specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions they must disclose those interests.

- Commissioner Mokak advised that one of his family members is an employee of the National Art School, Sydney and was previously employed by the National Association for the Visual Arts.

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Acknowledgments

The Productivity Commission thanks members of the community as well as organisations and government agencies who have provided data and other information for use in this study. We would particularly like to thank Aboriginal and Torres Strait Islander people and organisations, who generously shared their stories and insights with the Commission. We would like to thank Desart and Aboriginal and Torres Strait Islander art centres for supporting our work by contributing data.

The artwork used in this publication is adapted from
River of Knowledge
by Luke Penrith



Abbreviations

AAB	Aboriginal Arts Board
AACHWA	Aboriginal Art Centre Hub of Western Australia
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCO	Aboriginal and Torres Strait Islander community-controlled organisation
ACL	Australian Consumer Law
ADR	Alternative dispute resolution
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANKA	Arnhem, Northern and Kimberley Artists
APY	Anangu Pitjantjatjara Yankunytjatjara
ATSIC	Aboriginal and Torres Strait Islander Commission
Australia Council	Australia Council for the Arts
AWEP	Arts Worker Extension Program
BWA	Better World Arts
CCA	Competition and Consumer Act 2010 (Cth)
CPA	Creative Partnerships Australia
CTM	Certification trade mark
DAAF	Darwin Aboriginal Art Fair
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
GFC	Global Financial Crisis
GIVAI	Growing the Indigenous Visual Arts Industry
HoRSCIA	House of Representatives Standing Committee on Indigenous Affairs
IACA	Indigenous Art Centre Alliance
IACB	Indian Arts and Crafts Board
IartC	Indigenous Art Code Limited
ICIP	Indigenous Cultural and Intellectual Property
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources
ILA	Indigenous Languages and Arts
IP	Intellectual property
IPP	Indigenous Procurement Policy
IVAIS	Indigenous Visual Arts Industry Support

KALACC	Kimberley Aboriginal Law and Culture Centre
NATSISS	National Aboriginal and Torres Strait Islander Social Survey
NAVA	National Association for the Visual Arts
NFT	Non-fungible token
NIAA	National Indigenous Australians Agency
NIAAA	National Indigenous Arts Advocacy Association
NIACA	National Indigenous Arts and Cultural Authority
NIVA	National Indigenous Visual Arts
ORIC	Office of the Registrar of Indigenous Corporations
QAGOMA	Queensland Art Gallery and Gallery of Modern Art
RIS	Regulatory Impact Statement
SAM	Stories Art Money database
TAFE	Technical and Further Education
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
VET	Vocational Education and Training
WIPO	World Intellectual Property Organization

Overview

Key points

- * **Aboriginal and Torres Strait Islander people have been creating visual arts and crafts for tens of thousands of years. This practice has grown into a significant industry, generating income for artists and art workers, creating economic opportunities for communities, and helping to maintain, strengthen and share Aboriginal and Torres Strait Islander cultures.**
- * **Total sales of Aboriginal and Torres Strait Islander visual arts and crafts reached about \$250 million in 2019–20 — this includes \$30–47 million in artwork sales through art centres and at least \$83 million in sales of merchandise and consumer products (mostly souvenirs) bearing Aboriginal and Torres Strait Islander art and designs.**
 - While a small number of artists command high prices, the average income for the 5800–7700 artists who sold art through an art centre in 2019–20 was just over \$2700. For independent artists, average income was about \$6000.
- * **Inauthentic arts and crafts — predominantly Indigenous-style consumer products not created by Aboriginal and Torres Strait Islander people — are a pervasive and longstanding problem. They disrespect and misrepresent culture and, by misleading consumers and denting confidence in the market, they deprive Aboriginal and Torres Strait Islander artists of income. Inauthentic products accounted for well over half of spending on Aboriginal and Torres Strait Islander souvenirs in 2019–20.**
- * **Mandatory labelling of *inauthentic* products would raise consumer awareness and help them distinguish between authentic and inauthentic products, impose a negligible compliance burden on Aboriginal and Torres Strait Islander artists (and their commercial partners), and involve modest establishment and administration costs.**
- * **Some visual arts and crafts make use of Indigenous Cultural and Intellectual Property (ICIP), such as sacred symbols, without the authorisation of traditional custodians. This undermines customary laws and limits the economic benefits flowing back to Aboriginal and Torres Strait Islander people. Legal recognition and protection of ICIP is patchy, with very few limits on whether, how and by whom ICIP is used in visual arts and crafts.**
- * **A new law that strengthens protection for aspects of ICIP used in visual arts and crafts would formally recognise the interests of Aboriginal and Torres Strait Islander communities in their cultural assets, promote respectful collaborations and allow for legal action where protected cultural assets are used in visual arts and crafts without the authorisation of traditional owners.**
- * **Art centres assist thousands of established and emerging artists to practise their arts and crafts and engage in the marketplace; they fulfil important cultural and social roles. Other organisations provide vital services to artists — including addressing instances of unethical conduct from other market participants. Improving funding and the effectiveness of support services, as well as strengthening the Aboriginal and Torres Strait Islander arts sector workforce, will be critical for future growth. An independent evaluation of Australian Government funding to the sector — undertaken in partnership with Aboriginal and Torres Strait Islander people — is needed to inform future funding needs, objectives and strategic priorities.**

For tens of thousands of years, Aboriginal and Torres Strait Islander people¹ have practised and produced arts and crafts to record and share their traditions and experiences. These cultural practices continue to this day — forming a significant part of Australia's national identity. Aboriginal and Torres Strait Islander arts and crafts are increasingly recognised not only in the art world, but across the community: three in four Australians see Aboriginal and Torres Strait Islander art as an important part of the country's culture.

Over time, Aboriginal and Torres Strait Islander arts and crafts have also become a significant source of economic empowerment. Aboriginal and Torres Strait Islander arts and crafts markets have grown and thrived because of the talents and skills of artists, the cultural value artists and communities derive from the practice of art and the works themselves, the strength of Aboriginal and Torres Strait Islander communities, and rising consumer awareness of and demand for authentic Aboriginal and Torres Strait Islander arts and crafts.

Our art and culture are very dear to us, they embody the past history of my people, our beliefs today, and our strength to survive. Whilst wanting to protect ourselves and our art and culture for future generations, at the same time we are eager for all the world to witness the beauty and strength of our culture as expressed by our artists.

Wandjuk Marika,
1975, quoted in Arts
Law, Copyright
Agency and the
Indigenous Art Code
Limited, sub. 31, p. 30

Since Yolŋu art was first sold from the town of Yirrkala in the Northern Territory nearly a century ago, the sector has grown to generate sales of about \$250 million each year. About 19 000 Aboriginal and Torres Strait Islander people receive income from the sale of visual arts; and many more Aboriginal and Torres Strait Islander people are employed as art workers or work in related industries such as tourism. Many of these employment opportunities are created by community-controlled and led organisations, building on local strengths and skills.

But as the demand for Aboriginal and Torres Strait Islander art has grown, so have production and sales of inauthentic visual arts and crafts, which have no connection to culture and community. These products are not made by Aboriginal and Torres Strait Islander artists nor are they produced under a licensing agreement with an Aboriginal and Torres Strait Islander artist. Such inauthentic products erode the market share of authentic Aboriginal and Torres Strait Islander products, weaken consumer confidence, and misrepresent Aboriginal and Torres Strait Islander cultures.

Often, inauthentic products are made without cultural authorisation (or permission) from traditional owners to use Indigenous Cultural and Intellectual Property (ICIP — discussed in detail below). This disregards and disrespects traditional law and customs and means certain stories, images and styles are used in inappropriate ways or without compensation to the communities to whom these knowledges and expressions belong.

¹ 'Aboriginal and Torres Strait Islander people' is used to refer to Aboriginal and/or Torres Strait Islander people.

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

Concerns about inauthentic Aboriginal and Torres Strait Islander arts and crafts — and works produced without the relevant cultural permissions — have been raised by artists and communities for many years, and considered by a number of past inquiries. Most recently, in 2018, the House of Representatives Standing Committee on Indigenous Affairs examined the impact of inauthentic arts and crafts in the style of First Nations peoples. In its response to the inquiry, the Australian Government acknowledged the offence and harm caused by inauthentic products, which 'do not have any connection to Aboriginal and Torres Strait Islander peoples, provide no economic benefit to their communities ... and mislead consumers'.

What we have been asked to do and next steps

Following a recommendation from the House of Representatives, the Australian Government tasked the Productivity Commission with measuring the value, nature and structure of the markets for Aboriginal and Torres Strait Islander visual arts and crafts, identifying deficiencies and barriers in the markets and how they affect artists and other participants; and assessing costs, benefits, governance arrangements, risks, practicalities and implementation challenges of any policy and regulatory responses.

This draft report presents the Commission's findings on the size and structure of markets for Aboriginal and Torres Strait Islander visual arts and crafts, including inauthentic products. It makes draft recommendations to improve the operation of those markets to reduce the prevalence of inauthentic arts and crafts and the harms they cause, empower Aboriginal and Torres Strait Islander people to control and protect their cultural assets, and strengthen the capacity of artists and communities to participate in and benefit from trade in visual arts and crafts. The Commission is seeking feedback on these draft recommendations ahead of the publication of a final report in November 2022.

Aboriginal and Torres Strait Islander visual arts and crafts markets are strong, dynamic and growing

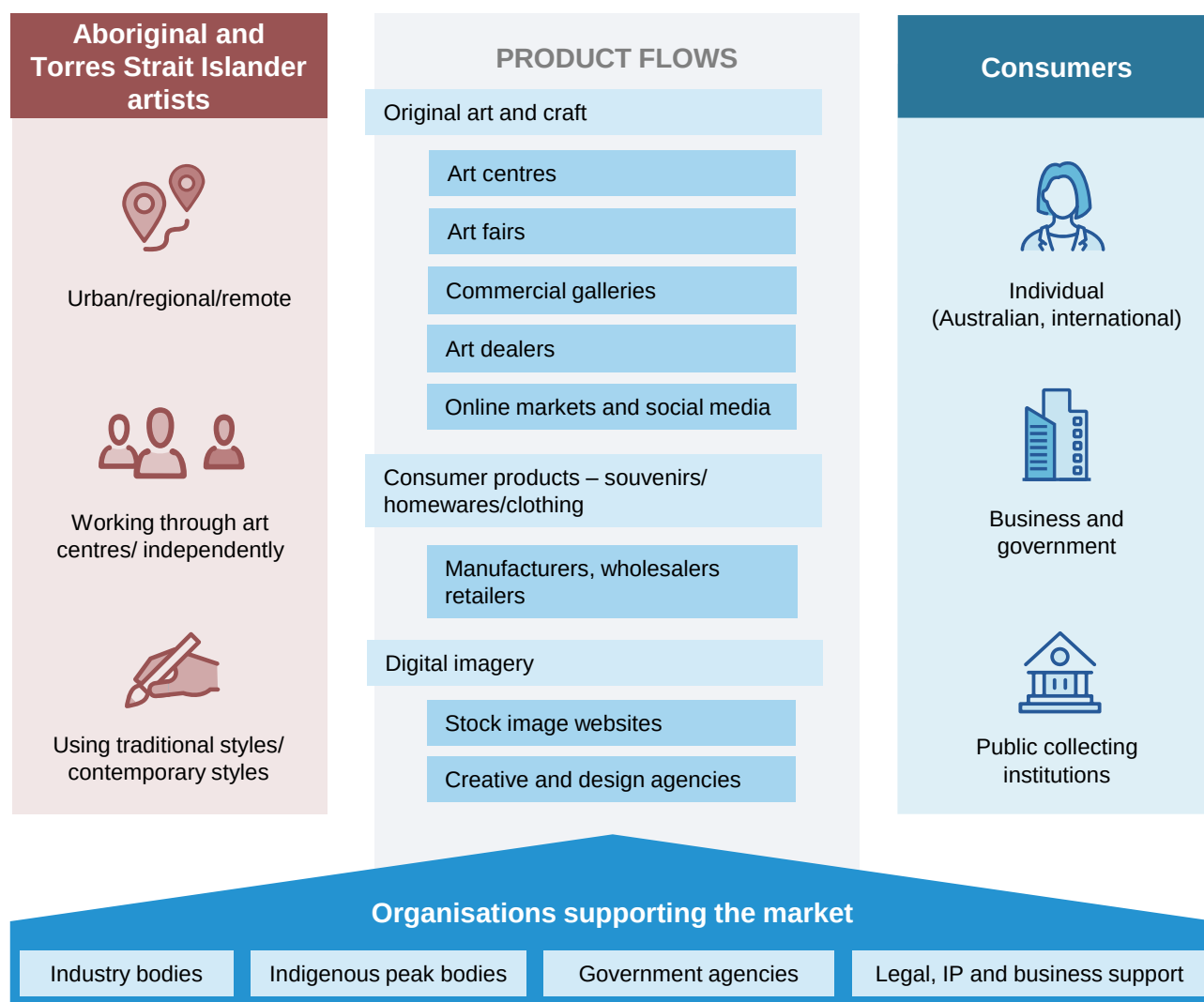
Aboriginal and Torres Strait Islander visual arts and crafts have been commercialised in Australia since the 1930s. While the practices, skills and knowledges that are central to art making have existed for thousands of years, commercialisation has transformed the way Aboriginal and Torres Strait Islander visual arts and crafts are consumed and expanded the range of products and production methods. Aboriginal and Torres Strait Islander visual arts and crafts — whether authentic or not — now include:

- the production and sale of art and designs on different media (such as bark, wood, canvas and digital art)
- handmade products and merchandise such as boomerangs, baskets and didgeridoos (also known as *yidaki* or *mandapul*)

- mass-produced products and merchandise (including souvenirs marketed to tourists, and designs printed on household items and clothing).

Artists sell their works through a range of channels, including art centres, art fairs, private dealers, commercial galleries, online platforms and direct sales to consumers. The diversity of products — which range from artworks that sell for hundreds of thousands of dollars to souvenirs that are sold in tourist shops — coupled with the numerous sales channels have created a complex marketplace (figure 1).

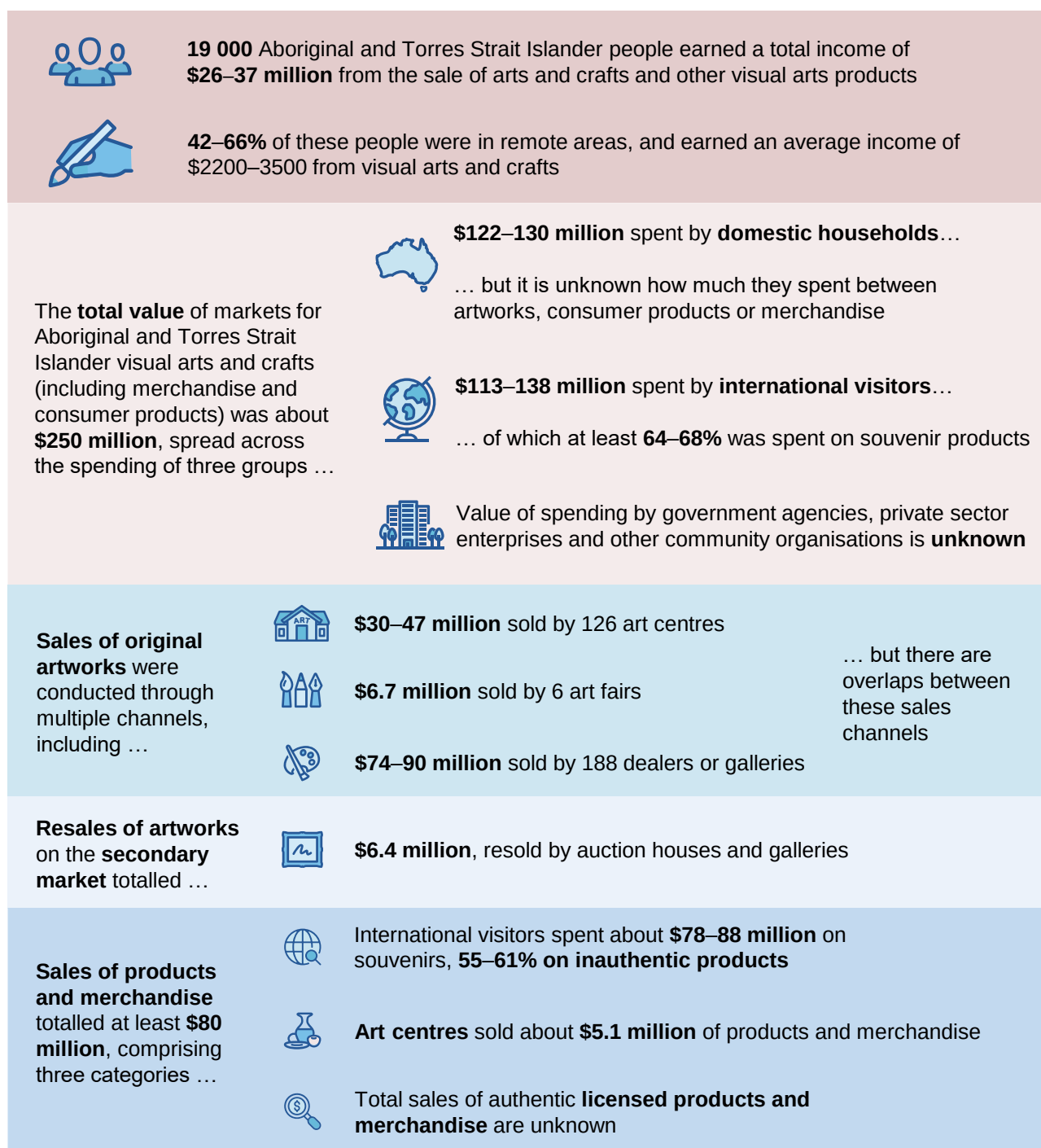
Figure 1 – Aboriginal and Torres Strait Islander arts and crafts supply chain



Visual arts and crafts make a substantial economic contribution to Aboriginal and Torres Strait Islander communities

The economic contribution of Aboriginal and Torres Strait Islander visual arts and crafts has grown considerably. Most artworks are produced by artists working in approximately 120 art centres, mainly in remote locations. Since 2012, sales of artworks through art centres have more than doubled to over \$30 million in 2019-20 (figure 2). Paintings account for about 70% of art centre sales, although there has been a noticeable increase in the sales of cultural artefacts and sculptures.

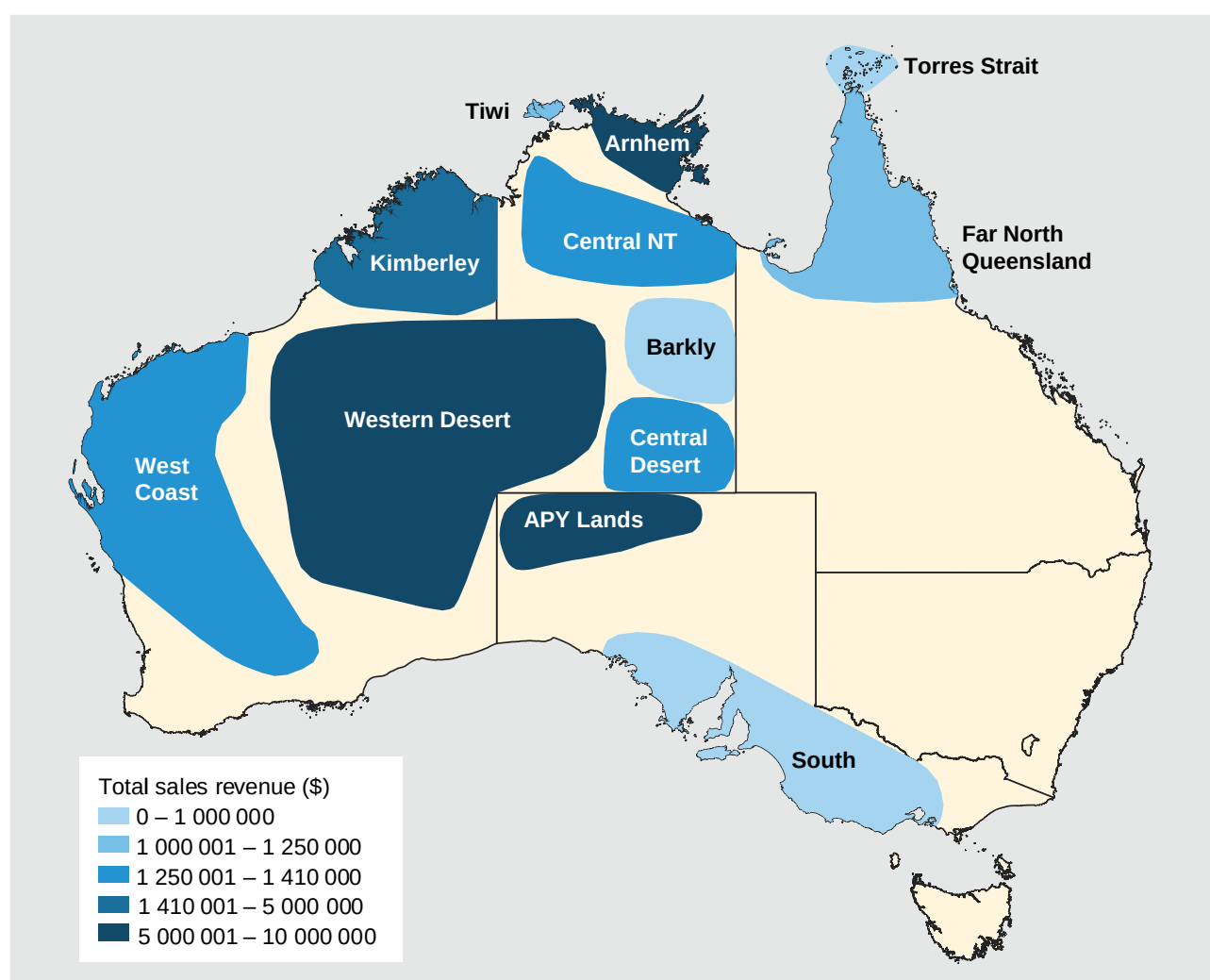
Figure 2 – Sales and income of key market segments in 2019-20^{a,b}



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.

There are significant differences in the scale of art production across different regions (figure 3). Most art centres are located in remote communities, where they are often one of the few (or sometimes, the only) organisations offering sustainable employment. In remote areas of Australia, up to 1 in 10 Aboriginal and Torres Strait Islander people earn income from the sale of arts and crafts — and many spend a significant amount of unpaid time in activities that promote cultural maintenance and cultural transmission, such as teaching artistic techniques to younger people.

Figure 3 – The scale of art sales varies greatly between art regions^{a,b,c}



a. Data refers to 2020–21. The geographic areas for the art regions depicted are intended to be illustrative, not definitive boundaries. **b.** While there are some art centres that operate in New South Wales, Victoria and south-east Queensland, the SAM database does not cover sales from these art centres. **c.** 'APY Lands' refer to the lands of the Anangu Pitjantjatjara Yankunytjatjara

Source: Commission estimates based on unpublished Desart data (Stories Art Money (SAM) database).

Sales of merchandise — including homewares, clothing and souvenirs sold by art centres and general retailers — have grown strongly, and account for at least 29% of overall sales. As the demand for merchandise has increased, there has been an associated increase in licensing agreements — where an artist agrees for their artwork or design to be mass-produced and sold by third parties. As a result of licensing, products designed by Aboriginal and Torres Strait Islander artists are being mass produced and sold by major retailers such as

Bunnings, as well as smaller ones. The average income from licensing agreements for Aboriginal and Torres Strait Islander artists increased by more than 50% between 2019 and 2021.

Overall, **sales of Aboriginal and Torres Strait Islander visual arts and crafts (including merchandise and consumer products bearing Aboriginal and Torres Strait Islander art and designs) reached about \$250 million in 2019–20**. Artists received about 10–15% of the total value of sales across all market segments. While some artists are well known and command high prices for their works, the income of most artists remains low — for artists who sold art through art centres in 2019–20, their average income was just over \$2700. The average income of independent artists was about \$6000. This reflects both the nature of the art market, where a sizeable share of the price of an artwork is paid as a commission to the gallery owner and/or the art centre, and the fact that many Aboriginal and Torres Strait Islander artists sell only a few artworks each year. Licensing agreements have increased in number and value; however, they still represent a relatively small share of overall sales.

While trade in Aboriginal and Torres Strait Islander visual arts and crafts has grown and diversified, there are some complex and longstanding issues affecting the sector. The prevalence of inauthentic art, limited legal protections and gaps in capacity across the sector impose economic costs and cultural harm and prevent the market from reaching its potential.

Inauthentic arts and crafts are pervasive and cause significant cultural and economic harm

Inauthentic arts and crafts have long been a feature of the market. Indeed, the prevalence of inauthentic arts and crafts, and the seriousness of the harms they cause, were the impetus for this study.

While views on what constitutes authentic art vary, the notion that some artwork is less authentic, real or genuine than other art is widely acknowledged. The Commission considers that Aboriginal and Torres Strait Islander authorship — that is, an Aboriginal and Torres Strait Islander person created or authored the work or product — is the most important determinant of whether or not Aboriginal and Torres Strait Islander visual arts and crafts are authentic. That said, many Aboriginal and Torres Strait Islander artists choose to enter into licensing agreements with third parties (for example, to have their art reproduced or used in mass-produced merchandise); products resulting from these arrangements are also considered to be authentic (box 1). Many participants in this study saw authorship by an Aboriginal and Torres Strait Islander person as a key factor in determining authenticity.

Box 1 – The Commission’s definition of authentic Aboriginal and Torres Strait Islander visual arts and crafts

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*.

How big an issue are inauthentic arts and crafts?

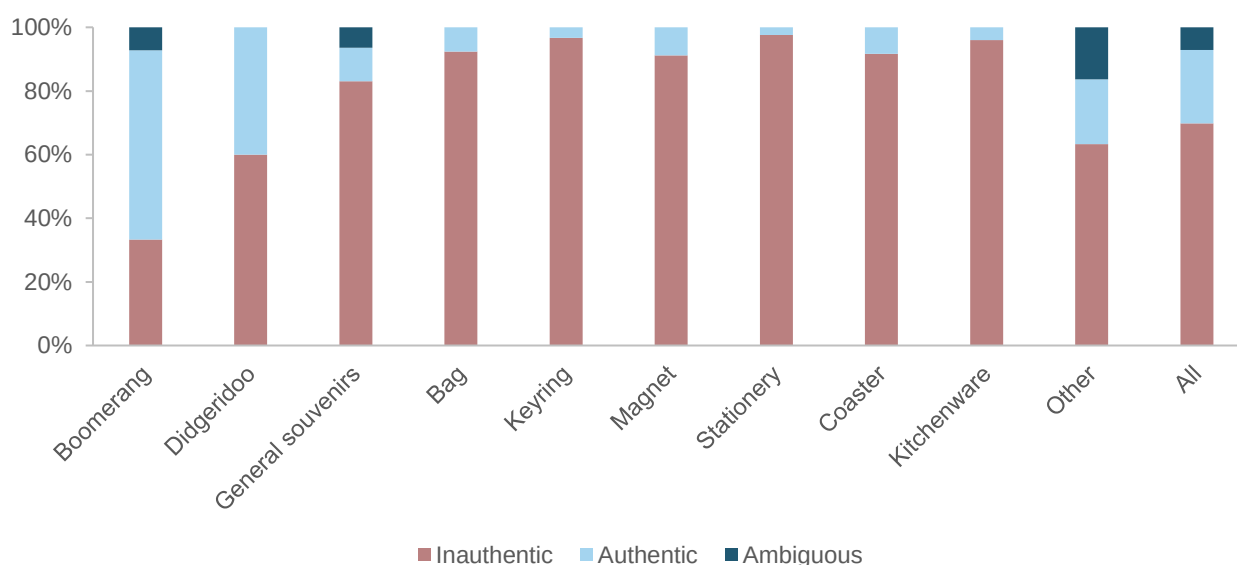
The Commission estimates that in 2019–20, spending on inauthentic Indigenous-style souvenir products totalled \$41–54 million, accounting for 55–61% of spending on Aboriginal and Torres Strait Islander souvenirs. The Commission’s analysis draws on a large number of data sources, and uses both standard and less traditional quantitative techniques such as web scraping.²

Three segments of the Aboriginal and Torres Strait Islander visual arts and crafts market are a particular focus for the draft report — the consumer products market (products that incorporate Aboriginal and Torres Strait Islander art and designs, such as woodcrafts, homewares, souvenirs and jewellery), the digital art marketplace, and the print-on-demand merchandise market.

Most Aboriginal and Torres Strait Islander consumer products (mainly souvenirs) are inauthentic

Across all the Aboriginal and Torres Strait Islander consumer products (predominantly souvenir-style products) in our sample³, the Commission estimates that two-thirds to three-quarters are inauthentic. Products that are intrinsically Aboriginal and Torres Strait Islander (such as boomerangs or didgeridoos) are far more likely to be authentic compared with other products (such as general souvenirs and gifts; keyrings, magnets and coasters) — 83% to 89% of the latter are considered inauthentic (figure 4).

Figure 4 – The share of product listings that are inauthentic, authentic or ambiguous^{a,b}



a. ‘General souvenirs’ contains products including bags, keyrings, magnets, stationery, homewares and kitchenwares, but not wooden crafts such as boomerangs and didgeridoos. ‘Other’ includes miscellaneous products such as wooden crafts, homewares, clothing, bottle coolers and face masks, among others. **b.** Ambiguous products contain labels that make contradictory or unclear claims about the involvement of Aboriginal and Torres Strait Islander artists in their design. Source: Commission estimates based on a sample of souvenir wholesalers selling authentic and inauthentic products.

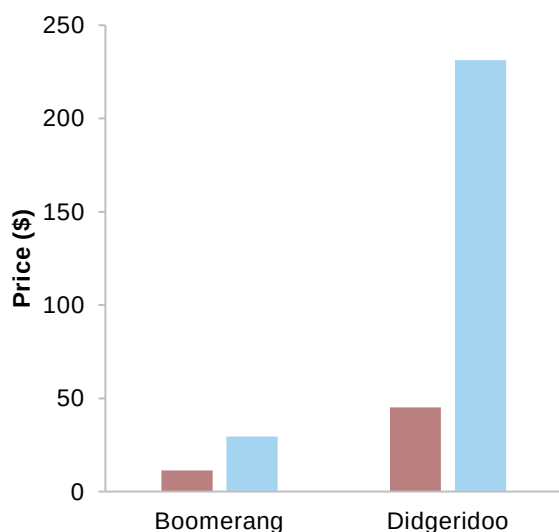
² Web scraping is a process where data is extracted from publicly available websites and placed into a format where it can be easily analysed.

³ A random sample of over 850 online product listings from a selection of souvenir wholesalers and retailers.

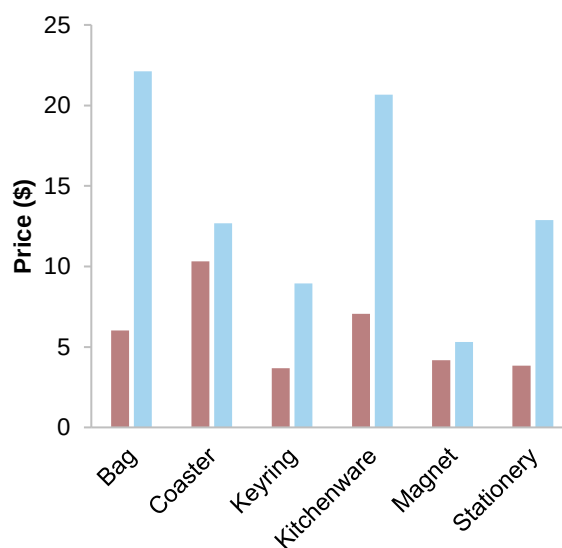
Across all products in the sample, authentic products were on average 1.8 times more expensive than an inauthentic product of the same type, although the price differential varies across products (figure 5). Whether a product is made in Australia or overseas is not a reliable way of ascertaining authenticity. Most consumer products — including most authentic products that are licensed by an Aboriginal and Torres Strait Islander artist — are manufactured overseas.

Figure 5 – Differences in the average prices of inauthentic and authentic products

a. Average prices of boomerangs and didgeridoos



b. Average prices of general souvenir products



■ Inauthentic ■ Authentic

Source: Commission analysis using web listing data from five wholesalers selling both authentic and inauthentic products, and one wholesaler exclusively selling authentic products.

The stock image market is saturated with inauthentic Indigenous-style art

Stock images — user-uploaded digital artworks and photographs that are licensed for general purposes (for a fee) — cover a vast array of topics and styles, including those that depict recognisable and popular Aboriginal and Torres Strait Islander styles and motifs.

The Commission's analysis suggests that inauthentic Aboriginal and Torres Strait Islander art is rife in online marketplaces. In examining a random sample of digital illustrations on a major stock image site, there was little evidence to indicate that *any* of the stock images in our sample could be considered authentic Aboriginal and Torres Strait Islander visual art.

- Over 80% of stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs are inauthentic, made by overseas creators without evidence of any licensing agreement with an Aboriginal and Torres Strait Islander person.
- Approximately one in six of the sampled stock images originated in Australia, but there is insufficient information to determine whether any were created by Aboriginal and Torres Strait Islander people.

Information provided on the site indicated that these works are often downloaded and used. Precisely who uses inauthentic stock images is not known, though the Commission has observed the use of such images on book covers and on the websites and marketing materials of various organisations. Many inauthentic stock images are used to sell products on merchandise marketplaces.

Inauthentic Aboriginal and Torres Strait Islander art is also prevalent in the print-on-demand merchandise market

Print-on-demand merchandise marketplaces are online sites where artists can sell merchandise containing their designs, without the need to individually manage logistics (including production, inventory, shipping and handling) and payment systems. Creators upload images of their works to the marketplace, which are then selected by consumers, who also decide which item to print the design onto. Designs are only printed onto products when an order is placed by a consumer.

The Commission analysed a random sample of listings from one of the largest and most prominent online print-on-demand merchandise marketplaces. About 60% of sampled listings appearing under the search terms 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art' were likely inauthentic. Various forms of inauthenticity were identified, including:

- copyright infringement of Aboriginal and Torres Strait Islander artists' works; approximately 15% of sampled product listings contained likely illegal reproductions that breached the copyright of Aboriginal and Torres Strait Islander artists
- inauthentic Indigenous-style designs and stock images authored by non-Indigenous people (over 35% of sampled listings).

What are the effects of inauthentic arts and crafts?

Many study participants spoke about the serious and wide-ranging negative effects of inauthentic arts and crafts, both for Aboriginal and Torres Strait Islander people and the broader Australian community. These negative effects include:

- personal and cultural harms — often in the form of personal hurt and emotional distress, and sometimes leading to a challenging of one's Aboriginal and Torres Strait Islander identity — from seeing culture misrepresented and disrespected in inauthentic products
- economic harm, as inauthentic products can dent consumer confidence in the visual arts and crafts markets and crowd out authentic merchandise, leading to lost opportunities and income for Aboriginal and Torres Strait Islander artists.

Fake art is an insult. I feel it's a big insult because Mapoon people ... were forbidden to practise their culture and to speak their language. It's something that's lost and something that, through art, we are trying to build up again and to regain, and fake art takes away from that. It disempowers us, because people see the fake art. 'Oh, this is what Indigenous culture is about'. It's not, and we need to stop it, because we want our culture to be out there, not this fake art.

Margaret Mara,
Submission to the
House of
Representatives
inquiry into *The
growing presence of
inauthentic Aboriginal
and Torres Strait
Islander 'style' art and
craft products and
merchandise for sale
across Australia*,
2018, sub. 102

Given the inherent challenges in quantifying intangible cultural harms, we have not estimated the costs associated with inauthentic visual arts and crafts. However, the significance of cultural harms has been recognised by Australian courts, which have awarded damages, including compensation specifically for cultural damage and hurt (box 2).

Box 2 – The significance of cultural harms has been recognised by Australian courts

In 1993, a group of Aboriginal and Torres Strait Islander artists took action against a carpet importer that had reproduced their works onto carpets without their agreement and sold them for a profit. The works reproduced depicted cultural clan images, and in some cases, these were altered by the manufacturer, which distorted the cultural message of the works.

The case, which has become known as the ‘Carpets case’, was the first time that the court considered and accepted cultural harm as a category of harm when assessing the amount of damages to be granted. In doing so, the court accepted that the traditional economic framing and assessment of harm was not appropriate in this case and that cultural harms were the more dominant and significant harm — harm that extended beyond the individual artist themselves to the community as a whole — which should be recognised and compensated for.

The court’s order for damages of \$188 640 were to the artists as a group, and specifically included compensation for cultural damage and hurt. At the time, this was the largest penalty awarded for copyright infringement against Australian artists, in a large part due to the magnitude of cultural harm quantified.

Why do inauthentic arts and crafts exist (and persist)?

A lack of consumer awareness coupled with limited legal barriers to the creation or sale of inauthentic Aboriginal and Torres Strait Islander visual arts and crafts enable the continued demand for these products.

For consumers, identifying inauthentic products can be difficult and some are unaware of — or indifferent to — their harms. A recent survey found most consumers do not think about authenticity when buying Aboriginal and Torres Strait Islander products, particularly low-cost products. Almost all the consumers surveyed who had purchased Aboriginal and Torres Strait Islander arts and crafts in the previous two years did not actively consider the authenticity of the product at the time of purchase — but nonetheless believed that they had purchased an authentic product.

Even when consumers understand and appreciate the harms of inauthentic arts and crafts, they still face difficulties distinguishing authentic products from inauthentic ones. Products may look similar and may be advertised using similar terms. Providing false or misleading information on product labels is illegal (and indeed, the Australian Competition and Consumer Commission (ACCC) has taken action against a wholesaler that incorrectly labelled their products as ‘Aboriginal made’). However, many of the descriptions used are not illegal but create the impression that a product is authentic, such as ‘Aboriginal designs’ or ‘handmade’.

Industry participants already use a range of approaches to help consumers identify and verify authentic Aboriginal and Torres Strait Islander visual arts and crafts. Governments also promote authentic arts and crafts via financial support to art centres and the Indigenous Art Code (box 6). Despite these efforts, it can still be difficult for consumers to distinguish authentic products from inauthentic ones, especially among lower-priced items.

For producers, there are few legal limits around the making or selling of inauthentic arts and crafts. The *Copyright Act 1968* (Cth) and the Australian Consumer Law (ACL) (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) are the main legal mechanisms that can be used to restrict the production and sale of inauthentic arts and crafts. However, these mechanisms apply in limited circumstances: copyright protection is only available for a period of time for artworks made by an identifiable author, and the ACL only applies where the marketing of visual arts and crafts inaccurately presents them as authentic. As a result, producing and selling inauthentic Indigenous-style visual arts and crafts is generally legal under Australian law.

Labelling *inauthentic* products would help consumers make better choices

A mandatory label on inauthentic products is a targeted and cost-effective policy response

Options to help consumers identify and distinguish authentic visual arts and crafts — whether via trade marks, product labels or education campaigns — have been championed, and in some cases implemented, over many years. This includes recent calls — including by participants to this study — for the government to establish a national authenticity labelling (or certification trade mark) scheme to distinguish and promote authentic art. There are also calls to ban the sale of inauthentic products outright.

Voluntary authenticity labelling is often regarded as a simple and low-cost way of encouraging consumers to purchase authentic products. This approach is used in countries such as Canada and New Zealand, and has also been introduced, and later abandoned, in Australia (box 3). The success of such schemes hinges on high take-up by producers (who must prove they comply with the scheme's requirements) and high recognition and awareness by consumers. Experience shows that neither of these features is easily achieved.

Box 3 – The boomerang tick logo: lessons from an unsuccessful certification trade mark scheme

The defunct National Indigenous Arts Advocacy Association (NIAAA) launched a certification trade mark scheme in 1999 using a boomerang tick logo. The scheme included two certification marks. One was a label of authenticity intended to identify authentic work created by an Aboriginal and Torres Strait Islander person. The second was a collaboration mark, used for products that involved assistance or input of a non-Indigenous person, or for products to be commercially used under a written agreement.

NIAAA Label of Authenticity Mark



To be a Certified Indigenous Creator under the scheme, an applicant had to be certified as an Indigenous person. This was defined as a person of Aboriginal and Torres Strait Islander descent, who identifies as an Aboriginal and Torres Strait Islander person and is accepted as such in an Indigenous community. Fees for Indigenous Creators were a \$30 application fee, with a \$20 annual renewal fee thereafter, plus the purchase of labels at 9 cents each.

Take up of the NIAAA scheme was low, with only about 160 creators using the marks. The limited adoption of the scheme was attributed

Box 3 – The boomerang tick logo: lessons from an unsuccessful certification trade mark scheme

in part to the difficulty of, and antipathy towards, proving Aboriginal and Torres Strait Islander status. It was reported that 75% of applicants failed to meet these requirements because they were too complex. In addition, art centres had limited need for the scheme as they already had processes for providing authenticity documentation. Broader criticisms of the scheme included that the works of artists not participating in the scheme might be perceived as inauthentic.

The scheme was expensive to administer and even with government support (in addition to fees paid by artists) did not have sufficient funding to promote the label. Government funding was eventually discontinued and the scheme ceased operating in 2003.

A mandatory labelling scheme for *inauthentic* products offers more promise. Such a scheme would apply to Aboriginal and Torres Strait Islander visual arts and crafts *not* authored by (or made under a licensing agreement with) an Aboriginal and Torres Strait Islander person, and would require that these products carry an inauthentic warning label before being sold in Australia. This approach would assist consumers in distinguishing between authentic and inauthentic products and has substantial advantages over a voluntary authenticity label.

- The mandatory nature of the scheme would result in higher uptake, which is critical to have a meaningful effect on consumer purchasing decisions and to improve consumer awareness of inauthentic art more generally.
- Compliance costs would predominantly fall on those producing inauthentic goods, rather than those producing authentic products.
- Failure to include a label where one should have been present would enable regulators to take action under the ACL.
- Consumers and other industry participants would be able to report concerns about compliance to assist enforcement.

A key advantage of a mandatory labelling scheme for inauthentic products over other labelling options is the very low compliance burden on Aboriginal and Torres Strait Islander artists — and on those producing goods under licence from an Aboriginal and Torres Strait Islander artist — as all of these products would be exempt from the labelling requirement. The effectiveness of a mandatory inauthenticity label will rely on enforcement; the Commission's analysis indicates that enforcement efforts will be best focussed on sales of mass-produced Aboriginal and Torres Strait Islander souvenirs and other consumer products, where the prevalence of inauthentic products is highest and the direct involvement of Aboriginal and Torres Strait Islander artists is relatively low.

Moreover, a mandatory inauthenticity label should not interfere with any branding or labelling approaches that producers choose to adopt in order to market and promote the authenticity of their work, such as individual or art centre branding, Indigenous Art Code certificates of authenticity, QR code labels, or even a potential future certification trade mark scheme.

A mandatory inauthenticity label also has some advantages over a prohibition on the sale of specified inauthentic products. For many years, a number of industry participants have been advocating for a ban on the sale of inauthentic Indigenous-style products in Australia through amendments to the ACL, arguing that a ban would be a relatively straightforward and effective way to mitigate the harm caused by inauthentic products. However, a ban could impose significant costs on Aboriginal and Torres Strait Islander artists if their products were inadvertently affected, and also could make it more likely that Aboriginal and Torres

Strait Islander artists would need to demonstrate their Indigeneity in order to avoid this outcome. Striking the right balance on product coverage would be difficult — taking a broad approach would capture more products but heightens the risk of errors (for example, authentic products incorrectly excluded from sale) that would be costly to resolve. On the other hand, a narrow ban focused only on the products easiest to identify as inauthentic would do less to reduce the cultural and economic harms caused by inauthentic products. A ban would also limit choice in the market, and consumers would arguably be better served by being able to make more informed choices. On balance, the Commission considers that a ban is unlikely to be the most appropriate response.

How would a mandatory label on inauthentic products work?

The proposed mandatory inauthenticity label could be implemented through an information standard under the ACL. A label would need to be applied to products that could reasonably be considered to be of Aboriginal and Torres Strait Islander origin but do not meet the authenticity criteria (box 1). The scheme could cover products offered for sale in Australia that include an expression or design (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product) that a reasonable person could consider to be a cultural expression, design or style of Aboriginal and Torres Strait Islander origin. This could potentially cover arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise containing Indigenous designs and expressions; and digital artworks and designs.

The Commission is seeking feedback on all aspects of the mandatory inauthenticity label proposal (table 1) to inform our recommendations for the final report.

Table 1 – Considerations for a mandatory labelling scheme for inauthentic products

Product Coverage	Suggested approach • The scheme should cover any product offered for sale in Australia that includes an expression or design (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product) that a reasonable person could consider as being an Indigenous Cultural Expression, or of Aboriginal and Torres Strait Islander origin or style. • It would potentially cover: arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise containing Aboriginal and Torres Strait Islander designs and expressions; and digital artworks and designs.	Limitations and questions to consider • The intent of the scheme is to provide broad coverage of Indigenous-style products. It would be insufficient to limit the coverage to a specific list of artefacts or designs, even though it would create some ambiguity at the margins about whether a product is subject to the standard. • One option to improve certainty could be a hybrid approach that also included a specific list of products subject to the standard. What are the pros and cons of different approaches to defining the coverage of the scheme? • There would also be gaps, including overseas transactions; non-commercial transactions and the use of inauthentic designs in publications or advertising. Can or should these be addressed?
Authenticity Criteria	Suggested approach • Authenticity in this context refers to authorship (creation) by an Aboriginal and Torres Strait Islander person (and would include products produced by third parties under a licensing agreement with the Aboriginal and Torres Strait Islander author/creator and collaborations with non-Indigenous people). • The Indigeneity criteria should be the three-part test (descent, self-identification and acceptance) already in use.	Limitations and questions to consider • While cultural permissions are important, this issue is outside the suggested scope of this initiative. • Similarly, this initiative would not address ethical concerns about the commercial arrangements between Aboriginal and Torres Strait Islander artists and other market participants. • Is this suggested approach to authenticity appropriate or are there other alternatives?
Design and Implementation	Suggested approach • Suppliers of designated products that do not meet the authenticity criteria must label those products indicating that the product has not been produced by or under licence from an Aboriginal and Torres Strait Islander person. • Labelling should be clear and obvious to consumers — attached to products where practicable or prominently included in product signage or descriptions. • To facilitate implementation of the labelling standard the following will likely be required: – awareness measures to inform suppliers – a transition period for suppliers – complementary awareness measures for consumers – resourcing for monitoring and enforcing compliance.	Limitations and questions to consider • How prescriptive should labelling requirements be? That is, should there be specific requirements on label contents or is a more flexible approach sufficient? • What awareness measures and transition arrangements would be most beneficial? • What education and awareness-raising measures would best support consumer decision making? Should specific measures be tailored to international tourists? • What resources are required for administration and enforcing compliance? What evidence of compliance would suppliers of unlabelled products need to verify Aboriginal and Torres Strait Islander authorship? Are the existing enforcement tools for information standards sufficient?

Indigenous Cultural and Intellectual Property is often used in visual arts and crafts without the permission of traditional custodians

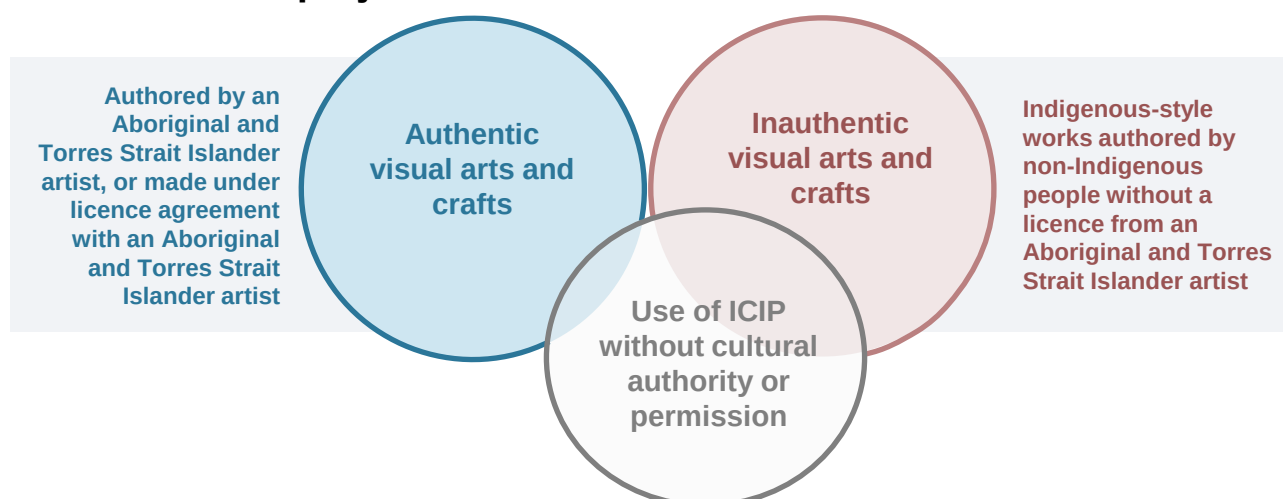
Aboriginal and Torres Strait Islander visual arts and crafts — both authentic and inauthentic — often contain traditional cultural expressions, which are forms of Indigenous Cultural and Intellectual Property (ICIP). Sometimes this ICIP is used without the permission (or authorisation) of traditional custodians, out of context, and without economic benefits flowing back to Aboriginal and Torres Strait Islander people and communities. This commonly occurs when inauthentic visual arts and crafts are produced (figure 6).

[T]he impact of the misappropriation of art in a meaningless way that does not represent lore and culture is the dismantling of Indigenous cultural heritage. Indigenous Australians have ... their own rules about their people and their country. Art identifies who you are and how you fit into Indigenous society. Misappropriation of art dismantles the cultural structure of Indigenous communities and causes damage to our identity.

Dr B Marika AO,
quoted in *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq)* (No 3) [2019] FCA 996, para. 53

There can also be instances where authentic art containing ICIP is produced without permission, for example where an Aboriginal and Torres Strait Islander artist may not have the required authorisations. Customary laws impose rights, obligations and responsibilities on Aboriginal and Torres Strait Islander people in respect of their culture. For instance, certain knowledge may need to be kept secret or is only able to be used by certain members of a group. Similarly, Aboriginal and Torres Strait Islander artists are authorised to paint only certain stories. While there is room for individual creativity, certain subjects must be portrayed in particular ways. Unrestricted use of ICIP in visual arts and crafts without relevant permissions undermines customary laws.

Figure 6 – The interplay between authenticity, inauthenticity and Indigenous Cultural and Intellectual Property



ICIP is fundamental to Aboriginal and Torres Strait Islander people and a unique national asset

ICIP includes all aspects of Indigenous heritage and culture and is integral to the identities of Aboriginal and Torres Strait Islander people. It enables Aboriginal and Torres Strait Islander communities to transmit history, customs and cultures to future generations.

Aboriginal and Torres Strait Islander ICIP is unique to Australia and part of our national identity. This is reflected in how Australia identifies itself on the world stage, including the significant role that Aboriginal and Torres Strait Islander cultures play in Australia's tourism industry. Australian legal and cultural institutions can help promote and protect the integrity of Aboriginal and Torres Strait Islander ICIP, in a similar way to how other countries protect and promote their First Nations' ICIP.

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.

Desmond Taylor
from Martumili
Artists, House of
Representatives
inquiry, public
hearing, 2018

ICIP is commonly used and misused in visual arts and crafts

Many study participants expressed deep concern about the unauthorised and inappropriate use of ICIP in visual arts and crafts because it disrespects and cheapens Aboriginal and Torres Strait Islander cultures and can bring shame on traditional custodians and their families.

The effects of unauthorised use of ICIP extend well beyond those directly involved; by misrepresenting traditional stories and customs, inappropriate use of ICIP can damage culture and challenge identity. It also presents incorrect interpretations of culture to non-Indigenous people.

Some unauthorised use of ICIP in visual arts and crafts occurs because artists are unaware of the traditional laws and customs that govern their use, and of the importance of seeking cultural permissions. In some instances, it may be difficult for artists or manufacturers to identify the Aboriginal and Torres Strait Islander person or community with the authority to grant cultural permissions. A range of protocols and other instruments have been developed to guide the use of ICIP in commercial settings and support good practice. In a legal context, however, there are few barriers to using ICIP without authorisation and in inappropriate and offensive ways.

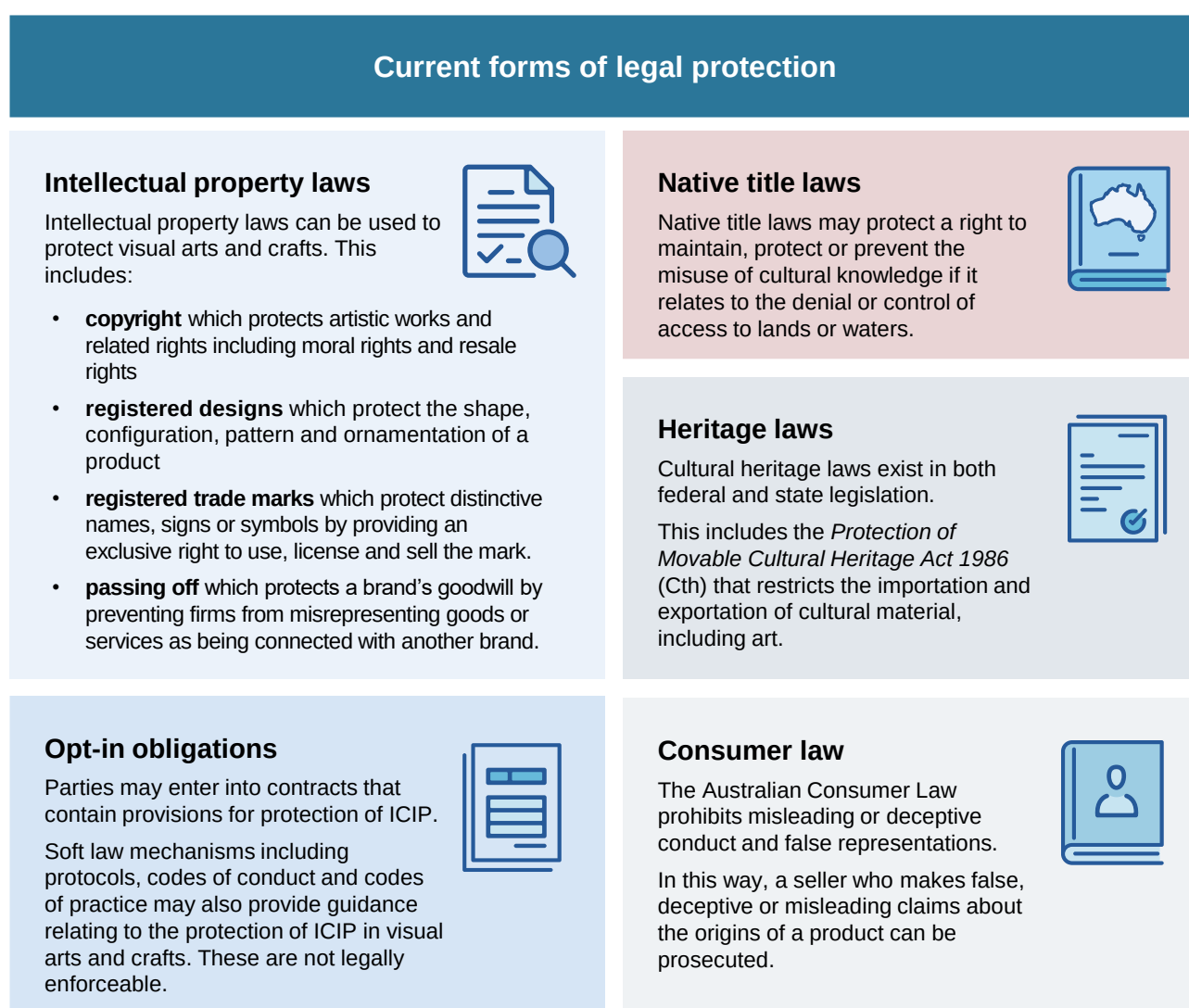
Legal recognition and protection of ICIP is patchy and incidental

No existing legal framework directly governs the circumstances under which ICIP can and cannot be used in the production of visual arts and crafts. A number of laws provide *some* protections in relation to whether and how Aboriginal and Torres Strait Islander ICIP is used (figure 7). However, because existing laws are not

designed for the purpose of protecting ICIP, protection is only available incidentally, where the misappropriation of ICIP coincides with other causes of action. As such, existing laws provide only limited and piecemeal coverage.

In practice, this means ICIP — including ancient stories, sacred symbols, and traditional techniques and styles — can be readily used in visual arts and crafts without the permission or authorisation of traditional owners. Many examples of ICIP being used without permission in inauthentic and authentic visual arts and crafts were raised with the Commission during the course of this study.

Figure 7 – Existing legal instruments provide varying degrees of protection for ICIP in visual arts and crafts



Sources: Australian Copyright Council (2019); *Competition and Consumer Act 2010* (Cth), Schedule 2; *Copyright Act 1968* (Cth); *Designs Act 2003* (Cth); IP Australia (2019a, 2019b, 2020c); *Native Title Act 1993* (Cth); *Protection of Movable Cultural Heritage Act 1986* (Cth); Sentina et al. (2017); Stratton et al. (2019); *Trade Marks Act 1995* (Cth).

There was widespread agreement among participants in this study that more should be done to shore up legal protections for ICIP used in visual arts and crafts. Many people consider that stronger ICIP protection is fundamental to protecting and preserving Aboriginal and Torres Strait Islander cultures, and enabling the transmission of laws, history and culture to future generations. Such protection would reduce the scope for

ICIP to be misrepresented and misinterpreted in visual arts and crafts, thereby protecting its integrity. It may also strengthen the economic opportunities available to Aboriginal and Torres Strait Islander artists and communities, by enabling them to increase the benefits derived from the use of ICIP in visual arts and crafts.

Amending the patchwork of existing laws to strengthen protection of ICIP used in visual arts and crafts is feasible (to some extent), but could lead to inherent tensions in the policy objectives of the legislation. For example, one of the overarching objectives of Australia's intellectual property system is to recognise and encourage the creation of new and valuable ideas. In contrast, one of the key purposes of introducing stronger legal protections for ICIP in visual arts and crafts is the preservation, maintenance and transmission of culture. Similarly, while the focus of the ACL is on protecting the interests of consumers, ICIP provisions would aim to protect the interests of those who own that ICIP, who are potential producers.

We cannot lose sight of the reason these matters have been given attention: the preservation of Australian First Nations culture. The acknowledgment of First Nations culture, the rights of First Nations people to their own cultural expression, the rights of First Nations peoples to make an income from appropriate cultural expression, and the right for First Nations peoples to protect their culture and communities from exploitation and misuse is imperative to the cultural, economic and social health and wellbeing of Aboriginal and Torres Strait Islander people, and for the preservation of Australian Indigenous culture for generations to come.

Aboriginal Arts
Centre Hub of
Western Australia,
sub. 20, pp. 12–13

In the Commission's view (and in line with the views of participants, and the recommendations of a number of past reviews), the preferred way to improve recognition and protection of ICIP in visual arts and crafts is via the development and introduction of dedicated legislation. Relative to amendments, this approach has the potential to provide stronger, more fit-for-purpose protections for the ICIP in visual arts and crafts, and greater clarity for the broader community. It would also be consistent with Australia's commitment to meeting its international obligations to recognise and protect ICIP.

Dedicated cultural rights legislation would give traditional owners control over their cultural assets

In this draft report, the Commission presents a model for dedicated legislation to recognise Aboriginal and Torres Strait Islander peoples' cultural rights in relation to visual arts and crafts. We are seeking feedback, including on the merits of such legislation and what it should look like, to help inform the recommendations in the final report.

Given the scope of this study, the emphasis here is on protecting the aspects of ICIP used in visual arts and crafts — namely, cultural assets. This is not to suggest that other aspects of ICIP such as scientific and ecological knowledge are unimportant or could not benefit from protective legislation. But various attempts to create a single, comprehensive set of laws that encompass all aspects of ICIP have shown how difficult such a task is. To achieve a coordinated approach to protecting and recognising ICIP, the Australian Government

should develop and publish a national ICIP strategy, which would cover all aspects of ICIP and provide an overarching framework and roadmap in relation to ICIP. Such a strategy could foster a shared understanding of policy objectives relating to ICIP and provide clarity and transparency about what governments will do to meet these policy objectives — including the role of cultural rights legislation.

A possible model for cultural rights legislation

The Commission's proposed model for dedicated cultural rights legislation would formally recognise the interests of Aboriginal and Torres Strait Islander communities or groups (including, for example, a mob or clan, language group, outstation or town) in their traditional cultural assets, such as ancient stories, sacred symbols and unique motifs, as they are expressed in visual arts and crafts. It would give traditional owners greater control over these assets by establishing a legal framework that sets out rights and obligations in relation to the use of cultural assets in visual arts and crafts. The legislation would give traditional owners the right to:

- control their cultural assets
- choose whether to authorise the use of their cultural assets
- place conditions on the use of their cultural assets (including payment)
- protect their cultural assets from misappropriation, including by taking legal action.

As proposed, cultural rights would accrue automatically, without the need for registration — similar to the way the existing copyright system operates. These rights would also be inalienable, meaning that they can only belong to traditional owners and cannot be sold or transferred to another party.

In effect, traditional owners would be able to take legal action in cases where certain cultural assets are used in visual arts and crafts without authorisation (box 4) unless an exception applies. Although the legislation would not prohibit the use of cultural assets without authorisation per se, it would enable traditional owners to take legal action where such behaviour occurs. This would be expected to create stronger disincentives against, and hence lower the prevalence of, cultural misappropriation in visual arts and crafts — though it would not directly address instances where 'generic' Aboriginal and Torres Strait Islander designs are used in consumer products (box 4).

While the proposed new legislation would enable traditional owners to protect cultural assets in cases where they are used without authorisation, it should not limit artistic innovation and the continuous development of Aboriginal and Torres Strait Islander visual arts and crafts where appropriate permissions are given. The new legal framework would encourage and support collaborations consistent with the principles of free, prior and informed consent. It would do so by identifying the boundaries around the use of Aboriginal and Torres Strait Islander cultural assets in visual arts and crafts and giving artists and designers greater clarity around rights and responsibilities.

As with existing copyright protections, the new legislation would need to balance the interests of traditional owners and of others 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 culture from evolving over time. The legislative regime should include checks and balances that consider the needs of Aboriginal and Torres Strait Islander artists and communities as well as non-Indigenous artists, researchers, students, reviewers and others. Therefore, the legislation would need to include a similar exceptions regime to that included in copyright legislation.

The legislation could also include an exception for customary and traditional uses, to prevent a situation in which the laws preclude Aboriginal and Torres Strait Islander people from practising their own culture in the way they choose. Further, the legislation could include an exception for Aboriginal and Torres Strait Islander people who make use of cultural assets as part of reconnecting with their culture. This is in recognition of the

fact that over many decades, European occupation has disrupted the connection to culture and Country for many Aboriginal and Torres Strait Islander people. This includes whole communities, groups and families being displaced from or dispossessed of their lands and prohibited from practising their culture.

Box 4 – How might cultural rights apply in practice?

Authorised use

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in her artwork. The motif can be traced back to a traditional owner and the artist has been granted permissions to use the motif by the traditional owner.

Outcome: The artist has used the cultural asset to create a cultural expression in a manner that is consistent with the cultural rights of the traditional owner.

Unauthorised use

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in his artwork. The motif can be traced back to a traditional owner, but the artist does not have permissions to use the motif from the traditional owner.

Outcome: By using the cultural asset to create a cultural expression without authorisation from the traditional owner, the artist may have infringed the traditional owner's cultural rights.

Use exceeds scope of authorisation

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in her artwork. The motif can be traced back to a traditional owner, from whom the artist had previously been granted permissions to use the motif — but those permissions do not cover the creation of this particular artwork.

Outcome: The artist has exceeded the scope of what she was authorised to do by the traditional owner. In doing so, the artist may have infringed the traditional owner's cultural rights.

Multiple owners

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in his artwork. The motif can be traced back to multiple Aboriginal clans, each of whom can show that they are a traditional owner of the motif. One of those traditional owners has given the artist permission to use the motif in his artwork.

Outcome: The artist's use of the motif was authorised. As such, the artist is not liable for infringing the cultural rights of the traditional owners.

No identifiable traditional owner

Scenario: An artist uses a motif in her artwork that appears Aboriginal and Torres Strait Islander in its style, 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).

Achieving fair and ethical market interactions remains a challenge

The ongoing strength of Aboriginal and Torres Strait Islander visual arts and crafts markets hinges on the ethical conduct of market participants. Ethical conduct comprises respectful interactions between artists and dealers, where artists receive fair payment and give free, prior and informed consent to all transactions, including direct sales and licensing.

Many Aboriginal and Torres Strait Islander artists navigate the complexity of the market successfully and create sustainable sources of income. However, there are instances of market operators exploiting the vulnerability of some artists by underpaying them or reproducing their works without permission (box 5).

Box 5 – Artists' experiences of unethical market interactions

Artists and art organisations have shared with the Commission examples of different experiences of unethical dealings. Surveys indicate that as many as half of the independent artists operating in Alice Springs believed they had been ripped off:

Unscrupulous dealers hold up a signed piece of paper to justify their actions in purchasing or reproducing the work of vulnerable artists on terms that grossly undervalue the work and permit conduct which doesn't meet even minimum standards of ethical dealing. Artists often do not understand the document and have no access to legal advice before signing. Usually, the artist has no copy of whatever they have signed and is effectively deprived of any legal redress at the first hurdle due to lack of evidence.

Alternatively, there is no written document just assertions that an artist 'agreed' and accepted 'payment' of some sort and so has entered a binding legal agreement. Aboriginal artists who are economically and socially vulnerable — true of many artists living in remote Australia — are not able to disprove the legal claims made by those exploiting them. Again, the onus is on the artist to seek a remedy with the practical result that such behaviour is unchecked. (Desart, sub. 4, p. 13)

[Unethical dealers] know the tricks to use on Anangu [people]; they use our desperation against us.

Nyurapya Kaika Burton, quoted in APYACC, sub. 17, p. 14

The most serious experiences of unethical treatment shared with the Commission relate to what is sometimes referred to as 'carpetbagging': where private art dealers in remote Australia exploit the difficult circumstances faced by artists to obtain artworks at a cost well below market value, or coerce artists to work in order to fulfill obligations to kin.

Over the past two years, artists at Kaltjiti Arts have been pressured and tricked to go into Alice Springs to make paintings. They are promised new motor cars, troopies, sometimes two cars each. They are asked to paint blanket sized paintings and they are pushed to work very long days for the carpet baggers. They are pushed to continue to work when they are tired. Sometimes there are non Indigenous people making paintings with the artists. In our Art

Box 5 – Artists’ experiences of unethical market interactions

Centre we have all the time we need to paint because we are painting at home, we are never rushed or pressured.

The artists come back from the carpet baggers upset, humiliated, and tired, they never get the deal they were promised. They return from Alice Springs angry at the carpet baggers, sometimes they say they will never paint again. (Ingrid Treacle, APYACC, sub. 17, p. 26)

Concerns around unethical behaviour toward Aboriginal and Torres Strait Islander artists have been raised for many years. In some cases, this conduct may be illegal yet often goes unreported to regulators or the justice system. 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. Further, some types of conduct that many would consider to be unethical (such as unfair terms in contracts) may not be illegal, which makes it even harder to pursue remedies.

Improving industry standards

A number of industry-led initiatives have seen an improvement in industry standards; evidence provided to the Commission indicates that unethical dealings (or carpetbagging) have become less prevalent over the past ten years. However, in some places, unscrupulous practices persist.

Governments fund various support services for artists, such as those provided by Arts Law Centre, the Copyright Agency and the Indigenous Art Code (box 6) to ensure instances of unethical conduct are reported and addressed, and artists are empowered to pursue their rights and maximise the economic benefits they derive from their artworks.

Box 6 – Indigenous Art Code

The voluntary Indigenous Art Code came into effect in 2010 and is administered by Indigenous Art Code Limited (IartC). It has over 550 members, comprising dealer members, Aboriginal and Torres Strait Islander artist members and code supporters. Dealer members and code supporters are required to pay annual membership fees of \$170 (there is no fee for Aboriginal and Torres Strait Islander artist members), but it is primarily funded by government grants.

The main provisions of the Code cover general standards of conduct for dealer members, such as acting honestly and not engaging in misleading or deceptive conduct, and standards for dealing with artists, covering matters such as the content of agreements and the need to provide clear information and obtain informed consent.

A notable feature of the Indigenous Art Code is the requirement to issue Code Certificates for artworks (valued at more than \$250), which provide information about the artist and dealer member.

The Indigenous Art Code is voluntary, and it operates alongside other industry initiatives to support ethical dealings in the market. Some participants have called for the Australian Government to prescribe a mandatory or voluntary code of conduct for the industry, so that the ACCC is able to enforce higher industry standards.

A mandatory code is likely to be a blunt response to a complex and often localised problem. It would impose administrative burdens on artists and other industry participants, but would not address the systemic factors that give rise to unethical conduct. Further, although a prescribed code would provide the ACCC with stronger investigation and enforcement powers, these are often last-resort powers under the enforcement of existing codes and the ACCC is only able to pursue a small subset of the issues presented to it.

But several changes to the Indigenous Art Code would enable it to influence conduct in the industry more effectively, including a process of independent review being made available to artists and dealers involved in disputes under the Code, with de-identified outcomes of dispute resolution processes published to strengthen transparency.

The Corporation administering the Code operates with minimal staff (just over two full-time-equivalent employees) and a small budget, which severely limits its ability to support artists, promote membership of the code, raise consumer awareness of what the code stands for, and to enforce it effectively. Greater funding could come from industry participants, through a modest increase in fees paid by dealer members, and additional support from the Australian Government. The Australian Government announced plans to evaluate the Code. A modest increase to its funding, as well as amendments to some of its processes, should be considered as part of the evaluation.

Capacity in the sector is under strain

Some art centres are struggling to fulfil their cultural and social roles

While the Aboriginal and Torres Strait Islander visual arts and crafts sector is much broader than art centres, these community-controlled organisations are central to cultural and community life.

There are differences in how art centres across Australia operate, reflecting the priorities and needs of each region and the artists they support. In some remote communities, art centres are the only successful business, offering employment opportunities to the local community. Beyond their economic contribution, art centres fulfil many roles in their communities, including supporting families and culture (via provision of youth services, cultural maintenance activities and local transport, for example). They work together with providers of other services, such as aged care, early childhood and health, to respond to community needs.

Art centres have been operating successfully for many decades with modest levels of government support. The Australian Government provides the bulk of targeted funding to the sector through the *Indigenous Visual Arts Industry Support* (IVAIS) and the *Aboriginal and Torres Strait Islander Arts* programs. Approximately \$24.5 million was distributed via these programs in 2020-21.

Many participants reported that some art centres are facing serious financial challenges. Art centres receive operational funding for activities that *directly* relate to producing art, but not for their other social, cultural and community roles, or for infrastructure projects and capital improvements. This leaves art centres reliant on a patchwork of government grants, which can be burdensome to identify and apply for, highly competitive and unpredictable (a situation described by a sector participant as a 'vortex of applications'). Some artists and art organisations face additional barriers in applying for grant funding, such as having limited English literacy skills, internet and phone network issues, and limited access to services to assist with applications.

Moreover, with total IVAIS funding plateauing in real terms over the past five years while the number of art centres being funded has increased, average funding to art centres has declined from \$243 000 to \$227 500 from 2015-16 to 2020-21. Some art centres may be forced to reduce or discontinue essential social and community services.

Some of this funding pressure has been relieved through the National Indigenous Visual Arts (NIVA) Action Plan (discussed below). However, this commitment is time limited.

Workforce and skills issues persist

Most art centres struggle to recruit suitably qualified Aboriginal and Torres Strait Islander art centre managers and other art workers from their local community. While local people have strengths in understanding the cultural and community expectations, there are other skills and qualifications that can be difficult to find among workers in communities, such as experience managing an organisation and relevant formal qualifications.

Many participants expressed frustration at the scant 'pipeline' of Aboriginal and Torres Strait Islander art centre managers and art workers, and considered that this has been neglected by industry and governments over many years.

Why are there still so few Aboriginal people in leadership and senior management roles in the art centre system? Almost 50 years down the track, everyone is still saying there should be indigenous art centre managers but where is the progress? If there are barriers to this skill transfer, those barriers should be identified, along with the immediate practical steps to begin removing the barriers. Removing the barriers will probably be a long-term process but it needs to transparently begin. This skill building process should be publicly tracked.

Aboriginal Art Association of Australia,
Submission to the Consultation Paper of *Growing the Indigenous Visual Arts Industry*, 2020, sub. 1, p. 13

Reliance on non-Indigenous staff residing outside of local areas can create issues for art centres — for example, high staff turnover leads to 'negative impacts including loss of trust and confidence in changing personnel, and loss of relationships from which the road to recovery is long' (SA Government, sub. 21, p. 16). High turnover can also hamper the ability of art centres to develop long-term projects or invest in the development of artists and artistic practices.

Gaps in training and professional development opportunities and a lack of career pathways for arts and crafts industry employment limit growth in the Aboriginal and Torres Strait Islander arts workforce. Resource constraints facing art centres and other industry organisations are partly responsible — for example, over-worked art centre managers are left with little time to devote to training, or to support and mentor local art workers to pursue a management position. Moreover, many artists and art workers learn valuable skills and practices from Elders, but this learning is often not formally recognised or accredited, limiting access to positions that may lead to senior management and leadership roles. For independent artists, there are only a limited number of targeted training and professional support options available.

More generally, existing training courses may not be well aligned with the needs of Aboriginal and Torres Strait Islander arts workforce:

- relevant Vocational Education and Training (VET) courses are predominantly focussed on art production, with limited time spent on the business and technology skills required for art workers and artists operating their own businesses
- some art centres and art organisations find it difficult to access relevant governance training and support.

The Morrison Government released its *National Roadmap for Indigenous Skills, Jobs and Wealth Creation* in December 2021. The Roadmap contains activities that are highly relevant for strengthening capacity in the visual arts and crafts sector, such as mentoring, showcasing successful role models, culturally safe wraparound support to keep Aboriginal and Torres Strait Islander people in education and employment, and partnerships between industry, schools and higher education to deliver a pipeline of talent. However, the visual arts and crafts sector was not identified as a focus area.

Strengthening artists and their communities

Funding arrangements should enable a strong and sustainable sector

The Australian Government has responded to some of the challenges of the sector through the NIVA Action Plan 2021–25, which includes an additional \$25 million in funding. The Action Plan includes commitments to:

- fund additional employment opportunities in up to eight art centres in regional and remote locations, and up to 20 infrastructure upgrade projects at art centres each year
- create stronger markets and professional opportunities for Aboriginal and Torres Strait Islander artists who do not have access to a service organisation
- improve internet connection and access to digital infrastructure for Aboriginal and Torres Strait Islander art centres
- provide more training and professional development for art centre managers, board members, Aboriginal and Torres Strait Islander arts workers and artists who are seeking independent business opportunities.

This additional funding appears to be directed at some of the issues and gaps raised by participants in this study. However, the funding commitment is only for five years at this stage.

To inform funding arrangements beyond 2025 — the objectives, quantum and recipients — an independent evaluation of IVAIS, the NIVA Action Plan and relevant Australia Council programs should be conducted. This evaluation should be undertaken in partnership with Aboriginal and Torres Strait Islander representatives of the sector, and explicitly consider art centre artists and independent artists, as well as the pipeline of new and emerging artists and art organisations.

Funding decisions should be informed by Aboriginal and Torres Strait Islander voices

Partnerships and shared decision-making between communities and the Australian Government are relatively rare in the Aboriginal and Torres Strait Islander visual arts and crafts sector. Some jurisdictional art funding agencies appoint peer panels or advisory groups to help inform their decision-making, but there is limited transparency about the way that these groups affect funding objectives and other policy decisions.

Under the National Agreement on Closing the Gap, all governments committed to '[build and strengthen] structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments to accelerate policy and place-based progress against Closing the Gap.' While the visual arts and crafts sector is not identified as a priority policy area in the National Agreement, the principles of the Agreement apply. 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 determine what objectives and activities are prioritised in funding decisions. Such a partnership will help ensure funding is directed towards the outcomes and objectives that matter most to communities, rather than being exclusively directed by government.

A potential (but not the only) model could be to establish a national peak body, as has been created in other priority policy areas under the National Agreement on Closing the Gap, including in the legal, health, housing, and languages space. The design of such a body would need to be led by Aboriginal and Torres Strait Islander people, potentially across the arts sector. The Australia Council is currently working and consulting with sector participants on the development of a National Indigenous Arts and Cultural Authority, with a National Summit due to be held later in 2022. The Commission is seeking views on this and other approaches to fostering a shared decision-making partnership between Australian governments and the Aboriginal and Torres Strait Islander visual arts and crafts sector.

Summary of the Commission's draft recommendations

Current problem	Proposed response	Expected benefits
Inauthentic arts and crafts are pervasive and cause significant cultural and economic harm.	Mandatory labelling of products that are not made by an Aboriginal and Torres Strait Islander artist, or under licence from an Aboriginal and Torres Strait Islander artist.	Consumers would have accurate information about the inauthenticity of products — supporting demand for authentic goods — while imposing minimal costs on Aboriginal and Torres Strait Islander artists.
Indigenous Cultural and Intellectual Property (ICIP) is commonly misappropriated in the production of visual arts and crafts — undermining customary laws and traditions and damaging culture.	Introduce new legislation that would enable traditional owners to take legal action when certain forms of ICIP that belong to their community are used in visual arts and crafts without authorisation.	Traditional owners would be able to control the use of their cultural assets in visual arts and crafts. The new legal framework would clarify the rights and responsibilities of traditional owners and those seeking to use ICIP in visual arts and crafts, enabling further collaboration and artistic innovation.
Some Aboriginal and Torres Strait Islander artists are not treated fairly in the market.	Bolster the Indigenous Art Code by creating an external dispute resolution capacity. Governments should modestly increase funding to the Indigenous Art Code, subject to evaluation of the Code's effectiveness.	The Indigenous Art Code would expand its ability to promote ethical dealings in the market and support artists to enforce their rights.
Some art centres are struggling to source funding to fulfil key roles in their communities, with average real funding from primary sources falling in recent years.	Governments — in partnership with Aboriginal and Torres Strait Islander people — should evaluate the effectiveness of expenditure directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector.	An independent evaluation would establish appropriate funding for the sector, including art centres and independent artists, and enable governments to deliver funding that aligns with community priorities.
Decisions on funding priorities — including responding to current and future workforce needs — do not adequately take into account the priorities of Aboriginal and Torres Strait Islander people and communities.	The Australian Government should establish a formal shared decision-making partnership with Aboriginal and Torres Strait Islander artists and organisations.	Shared decision making would help communities and governments to direct funding toward pressing priorities and to identify strategic initiatives that support the sustainability of the sector.

Draft findings, recommendations and information requests

Aboriginal and Torres Strait Islander arts and crafts are a cornerstone of culture



Draft Finding 2.1

Aboriginal and Torres Strait Islander arts and crafts generate broad cultural and economic benefits

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.

Visual arts and crafts markets are substantial, diverse and growing



Draft Finding 3.1

The total value of annual spending on Aboriginal and Torres Strait Islander visual arts and crafts — including artworks and consumer products — is about \$250 million

In 2019-20, the total value of spending on (authentic and inauthentic) Aboriginal and Torres Strait Islander visual arts and crafts was about \$250 million. This includes sales of original art made through art centres, commercial galleries, auction houses and other retailers, as well as consumer products such as souvenirs and homewares. Some of the spending on these consumer products was on inauthentic arts and crafts — about 55–61% of spending on souvenirs was on inauthentic Indigenous-style products, purchased predominantly by international visitors.



Draft Finding 3.2

Visual arts and crafts sales contribute to the economic wellbeing of Aboriginal and Torres Strait Islander artists

For many Aboriginal and Torres Strait Islander artists across Australia, selling their arts and crafts contributes to their economic wellbeing. In remote areas, arts and crafts activities provide economic opportunities for artists, through artwork sales and the teaching of art and culture. Artists in regional and metropolitan areas also benefit economically from the sale of their arts and crafts, although they are more likely to have access to a wider range of income sources.



Draft Finding 3.3

Art centres support most of the production and sales of art in remote areas

The Commission estimates that sales of artworks produced by art centre artists totalled between \$30–47 million in the 2019-20 financial year, from about 5800–7700 artists who sold at least one artwork. Total sales by art centres have more than doubled since 2012, but growth has been concentrated mostly in Northern Territory art centres. The scale of production at art centres varies substantially, with the largest scale operations taking place in the Western Desert, Arnhem Land and APY Lands art regions.

Art centres rely on several methods to sell artworks, but have shifted towards sales through consignment agreements with intermediaries such as commercial galleries. Art centres have also moved towards selling art direct to consumers, either through their own galleries or through art fairs.



Draft Finding 3.4

Artworks by independent artists have a material presence in Aboriginal and Torres Strait Islander arts and crafts markets

Independent artists have a material presence in markets for Aboriginal and Torres Strait Islander visual arts and crafts — the Commission's preliminary estimates based on limited data show that about 1700 independent artists generate sales of about \$10 million a year. About half of art dealer businesses sell the works of independent artists. In addition, independent artists produce commissioned artworks and sell direct-to-consumers through art fairs, online marketplaces and social media.



Draft Finding 3.5

The total value of Aboriginal and Torres Strait Islander artworks sold on the secondary market remains below its peak

Following strong growth up to 2008, resales of Aboriginal and Torres Strait Islander artworks collapsed following the Global Financial Crisis (GFC). The total value of resales has since remained below the pre-GFC peak, with average prices of Aboriginal and Torres Strait Islander artworks sold by public auction houses lower than resales of artworks by non-Indigenous artists.

Inauthentic visual arts and crafts are pervasive and cause significant cultural harm and economic costs

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*.

Draft Finding 4.2



Inauthentic Aboriginal and Torres Strait Islander arts and crafts are rife in the consumer product, digital and print-on-demand merchandise markets

Inauthentic products dominate the consumer product (mostly wholesale souvenirs), digital, and print-on-demand merchandise markets. Copyright infringement is also common in the print-on-demand merchandise market.

In the consumer product (wholesale souvenirs) market:

- approximately two-thirds to three-quarters of product offerings are inauthentic, though the prevalence of inauthenticity varies by product category
- on average, authentic products are nearly twice as expensive as an inauthentic product of the same type
- most consumer products are manufactured overseas regardless of their authenticity.

Based on random sampling, inauthentic products are commonplace in the print-on-demand merchandise market (over 60% of Aboriginal and Torres Strait Islander merchandise was found to be inauthentic) and even more prevalent in the digital art marketplace (over 80% of digital stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs were inauthentic).



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.



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.

A mandatory labelling scheme to reduce trade in inauthentic products



Draft Finding 5.1

Some approaches to distinguish between authentic and inauthentic Aboriginal and Torres Strait Islander art and craft products are already in place

Some approaches are already in place to help consumers distinguish between authentic and inauthentic Aboriginal and Torres Strait Islander artworks and other products. These include certificates of authenticity provided by art dealers (such as those produced in accordance with the Indigenous Art Code), as well as other branding and marketing initiatives used by artists and dealers to provide information and assurances to consumers. However, only limited information is provided for some products, particularly in the lower end of the market, including souvenirs and digital products.



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.



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.



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.



Draft Finding 5.5

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.

**Draft Recommendation 5.1****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 5.1**

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?

Indigenous Cultural and Intellectual Property is used in arts and crafts without permission and inappropriately

**Draft Finding 6.1****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.



Draft Finding 6.2

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.



Draft Finding 6.3

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.

Recognising cultural rights to protect the ICIP in visual arts and crafts



Draft Recommendation 7.2

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.



Draft Finding 7.2

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.



Information request 7.1

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?



Information request 7.2

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?



Information request 7.3

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?



Information request 7.4

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?



Draft Finding 7.1

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.



Draft Recommendation 7.1

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.

Some artists encounter unfair and unethical conduct



Draft Finding 8.1

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.



Draft Finding 8.2

Enforcement of the Indigenous Art Code is constrained by resourcing

The Indigenous Art Code 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.



Draft Finding 8.3

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.

There is scope to improve government support to the sector



Draft Finding 9.1

The big picture of government funding is hard to piece together

Aboriginal and Torres Strait Islander artists and art organisations receive funding from a multitude of sources, including targeted and mainstream arts programs and various non-arts portfolios across all levels of government, as well as from philanthropy and corporate sponsorship. Outside of the few targeted programs, data on funding provided to Aboriginal and Torres Strait Islander visual arts and crafts is not reported. As a result, it is hard to determine the overall amount of funding available to the sector, or assess how well different funding streams are addressing the needs of the sector.



Draft Finding 9.2

The National Indigenous Visual Arts Action Plan provides a time-limited funding increase

The Aboriginal and Torres Strait Islander visual arts and crafts sector has seen recent injections of funds both directly through the Australian Government's National Indigenous Visual Arts Action Plan, and indirectly through commitments to establish Aboriginal and Torres Strait Islander art and cultural centres.

The National Indigenous Visual Arts Action Plan provides \$25 million of additional funding to the sector over five years, including for infrastructure upgrades and building digital capacity.

The governments of the Northern Territory, South Australia and Western Australia are funding art and cultural centres in their respective jurisdictions while New South Wales is investigating similar opportunities. The Australian Government has also committed to establishing a National Aboriginal and Torres Strait Islander cultural complex in Canberra, which will include art and artefact collections.



Draft Finding 9.3

Primary funding sources from the Australian Government have plateaued in real terms in recent years

The Australian Government provides targeted annual funding of about \$24.5 million to the Aboriginal and Torres Strait Islander visual arts and crafts sector through its key art funding programs: the Indigenous Visual Arts Industry Support (IVAIS) and the Australia Council's Aboriginal and Torres Strait Islander Arts programs.

After increasing for many years, since 2015–16, total IVAIS funding has declined in real terms by 5%. Average funding for art centres — the main recipients of government support — has fallen by 6.3% as the number of art centres has increased while funding under the program has remained fixed.

Since 2016-17, funding to the Aboriginal and Torres Strait Islander Arts Program under the Australia Council has fallen in real terms by 5%.

The recent funding commitments through the National Indigenous Visual Arts Action Plan will assist a number of art centres over a five year period, but there has been no change to the ongoing operational funding provided by IVAIS.



Draft Finding 9.4

Many roles that art centres fulfil are out of scope for arts funding programs

The Australian Government's flagship funding program for the sector, the Indigenous Visual Arts Industry Support (IVAIS) program, focuses on art production and operational costs.

Aboriginal and Torres Strait Islander community-controlled art organisations fulfil a range of important cultural and social roles within their communities, which are not funded under IVAIS. This increases the administrative burden on art organisations (as they seek to secure funding from other sources) and limits their ability to undertake activities highly valued by their communities.

Securing funding to meet the infrastructure needs of art centres has been a longstanding issue. While some funding has been made available for this purpose under the National Indigenous Visual Arts Action Plan, this commitment is only for five years at this stage.

Building the Aboriginal and Torres Strait Islander arts workforce requires a strategic approach



Draft Finding 9.5

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.



Draft Finding 9.6

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 9.1

- 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?

Strengthening the sector



Draft Recommendation 10.3

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.



Draft Recommendation 10.4

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 10.1

- 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?



Draft Finding 10.1

The case for an ACCC-enforced mandatory or voluntary Indigenous Art Code is not strong

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.



Draft Recommendation 10.1

The Indigenous Art Code can be strengthened through a joint commitment of government 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.



Draft Recommendation 10.2

Artists should be aware of and able to access legal support services

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.



Information request 8.1

- 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?

1. About this study

Key points

- * Visual arts and crafts have been practised and created by Aboriginal and Torres Strait Islander people for tens of thousands of years as an integral part of culture and community. The commercial market for Aboriginal and Torres Strait Islander visual arts and crafts has grown into a significant industry, sustaining culture for current and future generations while providing an important source of income for artists and communities.
- * There is a broad spectrum of visual arts and crafts, ranging from original artworks and online digital imagery through to souvenirs, merchandise, clothing and homewares that use Aboriginal and Torres Strait Islander art and designs.
- * All Aboriginal and Torres Strait Islander artists are considered in this study, including:
 - artists in urban, regional and remote settings
 - artists working with art centres as well as those working independently
 - those artists who use traditional techniques, imagery and styles, and those who produce art in contemporary styles, those who draw on non-Indigenous styles and forms, and those whose work blends multiple influences.
- * The Commission has approached this study from an economic perspective while centring Aboriginal and Torres Strait Islander people, perspectives, priorities, and knowledges. In conducting the study, we have sought to identify the key impediments to efficient market operation, which limit the benefits that participants — and in particular, Aboriginal and Torres Strait Islander people — derive.
- * The Commission has engaged widely and has sought to reflect the views of Aboriginal and Torres Strait Islander people expressed in submissions and during meetings and discussions.
 - Aboriginal and Torres Strait Islander artists, art organisations and others have contributed much time and effort to previous reviews and inquiries and the Commission has made extensive use of submissions to these.
- * This report presents the Commission's draft findings and recommendations, and seeks further input. The Commission is particularly keen to hear the views of Aboriginal and Torres Strait Islander people on the findings and recommendations in this draft report, to inform its final report.

1.1 What we have been asked to do

Aboriginal and Torres Strait Islander visual arts and crafts are of global cultural significance and an important part of Australia's shared identity. For Aboriginal and Torres Strait Islander people, art is a way to pass down stories and spiritual beliefs to future generations.

Through our art, the cultural connections of songlines and dreamings continue. Deep principles and concepts are taught through art to tell us the right way to relate to and live with each other. Knowledge is maintained and instructed through art. (Hurley 2021)

As well as maintaining, strengthening and sharing culture and knowledge, arts and crafts generate income for artists and create economic opportunities for communities.

The Commission has been asked to examine the value, nature and structure of the markets for Aboriginal and Torres Strait Islander visual arts and crafts (our terms of reference are on p. ii). This study looks at everything from original art to homewares, clothing and tourist souvenirs that use Aboriginal and Torres Strait Islander art and designs. Performing and literary arts are outside the scope of the study.

We are also considering problems in visual arts and crafts markets — such as the proliferation of inauthentic arts and crafts and unethical conduct towards artists — and have made draft recommendations for governments to address them.

Long history of reviews but little action

Our study follows decades of inquiries, reports and reviews on Aboriginal and Torres Strait Islander arts and crafts markets and the protection of Aboriginal and Torres Strait Islander cultural and intellectual property. These stretch from the 1970s to the 2018 House of Representatives Standing Committee on Indigenous Affairs' *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (HoRSCIA 2018c) (box 1.1). The House of Representatives Committee's report recommended an inquiry by the Commission into the market for Aboriginal and Torres Strait Islander arts, which was the impetus for this study.

Many of the issues and challenges considered in this study have been raised in previous reviews and reports. The Commission has drawn on the findings and insights of many of these processes. Aboriginal and Torres Strait Islander artists, art organisations and others have contributed much time and effort to improving policies and laws as part of previous processes. The Commission has made extensive use of submissions to previous inquiries (particularly the 2018 House of Representatives Committee inquiry), and they are cited throughout the report.

Arts Law, Copyright Agency and IartC observed that:

... it is important to note the prevailing sense of frustration – to put it at its mildest – when, in the past, major inquiries have been conducted on related topics with little to show by way of meaningful, substantive reform. Our hope is that every study and submission on a given topic will be the last and that the political and public consensus around protecting Aboriginal and Torres Strait Islander arts and culture can be reflected in law and policy reform. Unfortunately, this has not been the case. Reports have been left to collect dust, recommendations have been ignored, and draft bills have failed to pass through Parliament. (sub. 31, p. 9)

Aboriginal and Torres Strait Islander visual arts and crafts are part of the wider Australian and international market for arts and crafts. As such, reviews, inquiries, reports and research on the broader visual arts and crafts industry also form part of the context for this study. There are common features and challenges but also distinct differences, not least the cultural knowledges embodied in Aboriginal and Torres Strait Islander

art, and the geographic remoteness of many Aboriginal and Torres Strait artists and art centres, which affect access to markets, digital connectivity, and the supply of art workers.

Box 1.1 – Major government reviews and reports on Aboriginal and Torres Strait Islander arts and crafts

Report of the Working Party on the Protection of Aboriginal Folklore (1981)

Following the first National Seminar on Aboriginal Arts in 1973, the Commonwealth Government established a Working Party on the Protection of Aboriginal Folklore. It commenced work in 1975 and reported in 1981. The Working Party recommended standalone legislation to protect Aboriginal cultural and intellectual property from unauthorised use and explored many of the same issues being considered by the Commission in this study.

Report of the Review Committee on the Aboriginal Arts and Crafts Industry (1989)

The Review Committee focused primarily on the size and characteristics of the Aboriginal arts and crafts industry, the role of government institutions and how they should support the industry. The report made recommendations on the policies and roles of government agencies, additional training for the industry, increased resourcing of art centres and support for legal assistance for artists where needed for enforcing copyright.

Issues Paper on ‘Stopping the Rip Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples’ (1994)

The Commonwealth Attorney-General's Department prepared an Issues Paper seeking feedback on a range of options for protecting Aboriginal and Torres Strait Islander cultural and intellectual property including amendments to the Copyright Act, amendments to heritage protection legislation, authentication marks and special legislation to protect Aboriginal and Torres Strait Islander arts and cultural expression.

Our Culture: Our Future Report (1998)

Our Culture: Our Future was written by Terri Janke for the Australian Institute of Aboriginal and Torres Strait Islander Studies and funded by the Aboriginal and Torres Strait Islander Commission. The report examined the nature and value of Indigenous Cultural and Intellectual Property, the concerns of Aboriginal and Torres Strait Islander people, and existing intellectual property and cultural heritage laws. It proposed a range of amendments to existing laws and the establishment of a *sui generis* legislative framework to protect Indigenous Cultural and Intellectual Property rights.

Indigenous Art — Securing the Future: Australia's Indigenous visual arts and craft sector (2007)

The Senate Standing Committee on Environment, Communications, Information Technology and the Arts made recommendations for increased funding to support Indigenous visual arts and crafts, more scrutiny of illegal practices by the Australian Competition and Consumer Commission, the introduction of an Indigenous art commercial code of conduct, greater training and education across the industry, and the development of legislation to protect Indigenous Cultural and Intellectual Property rights.

Box 1.1 – Major government reviews and reports on Aboriginal and Torres Strait Islander arts and crafts

Report on the impact of inauthentic art and craft in the style of First Nations peoples (2018)

The House of Representatives Standing Committee on Indigenous Affairs conducted an inquiry into issues related to inauthentic Aboriginal and Torres Strait Islander style arts and crafts in 2017 and 2018. The inquiry looked at the role and cultural significance of arts and crafts, the market and prevalence of inauthentic arts and crafts, and existing protections for art and artists. The Committee identified a lack of data and information about the market as a significant concern and included a recommendation that the Productivity Commission conduct an inquiry, which prompted this study.

Sources: Altman (1989); Attorney-General's Department (1994); Davis (1997b); HoRSCIA (2018c), Janke and Frankel (1998); Parkin (2020); SSCECITA (2007); Working Party on the Protection of Aboriginal Folklore (1981).

1.2 The Aboriginal and Torres Strait Islander visual arts and crafts sector

Visual arts and crafts have underpinned Aboriginal and Torres Strait Islander cultures for tens of thousands of years. Aboriginal and Torres Strait Islander people have created, preserved, maintained and protected artwork and objects through their history. Australian rock art has been dated to about 30 000 years ago, although there may be older sites. There are around 100 000 rock art sites around Australia (National Museum of Australia 2022b). In Arnhem Land in the Northern Territory, bark paintings, weavings and carvings were originally created for ceremonial purposes (McCulloch and McCulloch Childs 2008, p. 14); in more recent times, these have also been created as works of art for sale. In many areas, body painting and sand painting have long been an important part of ceremony and storytelling.

Aboriginal and Torres Strait Islander people use visual arts to pass on stories and knowledges from generation to generation. Arts and crafts are practised in many ways, including the handcrafting of items used for hunting (spears, spear throwers, boomerangs, fish traps), collecting and carrying food (digging sticks, bowls, woven bags and baskets), cutting (axes and knives), clothing (often using animal skins) and ceremony and storytelling (didgeridoos⁴, musical sticks, message sticks). As well as their practical purposes, these items have cultural importance and some carry artistic designs and stories. Visual arts and crafts remain integral to the maintenance and the ongoing evolution of Aboriginal and Torres Strait Islander culture and wellbeing. Chapter 2 explores in more detail the cultural value of visual arts and crafts.

In Arnhem Land, art and artefacts were produced for trade with Macassan fishers and trepang traders since at least the 1700s (McCulloch and McCulloch Childs 2008, p. 24). Aboriginal and Torres Strait Islander art works and objects were collected by anthropologists and settlers through the 19th and 20th centuries. Some of these items were stolen or taken without consent and in recent decades, Aboriginal and Torres Strait Islander people have sought to reclaim them.

In the 19th century, some Aboriginal artists in southern areas of Australia, such as William Barak and Tommy McRae, painted and drew traditional and other stories using various media. The commercial production and

⁴ Didgeridoos are known by various names (including *yidaki* and *mandapul* in Yolŋu Matha) in Aboriginal languages.

market for Aboriginal and Torres Strait Islander visual arts and crafts gradually emerged from the 1930s onwards in various places (box 1.2).

Aboriginal and Torres Strait Islander arts and crafts markets have grown and thrived because of the talents and skills of artists, the cultural value artists and communities derive from the practice of art and the works themselves, the strength of Aboriginal and Torres Strait Islander communities, and rising consumer awareness and demand for authentic Aboriginal and Torres Strait Islander arts and crafts.

Box 1.2 – Beginnings of the commercial Aboriginal and Torres Strait Islander visual arts and crafts sector

Aboriginal art was included in exhibitions from the 1920s. Commercial production and sales of Aboriginal and Torres Strait Islander arts and crafts emerged from the 1930s onwards, as Aboriginal and Torres Strait Islander artists began to make and sell decorated handcrafts for sale to tourists in various parts of the country.

Yolŋu art was sold commercially from the town of Yirrkala in North East Arnhem Land in the Northern Territory following its establishment in 1935. Well known art works from Yirrkala include the Yirrkala Bark Petition and the Yirrkala Church Panels, both from 1963, which were created as expressions of sovereignty, not for sale. Narritjin Maymuru set up and sold art from a beach front gallery in Yirrkala in the 1960s. In 1976, Yolŋu artists established Buku-Larrŋgay Arts in Yirrkala.

Albert (Elea) Namatjira, an Arrernte man from Hermannsburg (Ntaria) in the Northern Territory, began painting water colour landscapes in 1936, with his first solo exhibition taking place in 1938. His work was commercially successful and a school of local artists formed around him in Hermannsburg. The Hermannsburg art movement continues today.

Ernabella Arts was established in 1948 and is the oldest continuously operating Indigenous art centre in Australia. It is located in Pukatja, in the Anangu Pitjantjatjara Yankunytjatjara Lands in the far north west of South Australia. Artists produce a range of paintings, ceramics, prints and weaving.

In Queensland, an art movement emerged on Mornington Island in the 1940s, with artists such as Lardil artist Goobalathaldin Dick Roughsey (who was later the chair of the Aboriginal Arts Board of the Australian Council for the Arts) and later Kaiadilt artist Mirdidingkingathi Juwarnda Sally Gabori.

In 1971, at the urging of a local school teacher, artists in Papunya in the Northern Territory began painting using acrylic paints and canvasses, drawing the traditional images and stories of their ceremonial sand and body painting. The artists formed Papunya Tula Artists in 1972, which remains Aboriginal-owned and supports and markets the work of artists from across the Western Desert.

From these early beginnings, the sector continued to expand and by the late 1990s there were about 25 art centres. There are now more than 100 Aboriginal and Torres Strait Islander owned art centres across Australia, mostly in remote communities, supporting between 5800 and 7300 artists, plus many independent artists in all parts of Australia and networks of commercial galleries and dealers (chapter 3).

A market for Aboriginal and Torres Strait Islander art among international collectors and institutions has also emerged. A small number of Aboriginal paintings and drawings were included as part of an exhibition of Australian art that toured the United States and Canada in 1941 and 1942. Exhibitions of Aboriginal artworks were held in São Paulo, Brazil, in New York in 1963 and in London, Liverpool

Box 1.2 – Beginnings of the commercial Aboriginal and Torres Strait Islander visual arts and crafts sector

and Houston in 1965. The Aboriginal Arts Board of the Australia Council for the Arts, of whom all members were Aboriginal and Torres Strait Islander people, was established in 1973 and held sixteen international exhibitions in the 1970s. A major international exhibition, *Dreamings, the Art of Aboriginal Australia*, was held in New York, Chicago and Los Angeles in 1988 before being seen in Melbourne and Adelaide. Several international galleries now sell Aboriginal and Torres Strait Islander art and international buyers also buy direct from Australian galleries and art centres.

Chapter 3 provides more information on the nature and scale of the Aboriginal and Torres Strait Islander visual arts market.

Sources: Anderson and Dussart (1988, pp. 96–98); Buku-Larrnggay Mulka (2017a); Buku-Larrnggay Mulka (2017b); Colombari (2019); Ernabella Arts (2022); Kleinert (2000); Jones (1988, pp. 165–179); McCulloch and McCulloch Childs (2008, pp. 8–33); Mirndiyan Gununa Aboriginal Corporation (2022); (National Museum of Australia (2011); Papunya Tula Artists (2014); Whitlam (1973).

The range of products in scope

This study focuses *visual* arts and crafts. Music, dance, ceremony, performance and literature are vital parts of Aboriginal and Torres Strait Islander arts and culture but are outside the scope of this study. In practice, there is often overlap between visual arts and crafts and other forms of Aboriginal and Torres Strait Islander art and they are sometimes combined.

The production of much Aboriginal and Torres Strait Islander visual arts and crafts is a means of maintaining traditional cultural knowledges and practices and passing them on to future generations. However, some Aboriginal and Torres Strait Islander artists adopt contemporary non-traditional styles and use a range of media; some artwork represents a fusion of styles.

There is a broad spectrum of visual arts and crafts, including souvenirs, merchandise, clothing and homewares and other products bearing Aboriginal and Torres Strait Islander art and design, through to original art (figure 1.1). Consumer products are included in this study because they represent innovative and diverse avenues of expression and can be an important source of income for artists. Aboriginal and Torres Strait Islander art also takes the form of online digital imagery.

The markets for Aboriginal and Torres Strait Islander arts and crafts include both authentic and inauthentic products, which are discussed in detail in chapters 3, 4 and 5.

Key market participants

The market for Aboriginal and Torres Strait Islander visual arts and crafts comprises artists and consumers and a range of intermediaries who form part of the supply chain or who facilitate trade (figure 1.1). The study examines all parts of the supply chain, including trade in inauthentic arts and crafts.

Artists sell their work through a range of channels including:

- art centres
- art fairs
- private dealers

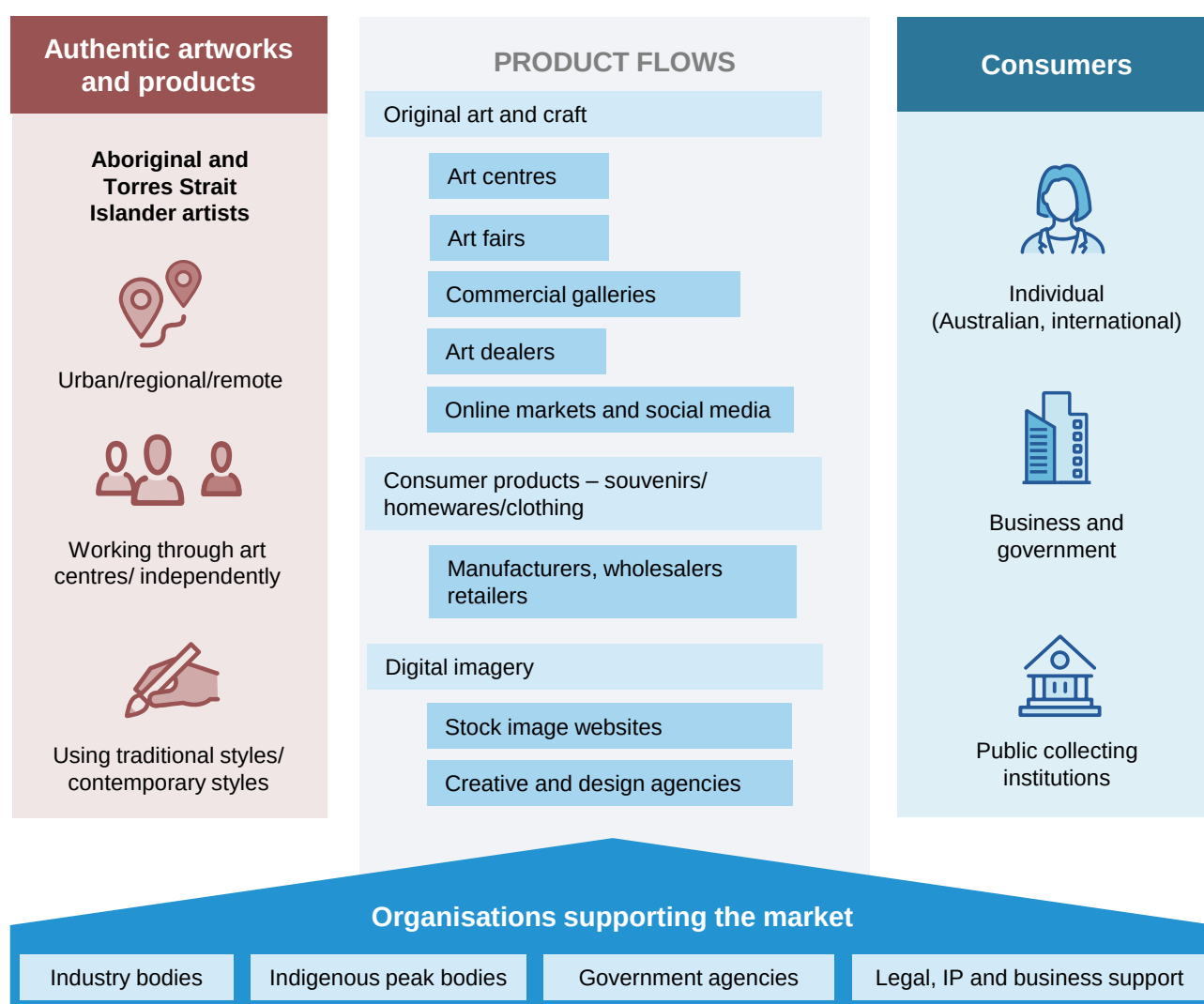
- commercial galleries
- manufacturers and wholesalers (who use art on souvenirs, clothing, homewares etc.)
- graphic design agencies
- direct to consumers (both in physical retail settings and through online market places, website and social media).

Some artists use multiple channels — for example art centres, commercial galleries, and directly online. Others choose to trade through just one channel.

Other bodies assist the market to function:

- peak industry bodies — advocating for artists, other market participants
- legal advisory and advocacy bodies and services — which assist artists in protecting their intellectual property and ensuring fair and equitable treatment of artists in the market
- government agencies — some provide funding and support, while others develop policy and regulate the market.

Figure 1.1 – Aboriginal and Torres Strait Islander arts and crafts supply chain



Aboriginal and Torres Strait Islander artists

All Aboriginal and Torres Strait Islander artists are considered in this study. In this context, 'artists' include the creators, designers and producers of the various arts and crafts described above (although not large-scale manufacturers of items such as souvenirs, homewares and clothing that bear Aboriginal and Torres Strait Islander licensed artwork):

- artists in urban, regional and remote settings
 - Arts and crafts from remote areas are well known and form a significant part of the total market but there are many Aboriginal and Torres Strait Islander artists in regional and urban areas.
- artists working with art centres as well as those working independently
- artists who use traditional techniques, imagery and styles, who produce art in contemporary styles, who draw on non-Indigenous styles and forms, and whose work blends multiple influences.

Art centres are very important in supporting many artists, particularly in remote areas. Art centres are owned and controlled by Aboriginal and Torres Strait Islander people and support artists in producing and marketing their art, while often serving as a community hub and carrying out a wide range of roles.

However, for many artists in regional and urban areas there is no nearby art centre. Hence, they work independently as small business people. Some independent artists have formed collectives and artists associations to support them in aspects of their work.

Even in places where there are art centres, some artists choose to work independently or may work partly through art centres and partly independently or with particular dealers or commercial galleries.

Consumers of Aboriginal and Torres Strait Islander arts and crafts

Consumers of Aboriginal and Torres Strait Islander arts and crafts fall into several categories:

- public collecting institutions – museums and galleries
- private art collectors
- consumers of mass-produced homewares, decorative items and clothing
- tourists buying souvenirs
- businesses and government agencies using imagery for decoration, branding and publishing.

The report examines these consumer segments, their characteristics, strengths and the challenges and opportunities they present for artists. Chapter 3 provides more information on the size and nature of these market segments.

1.3 Our approach

An economic perspective with Aboriginal and Torres Strait Islander people at the centre

The Commission has approached this study from an economic perspective while centring Aboriginal and Torres Strait Islander people, perspectives, priorities, and knowledges. Aboriginal and Torres Strait Islander arts are an intrinsic part of Aboriginal and Torres Strait Islander cultures and knowledges. Hence, this report has a strong focus on better enabling Aboriginal and Torres Strait Islander people to protect and safeguard Indigenous Cultural and Intellectual Property (chapters 6 and 7).

In conducting the study, we have sought to identify the key impediments to efficient market operation, which limit the benefits that participants — and in particular, Aboriginal and Torres Strait Islander artists — derive. As in any market characterised by issues such as difficulties in ascertaining product quality and authenticity, interventions may be warranted. Many mechanisms (discussed throughout this report) are already in place in markets for Aboriginal and Torres Strait Islander arts and are evolving to improve market interactions. Such mechanisms include self-regulation by galleries, protocols for ethical use of Aboriginal and Torres Strait Islander cultural expressions, model licensing agreements, legal support for artists, labelling schemes and production models such as government-supported art centres. New avenues for sales for artists (such as online and art fairs) can enhance their bargaining position. While some of these mechanisms work well, problems remain. In some instances, new approaches or additional low cost interventions would promote more efficient functioning of the market to maximise net benefits. For some problems there may be no straightforward solution but some improvement may be possible. The Commission has recommended changes where these are likely to be effective in improving outcomes.

In line with the terms of reference, this study has sought to estimate the size and value of the market for Aboriginal and Torres Strait Islander visual arts and crafts, and assess the policies that affect it. We have examined both market and non-market values, although we have not quantified non-market values.

The non-market value is in the cultural value of art, imagery and the stories and knowledges they represent that are valued by Aboriginal and Torres Strait Islander people and communities. Those stories and images preserve cultures and serve as a vehicle for passing on cultures, knowledges and understanding of Country to future generations. Art can also have non-market value for non-Indigenous people, although not necessarily in the same way as it does for Aboriginal and Torres Strait Islander people.

The market value is reflected in the sales of art works and products sold by artists and purchased by consumers in Australia and internationally. Visual arts and crafts are a source of employment and income for 19 000 Aboriginal and Torres Strait Islander people, particularly in remote areas (chapter 3). Income and employment often lead to better outcomes in health, education and other aspects of economic and social wellbeing.

Inawintji Williamson, Founding Chair of Kaltjiti Arts and Director APY Studio Adelaide identified the link between the cultural and economic value of art:

I wonder if the ancestors knew that when they left the Tjukurpa (ancestral stories) with us, that culture would be the key to overcoming the social challenge we would face in our communities. The elders use the Art Centres every day to create a better future for Anangu (people of the APY Lands); to celebrate and teach the younger generations about Tjukurpa, but also to provide jobs and income that give people purpose and hope, and empower them to exercise control over their lives, and future. The Art Centres are the beating heart of community and their existence is key to keeping people, culture and community strong. (APY Art Centre Collective, sub. 17, p. 7)

Creative Economy has argued that cultural value is at the core of the economic value of Aboriginal and Torres Strait Islander arts and crafts.

There exists a common misconception that cultural and economic values are mutually exclusive. However, our experience has shown that this is not the case. In fact, it is the exact opposite. Sustainable development is not a matter of choosing between cultural or economic value, but combining the two to generate sustainability. These two types of value are closely intertwined, and the best results occur when they are utilised in harmony.

Creative Economy's view ... is that culture is the core of the cultural and creative industries, expanding outwards to other forms of cultural value, which in turn translates to their respective economic value. (sub 9, p. 4)

The market and non-market values of art often occur together, as Kaely Woods explained:

Art has instrumental value where the product can be sold through art supply chains or direct to consumers (including tourists), thereby facilitating the realisation of other value (money). The production of this art can also contribute intrinsic cultural value, strengthening cultural identity and connection to Country and kin, and wellbeing. This cultural value may benefit the artist producing the art work as well as other community members through the transmission and sharing of stories that are central to cultural identity. The links between culture and Country can be strengthened through the process of art production, especially when associated with trips on Country, and depicted in art works. (sub. 11, p. 4)

What we heard from Aboriginal and Torres Strait Islander artists and communities

In line with the principles outlined in the Commission's *Indigenous Evaluation Strategy* (PC 2020c), centring Aboriginal and Torres Strait Islander people, perspectives, priorities and knowledges is at the core of our considerations. To achieve this, the Commission has engaged with many Aboriginal and Torres Strait Islander people and organisations to hear views about how well (or not) Aboriginal and Torres Strait Islander visual arts and crafts markets are functioning and how improvements could be made.

Aboriginal and Torres Strait Islander people have told us that they seek to see Aboriginal and Torres Strait Islander visual arts and crafts markets where artists and communities are empowered to protect their cultural and intellectual property, where governments provide effective and efficient support, where there is a well-trained workforce and consumers are informed and confident. Such a market would support artists and communities to flourish culturally and financially, strengthening and passing on culture, with increasing employment for Aboriginal and Torres Strait Islander people in all parts of the market, and consumers who are confident in the quality and authenticity of the arts and crafts they are buying.

Table 1.1 attempts to summarise the views we heard from Aboriginal and Torres Strait Islander people about how a well-functioning sector could look in practice (acknowledging that Aboriginal and Torres Strait Islander people have a range of perspectives on some topics). These views are an important benchmark against which the performance of the sector can be assessed.

The draft recommendations included in this report seek to identify efficient ways to progress the priorities of Aboriginal and Torres Strait Islander people and communities, and facilitate further economic and cultural benefits from the ongoing production of Aboriginal and Torres Strait Islander visual arts and crafts.

The Commission has sought to reflect the views of Aboriginal and Torres Strait Islander people expressed in submissions and during meetings and discussions. However, the findings and recommendations in this report are the Commission's and have not been developed in a formal codesign process with Aboriginal and Torres Strait Islander people.

The Commission is particularly keen to hear the views of Aboriginal and Torres Strait Islander people on the findings and recommendations in this draft report — which will inform the final report.

Table 1.1 – Centring Aboriginal and Torres Strait Islander people, perspectives, priorities and knowledges — some views from Aboriginal and Torres Strait Islander people about how the market should work

Producing and creating arts and crafts	• Aboriginal and Torres Strait Islander people are able to create visual arts and crafts that support and maintain culture and the passing of cultures and knowledges from generation to generation • Aboriginal and Torres Strait Islander people are able to create visual arts and crafts that contribute to the social and emotional wellbeing of artists and their communities • Aboriginal and Torres Strait Islander artists are able to find a market for their arts and crafts that brings them income to support their families • Artists are able to access art materials, facilities and support to enable the production of arts and crafts that will bring the best economic return
Wholesaling and retailing	• Wholesalers and retailers (art centres, commercial dealers and galleries) pay fair prices to artists for their artworks and do not exploit vulnerable artists. • Retailers and wholesalers sell authentic art and craft products made or fairly licensed by Aboriginal and Torres Strait Islander artists and do not sell products using Aboriginal and Torres Strait Islander styles and designs that are not created or licensed by Aboriginal and Torres Strait Islander people.
Manufacturing of licensed products	• Artists are able to access information and advice to assist them in negotiating fair and reasonable agreements for the licensing of their designs on products such as souvenirs, homewares and clothing. • Aboriginal and Torres Strait Islander owned and controlled organisations and businesses take on a larger share of the market for souvenirs, homewares, clothing and other licensed products.
Online and digital imagery	• Government agencies, businesses and other organisations that seek to use Aboriginal and Torres Strait Islander designs and digital imagery become skilled in identifying and procuring authentic artwork.
Protecting Indigenous Cultural and Intellectual Property	• Aboriginal and Torres Strait Islander artists are able to access legal advice and assistance to actively protect their intellectual property. • Aboriginal and Torres Strait Islander peoples and communities have access to legal mechanisms to enable the protection of Indigenous Cultural and Intellectual Property.
Government support	• Governments recognise the cultural, social and economic benefits of Aboriginal and Torres Strait Islander visual arts and tailor funding and support to maximise those benefits. • Governments ensure that their funding and support application mechanisms are accessible to artists and support organisations. • Governments fund training and support for artists in protecting their intellectual property and ensuring fair treatment in the market.
Consumers	• Consumers are able to access information to assist in identifying authentic products and have confidence in buying Aboriginal and Torres Strait Islander arts and crafts. • There is increasing appreciation of Aboriginal and Torres Strait Islander visual arts and crafts by consumers in Australia and internationally that leads to increasing demand and increased returns for artists.

Conduct of the study and further engagement

The Commission has engaged extensively across the Aboriginal and Torres Strait Islander visual arts and crafts sector (appendix A).

Meetings and visits

The Commission has held meetings with 98 organisations and individuals to discuss the issues raised by this study. Of these meetings:

- 25 were with Aboriginal and Torres Strait Islander controlled organisations and businesses
- 17 were with individual Aboriginal and Torres Strait Islander people
- 24 were with government agencies (including 6 with Indigenous specific agencies)
- 2 were with international organisations and experts

COVID-19 restricted our ability to travel for face-to-face meetings and many meetings were held online. However, we did visit and hold meetings in:

- Shepparton/Goulburn Valley, Victoria
- Mornington Peninsula, Victoria
- Adelaide, South Australia

Roundtables

The Commission hosted one roundtable meeting:

- 26 August 2021 — an initial discussion with key participants to identify issues to be explored in this study.

Submissions

The Commission received 34 written submissions and 3 brief comments. Of the 34 submissions in total:

- 9 were from Aboriginal and Torres Strait Islander organisations
- 6 were from government agencies.

As noted earlier, the Commission has also drawn on submissions to previous inquiries and reviews, particularly the 2018 House of Representatives committee report (HoRSCIA 2018c). Many of these earlier submissions address important issues considered in this study and the Commission recognises the effort that many organisations and individuals put into those earlier submissions. By drawing on them, we hope to minimise the consultation burden of successive reviews.

The Commission thanks those individuals and organisations who have made submissions to this study.

More information on submissions received and organisations we have engaged with are in appendix A.

What's next in the study (from draft report to final report)?

Following the release of the draft report, the Commission will engage further with participants in the industry to seek feedback on our draft findings and recommendations. This engagement will take the form of both meetings with individual people and organisations and roundtable discussions.

The Commission is also seeking submissions on the draft report. Submissions are due by 29 August 2022.

Information on how to make a submission is available on the study's web page (<https://www.pc.gov.au/inquiries/current/indigenous-arts>).

2. The contributions of Aboriginal and Torres Strait Islander arts and crafts

Key points

- * The production of arts and crafts is fundamental to the cultural fabric of Aboriginal and Torres Strait Islander people and is a significant source of economic and social value and empowerment.
- * Commercialisation of Aboriginal and Torres Strait Islander arts and crafts has diversified the range of products and increased the reach of Aboriginal and Torres Strait Islander cultures to new audiences. While some consumers may value the aesthetic over the cultural qualities of arts and crafts, this has not diminished the cultural value in their production.
- * Creating arts and crafts in a way that promotes self-determination and centres Aboriginal and Torres Strait Islander knowledges and perspectives improves the wellbeing of Aboriginal and Torres Strait Islander people and communities.
- * Community-controlled art centres enable artists to pursue economic objectives while maintaining and strengthening connection to kin, Country and culture. Art centres make substantial contributions to their communities and carry out a diverse range of roles that support better health, education, aged care and other wellbeing outcomes in culturally safe and sustainable ways.
- * Aboriginal and Torres Strait Islander arts and crafts markets are an important source of economic empowerment for Aboriginal and Torres Strait Islander people. They provide direct employment and income opportunities — particularly in many remote communities — and support other complementary industries such as tourism.
- * Aboriginal and Torres Strait Islander arts and crafts markets contribute to the national economy and Australia's shared identity.

Aboriginal and Torres Strait Islander art is part of the oldest ongoing culture in the world, with initial forms of artistic expression dating back more than 30 000 years (Queensland Law Society, HoRSCIA 2018, sub 97, p. 34). Today, the production of arts and crafts has evolved into new mediums and materials, and provides artists and communities with opportunities for economic empowerment. Arts and crafts continue to be central to maintaining and developing cultural, social and political expression for many Aboriginal and Torres Strait Islander people — including promoting self-determination, connections to Country, culture and kin, and improving wellbeing (figure 2.1).

This chapter outlines how arts and crafts are integral to Aboriginal and Torres Strait Islander cultures, and how they contribute to improving the lives of Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander visual arts and crafts also make an important contribution to the wellbeing of the Australian community, as an economic activity and through their contribution to Australia's national identity and cultural fabric (figure 2.1).

Figure 2.1 – Benefits from the Aboriginal and Torres Strait Islander visual arts and crafts sector

Economic independence	Cultural and Social	National
Employment/income opportunities in the arts 	Connection to Country, culture and kin, and cultural maintenance 	Economic activity in the arts and associated industries 
Employment/income opportunities in related industries (such as tourism) 	Self-determination 	Shared national identity and cultural fabric 
Economic development in remote communities (incl. infrastructure, skills) 	Education, health and broader wellbeing outcomes 	Creating products that consumers value 

2.1 Arts and crafts are integral to Aboriginal and Torres Strait Islander cultures

Arts and crafts as an expression of cultural identity

Culture is multidimensional, representing the customary beliefs, values and aspirations of a group of people who share a common connection. Culture can pass down through generations unchanged or is transformed over time, and can be contested and challenged from within, or disrupted by external actors. It can reflect a way of making sense of the world, and this can differ across groups. Creative participation, for example through arts and crafts, can be integral in the generation and expression of culture (Biddle and Crawford 2017, p. 1).

Arts and crafts are inextricably linked with culture, and hold significant value in the lives of Aboriginal and Torres Strait Islander people (box 2.1). Aboriginal and Torres Strait Islander peoples' knowledges, stories, connections and ceremonies have been created and evolved long ago since Dreaming or Creation time, and

have been passed down through oral storytelling, song and visual communication through drawing, painting and the use of ceremonial design (Japingka Aboriginal Art 2014).

Box 2.1 – ‘Art and culture are one’: the interplay between Aboriginal and Torres Strait Islander art and culture

Many participants in this study (and previous inquiries and reviews) have spoken about the significant interplay between arts and crafts and the practice and maintenance of Aboriginal and Torres Strait Islander cultures.

... Aboriginal traditional law or culture is the foundation for all the art. (Desart 2014)

Our art is who we are ... it helps us carry our culture from the past, to now and into the future for our children and grandchildren. The stories we paint are from our grandmothers and grandfathers and theirs before them. We must pass this on to our grandchildren, so they can know who they are and be strong and proud Aboriginal people — the first people from this land. Our art is about where we come from, our apmere [land] and our atweye [family] — it belongs to us and our atweye — no one can take this away from us — it doesn't belong to anyone else but us. (Desart, sub. 4, p. 10)

A painting is the visual expression of the story of our ancestors and spirit-beings ... Our art and culture are very dear to us, they embody the past history of my people, our beliefs today, and our strength to survive. Whilst wanting to protect ourselves and our art and culture for future generations, at the same time we are eager for all the world to witness the beauty and strength of our culture as expressed by our artists. (Wandjuk Marika, cited in Arts Law, Copyright Agency, IartC., sub. 31, p. 30)

Artworks on display ... [at the Gab Titui Cultural Centre] ... represent the unique Indigenous cultures of the surrounding communities and illustrate Torres Strait Islander and Aboriginal myths, legends, and connection to the sea and land. (Gab Titui Cultural Centre 2021)

Art communicates songlines, culture and environmental knowledge. Art is an important part of tribal education, allowing for a deeper understanding of cultural stories transmitted between generations. This is vital to the preservation of language and culture. (AACHWA, sub. 20, pp. 8–9)

... in Aboriginal way you can't separate language, dance, song, country, story and traditional knowledge from art. Everything connects, art cannot stand-alone, that's the thing we really have to fight for. (Gabriel Nodea cited in ANKA 2012)

I just think that art and culture are one. It seems that [the mainstream is] trying to remove Aboriginal art from outside the culture but everything's intertwined, the stories come from who you are or where you've come from, who your family is and what you've been doing over the years and it's handed down through the generations. Culture comes from people ... (Lorraine Coutts, cited in Edmonds and Clarke 2009, p. 47)

Aboriginal and Torres Strait Islander arts and crafts are diverse, reflecting the many cultural traditions that have existed in the past, are currently practised, and that will continue to evolve over time. The use of

specific techniques, styles, symbols and stories reflects cultural traditions that have been passed down for many generations across different parts of Australia, and connects Aboriginal and Torres Strait Islander artists to their respective community, family and Country.

The notion of Country ... is associated with ancestral and family connections and is frequently connected to the stories about and affiliations with particular places. For Aboriginal people, Country is more than land, it is a place where cultural connections exist and continue across time. (Edmonds and Clarke 2009, p. 5)

Some of these traditions have more widely recognised connections to particular regions of Australia in the Australian art market. For example, bush medicine leaves (from the desert regions of Utopia, Northern Territory), dot paintings (from Central Australia), cross hatching or *rärk* (from northern Australia), x-ray style (from Arnhem Land, Northern Territory), turtle shell masks (Torres Strait Islands), and minimalist block designs in ochre tones and Wandjina spirits (Kimberley region, Western Australia) (Artark 2020). Traditions from south-eastern parts of Australia have been less recognised in the visual arts market due to the speed of colonisation and the extent and impact of assimilation policies in these regions.

South-east art suffered from a rhetoric associated with the success of assimilation policies, which denied its authenticity and viewed the adoption of conventional European art techniques, such as landscapes and realistic figurative styles, alongside Aboriginal designs, as second-rate European art, kitsch, tourist art and not really Aboriginal. (Edmonds 2012, p. 24)

Traditional south-east Australian arts and crafts have nevertheless survived and thrived. For example, artist Lyn Thorpe described the use of traditional markings in her artworks as connected to her heritage as a woman from the north-west of Victoria:

Traditional Victorian art is very linear, lots of lines, crosshatching, diamonds, triangles, stick figures ... A good example of this is on our possum skin cloaks, our shields and boomerangs and when we paint up for dance. (cited in Edmonds and Clarke 2009, p. 5)

Production of arts and crafts is governed by traditional laws

The Aboriginal and Torres Strait Islander visual arts and crafts market is often characterised as a 'hybrid economic model', to highlight how the 'customary sector' works alongside the private and public sectors in the production of arts and crafts. 'The customary sector is constituted by non-monetised activities ... that emerge from and reaffirm dynamic Indigenous connections to Country and ways of being.' (Russell 2011, p. 1).

The role of the 'customary sector' in establishing and enforcing Aboriginal and Torres Strait Islander peoples' lore around the use and dissemination of certain knowledges, stories and ceremonies, further adds to the cultural value of Aboriginal and Torres Strait Islander arts and crafts.

The process of creating artwork holds an important social function to communicate the themes, beliefs, customs from one generation to another for an individual community. Indigenous artists have strict rules about how to tell stories in the right way. The right to tell certain stories is owned by community members based on their connection to the land, kinship and gender. Artists who paint someone else's dreaming without permission, will be met with sanctions and there is deep suspicion that to break culture lore will bring bad energy. (Melissa Callanan, sub 5, pp. 64–65)

Certain artworks that represent creation stories can be sacred and significant for the people who own these stories and their cultural heritage. For example, sacred images of creator-beings, the *Wandjina*, are significant to the Mowanjumb community of the north-western coastal region of Kimberley, and great harm is caused when these images are misappropriated by those uninitiated in this story.

The Wandjina ... produced self-portraits on rock faces ... to immortalize themselves and remind their communities of their constant power. ... It is the oldest living member of the community's duty to respectfully approach and speak to the Wandjina, as they are revered as still living, and repair any damage to their appearance in order to ensure the arrival of the monsoon rains. ... Between their large, dark eyes hangs a long and bulbous nose, which is believed to be their vessel to bring heavenly power to earth. Because of the power of its nose, a Wandjina is always shown without a mouth. Since the Wandjina control the major rainstorms of the Kimberly region, residents believe that if Wandjina are depicted with a mouth, they are granted immeasurable power for mass destruction through flooding or drought. (Edelman 2021, pp. 1–3)

For Aboriginal and Torres Strait Islander people, the production of arts and crafts is not just focused on the physical output. The production process can also sustain other practices that maintain cultural integrity, and promote connection to kin, Country and culture. This allows custodians of Aboriginal and Torres Strait Islander knowledges, songlines and law to carry out their responsibilities and obligations to protect these traditions, and teach new generations about them. Understanding the value of these traditions ensures that no offence is created in misrepresenting or misusing them — misuse can result in severe consequences.

Severe consequences can occur to the artist if his or her artwork is misused without permission of the traditional owners, such as being prohibited from further painting, prohibited from participating in community activities, being outlawed from the community, or in serious cases, being speared. (von Doussa 2006)

Contemporary arts and crafts create new opportunities

Contemporary Aboriginal and Torres Strait Islander arts and crafts, particularly those produced for commercial purposes and that use new materials and techniques, have expanded the reach of Aboriginal and Torres Strait Islander cultures to new audiences. Some of the most significant contemporary art movements include:

- the Hermannsburg School, which was established in the 1930s when Western Arrernte artists (including Albert Namatjira, who in 1957 became one of the first Aboriginal Australian citizens as a result of his successes in the art sector) at Hermannsburg Mission in the Northern Territory interpreted Country through western-style landscape watercolour paintings
- the Western Desert art movement and the Papunya Tula Artists cooperative, which was established in the 1970s, when a group of Aboriginal artists from the community at Papunya in the Northern Territory began painting traditional designs using acrylic paints and small boards. (Art Gallery of NSW 2006; National Museum of Australia 2017).

In each case, these movements were formed in the context of assimilationist policies in remote missions, where the marketing of arts was seen as a way of making money for these communities, but nevertheless they also asserted the value of Aboriginal cultures to audiences across Australia and internationally (Coleman 2001, p. 387). According to artist Richard Bell however, the emergence of Aboriginal art as a 'commodity' has not come without challenges, in particular how to integrate Aboriginal and Torres Strait Islander cultural expression into a market that is dominated by non-Indigenous people.

There is no Aboriginal Art Industry. There is, however, an industry that caters for Aboriginal Art. The key players in that industry are not Aboriginal. They are mostly White people whose areas of expertise are in the fields of Anthropology and "Western Art". ... key issues inter-relate to produce the phenomenon called Aboriginal Art and ... [these] ... conspire to condemn it to non-Aboriginal control. (Bell 2002)

Commercialisation has transformed the way Aboriginal and Torres Strait Islander arts and crafts are consumed — and introduced the world to Aboriginal and Torres Strait Islander arts and crafts. The expanded range of products (and production) — including prints, canvas, murals, textiles, homewares — has increased its accessibility to consumers who may value a piece for its technical or aesthetic qualities over its cultural significance. However, this does not diminish the cultural value of contemporary Aboriginal and Torres Strait Islander arts and crafts, as production maintains strong connections to cultural traditions and identity.

While Western art collectors may value the works according to how well they were executed, Aboriginal people tend to rank them by the importance of the Dreaming in them. (Lubow 2010)

For many contemporary Aboriginal and Torres Strait Islander artists the resilience of their peoples in successfully maintaining their cultures is an inspiration for their artworks. The key concept is that ancient traditions are also contemporary practices — and are an inseparable part of everyday life for Indigenous peoples. Some Indigenous artists draw together modern digital technology with songs, dances or symbols that have origins thousands of years old. Other artists produce cultural objects using traditional methods but invest them with contemporary conceptual content. In both instances, what the artist is doing is drawing upon traditional Indigenous cultural practices as part of their contemporary art practices. (ACCA 2019)

The generation and expression of culture therefore remains central in the market for contemporary Aboriginal and Torres Strait Islander arts and crafts. This flows through the entire value chains of the industry, where culture is the source, driver, and enabler of economic value.

What is considered ‘culture’ here includes cultural practice, language, and traditional knowledge; radiating out to ‘cultural expression’ in the form of creative arts, and then expanding to ‘cultural industries’ as the production and presentation of goods and services of culture and cultural expression. This, then, expands out to ‘creative industries’ with the commercial application of creativity and then to ‘related industries’ where culture and creative products become inputs to other sectors such as tourism, health, and education. (Creative Economy, sub. 9, p. 4)

2.2 Arts and crafts support Aboriginal and Torres Strait Islander people’s self-determination and wellbeing

The long fight for self-determination for Aboriginal and Torres Strait Islander people ...

Since colonisation, Aboriginal and Torres Strait Islander people’s sovereignty has never been adequately addressed. The 2017 Uluru Statement from the Heart, signed by 250 Aboriginal and Torres Strait Islander delegates representing communities from all over Australia, explained sovereignty as:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. ... This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. How could it be otherwise? That peoples possessed

a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years? (First Nations National Constitutional Convention 2017)

The denial of sovereignty has also seen a loss of self-determination, as government policies have sought to determine the lives of Aboriginal and Torres Strait Islander people. For example, from 1860, 'protective' legislation (known as the 'Aborigines Acts') required many Aboriginal people to live on reserves, and placed almost unlimited discretion in the hands of reserve superintendents and police protectors. Aboriginal people living outside reserves were spared the worst of the reserve regime, but their rights were still limited. From the late 1800s through much of the 20th century, governments in several jurisdictions controlled many Aboriginal people's wages, pensions and endowments, with much of the money mismanaged or taken — and now known as 'stolen wages'.

In the 1900s, governments adopted assimilation policies, with the explicit goal of integrating Aboriginal and Torres Strait Islander people into 'mainstream' society. The removal of Aboriginal and Torres Strait Islander children from their families and traditional lands became common, with 10–30% of Aboriginal and Torres Strait Islander children forcibly removed from their families and communities between 1910 and 1970 (SCRGSP 2020, pp. 1.3-1.5). The effects of these policies (including the dispossession of traditional owners from their lands) in many places saw the disintegration of Aboriginal and Torres Strait Islander cultures, including the practice of arts and crafts. For example, under the guise of stopping the illegal drug trade, the *Protection and Restriction of the Sale of Opium Act 1897* (Qld) increased police powers over Aboriginal people. Among other measures, cultural practices were banned, which included no speaking language, no dance, no ceremonies, and no teaching them to children. The Act allowed police to remove Aboriginal people from one reserve to another and the removal of Aboriginal children, as well as deciding who these children were to be placed with.

... and the importance of arts and crafts practices

Aboriginal and Torres Strait Islander people did not passively accept these experiences, and have pushed for greater representation in decision-making on issues that impact their lives. Arts and crafts have been an important tool used to express their political and social rights, including to land rights and self-determination.

In releasing paintings to Europeans and in displaying paintings in public contexts Yolŋu were giving Europeans access to objects and information that from a Yolŋu viewpoint demonstrated conclusively their ownership of the land and the way in which ownership was distributed among different clans in accordance with Ancestral Law. ... The significance of their paintings to them is reflected in their commitment to the objective of land rights. To Yolŋu continued ownership of their land is not only necessary for cultural survival, it is the fulfilment of a religious obligation. (Howard Morphy cited in Royal Commission into Aboriginal Deaths in Custody 1991, para. 19.1.6)

There have been several prominent examples of arts and crafts being used as political statements. For example, the 1963 Yirrkala bark petitions, presented by the Yolŋu people to the Australian Parliament's House of Representatives, called for recognition of native title and for Yolŋu people to be given a voice in decisions on mining activity that would impact their livelihoods and independence. The painted designs proclaim Yolŋu law, depicting the traditional relations to land and the typed text is in English and Gumatj languages (Museum of Australian Democracy 2001). In 1988 the Barunga Statement, presented to the Prime Minister of Australia, Bob Hawke, by the Central and Northern Land Councils, called for the Australian Government and people to recognise Aboriginal and Torres Strait Islander people's rights. The statement combined Aboriginal symbolism from northern and central Australia and a translation of these into English language text.

The dot-style painting of Central Australia and the cross-hatching paintings of Northeast Arnhem Land show that Aboriginal people of different countries, speaking different languages, can unite in the same struggle. (Galarwuy Yunupingu cited in AIATSIS 2018)

In 1996, the Ngurrara paintings I and II, an 80 square metre canvas depicting the Walmajarri and Wangkajunga people's Country, the Great Sandy Desert, were a communal statement of sovereignty, expressed through art, created by 19 traditional owners. The paintings are evidence of the Ngurrara people's connection to Country and were submitted as part of their 1996 native title claim (Hurley 2021). In 2017, the Uluru Statement from the Heart was an artwork as well as a political document, the former representing the *Anangu* concept of Tjukurpa, linking people to their environment and ancestors.

The Uluru Statement from the Heart follows that tradition of art expressing people's connection to the land through their Dreaming ... This Tjukurpa which is expressed here [in the statement] is part of Australian history and law. (Rachel Perkins cited in Fitzpatrick 2019)

Actions to assert Aboriginal and Torres Strait Islander rights to self-determination included joining international efforts to promote Indigenous rights, for example through the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This has become one of the most important instruments for Indigenous rights at the international level, and was the product of over two decades of discussions at the United Nations. UNDRIP sets out a framework for States to take actions to 'truly recognise Indigenous peoples' rights to self-determination, participation in decision-making, respect for and promotion of culture, and equality and non-discrimination' (Delaney, Maguire and McGaughey 2020, p. 366). This includes control over cultural traditions, customs and expressions (box 2.2). The Australian Government endorsed the Declaration in 2009, however since then there has been some criticism about the extent to which its obligations have translated to its domestic policies (Delaney, Maguire and McGaughey 2020, p. 367) (chapter 6).

More recently, governments have stepped up their efforts to improve how they work with Aboriginal and Torres Strait Islander people to design policies that affect their lives. For example, in 2020 all levels of government signed up to a new National Agreement on Closing the Gap, which shares 'decision-making with Aboriginal and Torres Strait Islander people represented by their community-controlled peak organisations on Closing the Gap, the Coalition of Aboriginal and Torres Strait Islander Peak Organisations' (Coalition of Peaks). (JCOCTG 2020) Treaty negotiations are progressing in Victoria, Queensland, ACT and NT; and the then Australian Government finalised a co-design process to develop a proposal for a 'national Indigenous Voice' that could provide advice to the Australian Parliament and Government on relevant laws, policies and programs. The Australian Government has committed to implementing the Uluru Statement from the Heart in full, including progress toward a referendum to constitutionally enshrine a Voice to Parliament in their first term (ALP 2022).

Box 2.2 – UN Declaration on the Rights of Indigenous Peoples

As part of the framework under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), a number of articles deal specifically with obligations on nation states to protect the rights of Indigenous people to freely determine cultural development and heritage – which includes the practice of visual arts. For example:

- Article 3 — Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Box 2.2 – UN Declaration on the Rights of Indigenous Peoples

- Article 11(1) — Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such ... artefacts, designs, ... and visual and performing arts ...
- Article 11(2) — States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
- Article 31(1) — Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including ... designs, ... and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
- Article 31(2) — In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Source: United Nations (2007).

Arts and crafts contribute to broader wellbeing outcomes

The production of Aboriginal and Torres Strait Islander arts and crafts is fundamental in achieving positive wellbeing outcomes for Aboriginal and Torres Strait Islander people. According to Australia Council (2021c, p. 6), ‘the evidence is clear’ that practising culture, including through arts participation, is the key to improving wellbeing for Aboriginal and Torres Strait Islander people, supporting:

- the development of strong and resilient children
- improved school attendance and engagement, and higher levels of educational attainment
- improved physical and mental health and wellbeing
- greater social inclusion and cohesion
- more employment, economic opportunities and meaningful work
- safer communities with reductions in crime and improved rehabilitation
- the prevention of suicide — fostering a secure sense of cultural identity is a powerful protective factor for young people and helps them navigate racism and being a minority group in their own Country.

This is consistent with the many wellbeing frameworks (developed primarily in the health policy space) that highlight connections to culture, language, Country and kin, and the importance of self-determination, as key domains in improving wellbeing of Aboriginal and Torres Strait Islander people (table 2.1). For example, an examination of wellbeing for the Yawuru people, the traditional owners of Broome, found that wellbeing ‘starts from a relational perspective and encompasses not only relatedness to family and the community but also relatedness to Country and culture’ (Yap and Yu 2016, p. 99). With arts and crafts being inextricably linked to the development and practice of these domains, their value in promoting wellbeing is significant.

Table 2.1 – Domains included in holistic wellbeing frameworks

National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2017–2023, NIAA	Community Wellbeing from the Ground Up: A Yawuru example, Mandy Yap and Eunice Yu	Defining the Indefinable: Descriptors of Aboriginal and Torres Strait Islander Peoples' Cultures and Their Links to Health and Wellbeing, Lowitja Institute
Connection to: • Culture • Country • Family and kinship • Community • Spirit, spirituality and ancestors • Body • Mind and emotions	• Country, culture and identity • Family connectedness • Contributions to the broader community • Self-determination, rights and autonomy • Health and material wellbeing	• Cultural expression and continuity • Indigenous beliefs and knowledge • Indigenous language • Connection to Country • Family, kinship and community • Self-determination and leadership

Sources: Australian Government (2017); Salmon, Doery, Dance, Chapman, Gilbert, Williams and Lovett (2019); Yap and Yu (2016).

This interplay between arts and crafts and a holistic promotion of wellbeing is a central feature of the service model offered by community-controlled Aboriginal and Torres Strait Islander art centres and organisations around Australia. Key domains important to the wellbeing of Aboriginal and Torres Strait Islander people are central to the delivery of community and art services, as well as the economic production and sale of arts and crafts in art and cultural centres. Desart (2018b, pp. 32–33) noted the fundamental place that culture and Country have in the operation of an art centre:

Culture, along with country, is the foundation of art centres. Culture and country underpin everything. ... Think about a big tree growing under the art centre. There are two healthy branches on the tree: the government and the market. Eight roots grow up from culture and country deep underground. The tree provides shelter to the art centre and keeps it secure. Each of its roots can grow strong through consistent leadership, taking up opportunities and good management. Alternatively, these roots may wither through not managing risk, ignoring problems, becoming uprooted from culture and country, and from working the wrong way.

Reconnecting with culture

Contemporary Aboriginal and Torres Strait Islander arts and crafts can also play an important role in maintaining and (for some) reconnecting with Aboriginal and Torres Strait Islander cultural identity. It can be used in promoting cross-cultural and political dialogue, which seeks recognition of Aboriginal and Torres Strait Islander sovereignty and reparation for the harms caused by colonial law, policy and practice (Hall 1995, p. 2).

Much of contemporary Aboriginal art ... [based on the volume of 'issue' or 'statement' based artwork that has emanated from 15 urban centres] ... are usually topical, the result of artists responding to particular social, political or economic conditions and issues, such as racism, land rights or deaths in police custody. Their political agency is apparent where the form and subject

matter arouses or challenges the interest of their audience to take action or where it attempts to galvanise a shift in attitude. (Hall 1995, pp. 14–15)

For example, large-scale collaborative arts projects by some Aboriginal community-controlled organisations were developed in the 1980s, including a number of murals. The projects enabled the exchange of Aboriginal ideas with outsiders, and portrayed images that showed the continuation of Aboriginal culture in the south-east (Edmonds and Clarke 2009, p. 28). In the inner-north suburbs of Melbourne:

... large-scale mural production by young Aboriginal people symbolically and literally transformed urban spaces into locations that visually communicated a continuing Aboriginal presence. These artworks contested the myths of south-east Aboriginal culture as obsolete, highlighting this paradox, as well as tensions surrounding notions of authentic Aboriginality in the region. Mural-making provided a space for Aboriginal artists to articulate perspectives on their history and culture, revealing a 'hidden history' through their artwork, while responding to the socio-political climate of the time ... (Edmonds 2012, pp. 21–22)

Colonisation disrupted many aspects of traditional culture particularly in south-eastern Aboriginal communities, but others survived and are being reclaimed and reinvigorated through a process of discovery, often assisted by art practices. As artist Vicki Couzens noted:

You see people who don't know where they come from or who they are and they start painting dots because it's that reaching out to their Aboriginal identity and trying to find out who they are, and when they start finding that out they move on to their own [art]. (cited in Edmonds 2012, p. 29)

This process of discovery has also been observed in the works of other artists:

... Ray Thomas's early paintings included 'dots' and 'cross-hatching' designs. However, following conversations with Lin Onus — who raised concerns by people from the Top End about their markings being used by people in the south without authorisation — Thomas discovered, through his own research of ethnographic texts and the collections of Gunnai material culture in Museum Victoria, ways of incorporating his Ancestors' motifs in his own work ... (Edmonds 2012, p. 30)

2.3 Arts and crafts provide critical social and economic benefits for Aboriginal and Torres Strait Islander people

Arts and crafts are a key income and employment source

The commercial production of Aboriginal and Torres Strait Islander arts and crafts was established within Aboriginal missions as a way to create an income and employment source for these communities. Arts and crafts evolved in a way that recognised their economic benefits, meaning a shift from production solely for cultural maintenance and transmission to producing more pieces for consumption by the broader arts and tourism markets. The industry has grown to develop into distinct markets, catering to different types of consumers (chapter 3).

The 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.

In many Aboriginal communities Art Centres are the only Aboriginal owned enterprise, and are often the most successful (or only) business of any kind. Art Centres are therefore vital places for employment of local people and of livelihoods for families. (ANKA, HoRSCIA 2018, sub. 132, p. 8)

The South Australian Government (sub. 21, p. 3) also noted that the seven art centres located on the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands are 'the primary source of non-government income in communities and a major source of employment for Anangu.'

In 2019-20, Desart estimated there were 19 276 active artists working in art centres across Australia, this included 1511 'core' artists that produced ten or more artworks in the year (which represent 7.8% of the total number) (Desart 2021b). The Commission has estimated a similar number of Aboriginal and Torres Strait Islander people (19 000) who earn an income from visual arts and crafts (this group accounts for about 20% of the total number of Aboriginal and Torres Strait Islander people practising arts and crafts) (chapter 3).

The production of arts and crafts plays an important role in the livelihoods of some Aboriginal and Torres Strait Islander artists. A study looking at arts and creativity across the Barkly Region in the Northern Territory, found that 75.7% of respondent artists and creatives earned an income from their practice, and over half of those cited it as their primary source of income. Art production in the Barkly Region was also sustained by voluntary labour, with 58.6% of artists and creatives giving up their time through volunteering (Bartleet et al. 2019, p. 6).

The vast majority of Aboriginal and Torres Strait Islander artists do not make a living from their practice. For example, an assessment of sales data in remote art centres from 1980 to 2012 found that only 5.4% of artists earned more than \$100 000 over their careers, while 70.8% made less than \$10 000. Only eight (0.3%) made more than \$1 million (Meredith 2018, p. 169; Woodhead and Acker 2015, p. 7). The Commission has estimated that in 2019-20, artists who sold their works through art centres earned just over \$2700 on average. Incomes are discussed in detail in chapter 3.

In addition to providing an income to Aboriginal and Torres Strait Islander artists, the sector also offers employment opportunities for art workers and directors working in Aboriginal and Torres Strait Islander community-controlled art centres and service organisations, as well as other business enterprises (including in related industries such as tourism, and other cultural and creative practices). For example, in 2021, the organisations funded by the Australian Government's Indigenous Visual Arts Industry Support (IVAIS) program employed more than 300 Aboriginal and Torres Strait Islander arts workers, most living in remote communities (OFTA 2021c). In 2022, the 89 Aboriginal and Torres Strait Islander corporations registered with ORIC that reported as only operating an art centre, employed around 545 directors (ORIC 2022a). However, there appear to be limited opportunities for career development in art centres and other organisations for art workers, which are staffed primarily by non-Indigenous people (chapter 9).

Most art centre managers are non-Indigenous people and there is a need to develop more effective succession planning and training to ensure First Nations peoples from local communities are recruited into management and leadership of these enterprises. (Department of Communities, Housing and the Digital Economy, sub. 33, p. 5)

In addition to the economic value of generating an income from working in the sector, artists can also derive agency, pride and purpose from practising art on Country. For example, Nyurapya Kaika Burton, Director of Tjala Arts, noted that the art centre:

... is a place where all the leaders of our community work each day, we share and instruct our cultural stories, it is the place where we have grown the most meaningful employment opportunities in community. There are very few jobs outside of the Art Centre in our community, and I am proud of Tjala Arts which my sister started, and I look after now. Everyone needs a job in

the world, everyone needs a place to be where they are respected for their work and ideas, this is Tjala Arts in Amata. We grew it and it means everything to us. (APY Art Centre Collective, sub. 17, p. 13)

Beyond people directly employed in the sector, arts and crafts generate economic activity for communities – particularly in remote communities where family responsibilities are significant. Artists for example, may share their cash income or goods they have purchased with their income with family members. ‘In this way, the money derived from the arts is distributed within the community’ (SSCECITA 2007, p. 18).

Broader social outcomes supported by arts and crafts

Participation in arts and crafts can also support other domains that impact on the wellbeing of Aboriginal and Torres Strait Islander people. The Victorian Government’s VicHealth, pointed to a number of evaluations and research work that conclude involvement in the arts can:

- increase social cohesion and connections
- build a sense of community pride
- create a vibrant, creative and innovative community
- promote economic development
- decrease rates of crime, discrimination and violence and reduce drug and alcohol consumption.

For Aboriginal people the arts can develop community connections and positive cultural identity, providing a source of resilience against difficult life circumstances while improving physical and mental wellbeing. The arts have also demonstrated positive impacts on [Aboriginal and Torres Strait Islander people’s] educational and employment outcomes. (VicHealth 2013, p. 2)

Community-controlled art centres take a strengths-based approach in their operations. Therefore, they are able to reflect the strengths and priorities of their communities in how they promote health outcomes, and overcome the ‘deficit discourse’ that has become synonymous with Indigenous health, which ‘accept[s] “illness” as part of the Indigenous identity’ (Meredith 2018, p. 28). The role of art centres is examined in the next section.

The therapeutic benefits from participation in arts programs can promote successful outcomes in a number of health and social areas. A number of examples are described below. Underlying the success of each of these arts programs are key factors that were identified by the Closing the Gap Clearinghouse (box 2.3).

Box 2.3 – ‘What works’ in supporting healthy communities through arts programs

- Where no activity was previously made available, offering some type of art program to fill that void should be given priority; evidence suggests that there are many art programs that provide positive outcomes.
- Providing a quality artistic experience heightens engagement in the arts activity.
- Arts programs require long-term, sustained and regular contact between arts professionals and participants to allow time to consolidate new skills and benefits that flow from involvement in the program.
- Linking arts programs with other services (for example, health services or counselling) and opportunities (for example, jobs or more relevant educational programs) improves the uptake of other services required to improve health and wellbeing outcomes, or behavioural change.
- Keeping participants’ costs to a minimum ensures broad access to programs, as well as sustainability after external funding ceases.

Box 2.3 – ‘What works’ in supporting healthy communities through arts programs

- Scheduling activities at appropriate times enhances engagement — for example, for young people: after school, weekends and during school holidays when they are most likely to have large amounts of unsupervised free time.
- Creating a safe place through arts activities, where trust has been built, allows for community members to work through challenges and potential community and personal change without fear of retribution or being stigmatised.
- Using local languages, where these are still strong, and linking programs to Country facilitates deeper engagement and allows local values and wisdom to be incorporated into programs.
- Facilitating successful and positive risk taking provides an alternative to inappropriate risks.
- Ensuring stable funding and staffing is crucial to developing sustainable programs.
- Involving the community in the planning and implementation of programs promotes cultural appropriateness, engagement and sustainability.

Source: Ware (2014, pp. 1–2).

Keeping Elders strong and transmitting knowledges

Older Aboriginal and Torres Strait Islander artists are more likely to participate in, and earn income from, arts and crafts (Australia Council 2017a). Based on financial statements from art centres, artists aged 60 or more produce 27.2% of all artworks, while female artists aged 50 or more produce 37.2% of all artworks (Desart 2021b, p. 6).

This highlights the contribution of arts and culture to the wellbeing and livelihoods of older First Nations Australians. It also highlights the importance of supporting intergenerational cultural transmission, and investment to engage young First Nations people in the arts ... (Australia Council 2017a)

Art programs are offered in aged care facilities to help maintain Aboriginal and Torres Strait Islander Elders' connection to their families and Country, and promote intergenerational learning. For example, in the Kungkarrangkalpa (Seven Sisters) Aged Care facility, located in the central desert region of Western Australia, the Warakurna Arts Centre provides a painting program for residents. Jane Menzies, the manager of the Warakurna Arts centre, noted that the painting program benefits both the aged care residents and the wider community.

Intergenerational learning was really important, and just enabling these artists to share their stories with their children and their children's children. ... [granddaughters, cousins, nieces or nephews, and sons] ... come here and they work here and they also help with the artists as well so there is that exchange. ... For a lot of these older people, they don't have the opportunities to share those stories, they might be in aged care, they may not see their family very often ... (cited in Morris 2016)

Art centres play an important role in keeping Elders strong and connected. This was highlighted in work undertaken by the National Ageing Research Institute, which interviewed Elders and their service providers across three art centres in the Northern Territory, South Australia and Western Australia. For example, Lynley Nargoodah from Mangkaja Arts Resource Agency noted:

... I think in all old people homes tend to get forgotten and for them to come here and paint, it's like mentally they're going home when they paint. Yeah, physically, they are not able to, but mentally they're already home and painting Country. (cited in NARI 2021a)

Michelle Young from Tjanpi Desert Weavers noted:

Art centres are really strong places for older people to be respected and valued, and they contribute fully to the economy and families, and they also contribute a wealth of information that informs the artwork. (cited in NARI 2021a)

The study highlighted the extent of support provided by art centres:

[M]any centres are delivering direct care for older artists including helping them with errands, prompting them to take their medication, providing meals and mobility assistance, and supporting them to access and navigate services ... we heard diverse examples of how art centres provide cultural, spiritual, physical, social, and emotional care. We also saw innovative examples of collaborations with aged care and health providers. (NARI 2021b)

‘A salve for a sore soul’: Art provides opportunities for healing and connection

Art therapy programs have been used by Aboriginal and Torres Strait Islander people to express and deal with experiences of loss, domestic violence and addiction. For example, the Barndi Nyarlu: Good Woman creative arts project facilitated by the WA Centre for Rural Health ran weekly workshops at the Mullewa Arts Centre, about 460 kilometres north of Perth. Art therapy was introduced after participants ‘wanted to focus their creative energy on how to cope with the many traumas experienced in their lives.’

A participant of the project noted:

We never realised how much we were carrying around. Then we got involved in making these pieces and talking about them. There seemed to be so much that was affecting us all. Not just the loss of loved ones, but loss of health and community, looking after family and trying to get by day to day. And then we started talking about where we get the strength to carry on and what keeps us going. (cited in WA Centre for Rural Health 2020)

Art therapy is used to help children deal with either personal or inherited collective trauma, such as the legacy of the Stolen Generations. For example, in New South Wales, Gunawirra’s art therapy project seeks to help Aboriginal pre-school children ‘to explore feelings and ideas, culture, and ... [increase] their ability to experiment and bring feelings through art’ (Toomey and Bloom 2021, p. 3). The project was co-facilitated by Aboriginal artists that provided cultural links that:

... helped develop pride in culture and give a sense of belonging and of self identity and value in being Aboriginal — returning what has been stolen. It also added a structural layer to the art making and a cognitive presence of the group as an exclusively Aboriginal group. Art is a profound part of Aboriginal culture. The presence of an Aboriginal Artist running this group connected the therapy to their culture. (Toomey and Bloom 2021, p. 3)

An evaluation of this program across five locations noted a positive change for school children who received art therapy for at least one school term, including improvement in psychological wellbeing, educational attainment, and behavioural and resilience factors (Lynch 2021, p. 4).

Other art programs seek to connect Aboriginal and Torres Strait Islander children to culture and promote the economic opportunities available in the arts and crafts sector. For example, the Miriam Rose Foundation provides school holiday art programs that, ‘encourage the children to identify art as an economic opportunity as well as a salve for a sore soul ... providing professional quality tools and paints on occasion and facilitating curated display and sale of the art’ (Miriam Rose Foundation 2020).

Improving community reintegration of ex-offenders

Participation in arts programs in correctional facilities has been shown to help prepare Aboriginal and Torres Strait Islander prisoners for life after their release. For example, a Victorian-based corrections program, the Torch, encourages inmates to paint and connect to their cultural roots. Participants are provided with cultural kits that contain pictures and information about their language group, totems and Country, and they are encouraged to paint in a way that draws on their cultural identities. The program also improves their prospects beyond prison — both in terms of strengthening their identities, including as an artist, and providing them with an opportunity to earn an income and save to meet basic needs post-release.

An evaluation in 2011-12 found that the program may improve recidivism rates by 53 per cent. This suggests that making art is so life-affirming that it can motivate people to change their ways. (Westwood 2015)

Arts and crafts programs are also offered in NSW. Like the Torch program, these provide a range of benefits, including engaging inmates in a constructive activity, and the opportunity to earn an income (for some of these programs) and acquire skills. For example, the Girrawaa Arts Centre was opened in 1998 at Bathurst Correctional Centre, and is supported by professional artists and Elders. The program provides opportunities for up to 15 Aboriginal and Torres Strait Islander inmates to develop artistic skills and learn how to sell their artwork and build careers as successful artists support. Sales incomes in this program are put back into the centre's operating costs. The program also:

... provides Aboriginal inmates with cultural, educational, vocational, workplace and business management skills. Inmates complete specialised courses such as Aboriginal contemporary design, picture framing and sandblasting through TAFE Western as well as basic small business courses. These skills aim to help them gain work on their release from custody and reduces their risk of re-offending. (Corrective Services NSW 2020)

Art centres as cultural hubs and fulfilling roles beyond the arts

While the Aboriginal and Torres Strait Islander arts and crafts sector is much broader than Aboriginal and Torres Strait Islander-owned community art centres, this model provides a good example about how customary practices are placed at the heart of operations. There is a diversity in how art centres operate in practice, reflecting the different needs of each community and the nature of the market that they have access to. Nevertheless, each works in service of the communities they represent.

Aboriginal art centres belong to us, to Aboriginal people. Art centres are places where you can paint, people come and talk story, a lot of people come together. It's a happy place for everyone. We don't have violence in our art centres. You can feel comfortable to sit down and talk about art and culture or if you have a problem. (Jane Young as cited in Desart 2018b, p. 2)

Art centres are much more than places where art is produced. They fulfil different roles in the community to support families and culture (figure 2.2). In some remote areas, they are the only places that support the community. Many participants in this study spoke of the important role that art centres play (box 2.4).

Figure 2.2 – Diverse roles of art centres

 Cultural maintenance	Aboriginal law and culture are the foundation for all the arts and crafts produced and sold in art centres.
 Renewal	Communities can renew culture, values, law and economic integrity. Attachment to country is renewed and strengthened.
 Work and income	Provides a major source of self-generated income and financial wellbeing of the community.
 Distributor to markets	Provides access to national, international and tourist markets through direct sales, and connections with galleries and wholesalers.
 Strengthening the community	Works with the community to provide family and community supports – such as youth, disability, aged care, substance abuse, employment programs.
 Learning	Artists and executive members are not just learners, but also educators, mentors and facilitators, providing formal and informal training opportunities.
 Respite and care	Provides a safe place for older people and women, where one can find company, a cup of tea and support.
 Other informal supports	Provides other supports, such as translating documents, arranging accommodation, transport and financial support.

Source: Adapted from Desart (2006).

Box 2.4 – Study participants' views on the role of art centres

The Aboriginal Art Centre Hub of WA:

Not-for-profit art centres play a multifaceted role in Aboriginal communities. They are an important meeting place for generations of people to gather and create art. They support the maintenance of culture as well as the health, wellbeing, financial sustainability and legal copyright protections of Indigenous communities and artists. (sub. 20, p. 9)

APY Art Centre Collective:

Our Art Centres play such a positive role in supporting everyone in our communities to have work they can be proud of particularly the vulnerable, our elderly and disabled family members. Our Tjukurpa, our culture is alive every day in our Art Centres, it is celebrated and instructed to younger generations. Our Art Centres benefit every household on them APY Lands and play a key role in improving the health and well-being for all Anangu families on the Lands. (sub. 17, p. 5)

Box 2.4 – Study participants' views on the role of art centres

Australia Council for the Arts:

In addition to the vital role that they play in the functioning of the Indigenous arts economy ... art centres are also highly valued by community members, are usually at the heart of community life, and are central to the cohesiveness and social and economic wellbeing of remote communities. Most art centres and artists subsidise other services for their communities such as food and nutrition programs, numeracy and literacy programs, training and employment support, leadership and youth services, after school and holiday programs, as well as facilitating access to government services. (sub. 24, p. 30)

Desart:

Aboriginal art centres are the primary places of art production, marketing, sales and employment for Australia's Aboriginal and Torres Strait Islander sector. They are the organising logic and creative powerhouse of the Aboriginal art industry, a place where creative apprenticeships, artistic excellence and social and cultural wellbeing unfold in dynamic relationship to each other. (sub. 4, p. 18)

National Association for the Visual Arts (NAVA):

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. (sub. 23, p. 5)

The Northern Territory Government:

Art centres across the Northern Territory and elsewhere play an indispensable role in remote regions as a source of Aboriginal cultural leadership, language, identity and creativity; as a link to the mainstream art market; as centres for community engagement and participation; and as the provider of a range of needed services in local communities that yield benefits in mental and physical health, social cohesion, cultural maintenance, creative thinking, problem solving skills, literacy and numeracy and more. (sub. 28, p. 14)

An evaluation of Wirnda Barna Artists, an art centre established in the Upper Murchison region of Western Australia in 2007, found that the centre had realised diverse benefits from art production, tourism, social and community development, community health and well-being, and reconciliation (in the medium to long-term). Artists valued the opportunity to promote their work, develop their skills, access better quality materials and broaden their horizons. The evaluation provided evidence of social outcomes, such as:

... community reconciliation, facilitation of local Aboriginal culture, receiving public acknowledgement in the upper Murchison communities, enabling of Aboriginal people to be respected outside their own community, facilitating Aboriginal people to form a positive identity for themselves, and improvements in personal and community health and well-being. (Cooper, Bahn and Giles 2012, p. 9)

The evaluation also noted that the relatively small and 'affordable' funding provided by government to the art centre proved relatively cost effective when compared to the considerable benefits that were identified, and when compared to what is spent on other programs.

2.4 Aboriginal and Torres Strait Islander arts and crafts play a key role in Australia's economy, identity and culture

Aboriginal and Torres Strait Islander visual arts and crafts are foundational to Australia's national identity, contributing to how Australians define and share culture, traditions and history, and how Australia promotes itself overseas. They also play a key role in contributing to economic activity.

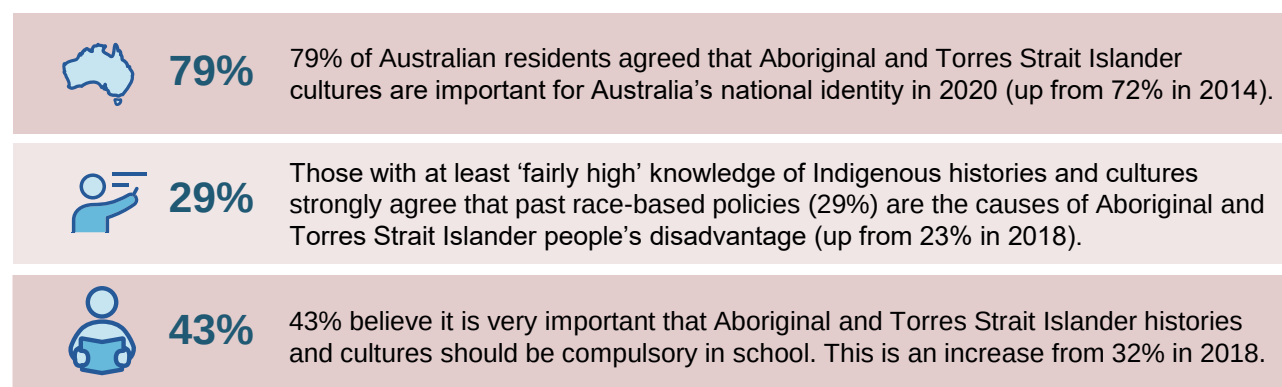
National identity and cultural fabric

Aboriginal and Torres Strait Islander cultural and creative practices are increasingly recognised as contributing to Australia's national identity. Participants in this study for example have described how art and culture is 'of vital importance' (APY Art Centre Collective, sub. 17, p. 5) and is a 'foundation' (A New Approach, sub. 6, p. 8) to Australia's national identity. The Australian Government's *Culture and Capability Programme* of the *Indigenous Advancement Strategy* provides funding for the maintenance and strengthening of Aboriginal and Torres Strait Islander cultural expression and conservation in the context that these cultures 'are a critical part of our national identity.'

As Australians, we can all be proud to be the home of one of the oldest continuous civilisations on Earth, extending back over 65,000 years. Aboriginal and Torres Strait Islander people's strong connection to family, land, language, and culture forms the foundation for social, economic, and individual wellbeing. (NIAA 2022a)

According to the 2020 Australian Reconciliation Barometer, about 79% of Australian residents agreed that Aboriginal and Torres Strait Islander cultures are important for Australia's national identity (figure 2.3). The strength of this sentiment has increased considerably across the general community between 2014 and 2020 (41% strongly agreed in 2020 compared to 26% in 2014) (Reconciliation Australia and Polity Pty Ltd 2020, p. 87).

Figure 2.3 – Australians' sentiment on Aboriginal and Torres Strait Islander cultures



Source: Reconciliation Australia and Polity Pty Ltd. (2020).

The contribution of Aboriginal and Torres Strait Islander arts and crafts to Australia's national identity is also observed in how our national institutions, businesses and organisations use Aboriginal and Torres Strait Islander arts to promote either themselves and Australian culture. International and national art galleries, such as the National Gallery of Australia in Canberra or the Musée du Quai Branly in Paris, have major

collections of Aboriginal and Torres Strait Islander visual arts and crafts. Aboriginal and Torres Strait Islander visual arts:

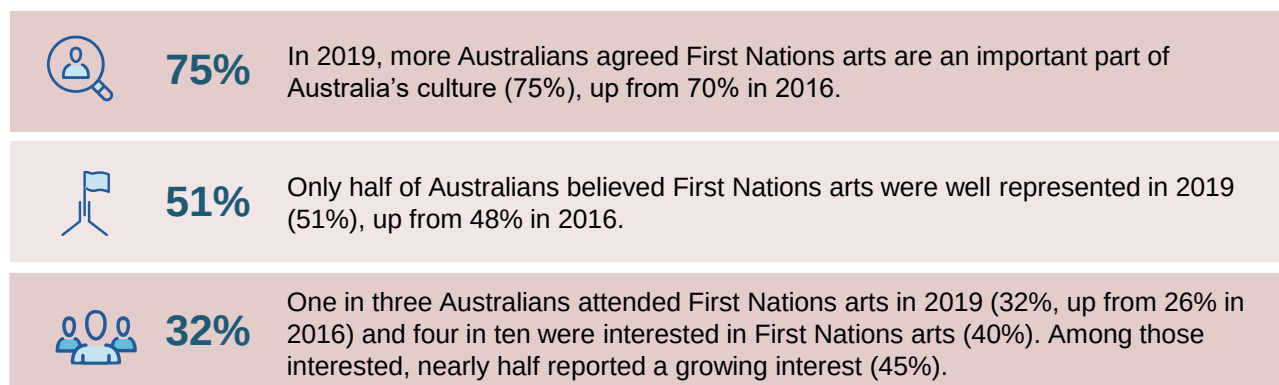
... are also used as powerful symbols in our Government buildings and courts to demonstrate the inclusion and appreciation of Indigenous culture by Australia's decision-makers, with two high profile examples being the mosaic by Aboriginal artist Michael Nelson Tjakamarra in the forecourt of Parliament House, Canberra and a display of Indigenous art in the foyer of the Supreme Court of the Northern Territory. (Arts Law Centre of Australia, HoRSCIA 2018, sub 64.1, p. 8)

Since 1994, QANTAS commissioned and displayed five Aboriginal and Torres Strait Islander liveries across their fleet. Through the Flying Art Series, QANTAS notes they are '... proud to bring Aboriginal and Torres Strait Islander culture and stories to the world' (QANTAS 2018).

Major events can also provide an opportunity to highlight Aboriginal and Torres Strait Islander arts and culture — and promote the sector to new markets. The Queensland Government for example noted that the 'Brisbane 2032 Olympics and Paralympics provide an opportunity for First Nations visual arts and craft enterprises to supply to new and bigger markets' (sub. 33, p. 8).

Aboriginal and Torres Strait Islander arts and crafts is a significant component of Australia's culture more generally. Results from the National Arts Participation Survey conducted by the Australia Council in 2019 noted an increasing number of Australians agree Aboriginal and Torres Strait Islander arts are an important part of Australia's culture (75%, up from 70% in 2016). Survey results also reported significant levels of engagement with Aboriginal and Torres Strait Islander arts and crafts, and a belief that greater Aboriginal and Torres Strait Islander representation is required in the arts sector (figure 2.4).

Figure 2.4 – Australians' participation and engagement with Aboriginal and Torres Strait Islander arts and crafts



Source: Australia Council for the Arts (2020b, p. 14).

Collaborations have been an important way in which Aboriginal and Torres Strait Islander culture, through art practice, has contributed to creating Australia's cultural fabric. The most meaningful collaborations are those where culture is respected and all aspects of the collaboration are shared. For example, one of the longest-standing trade and cultural relationships occurred between the Yolŋu people of north east Arnhem Land and the Macassan people of Sulawesi (now part of Indonesia) from at least the 1700s. The Macassans 'lived for months alongside the Yolŋu on local beaches, where they exchanged knowledge and oral and visual traditions, and worked together to source trepang, a sea cucumber prized by the Chinese' (Kale 2021).

Diane Moon, curator of Indigenous fibre art at the Queensland Art Gallery & Gallery of Modern Art (QAGOMA) in Brisbane, noted:

A mutual respect developed between the Macassans and the Yolŋu ... Importantly, they formed 'family' relationships, which meant [Macassans] were absorbed into Yolŋu society with shared responsibilities and rights. (cited in Kale 2021)

In contemporary collaborations, the importance of reciprocal relationships is reflected in best practice policy guides, such as the Australia Council for the Arts *First Nations Cultural and Intellectual Property in the Arts*. In a collaboration which the Copyright Agency (2019) described as 'a benchmark for future fashion licensing agreements', fashion brand Gorman worked with artists from Mangkaja Arts Resource Agency in Western Australia to design a new collection. The licensing agreement was brokered by Copyright Agency and involved them working:

... with both Mangkaja and Gorman to respectfully negotiate fair and reasonable licensing fees. ... [making] ... sure terms, conditions, attributions and acknowledgment of the artists were negotiated to protect the artist and the reproduction of the artwork. And crucially, ... [ensuring] ... the artists had approval throughout the whole process, from concept to instore delivery, and the approach to promotion via online platforms and social media. (Copyright Agency 2019)

This project allows artists to share their stories with new audiences and help promote contemporary Aboriginal art practices. Collaborations can also further the process of reconciliation. For example, the Solidarity Art Project facilitated by RMIT University in 2022 involves students and staff making written pledges on coloured fabric strips on how they will support Aboriginal and Torres Strait Islander people, and how they will contribute to making RMIT a safe and welcoming place for everyone. A Wemba Wemba, Gunditjmarra, Jardwadjali, and Wergaia artist, Indianna Hunt, will incorporate these commitments to cover a mapiyal (platypus) sculpture, forming its fur (RMIT University 2022).

Contributing to national economic activity

In addition to being a source of income and employment for Aboriginal and Torres Strait Islander artists and their communities, the sector also contributes to national economic activity across various parts of the economy. This includes the:

- creative sector, where direct financial gains are made by intermediary firms that trade in the primary and secondary sale of arts and crafts, including commercial art galleries, art dealers, auction houses, and art fairs (in addition to Aboriginal and Torres Strait Islander art centres)
- manufacturing and broader retail sector, where firms specialise in licensing Aboriginal and Torres Strait Islander arts into manufactured products made in Australia and overseas, including clothing and fabrics, homewares, giftware and stationery, and souvenir products, among others
- tourism, accommodation and hospitality sectors, which benefit indirectly from the economic activity generated by domestic and international tourists attracted by the Aboriginal and Torres Strait Islander arts and crafts produced in different regions.

Aboriginal and Torres Strait Islander arts and crafts also employ many non-Indigenous people who work across these sectors, including art workers, curators, retail workers, art therapists, researchers, consultants and many others.

Consumers also benefit from the availability of a wide range of Aboriginal and Torres Strait Islander visual arts and crafts. In the original art segment of the market, consumption value could come from the aesthetic benefits received in owning and displaying an art piece; intrinsic value could be obtained in supporting Aboriginal and Torres Strait Islander artists and art centres, or in the knowledges gained from learning about

the culture and stories of the artwork purchased; and finally an artwork could present future value as an investment asset. At the other end of the market, consumption value is generated from the use of art and craft products as a gift, souvenir or memento from a tourist experience, or consumption item (e.g., stationery, kitchenware, clothing).

Chapter 3 provides an assessment of the size and nature of Aboriginal and Torres Strait Islander arts and crafts markets.



Draft Finding 2.1

Aboriginal and Torres Strait Islander arts and crafts generate broad cultural and economic benefits

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.

3. Markets for visual arts and crafts

Key points

- * **Markets for Aboriginal and Torres Strait Islander visual arts and crafts are diverse. They include original artworks on traditional and contemporary media — for example, bark, wood, canvas and digital art. They also include consumer products that incorporate or claim to incorporate Aboriginal and Torres Strait Islander art or designs.**
- * **In total, the Commission conservatively estimates that, in 2019–20, consumers spent about \$250 million on Aboriginal and Torres Strait Islander visual arts and crafts, including original artworks, secondary market sales and product sales.**
 - Artists receive about 10–15% of the total value of sales taking place in the market.
 - Most original artworks by Aboriginal and Torres Strait Islander artists are sold through commercial galleries, which generated an estimated \$74–90 million in sales.
- * **Making visual arts and crafts contributes to the cultural and economic wellbeing of thousands of artists and their communities. In 2019, an estimated 19 000 Aboriginal and Torres Strait Islander people received income from the sale of visual arts and crafts, but many more artists did not earn income from artmaking.**
 - Those who earned income from producing visual arts and crafts tended to be older artists in remote areas, with strong language connections to their cultural group. Their paintings are underpinned by culture, embedded with traditional stories, motifs and laws.
 - Visual arts and crafts provide an important source of income for Aboriginal and Torres Strait Islander artists — artists in remote areas who sold visual arts and crafts often have higher incomes than those who did not.
- * **Art centres play an important role in the production and sale of original artworks in mostly remote areas, providing income to 5800–7700 artists and their families in 2019–20.**
- * **Independent artists have a noteworthy presence in primary and secondary markets for Aboriginal and Torres Strait Islander artworks. They use several methods to bring their art to market, including working with private dealers, direct sales, and creating commissioned designs for governments or businesses.**
- * **Resales of Aboriginal and Torres Strait Islander artworks peaked at \$36 million in 2007, but have since declined and stabilised at a range between \$6 million and \$14 million per year.**
- * **Spending on souvenirs and merchandise totalled at least \$78 million in 2019, purchased almost entirely by international visitors.**
 - An estimated 55–61% of spending on souvenirs was on inauthentic Indigenous-style products.

Information about the size and structure of Aboriginal and Torres Strait Islander visual arts and crafts markets is important to assessing how well policy decisions are calibrated to the unique characteristics of the markets. Data about the size of the markets provides information about the potential scale of problems associated with the sale of inauthentic or unauthorised reproductions of visual arts (chapter 4, chapter 6). And understanding the size and structure of the markets can help with the design of funding programs, so that they are directed to priority areas that deliver high net benefits to the community (chapter 9, chapter 10).

This chapter examines the total value of markets for Aboriginal and Torres Strait Islander visual art, and the value chain through which visual arts and crafts reach the market. In doing so, it fills a gap in information on the size of the industry — recent studies have tended to focus on individual segments (such as the secondary market and art centres), rather than considering the markets as a whole. The estimates produced in this chapter cover both authentic and inauthentic visual arts and crafts (the prevalence and nature of which is examined in greater detail in chapter 4). In estimating the size of the markets, the Commission has drawn on a range of approaches using several data sources, including an art centre database, tourism surveys, ABS surveys and a secondary market sales database.

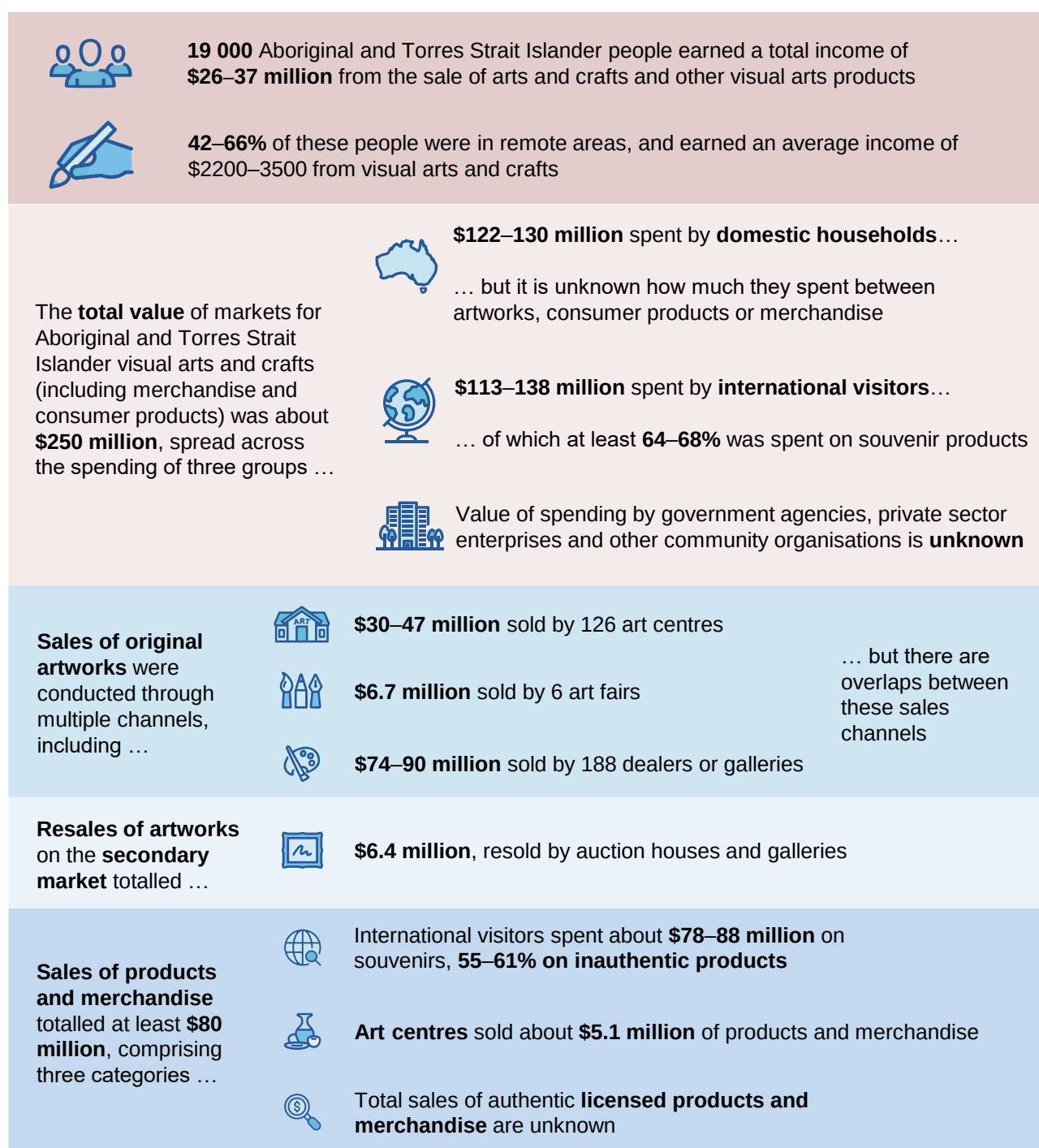
Despite the 20-year gap since the most recent study on the value of Aboriginal and Torres Strait Islander visual arts and crafts markets, problems with uneven and fragmented data remain (AAAA, sub. 26, p. 2; ARAA sub. 8, p. 1). In some areas, such as art centres, public secondary market sales and government grant recipients, data on sales and artist characteristics is regularly collected. Data availability in other areas such as activity by commercial galleries, independent artists and sales of souvenir products is poor, and the Commission's estimates therefore contain a considerable degree of uncertainty. For example, data specifically on sales of Aboriginal and Torres Strait Islander artworks by commercial galleries and consumer spending on souvenir products was last collected and published in the late 1990s. Further, overlaps in data across several market segments limit the precision of estimates for the value of the total market.

The markets for Aboriginal and Torres Strait Islander visual arts and crafts broadly comprises three main segments: original artworks, the secondary market and product markets. These segments are interrelated — for example, artworks must have passed through the (primary) market before being resold on the secondary market. Similarly, original artworks may be licensed for use on merchandise sold in product markets.

Section 3.1 considers these segments together as a whole, examining key data sources that indicate the size of the overall market for Aboriginal and Torres Strait Islander visual arts and crafts. Section 3.2 provides an overview of artists and their communities, including the challenges faced by Aboriginal and Torres Strait Islander people living in remote areas. The chapter then examines the market for original artworks, underpinned by artists working through art centres (section 3.3) and independent artists (section 3.4). Section 3.5 examines the total value of the secondary market. Section 3.6 examines how licensed and other consumer products are created and reach the market. Throughout all sections, the dollar values reported have been adjusted for inflation either to 2021 dollars (for calendar year data), or to 2020-21 dollars (for financial year data).

3.1 Markets in aggregate

The Commission estimates that, in 2019, consumers spent about \$250 million on Aboriginal and Torres Strait Islander visual arts and crafts (figure 3.1). This estimate is conservative, and due to gaps in data sources, it is not fully aligned with the overlapping estimates for market segments discussed below.

Figure 3.1 – Estimates for the total sales or income of 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 visual arts and crafts markets. In addition, there are substantial 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.

Source: Commission estimates.

Most visual arts and crafts are produced through art centres, and sold through commercial galleries

At the heart of visual arts and crafts markets are Aboriginal and Torres Strait Islander artists, who are responsible for creating most of the original artworks sold in this sector. There are about 19 000 Aboriginal and Torres Strait Islander people who earned income from the sale of arts and crafts in 2019-20. About 5800–7700 artists sold art through art centres in 2019-20; art centre sales totalled between \$30–46.6 million, of which about half — \$16.3–25.4 million — went to artists.

While some artists are well known and command high prices for their works, the income of most artists remains small — for artists who sold art through art centres in 2019-20, their average income was just over \$2700. The Commission has produced illustrative estimates based on sparse available data — independent artists working in remote locations earned an estimated \$2.6 million, and those working in regional and metropolitan areas, conservatively earned an estimated \$6.8–8.3 million (box 3.1).

Box 3.1 – The state of data on Aboriginal and Torres Strait Islander artists

Availability of data on the economic participation of Aboriginal and Torres Strait Islander artists is mixed. The available datasets tend to cover different sectors, but use varying definitions that do not fully align. For example:

- the 2014-15 ABS *National Aboriginal and Torres Strait Islander Social Survey* (NATSISS) produced estimates of the number of Aboriginal and Torres Strait Islander people aged 15 or over who received income from the sale of paintings, weavings, or other artworks
- the Indigenous Visual Arts Industry Support (IVAIS) grant program collects data on the number of artists who benefit from art centre services provided by IVAIS-funded art centres
- Desart's Stories Art Money (SAM) database includes multiple variations for counts of artists, including artists who sold at least one artwork per year, active artists (defined as those who sold, consigned or catalogued artworks) and core artists (defined as those who produced 10 or more artworks)

In particular, there is a high level of uncertainty for data on independent artists in regional and metropolitan areas, which inhibits the accuracy of any estimates for the total value of artworks that they sell. Commission estimates from the NATSISS suggest that a total of 8200–10 200 Aboriginal and Torres Strait Islander people in regional and metropolitan areas earned income from the sale of visual arts and crafts in 2019. However, the Commission, drawing from sources of information including the Indigenous Art Code, Aboriginal Art Association of Australia and Yellow Pages, has only been able to identify about 457 independent artists in regional and metropolitan areas.

The number of artists is a key component of the Commission's methodology in estimating the total income of independent artists. The Commission's estimates suggest that in 2019, 1200 independent artists working in remote locations earned at least \$2.6 million, and the 457 identified as working in regional and metropolitan areas earned \$6.8–8.3 million.

Artists working independently or through art centres often sell their art through channels other than direct sales, making use of commercial galleries and art fairs. Commercial galleries are by far the largest channel, generating an estimated \$74–90 million in sales in 2019,⁵ but this figure partially overlaps with estimates for other segments as it is not known what share was sourced from art centres or independent artists.

Original artworks may eventually be resold to other buyers on the secondary market. In 2019, secondary sales from auction houses and commercial galleries totalled \$6.4 million, but grew to \$11.6 million in 2021 (Furphy 2022). These sales are a further source of income for artists via the Australian Government's Resale Royalty scheme, which entitles artists or their beneficiaries to 5% of secondary sales of art priced over \$1000. Resales resulted in total payments to Aboriginal and Torres Strait Islander people of \$355 000 in the 2019-20 financial year and \$406 000 in 2020-21 (unpublished data from Copyright Agency).

Buyers are diverse, and include tourists and commercial enterprises

Demand in the market is driven by a mix of groups, varying with artwork and product types. Domestic households purchase original Aboriginal and Torres Strait Islander artworks, licensed products and secondary market artworks, with an estimated aggregate value of \$121.5–129.5 million in 2019. In 2015, domestic households spent about \$482.5 million on paintings, carvings and sculptures (ABS 2017). The Commission has estimated, based on historical data from the 1997 *Arts and Crafts Purchases Survey* and art centre data, that at least 18% of this spending was on original Aboriginal and Torres Strait Islander artworks. Part of this household spending takes place as part of domestic tourism, though the share attributable to these activities is unclear.

Purchases by international visitors are almost entirely responsible for sales of Aboriginal and Torres Strait Islander souvenirs and other licensed products sold in souvenir or gifts retailers, with a total spend between \$77.7–87.8 million in 2019. From this total, the Commission estimated that at least \$42.9–53.4 million was spent on inauthentic Indigenous-style products created without the involvement of Aboriginal and Torres Strait Islander artists, amounting to 55-61% of the total spending on souvenir products (box 3.2). International visitors also spent an estimated \$35–50.6 million on authentic original artworks and other crafts.

Box 3.2 – Estimating spending on inauthentic souvenir products

In past market studies, one longstanding gap in data has been the value of spending on inauthentic Indigenous-style visual arts and crafts products. To fill this gap, the Commission has made use of data on the prevalence of inauthentic products and souvenir spending data. From a sample of 863 product listings from souvenirs selling both authentic and inauthentic products, the Commission found that 69–76% of products containing visual designs resembling Aboriginal and Torres Strait Islander art were inauthentic (chapter 4, section 4.2).

⁵ This figure reflects total revenue from sales of Aboriginal and Torres Strait Islander artworks, not the net income that galleries receive from sales of these artworks. For example, some estimate that commercial galleries receive about 40% of sales revenue from consignments from art centres, but the percentage share received from other sales methods and independent artists is not clear (section 3.3).

Box 3.2 – Estimating spending on inauthentic souvenir products

Spending on souvenir products

Data on spending on Aboriginal and Torres Strait Islander souvenir products is extremely limited, and was last collected during the 1990s (Hoegh-Guldberg 2000, pp. 55–56). To create an estimate for spending on souvenirs in 2019, the Commission used data from 1996 and assumed that the pattern of spending followed the same pattern of growth as spending by international visitors on general ‘shopping, souvenirs, and gifts’ since 1997. This produced an estimated total spend on souvenirs of at least \$75 million. An upper bound estimate of \$88.8 million was derived from unpublished 2019-20 ATO taxation statistics for companies categorised as ‘other store-based retailing n.e.c.’, the most recent and granular information available for souvenir retailer and wholesaler activities.

To estimate the spending on inauthentic products, the Commission used the 69–76% inauthentic products estimate, and assumed that souvenir wholesalers and retailers selling these products were responsible for 80% of the market, based on observations about the quantities of inauthentic souvenirs in tourist hotspots by the Indigenous Art Code, Arts Law and Copyright Agency (2019). From this, the Commission estimated that spending on inauthentic Indigenous-style souvenirs totalled at least \$42.9–53.4 million. This estimate is conservative and should be interpreted cautiously.

It is likely that government agencies, private sector and non-government organisations purchase a substantial share of visual arts and crafts, but the aggregate value of their spending is not known. For example, the Australian Government reported that the value of new contracts with Aboriginal and Torres Strait Islander businesses totalled \$1.1 billion during the 2020-21 financial year (NIAA 2022c), but it is unclear what proportion is attributable to visual arts or crafts products. Between 2015 and 2018, the Australian Government spent at least \$0.9 million for ‘editorial and design and graphic and fine art services’, but this only accounts for spending on contracts valued between \$80 000–200 000 (Deloitte 2019, p. 53) and may therefore exclude a substantial share of design contracts.

Governments and other organisations often purchase works using different artistic mediums compared with those bought by domestic households and international visitors. For example, they may commission graphic designs for publications, multimedia campaigns or spatial designs for public installations in architectural settings. These commissions are responsible for a significant share of Aboriginal and Torres Strait Islander visual arts and crafts that are viewed by Australians more broadly, and are discussed in section 3.4 as part of methods that independent artists adopt to sell their artworks.

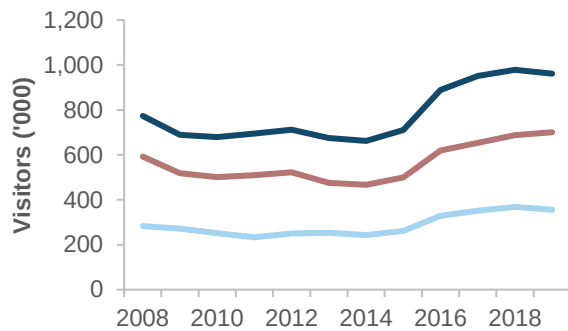
Tourist engagement with visual arts and crafts grew significantly prior to COVID-19

As noted above, tourism is a key driver of demand for visual arts and crafts products. Tourists who are informed and engaged in Aboriginal and Torres Strait Islander cultural experiences may be more likely to purchase arts, crafts and souvenirs.

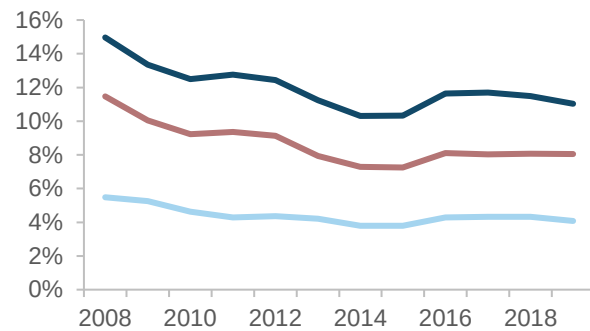
Prior to the COVID-19 pandemic, international visitors were key participants in Aboriginal and Torres Strait Islander cultural experiences, with participation in absolute terms experiencing strong growth during the 2010s. Between 2008 and 2019, the number of international visitors who reported experiencing Aboriginal and Torres Strait Islander art, craft or cultural displays increased by about 18%, growing from about 592 000 to 701 000 (figure 3.2, panel a). However, the share of total international visitors participating in these activities dropped from almost 12% in 2008 to 8% in 2019 (figure 3.2, panel b).

Figure 3.2 – The number of international visitors engaged in cultural activities has increased since 2008, but decreased as a share of total international visitors

a. Total participation in Aboriginal and Torres Strait Islander cultural activities by international visitors



b. Share of international visitors who engaged in Aboriginal and Torres Strait Islander cultural activities



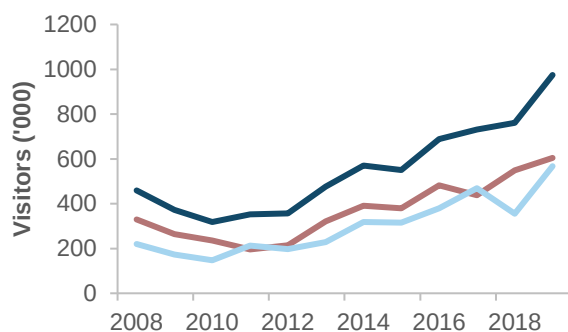
— Experience First Nations art, craft or cultural displays
 — Visit a First Nations site or community
 — Total First Nations cultural activities

Source: TRA (2022a).

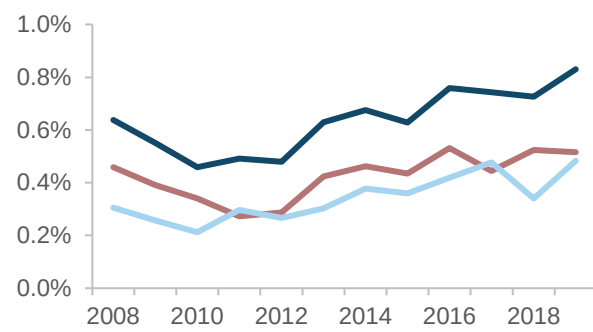
The evidence suggests that domestic tourists are increasingly interested in engaging with Aboriginal and Torres Strait Islander culture. Growth in the number of domestic travellers experiencing Aboriginal and Torres Strait Islander art, craft or cultural displays substantially outpaced international visitors, growing about 83% from 330 000 in 2008 to 605 000 in 2019 (figure 3.3, panel a). This resulted in a slight increase in the share of total domestic visitors participating in these activities (figure 3.3, panel b).

Figure 3.3 – Domestic visitors participating in Aboriginal and Torres Strait Islander cultural experiences nearly doubled between 2008 and 2019

a. Total participation in Aboriginal and Torres Strait Islander cultural activities by domestic visitors



b. Share of international visitors who engaged in Aboriginal and Torres Strait Islander cultural activities



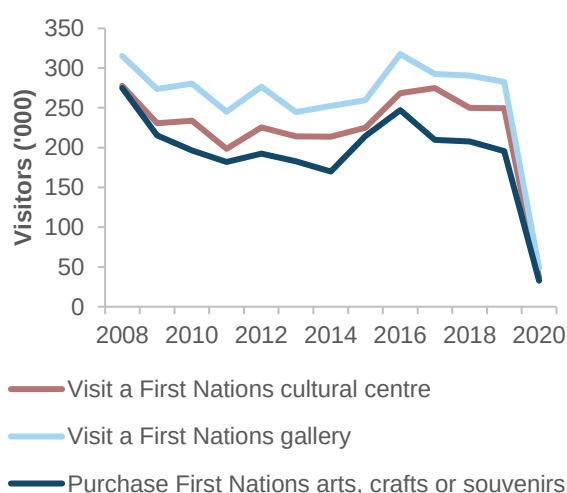
— Experience First Nations art, craft or cultural displays
 — Visit a First Nations site or community
 — Total First Nations cultural activities

Source: TRA (2022b).

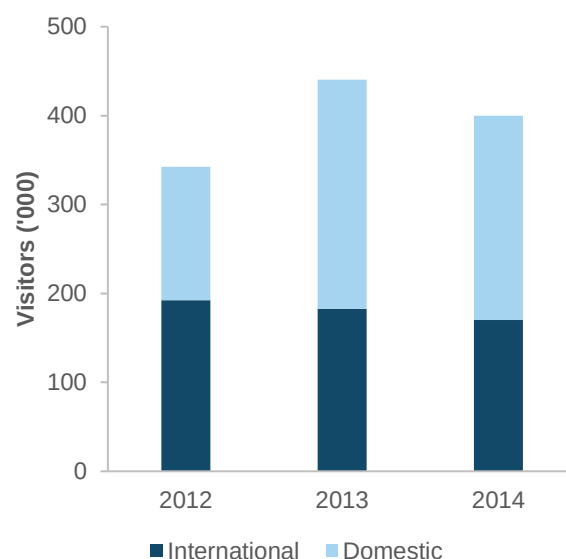
Growth in international visitor experiences with First Nations culture was not always reflected in other visual arts and crafts activities, such as visits to Aboriginal and Torres Strait Islander cultural centres, galleries, or purchases of Aboriginal and Torres Strait Islander arts, crafts or souvenirs. Figure 3.4, panel a shows that the number of international visitors engaging in these activities had decreased relative to their pre-GFC peak in 2008, but experienced a modest recovery from 2015 until the COVID-19 pandemic.

Figure 3.4 – Visits to First Nations cultural centres and galleries slightly declined since 2008, but purchases of visual arts and crafts increased between 2012 and 2014^a

a. International visitors participating in activities related to Aboriginal and Torres Strait Islander visual arts and crafts



b. Number of visitors who purchased Aboriginal and Torres Strait Islander visual arts and crafts



a. In panel b, there is no data available to distinguish between purchases of authentic and inauthentic products.

Source: Commission estimates based on TRA (2022a, 2022b) data.

Similar trends occurred with the number of international visitors purchasing Aboriginal and Torres Strait Islander arts, crafts or souvenirs, which decreased by almost 29% between 2008 and 2019 (figure 3.4, panel a). While comprehensive data is not available for the number of domestic overnight visitors who purchased Aboriginal and Torres Strait Islander arts, crafts or souvenirs, data between 2012 and 2014 indicates that they increased from 150 000 to 230 000, eventually overtaking the number of international visitors who made purchases (figure 3.4, panel b). While these figures do not account for the authenticity of these products, the Commission has found that most souvenir products are inauthentic — an issue which is examined in greater detail in chapter 4.

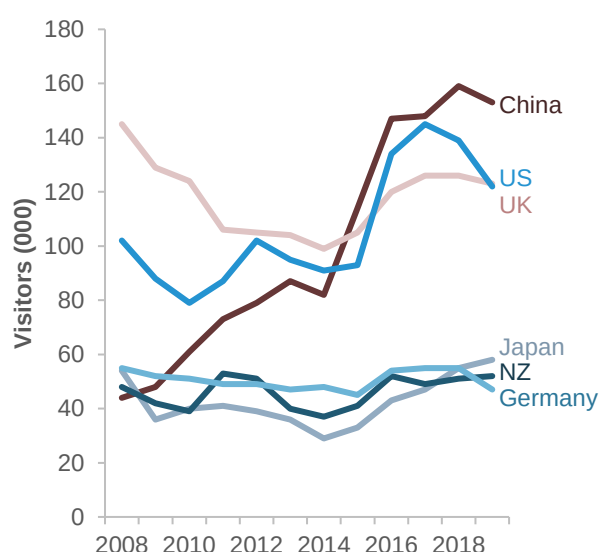
There are differences in the visual arts and crafts products purchased by international and domestic travellers. The Commission heard that international visitors are almost entirely responsible for demand for souvenir products, which almost completely disappeared following international travel restrictions associated with the COVID-19 pandemic (Murra Wolka, pers. comm., 7 March 2022, WW Souvenirs, pers. comm., 22 March 2022). On the other hand, domestic travellers are more likely to purchase products with licensed designs from mainstream retail stores (section 3.6).

Of the international visitors participating in Aboriginal and Torres Strait Islander cultural activities, most originated from China, the United Kingdom and the United States of America (figure 3.5, panel a). However, the share of international visitors participating in these experiences was highest among European visitors,

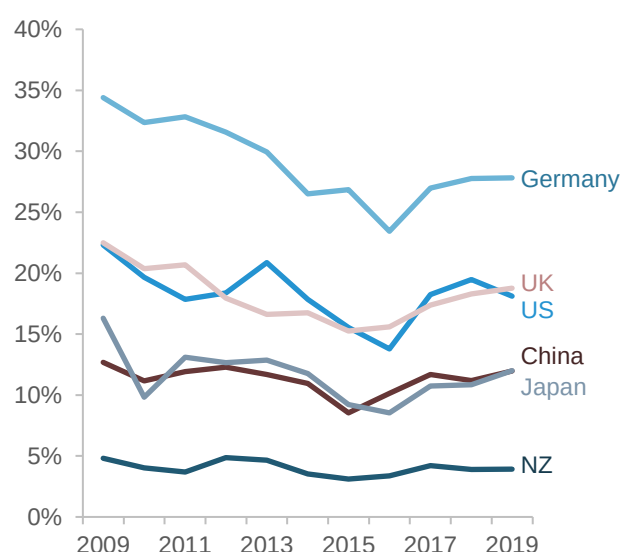
such as those from Germany (figure 3.5, panel b). Growth in total visitor engagement since 2008 has been highest among visitors from China and the United States of America, though mostly reflecting general tourism trends as seen by their relatively stable participation rates.

Figure 3.5 – Most international visitors participating in Aboriginal and Torres Strait Islander cultural experiences are from China, but participation rates are highest among visitors from Europe

a. Number of international visitors from top six largest countries who participated in Aboriginal and Torres Strait Islander cultural experiences



b. The share of visitors from top six largest countries who participated in Aboriginal and Torres Strait Islander cultural experiences



Source: Commission estimates based on TRA (2022a) data.



Draft Finding 3.1

The total value of annual spending on Aboriginal and Torres Strait Islander visual arts and crafts — including artworks and consumer products — is about \$250 million

In 2019-20, the total value of spending on (authentic and inauthentic) Aboriginal and Torres Strait Islander visual arts and crafts was about \$250 million. This includes sales of original art made through art centres, commercial galleries, auction houses and other retailers, as well as consumer products such as souvenirs and homewares. Some of the spending on these consumer products was on inauthentic arts and crafts — about 55–61% of spending on souvenirs was on inauthentic Indigenous-style products, purchased predominantly by international visitors.

3.2 Artists and their communities

Visual arts and crafts activities play an important role in the lives of many Aboriginal and Torres Strait Islander people. The Commission estimates that in 2019, about 17% of Aboriginal and Torres Strait Islander people aged over 15 made arts or crafts, with a smaller proportion of about 3% receiving income from arts or crafts. While this indicates that most people practising visual arts and crafts do not earn income from their

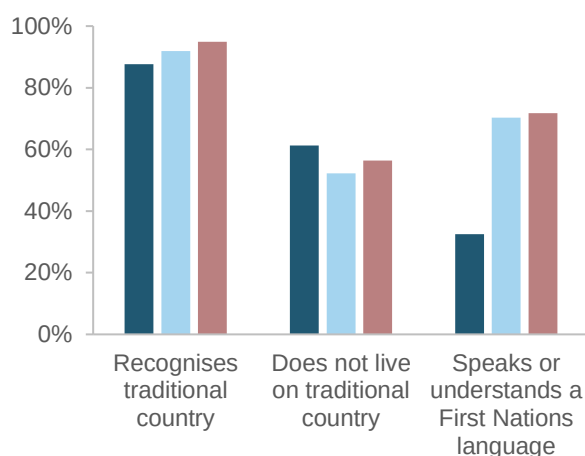
activities, they nevertheless play a vital role in developing cultural connection, self-determination and wellbeing (chapter 2).

Aboriginal and Torres Strait Islander visual artists use their artistic practice to express their connections to their culture. Data suggests that people earning income from arts and crafts are more likely to be fluent in an Aboriginal and Torres Strait Islander language and over the age of 34 than those who make but do not sell their arts or crafts (figure 3.6). Further, a large proportion of paid artists embed their paintings with traditional stories, culture and laws (chapter 4). Most artists recognise their homelands or traditional country, although many live elsewhere.

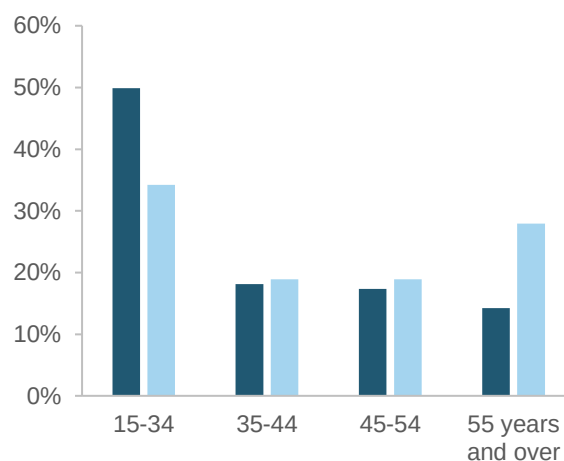
Figure 3.6 – Aboriginal and Torres Strait Islander people who earn income from their visual arts and crafts are likely to have a language connection to culture and are older in age^a

Percentage of Aboriginal and Torres Strait Islander artists in selected categories

a. Aboriginal and Torres Strait Islander visual artists and their connection to homelands and language



b. Aboriginal and Torres Strait Islander people participating in arts activities by age



■ Made arts or craft ■ Sold paintings ■ Sold sculptures

a. 'Sculptures' include pottery, wooden art and craft, weaving, dyed cloth and other sculptural forms.

Source: ABS (*National Aboriginal and Torres Strait Islander Social Survey, 2014-15*, Cat. no. 4714.0, prepared for the Australia Council).

Most paid Aboriginal and Torres Strait Islander artists tend to be based in remote areas. About 8–11% of Aboriginal and Torres Strait Islander people aged over 15 and living in remote areas earned income from the sale of their arts or crafts, compared with less than 2% of Aboriginal and Torres Strait Islander people living in regional and metropolitan areas.

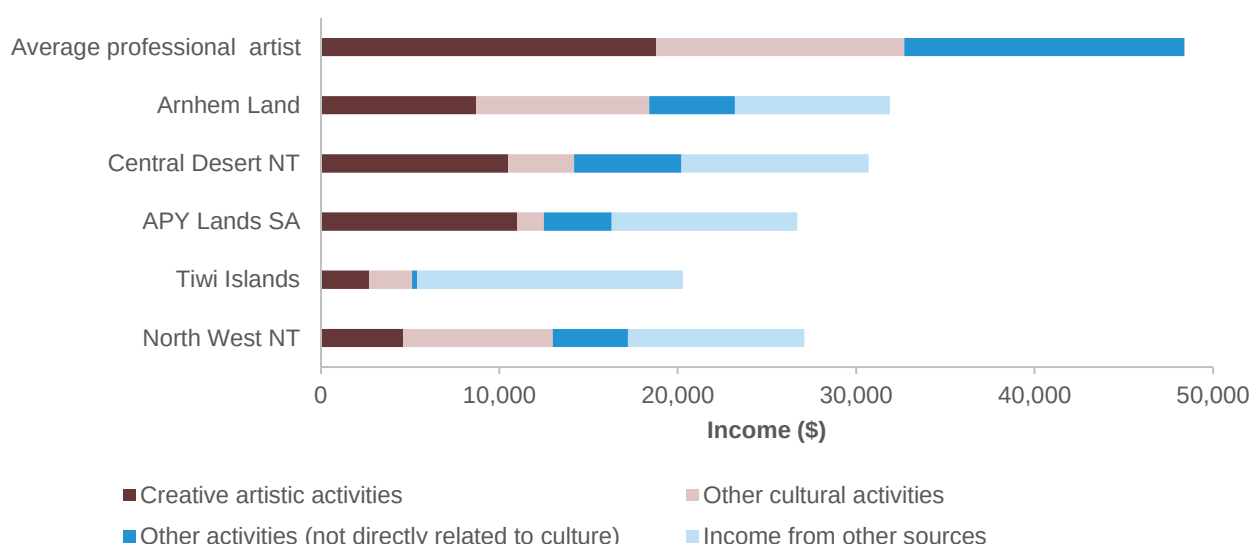
Aboriginal and Torres Strait Islander people living in remote areas have substantially different characteristics and face different circumstances compared with those living in regional and metropolitan areas. They are less likely to be participating in the labour force, have lower median incomes than their regional and metropolitan counterparts and are more likely to be living with significant socioeconomic disadvantage (PC 2020d, pp. 81–90).

Visual arts and crafts are a significant source of earned income for artists located in remote areas

For Aboriginal and Torres Strait Islander artists working in remote areas, earnings from visual arts activities are an important (and often the only) source of earned income amid other income sources (UMI Arts Ltd., sub. 1, p. 3). Figure 3.7 illustrates the average income of artists surveyed in five remote art regions⁶ by income source — the paid visual artists in these five regions comprised about half of the paid artists located across all remote art regions. Average earnings from creative artistic activities (primarily visual arts activities) were highest in the APY Lands (SA) and Central Desert (NT), where they comprised 41% and 34% respectively of the average annual income of artists. In addition, Throsby and Petetskaya (2019c, p. 57, 2019a, p. 45, 2019b, p. 45) found that artists located in remote areas tend to have higher incomes than the median income for Aboriginal and Torres Strait Islander adults living in remote Australia.

Figure 3.7 – Creative activities are an important source of income for artists located in remote areas^{a,b}

The components of average annual income earned by artists located in remote areas



a. Creative artistic activities include visual arts, performing arts, writing or storytelling, composing or choreographing and multimedia work. For artists in remote areas, 'other cultural activities' include teaching others in arts and culture, caring for Country, serving on a cultural board, interpreting culture, among others. **b.** Other activities (not directly related to culture) include teachers, care workers, municipal workers, among others. **b.** Throsby and Petetskaya (2017, p. 18) define professional artists as those working 'at a level and with a degree of commitment appropriate to the norms for professional recognition in their particular artform'. For these artists, 'other cultural activities' include teaching art, assisting other artists and arts administration.

Sources: Throsby and Petetskaya (2017, p. 9, 2019c, p. 78, 2019a, p. 44, 2019b, p. 63).

However, across all remote art regions, most artists nominated 'income from other sources' as their main income stream. This reflects how many artists located in remote areas rely on income from a mix of sources including government benefits, family members or community trust funds (mining and park royalties). Some artists, particularly those in North West Northern Territory, Arnhem Land (NT), along with other remote areas

⁶ Art regions are geographic areas that loosely group together communities that have cultural and artistic similarities. They are not definitive groupings and have slight variations across different studies.

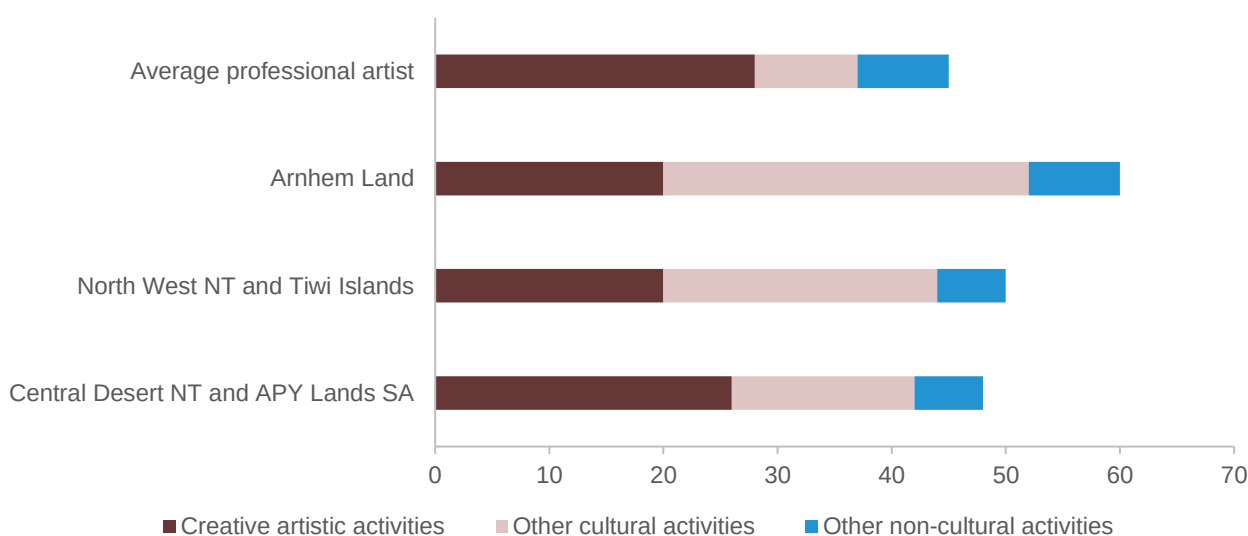
also receive substantial income from activities such as teaching art and culture, cultural tourism and cultural interpretation.

There remains a large gap between the average earnings of remote Aboriginal and Torres Strait Islander artists and the average visual artist in Australia (figure 3.7). For creative artistic activities, the average Australian visual artist earns almost twice as much as artists in the APY Lands (SA), Central Desert (NT) and Arnhem Land (NT) regions, and more than four times as much as artists in the Tiwi Islands and North West Northern Territory.

This gap in earnings exists despite evidence that artists in remote areas spend similar amounts of time to create art relative to the average Australian professional artist. For example, artists in the Central Desert (NT) and APY Lands (SA) regions spent almost the same amount of time on creative artistic activities as the average professional artist (figure 3.8), but receive almost 43% less income from those activities. And across all remote art regions surveyed by Throsby and Petetskaya (2019c, p. 44, 2019a, p. 30, 2019b, p. 31), 69% to 80% of visual artists reported spending at least 2-3 full days per week creating art.

Figure 3.8 – First Nations artists located in remote areas spend on average similar amounts of time creating art compared to the average Australian artist^{a,b}

Average weekly hours spent on cultural and non-cultural activities



a. For remote First Nations artists, creative artistic activities include visual arts, performing arts, writing or storytelling, composing or choreographing and multimedia work. Other cultural activities include teaching others in arts and culture, caring for Country, serving on a cultural board, interpreting culture, among others. Other activities (not directly related to culture) include a range of activities, such as teachers, care workers, municipal workers. **b.** Throsby and Petetskaya (2017, p. 18) define professional artists as those working 'at a level and with a degree of commitment appropriate to the norms for professional recognition in their particular artform'.

Sources: Throsby and Petetskaya (2017, p. 65, 2019c, p. 44, 2019a, p. 30, 2019b, p. 31).

There are a number of possible explanations for this difference. One is that artists working in remote areas may not always produce artworks for commercial reasons. For example, other studies have found that many paid artists in remote regions also created artworks for non-professional purposes, including for friends and their own enjoyment (Bartleet et al. 2019, p. 71), or created artworks on a more informal and occasional basis (Acker and Stefanoff 2016, pp. 8, 12). As a result, there may be a greater variation in the size and quality of art produced by artists working in remote areas than professional artists working in regional and metropolitan areas.



Draft Finding 3.1

Visual arts and crafts sales contribute to the economic wellbeing of Aboriginal and Torres Strait Islander artists

For many Aboriginal and Torres Strait Islander artists across Australia, selling their arts and crafts contributes to their economic wellbeing. In remote areas, arts and crafts activities provide economic opportunities for artists, through artwork sales and the teaching of art and culture. Artists in regional and metropolitan areas also benefit economically from the sale of their arts and crafts, although they are more likely to have access to a wider range of income sources.

3.3 Art centres

Aboriginal and Torres Strait Islander artists work with art centres or independently (including working with galleries and wholesalers), and some artists may choose to alternate between working independently and at an art centre. This section examines original visual arts and crafts produced by artists primarily in remote locations through art centres, and section 3.4 examines independent artists.

Art centres are major sources of production and sales in remote areas

Due to the relatively isolated remote areas that many Aboriginal and Torres Strait Islander artists live and work in, art centres have key roles that ensure artists are able to create and sell art. They support artists located in mostly remote areas by fulfilling an array of diverse roles, from general community service provision to services specific to art production (box 2.4). At the start of the art making process, they provide artists with a safe place to work and the necessary materials to begin creating art (AACHWA, sub. 20, p. 7). As places of learning, they provide opportunities for artistic skills development and cultural learning. Other roles of art centres in contributing to artists' career development are discussed further in chapters 8 and 9.

During the 2019-20 financial year, the Commission estimated that sales revenue of artworks produced by art centre artists totalled between \$30–46.6 million. About 8000–12 400 artists located in mostly remote areas practised art at these art centres, with about 5800–7700 artists having sold at least one artwork. The Commission estimates that there are at least 126 art centres in Australia,⁷ spread throughout mostly remote areas in South Australia, Western Australia and the Northern Territory, with a smaller number operating in Queensland, New South Wales and Victoria.

Artwork sales have more than doubled since 2012

Based on unpublished deidentified data from Desart's Stories Art Money (SAM) database (box 3.3), art centre sales of visual arts and crafts have increased substantially in the past decade, more than doubling from \$14.8 million in the 2012-13 financial year to \$35 million in 2020-21 (figure 3.9, panel a). This increase reflects both increased production from art centres and increased uptake of the SAM database. Much of this

⁷ This estimate is based on the 81 art centres that received grants from the Indigenous Visual Arts Industry Support (IVAIS) program in 2019-20, and the 45 medium to large art centres that were not IVAIS funding recipients. There are a larger number of non-IVAIS small art centres, but it can be challenging to verify the extent of their operations as many do not publish annual financial statements.

growth was driven by art centres in the Northern Territory, which more than tripled their total sales from \$5.1 million in 2012-13 to \$18.2 million in 2020-21 — however, this also reflects Northern Territory art centres adopting SAM.

Box 3.3 – Desart’s Stories Art Money (SAM) database

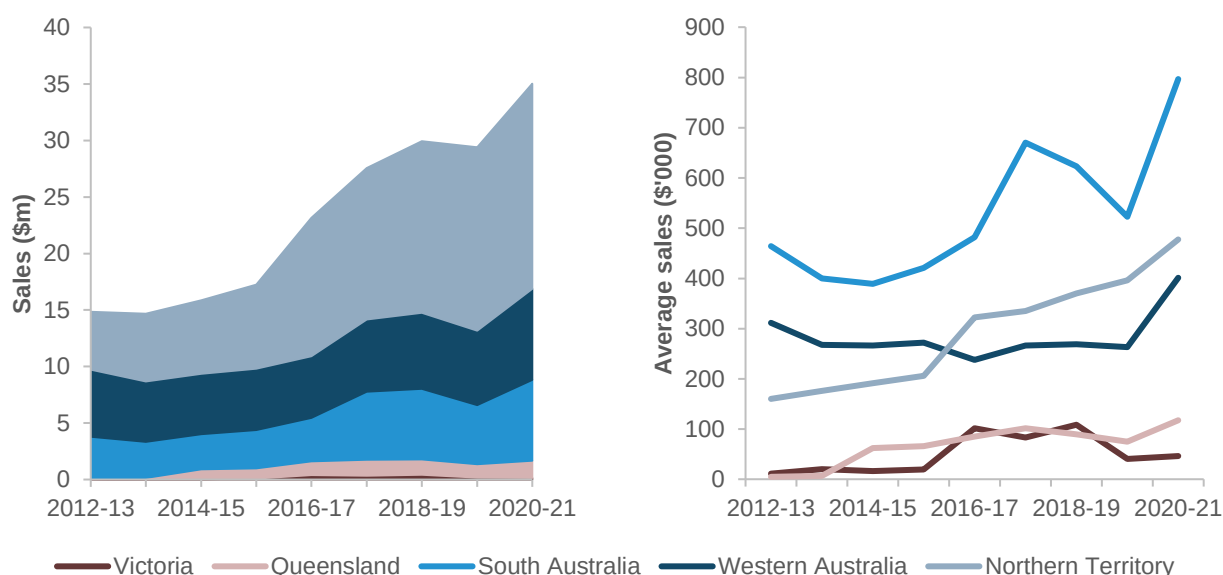
Stories Art Money (SAM) is an online artwork management system developed by Desart, a peak body that represents art centres in Central Australia. It is used by art centres to catalogue and label artworks, document provenance, record transactions, manage artist records and inventory.

Uptake for this database has steadily grown over time, increasing from 39 art centres in the 2004-05 financial year to 96 art centres during 2019-20, which covers most of the at least 126 art centres that the Commission estimates are operating in Australia. As a result, analysis using SAM data should be treated as underestimates, particularly when compared with the total art centre estimates previously discussed in section 3.1.

Source: Desart (2022a); unpublished deidentified data from Desart (SAM database).

Figure 3.9 – Art centre sales have steadily increased since 2012-13^{a,b}

a. Total art centre sales of artworks and larger artefacts by State and Territory b. Average sales per art centre by State and Territory



a. The years in the charts represent financial years. Sales figures have been adjusted for inflation to 2020-21 dollars. b. Values in panel b differ from other charts of average art centre sales (such as in Desart (2021b, p. 4)) due to differences in data sources used.

Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

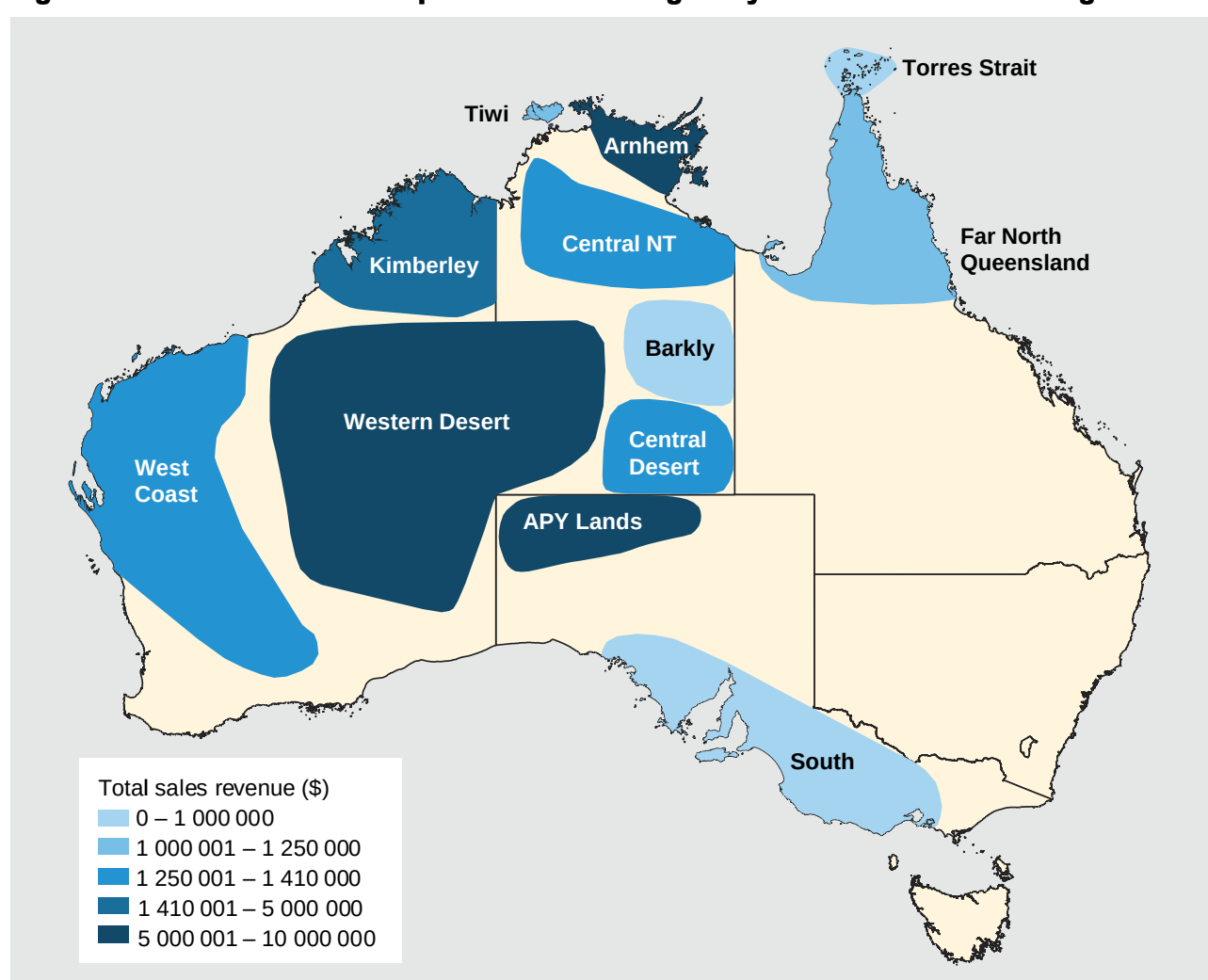
Between 2012-13 and 2020-21, total and average sales by art centres in South Australia almost doubled, and total sales by Western Australian art centres increased by about 36%. Art centres in Victoria and Queensland had substantially smaller operations compared with art centres in South Australia, Western

Australia and the Northern Territory — while Queensland art centres grew, growth was slower for Victorian art centres.

Art produced in remote areas of Australia is culturally and economically diverse

Sales of art produced in remote areas can also be represented through art region groupings — clusters of regions that have cultural and artistic similarities. These regions vary in total area, and at times cross state or territory boundaries. The scale of art production varies significantly between these art regions — in Central Australia alone, there are four different art regions, with total sales by art centres in the 2020-21 financial year ranging from \$9.5 million in the Western Desert region to \$0.9 million from the Barkly region (figure 3.10).

Figure 3.10 – The scale of art production varies greatly between remote art regions^{a,b,c,d}



a. Data is from the 2020-21 financial year. **b.** 'APY Lands' refer to the lands of the Anangu Pitjantjatjara Yankunytjatjara. **c.** The geographic areas for the art regions depicted are intended to be illustrative, not definitive boundaries. **d.** While there are some art centres that operate in New South Wales and South East Queensland, the SAM database does not cover sales from these art centres.

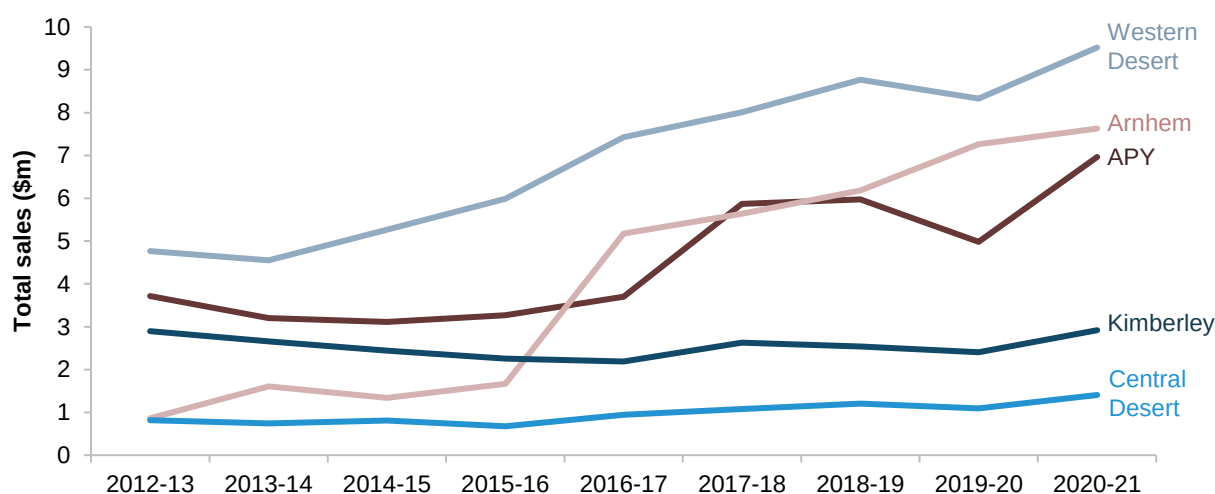
Source: Commission estimates based on unpublished deidentified Desart data (SAM database).

In the five art regions with the highest sales through art centres, sales growth has been most significant in the Arnhem Land, Western Desert and APY Lands art regions (figure 3.11). Sales from Arnhem Land grew substantially between 2012-13 and 2020-21. This was partly due to the addition of an art centre in the region

in the SAM database, which triggered a leap in sales revenue from 2015-16 to 2016-17. However, growth in the region was nevertheless strong, with sales revenue more than doubling from 2012-13 to 2019-20, as suggested by public audit data for Arnhem Land that included the same art centre for the full time period (Desart, pers. comm., 9 May 2022). Average annual growth between 2012-13 and 2020-21 was about 12% in Western Desert and 11% in APY Lands.

Figure 3.11 – Total sales revenue from the three largest art regions increased rapidly from 2012-13 to 2020-21 financial years^a

Total sales revenue from art centres in top five remote art regions



a. The years in the charts represent financial years. Sales figures have been adjusted for inflation to 2020-21 dollars.

Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

Most artworks sold are paintings, but demand for other forms of visual arts and crafts has increased

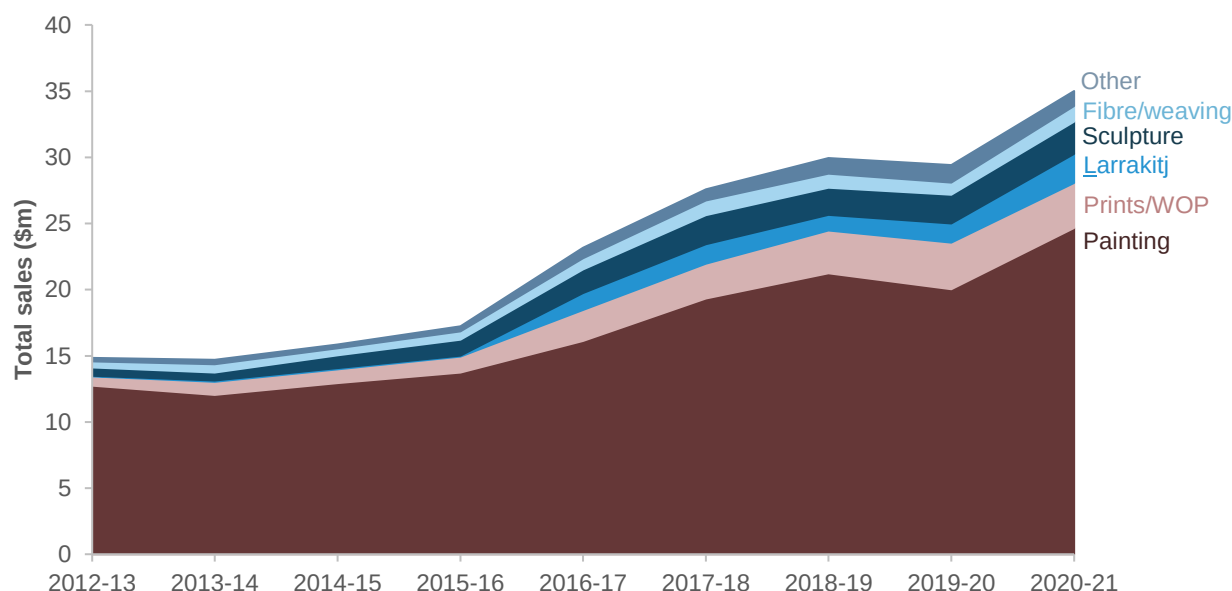
Paintings comprised about 70% of the total value of artworks sold by art centres in 2020-21 (figure 3.12). The five other most sold art forms include prints or works on paper, sculptures, *larrakitj*⁸ and fibre-based artworks or weavings. The prominence of *larrakitj* can be attributed to the uptake of SAM in 2015-16 by an art centre in Arnhem Land (Desart, pers. comm., 9 May 2022). Since 2015-16, prints or works on paper have substantially increased as a share of total art sales despite previously having the lowest percentage of sold products between 2008-09 and 2011-12, while the total sales of other art forms have remained mostly steady.

There are two potential factors that explain the growth in prints and works on paper. One likely factor is the uptake of SAM by art centres that produce more works on paper — for example, art centres in Far North Queensland produce relatively more works on paper than those located in the Western Desert region. In addition, art centres may have undertaken serious and sustained efforts to diversify their sources of income by varying the mediums of artworks that they produce (Desart, pers. comm., 9 May 2022).

⁸ *Larrakitj* are Yolŋu sculptures made from stringybark forest trees that have been hollowed out by termites, and then prepared as part of a cultural cycle to form memorial poles (Buku-Larrnggay Mulka 2017c).

Figure 3.12 – Most artworks sold by art centres are paintings, but there has been growth in prints, sculptures and *larrakitj*^{a,b}

Total sales revenue from art centres by artwork categories



a. The years in the chart represent financial years. Sales figures have been adjusted for inflation to 2020-21 dollars. **b.** 'WOP' refers to works on paper. 'Sculpture' includes ceramics, carvings and *yidaki*. 'Other' includes categories such as jewellery, textiles and artefacts, among others.

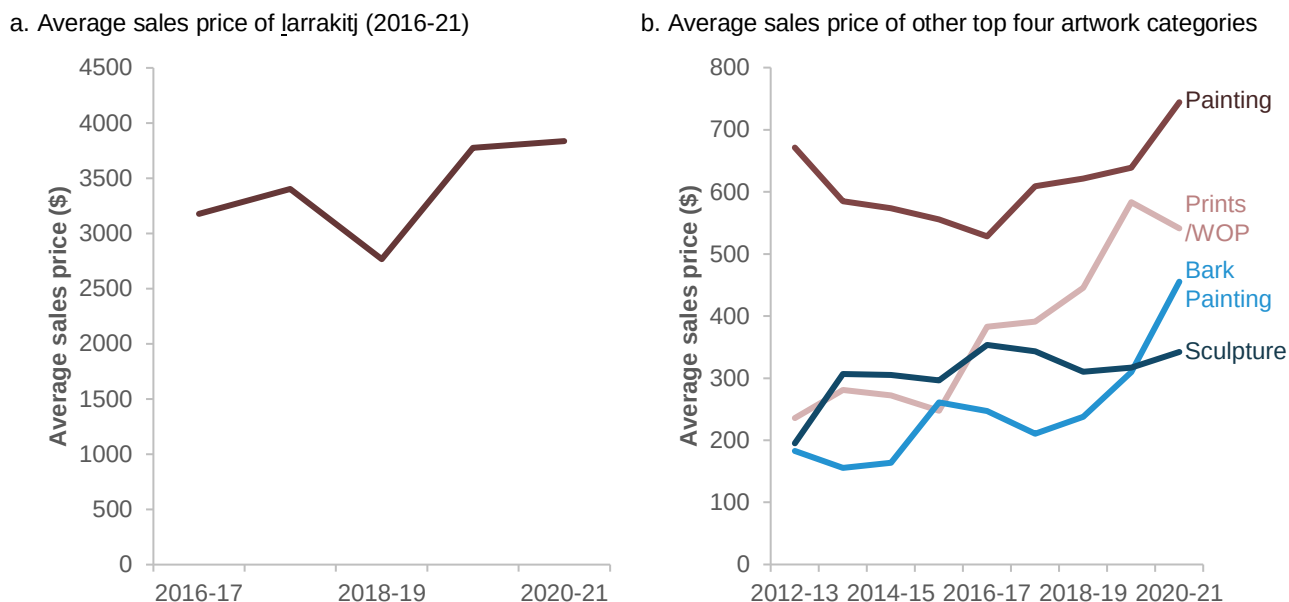
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

Of these categories, *larrakitj* artworks attract the highest average sales prices, and have experienced notable growth in recent years, increasing from \$3167 in 2016-17 to \$3837 in 2020-21 (figure 3.13, panel a). However, due to the lengthy process of creating *larrakitj*, they are sold in relatively small volumes compared with other forms of visual arts and crafts — in 2020-21, a total of 575 *larrakitj* were sold by art centres, compared with over 33 100 paintings.

Other artworks have also experienced strong growth in their average sales price between 2012 and 2020, particularly bark paintings, which have more than doubled from \$183 to \$455 per piece with an annual average growth rate of about 19% (figure 3.13, panel b). Prints or works on paper and sculptures have both also more than doubled in sales price during this period.

Growth in the average sales price of paintings has been more modest, with an annual average growth rate of about 1%. Factors that impact the price of artworks include their size, materials used, quality of artwork and the reputation of the artist (including whether the artist has won major awards such as the Telstra National Aboriginal and Torres Strait Islander Art Awards) (Taylor and Coleman 2011; Woodhead and Acker 2014a, p. 22).

Figure 3.13 – The average sales price of *larrakitj* has increased by over 300%, with modest significant increases in other artwork types^{a,b,c}



a. Annual average sales price data for *larrakitj* span from 2016-17 to 2020-21 as these are the most reflective of the market due to the adoption of SAM database by an art centre that sells *larrakitj*. **b.** The years in the chart represent financial years. Sales prices have been adjusted for inflation to 2020-21 dollars. **c.** 'WOP' refers to works on paper. 'Sculpture' includes ceramics, carvings and *yidaki*. 'Other' includes categories such as jewellery, textiles and artefacts, among others.

Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

Most artworks are bought by domestic buyers, but overseas sales have grown

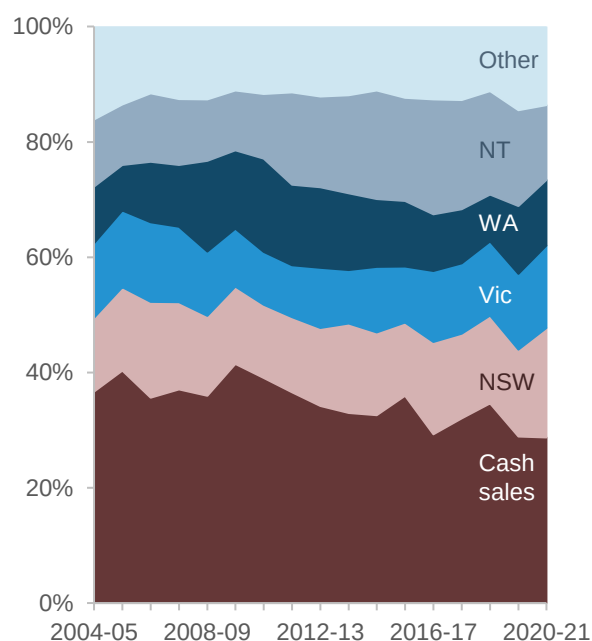
Most art centre artworks are sold to domestic buyers, particularly those in New South Wales, Victoria, Northern Territory and Western Australia (figure 3.14, panels a and b). Buyers in these states accounted for at least 57% of domestic sales in 2020-21, with their percentage shares remaining stable since 2004-05 (figure 3.14, panel a). These buyers include commercial galleries, art collectors, public and private institutions and other consumers.

However, a large proportion of art centre sales have been recorded as 'cash sales', where the location of buyers has not been recorded. Cash sales could either represent direct sales, smaller sales to one-off customers, or sales by art centres where the details of buyers are not recorded in the SAM data.

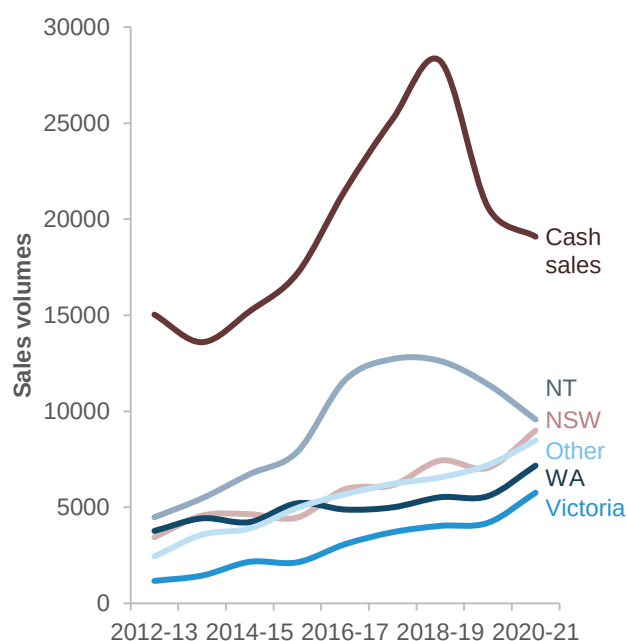
While sales volumes to buyers in all jurisdictions have generally increased, between 2019-20 and 2020-21, sales volumes to Northern Territory buyers experienced a substantial decline (figure 3.14, panel b). This can be largely attributed to the effects of COVID-19 restrictions on international tourists activity and art production.

Figure 3.14 – A large share of the total value of artworks sold can be attributed to buyers in Victoria and New South Wales, but most artworks are sold to buyers in the Northern Territory^a

a. Share of artworks sold to buyers located in States and Territories



b. Number of artworks sold to buyers located in States and Territories



a. 'Cash sales' refers to sales where the locations of buyers were not recorded, which could include direct sales, smaller one-off sales or sales by art centres that do not record the locations of buyers. 'Other' refers to sales to buyers in Queensland, South Australia, Tasmania and the Australian Capital Territory.

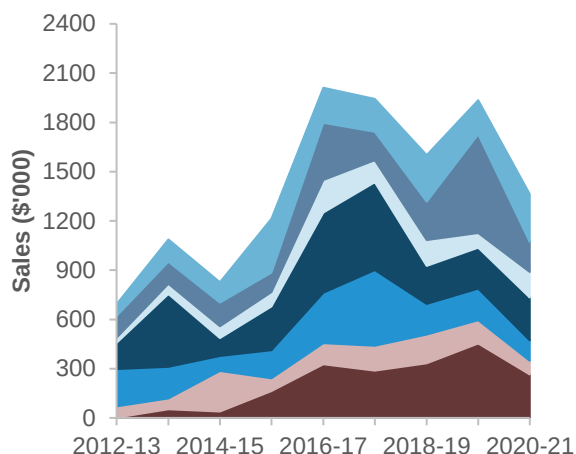
Source: Commission analysis based on unpublished deidentified data from Desart (SAM database).

While most artworks are sold domestically, a small share has been exported to buyers mostly located across Europe, North America and South-East Asia. Annual overseas sales have doubled since 2012-13, growing from \$0.7 million to almost \$1.4 million in 2020-21 (figure 3.15, panel a). Between 2012-13 and 2020-21, over 11 900 artworks have been sold to overseas buyers for a total of \$12.7 million.

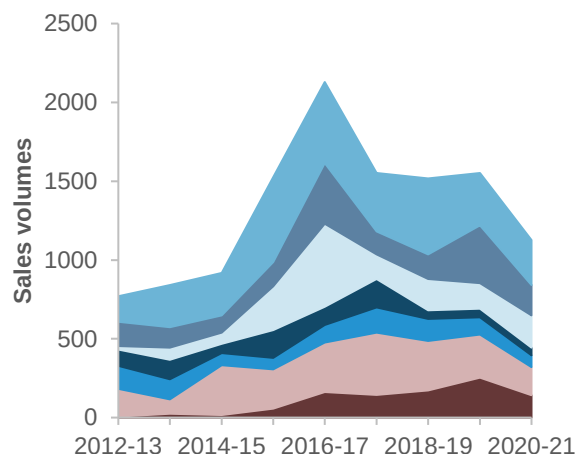
On average, overseas buyers tend to purchase more expensive artworks than domestic buyers. In 2020-21, artwork sales to overseas buyers had an average sales price of about \$1210, nearly double that of domestic purchases (\$650). Growth in the average sales price for artworks has been most significant among purchases by buyers in Singapore, increasing from over \$2100 in 2012-15 to \$3900 in 2016-20, although from only a small number of artworks (figure 3.16, panel b). By comparison, the average price paid by domestic buyers has been relatively stable.

Figure 3.15 – Overseas buyers account for a small but growing share of total sales^{a,b}
Sales revenue and volumes to the top six countries with overseas buyers of art centre artworks

a. Total sales to overseas jurisdictions



b. Number of artworks sold to overseas jurisdictions



■ Belgium ■ France ■ Germany ■ Singapore ■ UK ■ US ■ Other

a. The years represent financial years. Sales figures have been adjusted for inflation to 2020-21 dollars. **b.** 'Other' includes Switzerland, New Zealand, New Caledonia, Netherlands and several other overseas jurisdictions.

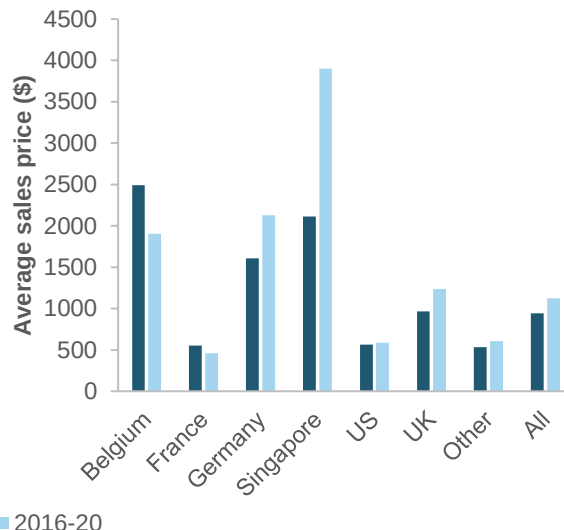
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

Figure 3.16 – On average, overseas buyers purchase art with substantially higher sales prices than domestic buyers^{a,b}

a. Average sales price of artworks sold to domestic buyers



b. Average sales price of artworks sold to overseas buyers



■ 2012-15 ■ 2016-20

a. 2012-15 refers to the period from the 2012-13 to 2015-16 financial years. 2016-20 refers to the period from 2016-17 to 2020-21 financial years. **b.** Average sales prices have been adjusted for inflation to 2020-21 dollars.

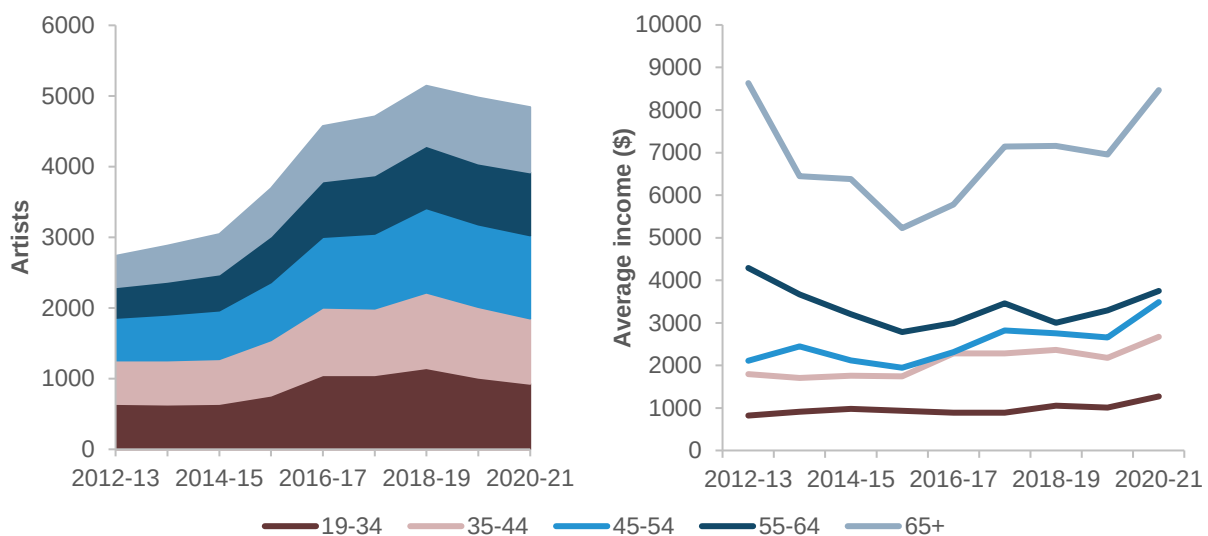
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

Artworks are mainly produced by older and female artists

The number of artists who have sold at least one artwork per year has grown steadily since 2012-13, but most of the increase has been concentrated in older age groups (figure 3.17, panel a). Of those artists who sell artworks, the largest group tends to be those aged over 44. On average, artists aged 65 or over received the highest annual payments from art centres, reaching almost \$8500 in the 2020-21 financial year (figure 3.17, panel b). This likely reflects older artists' higher level of experience, greater industry recognition, accumulated artistic skills and cultural expertise.

Figure 3.17 – Most artists who sell art are aged over 44, with artists aged over 65 receiving the highest payments from art centres^a

a. Total number of artists working through art centres who sold at least one artwork b. Average payments to artists by age group



a. The years in the charts refer to financial years. Average payments to artists have been adjusted for inflation to 2020-21 dollars.

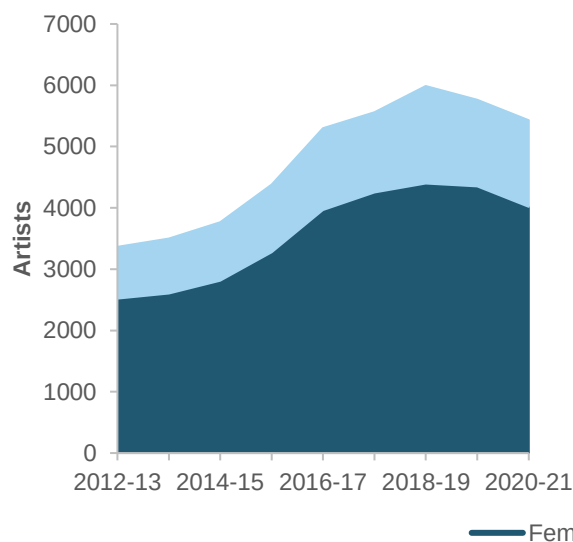
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

Most artworks produced through art centres are created by female artists — in 2020-21, just under 73% of artists who sold an artwork were female (figure 3.18, panel a). Yet from 2004 to 2018, average payments to female artists were lower than payments to male artists, but with the gap reversing in 2020-21.

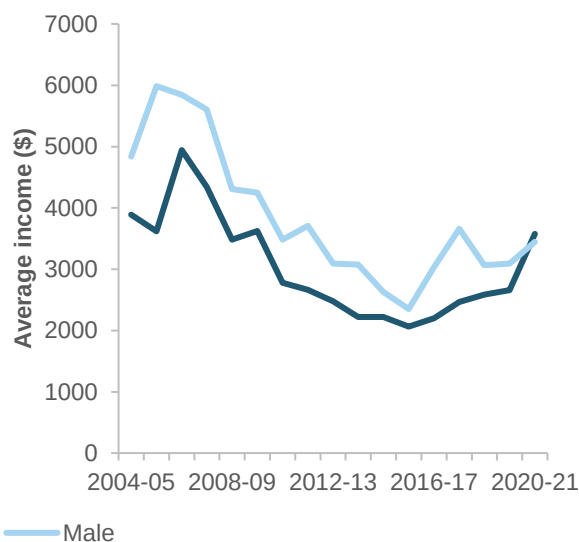
One explanation for this gap was that female artists tended to produce high volumes of lower-priced items, such as weavings and textiles (Woodhead and Acker 2014a, pp. 11,16–20). In recent years, demand for these lower-priced items may have increased, aided by growth in online sales (accelerated by the COVID-19 pandemic) and art fair participation (discussed below), resulting in a reversal of the payment gap between male and female artists (Desart, pers. comm., 11 May 2022).

Figure 3.18 – Most art centre artworks are produced by female artists, but female artists on average received lower total payments^a

a. Number of artists who sold at least one artwork by gender



b. Average payments to artists by gender



a. The years in the charts refer to financial years. Average payments to artists have been adjusted for inflation to 2020-21 dollars.

Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

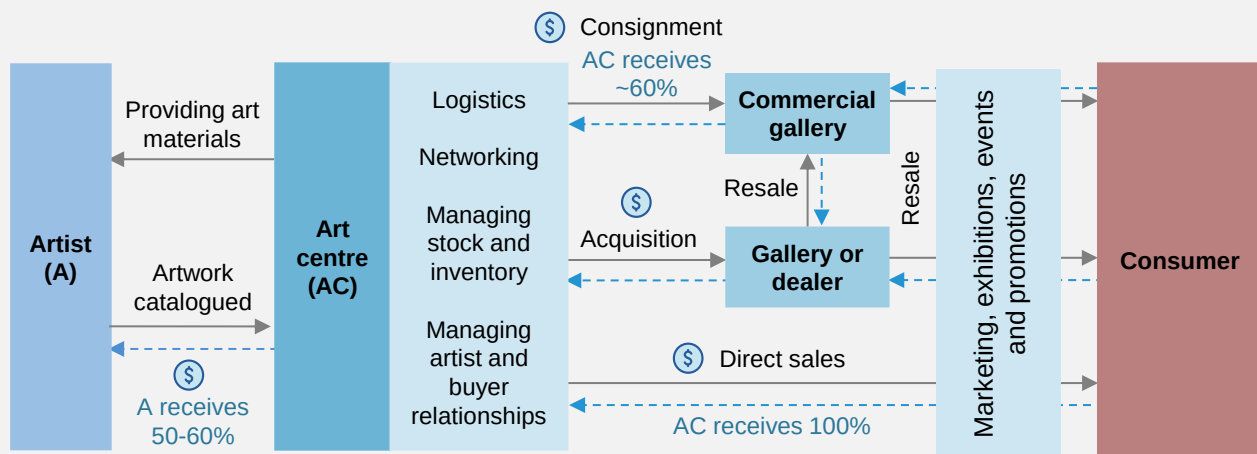
Art centres are increasingly selling through consignment

When artworks are ready to be sold, art centres act as intermediaries and distributors to the market, connecting artists with buyers through a range of different channels (box 3.4). Since 2017, art centres have increasingly used consignment agreements to sell artworks. Their use has grown from about 50% of art centre sales in 2017 to just under 66% in 2019, with a corresponding decrease in the use of acquisitions from about 44% to 28% of sales (figure 3.19, panel a). Direct sales, where art centres sell to consumers through their own physical galleries are a small but growing share of sales, comprising at least 6% of sales in 2019.⁹ Across the sales methods, art centre artists on average receive over 50% of sales income (figure 3.19, panel b).

Box 3.4 – Art centres use many channels to reach buyers

Art centres play many roles in the production and sale of artworks. They supply art materials to artists, who then submit artworks to be catalogued and sold. After this, art centres act as the key intermediaries between artists and the market. They are responsible for the logistics of transporting artworks to various sales channels, networking with potential sales avenues, and various roles in managing buyer relationships and inventory.

⁹ This is likely to be an underestimate because it is optional for art centres to identify the share of sales achieved through direct sales methods on IVAIS grant milestone reports.

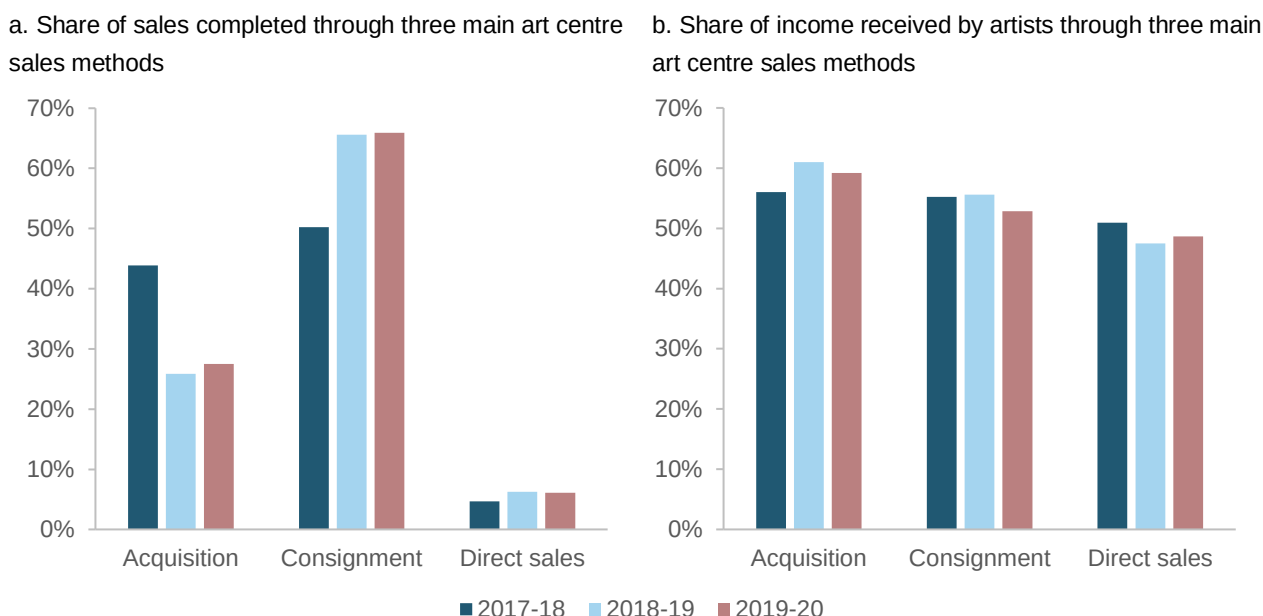
Box 3.4 – Art centres use many channels to reach buyers

Art centre sales methods tend to range from selling through intermediaries by consignment agreements to direct sales.

- **Selling through commercial galleries.** Commercial galleries cover the costs involved in exhibiting, promoting and marketing the artworks to buyers. In this setting, artworks tend to be sold through consignment agreements, where artworks are sent to commercial galleries for sale but legal ownership remains with the artist until the artwork is sold. This guarantees that art centres receive a percentage of the final sales price of artworks sold (estimated at about 60%) in exchange for some delay in payment.
 - Some artworks are purchased by commercial galleries under acquisition agreements, where ownership transfers from the artist to the commercial gallery in exchange for upfront payment (box 8.3).
- **Selling through wholesalers or dealers.** These are vendors who may then choose to sell directly to final buyers or other dealers or galleries. They purchase art almost exclusively through acquisition agreements, where ownership transfers from the artist to the wholesaler or dealer (or commercial gallery) in exchange for upfront payment. If the agent then sells the artwork for a price that is higher than anticipated, artists may receive a very small share of the final sales price.
 - When artworks priced over \$1000 are sold by a wholesaler or dealer to another intermediary, they may entitle the artists to 5% of the sales price through the Australian Government's Resale Royalty scheme.
- **Direct sales.** These sales are conducted within art centres, community-owned galleries, or online art centre websites. They may also take place during markets and fairs, which allow art centres to sell their artworks and products directly to buyers in major cities. Art fairs are discussed in more detail below.

Source: Arts Law, Copyright Agency, IartC (sub. 31).

Figure 3.19 – Consignments have been increasingly used by art centres to sell visual arts and crafts^{a,b,c}



a. The estimates in these figures have been created using data from 81 IVAIS-funded art centres. In some cases, art centres subsumed sales by other business models under the ‘consignment’ category, such as direct sales to consumers and sales through markets and fairs. **b.** In panel b, averages for shares of income earned by each business model were calculated using data from art centres that reported using those sales methods — art centres were excluded if they reported no sales under a particular business model. **c.** Years represent financial years.

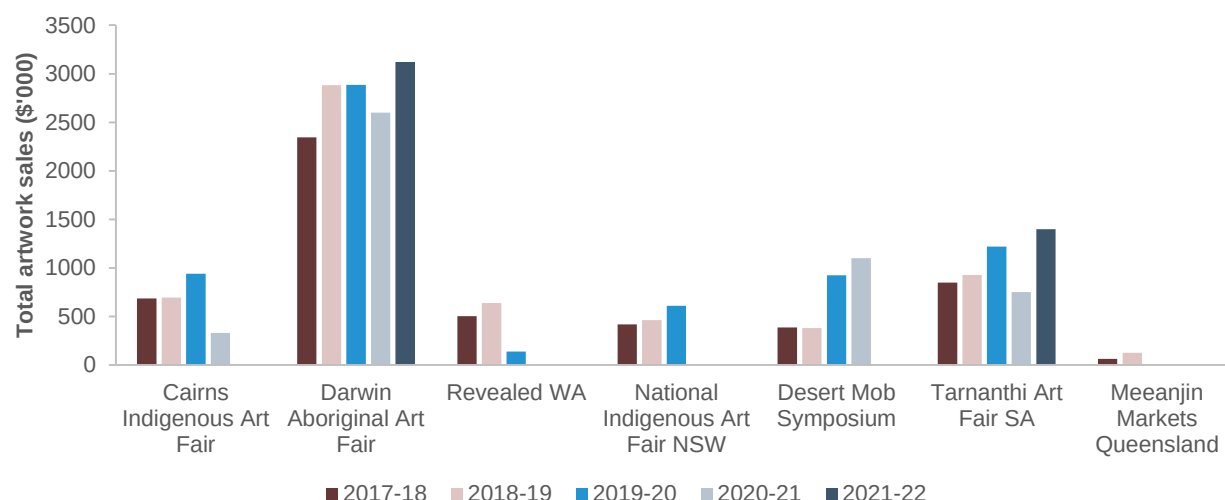
Source: Commission estimates based on unpublished Office for the Arts data (Indigenous Visual Arts Industry Support activity milestone reports).

Direct sales can also take place online on art centre gallery websites. The share of art centre sales completed online has grown rapidly, growing from about 1% in 2018 to just under 10% in 2020 (unpublished deidentified data from Desart).¹⁰ This increase has largely been due to art centres responding to the COVID-19 pandemic by shifting sales to online channels when in-person sales were untenable.

Art centres increasingly participate in art markets and fairs

In recent years, art centres have increasingly collaborated with art fairs and markets as platforms to showcase and sell art directly to the general public (box 3.4). They have become major industry events, responsible for a total of over \$17.9 million in sales from 2017-18 to 2019-20, with all earnings going to artists located in remote areas, their communities, art centres and independent artists working in regional and metropolitan areas (figure 3.20, box 3.4). To participate at these art fairs, sellers generally pay a fee to hold a stall or list their products online. For physical art fairs, buyers often pay an entry fee.

¹⁰ The collection of data on online sales through Desart’s Stories Art Money (SAM) database depends on art centres voluntarily identifying their sales as taking place online, which may not always take place.

Figure 3.20 – Art fairs are a growing venue for art centre sales^{a,b}**Total artwork sales revenue from Aboriginal and Torres Strait Islander art fairs**

a. Figures refer to financial years. Sales figures have been adjusted for inflation to 2020-21 dollars. **b.** There was no publicly available data for various art fairs during more recent financial years.

Sources: AGSA (2018, 2020b, 2020a, 2021, p. 17); Caldwell (2019); CIAF (2020, p. 10); Desart (2018a, p. 38, 2019, p. 20, 2020, pp. 38–39, 2021a, pp. 30–32); First Hand Solutions, pers. comm. 20 August 2021; OFTA (2021b); Gooley (2021); Spyridonidis (2021); Watego (2020); unpublished data from the Office for the Arts (IVAIS grant applications).

Art fairs and markets have typically taken place annually as physical events where buyers of visual arts and crafts can interact with stallholders and speak directly to artists. In this format, the sale of visual arts and crafts is often only one part of the art fair — for example, the Cairns Indigenous Art Fair also features live music, theatre, fashion, workshops and talks that promote Aboriginal and Torres Strait Islander culture.

But sales experiences at art fairs can differ. For example, UMI Arts Ltd. (sub. 1, p. 3) noted that in their experience:

... at the Darwin Art Fairs, smaller gift products usually move quicker [than] other bigger products, where at [Cairns Indigenous Art Fair] the bigger sales usually occur in the galleries with slow to medium sales in our market stall.

At the height of the COVID-19 pandemic, physical art fairs became untenable, prompting some art fair organisations to change either fully or partially to an online format. Globally, about 61% of art fairs were cancelled in 2020, with 37% holding live events and 2% shifting to hybrid alternative events (McAndrew 2021).

The Darwin Aboriginal Art Fair (DAAF) was held entirely online in August 2020 and 2021. By removing the need for consumers to travel to a physical marketplace, the online DAAFs substantially increased viewership of visual arts and crafts from interstate and overseas consumers — there were 59 000 website visitors in 2021 and 45 000 in 2020 compared with the 17 000 in-person attendees in 2019. The online DAAF achieved sales of \$2.6 million in 2020, growing to \$3.1 million in 2021 (OFTA 2021b), exceeding sales achieved at the pre-COVID events.

But digital pivots were not always able to offset most of the impacts of lockdowns and travel restrictions associated with the COVID-19 pandemic. For example, during the pandemic, sales from Revealed WA dropped from \$0.6 million in 2018-19 financial year to \$0.1 million in 2019-20, despite a full switch to online sales (unpublished data from the Office for the Arts).



Draft Finding 3.3

Art centres support most of the production and sales of art in remote areas

The Commission estimates that sales of artworks produced by art centre artists totalled between \$30–47 million in the 2019-20 financial year, from about 5800–7700 artists who sold at least one artwork. Total sales by art centres have more than doubled since 2012, but growth has been concentrated mostly in Northern Territory art centres. The scale of production at art centres varies substantially, with the largest scale operations taking place in the Western Desert, Arnhem Land and APY Lands art regions.

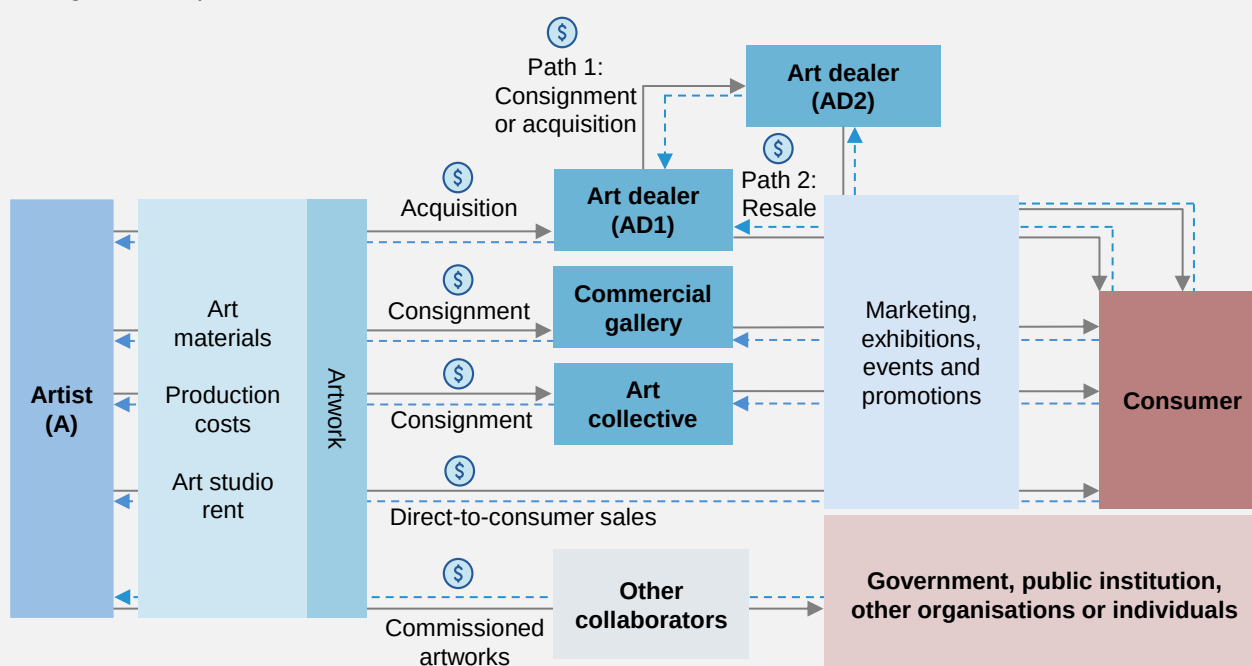
Art centres rely on several methods to sell artworks, but have shifted towards sales through consignment agreements with intermediaries such as commercial galleries. Art centres have also moved towards selling art direct to consumers, either through their own galleries or through art fairs.

3.4 The value chain for independent artists

While art centre artists occupy a significant share of total Aboriginal and Torres Strait Islander visual arts and crafts markets, some artists operate outside the art centre system mostly out of necessity or choice. These independent artists are located across Australia and work using one or more working arrangements (box 3.5).

Box 3.5 – Independent artists use many channels to sell their artworks

Independent artists typically use one or more of the following methods to sell their artworks (illustrated in the figure below).



Box 3.5 – Independent artists use many channels to sell their artworks

These methods include sales through intermediaries, gallery representation and direct-to-consumer sales. They can also include fulfilling specific art or design commissions.

- **Selling through an art dealer.** This method has also been referred to as the ‘dealer upfront’ model, where artworks are acquired by an art dealer for an upfront payment — the size of which is determined by the quality of the artist’s artworks and their bargaining and negotiation skills (chapter 8). The dealer can then choose the price at which to sell to consumers (without informing the artist), and may sell through another dealer, wholesaler or commercial gallery (path 1). The dealer may alternatively sell directly to a consumer through a resale (path 2).
- **Direct representation by commercial galleries.** These artists often consign their artworks to be sold at galleries and receive a percentage of the final sales price. They maintain contact with their gallerist throughout the sales process, and gallerists may also provide additional services to artists — in some cases, galleries may support professional development initiatives such as residencies.
- **Selling and exhibiting through art collectives.** These are groups that have galleries through which buyers can purchase art, and also provide career and professional development opportunities for artists. For example, Boomalli Aboriginal Artists Co-operative is a Sydney-based artist collective that aims to promote Aboriginal artists from language groups within New South Wales and provides them with opportunities to exhibit and sell their artworks, and other professional skills development opportunities (Boomalli 2022).
- **Direct-to-consumer sales.** Some independent artists establish their own physical or online shopfronts to sell directly to consumers. This method is discussed further in box 3.7.
- **Commissioned artworks and designs.** Artists may receive commissions for specialised art or designs for use in publications and other art forms. This method is discussed further in box 3.6.

Source: Arts Law, Copyright Agency, IartC (sub. 31).

Current data suggests that artworks by independent artists are sold by many art dealer businesses. Among members of the Indigenous Art Code — a voluntary code that promotes ethical conduct towards Aboriginal and Torres Strait Islander artists (box 8.4) — about half of 201 Indigenous Art Code-member art dealer businesses sold artworks by independent artists (Arts Law, Copyright Agency, IartC, sub. 31, p. 88). An estimated 55% of 173 non-member organisations were also found to sell artworks by independent artists. These member and non-member art dealer businesses include a mix of galleries, secondary market sellers, and may also include retailers and wholesalers.

Although data on the number of independent artists and their income is scarce, the Commission’s best estimates suggest that 1300 independent artists working in remote locations earned a total of \$2.6 million, and at least 460 artists working in regional and metropolitan areas earning an estimated \$6.8–8.3 million (box 3.1).

The Commission is expecting to obtain further data on independent Aboriginal and Torres Strait Islander artists prior to completing the final report.

Regional and metropolitan artists sell their artworks using a mix of approaches

Independent artists based in regional and metropolitan areas generally have access to a mix of services — for example, access to internet, mobile phones and technology — that allow them to consider a wide range of approaches to selling their artworks (box 3.5).

Many established artists receive direct representation by commercial galleries (Arts Law, Copyright Agency, IartC, sub. 31, p. 15). Where available, independent artists may also distribute and sell works through art collectives or cooperatives that have galleries through which buyers can purchase art.

Independent artists may be commissioned, either as individual artists or as part of a design or multimedia agency team, by government agencies, public galleries, commercial clients, other organisations and individuals to produce a wide range of artworks and designs. This includes public art such as murals, graphic designs for publications, multimedia projects or spatial designs such as interiors and installations (box 3.6). Government procurement processes for art and design services are discussed in chapter 8.

Box 3.6 – Independent Aboriginal and Torres Strait Islander artists may be commissioned to create a wide range of artworks and designs

Not all artworks created by independent artists (or art centre artists) conform to traditional paintings and sculptures. Many are commissioned to create artworks and visual designs with specific requirements for individuals and organisations including multimedia projects, murals, graphic designs and spatial designs (such as interior elements and public installations).

Blackfish's 'Welcome to My Country' campaign

In 2021, Tourism Australia released an advertising campaign produced by majority Indigenous-owned multimedia agency Blackfish centred on Elders and their connection to traditional lands across Australia. Valued at over \$500 000, this advertising campaign consisted of bespoke photography and filming overseen by director Malinda Rutter, a Bundjalung, Gidjhal and Galibal woman, in collaboration with non-Indigenous staff and partners (Green 2021; Supply Nation 2022).

Gaawaa Miyay's Westpac design projects

Gaawaa Miyay is the creative studio practice of Yuwaalaraay woman Lucy Simpson, who creates art using graphics, textiles, objects and spatial designs. In 2018, she produced the concept and design of the 'Reflection Pods' in Westpac's Sydney office. The pods were then hand-woven by 21 Yolŋu weavers from the art centres Elcho Island Arts and Milingimbi Art and Culture using materials harvested and prepared through traditional methods. The project earned nearly \$60 000 for Milingimbi and Elcho Island community members (Koskela 2018; Todd 2018).

Saretta Fielding's 'Burbuga Mura – Rising Path'

In 2018, Wonnarua woman Saretta Fielding was commissioned to create a mural for Laing O'Rourke's office space in Sydney. Valued at \$50 000, the mural was completed over a year and involved a team of artists and designers to create a public art installation that uses traditional motifs and contemporary design to convey themes and stories about inclusion, advancing Aboriginal and Torres Strait Islander people, closing the gap and reconciliation (Saretta Art & Design 2019; Supply Nation 2020a). Saretta Art

Box 3.6 – Independent Aboriginal and Torres Strait Islander artists may be commissioned to create a wide range of artworks and designs

& Design has also been commissioned to create artworks for not-for-profits including Catholic Care, Wesley Mission and Jeder Institute, as well as Bonnell's Bay Public School and Hunter Primary Care (Saretta Art & Design 2022).

We Are 27 Creative's Origin Energy project

We Are 27 Creative is a First Nations-owned design agency that creates custom artworks for commercial and community clients. In 2018, they were commissioned by Origin Energy to produce bespoke artwork for their Reconciliation Action Plan. This project was valued at \$60 000 and included the design of publications, animations and infographics (Supply Nation 2020b). Other notable graphic designs created by We Are 27 Creative include the 2014 G20 Brisbane logo, the logo and branding for the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Reconciliation Action Plan for the Woolworths Group (We Are 27 Creative 2022).

Independent artists located in remote areas tend to use fewer sales methods

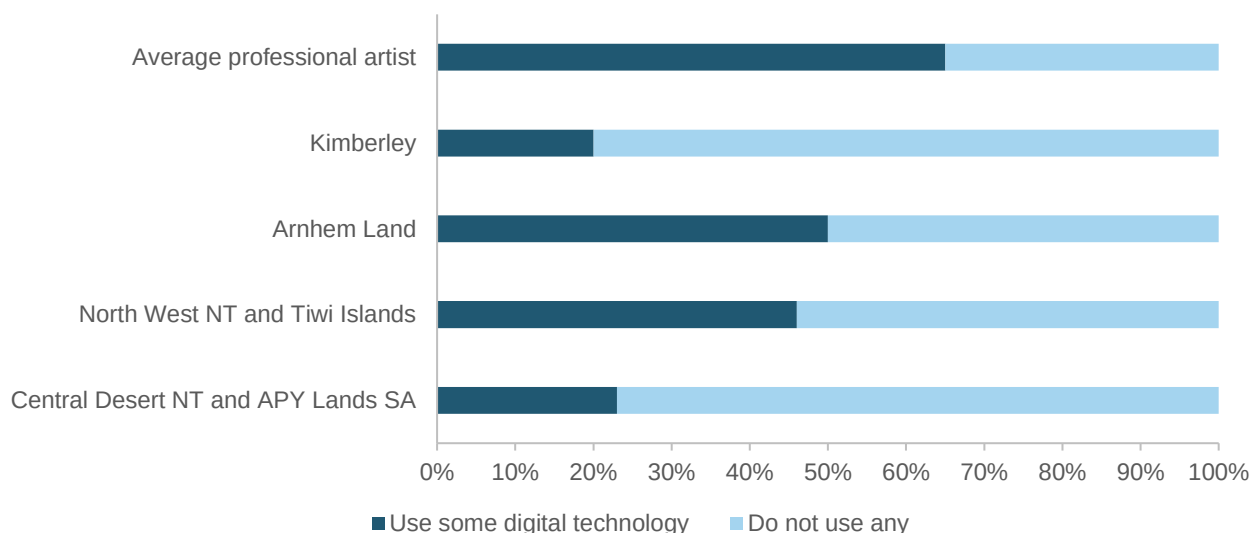
In 2014, just over 6% of artists located in remote areas worked independently (Woodhead and Acker 2014b, p. 14), with most of these independent artists selling directly to private customers or working with an art dealer or gallery. Direct sales by remote independent artists take place in a range of locations, including caravan parks, hotels, motels, a hospital and Todd Mall in Alice Springs (Acker and Stefanoff 2016, pp. 10–11). Some artists working in remote areas sell their artworks to art dealers for upfront payment under the 'dealer upfront model' (box 3.5).

Independent artists working in remote areas may use the sales methods outlined in box 3.5, but generally face barriers in accessing them due to factors associated with their remoteness. For example, while artists working independently in remote Australia may receive commissions for specific artworks, they may be less likely to receive commissions for digital artworks, multimedia projects and graphic designs that require access to digital technology. This is because the majority of Aboriginal and Torres Strait Islander artists in remote areas do not use digital technologies (such as mobile phones, computers or social media) in their artistic practice, in contrast to the average professional artist in Australia (figure 3.21). It is also less likely that artists in remote areas would be commissioned to paint murals or create public art installations in metropolitan or regional areas.

Artists in remote areas work outside art centres for a range of reasons. One survey of independent artists in remote areas found that about 26% preferred receiving upfront payment for their art compared with the delayed payment that may come from consignment sales used by most art centres (Acker and Stefanoff 2016, p. 8). Other reasons included 17% of artists preferring to make art at their home, 8% being unable to access an art centre and 7% having a desire to work independently. Work arrangements for artists working independently in remote areas are often transient, with many alternating between working with art centres and art dealers depending on their personal circumstances (Acker and Stefanoff 2016, pp. 8–10). But in some cases, artists may be subject to pressure from art dealers, family members or others that lead them to work independently on an ongoing basis (chapter 8).

Figure 3.21 – Aboriginal and Torres Strait Islander visual artists in remote areas do not typically use technology during their art-making process^a

Use of technology within four remote art regions compared to the average Australian artist



a. 'Technology' includes the use of mobile phones, social media, computers and other forms of digital equipment.

Sources: Australia Council for the Arts (2017b, p. 27); Throsby and Petetskaya (2016, p. 36, 2019c, p. 63, 2019a, pp. 53–54, 2019b, p. 54).

As with art centre artists, most independent artists in remote areas produce paintings, but 49% also use other mediums in the artworks such as fibres, weaving and other sculptural forms (Acker and Stefanoff 2016, p. 7). In addition, independent artists in remote areas do not necessarily produce or sell their artworks on a regular basis. In the week prior to one survey, 57% of independent artists working in remote areas reported not producing any artworks (Acker and Stefanoff 2016, p. 7). When their artworks were sold, about 70% sold for less than \$600 (Acker and Stefanoff 2016, pp. 11–12).

Direct sales: physical or digital?

As mentioned above, independent artists across all geographic areas choose to sell their original artworks or products direct to consumers. However, they often face a choice between reaching consumers physically or virtually through online marketplaces. Box 3.7 provides a general representation of the artist-to-consumer direct distribution model.

Each sales method incurs particular trade-offs. For sales through physical art fairs, artists accept monetary and time costs in setting up stalls, applying for necessary permits (if required) and paying travel costs to reach the event location, in exchange for the opportunity to directly connect with buyers in person. Online sales can allow artists to reach a wider consumer base (including those located overseas) with lower upfront costs compared with physical markets, but platforms such as social media require ongoing attention and management that can be time consuming and labour intensive (AACHWA, sub. 20, p. 8).

Box 3.7 – The general artist to consumer direct distribution model

There are several ways through which independent artists may sell their artworks directly to consumers. These are illustrated in the diagram below.



Selling through online platforms

Where artists decide to sell their original artworks online, a range of options are available.

- **Selling through their own website.** Through a direct online store, artists retain complete control over the entire sales process and retain almost all proceeds from sale. However, creating and designing a website incurs upfront costs, and the need for marketing can create ongoing costs.
- **Using social media sites.** Artists may also use various social media sites such as Instagram, Facebook and TikTok to market and sell their original artworks. Artists can not only establish pages promoting their art-making practice and personal stories, but also pay for targeted advertising. Some social media sites also allow artists to advertise and sell products through a specific market platform such as Facebook Marketplace. But in many cases, artists allow their social media followers to directly contact them through personal messages, where orders for art can be placed informally.
- **Selling through general online marketplaces.** These marketplaces include platforms such as Etsy and Ebay, which operate similarly to an artist's direct store. They provide a trusted online infrastructure and consumer base for artists to springboard off, in exchange for listing fees and commissions on sales. They may simplify the marketing and sales process for independent artists, but do not manage logistics or shipping of artworks.
- **Selling through specialised online art marketplaces.** These have been designed specifically to manage the sale of original artworks by emerging artists, and hold similar benefits compared to other online platforms with an added benefit. Some also manage the shipping of artworks to consumers.
 - For example, on Bluethumb artists can list artworks at no cost, but Bluethumb receives a commission of 30% on the sale price once an artwork is sold (Hartley 2022). Bluethumb provides standard shipping labels and, if needed, a specialised courier service for larger or higher-value artworks (Grant 2015). Similar to consignment sales, artists retain the ownership rights to artworks listed on Bluethumb until they are sold to the end consumer.

Regardless of whether artists reach consumers physically or virtually, in many cases they are operating an independent business and are therefore individually responsible for handling the entire marketing and sales process (in addition to the production process). This includes marketing and listing, pricing, sales, shipping and handling (in the case of online sales), as well as the business aspects of the process such as accounting and record keeping. The role of skills development in empowering artists to undertake these activities is discussed in greater detail in chapters 9 and 10.

Since 2017, some independent and art centre artists have entered emerging online marketplaces that allow for the sale of non-fungible tokens (NFT) associated with digital artworks, which act as digital certificates that purportedly provide owners with a unique claim of ownership over digital content. However, these marketplaces have their own unique risks (box 3.8).

Box 3.8 – Non-fungible tokens (NFTs)

Non-fungible tokens (NFTs) are an emerging type of digital asset that purport to provide a claim of ownership over digital content. This claim of ownership resides in the creation of a unique digital signature that is attached to digital content, creating a form of scarcity for digital files that can otherwise be freely transferred across the internet. For example, while anyone can download a picture of a digital artwork, it is intended that only one person or entity can own an NFT of the original artwork file.

NFTs are sold on specialised online marketplaces, such as OpenSea, Rarible and Bluethumb Digital. Fine art NFTs have also been sold by major auction houses Christie's and Sotheby's.

NFTs and Aboriginal and Torres Strait Islander artists

While NFT marketplaces are still quite young, there are signs that Aboriginal and Torres Strait Islander artists are beginning to make use of these marketplaces to sell digital art. One example is Buku-Larrngay Mulka Centre's 'Mulka NFT' project, which has seen the sale of NFTs from 3D digital scans of bark paintings and hand-drawn generative animations by internationally-renowned artists. These artworks were developed entirely inhouse in the Mulka Project Studios (Buku-Larrngay Mulka 2021; Houlbrook-Walk 2022). As at March 2022, sales of these NFTs have totalled just under \$9000, part of which will be used to purchase original physical bark paintings by one of the artists for the not-for-profit Yirrkala Museum.

Artists on NFT marketplaces face a range of challenges, including plagiarism and crypto volatility

There are a range of risks when selling art on NFT marketplaces, including plagiarism, cryptocurrency volatility and environmental issues. In 2022, over 80% of NFTs minted for free on OpenSea — the world's largest NFT marketplace — were 'plagiarised works, fake collections and spam' (Howcroft 2022; OpenSea 2022). By uploading original artworks onto NFT marketplaces, artists are competing with these plagiarised and fake artworks, and may increase the risk of having their own digital artworks plagiarised. Plagiarism of Aboriginal and Torres Strait Islander art is discussed in greater detail in chapter 4.

Almost all transactions in NFT marketplaces take place using the cryptocurrency Ethereum, which provides the blockchain technology that records ownership of digital content. Similar to other cryptocurrencies, Ethereum experiences extreme volatility that far exceeds traditional currencies. For example, between November 2021 and May 2022, the value of Ethereum in AUD more than halved (Yahoo Finance 2022).

Some have argued that NFTs create risks of environmental harm due to the energy-intensive process of 'mining' for cryptocurrencies and 'minting' new NFTs, which may have increased demand for carbon-

Box 3.8 – Non-fungible tokens (NFTs)

intense fossil fuels (Barber 2021; Howson 2021). In response, some emerging marketplaces such as Bluethumb Digital have stated that they will offset carbon emissions related to NFTs, but the majority tend to be silent on the matter.

Art buyers also confront risks when purchasing NFTs. The property rights associated with NFTs are ambiguous and untested. It is unclear whether the digital signatures of NFTs are perpetual or whether ownership can be extinguished upon the termination of web servers where the digital signatures are stored (Guadamuz 2021). It is also unclear the extent to which Australian consumer law applies to sales of NFTs.

**Draft Finding 3.4****Artworks by independent artists have a material presence in Aboriginal and Torres Strait Islander arts and crafts markets**

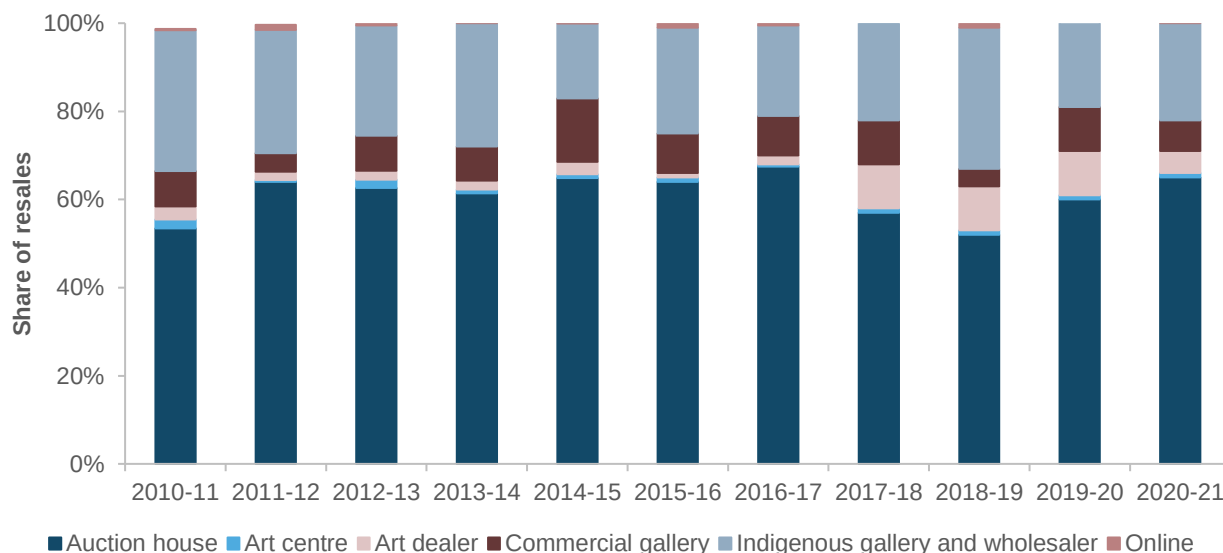
Independent artists have a material presence in markets for Aboriginal and Torres Strait Islander visual arts and crafts — the Commission's preliminary estimates based on limited data show that about 1700 independent artists generate sales of about \$10 million a year. About half of art dealer businesses sell the works of independent artists. In addition, independent artists produce commissioned artworks and sell direct-to-consumers through art fairs, online marketplaces and social media.

3.5 Resales on the secondary market

Original artworks may eventually be resold to other buyers on the secondary market. In 2019, the total value of Aboriginal and Torres Strait Islander art sold on the secondary market was \$6.4 million, which was about 5.6% of all public secondary market art sales in Australia (Furphy 2022). Resales have since grown to \$11.6 million in 2021.

Resales of Aboriginal and Torres Strait Islander art are conducted by auction houses, with some resales by wholesalers, art dealers and commercial galleries (figure 3.22). The shares of resales have remained steady, with a drop in auction house sales in 2018-19 due to a downturn in the auction house sector (Copyright Agency, pers. comm., 31 January 2022). Secondary market participants sell on behalf of organisations, art collectors and investors. Some art is also resold privately between art collectors without the involvement of art market professionals, but it is not clear the extent to which this occurs for Aboriginal and Torres Strait Islander art.

Figure 3.22 – Most secondary market sales over \$1000 are sold by auction houses^{a,b,c}
Secondary market sales of artworks over \$1000 by type of art market business



a. This graph represents the source of resales for all artworks resold by art market professionals, both Aboriginal and Torres Strait Islander artworks and non-Indigenous artworks. **b.** The share of resales over \$1000 refers to resales that are eligible under the Australian Government's Resale Royalty scheme. **c.** The years refer to financial years.

Source: Unpublished data from Copyright Agency.

In recent decades, resale trends have been volatile

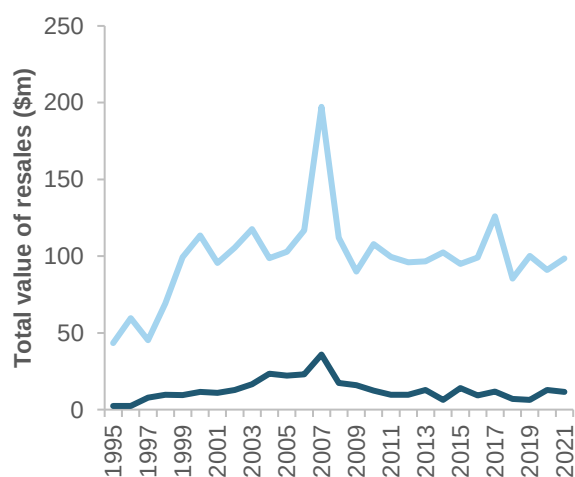
From the 1990s to the late 2000s, resales of Aboriginal and Torres Strait Islander art experienced sharp growth, peaking at about \$35.9 million in 2007 (figure 3.23, panel a). During this period, 'the top twelve-selling Aboriginal artists in the auction market were responsible for generating an average of \$5 million in sales per annum, or about 50% of the market sector' (Wilson-Anastasios 2012, p. 33).

This growth coincided with increased interest in Aboriginal and Torres Strait Islander artworks as a type of investment asset. Between 1995 and 2008, it was estimated that Aboriginal and Torres Strait Islander artworks sold on the secondary market yielded an average annual return of 6.6%, delivering returns comparable to the average returns of 7.8% from Australian equities and 8.5% from real estate (Taylor and Coleman 2011, p. 1526).

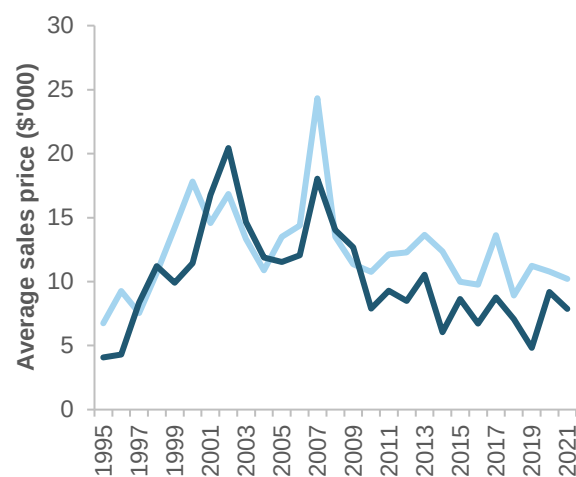
During the Global Financial Crisis (GFC), secondary sales of Aboriginal and Torres Strait Islander art were heavily impacted, halving to \$17.5 million in 2008, with further decreases until 2013 (figure 3.23, panel a). From 2013 to 2021, secondary sales did not recover to their pre-GFC heights, fluctuating between \$6.4 million and \$14.2 million, with the average resale prices dropping below those achieved by non-Indigenous Australian artists (figure 3.23, panel b). Compared with two major price indices for assets (Capital City Housing and the All Ordinaries) and price indices for global art sales (Contemporary Western and Modern art), an auction-derived Australian Aboriginal Art price index did not experience the same post-GFC rebound or increase in value (Lye and Hirschberg, sub. 7).

Figure 3.23 – Resales of Aboriginal and Torres Strait Islander art collapsed after 2007 and have not returned to pre-GFC heights^a

a. Total value of resales from public auction houses



b. Average price of artworks sold by public auction houses



— Aboriginal and Torres Strait Islander

— Non-Indigenous (Australian)

a. Figures refer to calendar years. Sales figures have been adjusted for inflation to 2021 dollars.

Source: Furphy (2022).

One potential reason for the lack of rebound is changes to rules on self-managed super funds (SMSF) that were introduced by the Australian Government in 2011 (Lye and Hirschberg, sub. 7). These rule changes stipulated that SMSFs could not hold artworks as assets unless they were held for the sole purpose of providing retirement benefits (rather than current personal benefits), included prohibitions on the display of artworks in investors' residential or business premises and required artworks to be externally stored and insured. In 2010, Mossgreen Auctions estimated that up to 60% of Aboriginal and Torres Strait Islander art was purchased through SMSFs (Battersby 2010). By 2014, it was estimated that about 5% of Aboriginal and Torres Strait Islander artworks sold by private art businesses were to super funds (Woodhead 2014, p. 8).



Draft Finding 3.5

The total value of Aboriginal and Torres Strait Islander artworks sold on the secondary market remains below its peak

Following strong growth up to 2008, resales of Aboriginal and Torres Strait Islander artworks collapsed following the Global Financial Crisis (GFC). The total value of resales has since remained below the pre-GFC peak, with average prices of Aboriginal and Torres Strait Islander artworks sold by public auction houses lower than resales of artworks by non-Indigenous artists.

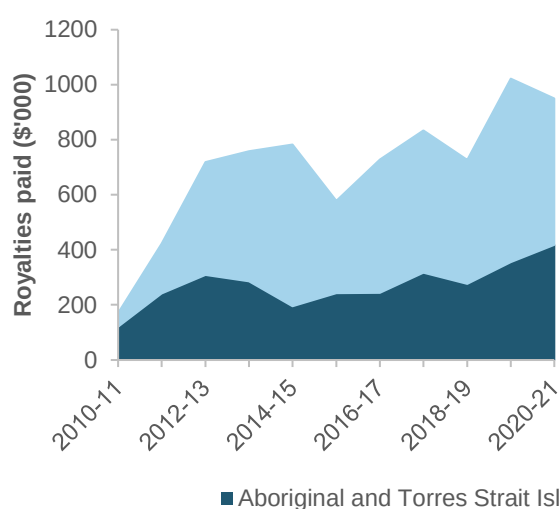
Over ten years, Aboriginal and Torres Strait Islander artists received \$3 million from resale royalties

Resales provide a further income source for artists through the Australian Government's Resale Royalty scheme, which entitles artists and their beneficiaries to 5% of the secondary sales of artworks priced over \$1000. Since its introduction, works by Aboriginal and Torres Strait Islander artists have comprised a

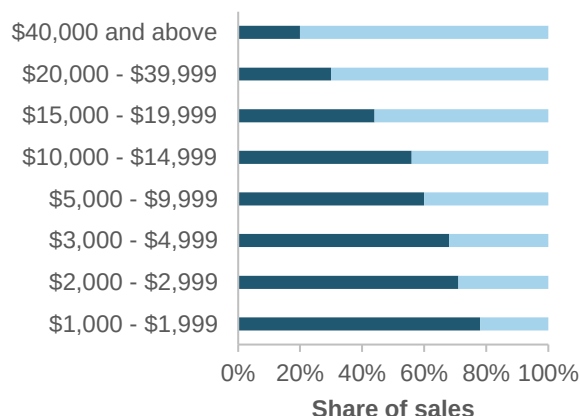
substantial share of artworks covered by the scheme. In the 2020-21 financial year, almost 44% of royalties paid were to Aboriginal and Torres Strait Islander artists and their beneficiaries, totalling about \$418 000 (figure 3.24, panel a). A total of \$3 million has been paid to First Nations artists since the scheme was introduced in 2010.

Figure 3.24 – Aboriginal and Torres Strait Islander artists and beneficiaries receive a substantial share of total resale royalties, primarily driven by lower-value resales^a

a. Royalties paid to artists or their beneficiaries



b. Share of sales eligible under the Resale Royalty scheme by sale price



a. The years refer to financial years. Royalties paid have been adjusted for inflation to 2020-21 dollars.

Source: Commission analysis using unpublished data from Copyright Agency.

Most eligible resales of Aboriginal and Torres Strait Islander art have been for relatively lower-priced artworks (figure 3.24, panel b). For example, Aboriginal and Torres Strait Islander artworks comprised 78% of all \$1000 to \$1999 artworks covered by the scheme, and about 20% of artworks valued \$40 000 or higher. This corresponds with the higher volume of relatively lower-value original artworks sold by art centres.

3.6 The consumer products market

The consumer products market encompasses goods made generally for the consumer market that incorporate Aboriginal and Torres Strait Islander art and designs — for example, boomerangs, other woodcrafts, homewares, souvenirs and jewellery. While visual arts and crafts products can be mass-produced with the designs of original artworks, they can also be handmade with unique one-off designs similar to original artworks (for example, bespoke jewellery).

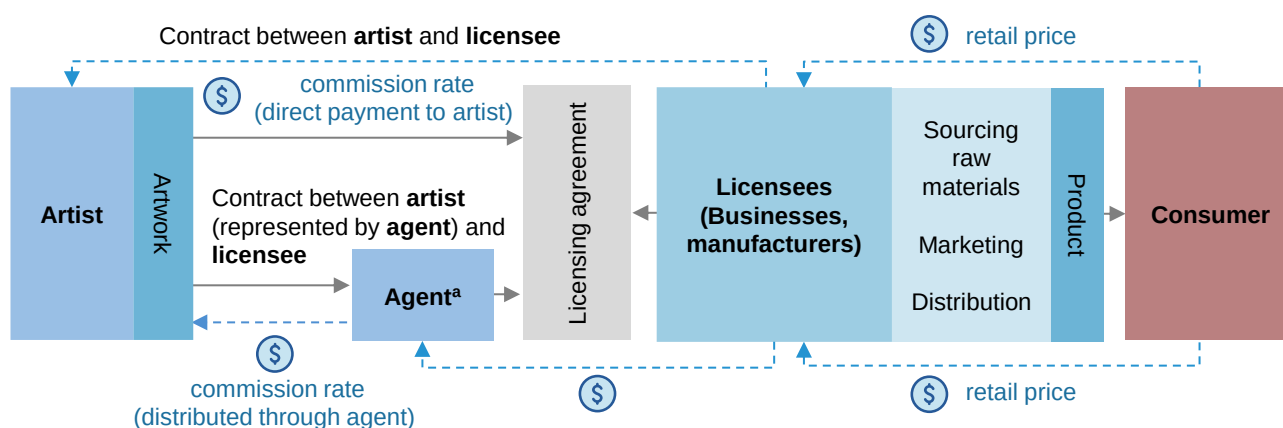
Within this submarket, a range of mechanisms are used in order to create and distribute products, by both art centre and independent artists. The three main types of consumer Aboriginal and Torres Strait Islander visual arts and crafts products are licensed, handmade and other mass-produced products. This section discusses each of these in turn.

Licensed Aboriginal and Torres Strait Islander art products

Manufacturers often enter into agreements to use the intellectual property of others in their products — including icons, characters or elements drawn from other works. For example, logos and imagery of popular cartoon or pop culture characters, or sporting teams may be placed on a range of third party products including clothing, merchandise and other household items. This agreement is known as a *licence*. A (copyright) licence — between a person (a licensor, usually the artist or copyright owner) and a third party (a licensee, such as a manufacturer) — authorises the licensee to do specified things, such as reproduce, publish and sell the artist's work, under certain conditions, which would otherwise infringe upon the artist's copyright (Arts Law 2022a). Licensing allows artists (including Aboriginal and Torres Strait Islander artists and communities) to retain ownership of their copyright rights, and to maintain control of how their work is used (Arts Law, Copyright Agency, IartC, sub. 31, p. 35).

The process of licensing can be complex (figure 3.25).

Figure 3.25 – From art to product — licensing Aboriginal and Torres Strait Islander art^a



a. An agent may include, but is not limited to, a private dealer, gallerist, art centre, or industry association.

Source: Based on Arts Law, Copyright Agency, IartC (sub. 31, p. 17).

Licensing can provide an additional revenue stream for artists (Arts Law, Copyright Agency, IartC, sub. 31, p. 35), to complement the direct sale of original visual arts and crafts products, and many manufacturers and other businesses enter into licensing agreements to use Aboriginal and Torres Strait Islander artworks. These agreements can be negotiated directly with artists or through an agent, who acts on behalf of the artist. An agent could be a private dealer, gallerist, art centre, or industry association.

In Australia, many Aboriginal and Torres Strait Islander artists (both working independently or through an art centre) are represented by the Copyright Agency, who manages the copyright licence process on their behalf. Over 5000 Aboriginal and Torres Strait Islander artists across Australia and over 70 community art centres are members (Copyright Agency 2022b, 2022c). The Copyright Agency supports both licensors and potential licensees — they act to ensure that artists' rights in their work are protected and they receive fair payments for its use, and assist potential licensees in sourcing work and negotiating agreements with artists (Copyright Agency 2022e, 2022c).

As a result of licensing, Aboriginal and Torres Strait Islander artists' works have appeared on a range of products and their packaging, including published works, postcards, homewares, fashion accessories, and architectural designs (Copyright Agency, sub. 30, p. 1). Many of these products are not traditionally

associated with Aboriginal and Torres Strait Islander visual arts and crafts. Some recent and well known examples of collaborative licensing arrangements include:

- Warlukurlangu Artists' collaborations with Bunnings to produce licensed pots and with various Myer House Brands to produce linen, homewares, clothing and jewellery lines (Bunnings 2022; Mitchell and Low 2015; Myer 2022)
- Adairs collaborating with artists independent Miimi + Jiinda and Brad Turner to produce linen and home décor products (Adairs 2022a, 2022b)
- Gorman's fashion collection in collaboration with artists from Mangkaja Arts Resource Agency (gorman 2022) (chapter 2).

Licensed products with Aboriginal and Torres Strait Islander designs have a notable presence among many sellers, particularly in businesses that are members of the Indigenous Art Code. For example, about 56% of 201 businesses with Indigenous Art Code membership sold licensed products (Arts Law, Copyright Agency, IartC, sub. 31, p. 89). Indigenous Art Code members include public institutions with gift shops (such as museums and public galleries), and other gifts and homeware retailers.

Income generated from licensing is growing ...

In recent years, there has been strong interest from Aboriginal and Torres Strait Islander artists in licensing their artworks. A recent survey of Desart member art centres (accounting for about 40% of all remote Aboriginal and Torres Strait Islander community art centres in Australia) found that over 80% of art centres were interested in undertaking third party licensing to produce merchandise and homewares. In addition, 77% were interested in producing textiles, 55% in homewares, and over 40% in creating jewellery and stationery (Desart, sub. 4, p. 11).

This interest has translated into a growth in licence agreements being entered into with Aboriginal and Torres Strait Islander artists. The Copyright Agency (sub. 30, pp. 1, 5) reported rapid growth in demand for licensing agreements for Aboriginal and Torres Strait Islander art. The growth in income generated by agreements has been driven by higher value licences (from merchandise, architectural and fashion licensing deals) and writing licences for more artists, rather than an increase in the number of licences per artist (Copyright Agency, pers. comm., 7 February 2022).

Between 2019 and 2021, Copyright Agency (sub. 30, pp. 1, 5) has observed:

- a doubling in the number of artists having licences written for — many of the 13 500 visual artists represented by Copyright Agency are Aboriginal and Torres Strait Islander (either directly or via art centres)
- an increase of more than 50% in the average income from licensing agreements for Aboriginal and Torres Strait Islander artists — in the 2020-21 financial year, Copyright Agency wrote over \$2.2 million worth of agreements for visual artists more broadly.
- a tripling of total income from licensing agreements generated by Aboriginal and Torres Strait Islander artists.

... resulting in a range of potential benefits to artists and Aboriginal and Torres Strait Islander cultures

In addition to the direct financial benefits accruing to Aboriginal and Torres Strait Islander artists from fees paid under licensing agreements, licensing also can also lead to potential monetary benefits for artists.

Licensing boosts artists' ability to bring their products to the market, thereby increasing their income via product sales. Third party licensees have the scale and scope in their operations to produce and market a wider array of products bearing artists' works, at a far greater scale, and to a wider customer base. For example, without a licensing agreement, an Aboriginal and Torres Strait Islander artist may only be able to

produce a few artworks a year, and have limited ability to reproduce them onto other products. In addition, artists may only be able to sell their works and products at art fairs or through specialised stores. A licensing agreement may allow an artist's work to be reproduced by a large-scale manufacturer onto a range of homewares, clothing and craft products, which are then sold in mainstream retail stores that are easily accessible to the everyday consumer.

Artists' personal reputation and name recognition in the eyes of the general public could potentially be boosted by the exposure generated from licensing products that are sold in mainstream consumer retail stores. Over time, this could result in increased sales of current and future products, and may also generate sales in the artist's original works.

Furthermore, licensing can also result in positive spill over effects to other artists (that is, other Aboriginal and Torres Strait Islander artists who are not engaged in licensing) and Aboriginal and Torres Strait Islander visual arts and crafts generally. Where consumers' awareness of Aboriginal and Torres Strait Islander artists and their works increases as a result of exposure to licensed products, this raises the awareness and publicity of Aboriginal and Torres Strait Islander art, craft and cultures more generally. As a result, other Aboriginal and Torres Strait Islander artists may benefit from increased interest in and sales of their works (chapter 4). And an increased quantity of high-quality products bearing authentic Aboriginal and Torres Strait Islander art and designs (beyond traditional original art work and crafts) signifies a recognition of its importance as part of Australia's cultural fabric and national identity (chapter 2).

Products sold by Better World Arts are examples of licensing collaborations that have yielded significant cultural benefits (box 3.9). Chapter 4 discusses the range of benefits of cross-cultural collaboration more generally for both Aboriginal and Torres Strait Islander artists, communities and cultures, as well as non-Indigenous collaborators.

Box 3.9 – Better World Arts

Better World Arts (BWA) is a social enterprise focused on the creation and sale of products depicting artworks by Aboriginal and Torres Strait Islander artists. BWA's production processes are collaborative and have yielded benefits for Aboriginal and Torres Strait Islander artists, communities and cultures.

A collaborative operating model ...

BWA's operating model is fundamentally collaborative — with Aboriginal and Torres Strait Islander artists and art centres, as well as traditional artisans overseas.

BWA engages with Aboriginal and Torres Strait Islander artists from across Australia — in regional and remote communities and cities — to create artworks to be applied onto a range of products. Artworks are featured on products through contractual licensing agreements with artists, who are paid royalties as a percentage of total artist sales. BWA then engages with traditional artisans in remote regions of Asia and South America to produce traditional crafts such as rugs, cushions, lacquer-ware boxes, jewellery, bone china and neckties bearing Aboriginal and Torres Strait Islander designs. Products by BWA are distributed for sale in retail stores (including museum and gallery gift shops), online marketplaces and through BWA's online store.

Box 3.9 – Better World Arts

... that has resulted in a range of benefits to Aboriginal and Torres Strait Islander artists

BWA's collaborations provide economic opportunities for Aboriginal and Torres Strait Islander artists and their communities. Artists benefit from being able to capitalise on BWA's supply chains and economies of scale to sell more products bearing their designs. BWA's royalty scheme also allows artists to earn a steady income, as royalties are paid (for the use of their designs) per item sold, rather than in the form of a single one-off licensing payment. In addition, BWA products serve as a way for consumers to learn more about Aboriginal and Torres Strait Islander art and culture through detailed product labels that contain information about the artwork, artist and art centre (where applicable).

The benefits and success of such collaboration are founded upon mutual respect

BWA's collaborations have been successful, which has been largely attributed to being founded upon respect for artists and culture. Instead of engaging (and contracting) with third parties to source designs and products, BWA works directly with Aboriginal and Torres Strait Islander artists, art centres and overseas artisans, which provides BWA with the ability to have full oversight over its supply chain, and ensure that its products are authentic and respectful of the cultures that they represent.

Contracting directly with artists also ensures that their rights (in particular, intellectual property rights) to their work are respected, maintained and protected. Artists retain ownership over the intellectual property contained in their works at all times in the collaborative process, and maintain control over how they are to be used on products.

Sources: Better World Arts (2022a, 2022b); National Museum of Australia (2022a); yarn (2022).

While licensing Aboriginal and Torres Strait Islander artworks can provide benefits to Aboriginal and Torres Strait Islander artists and communities, some concerns remain. These include the potential for consumers to mistakenly identify authentic licensed products as inauthentic products (chapter 4), and for artists to encounter unethical conduct from other market participants during the licensing process (chapter 8).

Handmade and other products designed by Aboriginal and Torres Strait Islander people

Not all consumer products bearing Aboriginal and Torres Strait Islander artworks are created under licensing agreements. A range of non-licensed Aboriginal and Torres Strait Islander consumer products are also produced and sold by a range of entities. These products can be split into three categories:

- handmade products designed by Aboriginal and Torres Strait Islander artists and craftspeople
- products designed by Aboriginal and Torres Strait Islander artists, produced and sold by third-parties that manufacture products from user-submitted content
- products made by (non-Indigenous) third parties using licensed Aboriginal and Torres Strait Islander inputs.

Handmade products designed by Aboriginal and Torres Strait Islander artists

One major category of non-licensed Aboriginal and Torres Strait Islander visual arts and crafts is products designed by Aboriginal and Torres Strait Islander artists themselves — which includes individually unique handmade products, types of products with unique designs, and product ranges that replicate a single

design. These products do not require licensing because their manufacture and sale is controlled by the artists themselves (or their agent), who own the copyright to their art.

Many Aboriginal and Torres Strait Islander artists design and make products themselves, handling every stage of the process from obtaining the raw materials required (which may include traditional sourcing methods) to creating the products themselves. This is because, as noted in chapter 2, art and creating art holds great significance and purpose to Aboriginal and Torres Strait Islander people. The act of making products by hand directly is often intertwined with the process of sharing knowledge and conveying and preserving storylines. For example, the natural and traditional processes involved in creating *yidaki* are sustainable practices that are pivotal to providing them with cultural significance (box 3.10).

Box 3.10 – Traditional methods provide *yidaki* with cultural significance

Yidaki are Yolŋu instruments made from a meticulous process that are inextricably tied to Yolŋu Country. As noted by Nicholls (2017):

Embedded in a complex web of interconnected relationships, the *yidaki* is part of an extended network comprising the humans and Spirit Beings belonging to Yolŋu country, its sacred topography and environment, the Yolŋu kinship system and the Yolŋu Matha language. The *yidaki* is thus connected to Yolŋu Law and ceremony - song, dance, visual art and narrative.

The materials to make *yidaki* are typically harvested during the initial half of the dry season, when 'savanna woodlands are accessible and timber is relatively easy to cut following the end of monsoonal rains' (Ryan 2015, p. 6). Native termites hollow out the trunk of eucalyptus trees specific to Yolŋu Country, which are then selected and carefully removed based on their size and likelihood of dying before maturity. As part of traditional sustainable practices, the number of trees cut is kept low in any single location. The Yolŋu people then strip off exterior bark layers, cleaning out any remaining termite nests before preparing a beeswax mouthpiece for the smaller end of the instrument.

Once played, the sound produced by the *yidaki* is also closely associated with Country. Nicholls (2017) also noted that:

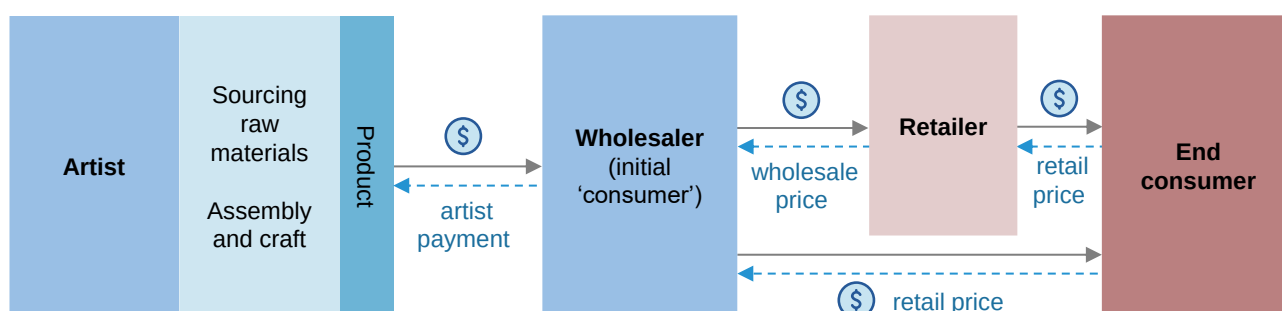
Local weather phenomena, such as lashing rain, gales and even the devastating cyclones that sweep through in the monsoon season also have parts to play. Wind, thunder, and lightning are closely associated with the *yidaki* ... The Yolŋu Matha word "murrun" refers somewhat onomatopoeiacally to the low, rumbling noise made by the *yidaki*. The same word is used to describe the deeply resonant sounds of thunder.

Methods of sale

After a product has been created, there are two ways that those products can be sold to consumers. The first is to direct sales to end consumers, in much the same way that independent artists can sell their original artworks directly (box 3.7, section 3.2). The second method is to sell their products to a wholesaler, who then sells to retailers and consumers. This may be a preferred distribution mechanism where an artist would prefer to focus on creating art and craft, rather than engaging in the 'business side' of operations. Under this model, once products have been created, artists no longer own them — they are the wholesaler's product, which they package and sell to retailers or end consumers directly (at a marked up price).

Figure 3.26 provides an example of an artist-wholesaler-consumer distribution model.

Figure 3.26 – The artist to consumer via wholesaler distribution model



Products designed by Aboriginal and Torres Strait Islander artists, produced by third parties or using in-house facilities at art centres

A single Aboriginal and Torres Strait Islander artist can often only produce a limited number of pieces in a given time period, which can limit the viability of their art business. To meet consumer demand, some Aboriginal and Torres Strait artists engage third-parties who have connections with manufacturers (including those overseas) to scale up production. Aboriginal and Torres Strait Islander people design and create the artwork that will feature on the products, which is provided to manufacturers or other third parties who produce the products. Manufacturers may also be provided with detailed specifications of the product on which the artwork is applied.

One example of a third-party arrangement is with products sold on Redbubble — an online marketplace for print-on-demand products based on user-submitted images. Redbubble offers a range of products, such as mugs, clothing, homewares and accessories on which artists' designs can be printed. Artists need only open a Redbubble 'shop' and upload their designs — after this, Redbubble handles the manufacture and shipping of products to consumers, facilitating the sale of the design on a particular item (and payment to artists) (Redbubble 2022).

On Redbubble, the Commission estimated that as at April 2022, Aboriginal and Torres Strait Islander artists produced about 36% of product listings under search terms associated with Aboriginal and Torres Strait Islander art. The remaining listings were by non-Indigenous users often based overseas, listing products that contain a mixture of plagiarised artworks by First Nations artists and Indigenous-style designs. The misuse of Aboriginal and Torres Strait Islander cultures on these marketplaces is discussed further in chapter 4.

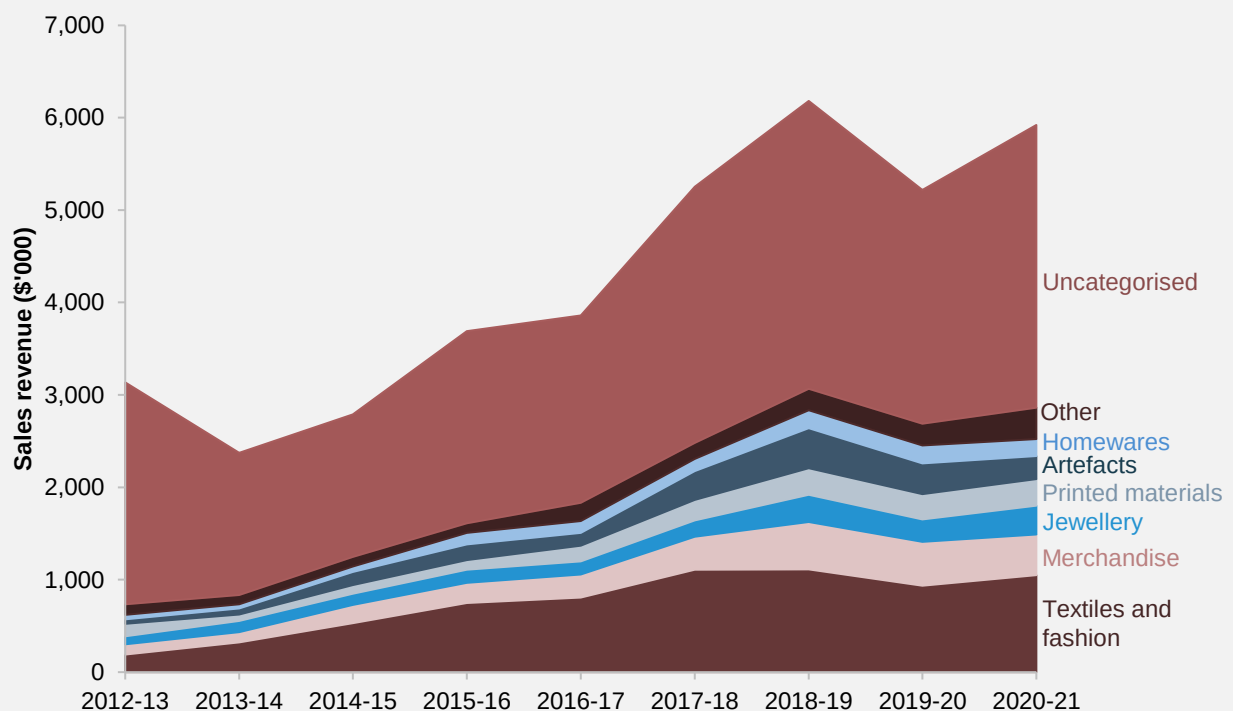
Some art centres have in-house facilities that they use to produce some product types, particularly textiles and fabrics (box 3.11). In other cases, art centres collaborate with manufacturers or printing houses to produce products at a higher scale.

Box 3.11 – Art centres produce different products and merchandise using in-house facilities and third-party manufacturers

Although the focus of most art centres has been the production and sale of artworks by Aboriginal and Torres Strait Islander artists, many also sell a range of products, including licensed goods, handmade artefacts and other merchandise. During the 2019-20 financial year, art centres sold at least \$5.2 million of products, driven in large part by textiles, clothing and fashion items. Many of these fabric and merchandise products were produced using in-house printing facilities (Marrawuddi Arts and Culture 2022; Ngukurr Arts Aboriginal Corporation 2022). However, some were produced in collaboration with print houses and other manufacturers, as seen with the textile collaborations between Ikuntji Artists and Publisher Textiles & Papers (Ikuntji Artists 2022).

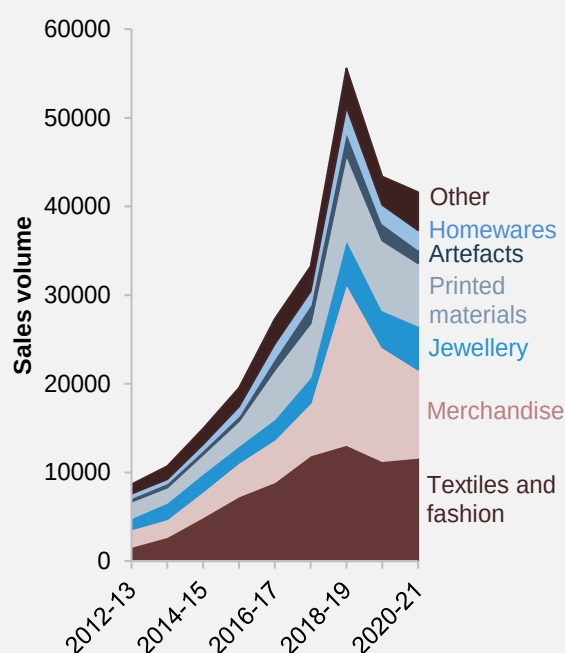
The use of in-house production facilities or manufacturer collaborations allow for larger scale production, resulting in higher sales volumes (panel b) compared with artworks (figure 3.13). However, these higher volumes are offset by generally lower product prices (panel c).

a. Total sales revenue from sales of products by art centres

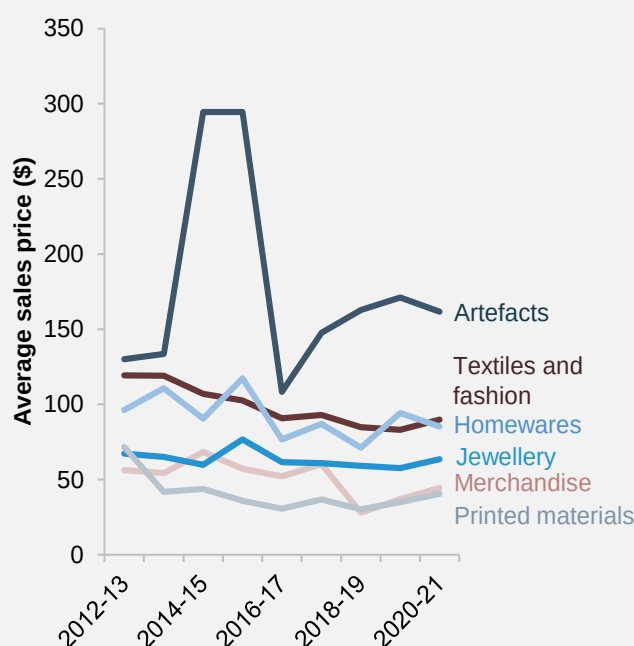


Box 3.11 – Art centres produce different products and merchandise using in-house facilities and third-party manufacturers

b. Volume of products sold by art centres



c. Average sales price of art centre products



Source: Commission estimates from unpublished Desart (SAM) data.

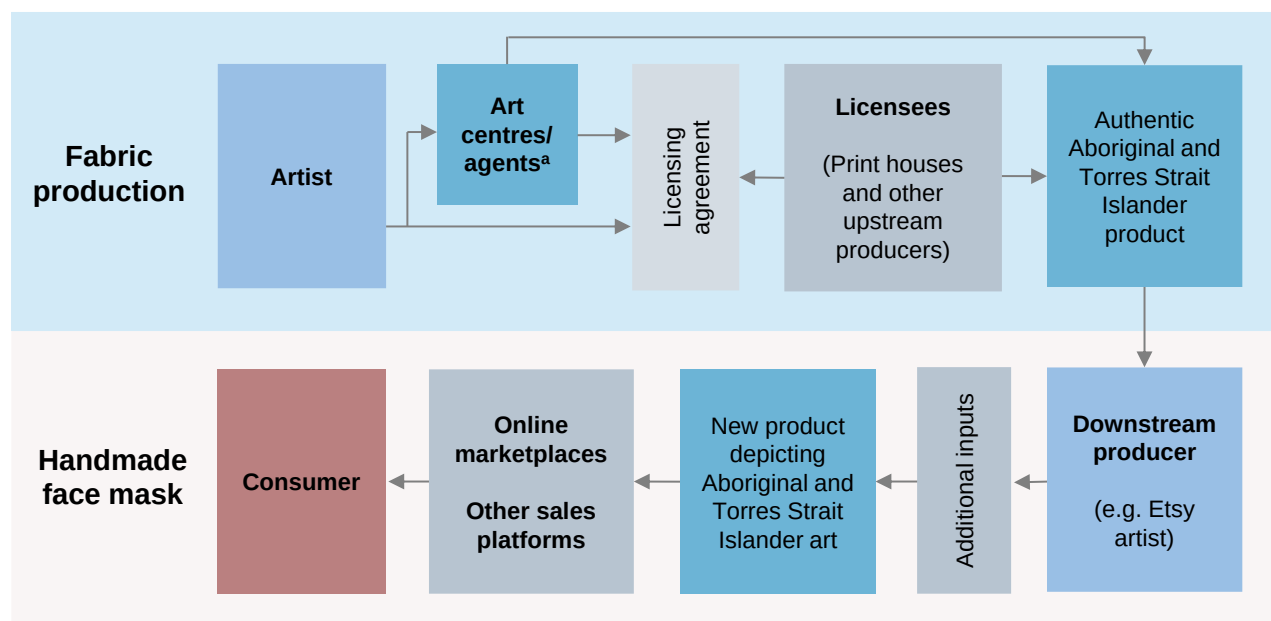
Products made using licensed Aboriginal and Torres Strait Islander inputs

There are also products that are not made by Aboriginal and Torres Strait Islander artists directly, but are rather made by other (non-Indigenous) people *using* Aboriginal and Torres Strait Islander artists' products as inputs. That is, the initial Aboriginal and Torres Strait Islander product has been transformed by a downstream producer into a new product, which the downstream producer then sells to end consumers.

Figure 3.27 provides an example of such a production process for handmade face masks using a licensed Aboriginal and Torres Strait Islander fabric. In this example, a hobby sewer may purchase the Aboriginal and Torres Strait Islander licensed fabric from a retail fabric store, and along with other fabrics and elastic, produce a face mask bearing the Aboriginal and Torres Strait Islander design, which they then put for sale online.

The scale at which these products are produced varies substantially. At a small scale, they can be made by individuals selling on marketplaces such as Etsy. But these products can also be produced by larger producers such as major fashion labels, which may choose to use textiles designed and created by Aboriginal and Torres Strait Islander artists as inputs into products that are sewn overseas — although they may license designs directly from artists to provide greater flexibility in what inputs are used in their product. In addition, downstream producers may be located in Australia or overseas — particularly with the rise of e-commerce, overseas downstream producers are able to easily purchase Aboriginal and Torres Strait Islander products.

Figure 3.27 – Use of Aboriginal and Torres Strait Islander original or licensed art products to create other products^a



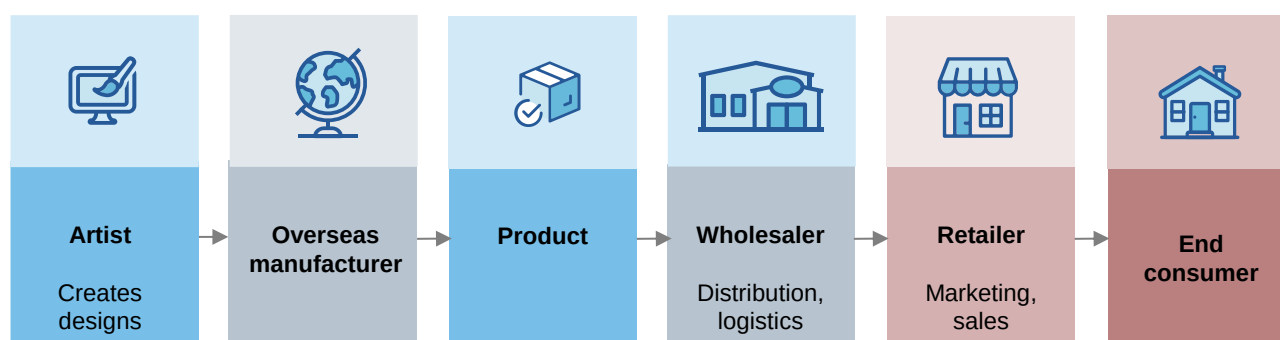
a. An agent may include, but is not limited to, a private dealer, gallerist, art centre, or industry association.

Mass-produced consumer products without a licence

In addition to the supply mechanisms discussed above, a range of large-scale suppliers also form part of the market for consumer products. These manufacturers and businesses focus on producing a range of consumer products typically for the souvenir market, including fridge magnets, keyrings, thongs, among others. They produce these products at far higher quantities and at lower price points than their smaller-scale competitors, fuelled by their economies of scale and scope, as well as consumer demand. These products tend to be designed and made without any input from Aboriginal and Torres Strait Islander artists.

Figure 3.28 provides a general example of the supply chain for mass-produced consumer products without licensing agreements. However, due to their nature, mass-produced Indigenous-style products inherently have different qualities to small-scale, low volume products on the market.

Figure 3.28 – An example of a supply chain for mass-produced consumer products



Products made overseas may not use traditional materials or methods ...

Manufacturing products in Australia, particularly time and labour-intensive handmade products, is costly. To keep costs as low as possible and maximise total output, larger-scale producers often look overseas to manufacture their products, and then import them into Australia for sale. Overseas-made products may still be handmade (with manufacturers able to engage more artists and craftspeople due to lower wages overseas) — or may be machine-made without the involvement of any craftspeople.

However, without the input of Aboriginal and Torres Strait Islander people — the traditional custodians of cultures being depicted in the products — there is a strong likelihood that these products will not be manufactured using traditional materials or methods. This may be due to supply constraints or a desire to further lower costs. For example, a boomerang or didgeridoo is traditionally made of wood, but some mass-produced didgeridoos or boomerangs may be made of bamboo instead.¹¹

Even if the material used is similar to traditional materials, it may not be of the same kind or sourced through traditional methods, which may differ between Aboriginal and Torres Strait Islander cultural groups. For example, the didgeridoo may be made of a wood species not found in Australia, and not hollowed out naturally by termites (Murruppi Enterprises 2011).

In addition, mass-produced wood products may contain printed designs (for example, from stock images) rather than designs that are individually carved or painted, as would be the case for products made by Aboriginal and Torres Strait Islander artists.

... and Indigenous-style designs are common

Large businesses and manufacturers, due to their size and finances, may be more likely to be in a position to licence Aboriginal and Torres Strait Islander art work to use on their products (discussed above). However, as licensing is not without cost, some businesses and manufacturers forego licensing and create their own Indigenous-style designs and artworks — designs and artworks that can be used without legal consequences, and, to the untrained consumer eye, may be indistinguishable from those made by Aboriginal and Torres Strait Islander artists.

Such designs and artworks are not created or endorsed by any Aboriginal and Torres Strait Islander person, and often appropriate or misuse various elements of different Aboriginal and Torres Strait Islander communities' unique styles and designs. Where this is the case, such products may be considered a misuse of Aboriginal and Torres Strait Islander cultures, which has a range of economic and cultural harms. Chapter 4 discusses inauthentic arts and crafts products in more detail.

¹¹ While native bamboos such as *Bambusa arnhemica* have been described as a traditional material used in the creation of didgeridoos (Ryan 2015, p. 6), most bamboo didgeridoos currently available in products markets are made overseas using non-native bamboos.

4. Inauthentic visual arts and crafts

Key points

- * There is lack of consensus as to what constitutes inauthentic Aboriginal and Torres Strait Islander arts and crafts, but a working definition is required to assess the scale of the issue and consider appropriate policy reforms.

For the purpose of this study, a product or artwork is considered *authentic* Aboriginal and Torres Strait Islander visual art and 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).

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*.

- * Inauthentic products are very common across the consumer product (mainly souvenirs), digital, and print-on-demand merchandise markets — mostly in the form of Indigenous-style products and designs. There is also evidence of a considerable degree of copyright infringement occurring in the print-on-demand market.

Based on sampling, the Commission found that inauthenticity is prevalent in the digital stock image market (over 80%), the consumer product market (two-thirds to three-quarters) and the print-on-demand merchandise market (over 60%).

- * The 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 (including emotional distress and loss of identity and self), and economic harms (such as a loss of income sources and consumer hesitancy in purchasing Aboriginal and Torres Strait Islander arts and crafts).
- * A lack of awareness and understanding by both producers and purchasers about the harms of inauthentic arts and crafts, consumer difficulties identifying and distinguishing inauthentic products, and few barriers to creating and selling inauthentic products under Australian law are key factors enabling the prevalence of inauthentic products in the market.

This chapter examines the scale and effects of inauthentic visual arts and crafts on Aboriginal and Torres Strait Islander people and the broader community.

- First, section 4.1 considers the issue of authenticity, the Commission's definition of authenticity for the purposes of this study, and the main forms of inauthenticity in Aboriginal and Torres Strait Islander visual arts and crafts.
- Section 4.2 then provides estimates of the scale of inauthentic arts and craft in the market, focusing on particular submarkets.
- Section 4.3 examines the harmful effects of inauthentic arts and crafts on Aboriginal and Torres Strait Islander people, communities and beyond (including consumers and the market for Aboriginal and Torres Strait Islander arts and crafts).
- Finally, section 4.4 considers the main reasons why inauthentic Aboriginal and Torres Strait Islander arts and crafts exist.

4.1 Authenticity — an important and necessary consideration

Whether an item is 'authentic' — or to many, 'real', 'genuine', 'true' and 'original' — is an important consideration for consumers and producers of a range of product types, including arts and crafts, merchandise (such as clothing, footwear, accessories), and even food and drink. However, what authentic means precisely is context-specific. For example, 'a forged painting will not be inauthentic in every respect: a Han van Meegeren forgery of a Vermeer is at one and the same time both a fake Vermeer and an authentic van Meegeren, just as a counterfeit bill may be both a fraudulent token of legal tender but at the same time a genuine piece of paper' (Dutton 2005, p. 1).

Nevertheless, authenticity (and addressing authenticity issues) is important, as authentic products have distinct economic and cultural value. This is particularly relevant in the context of Aboriginal and Torres Strait Islander arts and crafts.

Authentic products embody the history, culture and values of the item itself (including the author, producer or brand of the product). As such, consumers seeking to purchase these products are buying not only the product itself, but also the associated history, culture and symbolism embedded in the product. Protecting authentic products (and ensuring consumers are able to differentiate between authentic and inauthentic products that may be on the market) maintains the integrity of the cultural value underlying authentic products. The creation of inauthentic products, where they are items specific to a particular culture or embody cultural designs or motifs, is a form of cultural appropriation.

Authentic products also generally have greater economic value than similar inauthentic products — consumers typically are willing to pay extra for authentic products (or at least would expect to pay less for inauthentic products). And for the most part, the benefits arising from the creation and sale of authentic products go back to the creators, allowing them to maximise their returns and encourage the creation of more authentic products — as opposed to inauthentic products that take advantage of the authentic product's good will and inherent value to make sales where the returns and other benefits do not benefit the original product creators.

Authentic versus inauthentic Aboriginal and Torres Strait Islander visual arts and crafts

Authenticity for the purpose of this study focuses on authorship

Authenticity is ‘a pretty vexed conversation, even within Indigenous Australia’ (AIATSIS, quoted in HoRSCIA 2018c, p. 14). Many Aboriginal and Torres Strait Islander people do not use ‘authentic’ to describe artworks. Anecdotally, the Commission has heard that some Aboriginal and Torres Strait Islander people believe that ascribing authenticity to traditional Aboriginal and Torres Strait Islander icons and styles implies that contemporary Aboriginal and Torres Strait Islander art is inauthentic and ignores the dynamism of Aboriginal and Torres Strait Islander cultures. In addition, many consider that coming to a definition of authenticity in the context of Aboriginal and Torres Strait Islander arts and crafts is not a straightforward or feasible task (HoRSCIA 2018c, p. 68).

Nevertheless, in order to understand and address the issues of the existence and problems associated with inauthentic Aboriginal and Torres Strait Islander arts and crafts, it is necessary to come up with a working definition.

Indeed, it has been argued that ‘[t]he denial or inability to come to a landing on authenticity may be used to undermine demands for reform in this area’ (Parkin 2020, p. 109).

For the purpose of this study — that is, to assess the proliferation of inauthentic arts and crafts and the role (if any) that governments should take to address the issue — the Commission’s definition of authenticity centres around the notion of authorship — the person creating, or ‘authoring’ the work or product.

Under this definition, a product or artwork is considered *authentic* Aboriginal and Torres Strait Islander visual art and craft if it is an original piece authored (or co-authored) by an Aboriginal and Torres Strait Islander person¹², or produced under a licensing agreement with the Aboriginal and Torres Strait Islander artist(s)¹³. Aboriginal and Torres Strait Islander visual arts and crafts that do not meet these criteria, including those that infringe on 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*.

To support Aboriginal and Torres Strait Islander artists working in collaboration with others, authorship need not be *sole* authorship — the authenticity definition is satisfied provided that one of the co-authors of a work is an Aboriginal and Torres Strait Islander person.

Despite some variation in actual definitions of what constitutes authentic Aboriginal and Torres Strait Islander works by study participants, authorship by an Aboriginal and Torres Strait Islander person is a common thread. For example, the Aboriginal Regional Arts Alliance stated that:

Authentic Aboriginal Art is done by an Aboriginal person. (sub. 8, p. 4)

Desart considered authorship to be the simplest means of determining authenticity, regardless of artistic style or expression:

Authentic Aboriginal and Torres Strait Island[er] art and craft products can be defined as artworks, craft items and artefacts which are the legitimate expression of Aboriginal and Torres Strait

¹² The original piece need not be in a traditional Aboriginal and Torres Strait Islander style in order to be considered authentic.

¹³ Chapter 3 considers the licensing process.

Island[er] culture. This means that the 'author' or 'creator' must be an Aboriginal or Torres Strait Island[er] artist or group of artists.

In Desart's view, there is no need to complicate the definition of Aboriginal / Torres Strait Island[er] art and craft by reference to a certain visual style or technique or source of creative expression. If the work is the original creative expression of an Aboriginal or Torres Strait Islander person, then it is authentic Aboriginal or Torres Strait Islander art. To argue otherwise prevents the dynamic evolution that is the hallmark of the development of contemporary Aboriginal or Torres Strait Islander art. (sub. 4, p. 9)

Despite its apparent simplicity, the definition touches on contentious issues. Chapter 5 discusses the complex issues raised by the practical application of this definition in context of policies to reduce trade in inauthentic arts and crafts.

While authorship is central to authenticity, this should not preclude Aboriginal and Torres Strait Islander artists from entering into licensing agreements with (Aboriginal and Torres Strait Islander or non-Indigenous) third parties for the reproduction of their works, or the manufacture of products depicting their designs.

It is simple: authentic products are those made by Aboriginal and Torres Strait Islander peoples. This includes reproductions of such products made with the permission of the original creators. (Desart, sub. 4, p. 9)

That is, while the manufacturer of a product may not be Aboriginal and Torres Strait Islander themselves, if they have a licensing agreement with the Aboriginal and Torres Strait Islander artist responsible for the original work/design, the product should be considered authentic. Deeming such licensed products to be authentic is critical for supporting the economic and cultural aspirations of artists and their communities.

Ethical treatment of Aboriginal and Torres Strait Islander artists is also considered by many participants to be an important element of authenticity. For example, Desart considers a product to be authentic if it, among other requirements, has '[e]thical licensing arrangements in place with the Aboriginal and Torres Strait Island[er] artists and craftspeople who created the original version for any merchandise and other reproductions of such art and craft products' (sub. 4, p. 9). Chapter 8 discusses the ethical conduct toward Aboriginal and Torres Strait Islander artists in further detail.

What about authorisation?

Authorisation becomes relevant where certain Aboriginal and Torres Strait Islander cultural expressions are used (or wanting to be used) by artists. Seeking and obtaining authorisation is a way of respecting traditional laws around who can and cannot depict certain things, and of acknowledging 'custodianship' — the 'obligations to ensure cultural expression is created and managed in the right way' (Parkin 2020, p. 97).

Some participants consider that express authorisation (or permission) from Traditional Owners for the use of Aboriginal and Torres Strait Islander cultural expressions in arts and crafts should be a requirement for authenticity. For example:

Aboriginal artists inherit rights to paint certain cultural stories. Artists need authority and permission to paint traditional stories, and this authority is vested in the custodians of the knowledge of these stories. Ownership of stories is transmitted down generational lines, held within certain skin groups or moieties. Therefore stories are often managed within family groups. (Japingka Aboriginal Art 2014)

However, many artists are unaware of the importance of obtaining cultural permissions. And even where these issues are well understood, it is often difficult to identify who has custodianship over a particular

cultural expression (and therefore who is or is not able to grant the relevant authorisations. While no singular body or authority currently exists in Australia that can make such decisions and grant the relevant cultural permissions (Terri Janke and Company 2019, pp. 32–33), it is widely agreed that Aboriginal and Torres Strait Islander peoples and their communities are best placed to make such decisions (for example, LCA, sub. 19, p. 4).

Our “Cultural Authority” in the Pilbara consists of Senior Men and Women that have been active participants of practising Aboriginal lore. Within this Cultural Authority, there is a recognition of “Men’s Lore” and “Women’s Lore” of which only those specific genders may make decisions relevant to them and their lore. To compare to the Mainstream Western Hierarchies, the Cultural Authority are those Men and Women who are recognised as “experts” in their fields for a lifetime of learning and commitment such as Professors and Doctors of Philosophy that have at least 30 years of experience. They have also been legally compliant and carried out all obligations and responsibilities of them within their chosen field of expertise. (Hicks 2021)

While the Commission’s approach to defining authentic arts and crafts does not include cultural authorisation or permission requirements, this is a critical issue for many Aboriginal and Torres Strait Islander people. Chapter 6 discusses authorisation in the context of Indigenous Cultural and Intellectual Property (ICIP).

The nature of inauthenticity in Aboriginal and Torres Strait Islander arts and crafts

The two forms of inauthentic Aboriginal and Torres Strait Islander arts and crafts that have attracted the most concern in this study are:

- copyright infringement and/or plagiarism of Aboriginal and Torres Strait Islander artists’ work
- the creation of Indigenous-style products by non-Indigenous people and without a licensing agreement with an Aboriginal and Torres Strait Islander artist.

Copyright infringement and plagiarism of Aboriginal and Torres Strait Islander artists’ work

Aboriginal and Torres Strait Islander artists’ arts and crafts, particularly designs and art works, are often reproduced by others (including other Aboriginal and Torres Strait Islander artists) (section 4.2). Such reproductions can include:

- direct copies of Aboriginal and Torres Strait Islander artists’ works in entirety, with no transformation
- the direct copying of certain elements of Aboriginal and Torres Strait Islander artists’ works — for example, the copying of only one motif contained in an artwork, in isolation
- copying and minimal transformation of Aboriginal and Torres Strait Islander artists’ works in whole or part — for example, elements of an artwork may be copied, but with different colours or slight modifications to the pattern or design.

Depending on the circumstances, such unauthorised copying can constitute a breach of an artist’s copyright (copyright infringement) — which is illegal under copyright law — or plagiarism (which is not) (box 4.1).

Box 4.1 – Copyright infringement and plagiarism — what is the difference?

Both copyright infringement and plagiarism involve the improper use of another's work, however they are distinct, with different characteristics and penalties.

Copyright is a set of rights in certain creative material such as text, artistic works, music, computer programs, sound recordings and films (but does not protect ideas, concepts, styles or techniques), that allows the copyright owner to control who, when, where and how their work is used. In Australia, copyright protection is automatic (no registration is required), with protection accruing as soon as ideas are put into material form, such as being written down or recorded in some way. **Copyright infringement** is the breaching of these rights without authorisation or applicable exception under the *Copyright Act 1968* (Cth). Copyright infringement is illegal, and a range of penalties can be enforced.

Plagiarism occurs when a person attempts to pass someone another's work or ideas off as their own, without giving proper credit to the original source. It is not illegal to plagiarise, and plagiarism is most commonly enforced by academic and professional institutions.

It is therefore possible to: plagiarise another's work, but not engage in copyright infringement; infringe another's copyright, but not be plagiarising their work; or plagiarise and infringe another's copyright.

Sources: Arnold and Levin (2021); smartcopying (2022).

In addition, where the original Aboriginal and Torres Strait Islander artist is not appropriately attributed by the reproducer (irrespective of whether consent was obtained or not), this can also constitute a breach of the artist's moral rights.

Moral rights protect personal relationships between a creator and their work, even if the creator no longer owns the work or the copyright in it (Arts Law 2016). People using others' work have obligations to:

- attribute (give credit to) the creator
- not say a person is a creator of a work when they are not
- not do something with a work (such as change or add to it) that would have a negative impact on the creator's reputation (Copyright Agency 2022d).

Indigenous-style products (created by non-Indigenous people)

The production and sale of inauthentic Indigenous-style products created or authored by non-Indigenous people has been a longstanding and serious concern for Aboriginal and Torres Strait Islander people.

For example, in its submission, the National Association for the Visual Arts emphasised the issue of:

... people using styles belonging to and readily identifiable to certain First Nations communities, such as dot painting. (sub. 23, p. 3)

The use of recognisable cross-hatching techniques and motifs including certain animals (such as kangaroos, goannas, emus) is also common among Indigenous-style products. Indigenous-style products often 'mix and match' various Aboriginal and Torres Strait Islander styles and designs from different communities across Australia that artists and manufacturers consider to be recognisable and popular, in order to sell their products.

The Commission's analysis indicates that Indigenous-style products are most commonly found in the form of inexpensive souvenirs and digital art (section 4.2). This is consistent with the findings of the House of Representatives Standing Committee on Indigenous Affairs inquiry into *The growing presence of inauthentic*

Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia, which noted that Aboriginal and Torres Strait Islander original art, 'does not appear to be affected by authenticity issues to the same extent as the souvenir trade' (2018c, p. xii). This is in part due to the price point of such artworks, more knowledgeable buyers and the need for sellers to protect their reputation.

These products are not illegal under current Australian law, so long as no misrepresentations about their authenticity are made (section 4.4).



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*.

4.2 How common are inauthentic arts and crafts?

The Commission has been asked to examine the nature and structure of the market for inauthentic products, and assess the need for, and scope of any government intervention to reduce trade in inauthentic arts and crafts.

Comprehensive estimates of the scale and nature of inauthentic Aboriginal and Torres Strait Islander arts and crafts have not been developed to date. While some small scale surveys have been undertaken to help illustrate the seriousness of this issue, the Commission is not aware of any market-wide analysis of trade in inauthentic arts and crafts.

The Commission's analysis focuses on particular segments of the market, namely the souvenir product market, and online and digital marketplaces. In assessing whether particular products are inauthentic or not, the Commission has applied the definition of authenticity set out in section 4.1. Where doing so yields inconclusive results, the Commission has applied relevant proxy indicators of authenticity and inauthenticity.

Proxy indicators of authenticity and inauthenticity for quantitative analysis

Inauthentic products and artwork have been defined, for the purposes of this study, to be those that are not 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 (section 4.1).

In order to conduct the quantitative aspects of the study — in particular, assessing the scale and extent of inauthenticity in the market — it is necessary to identify a number of proxy indicators for authenticity and inauthenticity. These proxy indicators reflect other general characteristics that, if present in an 'Indigenous' art and craft product, are likely to indicate that it is authentic or inauthentic.

The relevant characteristics, set out in table 4.1, differ slightly depending on whether the product is physical or digital.

Table 4.1 – Proxy indicators of authenticity and inauthenticity in Aboriginal and Torres Strait Islander arts and crafts

Physical products		Digital products	
Authentic	Inauthentic	Authentic	Inauthentic
• Name of the artist, their cultural group or other assertion that the product was designed or made by Aboriginal and Torres Strait Islander artists • An authenticity label, or self-declaration of authenticity in the product's name or description • Certification from an organisation for promoting authenticity — for example, Supply Nation or the Indigenous Art Code (chapter 5)	• The product is explicitly described as 'Aboriginal style' or 'Indigenous style'	• Self-declaration that creator is Aboriginal and Torres Strait Islander • Creator states the cultural group they are from	• Use of an image that bears no resemblance to Aboriginal and Torres Strait Islander cultures, but is marketed as 'Aboriginal art' • Creator is not located in Australia • Product contains an illegal reproduction of another work • Use of an 'Indigenous style' stock image

While these proxy indicators are imperfect — for example, there may be instances where authentic Aboriginal and Torres Strait Islander art is manufactured (or the artist is located) overseas, or does not resemble traditional art — they provide a practical means of broadly identifying likely authentic and inauthentic products. In order to confirm the authenticity of any individual product, case-by-case analysis is essential. The Commission, in the course of its data collection and analysis, has assessed the authenticity of products (to the best of its ability) by applying the definition and proxy indicators of authenticity and inauthenticity described above, based on the information available on individual product listings.

Inauthenticity in the consumer product market

Many consumer products, such as woodcrafts, homewares, souvenirs and jewellery, incorporate Aboriginal and Torres Strait Islander art and designs (chapter 3). In order to assess the prevalence of inauthentic products in the consumer product market, and in the absence of other data sources on inauthentic products, the Commission undertook web scraping to collect data from online product listings taken from a selection of souvenir wholesalers and retailers. These wholesalers and retailers sold a mixture of authentic and inauthentic products, which the Commission understands reflects the majority of souvenir and gifts retailers.

The prevalence of inauthenticity varies by product type

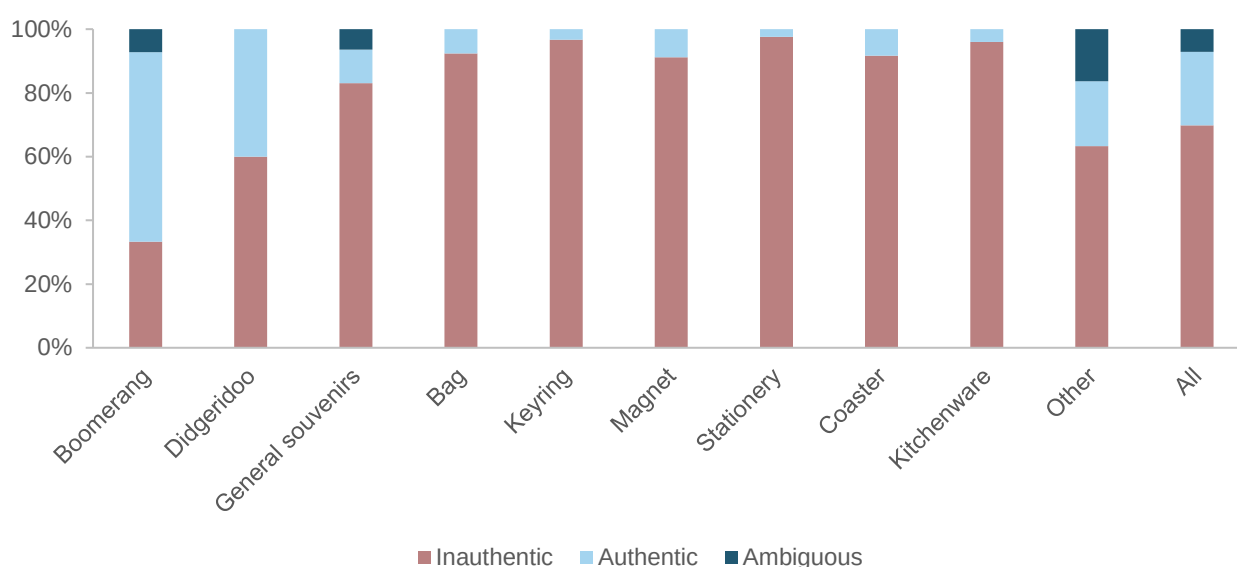
Isolating the products in the sample containing visual designs that could be associated with Aboriginal and Torres Strait Islander art, and applying the working definition of authenticity and proxy indicators in

section 4.1 and table 4.1, the Commission found that 69% to 76%¹⁴ of over 860 product listings were inauthentic. This estimation is consistent with a small-scale secret shopping exercise of souvenir shops and other tourist-centric retailers, which found that 80% of 'Indigenous style' products sold were inauthentic (Indigenous Art Code, Arts Law, and Copyright Agency 2019).

Inauthenticity in the souvenir product market varies considerably by product type. The Commission's analysis shows that products that are intrinsically Aboriginal and Torres Strait Islander (such as boomerangs or didgeridoos) are far more likely to be authentic (36% to 46% of such product listings were considered *inauthentic*) compared with products (such as general souvenirs and gifts; keyrings, magnets and coasters) that do not use or depict specific Aboriginal and Torres Strait Islander cultural expressions (83% to 89% were considered inauthentic) (figure 4.1).

Figure 4.1 – Inauthentic products are prevalent in the market, particularly among general souvenir products^{a,b}

Share of product listings with Aboriginal and Torres Strait Islander designs that are inauthentic, authentic or ambiguous



a. 'General souvenirs' contains products including bags, keyrings, magnets, stationery, homewares and kitchenwares, but not wooden crafts such as boomerangs or didgeridoos. 'Other' includes miscellaneous products such as wooden crafts, homewares, clothing, bottle coolers and face masks, among others. **b.** Ambiguous products contain labels that make contradictory or unclear claims about the involvement of Aboriginal and Torres Strait Islander artists in their design.

Source: Commission estimates based on a sample of souvenir wholesalers selling authentic and inauthentic products.

These are conservative estimates of the prevalence of inauthenticity in the souvenir product market, as the data relates to *product listings* rather than the *quantity* of each product in stock and available in stores. For example, a single product listing with a unique stock keeping unit (SKU) (such as a particular sized boomerang) may comprise multiple varieties (designs). As such, while there is a single product listing of a type of boomerang (authentic or inauthentic), multiple different types of that product listing may be available for purchase by consumers.

¹⁴ Approximately 7% of product listings contained insufficient or contradictory information to ascertain with a level of certainty, its authenticity.

In many cases, price may be an indicator of authenticity ...

Authentic Aboriginal and Torres Strait Islander products have a greater economic value and higher consumer willingness to pay for them compared with inauthentic products, as a result of the skill and cultural practices (including manufacturing processes) that Aboriginal and Torres Strait Islander artists bring (sections 4.1, 4.3).

Therefore, it is reasonable to expect that inauthentic products generally undercut authentic products by a significant margin. The Commission's analysis of wholesaler product listing data supports this hypothesis, and the results suggest that inauthentic and authentic products cater to different market segments and may not be close substitutes (section 4.4).

There are large differences between the average prices of authentic and inauthentic products (table 4.2). Across the most prevalent products in the sample, authentic products were on average 1.8 times more expensive than an inauthentic product of the same type. However, the extent of the price differential between authentic and inauthentic products varies across products (table 4.2).

There are cases where the price differentials between particular authentic and inauthentic products are small (or non-existent). In these instances, other factors, such as product size or quality, may influence consumers' purchasing decisions (figure 4.2).

Table 4.2 – Average prices and price differentials of souvenir products (authentic versus inauthentic)

	Average price of authentic product (\$)	Average price of inauthentic product (\$)	Authenticity premium (%)
Didgeridoo	231.24	45.09	412.86
Bag	22.13	6.03	266.74
Stationery	12.89	3.83	236.41
Kitchenware	20.67	7.07	192.49
Boomerang	29.54	11.36	160.12
Keyring	8.94	3.69	142.46
Coaster	12.69	10.31	23.04
Magnet	5.30	4.19	26.72
AVERAGE	43.10	11.50	182.60

Source: Commission analysis using web listing data from five wholesalers selling both authentic and inauthentic products, and one wholesaler exclusively selling authentic products.

Figure 4.2 – Price is not always a good indicator of authenticity^a

(a) \$11 (approx.) boomerang choices

	\$10.82 6 inch Authentic
	\$10.82 8 inch Inauthentic
	\$10.82 (each) 18 inch Inauthentic

(b) \$3 (approx.) keyring choices

	\$2.50 Authentic
	\$2.95 Authentic
	\$3.00 Inauthentic
	\$3.30 Inauthentic

a. The price chosen in both panels is a price that is less than half the average price for authentic products of that kind, but at which both somewhat similar authentic and inauthentic products can still be purchased.

Source: Product listings of various online wholesalers selling authentic and inauthentic souvenir products.

... but place of manufacture is not a reliable indicator of inauthenticity

It may seem intuitive that consumer products that are not made in Australia — where the vast majority of Aboriginal and Torres Strait Islander people live — are likely to be inauthentic. However, a product's place of manufacture is not in itself a reliable determinant of authenticity.

Aboriginal and Torres Strait Islander artists enter into licensing agreements with overseas-based manufacturers (or local third-parties who have overseas production facilities) to reproduce their arts and crafts, or use their designs on products (chapter 3). Artists may choose to do so for a number of reasons, including scale, scope and cost efficiencies, and this does not diminish the authenticity of the resulting products.

On the other hand, a product can be made in Australia, but without any involvement of Aboriginal and Torres Strait Islander artists, thus making it inauthentic.

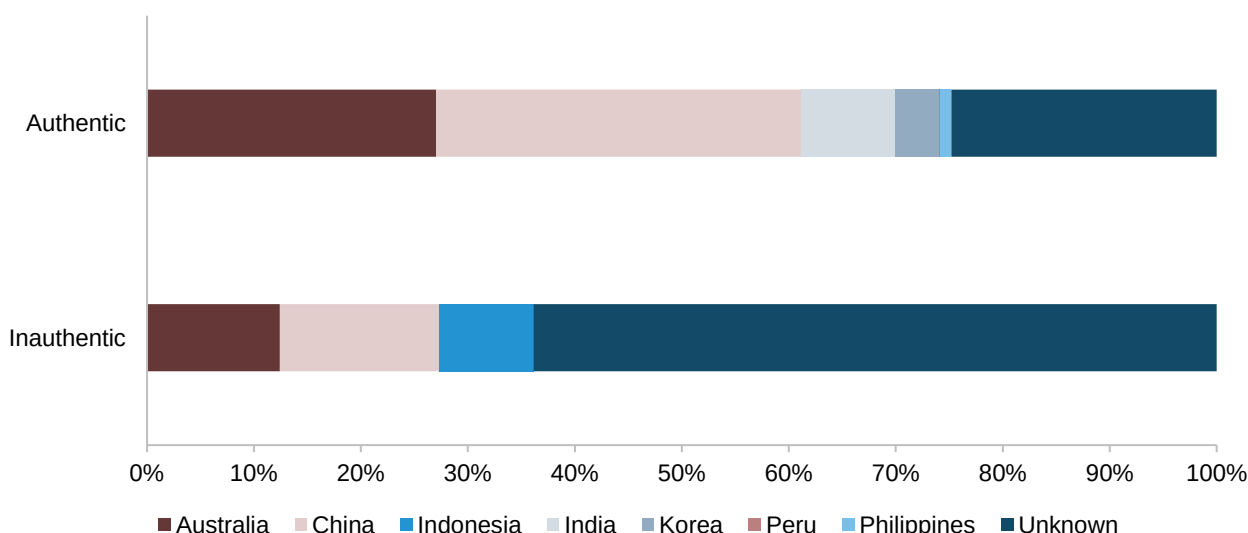
The Commission's analysis shows that approximately 88% of inauthentic and 73% of authentic products are made overseas (figure 4.3).

Over 40% of product listings analysed do not provide country-of-origin information. These products are likely manufactured offshore, given the strong incentives for wholesalers to disclose when their products are made

in Australia. Indeed, all wholesalers in the Commission's sample have specific 'made in Australia' products that are clearly labelled.

Figure 4.3 – Some inauthentic products are made in Australia, while most authentic products are made overseas

Share of authentic and inauthentic products, by country of origin



Source: Commission analysis using web listing data from five wholesalers selling both authentic and inauthentic products, and one wholesaler exclusively selling authentic products.

Inauthenticity in online marketplaces and for digital products

In addition to concerns about inauthentic Indigenous-style consumer products, there is increasing concern about the prevalence of inauthentic art and designs on online marketplaces, including:

- inauthentic art and designs on the stock image market
- unauthorised reproductions of Aboriginal and Torres Strait Islander artworks on online merchandise marketplaces
- the use of inauthentic stock images on online print-on-demand merchandise marketplaces.

Similar to the consumer product market, there is an absence of data on inauthentic products in the stock image and print-on-demand merchandise markets. As such, to gain a better understanding of the scale of inauthenticity in these markets, the Commission undertook a web scraping exercise, similar to that conducted for the consumer product market. For each market, the Commission examined a random sample of image and product listings from search results of the phrases 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art'. From this, the Commission applied its authenticity definition (section 4.1), proxy indicators (table 4.1) and used reverse-image searching techniques to assess whether listings were, on balance, authentic or inauthentic.

The stock image market for digital illustrations is saturated with inauthentic Indigenous-style art

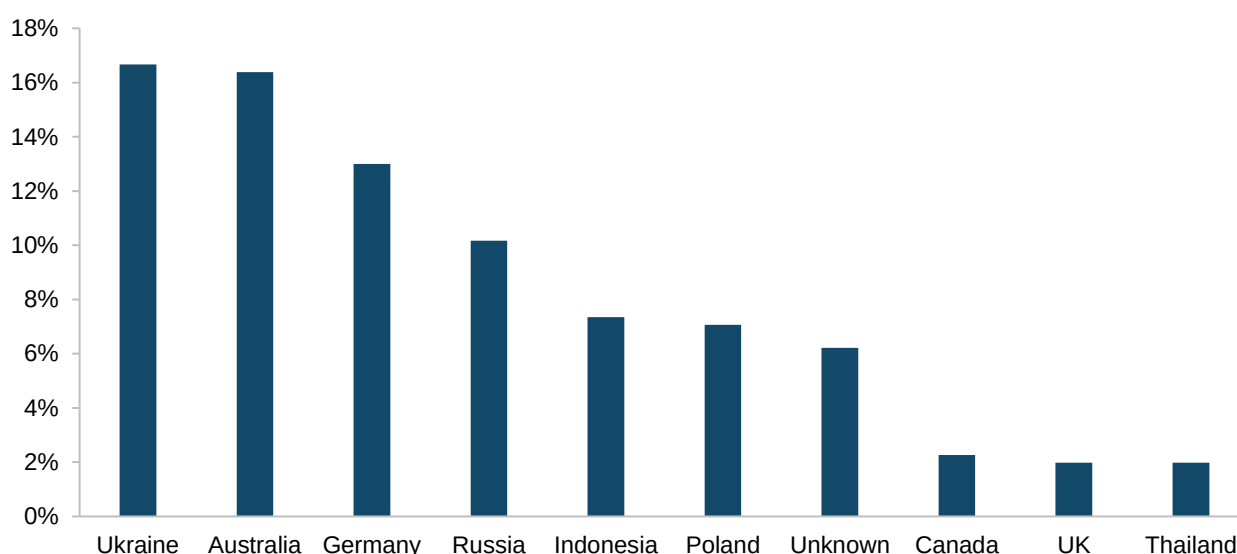
Stock images — digital artworks and photographs that are licensed for general purposes (for a fee) — allow people looking for images for a project to easily search for and find a suitable image, without having to

engage a photographer (Shutterstock 2022b). Stock images cover a vast array of topics and styles, including those that depict recognisable and popular Aboriginal and Torres Strait Islander styles and motifs.

To assess the degree of inauthenticity in the stock image market, the Commission has focused on the stock image site Shutterstock, which has over 300 million images in its library, over 1 million contributors (such as individual artists, photographers and small businesses), and customers in over 150 countries (Shutterstock 2022a). Shutterstock has an overall market share of over 60% (Datanyze 2022).

In the Commission's random sample, there was no evidence to indicate (on creator profiles, biographies or otherwise) that any of the stock images uploaded to Shutterstock were created by Aboriginal and Torres Strait Islander artists, or that they were produced under a licence agreement with an Aboriginal and Torres Strait Islander person. More than 80% of over 350 sampled images originated from countries other than Australia (including where a creator country of origin was not specified) — the top 10 countries included Ukraine (just under 17% of sampled listings), Germany (13%) and Russia (10%) (figure 4.4). These images are presumed to be created by non-Aboriginal and Torres Strait Islander people.

Figure 4.4 – Top 10 countries of origin for stock images depicting Aboriginal and Torres Strait Islander styles and motifs



Source: Commission analysis of a random sample of Shutterstock 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art' search results.

Approximately one in six images were created by artists stating they were from Australia. It is possible that a proportion of these are created by an Aboriginal and Torres Strait Islander person, but there is insufficient information to conclude with certainty whether, and to what extent, this is the case. There is also insufficient evidence to determine whether any of the stock images (Australian or otherwise) have been created under a licensing agreement with an Aboriginal and Torres Strait Islander person.

Thus, as per the Commission's authenticity definition (section 4.1), a significant proportion of the sampled stock images uploaded by contributors to Shutterstock are inauthentic Aboriginal and Torres Strait Islander art (in the form of Indigenous-style stock images). This is likely to be consistent with the broader market for stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs, given the market share of Shutterstock and the level of probable inauthenticity detected.

Not only is the stock image market saturated with Indigenous-style illustrations, these inauthentic works are very popular and often downloaded and used. Shutterstock provides high level data about the popularity of each image in the form of:

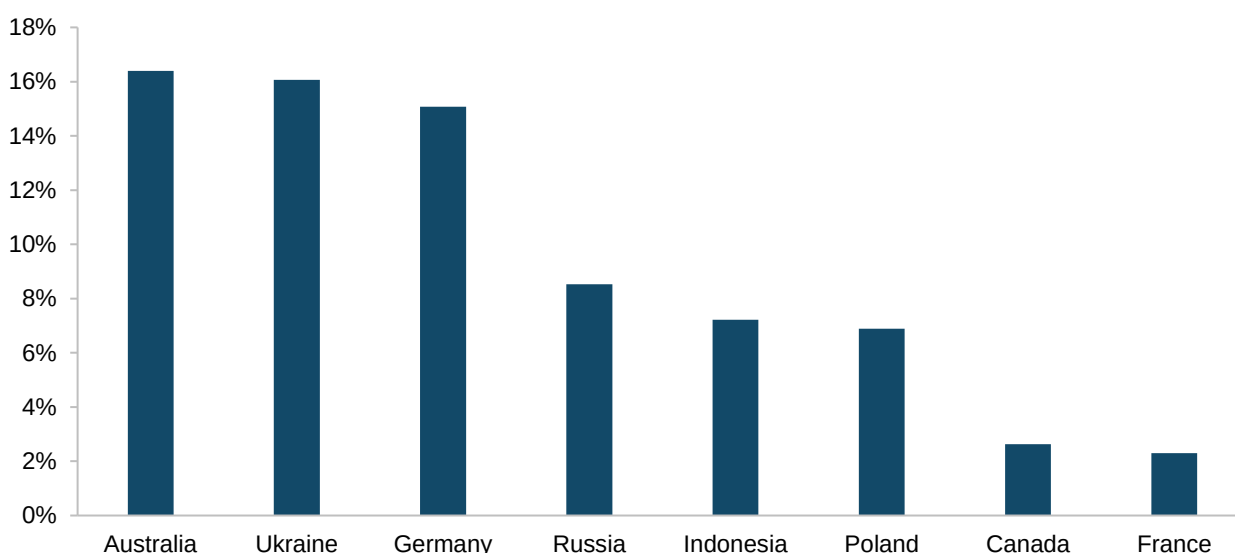
- a popularity score — community interest in an asset based on how many times an image is viewed or saved to a collection
- a usage score — download activity relative to other images in the Shutterstock collection (Shutterstock 2022c).

Out of the listings in the Commission's sample, approximately 78% were of 'High popularity', with these images originating from Germany (16% of 'High popularity' images), Ukraine (over 15%) and Australia (over 15%). This indicates that over three quarters of Shutterstock Indigenous-style images receive considerable web traffic, being viewed or saved by users.

Popularity scores, while an indicator of the general interest in such images, do not indicate the extent to which these Indigenous-style images are actually used by customers in their projects. The usage score provides a better indication of the potential direct impact of such inauthentic illustrations.

Over 86% of the images in the Commission's sample were listed as being 'Frequently used' or of 'High usage', with the remainder considered either 'Commonly used', 'Rarely used' or 'Never used'. Of these frequently used and high usage images, a large number originated from Australia (just over 16%), Ukraine (16%) and Germany (15%) (figure 4.5).

Figure 4.5 – Top 8 countries of origin for 'Frequent' and 'High' use stock images depicting Aboriginal and Torres Strait Islander styles and motifs



Source: Commission analysis of a random sample of Shutterstock 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art' search results.

Precisely who uses these Indigenous-style stock images (including their location) and where is not known, though the Commission has observed the use of such images on book covers, and the websites and marketing materials of various organisations such as universities, government, health services and media organisations. In addition, many stock images are used by people to sell products on merchandise marketplaces, such as Redbubble (discussed below).

Overall, the effects of inauthentic Aboriginal and Torres Strait Islander stock images (such as those on Shutterstock) are likely to be substantial, given the size and popularity of Shutterstock globally, and the popularity of images depicting Aboriginal and Torres Strait Islander designs, styles and motifs specifically. Section 4.3 considers the effects of inauthentic Aboriginal and Torres Strait Islander arts and crafts.

Inauthentic Aboriginal and Torres Strait Islander art is also prevalent in the print-on-demand merchandise market

Aboriginal and Torres Strait Islander artists often post images of their works online — on their websites, on social media, or on online sales platforms. Other people may copy these images and reproduce them for sale online as artworks or on products, without the artist's consent. Aboriginal and Torres Strait Islander artists do not receive any proceeds from the sale of these copies, or the products that bear their artworks. This practice is a form of copyright infringement, but occurs frequently.

One of the places where people may try to sell unauthorised reproductions is on print-on-demand merchandise marketplaces. These are online sites where artists can sell merchandise containing their designs, without the need to manage logistics (including production, inventory, shipping and handling) and payment systems themselves. Creators upload images of their works to the marketplace, which are then selected by consumers, who also decide which item to print the design onto. The company then manages the sales transaction and the application of the design onto the consumer's desired product. Designs are only printed onto products when an order is placed by a consumer.

Redbubble.com (Redbubble) is one of the most prominent online print-on-demand merchandise marketplaces. In 2021, Redbubble provided a platform for over 700 000 artists and designers from around the world to sell their designs to over 9.5 million unique customers (Redbubble 2021, p. 5). Total transactions on Redbubble in 2021 were in excess of \$701 million, with artists receiving \$104 million (Redbubble 2021, p. 4).

Given the size of Redbubble's operations, analysing a sample of Redbubble listings that depict Aboriginal and Torres Strait Islander designs, styles and motifs provides a reasonable representation of the degree of (in)authenticity in the broader print-on-demand merchandise market.

The Commission's analysis indicates that over 60% of over 400 sampled listings are likely inauthentic. Different forms of inauthenticity were detected, including:

- copyright infringement of Aboriginal and Torres Strait Islander artists' works
- Indigenous-style designs and stock images
- marketing of non-Australian Aboriginal and Torres Strait Islander style designs as Australian Aboriginal and Torres Strait Islander.

Copyright infringement of Aboriginal and Torres Strait Islander art is occurring in the print-on-demand merchandise market

An analysis, including reverse image searching, of the randomly sampled Redbubble listings indicated a considerable degree of copyright infringement, with roughly 15% being probable reproductions that breach the copyright of Aboriginal and Torres Strait Islander artists.¹⁵

Almost 70% of the listings identified as being copyright infringements were readily identified as infringements of well-known Aboriginal and Torres Strait Islander artists' works. The original artworks were rarely reproduced in full, and instead were small extracts of the larger piece, and sometimes recoloured.

¹⁵ The Commission found that the prevalence of copyright infringement varied slightly on the search term, with infringements generally more prevalent after searching 'Aboriginal art Australia' than 'Indigenous art Australia'.

For the remainder of the copyright infringing listings, the Commission was unable to verify the precise Aboriginal and Torres Strait Islander art work that had been copied. However, it is probable that they have been copied from an original Aboriginal and Torres Strait Islander artwork due to factors such as:

- poor image quality (for example, the image is blurry or distorted, or appears to be painted on canvas and poorly photographed for upload)
- image manipulation (for example, images are filtered, cropped or tiled in a way that is abrupt and inconsistent)
- the creator's Redbubble library contains a variety of miscellaneous designs of a differing style.

While it can be argued that copyright infringement by others is a risk that all artists face, analysis of search listings for Australian art on Redbubble indicated that copyright infringement was more likely for Aboriginal and Torres Strait Islander artists' works than non-Indigenous Australian artists' works. The Commission considered a sample of approximately 450 Redbubble product listings displayed from a search of 'Australian Art' and 'Australia Art'. From this sample, listings not related to Australia or not by an Australian artist were excluded, and the remaining listings were categorised as depicting Aboriginal and Torres Strait Islander designs or not. Reverse image searching techniques were then used to determine whether listing designs originated from an Aboriginal and Torres Strait Islander artist or a non-Indigenous Australian artist.

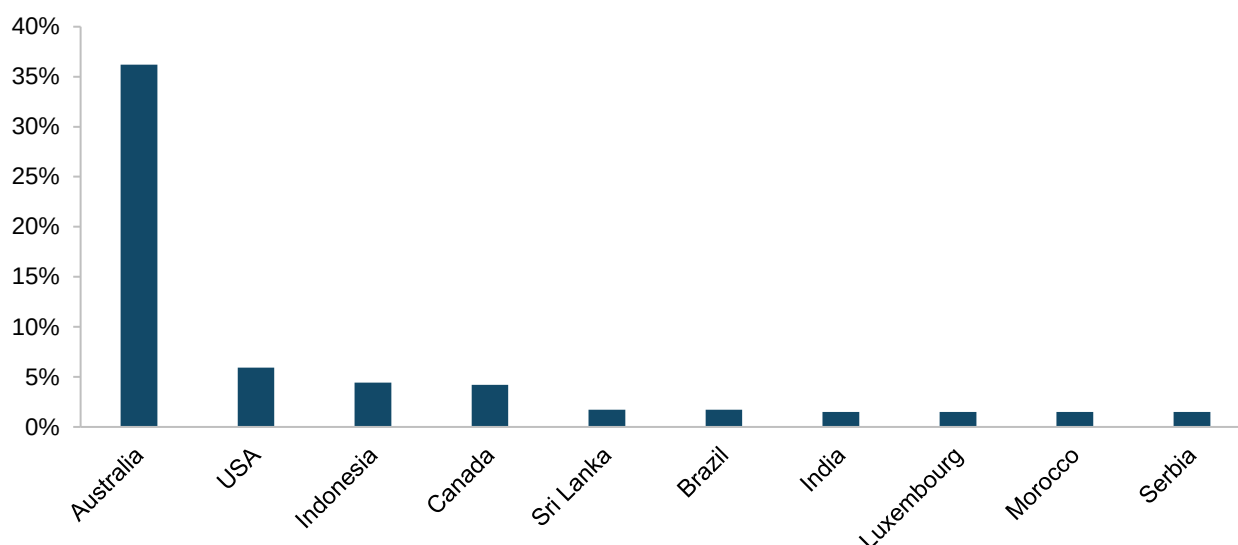
The analysis found that, when comparing designs that appear to depict an Aboriginal and Torres Strait Islander design and those that appear to depict general Australian art, the former were twice as likely to be a copyright infringement of an Aboriginal and Torres Strait Islander artwork than the latter being a copyright infringement of a non-Indigenous Australian artist's artwork.

Inauthentic Indigenous-style designs and stock images are prevalent

Many Redbubble creators upload original (non-copyright infringing) designs depicting Aboriginal and Torres Strait Islander designs, styles and motifs.

Where these are not created by an Aboriginal and Torres Strait Islander artist (or licensed by an Aboriginal and Torres Strait Islander artist), they are considered inauthentic Indigenous-style arts and crafts (as per the Commission's definition). Overall, the Commission estimates that over 36% of the listings in the sample are inauthentic Indigenous-style designs.

At the same time, many self-identifying Aboriginal and Torres Strait Islander artists use Redbubble to sell their original designs. Roughly 36% of sampled listings were from Aboriginal and Torres Strait Islander artists. Where a creator has not indicated that they are an Aboriginal and Torres Strait Islander person, it has been assumed that they are not, due to a lack of information otherwise. However, given that Redbubble does not require creators to supply this information, it may well be the case that there are other Aboriginal and Torres Strait artists uploading their images to Redbubble or signing licensing agreements for their designs to appear on products. A large proportion of creators (33%) did not list a country of origin on their profile, nor was it easily ascertainable from a basic online search. Where country of origin was specified, 36% of product listings were from Australian creators, followed by far smaller proportions (6% or less) from a variety of countries, predominantly in Asia and Europe (figure 4.6).

Figure 4.6 – Top 10 countries of origin for sampled Redbubble listings^a

a. Excluding where no country of origin was listed.

Source: Commission analysis of a random sample of Redbubble 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art' search result listings.

Over a quarter of the sampled Redbubble listings were reproductions of stock images (discussed above). In most cases, the Commission was able to find the image on a stock image site, but for a small proportion, a source was not found, but the image in question was of a style similar to verified Indigenous-style stock images.

Some creators are uploading non-Australian Indigenous-style designs as Australian Aboriginal and Torres Strait Islander designs

The Commission has identified numerous instances of creators marketing designs that do *not* resemble Aboriginal and Torres Strait Islander art and designs, as Aboriginal and Torres Strait Islander. These designs use descriptions such as 'Aboriginal art', 'Australian Aboriginal art' with other generic descriptors, but instead depict recognisable designs and styles from other countries and cultures such as Africa, India and Mexico, or are merely generic patterns or stock images. In some cases, the product name does not mention 'Australia' or 'Aboriginal' — and instead describe the design as 'Indian Art' or 'African Ethnic Seamless Patterns' — yet they appear in searches for 'Aboriginal art' as the relevant Australian Aboriginal and Torres Strait Islander art phrases are used in the product search tags.

A smaller, but still significant proportion of the sampled listings were of this kind — approximately 13%.

While these images do not depict Aboriginal and Torres Strait Islander designs, they are still considered inauthentic Aboriginal and Torres Strait Islander art, as they are marketed to consumers as being Aboriginal and Torres Strait Islander art, and they have not been created by Aboriginal and Torres Strait Islander people.

Such marketing misleads consumers as to what Aboriginal and Torres Strait Islander art is, and is likely to have broader cultural impacts (section 4.3).

Across the market, Aboriginal and Torres Strait Islander artists are enforcing their copyright

Many Aboriginal and Torres Strait Islander artists are members of the Copyright Agency, a not-for-profit copyright management organisation (or collecting society), which manages the copyright licensing process

on behalf of its members, and facilitates the proper licensing of copyright-protected works (Copyright Agency 2022a, 2022f). As part of its remit, the Copyright Agency is responsible for responding to infringement reports submitted by its members (pers. comm., 7 February 2022).

In the 2014-15 and 2015-16 financial years, the Copyright Agency received a total of 100 infringement enquiries (suspected infringements) in the context of a range of uses, including merchandise, advertising, product labels, websites and architectural features. Of these enquiries, 51 were found to be clear infringements. A further 25 were found to be inconclusive, but could not be ruled out as non-infringing activity (pers. comm., 7 February 2022). The true level of infringing activity is likely to be higher than the number of enquiries — for every suspected and proven infringement, there are likely to be many others that are undetected.

While this data is not specific to Aboriginal and Torres Strait Islander members, out of the Copyright Agency's 38 000 members (Copyright Agency 2021), over 5000 are Aboriginal and Torres Strait Islander artists (in addition to approximately 70 community art centres) (Copyright Agency 2022b, 2022c). As such, it is expected that a considerable number of infringement enquiries and confirmed infringements will relate to Aboriginal and Torres Strait Islander artists' works.

Aboriginal and Torres Strait Islander artists and art centres may also engage with lawyers (including on a pro bono basis) to assist with their legal matters, including suspected copyright infringement. King & Wood Mallesons (KWM) is one law firm that provides pro bono legal assistance to Aboriginal and Torres Strait Islander artists and art centres across urban, rural and remote communities.

KWM's First Nations pro bono program works closely with the Arts Law Centre of Australia (through the Artists in the Black Project), and provides services including a Document Review Service, secondments, outreach programs to remote communities, as well as ongoing pro bono artist support (KWM, sub. 34, p. 1).

A considerable number of Aboriginal and Torres Strait Islander artists and art centres have sought assistance through the program over the past three years, for matters including outright copyright infringement (people 'ripping off' Aboriginal and Torres Strait Islander artists' works without permission) (KWM, sub. 34, p. 2). Other issues of concern brought to KWM by artists and art centres include those relating to inequitable or unfair licensing structures, and deceptive conduct (chapter 8).

Over the past three years, KWM has opened 58 separate pro bono matters for Aboriginal and Torres Strait Islander artists and art centres relevant to this study (each of which may involve one or more artists), totalling 5458 hours and an approximately \$2.5 million notional spend. Many of these matters involve dispute resolution rather than the provision of general advice alone (KWM, sub. 34, p. 2).

The overall scale of artists and art centres enforcing their copyright is expected to be considerably higher. Not all of above matters related to copyright infringements, KWM is only one of several law firms providing pro bono services to Aboriginal and Torres Strait Islander artists and art centres, and artists and art centres do not seek legal advice in all instances of suspected copyright infringements.



Draft Finding 4.2

Inauthentic Aboriginal and Torres Strait Islander arts and crafts are rife in the consumer product, digital and print-on-demand merchandise markets

Inauthentic products dominate the consumer product (mostly wholesale souvenirs), digital, and print-on-demand merchandise markets. Copyright infringement is also common in the print-on-demand merchandise market.

In the consumer product (wholesale souvenirs) market:

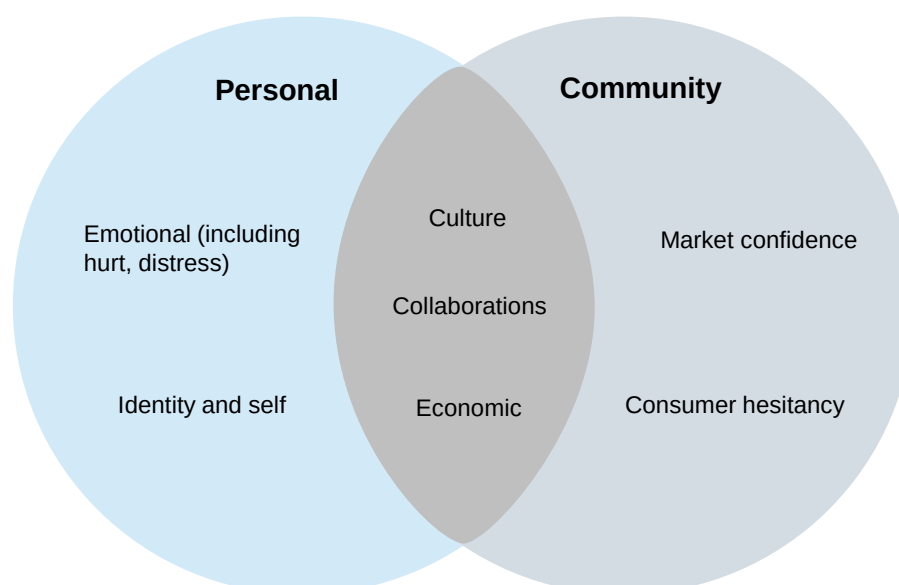
- approximately two-thirds to three-quarters of product offerings are inauthentic, though the prevalence of inauthenticity varies by product category
- on average, authentic products were nearly twice as expensive as an inauthentic product of the same type
- most consumer products are manufactured overseas regardless of their authenticity.

Based on random sampling, inauthentic products are commonplace in the print-on-demand merchandise market (over 60% of Aboriginal and Torres Strait Islander merchandise was found to be inauthentic) and even more prevalent in the digital art marketplace (over 80% of digital stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs were inauthentic).

4.3 The effects of inauthentic arts and crafts are wide ranging

The creation and sale of inauthentic arts and crafts affects Aboriginal and Torres Strait Islander artists and their communities as well as the broader Australian community and art market in a variety of ways (figure 4.7).

Figure 4.7 – Categorising the harms caused by inauthentic arts and crafts



While it can be argued that inauthentic arts and crafts can provide *some* economic benefits, these benefits are modest, and are significantly outweighed by the harms resulting from the creation and sale of inauthentic art and craft products.

Personal hurt and challenging of Aboriginal and Torres Strait Islander identity

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.

Many participants in this study as well as past inquiries and reports have emphasised the emotional distress and loss of self and identity from seeing inauthentic arts and crafts (box 4.2).

In the *Birubi Penalty Case*¹⁶, evidence was given expressing the effects on cultural identity resulting from inauthentic products:

[When people use images without permission] the impact of the misappropriation of art in a meaningless way that does not represent lore and culture is the dismantling of Indigenous cultural heritage. Indigenous Australians have ... their own rules about their people and their country. Art identifies who you are and how you fit into Indigenous society. Misappropriation of art dismantles the cultural structure of Indigenous communities and causes damage to our identity. (para. 53)

Such feelings can also lead to disengagement and long-term effects on artists' career development:

Over 50% reporting that their artists were distressed and upset by what is seen as a gross lack of respect for their culture not only by those that sell such products but by the lack of any government response to protect them. As one respondent explained “artists are often unaware of how their culture is being abused and are livid when they find out. It creates disengagement. It is destructive to their career development, especially longer term”. (Desart, sub. 4, p. 11)

Box 4.2 – Hurt, emotional distress and a loss of self, identity and expression resulting from inauthentic arts and crafts

A number of participants in this study, as well as to other inquiries and reports, have outlined the many personal effects of inauthentic arts and crafts. Many refer to the hurt, pain and emotional distress suffered, including offence and insult:

I feel hurt that my people are being exploited by people who are taking things from our culture and introducing it as their own work. (Jacob, HoRSCIA 2018, sub. 103, p. 3)

It hurts us when people make fake Aboriginal art because that breaks our Law, our rights to our amperre [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)

Fake art is an insult. I feel it's a big insult because Mapoon people were never – were forbidden to practice their culture and to speak their language. It's something that's lost

¹⁶ *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996.

Box 4.2 – Hurt, emotional distress and a loss of self, identity and expression resulting from inauthentic arts and crafts

and something that, through art, we are trying to build up again and to regain, and fake art takes away from that. It disempowers us, because people see the fake art. 'Oh, this is what Indigenous culture is about'. It's not, and we need to stop it, because we want our culture to be out there, not this fake art. (Mara, HoRSCIA 2018, sub. 102, p. 3)

These stories are sacred and significant for these people and their cultural heritage. There is strict Aboriginal lore in place to protect custom and pass on to future generations in the proper way. The artwork tells these stories. Deep offence is created by the mis-representation of these stories and punishment to those who breach this trust inflicted. (Callanan, sub. 5, p. 22)

Others have focused on the denial, dismissal and loss of Aboriginal and Torres Strait Islander peoples' selves and identities:

The defining and positioning of Aboriginal people by non-Indigenous people through such imagery of romanticised or negative then becomes the 'non-Indigenous persons' truths, which ultimately means that the Aboriginal perspective of ones' self is denied or dismissed. (Parkin 2020, p. 120)

Such conduct [the creation of inauthentic art] also gives rise to unique social and cultural harm associated with the loss of identity and lore. Traditional rules and lore exist to ensure that art and designs that are sacred to Indigenous Australians are not misused and that culture and songlines are not distorted or diluted. Misuse of Indigenous Australian art and designs, including without permission of the traditional guardians, can cause serious offence and distress to Indigenous Australians. (ACCC, sub. 13, p. 11)

Artists can also as a result lose or forego opportunities to express themselves, thus undermining the messages of their art.

When non-Indigenous individuals and businesses reinterpret and market Aboriginal culture for their own benefit and profit, they take away Aboriginal and Torres Strait Islander artists' autonomy to represent themselves to the wider Australian and international community. (Parkin 2020, p. 117)

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. (NAVA, sub. 23, p. 3)

The effect on Aboriginal and Torres Strait Islander cultures as a whole

Inauthentic products made and sold that embody Aboriginal and Torres Strait Islander cultural expressions cause substantial cultural harm.

As emphasised in the course of the 2018 HoRSCIA inquiry, cultural harm is severe *regardless of the nature or price* of the inauthentic product in question. That is, even though some inauthentic arts and crafts are relatively low cost (for example, an inexpensive souvenir keyring), this does not mean that the cultural harms that they create are lower than the harms created by a relatively more expensive inauthentic product.

The theft of cultures

Participants in this study as well as the HoRSCIA inquiry (2018c) have raised the significant theft and loss of cultures that results from inauthentic arts and crafts. Many spoke to the taking away of Aboriginal and Torres Strait Islander peoples' way of life, stories and culture:

Our art is who we are ... it helps us carry our culture from the past, to now and into the future for our children and grandchildren. The stories we paint are from our grandmothers and grandfathers and theirs before them. We must pass this on to our grandchildren, so they can know who they are and be strong and proud Aboriginal people — the first people from this land. Our art is about where we come from, our apmere [land] and our atweye [family] — it belongs to us and our atweye - no one can take this away from us - it doesn't belong to anyone else but us. (Young, Tangentyere Artists, quoted in Desart, sub. 4, p. 10)

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)

Stereotypical styles mask the diversity and dynamism of Aboriginal and Torres Strait Islander cultures

Across the country, there are over 250 Aboriginal and Torres Strait Islander nations, each with their own language, culture, customs and communities (AIATSIS 2022; Blak Business 2021). As such, there is a rich diversity and dynamism in Aboriginal and Torres Strait Islander cultures. However, this is masked as a result of pervasive inauthentic arts and crafts in the market, which often depict generic, stereotypical 'Indigenous' styles and motifs, and in combinations that hold no meaning or significance to Aboriginal and Torres Strait Islander peoples. These products incorrectly describe not only these styles and motifs, but also the underlying history and storylines.

Rising awareness, interest in and popularity of Aboriginal and Torres Strait Islander art, craft and cultures (in Australia and globally)¹⁷ (Coslovich 2020; KPMG 2021, p. 24) means that more people than ever are engaging with and purchasing Aboriginal and Torres Strait Islander arts and crafts.

Where these people (who may have limited knowledge about Aboriginal and Torres Strait Islander cultures generally (section 4.4)) are purchasing or browsing inauthentic products that misrepresent Aboriginal and Torres Strait Islander art and culture, this can lead to misinformation about Aboriginal and Torres Strait

¹⁷ A 2014 survey found that 64% of Australians have a strong or growing interest in Aboriginal and Torres Strait Islander arts (Bridson et al. 2015, p. 19).

Islander cultures and cross-cultural relations by giving the perception of a single, generic, stereotypical 'Indigenous' culture. Inauthentic arts and crafts miscommunicate Aboriginal and Torres Strait Islander stories. Non-Indigenous people cannot learn from miscommunicated stories, and may end up misinformed about Aboriginal and Torres Strait Islander cultures and cross-cultural relations. For example:

... this kind of 'romanticised' view of Indigenous culture presents an easily digestible image of cultural relations in Australia, which ignores (and presents a rose-tinted vision of) the current injustices experienced by First Nations people in cities and regional areas alike. (Purcell, HoRSCIA 2018, sub. 58, p. 1)

Over time, this continual misrepresentation of cultures risks the dilution or even loss of Aboriginal and Torres Strait Islander cultures and their integrity.

The significance of cultural harms has been recognised by Australian courts

The cultural harms resulting from the creation and sale of inauthentic products have been acknowledged and accepted by Australian courts as (non-economic) factors that should be considered in assessing compensation and other remedies associated with copyright infringement.

For example, in the *Carpets* case (chapter 6, box 6.5) action was taken by a group of Aboriginal and Torres Strait Islander artists against a carpet importer that had reproduced their works onto carpets without authorisation and sold them for a profit. The works reproduced depicted cultural clan images, and in some cases 'were altered by the manufacturer which distorted the cultural message of the works' (Parkin 2020, p. 34).

In addition to the case being significant as 'an accommodation of copyright law to protect Indigenous art and cultural expression' (Parkin 2020, p. 35), it was the first case that considered and accepted cultural harm as a category of harm when assessing the amount of damages to be granted. Prior to *Carpets*, damages were granted purely based on an assessment of the economic harms to the creator resulting from the unauthorised use.

As a result of significant evidence provided to the court by Aboriginal and Torres Strait Islander artists and others, the Court established a new category of 'cultural harm' within copyright law in which to consider and assess harm and the resulting damages that should be granted. In doing so, the Court accepted that the traditional economic framing and assessment of harm was not appropriate in this case and that cultural harms were the more dominant and significant harm — harm that extended beyond the individual artist themselves to the community as a whole — which should be recognised and compensated for.

The court's order for damages of \$188 640 to the artists as a group specifically included compensation for cultural damage and hurt. At the time, this was the largest penalty awarded for copyright infringement against Australian artists (Marika 2008, p. 159) (in a large part due to the magnitude of cultural harm quantified).

A 'crowding out' of opportunities for cross-cultural collaborations

Positive cross-cultural collaborations — including licensing arrangements — are collaborations between Aboriginal and Torres Strait Islander artists and non-Indigenous people and organisations that are founded upon respect, trust, and meaningful and mutually beneficial sharing among people who are treated as equals. As put by the Aboriginal Regional Arts Alliance:

Respect is central to all interactions ... [as is] [o]pen, honest communication. Cultural values, rights and expectations are incorporated into all discussions. Expectations and rights of all parties are fair, clear and beneficial. All parties fully understand the collaboration and are on equal ground. (sub. 8, p. 5)

In the context of arts and crafts, this includes being respectful of artists' copyright in their work. Aboriginal and Torres Strait Islander artists should provide authorisation and consent to use and depict their cultural expressions in that manner, and there should be no cultural appropriation.

There have been multiple notable instances of successful collaborations with Aboriginal and Torres Strait Islander artists and communities, in Australia and overseas. One example is the Musée du Quai Branly project in Paris, France (box 4.3). Chapter 3 also discusses cross-cultural collaborations in the context of licensed products bearing Aboriginal and Torres Strait Islander artwork.

Positive cross-cultural collaborations provide wide ranging benefits to both Aboriginal and Torres Strait Islander artists and communities, as well as the Australian community at large. These include innovation and cultural development through:

- the joint creation of new art and products
- appreciation of how to use different artistic techniques
- forming of new perspectives of how different people and cultures see the world and a deeper understanding of the issues different cultural groups face.

Box 4.3 – The Musée du Quai Branly project

The Musée du Quai Branly (the Quai Branly Museum) is located in Paris, France. The museum was opened in 2006 and is a presentation of history and cultures of non-western civilisations from Africa, Asia, Oceania and the Americas (Lusiardi 2019).

The museum's architect had a vision to integrate Aboriginal art from Australia within the architectural concept, whereby the building becomes a canvas for the artists (Australia Council 1990; Janke 2016). In order to bring this vision to life, the museum worked with the Australia Council for the Arts on the Australian Indigenous Art Commission (Janke 2016, p. 18) to create one of the 'most significant cross-cultural collaborations between Australia and France' (Australia Council 1990).

The commission was considered to be 'a landmark contemporary public art commission, and the largest ever of Aboriginal and Torres Strait Islander artwork, occupying more than 2500 square metres of the Musée's facade, walls and ceilings over four levels and in 10 sites throughout one of the Musée's four buildings' (Australia Council 1990).

The collaborative process involved significant engagements with Aboriginal and Torres Strait Islander artists and the community (Australia Council 1990; Janke 2016, p. 18):

- Eight Aboriginal and Torres Strait Islander artists were asked to produce works.
- The project was co-curated by prominent Aboriginal and Torres Strait Islander curators in collaboration with the curator in charge of the museum.
- Artists were consulted with about the creation of the works, to 'ensure that the artist could control any community owned cultural material included in the works, and ensure that they complied with any customary obligations'.
- The rights in the works were secured via contracts in both French and English, and were comprehensive — covering the rights to install the artworks in to the building and to grant any non-commercial use of the works that the museum required.

Box 4.3 – The Musée du Quai Branly project

- Artists were paid a fee, with their contracts including attribution clauses; community recognition clauses; annual reporting provisions; and the Indigenous visual arts protocols guide (that ‘endorses the rights of Indigenous people to their cultural heritage and supports Indigenous creative practice’ (Australia Council 2021d)) was translated in French and attached in an appendix.
- A curatorial guide was created for the Musée so that the care of the works could be properly managed.

This positive and successful cross-cultural collaboration has provided many benefits to Aboriginal and Torres Strait Islander artists, communities and cultures and beyond:

The AIAC [Australian Indigenous Art Commission] will change international perceptions of Indigenous art from Australia. The fact that Australian Indigenous culture is profiled in this way speaks volumes for the bold and inspirational creativity of the Musée du quai Branly, and its commitment to presenting unique world cultures as living traditions. (Croft, quoted in Australia Council 1990)

The collaboration has also opened doors for the creation of an Aboriginal and Torres Strait Islander curator exchange program, where Aboriginal and Torres Strait Islander curators are given the opportunity to ‘hone their skills’ at the museum for six weeks (Harold Mitchell Foundation 2012).

However, the existence of inauthentic arts and crafts may act to ‘crowd out’ or disincentivise beneficial cross-cultural collaborations in a number of ways, including by leading to **general hesitancy** (by both Aboriginal and Torres Strait Islander artists and non-Indigenous people and organisations) **to collaborate**. Non-Indigenous artists and organisations may feel unsure about collaborating with Aboriginal and Torres Strait Islander artists (including through licensing agreements) because they fear that the resulting artworks will be considered inauthentic or harmful for Aboriginal and Torres Strait Islander people and cultures. Aboriginal and Torres Strait Islander artists may also be hesitant to accept collaboration requests if they fear that their collaboration will not be respectful or mutually beneficial. This can result in society missing out on potential successful collaborations (and the range of benefits that come with such collaborations).

For example, licensing is a form of cross-cultural collaboration between Aboriginal and Torres Strait Islander artists who license their art to third parties to be reproduced onto a range of products (chapter 3). Licensing is increasing in popularity and can result in a range of benefits for artists, art centres and communities. However, many artists are hesitant in pursuing licensing opportunities — a recent survey found that a lack of confidence in potential licensees being trustworthy, ethical and respectful of artists’ copyright was a threshold barrier to establishing a licensing business and entering into beneficial licensing agreements for 80% of art centres (Desart, sub. 4, p. 11).

Inauthentic products mislead consumers and undermine market confidence

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

Consumers are exposed to misleading information

Aboriginal and Torres Strait Islander cultures and arts and crafts have experienced a rise in interest and popularity in recent years. This may be, in part, due to recent cultural movements that have shone a light on Indigenous issues (KPMG 2021, p. 24). Very recent increases may also be a result of the COVID-19 pandemic — producers of Aboriginal and Torres Strait Islander art have been forced to pivot their businesses to the online marketplace, thus making more Aboriginal and Torres Strait Islander arts and crafts accessible to buyers across the world. Anecdotally, the Commission has heard that some participants have experienced significant growth in the sales of Aboriginal and Torres Strait Islander art during the pandemic, compared with other forms of art during the same period.

The level of interest in Aboriginal and Torres Strait Islander cultures and art is relatively high among Australians — according to a recent survey of consumer and retailer attitudes towards the authenticity and certification of the Indigenous arts and crafts market, 60% of those surveyed indicated an '[interest] in aspects of Indigenous Australian culture', and 58% in Aboriginal and Torres Strait Islander art, designs and artefacts (KPMG 2021, p. 31). The level of interest from international tourists is significantly higher — over 80% of tourists surveyed from the United Kingdom, the United States and China expressed an overall interest in Aboriginal and Torres Strait Islander cultures art, design and artefacts (KPMG 2021, p. 33).

This is supported by Tourism Research Australia data that found that the number of 'Indigenous tourism' visitors has increased by an average 9% per year from 2013 to 2018, with the number of international tourists taking part in at least one of the categories of Indigenous tourism activities (visiting an Aboriginal site or community, experiencing an Aboriginal art or craft or cultural display, or attending an Aboriginal performance) increasing by over 40% over the same time period (DFAT 2022).

Despite the high level of interest, consumers are 'highly susceptible to purchasing inauthentic Indigenous Australian art and craft products' (ACCC, sub. 13, p. 10). Consumers often have limited knowledge and understanding of Aboriginal and Torres Strait Islander cultures generally and the significance of their arts and crafts — 77% of Australians surveyed had 'low to no familiarity' (KPMG 2021, pp. 36–37).

... the unsuspecting tourist fall prey in purchasing these git products as they wish to take back a cheap memento of their visit to our region. The same occurrence occurs with our local pop up markets where inauthentic art products find their way onto stallholder tables under the guise they were made by Indigenous artist/people. (UMI Arts Ltd., sub. 1, p. 7)

Consumers, including tourists, can be misled into buying products they believed were produced by Indigenous artists, often paying a premium. Many purchasers of Indigenous 'style' art and craft products are tourists from non-English speaking backgrounds, so even where it may be accurately disclosed through fine print disclaimers where and how a product is made, this information is likely to be overlooked. (ACCC, sub. 13, p. 10)

The 2021 KPMG survey found that almost all Australian consumers surveyed who had purchased Aboriginal and Torres Strait Islander arts and crafts in the previous two years believed that they had purchased an authentic product, despite few actively considering the authenticity of the product they were purchasing at the time of purchase (KPMG 2021, p. 43).

Misleading consumers into purchasing inauthentic products that purport to represent authentic Aboriginal and Torres Strait Islander art forms and cultures has the potential to result in significant cultural harm — inauthentic arts and crafts, and in particular works that mislead unsuspecting consumers, give an inaccurate impression of Aboriginal and Torres Strait Islander art and cultures, and contributes to the perception of a homogenised, generic and stereotyped 'Indigenous culture'.

Inauthentic products can also lead to broader consumer hesitancy

Broader consumer uncertainty and hesitancy in purchasing Aboriginal and Torres Strait Islander art and craft products may result from the prevalence of inauthentic art and craft products in the market. Where consumers consider buying authentic Aboriginal and Torres Strait Islander arts and crafts, the presence of inauthentic products (in particular where such products are prevalent and presented side by side with similar descriptors and inconsistent price differentials) creates uncertainty and confusion. And where consumers face difficulties differentiating between authentic and inauthentic products in the market, some may choose to not make a purchase at all, rather than buy a potentially inauthentic product.

A 2018 CHOICE consumer survey found that the presence of inauthentic products and a lack of clear information about authenticity generally makes it harder for consumers to make informed decisions, thereby damaging consumer confidence in the market. A majority of consumers believed Aboriginal and Torres Strait islander artists, communities and cultures are being undermined by the abundance of inauthentic arts and crafts (CHOICE, HoRSCIA 2018, sub. 145).

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

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.

A share of proceeds from the sale of authentic Aboriginal and Torres Strait Islander art and craft products generally flow back to the Aboriginal and Torres Strait Islander artists and their communities. However, artists and communities derive next to no financial or economic benefit, and bear intangible costs, from the creation and sale of inauthentic arts and crafts. Producers of inauthentic products benefit from the misappropriation of Aboriginal and Torres Strait Islander cultures, free riding on the good will and reputation of the cultural expressions and authentic products.

In addition, the presence of inauthentic products affects the ability of Aboriginal and Torres Strait Islander artists to compete in the market, with resulting effects on the viability of authentic products generally, and opportunities and income streams for Aboriginal and Torres Strait Islander artists and communities.

The presence of inauthentic products affects the ability of authentic products to compete in the market

The presence of (usually cheaper) inauthentic art and craft products almost certainly crowds out sales of authentic products to some degree, especially if consumers find it difficult to discern authenticity. If authenticity cannot be easily discerned, consumer decisions will focus on aesthetic aspects and relative prices for broadly similar items. If authenticity can be ascertained, some consumers may be willing to pay a premium for authentic products, but others will still prefer lower priced inauthentic ones. A recent survey found that once made aware of the distinction between authentic and inauthentic arts and crafts, consumers (from both domestic and international markets) stated that they cared about buying authentic products and would be willing to pay 10-15% more for authentic products (KPMG 2021, pp. 50–54).

Inauthentic products can impose competitive pressures on authentic products, affecting their viability and overall market integrity

In instances where authentic and inauthentic products compete, inauthentic products are generally cheaper and mass-produced, resulting in greater quantity, variety and accessibility. Therefore, they possess a competitive advantage over authentic products, which has been observed to create significant barriers for authentic producers seeking to enter and remain competitive in the market. A recent survey of approximately 40% of all remote Aboriginal and Torres Strait Islander community art centres in Australia found that:

Over 60% [of the 90% who were adversely affected by inauthentic products] [are] finding it harder to compete in the market due to the prevalence of lower priced inauthentic product ... [and] [o]ver 50% [are] finding it more difficult to get access to retail and wholesale outlets. (Desart, sub. 4, p. 11)

Though there are some Aboriginal and Torres Strait Islander artists who are able to compete with inauthentic products in the market — by making use of licensing arrangements and overseas manufacturing facilities, it is not always possible for Aboriginal and Torres Strait Islander artists to improve their production efficiencies and lower prices to match those of inauthentic producers:

... the sale of fake art products makes it harder for traditional artefacts to compete as our scale of production cannot match mass produced items in price or volume. (Desart, sub. 4, p. 11)

This is largely because authentic Aboriginal and Torres Strait Islander art and craft products embody culturally significant storylines and storytelling, and are often hand-crafted (chapter 3, box 3.10). For example, in relation to art work produced for the Musée du Quai Branly (box 4.3, above), Aboriginal artist Gulumbu Yunupingu stated:

This is my gift to you, to the French people, and to the people of the world, this is my heart.
(Australia Council 1990)

It is therefore not possible for many producers of authentic art and craft products to increase or expand their production or lower their prices to compete with inauthentic products. In many cases, taking into account the time costs of producing authentic products and the quality of resulting pieces, matching the prices and offerings of inauthentic products may result in very low margins or losses being incurred by artists.

The prospect of competing with inauthentic products in the market has been raised as a barrier to some Aboriginal and Torres Strait Islander artists and art centres engaging in third-party licensing of works. Concerns centred around putting out licensed reproductions of their work ‘in a market flooded with cheap fake product’ (Desart, sub. 4, p. 11) and having these licensed products competing directly with inauthentic products. For example, in Desart’s recent survey of member art centres, over 25% of its member art centres had ‘made a deliberate choice not to engage in third party licensing of artwork for fear of competition with inauthentic work’, despite over 80% of centres being interested in undertaking licensing of artwork to produce merchandise and homewares (sub. 4, p. 11).

Anecdotally, the Commission heard underlying concerns that producing licensed (authentic) products may open artists up to the risks of their products being perceived as equivalent to the inauthentic (and mass-produced) Indigenous-style products in the market. As stated by the Aboriginal Art Centre Hub of Western Australia, the sale of licensed products or merchandise ‘may be perceived to reduce the value of the original artworks and/or dilute culture’ (sub. 20, p. 7). In addition, “mass production” and poor quality materials or work’ can negatively impact artists’ reputation and devalue their artworks (ACCC 2007).

The competitive advantage enjoyed by inauthentic arts and crafts is premised on the misappropriation of Aboriginal and Torres Strait Islander cultures, and to some extent, a lack of knowledge and understanding of Aboriginal and Torres Strait Islander cultures and art by purchasers. In this regard, the presence (and dominance) of inauthentic

products has a significant negative effect on the integrity of the market for (authentic) Aboriginal and Torres Strait Islander visual art and craft products generally. This was emphasised by a number of study participants:

It undercuts and devalues Aboriginal art ... It floods the market with cheap, poor quality work. (ARAA, sub. 8, p. 5)

The supply of inauthentic Indigenous Australian art and craft products has the potential to undermine the integrity of the industry ... (ACCC, sub. 13, p. 11)

Aboriginal and Torres Strait Islander artists and communities therefore miss out on opportunities and income streams

Arts and crafts are an important way in which Aboriginal and Torres Strait Islander people earn a living — through opportunities to create, display and/or sell their work, and the resulting income from these endeavours. For example, the Australia Council noted that:

Traditional cultural expressions are integral to the economic, cultural and social life of Indigenous communities, embodying knowledge and skills, transmitting core values and beliefs and manifesting identity.

For many remote communities, arts and cultural production has the potential to be one of the most important ways for community members to earn a viable and culturally relevant livelihood.

Creative artistic activities and other cultural activities are the main income sources for around a third of artists working in North West NT and the Tiwi Islands (29%), the Central Desert (NT) and the APY [Anangu Pitjantjatjara Yankunytjatjara] Lands (SA) (35%), Arnhem Land (NT) (33%) and the Kimberley (31%). Within creative practices, the most prominent art form in these four remote regions is visual arts, with over nine in ten visual artists who practised their art in the last 12 months receiving some financial return from it. (sub. 24, p. 20)

However, where authentic and inauthentic products compete in the market, Aboriginal and Torres Strait Islander artists and their communities miss out on such opportunities and income streams. Aboriginal and Torres Strait Islander artists may be denied opportunities to create, display and/or sell their work (including licensed products), in favour of cheaper or more easily accessible inauthentic works. Simply put by the Aboriginal Regional Arts Alliance:

It deprives Aboriginal artists of opportunities to sell their work. (sub. 8, p. 5)

And as raised by the National Association for the Visual Arts, not only are Aboriginal and Torres Strait Islander artists deprived of opportunities and had their styles appropriated, non-Indigenous artists were actively benefiting financially and otherwise as a result:

NAVA raised concerns regarding stylistic and conceptual appropriation of Aboriginal and Torres Strait Islander art and designs results in both cultural and economic harms ... [including] non-Indigenous artists appropriating Aboriginal styles, winning prizes and benefiting financially at the expense of Aboriginal artists. (NAVA, sub. 23, p. 3)

A loss of income streams for Aboriginal and Torres Strait Islander artists not only affects artists, but also their families and communities.

The fake product denies Aboriginal and Torres Strait Islander artists and their communities legitimate income streams which could be earned from selling authentic arts and craft works to the many consumers and tourists wanting to connect with Indigenous Australia. It also destroys the income streams that could be earned from selling genuine arts and craft works to the many consumers wanting to connect with Indigenous Australia. (Bana Yirriji Art Centre, sub. 25, p. 2)

Chapter 3 examines in greater detail the importance of the sale of artworks and products for Aboriginal and Torres Strait Islander artists' income.

Inauthentic products do provide some benefits

Despite causing clear and significant personal, cultural, economic and consumer harm, inauthentic arts and crafts products are beneficial — to their producers, retailers and consumers, including those located overseas.

The sale of inauthentic products provides income to producers and sellers, and consumer benefits. The magnitude of these benefits is uncertain, but as many buyers (international tourists) and producers are not local residents, a significant share of these benefits is not retained in Australia. Furthermore, although the availability of inauthentic products gives consumers wider choice, it is unlikely that many tourists would hold a strong preference for (inauthentic) Indigenous-style souvenirs, which limits the benefit they derive from purchasing them — in other words, many might be just as happy with other types of similarly-priced souvenirs.

The Commission has also heard anecdotally that some 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.

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. However, this is a two edged-sword as the products purchased misappropriate and, in many cases, misrepresent Aboriginal and Torres Strait Islander cultures.



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.

4.4 Why do inauthentic arts and crafts exist (and persist)?

Despite having clear negative impacts on Aboriginal and Torres Strait Islander people and the broader community (section 4.3), inauthentic arts and crafts proliferate in the market (section 4.2).

There are three main reasons why inauthentic arts and crafts exist and persist:

- lack of consumer awareness or understanding as to the problems caused by inauthentic arts and crafts
- consumer difficulties distinguishing authentic and inauthentic products at the point of purchase
- deficiencies in various laws including copyright law and the Australian Consumer Law in effect make it legal to produce and sell most Indigenous-style products.

In addition, some producers do not understand that they may be misusing cultural expressions, and/or the harm this causes.

Some consumers may not be able to identify inauthentic arts and crafts and are unaware of the problems associated with them

Many consumers may purchase inauthentic art and craft products (and thus provide demand for further production of such products) due to a lack awareness of the problems they cause. A recent survey found most consumers do not think about authenticity when buying Indigenous-style products (particularly in the lower-end part of the market) (KPMG 2021, p. 43).

Such a lack of awareness may be a result of underlying differences in the perception of art in Indigenous and non-Indigenous cultures. In contrast to how Aboriginal and Torres Strait Islander people view and value art, it has been argued that non-Indigenous people generally focus on (at least initially), the aesthetic value and price (as an indicator of significance and value) of a product rather than the underlying story behind the work.¹⁸

We think it's a pity people can hardly look at Aboriginal paintings without first saying 'what's the story?'. (Fisher 2016, p. 115)

Even when consumers understand and appreciate the problem of inauthentic art and craft products, they can still face difficulties identifying authentic products from inauthentic ones when making purchasing decisions.

While the evidence from consumer surveys is mixed,¹⁹ Desart's recent survey of approximately 40% of Aboriginal and Torres Strait Islander community art centres located in remote areas found that:

Over 90% of art centres felt that many consumers were unable to distinguish between authentic and inauthentic product and over 80% believe that many consumers do not see the value in authentic product if a cheap alternative is available. In Desart's view, these responses refer principally to consumers in the souvenir and merchandise markets rather than the fine art market; however, it is also true of paintings and fine art sold in retail outlets other than art centres and established commercial galleries - such as pop-up auctions, online and in souvenir shops. (sub. 4, p. 11)

¹⁸ As noted above, and in chapter 2, art holds significant cultural importance and value to Aboriginal and Torres Strait Islander people and communities beyond the physical art piece itself and its aesthetics. Storytelling is one of the primary goals of Aboriginal and Torres Strait Islander art and artists, and an aspect that is not present in inauthentic arts and crafts.

¹⁹ A 2018 survey by consumer organisation CHOICE found that almost half of surveyed consumers (62%) reported having difficulty distinguishing between authentic and inauthentic Indigenous art and craft products (2018, p. 2). This is despite a separate survey conducted by KPMG finding that most Australian consumers believed that they could tell if a product was authentic (KPMG 2021, p. 43).

There are many reasons why consumers may have difficulty identifying authentic and inauthentic products, in particular from their labels (representations). These include:

- ambiguous, confusing labels, or labels that contain insufficient information to assess authenticity. For example, both authentic and inauthentic products are often described as having 'Aboriginal designs', or are advertised as 'hand made' without stating upfront where the product was made
- discrepancies between physical and online product labels for souvenirs. For example, the website of one major souvenir manufacturer of boomerangs and other wooden souvenirs claims that almost all of their products are designed by a single named Aboriginal Elder, however individual physical product labels ambiguously describe the products as being 'designed and owned by Australian artists'.

The Commission examined a range of wholesaler websites offering Aboriginal and Torres Strait Islander art and craft products (both authentic and inauthentic), focusing on the terms most frequently used in product listings to describe art and craft products that may act to give consumers an indication or impression as to the product's authenticity. Figure 4.8 provides a summary of this analysis.

In the Commission's sample, individual words used in the descriptions of authentic and inauthentic products are largely distinct (figure 4.8, panel a, b). Authentic product descriptions tended to use terms that relate to the artist and the cultural and contextual aspects of Aboriginal and Torres Strait Islander art and design, while inauthentic product descriptions focused on the products themselves and other generic terms.

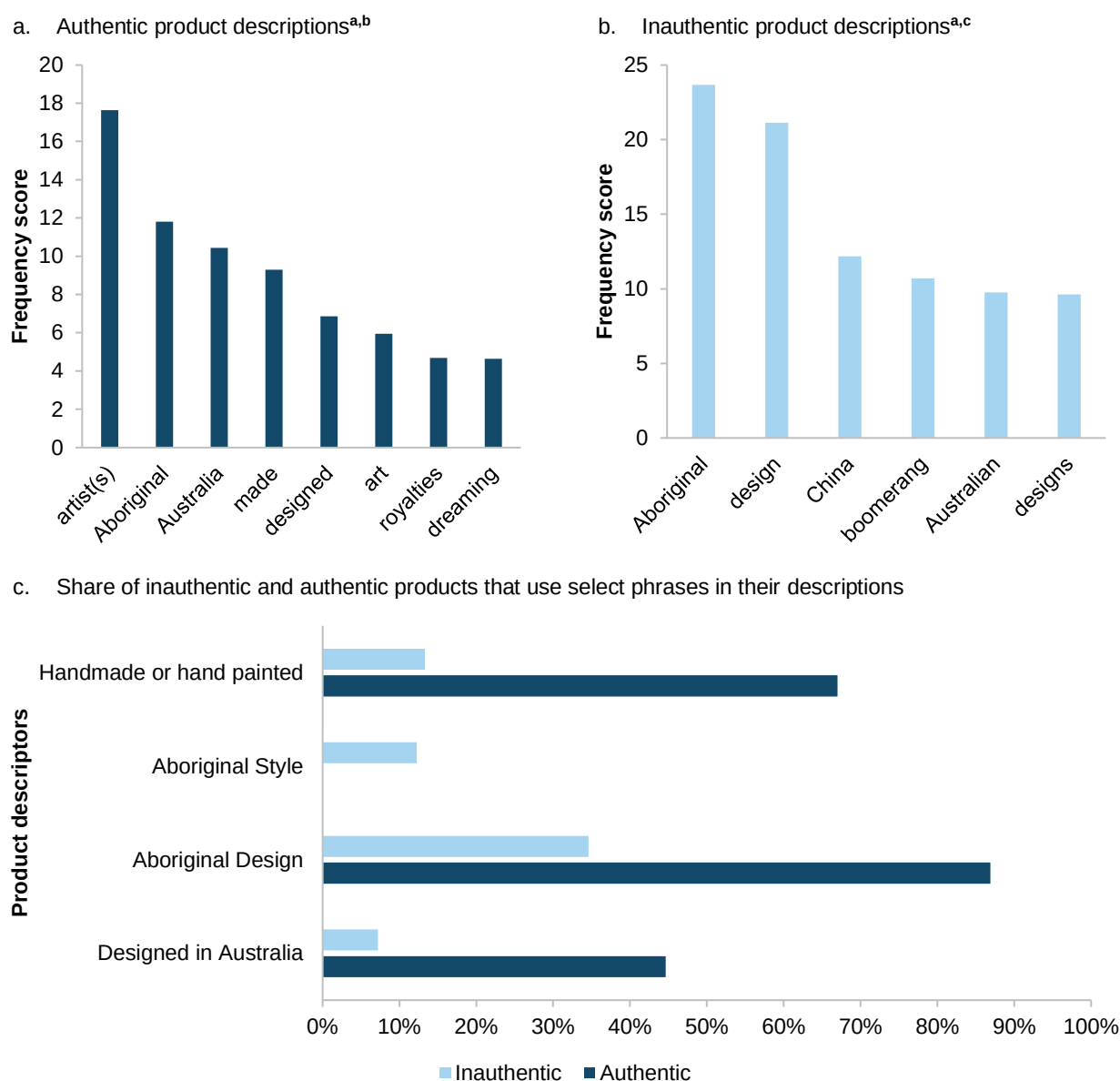
While there are some terms used across both categories, the frequency of their use was very different — the term 'Aboriginal' was commonly used to describe the style of both inauthentic and authentic products, but the descriptions of inauthentic products used the term more than twice as frequently.

However, these terms, on their own, do not readily indicate whether a product is authentic or inauthentic — the term 'authentic' was not found to be a commonly used descriptor for products. Instead, a certain degree of knowledge and understanding of Aboriginal and Torres Strait Islander arts and crafts, as well as the ability to compare terms used across authentic and inauthentic products is required to ascertain whether a product is likely to be authentic or inauthentic based on its description.

As such, without background knowledge about Aboriginal and Torres Strait Islander arts and crafts, or even the time and ability to compare the terms used in a range of product listings to make an educated guess as to the authenticity of a product, it is easy for consumers to be misled.

Exacerbating this difficulty are phrases (used in the descriptions of both authentic and inauthentic products) that go directly to indicating authenticity and are very similar on first glance, but have very different meanings (figure 4.8, panel c). For example, the words 'design' and 'designed' would be read as being almost synonymous by the average consumer at the point of purchase. However, they give rise to very different claims. Describing a product as 'Aboriginal designed' implies that the artist responsible for the work was Aboriginal and Torres Strait Islander artist. However, merely stating that a product is an 'Aboriginal design' is very different — it only provides an indication about the general appearance of the product and not its authorship. It does not assist consumers when both authentic and inauthentic products use both phrases in their descriptions.

In addition, it is also often very difficult for consumers to determine a product's authenticity by looking at the product itself. For example, a non-expert consumer will find it very difficult to determine whether a product has plagiarised a work — and it is unrealistic to expect consumers to perform extensive investigation in order to determine which product is the original, and make an assessment whether any plagiarism or other misuse of Aboriginal and Torres Strait Islander cultural expressions has occurred, prior to purchasing a product.

Figure 4.8 – Inauthentic and authentic products are described similarly^{a,b,c}

a. Frequency score refers to the frequency with which a word is used, normalised by the average number of words that appear in a product listing. **b.** The average number of words in a product listing for authentic products was approximately 59. **c.** The average number of words in a product listing for inauthentic products was approximately 7.

Source: Commission analysis using wholesaler listing data. Wholesalers include specialist authentic and mixed inauthentic and authentic product wholesalers.

Some creators of inauthentic arts and crafts are unaware that they may be misappropriating culture, and the harm it causes

It may be the case that people produce inauthentic art and craft products because they do not understand that they are engaging in misappropriation of Aboriginal and Torres Strait Islander cultures and cultural expressions, the significance of the expressions themselves, or the harm that results from such misuse.

Sometimes this may be a result of their perception and lack of understanding of Aboriginal and Torres Strait Islander arts and crafts and cultures generally. For example, in the *Dreamtime Creations* case,²⁰ the owner of the non-Indigenous business was found guilty of misleading consumers ‘by making false and misleading representations about artwork being made by an Aboriginal person when they were in fact made by a non-Indigenous person’ (Parkin 2020, p. 47). The misappropriation in this case was a result of the business owner’s lack of understanding of the underlying cultural significance of Aboriginal and Torres Strait Islander cultural expressions that are depicted in his products.

... Mr Antoniou’s understanding of what constitutes Aboriginal art could be interpreted as recognising only the physical end product art form and failing to comprehend the underlying knowledge and stories of ancestors, family and country that influence an artist’s cultural expression in the physical piece. (Parkin 2020, p. 52)

Producing and selling most Indigenous-style products is legal

The *Copyright Act 1968* (Cth) and the Australian Consumer Law (ACL) (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) are the main legal mechanisms that can be used to restrict the supply of some forms of inauthentic art and craft products, and compensate Aboriginal and Torres Strait Islander artists and communities for the harms caused by specific inauthentic products. However, these laws only protect Aboriginal and Torres Strait Islander artists and authentic arts and crafts against certain types of inauthentic arts and crafts (the creation and existence of plagiarised arts and crafts, and the marketing of arts and crafts inaccurately purporting to be authentic, respectively), and producing general Indigenous-style products without contravening the Copyright Act and ACL is possible and legal.

Chapter 6 explores these legal deficiencies in further detail.



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.

²⁰ *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* [2009] FCA 1545.

5. Reducing trade in inauthentic arts and crafts

Key points

- ✱ Individual artists and organisations can and do undertake a range of activities to promote authentic arts and crafts. These can help consumers distinguish between authentic and inauthentic artworks and other products — but there are gaps, particularly in the souvenir market.
- ✱ There is a range of options that governments could pursue to counter the trade in inauthentic arts and crafts, each with pros and cons.
 - Industry-wide voluntary labelling schemes, such as certification trade marks, could assist Aboriginal and Torres Strait Islander artists to promote and distinguish their work from inauthentic products, but low uptake by artists may limit their effectiveness.
 - Education and awareness-raising measures can inform consumers and businesses about the harms of inauthentic products but they are likely to be most effective when they complement other measures that help consumers distinguish between authentic and inauthentic products.
- ✱ A prohibition on the sale of certain inauthentic products could be an effective way to reduce trade in inauthentic products. But a ban also has limitations and potential unintended consequences, including for Aboriginal and Torres Strait Islander artists, so is unlikely to be the most cost-effective response.
- ✱ A mandatory labelling scheme for inauthentic products, warning they are not produced by an Aboriginal and Torres Strait Islander person, potentially offers a more effective, practical and proportionate response. A mandatory labelling scheme:
 - has implementation advantages over a product ban, including potentially broader coverage and lower burdens on industry, and in particular Aboriginal and Torres Strait Islander artists
 - would help consumers distinguish between authentic and inauthentic products, but not limit consumer choice
 - would not hinder other initiatives by Aboriginal and Torres Strait Islander artists to promote their work or enforce their rights, and would complement any future legal protections for cultural assets.

Various measures can be used (on their own or in combination) to reduce the trade in inauthentic arts and crafts. These include providing better information to market participants, encouraging consumers to preference authentic products over inauthentic ones, or banning the sale of inauthentic products.

Some measures are already in place, while others have been tried before, but with little success. Alternative approaches have been proposed, but encountered stumbling blocks. This chapter discusses:

- existing approaches used to identify and promote authentic products (section 5.1)
- the scope for voluntary approaches to identify authentic arts and crafts (section 5.2)
- the use of education and awareness measures to address the harms of inauthentic arts and crafts (section 5.3)
- the option of a regulatory ban on inauthentic products (section 5.4)
- options for mandatory labelling (section 5.5)
- the Commission's proposed approach (section 5.6).

5.1 Approaches adopted by artists and dealers to distinguish and promote authentic products

Some artists, dealers and other retailers already take steps to identify and promote the authenticity and provenance of their work to distinguish it both from other artists and from inauthentic or ambiguous products. These actions reflect the private benefits that can accrue to sellers from promoting and distinguishing the authenticity and provenance of artworks.

Individual labelling approaches

Many individual artists, art centres and dealers apply their own labels and logos to promote their own work, including demonstrating its authenticity. They can also apply for trade mark protection for their logos or branding. This option does not appear to be widely used, either because of the costs involved or because market participants do not see significant risk in their branding being misappropriated.

Individual artists or dealers can provide self-generated certificates of authenticity. Certificates of authenticity (or a detailed label with the particulars of an artwork) are a form of declaration of the authenticity of an artwork, and can be created by the artist, an art centre, dealer or other party, with varying levels of details.

The usefulness of individual labelling approaches will depend on the credibility of the seller, but can be an effective marketing tool, as evidenced by examples of third party retailers promoting these products (box 5.1).

Mechanisms are already in place to ensure information provided to consumers is accurate. For instance, where a certificate of authenticity for a work is subsequently determined to be inaccurate there may be scope for legal action against the supplier of the certificate, including action under the Australian Consumer Law (ACL) for misleading and deceptive conduct, or a breach of contract on the basis that the purchase agreement for authentic art was not honoured. There may also be scope for legal action by an artist where a seller misrepresents a work as being by that artist (Arts Law 2010).

Box 5.1 – Individual branding is promoted by retailers

The promotion of individual branding and provision of authenticity information by third party retailers reinforces its effectiveness. One example is a range of pots and cushions being sold by Bunnings that are printed with the artwork of the Warlukurlangu Artists. The Bunnings webpage, where the products are listed for sale, prominently displays the Warlukurlangu Artists logo, as well as information about the art centre, the artists and their artworks used on the products (Bunnings 2022).

The use of this branding and the provision of information can be effective, even if there is no immediate brand recognition. For instance, in the case of the pots being sold by Bunnings, it is likely that most prospective purchasers are unfamiliar with the Warlukurlangu Artists logo or story, but the provision of credible information in and of itself can be used to assure customers about the authentic or ethical origins of the artwork or product (and provide an opportunity to do further research).

Promoting membership of associations and industry codes of practice

A common form of branding is to advertise membership of associations and schemes as a way of providing assurances to consumers — for example, by displaying an organisation's logo on a gallery's website or on other advertising and authenticity documentation.

A prominent example is the Indigenous Art Code (IartC 2010), which is partly funded by the Australian Government (chapter 8). While the code covers various aspects of dealer conduct, a notable feature is the requirement for Code Certificates. Dealers that receive artworks directly from artists are required to create a Code Certificate for the artwork (unless it is valued at less than \$250 or the artist does not want a certificate). The certificate must state: that it is an 'Indigenous Art Code Certificate'; the name of the artist(s) who created the work; where and when it was created (to the extent known); a description of the artwork; the identity of the Dealer Member; and a signed declaration confirming the accuracy of the details set out in the Code Certificate.

Another example is the Aboriginal Art Code developed by the Aboriginal Art Association of Australia (AAAA 2016). The provisions in the Aboriginal Art Code are broadly similar to those in the Indigenous Art Code, including the creation of certificates of authenticity. One notable difference is the value threshold in the Aboriginal Art Code is \$1000 rather than \$250 in the Indigenous Art Code, which reflects the Aboriginal Art Association of Australia's view that its certificates of authenticity are aimed towards higher end art, rather than souvenir-style products (HoRSCIA 2018, sub. 52, p. 10).

Adhering to code of conduct provisions raises the standards of dealings across the industry (chapters 8, 10). It also adds uniformity to the details and form of authenticity certificates. The fact that they are issued under the auspices of a code can provide additional assurances about the veracity of the authenticity certificate and used as a selling point.

However, there are limitations of these schemes in addressing the proliferation of inauthentic products. One is that certificates of authenticity under codes of conduct only apply to certain artworks, and do not cover lower priced products. Another is that they still rely on accurate declarations by sellers; they are not independently verified by the organisations.

Finally, because membership of industry associations and codes of conduct is voluntary, coverage is limited to those dealers who choose to participate. And in the absence of significant consumer awareness of the code, and demand to purchase from code affiliated dealers, there are limited consequences for dealers of not participating in and abiding by industry codes of conduct (chapter 10).



Draft Finding 5.1

Some approaches to distinguish between authentic and inauthentic Aboriginal and Torres Strait Islander art and craft products are already in place

Some approaches are already in place to help consumers distinguish between authentic and inauthentic Aboriginal and Torres Strait Islander artworks and other products. These include certificates of authenticity provided by art dealers (such as those produced in accordance with the Indigenous Art Code), as well as other branding and marketing initiatives used by artists and dealers to provide information and assurances to consumers. However, only limited information is provided for some products, particularly in the lower end of the market, including souvenirs and digital products.

5.2 Voluntary authenticity labelling

Certification trade mark schemes

There is a long history — tracing back to the Romans and Greeks — of marks being applied to products, to identify makers and indicate an official certification (Rogers 1910). Today, trade marks can be registered to provide exclusive rights to use (or license or sell) the mark. Trade marks can be applied to many things, including words, phrases, pictures, logos or combinations thereof. Applicants need to apply to register a trade mark (with registration lasting ten years). Once registered, trade marks must be used or registration can be removed. As is the general case with intellectual property rights, enforcement of trade marks rests with the owner (IP Australia 2019b).

The decision to register a trade mark is likely to be influenced by the likelihood and potential harm of the mark being appropriated by others, as well as the capacity and resourcing of the individual or organisation to engage with the intellectual property system and enforce their rights.

Beyond the use of trade marks as marketing tools by individual businesses, they can also be used by groups of entities to promote particular attributes. One special type of trade mark used for this purpose is a certification trade mark (CTM) (box 5.2).

Prominent and long-standing examples of CTMs include the Australian Made and Woolmark logos. Another relevant example of a CTM scheme is that of Supply Nation, which verifies businesses that have a minimum level of Aboriginal and Torres Strait Islander ownership and/or control.²¹

²¹ Supply Nation recognises two different levels of Indigenous ownership. 'Registered' is available to businesses with 50% or more Aboriginal and Torres Strait Islander ownership, while 'Certified' is available to businesses that are 51% or more Aboriginal and Torres Strait Islander owned, managed and controlled (Supply Nation 2021).

Box 5.2 – What is a certification trade mark?

Certification trade marks (CTMs) are a special type of trade mark used to identify goods or services that meet certain standards or possess specified characteristics.

In comparison to standard trade marks that are used to distinguish one entity's product or service from others, CTMs are intended to be used by multiple authorised users to guarantee that products or services meet specified standards, as set out in the certification rules for that CTM. A CTM's rules must include:

- the standards that goods or services must meet
- the method for determining if the standards have been met
- the requirements an approved certifier must meet
- the requirements the owner of the certification trade mark, or an approved user, must meet
- any other requirements for the use of the certification trade mark
- the procedure for resolving a dispute about whether goods or services meet the certification standards
- the procedure for resolving any other issue regarding the certification trade mark.

Applications to register a CTM are initially examined by IP Australia, but are also assessed by the Australian Competition and Consumer Commission for compliance with competition and consumer laws. Complying applications are advertised for registration, with third parties able to raise concerns about the proposed trade mark. Registration lasts for ten years, with renewal available.

Source: IP Australia (2021a).

Use of CTMs for authentic Aboriginal and Torres Strait Islander arts and crafts

There is a precedent for using CTMs to identify authentic arts and crafts, both in Australia and around the world. In Australia, a scheme was launched in 1999, but ceased operating in 2003. However, there are international examples that have been more enduring.

The now defunct National Indigenous Arts Advocacy Association scheme

The now defunct National Indigenous Arts Advocacy Association (NIAAA) launched a certification trade mark scheme in 1999 utilising a boomerang tick logo (figure 5.1) (IP Australia 2022). There were two different certification marks. One was a label of authenticity intended to identify authentic work wholly created by an Aboriginal and Torres Strait Islander person. There was also a collaboration mark, which could be used for products that involved assistance or input from a non-Indigenous person, or for products to be commercially used under a written agreement.

To be accredited as a Certified Indigenous Creator under the scheme, an applicant had to be certified as an Indigenous person. This was defined as a person of Aboriginal and Torres Strait Islander descent, who identified as an Aboriginal and Torres Strait Islander person and was accepted as such in an Indigenous community. Fees for Indigenous Creators were a \$30 application fee, with a \$20 annual renewal fee thereafter, plus the purchase of labels (including sticker or swing tag variants) at 9 cents each.

Figure 5.1 – NIAAA Label of Authenticity Mark^a



a. The collaboration mark was similar to above, but with a white border.

Source: NIAAA (1998).

Take up of the NIAAA scheme was relatively low, given that there are thousands of Aboriginal and Torres Strait Islander artists (chapter 3), with only about 160 creators using the marks (SSCECITA 2007, p. 122). One of the reasons suggested for the limited adoption of the scheme was the difficulty of, and antipathy towards, proving Aboriginal and Torres Strait Islander status. It was reported 75% of applicants failed to meet these requirements because they were too complex. Another suggested reason was that art centres already had processes for providing authenticity documentation in place. Broader criticisms of the scheme included that the symbol representing the mark was overly exclusive and that artists not using the mark would be perceived as inauthentic, and that it conflated Indigenous authorship with authenticity and provided no protection against the appropriation of region specific styles (Altman and Ward 2002, p. 79; HoRSCIA 2018c, p. 47; Rimmer 2004, pp. 158–159; SSCECITA 2007, p. 123).

The scheme was expensive to administer and even with government support had insufficient funding to promote the label. Following reports of maladministration and misuse of funds, government funding was subsequently discontinued (Graber and Lai 2012). The NIAAA scheme reportedly received government funding through the Australia Council for the Arts of about \$500 000 year (Rimmer 2004, p. 160).

International approaches

There are also similar schemes in other countries, some of which have been operating for a relatively long time (box 5.3). But they also appear to face similar issues in terms of artist acceptance and low uptake.

For example, the Toi Iho mark in New Zealand has just over 100 registered artists, despite being in place for 20 years. Commentary on the scheme following the decision to cease government funding noted that aside from frustrations about the uptake and effectiveness of the program at that time, there were also mixed views about the operation of the mark. For some, the process of verification was a sign of peer esteem that culturally and artistically validated their work, while others opposed the commercialisation and commodification of culture from the application of intellectual property laws to artistic practice (Brown and Nicholas 2010).

These schemes tend to be dependent on government support to get established, and in some cases for ongoing administration. For example, recent financial statements for the Inuit Art Foundation indicate that the expenditure on administration of the Igloo tag scheme (about Can\$190 000 in 2020) exceeds revenue from licensee fees (about Can\$6000 in 2020) (Inuit Art Foundation 2022b).

Box 5.3 – International labelling schemes

In **Canada**, the Igloo trade mark is used as a label of authenticity for Inuit art, which covers a range of art and craft products, including fashion goods that have been made by an Inuit artist. The scheme was established in 1958 by the Canadian Government. In 2017, ownership and control of the program was transferred to the Inuit Art Foundation (Inuit Art Foundation 2022a). The stated objective for this transfer was ‘to increase the Inuit art community’s ability to regulate art in a way that benefit Inuit artists and help preserve the values of Inuit cultural heritage for generations to come’ (CIRNAC 2021). There are various rules about the application of labels to artwork, including what additional information must be included on the label. Additional information that must be included on the inside of the tag include the name of the artist and their community, when it was made and the description given to it by the Inuit artist. There are 21 authorised licensees under the scheme (6 of which are legacy members from the program prior to the change of ownership in 2017 (Inuit Art Foundation 2022c). In 2016, prior to the transition, these licensees issued approximately 30 000 tags annually (CIRNAC 2017).

In **New Zealand**, the Toi Iho trade mark is used to signify authenticity for Māori art and artists (Toi Iho Charitable Trust 2022c). The trade mark was launched in 2002 by the New Zealand Government through Creative New Zealand and the then Māori Arts Board. In 2009, Creative New Zealand announced it would stop investing in the Toi Iho trade mark in favour of other initiatives, and in early 2010 sought expressions of interest to take ownership of the program (Creative New Zealand 2010). Ownership was transferred to the Transition Toi Iho Foundation, which was replaced by Toi Iho Kaitiaki Incorporated later that year, followed by the Toi Iho Charitable Trust in 2013, which remains responsible for the program (Toi Iho Charitable Trust 2022a). There are currently over 100 registered Toi Iho artists, comprising a mix of longstanding Toi Iho artists (including some who have passed away) and a smaller number of newly assessed and accredited ‘Te Ara Hoe’ artists. This category was added in 2015 and is open to applications from artists — who must already be established with a substantial body of work and be recognised nationally (applicants also need to provide their iwi and hapu affiliation) (Toi Iho Charitable Trust 2022b).

In the **United States**, the state of Alaska established the Silver Hand program to promote authentic original art works by Alaska Native artists. It is administered by the Alaska State Council on the Arts. To participate in the program and attach Silver Hand tags to their art works, an artist must be a full time resident of Alaska and provide documentation of membership of a federally recognised Alaska Native tribe. The tags can only be attached to handmade original works (not reproductions or manufactured items) produced in Alaska (Alaska State Council on the Arts 2022).

In **Kenya**, the ‘Taita Basket’ trade mark is a scheme for sisal baskets made in the Taita Taveta County. The project was launched in 2016 by the World Intellectual Property Organization (WIPO). The project was set up as a ‘collective’ mark rather than a certification mark to avoid the costs of setting up a certifying body and because the certification process would be difficult to access. However, an association was established and quality standards were implemented. A key issue in setting the standards was striking the right balance between making the quality standards sufficiently high to give value to the brand and not making them so onerous that weavers would be unable to meet them. Training was also providing to help weavers meet the standards (WIPO 2019a).

What are the prospects for a successful new scheme?

Despite earlier experience, there is still support for a CTM scheme for Aboriginal and Torres Strait Islander visual arts and crafts. It was endorsed as one solution in the House of Representatives Standing Committee on Indigenous Affairs 2018 inquiry into *The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia*, which recommended that IP Australia develop a CTM scheme for First Nations arts and crafts in full consultation with stakeholders (HoRSCIA 2018c, Recommendation 6). The recent Australian Government *National Indigenous Visual Arts Action Plan 2021–25* also commits to further consideration of a labelling scheme, including certification trade marks, and funding a national rollout of digital labelling for artworks and products.

Certification trade mark labelling schemes have some appeal, as they would build on approaches used by artists and dealers to differentiate authentic products from inauthentic products and can be done using existing mechanisms. A comprehensive labelling scheme would likely support the rising demand for authentic products accompanied by information about their provenance. There is evidence that some consumers are willing to pay a premium for products that are demonstrably authentic. For example, a study of the Canadian Igloo tag found that consumer valued the presence of the tag on artworks quite highly.²²

Similarly, as discussed in chapter 4, a recent study by KPMG found many consumers were willing to pay a little extra for product information and certification to ensure the authenticity of Aboriginal and Torres Strait Islander arts and crafts, although this varies between types of consumers (KPMG 2021).

But there are also concerns about the prospects for a new scheme. Following the 2018 HoRSCIA inquiry, IP Australia has been investigating interest in a new certification trade mark scheme, with concerns raised echoing those about the earlier NIAAA scheme. IP Australia submitted that:

The need to accommodate regionality and different styles and protocols behind what may be authentic was raised as part of the House of Representatives Inquiry. This issue highlights that a national level scheme may not be a good fit due to the potential difficulty in providing for regional differences. The costs of raising consumer awareness about the meaning of an authenticity label, and to manage and enforce the use of a label, is also a key matter that would need to be addressed in a successful scheme. Another concern raised by stakeholders is the impact on producers who are unable to, or choose not to, engage in a labelling scheme, and whether they may be seen as inauthentic. (sub. 27, pp. 3–4)

The prospects for a national CTM scheme to effectively reduce the impact of inauthentic products are uncertain. These schemes can have private benefits for participants, but in order to effectively counter inauthentic art by allowing consumers to distinguish between authentic and inauthentic products a national scheme would need to be inclusive and accessible to ensure broad coverage. Accompanying education campaigns would also be required to build consumer awareness of the presence and purpose of a scheme. A scheme would need to be resourced — the common experience from previous CTM schemes is that establishing a CTM is dependent on government funding and support, and while they could become self-sustaining, ongoing funding could be necessary, which can make them vulnerable to future changes in government funding priorities.

²² A 2016 survey of the Inuit Arts Economy asked retailers, wholesalers and consumers how much they valued the presence of an Igloo Tag when considering the purchase or sale of Inuit art. On average, retailers and wholesalers assigned relatively little value to the tag (Can\$7), while consumers attached much higher values (Can\$117) (CIRNAC 2017).

Other labelling approaches

QR code digital labels

Digital labelling using QR codes is also being used to provide additional information about authentic products. The Australian Government initially provided funding to Desart (the peak body representing art centres in Central Australia) for a digital labelling trial, and has subsequently indicated in the *National Indigenous Visual Arts Action Plan 2021–25* (Action 5) that it would fund a national rollout of digital labelling, subject to the findings of an independent evaluation of the trial.

In announcing the trial, the then Minister for Communications, Cyber Safety and the Arts said:

The technology aims to support Aboriginal and Torres Strait Islander artists and designers — and to help fight the problem of inauthentic art and products which all too often sees both artists and buyers ripped off. (Fletcher 2019)

The project commenced in mid-2018 with a grant to Desart of \$150 000 and involved a small number of art centres (three initially and then another two added in 2020-21). It uses QR codes on the labels attached to artworks to link to the Stories Art Money database, an online artwork management system administered by Desart (chapter 3). The QR code link provides the consumer with further information on the artist, artwork and art centre.

Desart (sub. 4, pp. 16–17) submitted that an evaluation of the pilot identified a number of benefits, particularly for consumers in terms of improving understanding and knowledge of the product. It also provided development opportunities for arts workers. But there were also challenges, including capacity constraints to resource the labelling initiative, quality assurance concerns and the potential to create inequity between art centres and artists. The conclusion of the evaluation was that the digital labels were a positive tool for art centres and that there would be benefits in an expanded rollout, noting the need for additional resourcing, training and capacity building.

Desart (sub. 4, p. 17) also concluded that:

Digital labelling should not be approached as a solution to preventing inauthentic art and products, but rather as a single method for confirming and promoting authenticity.

The findings from the evaluation cited by Desart align with what might be expected from a digital labelling pilot (or a broader rollout). QR codes are a means of conveniently linking to information on a website, which provides more expansive information than can be placed on labels. This might be particularly useful for cheaper products (such as licensed products) that would not typically come with certificates of authenticity or other accompanying documentation. While they can be used by individual businesses, a coordinated scheme, such as the Desart trial, could increase the extent and consistency of their use, particularly if there are detailed guidelines on their use. However, it does not provide the same level of assurance as a certification trade mark scheme, which has rules and standards that users of the scheme must meet.

Accordingly, it seems reasonable to view digital labelling as a relatively low cost means of providing additional information to people who are already interested in seeking out authentic products. It could also have other benefits, such as capacity strengthening for art centres and arts workers. But it is unlikely to have much effect in countering inauthentic products.

Some participants expressed concern that a digital QR code label could create perceptions among consumers that only labelled products are ‘authentic’, and that a rollout to only one part of the market (such as art centres) would ‘seriously disrupt consumer confidence and trust in other parts of the market and create an anti-competitive structure which would risk shrinking the market, not growing it’ (AAAA, sub. 26, p. 6).

Other industry initiatives are in train

Other industry initiatives to distinguish authentic products are being developed. For example, the Queensland University of Technology submitted that it has supported the work of a First Nations start up business, IndigiLedger, which:

... uses blockchain technology to verify the authenticity of Aboriginal and Torres Strait Islander cultural work, developing a culturally-appropriate business rules engine based on collective Indigenous Knowledge that uniquely defines and captures what is authentic, provable and traceable Aboriginal and Torres Strait Islander art. (sub. 12, p. 4)

The Queensland University of Technology noted that pilots of the scheme had demonstrated 'strong demand' for the technology from Aboriginal and Torres Strait Islander businesses, and that this had occurred without government support. However, it also implied that government support would be necessary for it to 'become the trusted mark of Australian Indigenous cultural expression' (sub. 12, p. 4).



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.

5.3 Education and raising awareness

Educative approaches, either on their own or as a complement to other initiatives, can raise the awareness of market participants about issues such as: the cultural value and importance of art from the perspective of Aboriginal and Torres Strait Islander peoples; the existence and harms of inauthentic Indigenous-style arts and crafts (or unethically produced or sourced artworks); and how to identify and avoid inauthentic products.

Existing initiatives by government, art centres and other industry organisations

There are already a number of resources that have been developed to inform consumers about steps to take to purchase art that is both authentic and ethically sourced.

The Australian Competition and Consumer Commission (ACCC) developed a brief consumer guide in 2010, which contains information for consumers about what to look for and what to ask the seller (ACCC 2010). The ACCC also submitted that it has drawn on this guide for a recent October 2021 campaign on its *Your Rights Mob* Facebook page (sub. 13, p. 3).

Other industry participants have developed and disseminated information for consumers on ethical purchasing of Aboriginal and Torres Strait Islander art. For instance, the Indigenous Art Code has a webpage on how to buy ethically (IartC 2019b). Similarly, art centre peak bodies also provide these resources. For example, the Arnhem, Northern and Kimberley Artists Aboriginal Corporation has produced a guide to Aboriginal art, as well as shorter ethical buying guides, including versions in French, German and Japanese (ANKA 2019). There are also broader resources that extend beyond guidance for purchasers to inform people about Aboriginal and Torres Strait Islander art, such as resources developed by the Art Gallery of South Australia (AGSA 2022).

A prominent example of an awareness-raising campaign is the Fake Art Harms Culture campaign, which was an initiative of the Indigenous Arts Code, Arts Law and Copyright Agency, which was launched at the Darwin Aboriginal Art Fair in 2016. The campaign sought to raise awareness of the prevalence of inauthentic Indigenous-style souvenirs products and its harms to Aboriginal and Torres Strait Islander artists and culture (IartC 2019a). While this policy advocacy may have been directed at governments, and was the launching pad for proposals that the Australian Government implement a ban on inauthentic products under the ACL, it is also likely to have raised general awareness about the issue as well.

Government proposals

Further initiatives were proposed by the 2018 HoRSCIA inquiry, which recommended measures to provide information to inbound international tourists:

The committee recommends that the Australian Government develops an information guide on authentic First Nations art to be provided to all arriving passengers at an airport or any other port of entry to Australia, with a preference for a short pre-arrival video presentation. (HoRSCIA 2018c, Recommendation 5)

In the Government Response, the recommendation was agreed to in part, with the Government indicating that options would be investigated on how to best guide consumers, and on the role of the ACL. It also said that Tourism Australia would disseminate this information through a number of channels.

Following on from this response, the recent *National Indigenous Visual Arts Action Plan 2021–25* foreshadowed a new awareness strategy, stating:

We will promote the importance of ethically produced and authentic Indigenous art and related cultural tourism, particularly for the domestic tourism market. The awareness strategy will promote consumer information about Aboriginal and Torres Strait Islander art, where and how to buy authentic art, information about key Indigenous art fairs and events, and the Indigenous Art Code. (Australian Government 2021, Action 6)

Scope for new education and awareness measures

Study participants have expressed support for new education and awareness measures to address inauthentic art.

There needs to be a community engagement strategy to capture the awareness of not only the Australian public but the overseas tourist trade as well by ensuring that they are buying authentic Aboriginal artworks and products in local shops. There also needs to be a campaign to buy locally made Aboriginal Art products which are displayed in retail shops and tourist venues. (UMI Arts Ltd., sub. 1, p. 2)

We need stronger education campaigns about the negative impacts of inauthentic art and encourage consumers to demand ethically produced art ... (ARAA, sub. 8, p. 5)

Building awareness through educational campaigns of the impacts of inauthentic art could increase community understanding of the costs of inauthentic art and craft products. Awareness could also be built through the promotion of using and understanding authenticity certificates, as well as other resources to enable regional Indigenous arts peak bodies to provide education to consumers about buying ethically sourced and authentic art. (Australia Council, sub. 24, p. 25)

While increasing consumer awareness of the harms of inauthentic products is necessarily dependent on providing additional information to consumers, its effectiveness could be limited for a variety of reasons.

- If information is not provided sufficiently proximate to the point of purchase, purchasers may miss or forget it.
- Consumers cannot act on information received about the harm of inauthentic products due to the inability to determine whether or not a product is authentic. While some of the education materials noted above do discuss how consumers can seek out information about authenticity, this is more likely to be used for relatively expensive purchases, whereas for cheaper souvenirs fewer consumers are likely to undertake such enquiries.
- Another concern is that awareness campaigns risk reducing consumer confidence in Aboriginal and Torres Strait Islander arts and crafts markets, and deterring consumers from making purchases.

This suggests that education and awareness-raising measures are likely to be most effective when used in conjunction with other initiatives — for example, labelling initiatives or codes of conduct — that might help address these potential limitations.



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.

5.4 Product bans

Another option to eliminate inauthentic products from the market would be to ban them from sale.

Prohibitions on products are a relatively strong form of regulation, typically used where products are deemed dangerous or unsafe, either to the individual or broader community. Prohibitions can also extend to items that cause offence, including cultural offence. For example, the word 'ANZAC' cannot be used for official or commercial purposes without permission from the Minister for Veterans' Affairs (DVA 2020).

Bans on inauthentic art have been proposed ...

Since the launch of the Fake Art Harms Culture campaign, there have been proposals to ban the sale of inauthentic products in Australia through amendments to the ACL. This has included the introduction of a private members bill into the House of Representatives by Bob Katter in 2017, and a bill introduced into the Senate by Sarah Hanson Young in 2019 (box 5.4).

Box 5.4 – Bills to ban inauthentic products previously introduced to Parliament

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2020

Bob Katter first introduced this Bill in 2017; it was removed from Parliament in 2018; reintroduced in 2020, and subsequently lapsed in March 2021.

The justification for the bill was economic: MP Bob Katter argued that the sale of imported fake art undermines ‘the ability of Indigenous artists to gain economic benefit from their work; and ... Indigenous culture’ (Katter 2020a). He claimed that the introduction of the Bill would lead to the creation of 200 to 300 jobs (Katter 2020b).

The Bill sought to ban the sale of any product that includes an ‘indigenous cultural expression’ unless:

- (a) the thing is supplied by, or in accordance with an arrangement with, each indigenous community and indigenous artist with whom the indigenous cultural expression is connected; and
- (b) the thing is made in Australia.

The Bill defined an ‘indigenous cultural expression’ as:

... an expression of indigenous culture (whether through images, form or any other medium) that:

- (a) has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an indigenous community; or
- (b) has its origins in an indigenous community; or
- (c) is made by an indigenous artist; or
- (d) is derived from, or has a likeness or resemblance to, one or 19 more indigenous cultural expressions mentioned in paragraphs (a), (b) or (c).

Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019

This Bill was first introduced to the Senate in 2019 by Sarah Hanson-Young. It was more specific in its application than the House of Representatives Bill. It differentiated between:

- Indigenous ceremonial or sacred artefact, for which the Bill would ban all trade
- Indigenous cultural artefacts, including paintings on bark; Yidaki or didgeridoo; boomerang; clapsticks; traditional weavings; dillybags; grass mats; and carvings. These artefacts could only be traded if they were made in Australia, either by an Indigenous artist or under a licensing agreement, and were clearly attributed to the original artist.
- All other Indigenous cultural expressions, which could be traded if they were made by an Indigenous artist or under a licensing agreement, and were clearly attributed to the original artist. However, it would not be a requirement that these goods be manufactured in Australia.

Box 5.4 – Bills to ban inauthentic products previously introduced to Parliament

The proposed Bill was referred to the Senate Environment and Communications Legislation Committee, and the Committee's inquiry report was published in April 2020. The Committee concluded that:

Recommendation 1

The committee recommends that the Commonwealth consult Indigenous artists, organisations and communities to develop legislation to prohibit the sale of inauthentic Indigenous products sold as souvenirs, either through amendment of the *Competition and Consumer Act 2010* or through another mechanism.

Recommendation 2

The committee recommends that the Senate not pass the Bill. (SECLC 2020, p. 25)

In dissenting comments, Labor Senators called for the Bill to be passed with amendments, and Greens Senators asked for the bill to be passed in its original form (SECLC 2020, pp. 27–34).

Proposals for bans under the ACL have also been developed by participants in submissions to the 2018 HoRSCIA inquiry, specifically by Arts Law and the Indigenous Art Code (HoRSCIA 2018, sub. 64, 138, 149). This proposal was that the ACL be amended to make it an 'offence to supply or offer to supply an artwork (being a creative expression in a material form) that includes an 'Indigenous Cultural Expression' that is not either:

- i. hand crafted by an Aboriginal and Torres Strait Islander person; or
- ii. a licensed reproduction of an artwork created by an Aboriginal and Torres Strait Islander person.'

The proposal also included that the original artwork or licensed reproduction should attribute the artist(s) who created the original artwork. Under the proposal, an 'Indigenous Cultural Expression' was defined as:

... an expression of Indigenous culture (whether through images, form or any other medium) that: has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an Indigenous community; has its origins in an Indigenous community; is made by an Indigenous artist; or is derived from, or has a likeness or resemblance to, one or more Indigenous Cultural Expressions mentioned previously. (Indigenous Art Code, HoRSCIA 2018, sub. 138, p. 1)

A further part of the proposal was that certain traditional Aboriginal and Torres Strait Islander artefacts (stipulated in regulations) should be restricted to items handcrafted in Australia by an Aboriginal and Torres Strait Islander person, or for some items not offered for commercial supply at all.

... but have not been implemented

Neither the private members' bills, nor the proposal submitted to the 2018 HoRSCIA inquiry have been implemented, nor was such a proposal recommended by the 2018 HoRSCIA inquiry. Reasons for this fall into two broad groups: first, concerns about the suitability of the ACL for housing such a ban; and second, the limitations and potential for adverse consequences of the proposed bans.

Proponents of amendments to the ACL suggested that amending the ACL had a number of advantages, including:

- that it would be relatively cost effective, drawing on the existing administrative arrangements of the ACL through the ACCC
- the ACL already contained a broad set of appropriate penalties and remedies

- consumers and businesses are already familiar with the powers and operation of the ACCC (HoRSCIA 2018c, p. 53).

However, there are also counterviews, particularly by the ACCC that the ACL is not well suited given its economy wide coverage and focus on consumers. For instance, the ACCC submitted to the 2018 HoRSCIA inquiry that:

To the extent that government seeks to introduce broader prohibitions on the supply of Indigenous-style art and craft products not produced by Indigenous Australians, we consider that the consumer protection framework is not the appropriate vehicle to achieve this public policy aim. The ACL is underpinned by broad economy wide principles of fair trading and preventing misleading conduct. It is not able to deliver broad public policy aims of supporting and safeguarding Indigenous Australian culture. (ACCC, HoRSCIA 2018, sub. 54, p. 4)

The ACCC argued that ‘any amendments to the ACL should focus on misleading behaviour, instead of outright prohibition’ (HoRSCIA 2018c, p. 55). The Committee subsequently concluded that the ACL was not suitable to deal with the issues of inauthentic art (nor copyright law to protect Indigenous cultural expressions) and that ‘[s]tand-alone legislation may be best long term option to resolve this complex issue’ (HoRSCIA 2018c, p. 58). In its submission to this study, the ACCC reiterated this view about the inappropriateness of the ACL and that ‘[s]pecific tailored protections are required to protect and value Aboriginal and Torres Strait Islander peoples’ traditional knowledge and cultural expressions’ (sub. 13, p. 2).

There were also concerns about the coverage of the proposed ban, which could have led to unintended consequences, including for Aboriginal and Torres Strait Islander artists and communities. For instance, in the case of the bill proposed by Bob Katter, concerns included the following.

- The requirement that products be made in Australia. There are examples of artists and art centres signing licensing deals for goods such as homewares, which are then produced under licence overseas. The bill, as introduced to the House of Representatives, would have banned these products from sale.
- Concerns about the definition of Indigeneity used in the bill raised by experts such as Professor Jon Altman. The definitions in the bill were inconsistent with those used in most other legislation and the question this raised for defining authentic art. Commenting on the earlier 2017 bill, Altman (2019) argued that the bill was ‘well intentioned. But determining what constitutes authentic Indigenous arts and crafts products and merchandise is extremely difficult’.
- The Senate Standing Committee for the Scrutiny of Bills, which examined the bill when it was originally introduced, was concerned that the bill would create a broad definition of offence, which may also inadvertently apply to Indigenous artists selling their own artwork. It concluded that the bill as drafted ‘may unduly trespass on personal rights and liberties’ (SSCSB 2017, pp. 82–88).

Other variations of the proposed bans provided more scope for Aboriginal and Torres Strait Islander artists to license product manufactured overseas, although they still sought to limit the commercialisation of certain artefacts, which could reduce opportunities for Aboriginal and Torres Strait Islander artists.

These proposals have the potential to create adverse consequences for non-Indigenous creators/sellers. For example, there is a lack of clarity about what they could sell, because the definition of an Indigenous Cultural Expression is broad and potentially subject to change over time.

The case for product bans as a response to inauthentic products has been reiterated in submissions to this study. Arts Law, Copyright Agency and IArtC (sub. 31) supported the development of standalone legislation to address the misuse of Indigenous culture, but considered it a longer-term solution. They further stated that:

... given the damage caused by inauthentic Aboriginal and Torres Strait Islander art and craft product is both current and widespread, we consider it imperative to expedite a legislative prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art within an existing legislative framework, while standalone legislation is developed as a long-term solution. (sub. 31, p. 37)

Other participants also expressed support for prohibitions on the sale of inauthentic art.

There needs to be stronger policy and penalties for those producing, importing and selling inauthentic art. Particularly when the seller is not an Aboriginal person or organisation. There has been a lack of strong policy and enforcement which is the gap that allows inauthentic art to be produced and sold. (Aboriginal Regional Arts Alliance, sub. 8, p. 5)

A ban could be effective, but would also impose costs

A ban could be an effective way of reducing the harms of inauthentic products. An effective ban could:

- reduce the personal and cultural harms (hurt, offence and diminution of culture) caused by the sale of inauthentic products
- increase economic opportunities for Aboriginal and Torres Strait Islander artists by removing competing inauthentic products
- and prevent consumers from unwittingly purchasing inauthentic products.

However, prohibitions are a blunt instrument that bring risks and associated implementation challenges:

- **Banned products would need to be defined clearly to make compliance straightforward and enable effective enforcement, but clarity may come at the expense of coverage.** In previous proposals, the extent of what would be prohibited is fairly broad and may be ambiguous. Prohibition on selling particular products imposes costs on producers and sellers of these products, including in cases where there is ambiguity about whether or not a non-Indigenous artist's work incorporates Aboriginal and Torres Strait Islander designs or styles. Such ambiguity may lead to substantial compliance costs, make enforcement difficult and potentially reduce the effectiveness of the ban. To minimise potential unintended negative consequences of a prohibition, coverage may need to be defined narrowly, such as to certain specified artefacts or designs, meaning that some inauthentic products that incorporate Indigenous-style or Indigenous-inspired designs would not be prohibited from the marketplace.
- **Aboriginal and Torres Strait Islander artists may be negatively affected.** Some provisions (such as those suggested in previous proposals restricting the use of certain expressions or certain production methods) may unintentionally ban products by Aboriginal and Torres Strait Islander artists, particularly those who want to engage in overseas manufacturing, or are unable or unwilling to demonstrate that they are a Aboriginal and Torres Strait Islander person.
- **A ban could create incentives for unethical behaviour.** The potentially substantial costs imposed on producers and sellers of products that would be subject to a ban could create a strong incentive to engage in strategies to circumvent requirements, such as engaging an Aboriginal and Torres Strait Islander person to meet eligibility criteria but with that person having no substantive or genuine creative input. While such incentives would also be present in other circumstances (for example, labelling of inauthentic products, which is discussed below), they may be stronger in the face of a ban, given the possible significant losses for producers where products are excluded from the market.

Further, a ban would limit choice in the market and consumers would arguably be better served by being able to make more fully-informed choices. Given the implementation risks, potential negative effects on Aboriginal and Torres Strait Islander artists and impacts on consumers, the Commission considers that a ban is unlikely to be the most appropriate response.



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.

5.5 Mandatory labelling

Unlike prohibitions, mandatory labelling requirements do not prevent consumers from buying certain items, but they can improve the functioning of the market by giving consumers the information they need to make more informed purchasing decisions, and by providing warnings to alert purchasers to the harms of particular products.

Mandatory labelling requirements apply to some products

There are provisions in place for the mandatory labelling of certain products in Australia. These can be enacted through country of origin labelling requirements on certain imported products and information labelling requirements under the ACL.

Country of origin labelling is often found on products. With the notable exception of food products, such labelling is not required for products to be sold in Australia, but is a requirement for products to be imported (ABF 2020). Specified products must include a trade description, which includes the name of the country where the goods were made or produced. The requirement to label imported goods, and how that label must be applied, varies depending on the type of good and how it is packaged for import. For instance, goods that require labelling include certain kitchenware, textiles and apparel, electrical goods, toys, tobacco products and any pre-packaged goods. For some imported products, the label must be permanently affixed to the products, but in other cases can be attached to the packaging only.

The upshot of the current import labelling requirements is that many imported visual art and crafts products — whether produced under an ethical licensing arrangement or otherwise — are subject to country of origin labelling. However, some products that are labelled to comply with the import labelling requirements may not be labelled when sold to consumers.

Under the ACL, there are mandatory standards that specify minimum requirements that products must meet before they can be supplied to consumers (Product Safety Australia 2022). Most of these are aimed at ensuring product safety and cover requirements for the design and construction for particular products. But some are mandatory information standards that require certain warning or other information to be included

on labels. Examples include labelling requirements for cosmetics and tobacco products and care labels that must be attached to items of clothing and textiles.

There are also information standards that only have to be complied with if certain claims are made. For instance, there is an information standard under the ACL that sets out requirements for free range egg claims (box 5.5).

Box 5.5 – Labelling of free range eggs

An information standard on the labelling of free range eggs was introduced in 2017 in response to evidence of misleading labelling and producer uncertainty regarding their labelling obligations. While some consumers preferred free range eggs and were prepared to pay a premium, such eggs are not observably different from other types of eggs, and some eggs sold as free range were from hens that did not regularly go outside.

Feedback from consumers to the Consultation Regulatory Impact Statement (RIS) indicated consumer supported for more regulation of use of the term free range on labelling. However, some consumers were well-informed and those who actively sought out eggs to meet their preferred production attributes were able buy them. The Decision RIS could not find clear evidence of consumer detriment, but indicated that there remained a risk the average consumer may be purchasing eggs that do not meet their expectations. It identified a need for government intervention, but concluded that any regulation with significant compliance costs or market impacts could not be justified. The Decision RIS supported the introduction of an information standard for eggs labelled as free range over continued enforcement of the ACL's misleading and deceptive conduction provisions and ongoing education campaigns.

Under the information standard, egg producers can only use the words 'free range' in labelling where they meet specified minimum standards around the conditions under which the hens are kept. Producers that use the words 'free range' must also specify on the label the stocking density at which the hens are kept.

The introduction of the standard was expected to create upfront compliance costs for producers to change their labelling, although it was estimated that over the longer term it would have net benefits for egg producers due to greater certainty for producers from a more consistent definition of free range.

Sources: ACCC (2018a); Treasury (2015, 2016).

Potential application to arts and crafts?

Mandatory labelling requirements could be employed to address the proliferation of inauthentic Indigenous-style products. While they would not directly remove inauthentic products from the market, such requirements would increase the information available to consumers to assist them in distinguishing between authentic and inauthentic products. There is limited evidence that some consumers are willing to pay extra for authentic products, and a warning label on inauthentic products would facilitate this choice. There may also be a shift by producers and sellers towards selling authentic products in order to avoid the need (and cost) to comply with labelling requirements.

Options for mandatory labelling of products sold in Australia

One approach would be to require labelling of products sold in Australia, which would provide coverage of Australian produced products, not just imports. This could be implemented through an information standard under the ACL.

Under the ACL (s. 134 (2)) an information standard can be made for either goods or services of a particular kind to:

- (a) make provision in relation to the content of information about goods or services of that kind; or
- (b) require the provision of specified information about goods or services of that kind; or
- (c) provide for the manner or form in which such information is to be provided; or
- (d) provide that such information is not to be provided in a specified manner or form; or
- (e) provide that information of a specified kind is not to be provided about goods or services of that kind; or
- (f) assign a meaning to specified information about goods or services.

The explanatory memorandum for the ACL explained the purpose of information standards:

Information standards are used where the Government considers the characteristics of a good or service are such that the mandated provision of information will facilitate effective trade in that good or service. (Emerson 2010, para. 11.3)

An ‘information standard can be made in relation to any subject matter, and not just with respect to consumer health or safety matters’ (Emerson 2010, para. 11.16). The enforcement powers, remedies and penalties available for failure to comply with an information standard include undertakings, substantiation notices, public warning notices, injunctions, damages, compensatory orders, redress for non-parties, and non-punitive orders. However, the ACCC may not issue infringement notices for contraventions of information standards (Emerson 2010, para. 11.35-11.37).

The information standard arrangements appear to provide relatively broad scope to impose mandatory labelling requirements to improve the provision of information to consumers. Accordingly, there are a number of ways in which a mandatory labelling scheme could be designed. Three alternative approaches are discussed below.

Option 1: Labelling all Aboriginal and Torres Strait Islander art and craft products

One option would be to require all designated products to be labelled with information about whether they are authentic or inauthentic. Two key elements to implementing such a requirement are:

- specifying the coverage of products that would be subject to the labelling requirement
- setting the criteria for products to be classified as authentic or inauthentic.

Getting the coverage of such a scheme right is a critical factor to success — too narrow and the effectiveness of the scheme would be diminished, while broader coverage would increase the administrative and compliance costs of the scheme. However, as discussed in earlier chapters, the nature of inauthentic Indigenous-style products that cause harm and offence to Aboriginal and Torres Strait Islander people is broad. It extends beyond direct copies of authentic artworks or the appropriation of specific designs, motifs and stories, to a broader, more generic form of cultural appropriation where artwork or other products are produced incorporating Indigenous-style designs. To capture all forms of inauthentic products, including generic Indigenous-style or Indigenous-inspired designs, the definition of what is covered by a labelling

scheme would need to be broad. To this end, a definition along the lines of an 'Indigenous Cultural Expression', as proposed in the context of the prohibition proposals discussed earlier, could be a useful starting point. The key objective should be to ensure that any product that a reasonable person could infer as containing an Indigenous Cultural Expression, or a design or style of Aboriginal and Torres Strait Islander origin would be covered by the scheme.

The second element to consider is the definition of what is or is not authentic. A definition of authenticity based on authorship (including co-authorship with non-Indigenous artists) and licensed reproductions as outlined in chapter 4 would be appropriate for this purpose.

Such a definition can be implemented using the existing three part criteria for identifying as an Aboriginal and Torres Strait Islander person. This would not be without issue. As with other approaches that require verifying Indigenous status, some people find these conditions difficult or impossible to meet, while others find it uncomfortable or offensive.

Implementing a requirement to label all products would maximise the information available to consumers. However, by requiring labelling of authentic products it would impose additional compliance burdens on Aboriginal and Torres Strait Islander artists, not just on the producers of the inauthentic products that the measure is intended to address.

Option 2: Labelling of inauthentic products only

An alternative mandatory labelling approach that would impose lower compliance burdens on Aboriginal and Torres Strait Islander artists and producers would be to require labelling of products deemed inauthentic only.

This approach would require the same basic underpinnings as the option of labelling all products in terms of product coverage and authenticity criteria.

However, it would only need to be applied to products containing an Indigenous Cultural Expression (or designs or styles that could reasonably be considered to be of Aboriginal and Torres Strait Islander origin) where they do *not* meet the authenticity criteria. Such a label could be thought of as a 'warning label' to consumers, alerting them that the product they may be considering buying is not authentic.

The lower compliance burdens on Aboriginal and Torres Strait Islander artists are the key advantage of this approach, as there should be no additional obligations imposed on Aboriginal and Torres Strait Islander artists or those producing products under licence from an Aboriginal and Torres Strait Islander artist in most instances. However, there may be some instances where enforcement activity to ensure compliance with the labelling requirements would involve investigation and verification of unlabelled products to determine if they meet the authenticity requirements, which may require people to demonstrate their Aboriginal and Torres Strait Islander status. However, 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.

Mandatory labelling of inauthentic products should also not interfere with any branding or labelling approaches that Aboriginal and Torres Strait Islander artists choose to adopt to market and promote the authenticity of their work (such as individual or art centre branding, Indigenous Art Code certificates of authenticity, QR code labels, or even a potential future CTM scheme).

Option 3: Setting criteria on certain labelling claims

A third, narrower, option could be to reduce the coverage of any labelling requirements to impose conditions only where certain claims are made. This approach would focus on those products where labelling and advertising uses specified words or phrases that could give the impression that the products are authentic; it would not apply to more ambiguous cases, such as where a non-Indigenous producer incorporates Indigenous-style design elements into an artwork or product without making any claim that such design is Aboriginal and Torres Strait Islander in origin. It would also be unlikely to have much effect in raising consumer awareness about the existence of inauthentic products.

An approach along these lines was canvassed in a submission to the 2018 HoRSCIA inquiry by the (then) Department of Communications and the Arts, the Department of the Prime Minister and Cabinet, Treasury, the ACCC and IP Australia (HoRSCIA 2018, sub. 131.1), which noted that a potential longer term policy option was to implement a mandatory information standard under the ACL to define what information could be conveyed about authenticity and what would constitute an authentic product. There were no further details in the submission about how such a proposal would work beyond noting the implementation of the information standard for free range egg labelling in 2017. Despite the lack of clarity about how it would work, the idea was endorsed by HoRSCIA 2018, which recommended that ‘the Australian Government develops an Information Standard for authentic First Nations art in full consultation with First Nations artists and communities and the Indigenous Art Code’ (HoRSCIA 2018c, Recommendation 4).²³

Depending on what was included in the standard, this approach would prohibit sellers from using certain descriptions without meeting the set criteria (such as whether the creator is an Aboriginal and Torres Strait Islander person), or require the use of disclaimers. For example, the standard could say that for a product to be sold as an ‘authentic Aboriginal artwork’, the artist must meet the Indigeneity criteria set out in the standard. Criteria could be extended such that various specified words and phrases could not be used in the marketing or labelling of products without either meeting the authenticity criteria or explicitly stating that the product has not been made by an Aboriginal and Torres Strait Islander person.

This narrow approach could have the advantage of providing greater clarity to market participants about what would be subject to the standard compared with the broader options, where there may be ambiguity about whether or not a product incorporates an Aboriginal and Torres Strait Islander design or style. It would also likely cover the most egregious examples of inauthentic products. This approach could have similarities to the requirements set out under the US Indian Arts and Craft Act of 1990 (box 5.6).

However, such a narrow approach might not materially increase the requirements already imposed by the ACL, which already prohibit express and implied representations that something is authentic where it is not. As such, this type of approach may mainly serve to provide greater clarity to market participants, and greater scope for enforcement of misleading authenticity claims.

²³ In the Government Response, Recommendation 4 was noted, with reference to the QR digital labelling trial (Australian Government 2020, p. 5).

Box 5.6 – The US Indian Arts and Crafts Act

In the United States, the Indian Arts and Crafts Act of 1990 prohibits misrepresentations in marketing Indian arts and crafts. It is unlawful to offer or display for sale or sell any good ‘in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States’.

Violations of the Act can result in civil or criminal penalties (including fines and imprisonment). Under the Act, an Indian is defined as ‘a member of any federally or officially State recognized tribe of the United States, or an individual certified as an Indian artisan by an Indian tribe’ (IACB 2015b).

The Act applies to art and craft products represented as ‘American Indian, Indian, Alaska Native, Native American, or the product of a particular Indian tribe as defined by the Act’. Products produced by non-Indians can be sold with qualifying statements or labelling such as ‘Indian style’ or ‘Indian inspired’. People with Indian heritage who are not members of a recognised tribe or certified by a tribe as being an Indian artisan cannot sell a product as an ‘Indian produced’ or an ‘Indian product’, although they could include in their advertising that they are of Indian descent (IACB 1996).

Coverage of the Act is limited and only applies to art and craft products. The Indian Arts and Crafts Board (IACB), which administers the act states that:

While the IACB is aware of concerns about cultural appropriation, those specific issues fall outside the scope of the Act.

Non-art and craft products, such as literary works, films, audio recordings, mascots, educational workshops, industrial products (T-shirts, cook books, etc.), are also outside the scope of the Act. (IACB 2015a)

Scope for increased import labelling requirements of arts and crafts

Another option would be to restrict increased labelling requirements to imported products. At a minimum, the coverage of products subject to country of origin import labelling could be expanded. But such a change would not distinguish between licensed and inauthentic merchandise, so is unlikely to increase the capacity of consumers to distinguish between authentic and inauthentic products substantially.

To be more useful to consumers, import labelling requirements would need to distinguish between inauthentic and authentic (licensed) products. However, such a system would be more onerous to implement, both in terms of administration of the requirements to ensure products comply with the rules, and the compliance burdens imposed on importers to meet them. Its coverage of the market would be partial, as Australian-made products would not be included. The benefits from such an approach are uncertain, given that labelling to meet import requirements does not guarantee that those labels will still be present on the products when sold to consumers.

How do these options compare?

There is a variety of ways in which labelling requirements could be mandated — table 5.1 summarises the key characteristics of the options discussed above. A labelling regime that applies to products sold in Australia, such as one implemented through information standards under the ACL, offers the clear benefit that it would apply to all designated products sold in Australia, not just imports. And restricting the obligation

to label only inauthentic products, akin to a warning label, offers the further benefit that it would minimise the compliance burdens on Aboriginal and Torres Strait Islander artists and producers.

Table 5.1 – Comparing mandatory labelling options

	Labelling all products	Labelling inauthentic products	Setting labelling criteria	Import labelling
What is it?	Label all specified products as authentic or inauthentic.	Only label inauthentic products.	Set criteria that must be met to use specified words or phrases on labels (such as authentic).	Require country of origin or authentic / inauthentic labelling of imported products.
Product coverage	Applies to all authentic and inauthentic Aboriginal and Torres Strait Islander arts and crafts.	Applies to all inauthentic Indigenous-style products.	Applies to products that make certain claims of authenticity.	Applies to imported products only.
Expected effects	Provide greater clarity to consumers about products' authenticity.	Provide greater clarity to consumers about products' authenticity.	Could reduce misleading claims that suggest a product is authentic.	Could provide greater clarity to consumers about imported products' authenticity.
Compliance costs on Aboriginal and Torres Strait Islander artists	Require artists to verify Indigeneity and label products.	No action generally required. May require artists to verify Indigeneity if challenged.	No action generally required. May require artists to verify Indigeneity if challenged.	May require artists to verify Indigeneity to license overseas manufacturing.
Compliance costs on producers of inauthentic Indigenous-style products	Require labelling of products as not being created by an Aboriginal and Torres Strait Islander person.	Require labelling of products as not being created by an Aboriginal and Torres Strait Islander person.	Prevented from using specified phrases that suggest product is authentic.	Require labelling of imported products as not being created by an Aboriginal and Torres Strait Islander person.
Enforcement issues and limitations	Non-compliance may be difficult to detect and dependent on complaints.	Non-compliance may be difficult to detect and dependent on complaints.	Non-compliance might be more clear-cut than relying on misleading and deceptive conduct provisions of the ACL.	Require monitoring and enforcement at the border. Products labelled for import may not be still labelled when sold to final consumers.



Draft Finding 5.5

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.

5.6 The Commission's proposed approach

The Commission considers that a mandatory labelling scheme for inauthentic products is the most promising option for addressing the prevalence of inauthentic Indigenous-style products.

As with voluntary authentic product labelling schemes, mandatory inauthentic labelling would allow consumers to better distinguish between authentic and inauthentic products, but offer the distinct advantage of broader coverage, given it is highly unlikely that all producers of authentic products would sign up to voluntary labelling schemes. A well-designed mandatory labelling scheme for inauthentic products would also have lower burdens on Aboriginal and Torres Strait Islander artists compared with relying on voluntary schemes to demonstrate authenticity.

Mandatory labelling of inauthentic products also offers some advantages compared with a prohibition or ban on the sale of specified inauthentic products. Both of these options are relatively complex to implement and face many of the same challenges, particularly with respect to how product coverage and authenticity criteria are defined. Where they differ is in their effects on market participants, including the potential unintended impacts of a product ban on Aboriginal and Torres Strait Islander artists. Key features of these two approaches are summarised in table 5.2.

On balance, the Commission considers that a mandatory labelling scheme for inauthentic products is preferable to a ban. It may not be as effective in reducing trade in inauthentic products (and the associated cultural harms), but it would help ensure that consumers are informed about the inauthenticity at the point of sale, while not restricting consumer choice. It also carries a lower risk of errors and unintended costs and consequences, including for Aboriginal and Torres Strait Islander artists. This means it should be possible pursue a broad coverage of products, acknowledging this will create some uncertainty for producers.

Accordingly, the Commission's draft recommendation is that the Australian Government should develop a mandatory information standard to require the labelling of inauthentic Indigenous-style products. While such an initiative will only partly address the factors that make it difficult for Aboriginal and Torres Strait Islander people to maximise the benefits they derive from the markets for visual arts and crafts, it would complement other initiatives, including a potential legal framework that explicitly recognises and protects cultural assets that would enable Aboriginal and Torres Strait Islander people and communities to have greater control over the use of cultural expressions in visual arts and crafts (chapter 7).

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

	A product ban	Labelling inauthentic products
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.
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.
Authenticity criteria	Authorship (creation) by an Aboriginal and Torres Strait Islander person.	As per ban.
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.
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.
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.
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.
Enforcement and compliance issues	Difficulties will arise at the margins, either where it is not clear if a product is covered or not, or where the Indigeneity of the creator is difficult to verify. May not neatly fit into ACL and require separate legislation.	As per product ban. However, inadvertent non-compliance can potentially be addressed less onerously by retrospective labelling (rather than be withdrawn from sale under a ban). Utilise existing provisions of the ACL.



Draft Recommendation 5.1

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.

But there are further considerations in designing a mandatory labelling scheme for inauthentic products

The implementation of labelling requirements under an information standard raises many practical questions, which will need to be resolved with Aboriginal and Torres Strait Islander people. In particular, there are questions to consider about both the coverage of products and the authenticity criteria that would be required to implement a labelling standard for inauthentic products. There are also questions about the design of any labelling requirement and how it would be implemented. These are summarised in table 5.3 and discussed further below. The Commission invites views and feedback about these issues.

Considerations about product coverage

One of the key issues in designing a regulatory response to address the issue of inauthentic Indigenous-style products is defining the coverage of products that would fall under the scheme. This is difficult because Aboriginal and Torres Strait Islander cultural expressions, designs and styles are both diverse and evolving. Some expressions are widely seen as being distinctively of Aboriginal and Torres Strait Islander in origin, while other expressions will be less widely recognised and/or superficially similar to non-Indigenous designs and styles. For example, a decorated boomerang may be readily seen as of Aboriginal and Torres Strait Islander origin or style, but designs incorporated into artworks or other products such as homewares or clothes may be less apparent, or more contestable.

To achieve the intent of the scheme, coverage needs to be set broadly, despite the fact that this will create uncertainty and ambiguity at the margins. Accordingly, coverage could be defined along the lines of ‘any product that a reasonable person might consider as containing an Indigenous Cultural Expression, or to be of Aboriginal and Torres Strait Islander origin or style’.

One option to improve certainty could be a hybrid approach where coverage included both a specific list of products (for example, boomerangs and specific motifs or designs) as well as any other items that a reasonable person might consider to incorporate an Aboriginal and Torres Strait Islander design or style.

Another issue to consider is the types of transactions covered by an information standard. Under the ACL, the labelling requirements are limited to items that are sold or ‘supplied’ in Australia. This means there would be a number of gaps, including: overseas transactions; non-commercial transactions (such as amateur artworks); and the use of inauthentic designs in publications or advertising.

Table 5.3 – Considerations for a mandatory labelling scheme for inauthentic products

Product Coverage	Suggested approach	Limitations and questions to consider
	• The scheme should cover any product offered for sale in Australia that includes an expression or design (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product) that a reasonable person could consider as being an Indigenous Cultural Expression, or of Aboriginal and Torres Strait Islander origin or style. • It would potentially cover: arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise containing Aboriginal and Torres Strait Islander designs and expressions; and digital artworks and designs.	• The intent of the scheme is to provide broad coverage of Indigenous-style products. It would be insufficient to limit the coverage to a specific list of artefacts or designs, even though it would create some ambiguity at the margins about whether a product is subject to the standard. • One option to improve certainty could be a hybrid approach that also included a specific list of products subject to the standard. What are the pros and cons of different approaches to defining the coverage of the scheme? • There would also be gaps, including overseas transactions; non-commercial transactions and the use of inauthentic designs in publications or advertising. Can or should these be addressed?
Authenticity Criteria	Suggested approach	Limitations and questions to consider
	• Authenticity in this context refers to authorship (creation) by an Aboriginal and Torres Strait Islander person (and would include products produced by third parties under a licensing agreement with the Aboriginal and Torres Strait Islander author/creator and collaborations with non-Indigenous people). • The Indigeneity criteria should be the three-part test (descent, self-identification and acceptance) already in use.	• While cultural permissions are important, this issue is outside the suggested scope of this initiative. • Similarly, this initiative would not address ethical concerns about the commercial arrangements between Aboriginal and Torres Strait Islander artists and other market participants. • Is this suggested approach to authenticity appropriate or are there other alternatives?
Design and Implementation	Suggested approach	Limitations and questions to consider
	• Suppliers of designated products that do not meet the authenticity criteria must label those products indicating that the product has not been produced by or under licence from an Aboriginal and Torres Strait Islander person. • Labelling should be clear and obvious to consumers — attached to products where practicable or prominently included in product signage or descriptions. • To facilitate implementation of the labelling standard the following will likely be required: – awareness measures to inform suppliers – a transition period for suppliers – complementary awareness measures for consumers – resourcing for monitoring and enforcing compliance.	• How prescriptive should labelling requirements be? That is, should there be specific requirements on label contents or is a more flexible approach sufficient? • What awareness measures and transition arrangements would be most beneficial? • What education and awareness-raising measures would best support consumer decision making? Should specific measures be tailored to international tourists? • What resources are required for administration and enforcing compliance? What evidence of compliance would suppliers of unlabelled products need to verify Aboriginal and Torres Strait Islander authorship? Are the existing enforcement tools for information standards sufficient?

Considerations about authenticity criteria

The definition of authenticity suggested here, which centres on authorship, including co-authorship, of original arts and crafts, as well as manufactured products made under a licensing agreement, appears to be the most suitable approach for a mandatory labelling scheme.

A possible practical question is how proof of Indigeneity for the purposes of the standard should be defined. A three part definition already used by the Australian Government in other contexts is that an Aboriginal and Torres Strait Islander person is someone:

- of Aboriginal and/or Torres Strait Islander descent
- who identifies as an Aboriginal and Torres Strait Islander person, and
- who is accepted as such by the community in which they live, or previously lived.

Such a definition would support the integrity of the scheme. Study participants also submitted that this definition would be best suited to demonstrating authenticity:

At present the three-part definition (descent, self-identification and community recognition) would be the best working definition for determining authenticity of an Aboriginal artist ... Artists identifying as Aboriginal should be able to demonstrate that they can meet the three part test and produce evidence to support that ... (ARAA, sub. 8, p. 4)

However, some say that this definition sets a relatively high bar for someone to demonstrate that they are an Aboriginal and Torres Strait Islander person, which may adversely affect people that are unable or unwilling to demonstrate these criteria. Some participants also expressed concern about external parties or forces imposing on First Nations communities what it means to be Aboriginal in satisfying authenticity.

The classification and therefore definition of Indigenous Art hinges on 'authenticity' where only true Indigenous communities are believed to be able to create art directly linked to traditional cultural expression. However, this idea is deeply problematic to Indigenous people because 'authenticity' is imposed and/or decided by outside market forces for the art and these do not correspond neatly to the production of Indigenous art throughout the network of Indigenous art centres. Indigenous communities do not want what it means to be Aboriginal imposed. (Callanan, sub. 5, pp. 63–64)

While there is no consensus on exactly who should determine whether Aboriginal and Torres Strait Islander authorship is satisfied, a definition of Aboriginal and Torres Strait Islander authorship is required and the existing three part definition appears the most practicable.

This authenticity definition has limitations. It is not well suited to dealing with the issue of cultural permissions, as these are not included in the definition. While these are important, addressing them in this initiative would substantially increase the complexity of the scheme. It is also not necessary in order to address the issue of products wholly designed and produced by non-Indigenous people. Similarly, this initiative would not address concerns about unethical commercial arrangements between Aboriginal and Torres Strait Islander artists and other market participants. These issues would seem to be best addressed through other mechanisms (chapters 7 and 10).

Further considerations about how the label should be implemented

There are also further design considerations about how a mandatory labelling scheme for inauthentic products might operate.

One issue is what should the label say and how prescriptive it should be. Presuming that the standard is restricted to a limited definition of authenticity, it is likely that the label would need to state that 'this product

has not been produced by or with the involvement of an Aboriginal and Torres Strait Islander person', not that a product is 'inauthentic'. An open question is whether the label should require specific phrasing, or whether any other form of words that clearly conveyed this meaning would suffice.

Another issue to consider is what the requirements for applying the label should be. For instance, should it be necessary to individually label each item or sufficient to include the information in product signage or online product descriptions, or even as a broader disclaimer that products offered by the seller may not be authentic? Providing information on each product may be desirable, but not always feasible.

To facilitate the implementation of the labelling standard, some supporting arrangements will be required.

Suppliers of inauthentic products would need to be informed about their obligations and given sufficient time to comply with the new labelling obligations, either through a delayed implementation date, a staged introduction starting with a subset of products, or an initial period where no enforcement action is taken. While all these options would provide time for suppliers to adjust (either by implementing labelling or changing their product mix), an approach such as an enforcement free period would provide additional opportunities to iron out any deficiencies in the practical operation of the scheme.

Another issue to consider is how awareness measures for consumers could best complement the labelling requirements. There are already consumer education resources and the Australian Government has committed to a new awareness strategy. Ideally these measures would also inform consumers about the labelling requirements.

Finally, there are issues of administration and compliance, including what resources might be required to administer and enforce the labelling standard. Related questions include what evidence of compliance suppliers of unlabelled products would need to verify Aboriginal and Torres Strait Islander authorship, and whether the existing enforcement tools for information standards are well suited to addressing non-compliance.



Information request 5.1

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?

6. Indigenous Cultural and Intellectual Property in visual arts and crafts

Key points

- * Indigenous Cultural and Intellectual Property (ICIP) refers to all dimensions of Indigenous heritage and culture, from languages and performances to traditional scientific and ecological knowledge. Aboriginal and Torres Strait Islander visual arts and crafts are often expressions of culture and as such, incorporate ICIP.
- * Aboriginal and Torres Strait Islander ICIP is unique to Australia and is integral to the cultural and social identities of many Aboriginal and Torres Strait Islander people. However, in the markets for Aboriginal and Torres Strait Islander visual arts and crafts, there are many instances where ICIP is used without the permission of traditional owners and in ways that cause cultural and economic harm and undermine traditional laws and customs. As a result, the value of ICIP risks being diluted.
- * Current laws provide some protections in relation to ICIP expressed in Aboriginal and Torres Strait Islander visual arts and crafts but the protection is patchy and incidental.
 - Opt-in obligations such as contractual agreements can help to ensure that ICIP is used in a respectful way that accords with customary use. In the absence of these arrangements, existing laws do not enable Aboriginal and Torres Strait Islander people and communities to control and protect their ICIP directly. This means that ICIP is often used out of context, without the consent of and without benefits flowing back to Aboriginal and Torres Strait Islander people and communities.
- * Amendments to existing legislation could result in improved protection of ICIP in visual arts and crafts but gaps would remain.
 - Such amendments could widen the scope of existing laws to better protect some aspects of ICIP in visual arts and crafts. But there are limits to what could be achieved, given that amendments would need to be pigeon-holed into the frameworks and objectives of existing laws (for example, intellectual property laws are largely focused on protecting novel ideas while ICIP is often passed down through generations).
- * Dedicated legislation has the potential to provide stronger, more fit-for-purpose protection for ICIP in visual arts and crafts. Introducing such legislation would directly guard against certain aspects of ICIP being misappropriated in visual arts and crafts and explicitly recognise the value of this ICIP.

Aboriginal and Torres Strait Islander visual arts and crafts often incorporate expressions of culture, containing traditional stories, symbols and motifs or made in a style that is passed down in cultural practice. Arts and crafts are an important way for Aboriginal and Torres Strait Islander people to document and tell stories, maintain and share culture and promote an understanding of history and connection to Country (Australian Government 2021, p. 3). However, cultural expressions are frequently used out of context, without consent and without benefits flowing back to Aboriginal and Torres Strait Islander people and communities (chapter 4).

While some protection is provided by existing laws, Aboriginal and Torres Strait Islander people are often unable to prevent the unauthorised use of traditional cultural expressions — a form of Indigenous Cultural and Intellectual Property (ICIP) — in visual arts and crafts.

This chapter considers what ICIP encompasses, its value and how ICIP relates to visual arts and crafts (section 6.1). It discusses the current legal protections afforded to ICIP in visual arts and crafts and the limitations of those protections (section 6.2). Finally, it considers options available to address those limitations, including amendments to existing laws and dedicated protections for the ICIP used in visual arts and crafts (section 6.3).

6.1 What is ICIP?

ICIP is a term used to encompass all dimensions of Indigenous heritage and culture, from languages and performances to traditional scientific and ecologic knowledge (figure 6.1). The broad coverage of this term reflects Aboriginal and Torres Strait Islander people's view that the world is an integrated whole (Janke and Frankel 1998, p. 2).

'Heritage' includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships — through sharing — with other peoples. All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned. (Daes 1993, p. 39).

In line with the House of Representatives inquiry report that was the genesis of this study (HoRSCIA 2018c), this report uses ICIP to refer to all dimensions of Aboriginal and Torres Strait Islander heritage and cultures.

Other terms are used interchangeably to describe the culture and heritage of First Nations²⁴ people. For example, IP Australia uses Indigenous Knowledge to refer to a wide range of Aboriginal and Torres Strait Islander cultural knowledge including techniques, know-how practices and scientific, medicinal and environmental knowledge, as well as cultural expressions such as language, art, dance, stories, songs and crafts (IP Australia, sub. 27, p. 2).

Other terms commonly used to identify specific types of ICIP include Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs). There are no set, universally accepted definitions for these terms but the World Intellectual Property Organisation (WIPO) provides the following explanations:

- TK refers to knowledge resulting from intellectual activity in a traditional context and includes know-how, practices, skills and innovations (WIPO 2017b).
- TCEs may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions (WIPO 2017a).

²⁴ For this study, the term 'First Nations' is used to describe the First Peoples of all countries collectively.

Figure 6.1 – The many dimensions of ICIP

This is one categorisation of the various types of ICIP



Source: Adapted from Terri Janke and Company (2019, p. 6).

Even though the word ‘traditional’ is used to describe these concepts, this does not mean that they are static or unchanging. Rather, they are continually used and built upon, as part of the living heritage of First Nations people.

ICIP has intrinsic value to Aboriginal and Torres Strait Islander people and the nation

ICIP is a unique asset that forms an important part of Australia’s national identity.

For Aboriginal and Torres Strait Islander people, ICIP is integral to their cultural and social identities (chapter 2). It has a functional purpose for Aboriginal and Torres Strait Islander communities in ‘transmitting and thereby preserving laws, history, culture and customs through the generations’ (Steele 2021, p. 3).

ICIP is the heart of Indigenous identity. It connects Indigenous people to each other, and to the lands and seas that they have lived in, and around, for over 65,000 years. The many different Aboriginal and Torres Strait Islander clans and communities had developed complex systems of understanding and passing on their intangible heritage assets. (Janke 2019, p. 2)

Aboriginal and Torres Strait Islander cultures are also of substantial value not only to Aboriginal and Torres Strait Islander people but the broader Australian community. Over time, community recognition of Aboriginal and Torres Strait Islander cultures has risen — in 2020, over 80% of Australians agreed that Aboriginal and

Torres Strait Islander cultures are important to Australia's national identity and that it is important for Indigenous histories and cultures to be taught in schools as part of the national curriculum (Reconciliation Australia and Polity Pty Ltd 2020, p. 148). This community sentiment is also echoed in the way governments regard Aboriginal and Torres Strait Islander cultures and in particular, visual arts and crafts (box 6.1).

Box 6.1 – Governmental recognition of value of Aboriginal and Torres Strait Islander visual arts and crafts

Aboriginal and Torres Strait Islander visual arts and crafts are an important part of Australia's identity. This is a view that is commonly expressed, including by the Australian Government.

Aboriginal and Torres Strait Islander art enriches the cultural and economic life of Australia and is recognised around the world for its vibrant creativity. It is vitally important that this expression of culture and art continues to thrive for future generations. (2021, p. 1)

The Government recognises the importance of keeping Aboriginal and Torres Strait Islander languages and cultures strong by enabling and supporting Aboriginal and Torres Strait Islander peoples to continue to maintain, safeguard, manage, control and develop their Traditional Cultural Expressions. (2013, p. 12)

Indeed, the terms of reference for this study noted:

The Australian Government recognises that art is an important way for Aboriginal and Torres Strait Islander peoples to tell stories, share and strengthen cultures and connection to Country, promote understanding of history, strengthen communities, and expand economic opportunities. Aboriginal and Torres Strait Islander art is a vital part of Australia's identity and makes a large contribution to the economy.

In submissions to this study, the Northern Territory Government, South Australian Government and Arts Queensland (Queensland Government Department of Communities, Housing and Digital Economy) expressed similar sentiments:

The [NT] Government recognises the significance of Aboriginal and Torres Strait Islander arts and craft to the economy and as an expression of an authentic living culture that is integral to Australia's history, identity and future. (NT Government, sub. 28, p. 6)

Aboriginal and Torres Strait Islander visual arts and crafts have immense value at many levels ... South Australia is justly proud of our Aboriginal and Torres Strait Islander visual artists, organisations and art centres and their achievements. (SA Government, sub. 21, p. 1)

Aboriginal and Torres Strait Islander arts are an intrinsic part of Queensland's culture and identity ... (Arts Queensland, sub. 33, p. 1)

The importance of ICIP to Australia as a whole is reflected in the way Australia identifies on the world stage, from sporting events to cultural institutions (chapter 2). It is further evidenced by the significant role that Aboriginal and Torres Strait Islander cultures play in Australia's tourism industry (chapter 3).

We don't have Egyptian pyramids or Roman ruins or ancient writings to illuminate and explain that [Aboriginal and Torres Strait Islander] culture – instead we have the stories as expressed in ancient rock art interpreted by its living ATSI custodians and as expressed in the contemporary art

of our ATSI peoples. Yet instead of treating this with the reverence accorded by other countries to their cultural monuments and records, our laws allow it to be diminished and diluted ... (Everard, HoRSCIA 2018 sub. 83, p. 2)

Visual arts and crafts often incorporate ICIP

Many participants in this study (and previous inquiries and reviews) have spoken about the significant role that visual arts and crafts play in transmitting Aboriginal and Torres Strait Islander cultures (box 2.1). Artworks and crafts made by Aboriginal and Torres Strait Islander people are often tangible manifestations of ICIP and serve a much broader purpose than creative expression.

The nexus between cultural expression, land, heritage and spirituality serves as the foundation of the practice and creation of Aboriginal cultural expression or art ... Obligations exist to protect the ancestral and land relationships, including the ongoing transmission of cultural knowledge through cultural expression. (Parkin 2020, p. 125)

These works are used as ‘vehicle[s] to transmit knowledge, culture and stories’ (Parkin 2020, p. 9) and the use of the ICIP in these works is governed in accordance with strict customary laws:

Aboriginal artists paint according to strict traditional rules of ownership. They are authorized to paint only certain stories and even though there is room for individual creativity, certain subjects must be portrayed in particular ways according to Aboriginal customary law ... Ownership of certain works may vest in a particular clan member, or members, whilst the rights to use the work may vest in various other members for various purposes. (Puri 1997, p. 11)



Draft Finding 6.1

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.

Why protect ICIP in visual arts and crafts?

For thousands of years, Aboriginal and Torres Strait Islander people and communities have developed and enforced customary laws designed to protect and preserve their ICIP, including when expressed in visual arts and crafts. Such laws impose limitations on the ways in which ICIP can be used and designate authorisation processes for its use. For example, certain knowledge may need to be kept secret or is only able to be used by certain members of a group (Janke 2019, p. 11).

As the market for Aboriginal and Torres Strait Islander visual arts and crafts has expanded, ICIP has increasingly been used without the permission of traditional owners and in ways that are inconsistent with traditional laws and customs (chapter 4). Such uses of ICIP could be viewed as a process of artistic innovation. But from the viewpoint of traditional owners they often constitute misappropriation. This not only

denies Aboriginal and Torres Strait Islander people the ability to gain economic benefits from the use of their ICIP but can cause offence and erosion of community identity (chapter 4). For example, in *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] FCA 1082, the following evidence was given:

Unauthorised reproduction of 'at the Waterhole' threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual, and threaten our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations.

The continued production of artworks and merchandise that misappropriate ICIP results in inaccurate depictions of Aboriginal and Torres Strait Islander cultures. Study participants expressed deep concern about the unauthorised and inappropriate use of ICIP in visual arts and crafts because it disrespects and cheapens Aboriginal and Torres Strait Islander cultures (Callanan, sub. 5, p. 16; ARAA, sub. 8, p. 5; Arts Law, Copyright Agency, IartC, sub. 31, p. 28). Such depictions erode the economic benefits that Aboriginal and Torres Strait Islander people can derive from this ICIP and — over time — dilute Aboriginal and Torres Strait Islander cultures, which has implications beyond Aboriginal and Torres Strait Islander people and communities.

Indeed, the stories, customs, knowledges and symbols of the world's oldest living continuous culture are irreplaceable; conduct that dilutes or damages this ICIP must be viewed in the context of what is at stake for Aboriginal and Torres Strait Islander people and cultures, the broader community and for Australia's national identity. Australia's legal and cultural institutions are uniquely placed to help to protect the integrity of these cultures, which will have benefits in Australia and beyond.

For Aboriginal and Torres Strait Islander people, there is a balance between protecting ICIP and sharing it with non-Indigenous people:

Whilst wanting to protect ourselves and our art and culture for future generations, at the same time we are eager for all the world to witness the beauty and strength of our culture as expressed by our artists. To retain a jealous hold on our cultural heritage is not our desire, but we must realise our responsibility to safeguard this heritage and to ensure that Aboriginals at last achieve the recognition that is universally attributed to all artists. (Wandjuk Marika, quoted in Arts Law, Copyright Agency, IartC, sub. 31, p. 30)

Striking this balance requires fit-for-purpose protections for ICIP. Such protections would enable Aboriginal and Torres Strait Islander people to reap gains from the use of ICIP and help ensure that those who use ICIP in visual arts and crafts do so in a way that is respectful of Aboriginal and Torres Strait Islander peoples' customs and laws. This would help preserve the integrity of Aboriginal and Torres Strait Islander cultures and discourage misappropriation without stymieing wider artistic innovation, collaborations and knowledge exchange.

The following section examines existing legal protections for ICIP in visual arts and crafts, and the extent to which they can be used to preserve Aboriginal and Torres Strait Islander cultures and minimise misappropriation, while also enabling artistic innovation.

6.2 What is the current state of play?

An international perspective

There appears to be a broad consensus in international forums that specific protections for cultural expressions in arts and crafts are necessary (box 6.2). However, these instruments are non-binding and implementation at a national level has not been widespread.²⁵

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes an important standard for behaviour towards First Nations peoples and represents the commitment of the Member States to 'move in certain directions, abiding by certain principles' (UN 2007). Australia formally adopted UNDRIP in 2009 and in international forums, Australia has committed to taking actions to implement the Declaration (Macklin 2009).

In Australia's response to the Universal Periodic Reviews²⁶ in 2011 and 2016, the Australian Government supported the promotion of and respect for the principles in the Declaration (Australian Government 2012, p. 7, 2016, p. 4). The Australian Government stated 'Australia aims to ensure that laws and practical actions give effect to the aims of the Declaration' (Australian Government 2016, p. 4).

Although proactive implementation of UNDRIP has been lacking, some of Australia's policy initiatives are aligned with certain principles outlined in the declaration (Delaney, Maguire and McGaughey 2020, p. 369). In 2017, the then Minister for Indigenous Affairs stated:

Australia's Indigenous Affairs agenda is consistent with the Declaration. From efforts to repatriate ancestral remains, supporting the maintenance of language and culture and recognising and respecting the ongoing connection between Aboriginal and Torres Strait Islander peoples to land. (Scullion 2017)

Despite this, current Australian legislation does not specifically recognise the principles in UNDRIP that relate to manifestations of culture in visual arts and crafts (box 2.2). In particular, effective measures to recognise and protect rights to maintain, control, protect and develop traditional cultural expressions and their associated intellectual property (UNDRIP, article 31) are not explicitly reflected in national legislation.

²⁵ International instruments also recognise the importance of protecting other aspects of ICIP. For example, the Convention on Biological Diversity recognises the importance of protecting genetic resources. Australia is a party to the Convention but has not ratified the supplementary Nagoya Protocol which sets out obligations around the use of traditional knowledge (Department of Agriculture Water and the Environment nd). Similarly, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003) provides guidelines for protecting intangible cultural knowledge. Australia is not currently a party to this Convention (UNESCO 2020).

²⁶ The Universal Periodic Review is a United Nations (UN) Human Rights Council peer-review process, where the human rights record of each UN Member State is considered every five years.

Box 6.2 – International instruments recognise the importance of ICIP

Some international instruments have recognised the importance of protecting ICIP in visual arts and crafts. These include:

Berne Convention for the Protection of Literary and Artistic Works (1886)

This convention provides an international standard for protection of artworks and literature. It was revised in 1971 to include a provision that allows countries to designate a specific authority for the protection of national ‘folklore’²⁷ (WIPO 1978, p. 95). However, the Convention does not require the protection of ‘folklore’ as a minimum standard of protection. Rather, it provides an optional provision for inclusion if desired (Phillips 2009, p. 559).

Tunis Model Law on Copyright for Developing Countries (1976)

This model law expands protections for ‘folklore’ by exempting the works from typical copyright requirements. For example, fixation (material form) is not required and ‘folklore’ is defined to include works by authors or communities, circumventing the need for an identifiable author (Phillips 2009, p. 559).

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985)

The World Intellectual Property Organisation (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) formulated draft model provisions for the protection of expressions of folklore. The model provisions provide that certain uses of expressions of folklore are subject to prior authorisation (WIPO 1985).

United Nations Declaration on the Rights of Indigenous Peoples (2007)

The United Nations Declaration on the Rights of Indigenous Peoples establishes a universal framework of minimum standards for the rights of Indigenous people of the world (United Nations 2007). Among the provisions in the Declaration, the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions is recognised (box 2.2).

Australia is also a member of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (box 6.3). The Intergovernmental Committee (IGC) provides a forum where Member States discuss intellectual property issues, with the objective of reaching agreement on an international legal instrument to ensure ‘effective protection of genetic resources, traditional knowledge and traditional cultural expressions’ (WIPO 2016, p. 1).

While progress to date has been slow, the WIPO IGC has now developed draft provisions for consideration. These include:

- draft articles for the protection of traditional cultural expressions/expressions of folklore
- draft articles for the protection of traditional knowledge
- a consolidated document relating to intellectual property and genetic resources.

²⁷ The term folklore is used here to reflect the language used in the international space at that time. Aboriginal and Torres Strait Islander people do not endorse the use of the term folklore to reflect their cultures (Janke and Frankel 1998, p. 10).

Box 6.3 – Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is the international forum where international instruments for the protection of ICIP are being discussed. Participation is open to all 193 WIPO Member States (WIPO 2014). The mandate of the IGC is to reach an agreement on:

an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources ... traditional knowledge ... and traditional cultural expressions ... (Assemblies of the Member States of WIPO 2021)

The IGC commenced its initial discussions in 2001 and started formal negotiations in 2010. Progress on developing model laws has been slow. Some previously scheduled meetings were postponed due to the COVID-19 pandemic. The IGC's Indigenous Caucus supported the delay, but noted that:

... the pandemic has not interrupted the misappropriation and exploitation of TK, TCEs, and GRs without the free, prior, and informed consent of the Indigenous Peoples who are the rights holders and guardians of these vital aspects of their cultural heritage. ... The need to conclude these negotiations and produce legal instruments that will protect the rights of Indigenous Peoples' remains urgent. (WIPO 2021, p. 1)

Since August 2021, IGC meetings have been held in a hybrid format with participants attending both in person and virtually. Over 95 Member States attended the meeting held in February/March 2022. Its focus was largely on genetic resources.

These draft articles represent a key step towards the development of an international instrument; however, some core issues remain unresolved. For example, in the draft articles for the protection of traditional cultural expressions (which is most relevant for protection of visual arts and crafts), definitions of traditional cultural expressions, relevant beneficiaries and objectives are yet to be agreed upon by all negotiators (WIPO 2019b). One participant, commenting on the progress at an international level, said:

The failure, after 20 years of negotiations, to settle even the core issues for a draft text, suggests that a treaty to protect TCEs is likely to remain elusive. (Blakeney, sub. 32, p. 2)

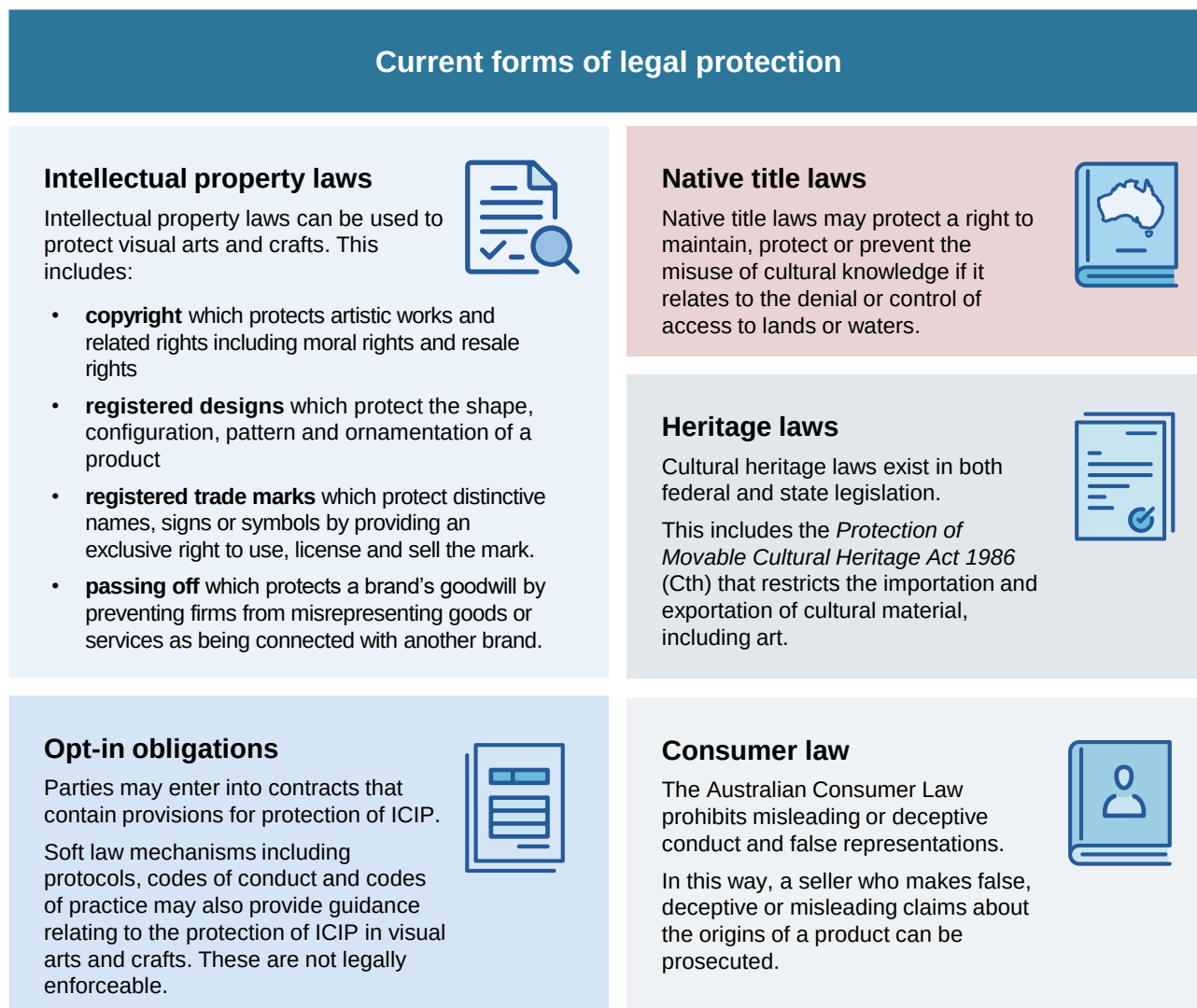
Australia's legal framework

Australia's current legal framework does not explicitly recognise or protect ICIP. But existing legal mechanisms and obligations can be used to protect some aspects of ICIP contained in visual arts and crafts and safeguard cultural authorisation processes (figure 6.2).

This section examines how effective those laws and obligations are in providing protections for tangible expressions of ICIP in visual arts and crafts. One emerging theme is that, because existing laws are not designed for the specific purpose of protecting ICIP, protection is only available incidentally, where the misuse of ICIP coincides with other causes of action. As such, existing laws provide limited and piecemeal coverage to address the misuse of ICIP in visual arts and crafts markets (Whinn, sub. 22, p. 2).

Figure 6.2 – Existing legal instruments provide some protection

The instruments provide varying degrees of coverage for ICIP in visual arts and crafts



Sources: *Copyright Act 1968* (Cth); *Trade Marks Act 1995* (Cth); *Designs Act 2003* (Cth); *Native Title Act 1993* (Cth); *Protection of Movable Cultural Heritage Act 1986* (Cth); *Competition and Consumer Act 2010* (Cth), Schedule 2; Australian Copyright Council (2019); IP Australia (2019a, 2019b, 2020c); Sentina et al. (2017); Stratton et al. (2019).

Intellectual property laws

Copyright

The *Copyright Act 1968* (Cth) provides economic and moral rights to authors and creators of original artistic, dramatic and literary works and publications (box 6.4). These laws apply to Aboriginal and Torres Strait Islander visual arts and crafts in the same way as they apply to other artistic works.

Where copyright subsists in an original artwork or craft created by an Aboriginal and Torres Strait Islander artist, the creator will have exclusive rights in relation to the work. This allows the creator to exclusively reproduce, publish, and communicate the work to the public for a specified period of time. Creators of copyright works are able to pursue those who have engaged in unauthorised reproduction, publication or communication of that artwork or craft under the Copyright Act. A copyright owner can also give permission

to someone to use their copyright material (a licence) or transfer the ownership of the material to someone else (an assignment) (Copyright Act, s. 196).

The importance of copyright to the ecosystem in which First Nations artists work is demonstrated by the reliance on copyright to license and transact their work including through organisations including the Copyright Agency. (Australian Copyright Council, sub. 14, p. 3)

Box 6.4 – Copyright protection

The *Copyright Act 1968* (Cth) provides a range of exclusive rights to authors and creators of original expressions to protect their works. In order for copyright to subsist, the work must be:

- original
- recorded in a material form
- attributable to an author or creator.

Copyright exists automatically from the moment the work is recorded in a material form. There is no requirement for registration. Copyright generally lasts for the life of the creator plus 70 years or where duration is dependent on the year of publication, it lasts until 70 years after it is first published.

Infringement of copyright will occur where copyright material is used in a way that is exclusively reserved to the copyright owner without permission, and a specific defence does not apply.

Defences to a claim of copyright infringement include fair dealing for research and study, criticism or review, parody or satire, news reporting, giving professional advice or in a judicial proceeding, or where an artistic work is displayed in a public place.

Where copyright infringement occurs, typical remedies awarded include injunctions, account of profits, damages and delivery up for destruction.

Sources: *Copyright Act 1968* (Cth), Part III; Australian Copyright Council (2017, 2019).

Individual creators also have moral rights under the Copyright Act, whether or not they own the copyright in the works produced. These rights arise automatically and cannot be transferred, assigned or sold. Like copyright, moral rights in artistic works exist for the life of the creator plus 70 years. These moral rights include the right:

- to be attributed as the creator of the work (s. 193)
- not to have the work falsely attributed as someone else's work (s. 195AC)
- not to have the work treated in a derogatory way (s. 195AI).

Copyright laws provide legal remedies where there have been acts of clear copyright infringement of Aboriginal and Torres Strait Islander visual arts and crafts. There have been successful court cases under the Copyright Act involving this type of infringement.²⁸ One of the most significant cases is the *Carpets Case* (box 6.5) where record damages were awarded to wronged artists. For the first time, in the awarding of damages, the court recognised and took into account cultural harm and offence caused by unauthorised copying of Aboriginal art to the individual artist, their community and culture (Martin 1995, p. 592).

²⁸ For example, *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] FCA 1082.

Box 6.5 – The Carpets Case^a

This 1994 Federal Court decision involved the application of copyright law in Australia where the works of Aboriginal artists had been reproduced on carpets without permission.

A company, Indofurn Pty Ltd, had imported a number of carpets that featured Aboriginal artistic designs into Australia and then sold them. The artists (three living and the estates of five deceased artists) claimed that the designs on the carpets were substantially copied from their works without authorisation. One artist explained that her artwork depicted a dreaming and use of the artwork in circumstances where it would be walked on was totally opposed to the cultural use of the imagery in her artwork.

The court held that the carpets were either exact or substantial reproductions of the artists' works and constituted copyright infringements. In assessing damages, the court took into account the cultural harms to the artists and their communities of reproducing the works without permission. Cultural harm had not previously been considered in the awarding of damages.

The court noted that while not arising in this case, there could be a problem where Aboriginal artworks based on pre-existing tradition and images did not satisfy the requirement of originality and therefore would not attract copyright protection.

a. *Milpururru & Others v Indofurn Pty Ltd & Others* [1994] FCA 975.

Despite providing some protection, existing legislation is not consistent with Indigenous notions of cultural and intellectual property (SSCECITA 2007, p. 146). Copyright law protects individual artists against having their works copied without permission, but it does not protect the underlying cultural expression. This means that tangible manifestations of ICIP in visual arts and crafts are only protected by copyright where the elements of copyright are satisfied.

[Copyright law] arguably prevents certain unauthorised reproductions of contemporary works but does not prevent the appropriation of Aboriginal iconography and symbols. It doesn't prevent fake artworks 'in the style of' certain artists which are not direct copies. (Desart, sub. 4, p. 13)

Often, Aboriginal and Torres Strait Islander visual arts and crafts will not meet the criteria for copyright to apply, including the requirements for: originality, the existence of a known author and material form (box 6.6).

Even where these copyright elements are satisfied, and protection exists, the level of protection does not align with certain characteristics of ICIP contained in Aboriginal and Torres Strait Islander visual arts and craft. In particular, copyright law does not recognise communal rights, does not protect underlying ideas, methods or styles used in the production of artwork, and is time limited in its protection (box 6.7).

Box 6.6 – Aboriginal and Torres Strait Islander visual arts and crafts may not always satisfy the criteria for copyright protection

For copyright to exist, the work must be original, attributable to a known author and in a material form. There are instances where Aboriginal and Torres Strait Islander visual arts and crafts do not satisfy these criteria and are therefore, not protected by copyright law.

Originality

Copyright can only exist in original works. A relatively low level of creativity is required to meet the originality requirement.²⁹

This means that works that are adaptations or interpretations based on aspects of traditional culture are likely to be protected (as they are sufficiently original). While this protects works of this nature created by Aboriginal and Torres Strait Islander artists, it also protects artworks created by non-Indigenous artists in the same way. If a work created by a non-Indigenous artist is not considered to be sufficiently similar to infringe copyright, it can still be produced despite using cultural motifs and icons.

As discussed in the Carpets Case (box 6.5), there may also be problems where pre-existing designs that have been passed down through generations are replicated. The requirement for originality may not be satisfied in these cases and an artist producing the pre-existing design may not be protected by copyright.

Attributable to a known author

Copyright accrues to identifiable individuals or companies. Traditional knowledge and cultural expressions are often passed on between generations without clearly identifiable creators. However, copyright cannot be granted to Aboriginal and Torres Strait Islander communities or groups (Australian Copyright Council 2021). This means that Aboriginal and Torres Strait Islander people cannot stop the exploitation of ICIP that is contained in communally owned works or in works that do not have a clear creator, such as rock art.

For example, artworks in Kakadu National Park at Ubirr Rock are not protected by copyright as the artist (or group of artists) that created it are unidentifiable (Janke and Frankel 1998, p. 53) (as well as having been produced too long ago, meaning copyright would have lapsed in any event). These kinds of works can be reproduced without any legal consequence.

In material form

Copyright only exists where a work is written down or recorded in some tangible way. Ideas or stories that are the inspiration of the artworks or crafts are not protected in and of themselves. Given that visual arts and crafts are tangible expressions, they will usually satisfy this requirement. There is, however, some doubt as to whether traditional forms of Aboriginal and Torres Strait Islander art such as body painting or sand paintings would satisfy this element.

Sources: Australian Copyright Council (2019); *Copyright Act 1968* (Cth); Janke and Frankel (1998, p. 64); SSCECITA (2007, p. 145).

²⁹ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

Box 6.7 – Copyright protections are incompatible with ICIP concepts

Copyright laws are not designed to specifically protect Indigenous Cultural and Intellectual Property (ICIP). As a result, the protection provided by existing mechanisms is incongruous with underlying concepts of ICIP.

Lack of recognition of communal rights

Copyright law provides economic and moral rights to a well-defined, finite set of persons. By contrast, ICIP is generally understood to belong to a community/group. As one submitter put it:

Due to the collaborative nature of many First Nations artworks and stories, which are passed down through the generations, many works are deemed to be owned by the community or ‘mob’ rather than by one person. It has been recognised that ‘our legal system remains centred around individual personhood’ and therefore the concept of ‘community ownership remains largely unrecognised and unprotected’. (Whinn, sub. 22, p. 1)

Copyright laws are not designed to recognise the ‘eternal and communal nature of Indigenous cultural expressions’ (HoRSCIA 2018c, p. 58) and there is currently no legal recognition of communal ownership. This was confirmed in *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*, where the court said that:

To conclude that the Ganabingu people were communal owners of the copyright in the existing work would ignore the provisions of s 8 of the *Copyright Act*, and involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia.

The lack of recognition of rights accruable to a community means that cultural assets built up communally over an extended period of time are not protected. This means that those individuals who express traditional culture in a tangible form (even if they are not authorised to do so) are the rights holders, rather than the community who effectively own the traditional cultural expression.

[C]opyright does not protect or recognise the traditional knowledge and communal cultural expression embodied in a work. This enables an artist, craftsman or designer outside a specific indigenous community to claim copyright over a work derived or adapted from a TCE. (Goss, HoRSCIA 2018, sub. 162, p. 8)

The absence of communal rights also creates issues if the work is to be licensed. The Copyright Act only requires permission from the copyright owner; there is no obligation to obtain permission from the community whose customary laws apply to uses of a work or style of work (NAVA, sub. 23, p. 3).

Protection of form — not ideas, method, technique or style

Copyright law protects the form in which an idea is expressed but it does not protect styles, methods, techniques or ideas. Techniques such as cross-hatching (including rärrk), x-ray painting and specific dot designs are important aspects of Aboriginal cultures (chapter 2). However, the use of techniques and styles belonging to and readily identifiable to certain communities will not be a copyright infringement provided there is sufficient ‘originality’ in an artwork (NAVA, sub. 23, p. 3).

Box 6.7 – Copyright protections are incompatible with ICIP concepts

Time-limited protection

The time-limited nature of copyright contrasts with the perpetual nature of traditional cultural expressions. Copyright generally exists for the life of the artist plus 70 years before the work enters the public domain.

Most of what is referred to as traditional cultural expressions or folklore (TCE) is unprotected and part of the public domain. Anybody may therefore make use of or market TCE even without the consent of its traditional owners. (Bizer et al. 2011, p. 114)

This means that copyright laws do not protect 'Indigenous clan designs, stories, and rock art that first existed in material form thousands of years ago and remain part of the particular Indigenous culture in perpetuity' (Sentina et al. 2017, p. 6).

Designs

The *Designs Act 2003* (Cth) protects the appearance and shape of a commercial product, where the design is new and distinctive. For example, the patterns on crockery or artwork on fabric could be protected as a design (Australian Copyright Council 2021, p. 8). Protection requires registration with IP Australia and lasts for a period of 5 years; with an option to extend the protection for an additional five years. Registration of a design right often means that the product can no longer be protected by copyright law (IP Australia 2020c).

Certain Aboriginal and Torres Strait Islander cultural designs may be protected by designs law where the design meets the requirements for protection (SSCECITA 2007, p. 149). However, for many designs, it may be difficult to meet the requirement of being new and distinctive. For instance, the design of the *yidaki* could not be registered because it is already known and has previously been used in Australia (Janke and Frankel 1998, p. 64).

Some Aboriginal and Torres Strait Islander cultural motifs and symbols are sacred and secret within the community. This means that the community would be unlikely to include these cultural designs in a saleable product. This means they cannot be registered as a protected design under the Designs Act. Even where an Aboriginal and Torres Strait Islander design is registered, the protection lasts for a maximum of 10 years, contrasting with the perpetual nature of the cultural expression.

Trade marks

A trade mark is a sign used to distinguish goods or services in the course of trade. Registration of a trade mark under the *Trade Marks Act 1995* (Cth) provides exclusive rights to use, license and sell the mark in the course of trade. This mark can be a letter, number, word, phrase, sound, scent, shape, logo, picture, movement, aspect of packaging or a combination of these (IP Australia 2019b). Protection under trade mark law requires registration with IP Australia. Trade marks are protected for 10 years from registration but can be renewed in perpetuity.

Aboriginal and Torres Strait Islander communities may be able to use trade mark law to register Indigenous words and symbols. Certification trade marks (chapter 5), aimed at identifying authentically produced craft or works produced under appropriate licensing arrangements, can also be used (box 6.8).

While trade marks are not time-limited, they only protect marks used *in the course of trade* rather than cultural expressions in the broader context. This means that if the specific mark is used other than in the

course of trade, there is no protection under trade mark law. Protection under the Trade Marks Act also only arises where the mark is registered.

Box 6.8 – Examples of trade marks used to protect Aboriginal visual arts and crafts

Wandjina trade mark

The Kimberley Aboriginal Law and Culture Centre (KALACC) holds a trade mark over the image of the sacred creator spirit Wandjina. KALACC represents the interests of cultural custodians and law bosses for the 30 language groups of the Kimberley, including the North Kimberley groups for which the Wandjina is key to spirituality, traditional law and culture. The trade mark effectively means that:

only ‘authorised’ persons can use ie can artistically represent the Wandjina figure. Such permission or authorization will only ever be granted to members of those three language groups and even then only to selected individuals who are considered by the cultural bosses to be ‘appropriate’ persons to represent the Wandjina. (KALACC, HoRSCIA 2018 sub. 13, p. 1)

Supply Nation certification trade mark

Supply Nation’s certification trade marks indicate goods and services that have been ‘certified’ or ‘registered’ as being produced by Aboriginal and Torres Strait Islander businesses. Registered businesses are at least 50% Aboriginal and/or Torres Strait Islander owned, while certified businesses are 51% or more (and often 100%) Aboriginal and/or Torres Strait Islander owned, managed and controlled. In becoming a registered or certified business, the businesses commit to, amongst other things, abide by any cultural or ICIP policy or procedure implemented by Supply Nation (Supply Nation nd).

The trade mark indicates Aboriginal and Torres Strait Islander business ownership and a commitment to abiding by Supply Nation’s terms and conditions. As such, this mark may be a useful indication to determine if the goods or services in question are produced by Aboriginal and Torres Strait Islander owned businesses.

Currently, trade mark laws do not preclude non-Indigenous businesses from including ICIP in registered trade marks. When considering an application for trademark registration, IP Australia will consider whether the registration would be likely to deceive or cause confusion or would be scandalous or contrary to law. The test for what constitutes scandalous is subjective. It may or may not extend to the use of ICIP in ways that are culturally offensive (Janke and Sentina 2018, p. 56).

Some commentators have noted that non-Indigenous businesses are able to register trade marks for Aboriginal and Torres Strait Islander words and symbols, preventing an Aboriginal and Torres Strait Islander person, group or business from registering that name as a trade mark in the future (Janke and Frankel 1998, p. 68; Stratton et al. 2019, p. 5). There is an opportunity for an Aboriginal and Torres Strait Islander person or community to oppose the registration of a mark. However, this relies on that person or community being aware of the application and opposing the inappropriate use of ICIP within the relevant timeframes.

Passing off

The common law action of passing off protects a business’ reputation or goodwill. It applies where a person suffers a loss as a result of another person falsely representing that their goods or services are associated

with that person's brand or business. It can be used to stop people from 'cashing in' on someone else's name, brand or image (Australian Copyright Council 2019, p. 8).

Where a non-Indigenous business seeks to misuse the goodwill associated with an Aboriginal and Torres Strait Islander artwork or craft, passing off laws might prevent this. To successfully argue an action for passing off, the plaintiff must show that its business holds goodwill or brand reputation and that there has been a misrepresentation by the defendant that there is a connection between the defendant's goods, services or business and the plaintiff's. Further to this, the misrepresentation must have caused or be likely to cause damage to the plaintiff. In many cases where ICIP is misused, these elements are unlikely to be established (Sentina et al. 2017, pp. 27–28).

Consumer law

The Australian Consumer Law is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), operating as a single generic law of the Commonwealth and in each State and Territory. It aims to address problems that arise where consumers face information gaps or overload about products, and information asymmetries that can result in consumer harm (PC 2021, p. 80).

The Australian Consumer Law provides a range of protections for consumers including through the regulation of suppliers' and manufacturers' behaviours. This includes causes of actions for misleading and deceptive representations or conduct. These provisions can, in certain circumstances, be used to prevent the sale of products that are falsely represented as being made by or in collaboration with Aboriginal and Torres Strait Islander people.

At the Commonwealth level, the Australian Competition and Consumer Commission (ACCC) administers and enforces the Australian Consumer Law. As the ACCC cannot pursue all matters that come to its attention, it generally focuses on systemic issues that 'will, or have the potential to, impact vulnerable consumers, harm the competitive process or result in widespread consumer or small business detriment' (ACCC 2021, p. 4). A key case pursued by the ACCC relating to false and misleading claims around Aboriginal and Torres Strait Islander style products was the *Birubi* case (box 6.9).

Despite instances of successful prosecution, the Australian Consumer Law only incidentally protects ICIP. The ACCC can take action against a company for misleading its customers but is unable to prevent 'imitation products that are not explicitly claiming to be authentic' (HoRSCIA 2018, p. xiii). Desart said that, in its experience:

... dealing in Aboriginal looking artworks or products is not unlawful if the word 'Aboriginal' is not used in the marketing. Certainly, the proliferation of souvenir businesses selling fake souvenirs sometimes adjacent to genuine (usually more expensive) Aboriginal products bears this out. (sub. 4, p. 14)

This means that the production and sale of products that misappropriate Aboriginal and Torres Strait Islander culture can occur without legal consequence under consumer law (box 6.10). This falls short of the expectations of many Aboriginal and Torres Strait Islander people and communities around what protections the law should provide:

... the law should recognise that it is inappropriate for Indigenous culture to be unfairly misappropriated for commercial gain; the concern is not just about misleading consumers. (Arts Law Centre of Australia, HoRSCIA 2018 sub. 64, p. 10)

Box 6.9 – Australian Competition and Consumer Commission v Birubi Art Pty Ltd

In *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595, the Australian Competition and Consumer Commission took action against Birubi Art Pty Ltd (Birubi) for representations made about the provenance and characteristics of its products (including boomerangs, didgeridoos, bullroarers and message stones). These products contained images, symbols and styles of Australian Aboriginal art. Words such as 'Authentic Aboriginal Art', 'Hand Painted' and 'Australia' were displayed on the products.

Birubi did not disclose that the products' place of origin was Indonesia. The court determined that Birubi, by representing to consumers that these products were hand painted by Australian Aboriginal persons, engaged in misleading or deceptive conduct, in breach of the Australian Consumer Law.

In assessing damages, the court 'noted the importance of the deterrent effect of the penalty imposed not only in relation to economic harms impacting Indigenous Australians, but also the social and cultural harms that may flow from businesses misrepresenting the provenance of Indigenous art and artefacts' (ACCC 2019a). The court ordered Birubi to pay \$2.3 million in damages for its breach.

Sources: Australian Competition and Consumer Commission (2019a); Australian Copyright Council (2021).

Box 6.10 – The Australian Consumer Law is often unable to provide protection

The inability of the Australian Consumer Law to prevent misuse of aspects of Aboriginal and Torres Strait Islander culture is evidenced by a series of events involving a sculpture featuring the Wandjina image.

The Worrora, Wunumbal and Ngarinyin Aboriginal people of the remote Kimberley region have painted the sacred creator spirit Wandjina for thousands of years. Under customary law, they are the only people entitled to produce the image (Janke and Dawson 2012, p. 31).

In 2011, a non-Indigenous artist created a public sculpture titled 'Wandjina Watchers in the Whispering Stone' depicting sacred Wandjina images without authorisation from the traditional custodians. Copyright law could not be used to prevent the unauthorised use because:

- artworks more than 70 years old do not attract copyright — as Wandjinas have been painted for many thousands of years, they are considered under copyright law to be part of the public domain
- there was no identifiable author – the original authors of the Wandjina image were unknown as the images were first painted thousands of years ago.

Additionally, while the sculpture was recognisable as a Wandjina figure, it was not a direct copy of an existing artwork and therefore was not a substantial reproduction deemed to have infringed copyright.

Instead, a complaint to the ACCC was made on the basis that the display of the sculpture was misleading and deceptive as it falsely suggested an association with or licensing by the custodians of the Wandjina image. The ACCC determined that the complaint was not made out as it was unable to conclude that there had been a representation that permission to use the imagery had been granted.

Instead, a unique remedy was pursued. Submissions opposing the development approval for the site of the sculpture were filed and as a result, the Blue Mountains City Council did not approve the sculpture

Box 6.10 – The Australian Consumer Law is often unable to provide protection

due to the social impact of the public display. The decision was appealed but ultimately upheld by the New South Wales Land and Environment Court.

This highlights the inability of the Australian Consumer Law to prevent unauthorised use of aspects of Aboriginal and Torres Strait Islander culture, in circumstances where there is no explicit misrepresentation made.

What was most significant about that case was the absence of any remedy to be found other than in local planning laws — a serendipitous and coincidental source of protection available only because of the unique circumstances of the exact location of the sculpture. (Arts Law 2015)

Desart commented that this ‘clearly highlights the fundamental problem of the current legal regime which does not provide any legal mechanism to protect the misappropriation of Aboriginal forms of traditional cultural expression except incidentally and tangentially’ (sub. 4, p. 14).

Sources: Arts Law Centre of Australia (2015); Everard (2011); Janke and Dawson (2012, pp. 31–32).

Heritage laws

Heritage protection laws exist at both state and territory and Commonwealth levels. The Commonwealth laws are designed to provide a ‘safety net’ when the relevant state or territory’s legislation fails to provide protection (Sentina et al. 2017, p. 37).

Broadly, state and territory statutes are focused on places and objects of significance to Aboriginal and Torres Strait Islander people. These laws do not usually protect visual arts and crafts. An exception to this is in Victoria, where changes were made to the *Aboriginal Heritage Act 2006* (Vic) to protect intangible Aboriginal cultural heritage.³⁰ The Act specifically includes visual arts in this definition. The Act also includes any intellectual creation or innovation based on or derived from the knowledge or expression of Aboriginal tradition.³¹ The protection is however reliant on the intangible heritage being registered, only protects aspects of heritage that are not widely known and only prohibits use in commercial settings. Registration uptake has been slow with only one item of intangible property registered since the provisions were introduced (VAHC 2021, p. 44).

At a Commonwealth level, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) can protect areas and objects that are of particular significance to Aboriginal and Torres Strait Islander people or communities from threats of injury or desecration³². Places of significance such as heritage sites are protected under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) (NIAA 2021c). Additionally, the Uluru Kata Tjuta National Park Film and Photography Guidelines under the EPBC Act regulate the inclusion of sacred sites within the National Park in artwork, photographs and films.

³⁰ A similar law is being considered in New South Wales. See the *Aboriginal Cultural Heritage Bill 2018* (NSW).

³¹ *Aboriginal Heritage Act 2006* (Vic) s. 79B.

³² An area or object is taken to be injured or desecrated where used in a manner inconsistent with Aboriginal tradition or where the use or significance of the area in accordance with Aboriginal tradition is adversely affected. See *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s. 3.

The Director of the National Park can take action against publishers of this type of content (Janke and Sentina 2018, p. 115).

Exportation of significant cultural items, including forms of visual arts such as rock art, outside of Australia is prohibited under the *Protection of Movable Cultural Heritage Act 1986* (Cth). Some other forms of cultural property require a permit before being exported. In particular, Aboriginal desert paintings and Aboriginal Kimberley paintings (with a current market value of more than \$100 000 and created more than 30 years ago), as well as Aboriginal and Torres Strait Islander ochre paintings (with a current market value of more than \$20 000 and created more than 30 years ago) all require permission to be exported (*Protection of Moveable Cultural Heritage Regulations 2021* (Cth), Schedule 1).

As an example, the painting *Women's Dreaming* by Uta Uta Tjangala was refused an export permit due to its high significance as an object of fine art (OFTA 2020a, p. 2). This legislation assists in preventing culturally significant objects from being removed from Australia. There has however been criticism of the effect that these limits on importation and exportation can have on Aboriginal and Torres Strait Islander people who wish to export their artworks or craft for commercial gain.

Other laws intended to protect Australia's cultural traditions and unique flora and fauna in fact positively hinder the sale and supply of authentic product enabling a further competitive advantage to fake or inauthentic product. (Desart, sub. 4, p. 14)

In some instances, heritage legislation gives Aboriginal and Torres Strait Islander groups minimal powers in terms of managing and protecting heritage (Sentina et al. 2017, p. 41). For example, for protection to accrue under the Aboriginal and Torres Strait Islander Heritage Protection Act, the Minister must declare an area of significance to Aboriginal and Torres Strait Islander people, which creates a potential barrier for communities seeking to protect their heritage.

Native title laws

The *Native Title Act 1993* (Cth) codified the decision of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, which recognised the existence of native title in Australia. The Act protects pre-existing Aboriginal and Torres Strait Islander rights and interests in land and water according to traditional laws and customs (Janke and Sentina 2018, p. 32).

Native title laws could potentially protect a right to maintain, protect or prevent the misuse of cultural knowledge. This would occur in the instance where the misuse of cultural knowledge relates to the denial or control of access to the lands and waters. The High Court in *Western Australia v Ward* explained:

The native title rights and interests protected by the NTA [Native Title Act] are rights in relation to land or waters where, among other things, the peoples concerned, by traditional laws and customs, have a connection with the land or waters. In so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not rights protected by the NTA. ([2002] HCA 28 at [468])

It is arguable whether misuse of ICIP in the visual arts and crafts industry would sufficiently relate to the denial or control of access to land or waters. Therefore, it is unclear that any protection for ICIP would be afforded under the Native Title Act.

Opt-in obligations

Contracts

Contracts can be used in the Aboriginal and Torres Strait Islander visual arts and crafts sector to protect ICIP. For example, an artist could enter into a contract when a client commissions an artwork or when licensing the use of an artwork. Contracts can include specific provisions that set out terms and conditions for the use of ICIP, including in terms of the authorisations required to be sought for use or the appropriate contexts in which the ICIP can be used. The Arts Law Centre of Australia has developed a range of sample contractual agreements and templates for artists, businesses and organisations to purchase and adapt (Arts Law 2022b).

Nevertheless, contracts do not provide holistic protection. A contractual cause of action does not adequately protect the rights of communities and groups, as it focuses on individual claims. Moreover, even where contracts are put in place, they may contain terms that do not directly protect ICIP or are adverse to artists or traditional custodians (Desart, sub. 4, p. 13). The role that contracting plays in conduct towards Aboriginal and Torres Strait Islander artists is discussed further in chapter 8.

Soft law mechanisms

There are also a range of ‘soft law’ mechanisms that provide some protection of ICIP in visual arts and crafts. While not legally enforceable, voluntary protocols and codes of conduct encourage appropriate treatment of, and compensation for, the use of ICIP (Stratton et al. 2019, p. 11). These include:

- the Indigenous Art Code
- Australia Council for the Arts’ Protocols for Using First Nations Cultural and Intellectual Property in the Arts
- Arts New South Wales’ Aboriginal Arts and Cultural Protocols
- Arts Tasmania’s Respecting Cultures: Working with the Tasmanian Aboriginal Community and Aboriginal Artists
- City of Melbourne’s Code of Practice for galleries and retailers of Indigenous Art
- National Association for the Visual Arts (NAVA)’s Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector.

These soft law mechanisms are useful to establish good practice behaviour. For example, Australia Council for the Arts requires creative practitioners who receive funding to work with Aboriginal and Torres Strait Islander artists or engage with cultural heritage in projects to comply with its protocols as a condition of funding (Terri Janke and Company 2019, p. 2).

While non-binding legal protocols can help to ensure that ICIP is used in a respectful way that accords with customary use, the lack of legal enforceability limits their effectiveness (especially in cases of intentional misuse).

Effectiveness of existing protections for ICIP

Current legal protections are limited in their ability to protect Aboriginal and Torres Strait Islander cultural expressions. While some protection is afforded by existing laws, it is often incidental coverage. Taken as a whole, existing laws do not provide systematic or reliable protections.

The current reality is that existing intellectual property laws were not designed to protect the practice and expression of cultural heritage and traditional knowledge, even if coupled with native title and heritage laws protecting sacred sites and objects. (Elsdon 2019, p. 20)

The limitations of existing laws were recognised in cases including *Milpururru & Others v Indofurn Pty Ltd & Others* and *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*. In *Yumbulul v Reserve Bank of Australia*, the need for law reform to recognise communal interests was noted:

Difficulties ... arise in the interaction of traditional Aboriginal culture and the Australian legal system relating to the protection of copyright and the commercial exploitation of artistic works by Aboriginal people ... the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators. ((1991) 21 IPR 482 at [1],[24])

There was widespread agreement among participants in this study that more should be done to shore up protections for ICIP (ANA, sub. 6, p. 3; ARAA, sub. 8, p. 6; Australia Council, sub. 24, p. 20; Bana Yirriji Art Centre, sub. 25, p. 2; Callanan, sub. 5, pp. 29–30; Cheong, sub. 15, p. 1; MinterEllison, sub. 18, p. 6; SA Government, sub. 21, p. 21; Whinn, sub. 22, p. 3). For example, Aboriginal Art Centre Hub of WA reported:

Western Australian art centres and artists recently surveyed by AACHWA indicated that **70% of respondents believe the government and the law are not doing enough** to protect Aboriginal arts and culture. (sub. 20, p. 5)

The Law Council of Australia said that there are ‘real perceptions of a conceptual “gap” between how existing laws protect Aboriginal and Torres Strait Islander visual arts and crafts and the needs of Aboriginal and Torres Strait Islander people and communities to protect their ICIP (sub. 19, p. 4). Such a gap can lead to situations where ICIP issues fall between the cracks (box 6.11).

Overall, current laws provide some protection of ICIP in visual arts and crafts. But these protections are patchy and often allow for misappropriation of Aboriginal and Torres Strait Islander cultures. Without reliable legal barriers, people can use Aboriginal and Torres Strait Islander people’s ICIP in a range of contexts, without permission and without recompense. These forms of use often disrespect, misrepresent and even demean Aboriginal and Torres Strait Islander cultures and can cause offence. If sustained, this misappropriation could eventually lead to the dilution or erosion of the world’s oldest continuous living cultures. Indeed, for many, protecting and preserving Aboriginal and Torres Strait Islander cultures is a key reason why increased protections for ICIP are so important (Janke and Frankel 1998, p. 75; Stoianoff and Roy 2015).

We cannot lose sight of the reason these matters have been given attention: the preservation of Australian First Nations culture. The acknowledgment of First Nations culture, the rights of First Nations people to their own cultural expression, the rights of First Nations peoples to make an income from appropriate cultural expression, and the right for First Nations peoples to protect their culture and communities from exploitation and misuse is imperative to the cultural, economic and social health and wellbeing of Aboriginal and Torres Islander people, and for the preservation of Australian Indigenous culture for generations to come. (AACHWA, sub. 20, pp. 12–13).

In this context, the Commission considers that there is a strong case for examining how legal protections for ICIP could be strengthened to reduce misappropriation of Aboriginal and Torres Strait Islander cultures and thereby help to protect and preserve ICIP. The remainder of this chapter considers the viability of different approaches.

Box 6.11 – Existing protections for ICIP: a worked example

Scenario: An artwork, dating from over 200 years ago, is displayed publicly in a gallery. The exact identity of the artist is unknown, but it is known that they belonged to a particular clan. The clan is known to create art in a particular style, and art in this style has been painted by members of the clan, with appropriate permissions, over the years.

In 2022, a non-Indigenous artist creates an artwork that is clearly in the style of the clan and enters into a licensing agreement with a product manufacturer for reproduction of the artwork on household goods. The licensing agreement does not provide for any payments to the clan. The artist does not make any representations that the work has been created by an Aboriginal and Torres Strait Islander person. The clan is deeply hurt by the inappropriate use of its ICIP and is seeking a legal remedy to prevent the misappropriation of its ICIP.

Applicability of existing laws: There is no legal mechanism that would allow the clan to take action in relation to the misappropriation of their ICIP.

- No remedies are available under copyright law, because there is no identifiable author. In any event, the original artwork's copyright has expired and it is now considered to be in the public domain.
- Consumer laws do not provide recourse as there has been no misrepresentation made in relation to the licensed products.
- The artwork is not eligible for registration under designs law. It is in the public domain and so would not satisfy the requirement of being 'new and distinctive'. It is also over 200 years old and has been painted by members of the clan on other occasions.
- Trademarks law does not apply — recourse is only available where a registered mark was used in the course of trade. The art styles and motifs of Aboriginal and Torres Strait Islander clans are not eligible for registration as a trademark unless they are a 'sign used ... in the course of trade' (*Trade Marks Act 1995* (Cth), s. 17).
- There is no contractual relationship between the clan and the non-Indigenous artist, so there are no contractual law mechanisms that can be relied upon.
- There are no applicable soft law protocols that would provide a legal mechanism of enforcement.

**Draft Finding 6.2****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.

6.3 What can be done?

Over the course of the numerous studies and inquiries that have focused on Aboriginal and Torres Strait Islander art (box 6.12), many suggestions have been put forward for strengthening ICIP protection. Some of these have focused on amendments to the existing IP legislation, while others have advocated for dedicated legislation.

Box 6.12 – Other processes that have considered the need for standalone legislation

Interdepartmental Working Party on the Protection of Aboriginal Folklore

In 1974, the Aboriginal Arts Board of the Australia Council for the Arts called for a working committee to examine copyright legislation and to ‘consider the need for new legislation specifically designed to protect Aboriginal individual and overall rights to their own heritage of arts’ (Australia Council 1975, pp. 8–9).

The 1981 report of the working committee concluded that existing laws such as the *Copyright Act 1968* (Cth) and *Designs Act 1906* (Cth) did not satisfactorily protect Aboriginal folklore. It concluded amendments to existing laws could not provide the necessary protection and that special legislation was desirable (Bell 1985). The report’s recommendations were not implemented (Blakeney 2015, pp. 200–201).

Australian Law Reform Commission’s Report on Recognition of Aboriginal Customary Laws

The Australian Law Reform Commission’s 1986 report considered whether customary law should be recognised in the Australian legal system. It endorsed enacting specific legislation to safeguard against the exploitation of Aboriginal culture, including Aboriginal artwork and designs (ALRC 1986, para 470). No immediate action followed this report (Janke and Dawson 2012, p. 29).

Attorney General’s Department ‘Stopping the Rip-offs’ Issues Paper

This 1994 paper discussed the effectiveness of the Copyright Act and other intellectual property legislation for protecting Aboriginal and Torres Strait Islander arts and cultural expressions. An interdepartmental committee was formed to evaluate submissions and make recommendations for further action (Davis 1997a).

The committee supported the enactment of specific legislation but noted that further consultation would be required (Blakeney 2015, pp. 201–202; Janke and Dawson 2012, p. 29). The now-abolished Aboriginal and Torres Strait Islander Commission (ATSIC) was tasked with undertaking consultation to seek views and input on possible new legislation. However, with a change in government, no further action was taken on this issues paper (Blakeney 2015, p. 202).

In 1997, ATSIC formed an Indigenous Reference Group comprising Aboriginal and Torres Strait Islander people with expertise in arts, culture and heritage. It also funded the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to coordinate a project to develop practical reforms. AIATSIS commissioned the *Our Culture, Our Future Report* authored by Terri Janke (Davis 1997a). This report recommended a sui generis legislative framework to protect ICIP rights (Janke and Frankel 1998, p. 194).

Report of the Senate Standing Committee on Environment Communications and the Arts: ‘Securing the Future Australia’s Indigenous visual arts and crafts sector’

In 2006, the Senate Standing Committee was directed to conduct an inquiry into the Indigenous visual arts and crafts sector. Amongst other things, the Committee considered the scale of the sector, ways to

Box 6.12 – Other processes that have considered the need for standalone legislation

improve its operational capacity and identified opportunities to alter existing government and industry support programs to more effectively cater to the sector's needs.

The Senate Committee released its report in 2007, which recommended the introduction of legislation to protect ICIP rights and revised legislation to recognise Indigenous communal moral rights (SSCECITA 2007, pp. xi–xiv).

House of Representatives Standing Committee on Indigenous Affairs inquiry: 'The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia'

The most recent inquiry to recommend sui generis legislation was the 2018 House of Representatives inquiry (the same inquiry that was the genesis of our study). It recommended 'the Australian Government begins a consultation process to develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions' (HoRSCIA 2018c, p. xxi).

IP Australia has not yet commenced this consultation process. It has instead 'established a cross departmental Working Group to undertake a scoping study assessing if stand-alone legislation could help First Nations people to protect and commercialise their Indigenous Knowledge' (IP Australia 2021b, p. 1). The working group is expected to report in mid-2022, and consultations to commence after that.

No legislative measure — whether in the form of amendments or new legislation — can completely eliminate misappropriation of ICIP in visual arts and crafts, including because some actors may still engage in such behaviour despite the existence of sanctions. But it can create a system of incentives to influence the behaviour of market participants as a whole. This is analogous to how copyright laws reduce, but do not eliminate, unauthorised use of intellectual property.

Artists, communities and other organisations have also proposed other solutions to deal with the problem of inauthentic art and craft, including banning the importation of inauthentic products, labelling schemes and mandatory codes of conduct (chapters 5 and 10). These options are not mutually exclusive. For example, a legislative solution to address unauthorised use of ICIP expressed in visual arts and crafts could work alongside labelling requirements or other protections to reduce the presence of inauthentic products in the market.

The remainder of this chapter considers the options available to strengthen protections for ICIP expressed in visual arts and crafts. It examines the merits of bolt-on amendments to existing laws and considers the case for new laws specifically and exclusively about ICIP.

Amendments to existing laws

In assessing how amendments to existing laws could strengthen ICIP protections, there are a range of potential reform options to consider. These fall broadly into two categories — minor amendments designed to address a single, specific issue and more extensive amendments that would deliver broader ICIP protection.

Minor amendments

Participants have suggested targeted approaches in past inquiries, including:

- amending copyright law to recognise ‘communal ownership of Indigenous cultural works’ (Rimmer, HoRSCIA 2018 sub. 95, p. 9).
- amending the Trade Marks Act to allow for registration of Aboriginal and Torres Strait Islander marks and symbols only with prior informed consent of the relevant community (Janke and Frankel 1998, p. 149)
- amending the Designs Act to include provisions for registration of Aboriginal and Torres Strait Islander cultural designs and a perpetual protection period for these designs (NAVA, SSCECITA 2007 sub. 27, p. 10).

These types of reform would widen the scope of existing laws. As such, they could assist in better protecting ICIP expressed in visual arts and crafts by allowing copyright, trade mark or designs laws to have broader coverage. Currently, IP Australia is investigating possible reforms to trade mark and designs registration processes to better address issues affecting Aboriginal and Torres Strait Islander people (IP Australia 2020b).

Nevertheless, there are many scenarios in which manifestations of ICIP in visual arts and crafts do not satisfy the requirements for protection under existing laws. In these circumstances, these targeted amendments would only lead to minor improvements in the levels of protection available. For example, while amendments to the Trade Marks Act to require prior informed consent of the community before registration would assist in reducing the registration of offensive marks, the issue of limited coverage would remain as this amendment would only apply to marks used in the course of trade. Similarly, if the Copyright Act was expanded to recognise communal ownership, this would not address existing issues where ICIP is not protected by copyright law — for example, where it does not satisfy originality requirements or the time limited protection has expired. Aboriginal and Torres Strait Islander styles and techniques would also remain unprotected.

Implementing ad hoc changes is unlikely to comprehensively address the needs of Aboriginal and Torres Strait Islander people and communities to control the use of their ICIP as expressed in visual arts and crafts. Amendments of this type fill specific and narrow gaps in existing laws, rather than addressing broader objectives — that is, to protect ICIP in visual arts and crafts and recognise Aboriginal and Torres Strait Islander people's rights to control this ICIP.

More extensive amendments

An alternative approach is to implement more extensive ICIP protections via existing laws. These proposals typically involve the creation of a new legislative or regulatory mechanism (rather than tweaks to those already existing), but within the framework of an existing piece of legislation. For example, in a previous inquiry, one participant suggested amending the Copyright Act to include a chapter about Aboriginal and Torres Strait Islander heritage (Eliades, HoRSCIA 2018, sub. 157, attachment 1, p. 2).

Another option is to add new protections in existing consumer laws. For example, the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (Cth) proposed additional protections for Indigenous cultural expressions used in the sale of commercial goods. It proposed to prohibit the supply of commercial goods that included an ‘Indigenous cultural expression’ unless they were supplied by, or in accordance with an arrangement with an Indigenous artist or community (chapter 5).

Incorporating these protections into existing laws could provide benefits given there are inherent structures and processes to be leveraged off (Eliades, HoRSCIA 2018, sub. 157, attachment 1, p. 84). For example, this type of approach might eliminate the need to devise a new enforcement body. Parties would also have a level of familiarity with the manner in which the legal framework operates (Arts Law, Copyright Agency, IartC, sub. 31, p. 41).

However, existing legal frameworks do not always operate in a way that aligns with notions of Aboriginal and Torres Strait Islander cultural heritage. For example, current IP laws recognise a range of rights for individual, identifiable creators, which are often time-limited. They are not designed for the purpose of protecting ICIP (section 6.2).

The cultural protocols and processes for IK [Indigenous Knowledge] form a different knowledge-management system to that supported by the western IP system. The result is that there are inherent limitations in how the western IP system can protect IK. (IP Australia, sub. 27, p. 3)

Amending existing legislation to include new mechanisms for increased protection of ICIP in visual arts and crafts could be incompatible with the purposes or objects of that legislation. One of the overarching objectives of Australia's IP system is to recognise and encourage the creation of new and valuable ideas and innovations (PC 2016, p. 54). In contrast, one of the key purposes for introducing stronger legal protections for ICIP is the preservation, maintenance and transmission of culture (SSCECITA 2007, p. 146).

[T]here is a **conceptual and legal divide** in relation to how Indigenous people's belief systems, customary laws and practices interact with western cultural norms and laws. From [an Indigenous] perspective the very conception of 'ownership' in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems. (Goss, HoRSCIA 2018 sub. 162, p. 3)

Similarly, while the focus of the Australian Consumer Law is on protecting the interests of consumers (COAG 2009), ICIP provisions would be about protecting the interests of those who own that ICIP who are potential producers.

Incorporating provisions focused on achieving different legislative objectives into existing legislation should be approached cautiously as there is potential for unintended consequences (Goss, HoRSCIA 2018 sub. 162, p. 10). For example, mixing multiple and potentially contradictory objectives in a single piece of legislation would create ambiguity about the purpose of the legislation as a whole, as well as how individual provisions should be interpreted.³³ In this way, introducing provisions about ICIP into, say, the Copyright Act could undermine or compromise the intended operation of the copyright regime. This is because it would be unclear whether specific provisions should be interpreted in light of the objectives of copyright laws (such as encouraging the creation of original works) or the objectives of laws to protect tangible artistic expressions of ICIP (protecting Indigenous cultures).

In response to the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill, the ACCC acknowledged the issue of misaligned objectives:

The ACL cannot address the broad economic, social, and cultural harms caused by inauthentic Indigenous Australian art and craft products. The issues within the Indigenous Australian art and craft sector go beyond the fair trading and consumer protection objectives of the ACL. Given this, attempting to deal with such issues through the ACL may be perceived as a superficial way of addressing them. (ACCC 2019b, p. 1)

This would suggest that the broader objective of protecting ICIP is beyond the scope of what is possible through amendments to the Australian Consumer Law.

³³ The 'mischief/purpose rule' of statutory interpretation dictates that when there is ambiguity in how a statutory provision should be interpreted, the court can have regard to the purpose or objective of the statute as a whole. Multiple, potentially contradictory, objectives could create uncertainty as to how this rule should be applied.

For these reasons, larger-scale amendments to protect ICIP are likely to be a poor fit with the frameworks or objectives of existing legislation. Amending existing laws to include comprehensive protections for ICIP in visual arts and crafts could lead to inherent tensions in the policy objectives of the legislation.

Dedicated legal protections

Another option to improve protections for ICIP is the development and introduction of a dedicated ICIP regulatory regime, including legislation that governs access to and use of ICIP in the context of visual arts and crafts. Such laws are often described as standalone (or '*sui generis*') because, rather than embedding ICIP protections in existing regulatory or legal frameworks, they involve the development of legislation explicitly and specifically focused on ICIP.

The need for dedicated legislation to protect ICIP has been the subject of, and recommended or endorsed by, numerous inquiries and reviews to date (box 6.12).

In this vein, many submissions to this study called for the introduction, or supported the development, of dedicated legislation to provide this protection (AAAA, sub. 26, p. 14; ACCC, sub. 13, p. 2; Arts Law, Copyright Agency, IartC, sub. 31, p. 37; ARAA, sub. 8, p. 6; Arts Queensland, sub. 33, p. 2; Australia Council for the Arts, sub. 24, p. 22; Bana Yirriji Art Centre, sub. 25, p. 2; Cheong, sub. 15, p. 1; MinterEllison, sub. 18, p. 6; SA Government, sub. 21, p. 21; Whinn, sub. 22, p. 3). For example, the ACCC said:

... ensuring the integrity of the Aboriginal and Torres Strait Islander arts and crafts industry, and safeguarding the culture of, and opportunities for, Aboriginal and Torres Strait Islander communities requires a comprehensive and holistic framework that is appropriately able to:

- deal with the complex nature of the rules and law relating to the use of Aboriginal and Torres Strait Islander knowledge, cultural expressions, and artefacts in order to protect them, and
- support Aboriginal and Torres Strait Islander artists in managing and commercialising their works if and as they wish.

We consider that the focus should be on ... a potential framework for new standalone legislation, rather than relying on a less effective policy process, such as amending the ACL to include specific prohibitions relating to the supply of inauthentic arts and crafts. (ACCC, sub. 13, p. 2)

Similarly, in a submission to the 2018 House of Representatives inquiry, one participant said:

Whilst there are immediate opportunities to address gaps and limitations in extant laws which impact on this issue, including IP and Consumer Laws. I believe that such an approach, in the longer term, will not fully address the obligations Australia has committed to in the UNDRIP, in particular Article 31. I believe only a *Sui Generis* approach will fully meet this need in terms of safeguarding and protecting their cultural heritage. It will also ensure we take a holistic approach rather than attempting to adapt laws which may not be fit for purpose or have different policy intent. (Goss, HoRSCIA 2018 sub. 162, p. 3)

In practice, there are a number of potential advantages (relative to amending existing laws) from the implementation of dedicated legislation to strengthen the protection of ICIP in visual arts and crafts.

Fit-for-purpose protections that recognise the value of ICIP

Enacting legislation that is exclusively focused on increasing protection of ICIP in visual arts and crafts would enable policy makers to devise a regulatory framework and define legislative objectives in a way that is fit for this purpose.

As the Law Council of Australia observed:

... many of these principles [of existing laws] do not correspond neatly with the cultural context and obligations that inform Aboriginal and Torres Strait Islander arts and crafts, or culture generally ... Culture can be expressed continuously by communities, and in a variety of formats, with an associated diversity of permissions and restrictions. (sub. 19. pp. 4–5)

In practice, dedicated legislation would result in stronger protections for ICIP in visual arts and crafts, as more direct mechanisms would be available for communities to protect their ICIP. Direct sanctions for cultural misuse would be expected to discourage, and hence lower the prevalence of, misappropriation of ICIP. Where cultural misuse does occur, dedicated legislation could also provide direct mechanisms for addressing the resultant harms. Taken together, this would assist in protecting and preserving the integrity of Aboriginal and Torres Strait Islander cultures (discussed above).

The introduction of legislation to strengthen protections for ICIP in visual arts and crafts also provides an opportunity to recognise explicitly the value of Aboriginal and Torres Strait Islander cultures to Australia. This includes an acknowledgement of the fact that its value stems, at least in part, from its distinctiveness from other forms of intellectual property. Compared with embedding ICIP protections in existing legislation, the development of dedicated ICIP legislation to protect ICIP in visual arts and crafts offers:

... a significant opportunity to develop a fit for purpose framework that ... appropriately recognises and values Aboriginal and Torres Strait Islander traditional knowledge and cultural expressions. (ACCC, sub. 13, p. 2)

This direct focus on ICIP in visual arts and crafts would reflect its importance as a distinct part of Australia's national identity that requires dedicated protection.

[T]he First Nations people and communities of Australia deserve separate, stand-alone legislation that respects and acknowledges what they have always known; that their traditional knowledge, stories, songlines, dances and other cultural expressions are valuable and deserving of protection. As a nation we should embrace the rich, diverse culture that we live amongst, and be doing all we can to protect the rights of cultural custodians and knowledge holders. (Elsdon 2019, p. 21)

Implementing fit-for-purpose legal protections that recognises the rights of communities to control the use of their ICIP in the context of visual arts and crafts would affirm the value of ICIP and directly support cultural protection and preservation as a policy objective.

Greater clarity around cultural rights

The adoption of dedicated legislation would allow for better recognition of ICIP rights and would help to clarify obligations for individuals seeking to access or use that ICIP. Increasing clarity around cultural rights would provide a firmer foundation for negotiations about accessing and using ICIP. This is because it provides the parties with a common understanding about who has the 'right' to permit or deny access to certain ICIP. One of the reasons that ICIP is misused is because those who use the ICIP are not 'on the same page' as the traditional owners of the ICIP — for example, an artist may not be aware about the need to seek or how to obtain cultural permissions.

By directly addressing the question of cultural rights, dedicated legal protections can provide greater clarity around the need to and process for obtaining cultural permissions (or authorisations). In turn, this will provide a more well-defined framework for traditional owners and artists (and others seeking to use ICIP) to discuss and negotiate when and how ICIP may be used.

The introduction of dedicated protections also offers an opportunity to define cultural rights in a way that results in outcomes that are fair and just. At present, there is evidence to suggest that ICIP in the context of visual arts and crafts is often used without economic benefits flowing back to the community.

There is an ongoing problem with the benefits of the commercial success of Indigenous artists not flowing evenly or fairly back to those artists or communities ... The data suggests the reverse is happening. Remote Indigenous Communities in Australia are moving backwards and not forwards on all external social and economic measures of success. (Callanan, sub. 5, pp. 77, 86)

Clearly defined rights in relation to the use of ICIP in visual arts and crafts would facilitate the negotiation of access or benefit-sharing agreements for the use of ICIP (Australia Council, sub. 24, p. 6), thus enabling an appropriate share of the commercial benefits to flow back to the communities who own the ICIP.

Some commentators have emphasised the importance of the broader community being able to access and use ICIP, particularly where doing so gives rise to innovations or new aesthetic creations (WIPO 2013, p. 3). Implementing dedicated ICIP protections allows for the development of a framework that explicitly balances these competing interests. This will help strike the right balance between protecting the integrity of ICIP and enabling its use. It would also help to facilitate knowledge transfers in a way that promotes respectful and collaborative engagement with Aboriginal and Torres Strait Islander people and benefit sharing.

Meeting Australia's international obligations

A dedicated ICIP regime would align with Australia's commitment to meeting its international obligations by implementing principles outlined in UNDRIP in Australian law. A number of other countries have taken steps to acknowledge and protect traditional culture through the implementation of national legislation.

Meeting international obligations under UNDRIP

UNDRIP recognises the importance of protecting manifestations of culture, such as visual arts and crafts. While UNDRIP is non-binding, Australia formally supported this declaration in 2009 indicating its intention to take steps to recognise the rights contained therein (Macklin 2009). UNDRIP provides that Member States will:

- recognise the rights of Aboriginal and Torres Strait Islander people to maintain, control, protect and develop manifestations of their culture, cultural heritage, traditional knowledge and traditional cultural expressions (and associated intellectual property)
- provide effective protection for the exercise of these rights and in doing so, ensure there is appropriate means of redress where free, prior and informed consent is not given or customary laws are violated.

Legislation that recognises the importance of protecting ICIP expressed in visual arts and crafts and supports artists and communities to remedy instances of misuse would be an integral step towards fulfilling the obligations outlined in UNDRIP.

Overseas adoption of national and regional legislation

Some countries and regions have legislative arrangements in place that provide First Nations people and communities with protection against misuse of traditional knowledge and traditional cultural expressions (WIPO 2022a). While some of these mechanisms have been implemented as part of existing IP systems, a number of countries including Panama, South Africa, Vanuatu, Niue and the Cook Islands have adopted national legislation that protects different forms of ICIP (box 6.13).

Box 6.13 – Examples of dedicated legislation overseas

Countries have adopted forms of ‘sui generis’ legislation that provides protection for ICIP of First Nations peoples. Examples of these include:

- **Panama:** where a law enacted in 2000 provides perpetual and collective protection of the intellectual property type, based upon a registration requirement, for the handicrafts and other creations of its Indigenous peoples (WIPO 2008, p. 64). This law protects a range of Indigenous knowledge, including the traditional dress known as a Mola. As at 2019, approximately a dozen forms of cultural expressions had been registered (Figueroa 2021, p. 1007).
- **South Africa:** where a law enacted in 2019 provides for the protection of Indigenous knowledge, traditional cultural expressions and natural resources associated with Indigenous knowledge. Protection requires registration and the law will be administered through the National Indigenous Knowledge System Office (South African Government 2019). The implementation of the Act, including the development and approval of regulations that will govern the application of the legislation is ongoing (Department of Science and Innovation, Republic of South Africa 2021).
- **Cook Islands, Niue and Vanuatu:** where national legislation establishing traditional cultural rights and moral rights has been implemented, using the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture as a guide (Falemaka 2015; Parliament of Vanuatu 2019a; Salī 2020, pp. 579–587). Fiji, Kiribati, Palau and Papua New Guinea are also currently working towards implementing similar laws (Salī 2020, p. 587).

Canada has taken a strong stance on the implementation of UNDRIP as a whole. In 2021, legislation advancing the implementation of UNDRIP came into force. Canada’s *United Nations Declaration on the Rights of Indigenous Peoples Act* affirms the Declaration as an international human rights instrument that can assist in interpreting and applying Canadian law and provides a framework to implement the Declaration at the federal level. While related federal legislation has yet to be implemented, an action plan to effect this is currently being developed (Government of Canada 2021). In December 2021, the Canadian Department of Justice announced over \$23 million in funding for Indigenous people and organisations to support Indigenous-led consultations on developing the action plan (due to be completed by June 2023) (Department of Justice Canada 2021; Government of Canada 2022).

This growing support for national legislation reflects a globally held view that increased protection for ICIP is warranted. As a signatory of UNDRIP and a member of the WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Australia has committed to recognising the rights of Aboriginal and Torres Strait Islander people to their ICIP. The implementation of dedicated legal protections would reinforce this commitment.

Summing up

Overall, in contrast to relying on amendments to the patchwork of existing legal mechanisms, dedicated legislation to protect tangible expressions of ICIP in visual arts and crafts has the potential to provide stronger, more fit-for-purpose protection for ICIP in visual arts and crafts and greater clarity around cultural rights for the broader Australian community. It could also enable Australia to demonstrate its commitment to meeting its international obligations to recognise and protect ICIP.

The realisation of these benefits will depend in part on how such legislation is implemented. This includes how the scope of protection is defined, how those protections are enforced, and what checks and balances are built into the legislation. Chapter 7 outlines a model for new legislation that focuses on incentivising a person to obtain proper authorisations before using ICIP contained in a work of art or craft — the Commission is seeking feedback on how this could best be implemented.



Draft Finding 6.3

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.

7. Strengthening protections for cultural assets

Key points

- ✳ **Dedicated cultural rights legislation has the potential to provide stronger and fit-for-purpose protections for Indigenous Cultural and Intellectual Property (ICIP) in visual arts and crafts.**
The Commission has developed a model for what new cultural rights legislation *could* look like. We are seeking feedback on this proposed model — this will help the Commission determine, in its final report, the merits of such legislation and what it *should* look like.
- ✳ **The proposed legislation would formally recognise the interests of Aboriginal and Torres Strait Islander communities or groups in their traditional cultural assets.**
 - Traditional owners would have the right to: control their cultural assets, choose whether to authorise and place conditions on their use, and protect them from misappropriation.
 - These rights would be recognised as accruing automatically, without the need for registration. They would also be inalienable, meaning that they can only belong to traditional owners.
- ✳ **Traditional owners would be able to enforce their cultural rights, including through the court system. A successful claim would require a claimant to show: that they have standing to bring a claim; that the cultural asset is protected by the legislation; and that the traditional owner's rights were infringed (that is, the cultural asset had been used without authorisation).**
- ✳ **To strike the right balance between the interests of rights holders and of others seeking to access and use cultural assets, there will need to be a formalised system of checks and balances.**
 - The existence of rights would be subject to certain criteria, including criteria relating to: what counts as a cultural asset and what acts constitute an infringement.
 - An exceptions regime would deem certain uses of cultural assets to be non-infringing. This would include uses for research or education; criticism or review; reporting news; and personal use. An exception could also be required for traditional and customary uses.
- ✳ **The Commission is seeking feedback about what institutional arrangements (such as dispute resolution bodies and statutory authorities) are needed to support a new cultural rights regime.**
- ✳ **New cultural rights legislation is only part of the bigger picture. Given the breadth of ICIP, a mix of regulatory responses will be needed. To coordinate these responses, the Australian Government should develop and publish a national ICIP strategy.**

Dedicated legislation covering Indigenous Cultural and Intellectual Property (ICIP) has the potential to provide stronger and fit-for-purpose protections, as well as greater clarity about the allocation of cultural rights (chapter 6).

This chapter develops a model for what such dedicated legislation could look like. Given the scope of this study, the emphasis of this chapter and the solutions it considers is on issues relating to visual arts and crafts. The focus is on protecting some of the cultural aspects of ICIP, rather than the aspects that relate to knowledge or physical assets. This is not to suggest that those aspects of ICIP are unimportant or could not benefit from protective legislation, but they are outside the scope of this study.

That said, designing dedicated legislation for protecting the cultural aspects of ICIP requires considering how that legislation would fit into a bigger picture of measures for protecting ICIP broadly — including potential measures for protecting knowledge and physical assets. Section 7.1 examines this question.

The remainder of the chapter is about the design of new dedicated legislation to protect and recognise cultural rights in relation to visual arts and crafts ('cultural rights legislation'), which would form part of the comprehensive ICIP strategy. Section 7.2 outlines the basic framework for the design of the new cultural rights legislation, which would include a new cause of action that would enable traditional owners to assert their rights in relation to cultural assets.

The subsequent sections examine options for the design of particular elements. In particular, the following questions are considered:

- what would be protected under the legislation? (section 7.3)
- who could bring a cause of action under the legislation? (section 7.4)
- what would count as an infringement? (section 7.5)

Section 7.6 discusses what institutional arrangements would be needed to support the operation of the new cultural rights legislation.

Ultimately, this chapter is about what is *possible* for dedicated legislation. Throughout, the Commission has identified areas where it is seeking further feedback about whether other options are available, as well as the viability and desirability of different options. Responses to these information requests will assist the Commission in reaching a view about the merits of dedicated legislation and how it should be designed for its final report.

7.1 Regulatory architecture for protecting ICIP

As noted in chapter 6, there are already some regulatory measures in place that protect some aspects of ICIP, such as native title and heritage laws. This means that new cultural rights legislation would not exist or operate in a vacuum. Rather, it would ideally be part of a broader and coherent ICIP regime, both within Australia and internationally. This section considers how new cultural rights legislation could fit into the broader regulatory landscape — with an emphasis on identifying what is needed to enable the legislation to be effective, both in its own right and in conjunction with other laws and regulatory measures.

A multi-pronged approach to protection and recognition

As discussed in chapter 6, ICIP covers a wide range of traditional knowledges and cultural expressions. This has implications for how policy and regulatory initiatives should be designed, in order to protect and recognise rights in relation to ICIP most effectively.

The multi-faceted nature of ICIP means that a mix of regulatory responses may be needed to protect and recognise the different aspects of ICIP.

A targeted approach combining legislation, prosecution of test cases, protocols, codes of practice, promotion of best practice, education, advocacy, research and ongoing consultation can make an effective contribution to the recognition and protection of ICIP ... (Janke and Quiggin 2006, p. 10)

For this reason, a multi-pronged approach to protecting and recognising ICIP is likely required, with multiple measures that would each address a different aspect of ICIP. Box 7.1 outlines some potential regulatory responses that could be used to improve protections for and recognition of ICIP.

Some have advocated for a single unified mechanism covering all aspects of ICIP (Janke and Frankel 1998, p. 194; Stoianoff and Roy 2015, pp. 779–780). The *Our Culture, Our Future* report identified this as the preferred option from the perspective of participants in its Indigenous Reference Group.

The [Indigenous Reference Group] supported the view that any legislation should cover the range of heritage material ... Indigenous people prefer the introduction of one Act. (Janke and Frankel 1998, pp. 185, 194)

It was also argued that the separation of ICIP into different regimes (such as separate laws for traditional cultural expressions and traditional knowledge) would fail to reflect the interconnectedness of its various elements (Adjei and Stoianoff 2013, p. 37; Janke 2019, p. 323). For example:

ICIP is not a bundle of separate rights and interests that can be fragmented and so undermined ... Rather it is holistic; an integrated institutional system connected to place and linked to people, land and identity. (Janke 2019, p. 323)

Stoianoff and Roy also expressed the view that multiple legislative instruments would be unjustified:

If this ... were to be followed in Australia, the result would be at least two legislative regimes — which seems unwarranted. In our opinion, it is sufficient to provide a uniform *sui generis* regime for both cultural expressions and Indigenous knowledge, particularly if the regime is kept to a principles-based level ... (2015, p. 779)

However, the suggestion that there should be ‘one Act which deals with the full ambit of rights and responsibilities relating to Indigenous knowledge and culture’ (Stoianoff and Roy 2015, p. 780, emphasis in original) would require such legislation to incorporate ICIP protections that are already embedded in existing legislative instruments. These instruments include legislation about intellectual property, native title and heritage (chapter 6). It would be prohibitively impractical to relocate the parts of those laws that relate to ICIP into a single Act — meaning that, by necessity, there will need to be more than one Act governing ICIP. While it is important for ICIP laws to be cohesive and coherent, this can be achieved through coordination across different legislative instruments (discussed below), rather than combining all those instruments into one.

Moreover, given the many dimensions of ICIP, a blanket approach would likely be too blunt to address the full range of ICIP issues in a meaningful way. A purely ‘principles-based’ approach to protecting ICIP would likely be at the expense of the specificity required to distinguish between acceptable and unacceptable uses of ICIP, and hence the ability to enforce ICIP rights. By contrast, a multi-pronged approach to protecting and recognising rights would mean that regulatory responses can be tailored to specific types of ICIP (for example, visual arts and crafts, languages or ancestral remains, etc.). In turn, this would enable a more nuanced and fit-for-purpose approach to protection.

Box 7.1 – Tools for protecting Indigenous Cultural and Intellectual Property

A range of complementary responses are available for governments to improve protections for Indigenous Cultural and Intellectual Property (ICIP).

- **Legislation** can compel or incentivise people to change their behaviour. Sections 7.2-7.5 discuss a proposal for new cultural rights legislation, which would create consequences for the unauthorised use of cultural assets. Other legislation could address other aspects of ICIP, such as the protection of or recognition of rights in relation to traditional knowledge or genetic resources.
- **Declaratory measures** can expressly recognise the ICIP interests of Aboriginal and Torres Strait Islander people. For example, a declaration could affirm or acknowledge: the contribution that ICIP makes to Australia's national identity; a shared understanding of Australia's commitment to working towards fair and just outcomes; or Australia's commitment to meeting its international obligations in relation to ICIP.
- **Voluntary measures** are soft law measures, including codes or rules that people choose to abide by. For example, the Australia Council for the Arts has published Protocols for using First Nations Cultural and Intellectual Property in the Arts (Terri Janke and Company 2019). Voluntary measures are discussed further in chapter 10.
- **Government practices** can also influence the behaviour of other market participants.
 - Government agencies can set a standard for what constitutes good practice. For example, the Indigenous Procurement Policy sets targets for the volume and value of contracts awarded to Indigenous businesses (NIAA 2022c). Policies could also articulate a required standard of conduct for government agencies that procure goods and services incorporating ICIP.
 - Governments can build ICIP protections into contracting decisions, such as who they agree to contract with, and on what terms. For example, Screen Australia's funding agreements include a requirement for the producer to obtain the appropriate permissions to use any ICIP in a film (Screen Australia 2018).
- **Education initiatives** can improve awareness about issues relating to ICIP, influence people to change their attitudes and practices, and shift public sentiment about what is acceptable (chapter 5). The South Australian Government argued that education 'is required at all levels of the Aboriginal visual arts and crafts market (e.g. retail, wholesale, commissioning, licensing and gallery sales)' (SA Government, sub. 21, p. 13).

It is also unclear whether all-encompassing ICIP laws are feasible or practicable. In Australia, there have been some efforts to design such laws (Janke and Frankel 1998; Stoianoff and Roy 2015), but these efforts have not been taken up. Internationally, there have been attempts to introduce ICIP legislation, but these laws have tended to focus on specific aspects of ICIP, rather than covering all aspects of ICIP (box 7.2). Taken together, these factors mean that, worldwide, there is no precedent for all-encompassing ICIP laws being put into practice. The Commission considers that, compared with pursuing the development of a single catch-all Act, taking a multi-pronged approach to protecting ICIP is more likely to lead to progress towards the formal recognition of ICIP rights in Australia.

Box 7.2 – International approaches to ICIP legislation

South Africa

In 2019, South Africa introduced the *Protection, Promotion, Development and Management of Indigenous Knowledge Act*. The Act protects knowledge of a functional nature, knowledge of natural resources and Indigenous cultural expressions. The *Intellectual Property Laws Amendment Act*, while awaiting proclamation and unimplemented, amends copyright law to extend protection to Indigenous cultural expressions or knowledge (Law Council of Australia, sub. 19, p. 8). Provisions protecting traditional knowledge related to genetic or biological resources are included in the *Patents Act* and *Bioprospecting, Access and Benefit-Sharing Amendments Regulations*.

New Zealand

New Zealand has introduced provisions into national trade mark laws that prohibit the registration of trade marks where it would be likely to offend the Māori community (*Trade Marks Act 2002*, s. 17(1)(c)). An advisory committee has also been established, consisting of members who have knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture). This committee advises on whether a trade mark is derivative of a Māori sign or likely to be offensive to Māori (ss. 177-179).

United States of America

The United States of America has implemented a ‘truth-in-marketing’ law (WIPO 2020, p. 33) that aims to promote the economic well-being of American Indians (Law Council of Australia, sub. 19, p. 8). The legislation makes it illegal to sell goods and products ‘in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization’ (*Indian Arts and Crafts Act of 1990*, s. 104). This legislation is discussed further in chapter 5.

A coordinating strategy

One challenge of taking a multi-pronged approach to ICIP issues is coordinating different policy and regulatory measures. There is the potential for gaps and overlaps between different measures, and questions may arise as to how these measures interact with each other. The National Association for the Visual Arts expressed similar concerns (in the context of funding) about certain cohorts falling outside the scope of existing 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. (sub. 23, p. 4)

Part of the appeal of a blanket approach is that it would be, by definition, comprehensive in scope — meaning that there would be no need to consider interface issues. But, as discussed above, it is not clear that a blanket approach would be feasible or would provide effective protections in practice.

Therefore, to support a multi-pronged approach to protecting and recognising ICIP, the Australian Government should develop and publish a national ICIP strategy. The strategy should cover all aspects of ICIP, such as those identified in the report *Our Culture, Our Future* (Janke and Frankel 1998, p. xvii) — including arts and crafts; languages; and traditional, scientific and ecological knowledge. As such, the strategy would be broader in scope than the work currently being undertaken by IP Australia, which is focused on ‘looking at how Australia’s IP system can help support the cultural integrity and economic

potential of Indigenous Knowledge held by Aboriginal and Torres Strait Islander people' (IP Australia 2020b, p. 3). The cultural rights regime discussed later in this chapter would form one element of the strategy.

The purpose of a strategy would be to provide an overarching framework in relation to ICIP issues. In this way, the strategy would:

- foster a shared understanding of policy objectives relating to ICIP
- provide clarity and transparency about what governments will do to meet these policy objectives
- articulate how various policy and regulatory initiatives will work together to address the various aspects of ICIP — including the role of cultural rights legislation, discussed below.

This is distinct from the *National Indigenous Visual Arts Action Plan* (Australian Government 2021) and the proposal to develop a National Cultural Plan (HoRSCCA 2021) because, whereas those plans (would) focus on the arts, an ICIP strategy would encompass all elements of ICIP.

As such, the development of the strategy should be led by the Minister for Indigenous Australians (supported by the National Indigenous Australians Agency), rather than the Minister or department responsible for the arts — to reflect the fact that ICIP is about ways of being for Aboriginal and Torres Strait Islander peoples, not just about cultural outputs. The strategy should be developed in partnership with Aboriginal and Torres Strait Islander people, and in consultation with state and territory governments, noting that certain state laws (such as heritage laws) also contribute to the protection of ICIP. Its development should also have regard to the role for international cooperation in protecting ICIP (box 7.3).

In developing the strategy, the Minister should map existing and any planned policy and regulatory measures to the aspects of ICIP they are intended to protect. Such an exercise would provide an opportunity to explicitly consider and articulate how any new measures will interact with existing laws, such as heritage and native title laws.

Publishing the mapping as part of the strategy would provide greater transparency and clarity about which measures are intended to address which issues relating to ICIP. In practice, this 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. It could also help alleviate participants' concerns about certain issues going unaddressed. Taken together, these factors may help progress ICIP protections.

Box 7.3 – International cooperation on ICIP issues

International cooperation is key to creating a cohesive system of Indigenous Cultural and Intellectual Property (ICIP) protections internationally. An international system for protection would enable Australian ICIP to be protected beyond Australia's borders.

Arrangements of this type are already in place for intellectual property laws. Australia is party to many international agreements about intellectual property, many of which have the effect of enabling the rights of Australian intellectual property holders to be recognised and enforced overseas. For example, one such agreement is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires members of the World Trade Organization (WTO) to provide a minimum standard of intellectual property protections under their domestic laws (WTO 1994).

Box 7.3 – International cooperation on ICIP issues

The agreement also includes articles that prohibit discrimination in relation to the intellectual property protections available to foreigners.

- Members are prohibited from treating foreigners less favourably than their own nationals (article 4).
- Members must grant advantages, privileges and immunities to other member states equally (article 5).

Together, these factors mean that a baseline level of intellectual property protection is available in all WTO member states, for a national of any WTO member state (including Australians).

In relation to the protection of ICIP, there are ongoing efforts towards a similar international agreement, but progress has been slow (chapter 6).

Since 2001, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization ... has been debating the protection of Traditional Cultural Expressions (TCEs). The latest version of draft articles for a TCEs treaty was presented to the 40th session of the IGC in Geneva, June 17 to 21, 2019. (Blakeney, sub. 32, p .1)



Draft Finding 7.1

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.



Draft Recommendation 7.1

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.

7.2 New cultural rights legislation: the basic framework

One measure that should be incorporated into an ICIP strategy is dedicated legislation to recognise the cultural rights of Aboriginal and Torres Strait Islander people in relation to visual arts and crafts. At its core, the new cultural rights legislation would formally recognise the interests of Indigenous communities or groups³⁴ in their traditional cultural assets. In other words, the legislation would give traditional owners of cultural assets exclusive control over their cultural assets, provided certain criteria are met. As such, it would recognise Indigenous custodianship of traditional cultural assets as being a form of ownership.

The legislation would also establish a legal framework that sets out rights and obligations in relation to the use of those assets. That is, traditional owners would be empowered to decide who may use cultural assets and in what ways. In the sphere of visual arts and crafts, this would give traditional owners the right to:

- control their cultural assets
- choose whether to authorise the use of their cultural assets
- place conditions on the use of their cultural assets (including payment)
- protect their cultural assets from misappropriation, including by taking legal action.

Although the legislation would not prohibit the use of cultural assets without authorisation per se, it would enable traditional owners to take legal action in relation to such behaviour. This would be expected to create stronger disincentives against, and hence lower the prevalence of, cultural misappropriation.

Like all Australian legislation, the new cultural rights legislation would operate domestically. Extending protection for cultural assets beyond Australia's borders would require international cooperation and cannot be achieved through domestic legislation alone (box 7.3). The legislation would also apply prospectively — to uses of cultural assets occurring after the commencement of the legislation.

The recognition of cultural rights should be grounded in the idea that they are inalienable — that is, no one apart from the traditional owners can be recognised as having title in cultural assets. This is similar to how moral rights inhere in the author of a copyrighted work (*Copyright Act 1968* (Cth), s. 195AN) and to how native title rights and human rights are considered to be inalienable rights (AIATSIS 2020; UN 1948). This would have implications for what sort of 'dealings' of cultural assets should be legally recognised: dealings that purport to sell, transfer or assign cultural assets would not be valid, because they would purport to 'alienate' the asset from the traditional owners. By contrast, a licence or authorisation to access or use cultural assets should be recognised as valid, as they would be consistent with the traditional owner's continued ownership of the asset.

The new cultural rights legislation is intended to complement the rights that artists and their communities already have under existing laws to protect their intellectual property and cultural assets. It is also intended to work in tandem with other measures to recognise ICIP rights, as part of a broader ICIP strategy (section 7.1). In particular, it is not intended to preclude existing measures to protect other aspects of ICIP — such as the right to proper attribution (box 7.4) or 'the right to protect Indigenous sites including sacred sites [and] the right to own and control management of land and sea, conserved in whole or part because of their Indigenous cultural values' (Janke and Frankel 1998, p. 47).

This section gives an overview of the basic framework for what the new cultural rights legislation could look like. Later sections of this chapter identify options for the design of particular elements. Given the scope of this study, these discussions focus on how such legislation could operate specifically with respect to visual

³⁴ A community or group could be a mob or clan, language group, outstation, town, etc.

arts and crafts — however, as discussed above, this does not preclude the possibility that similar mechanisms could be beneficial for other types of arts and crafts, such as performance arts.

Box 7.4 – Moral rights and communities

Under the *Copyright Act 1968* (Cth), an author or performer of a copyrighted work is recognised as having moral rights. This grants the author or performer:

- a right of attribution (ss. 193, 195ABA)
- a right not to have work falsely attributed (ss. 195AC, 195AHA)
- a right to integrity — that is, a right not to have the work subjected to derogatory treatment (ss. 195AI, 195ALA).

Attribution of community under current laws

There are also provisions that allow authors to, within reason, nominate how they would like to be identified (s. 195). It has been argued that this could allow Aboriginal and Torres Strait Islander authors to acknowledge their clan affiliations (Janke 2001):

It has become the practice in Indigenous arts industry for artists to be identified with their clan names ... For instance, Buku Larrnggay Mulka have a practice of including the community on copyright notices of artistic works:

©Banduk Marika, 1998. This work and documentation is the copyright of the artist and may not be reproduced in any form without the permission of the artist and the clan concerned.

In effect, this ‘bundles up’ the attribution of a community with the requirement to attribute the work to the author. But it does not give a community an independent right of attribution — rather, it gives the author a *de facto* right to have their community attributed. This is consistent with the provisions that ‘only individuals have moral rights’ (s. 190).

Proposal for communal moral rights

In December 2003, the Australian Government released a draft bill to amend the Copyright Act. The amendments would enable the recognition of Indigenous communal moral rights, provided certain conditions were met. These conditions included formalistic requirements, namely: an agreement between the author and the community; an acknowledgement of the Indigenous community’s connection with the work; and written notice of consent from all people with an interest in the work (SSCECITA 2007, p. 155).

The proposed amendments were criticised for being ‘highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their knowledge and its use’ (Anderson 2004). A further limitation was that the communal moral rights would only be recognised for the duration of the work’s copyright (the life of an author plus 70 years), with the result that ‘the protections offered ... were so limited as to be largely ineffective’ (Sentina et al. 2017, p. 10).

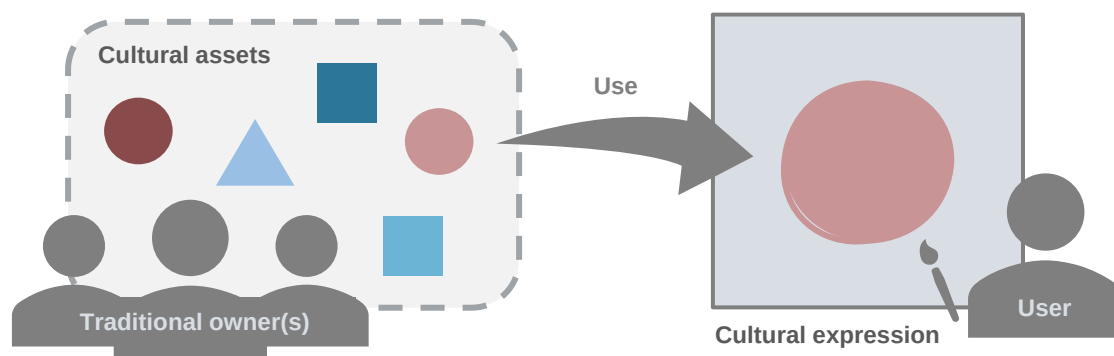
Ultimately, the draft bill was not introduced to Parliament. In 2007, the Attorney-General’s department advised that a revised bill was listed for introduction in the 2007 winter sittings (SSCECITA 2007, p. 156), but this bill was also not introduced to Parliament.

Definitions and key concepts

The legislative framework would need to include constructs to define and identify the relevant parties, as well as the aspects of culture that are in scope. This chapter uses the following terminology (figure 7.1).

- **Cultural asset:** the underlying cultural idea or concept that embodies Aboriginal and Torres Strait Islander traditions.
- **Traditional owner:** the person, group or community who has ownership and custodianship of the cultural asset.
- **Use:** the act of giving expression to a cultural asset — in this context, the incorporation of a cultural asset in art, craft or other works. By definition, the use of a cultural asset creates a cultural expression.
- **User:** a person, whether or not the traditional owner, who uses a cultural asset to produce a cultural expression.

Figure 7.1 – Key terms



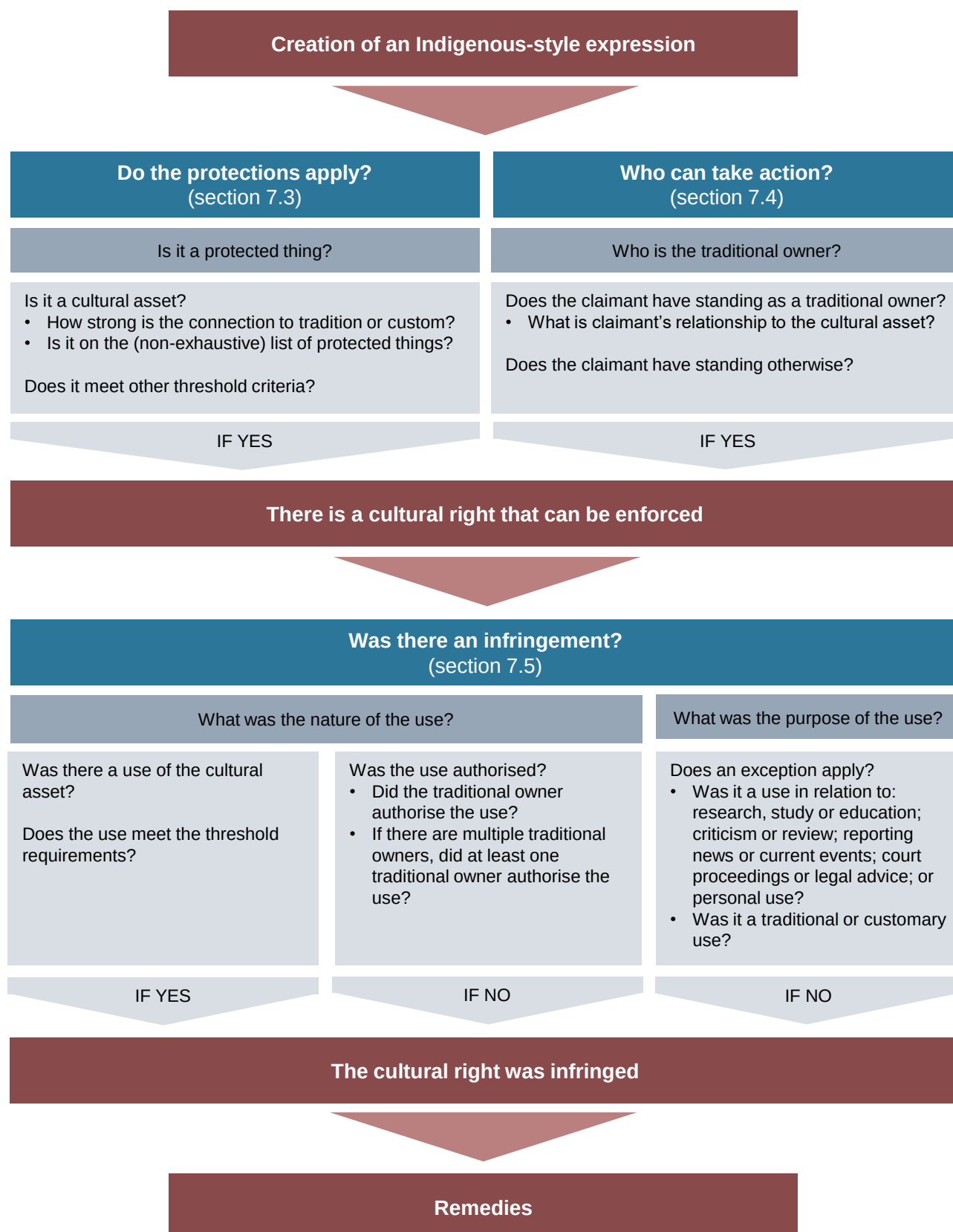
A new cause of action

The 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. This would entitle a traditional owner to take court action to enforce their rights, and to seek damages and/or other remedies, in relation to that infringement.

In this way, the legislation would define the circumstances under which cultural rights exist, what constitutes an infringement and who can take legal action to enforce these rights. In other words, a successful claim under the legislation would require the following elements to be proved:

- the cultural asset falls within scope of what is protected under the legislation (section 7.3)
- the claimant is the traditional owner of the asset (or otherwise has standing) (section 7.4)
- the rights of the traditional owner were infringed (section 7.5)

Once an infringement has been established, a court would then consider what remedies are appropriate in the circumstances. Figure 7.2 depicts how these elements interact with each other, and illustrates how a court might consider and decide a case.

Figure 7.2 – How would a case be decided?

A key design challenge is striking the right balance between protecting cultural assets and the interests of those seeking to access and use them. To achieve this, checks and balances would need to be built into each element, such as by setting out criteria that must be met or specifying exceptions to the rule.³⁵ Later in this section, each element is discussed in turn and options for introducing checks and balances are canvassed.

Interaction with customary law authorisation processes

In practice, the new cultural rights legislation would work alongside traditional cultural authorisation processes (chapter 6) — by empowering traditional owners to decide what uses of cultural assets are legally permissible and by enabling those decisions to be made in accordance with customary law.

- Traditional owners would have decision-making power over whether or not to authorise the use of their cultural assets. This is because those seeking to use those cultural assets would, in practical terms, be required to seek authorisation to do so upfront.
- It would also enable traditional owners to choose how such decisions are made. This is because the legislation would not prescribe criteria or processes for making such decisions; traditional owners would be free to make decisions in the manner that they see fit, including through customary law processes.

Box 7.5 outlines how the Commission envisions these new cultural rights laws would apply, and the role that authorisation would play, in different scenarios.

Box 7.5 – How would cultural rights apply in practice?

Authorised use

Scenario: An artist uses a traditional Indigenous motif in her artwork. The motif can be traced back to a traditional owner and the artist has been granted permissions to use the motif by the traditional owner.

Outcome: The artist has used the cultural asset to create a cultural expression, in a manner that is consistent with the cultural rights of the traditional owner.

Unauthorised use

Scenario: An artist uses a traditional Indigenous motif in his artwork. The motif can be traced back to a traditional owner, but the artist does not have permissions to use the motif from the traditional owner.

Outcome: By using the cultural asset to create a cultural expression without authorisation from the traditional owner, the artist may have infringed the traditional owner's cultural rights.

Use exceeds scope of authorisation

Scenario: An artist uses a traditional Indigenous motif in her artwork. The motif can be traced back to a traditional owner, from whom the artist had previously been granted permissions to use the motif — but those permissions do not cover the creation of this particular artwork.

³⁵ By way of illustration, the Copyright Act imposes limits on what is protected (including by placing boundaries on the types of works in which copyright subsists and specifying time limits for protection) and minimum thresholds on what counts as an infringement (only copies of a 'substantial part' of the original work are prohibited and there is an exceptions regime that deems certain uses to be non-infringing).

Box 7.5 – How would cultural rights apply in practice?

Outcome: The artist has exceeded the scope of what she was authorised to do by the traditional owner. In doing so, the artist may have infringed the traditional owner's cultural rights.

Multiple owners

Scenario: An artist uses a traditional Indigenous motif in his artwork. The motif can be traced back to multiple Aboriginal and Torres Strait Islander groups, each of whom can show that they are a traditional owner of the motif. One of those traditional owners has given the artist permission to use the motif in his artwork.

Outcome: The artist's use of the motif was authorised. As such, the artist is not liable for infringing the cultural rights of the traditional owners.

Indigenous-style motifs

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).

**Draft Recommendation 7.2**

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.

**Draft Finding 7.2**

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.

7.3 What would be protected?

The first element of a cultural rights claim relates to what would be protected under the new cultural rights legislation. In other words: what would cultural rights subsist in or attach to?

Cultural assets would be eligible for protection

In the framework set out above, cultural assets would be the object of protection — which leads to the question of what counts as a cultural asset.

The Commission considers that it would not be possible to define ‘cultural asset’ in a way that provides absolute clarity about what is in scope and what is not — such as by specifying an exhaustive list of what types of things are protected. Moreover, it is doubtful whether doing so would be desirable, as it would leave no room for the exercise of judgment in relation to specific circumstances. As was argued in the context of defining ‘traditional knowledge’:

[P]roviding a comprehensive definition ... is a difficult task and one that has questionable benefits ... The benefit of using a term that is clearly delineated from other terms but is not explicitly defined is that the content of the term is not fixed and the term will therefore be able to adjust and adapt to dynamic customary legal systems and novel aspects of traditional knowledge. (Dodson and Barr 2007, p. 24)

For this reason, the Commission’s preliminary view is that the assessment of whether something is a cultural asset should be left for courts to determine, in the context of the specific circumstances of each case. This determination should be guided by legislative criteria, but not a legislative definition. The criteria could be accompanied by examples (that is, a non-exhaustive list) of things that are clearly intended to be in scope — such as symbols and motifs. In practice, this would mean that a court would determine whether something is a cultural asset based on the facts of a case, having regard to the legislative criteria. The court could also consider the non-exhaustive list to assess whether the thing in question is included in or ‘of a kind’ with any of the examples in the list. The onus would be on the claimant to establish that there is a cultural asset that is eligible for protection.

An emerging theme from the literature is that one criterion for assessing whether something should be protected (and hence constitutes a cultural asset) should be the strength of its connection to tradition or custom (Janke and Frankel 1998, p. 7; Janke and Sentina 2018, p. 20). The inclusion of this criterion reflects the view that:

... legislation should focus on *traditional* knowledge rather than new, also because new knowledge is protected under the current legal framework. (Janke and Frankel 1998, p. 184, emphasis added)

This would echo the requirements under the *Native Title Act 1993* (Cth) to provide evidence about traditional laws and customs in relation to lands and waters (s. 223(1)(a)).

In practical terms, this criterion could be addressed, for example, through evidence about a pattern of behaviour in relation to the asset or of intergenerational knowledge transfer. The criterion should be framed so as to require claimants to show a positive connection to the tradition or custom, but should not require that the connection is exclusive. This would be in acknowledgement of the fact that there are often shared traditions and customs between different Aboriginal and Torres Strait Islander groups.

The criterion should also be framed so as to acknowledge that traditions can evolve over time. In 2015, the Australian Law Reform Commission recommended a similar acknowledgement in relation to native title laws (box 7.6). This is especially important in light of the fact that ‘Aboriginal and Torres Strait Islander cultures

have adapted dramatically to accommodate all that has been introduced into Australia since 1788' (Reconciliation Australia nd). In other words, this means that the criterion should not be focused on tradition or custom as it existed at a particular point in time. It would be for courts to determine, on a case by case basis, whether something is traditional.

The Commission is seeking feedback on the criteria by which a court should decide whether something is a protected cultural asset.

Box 7.6 – Connection to Country: Review of the Native Title Act

In 2015, the Australian Law Reform Commission (ALRC) undertook a review of the *Native Title Act 1993* (Cth). One issue considered as part of that review was whether the Native Title Act should explicitly recognise that traditions can change over time. An example of such change is customary laws allowing images relating to Country to be painted on canvas rather than on Country, and the sale of these artworks.

Many participants to that review supported the inclusion of such a provision or were critical of the way that 'traditional' had been interpreted by courts. For example, Goldfields Land and Sea Council argued that a static view of tradition would 'ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal'.

In its discussion paper, the ALRC initially proposed that the term 'traditional' be removed from the definition of native title, but that proposal did not receive widespread support. Participants generally indicated a preference for retaining the word 'traditional' — for example, Native Title Services Victoria said that 'it is not the word "traditional" but its interpretation that is at issue'. And Yamatji Marlpa Aboriginal Corporation suggested that the 'danger of removing the word "traditional" ... is that it may suggest that native title claims could be supported by mere "historical" (namely, post-settlement) connection and/or newly invented laws and customs'.

In its final report, the ALRC recommended that the Native Title Act 'should be amended to provide that traditional laws and customs may adapt, evolve or otherwise develop'. In making this recommendation, the ALRC noted the role of courts in determining whether something should be considered traditional:

... 'difficult questions of fact and degree' will continue to arise in determining whether the content of contemporary laws and customs can be characterised as having their origins in pre-sovereign laws and customs. These are essentially matters of evidence and the inferences to be drawn from the evidence. Establishing that the content of contemporary laws and customs have their origins in laws and customs acknowledged and observed prior to sovereignty will, in most cases, rely on the Court ... being willing to draw inferences from other evidence.

The ALRC expressed the view that, given the effect of European occupation on Aboriginal and Torres Strait Islander cultures, the adaptation and evolution of laws and customs should be considered the norm rather than the exception.

Source: Australian Law Reform Commission (2015, pp. 137–146).

Limits or conditions on protection

The next question is whether protections should apply to *all* cultural assets. That is, should limits or conditions apply, so that only certain cultural assets are protected? This subsection outlines some options for what those limits might be and assesses the case for their inclusion in the regime. But more information is needed to reach a final view — as such, the Commission is seeking feedback on what, if any, threshold criteria should be applied.

Registration requirements?

One question is whether registration should be required. A ‘registered rights’ approach would mean that a cultural asset would not attract protection unless it had been registered. By contrast, under an ‘unregistered rights’ regime, protections would attach automatically to cultural assets without the need for registration. In practical terms, this would mean that a party seeking to enforce their rights in court would need to establish their claim from scratch, rather than being able to rely (in part) on what is in the register.

Internationally, there is a mix of approaches.

- Registration-based ICIP regimes have been implemented in some countries such as Brazil, Peru, Panama, and the Philippines (Stoianoff and Roy 2015, p. 767).
- Unregistered ICIP rights are recognised in some countries such as Vanuatu (Parliament of Vanuatu 2019b). Model laws drafted by the World Intellectual Property Organization (WIPO) and for the Pacific Islands do not include provisions that would require registration for the purpose of gaining protection (Secretariat of the Pacific Community 2002; WIPO 1985).

Under a registration-based regime, the register would be a *prima facie* record of all cultural rights. Advocates for registration typically point to the certainty and transparency that a register would provide, for both registrants and those consulting the register. For example, in the context of advocating for register of Aboriginal artists, UMI Arts Ltd. said:

There should be a register set up of all Indigenous artist[s] similar to the Supply Nation framework that can: verify the works of the artist and confirm that the artist is registered as a *bon[a] fide* Indigenous art supplier ... This would eliminate non-Indigenous artist[s] sheltering under bogus Aboriginal names from entering the Indigenous artist space. (sub. 1, p. 13)

But even a registration regime would not provide complete certainty, because the contents of a register can still be open to dispute. By way of example, patent law in Australia grants rights in relation to inventions by way of registration (*Patents Act 1990* (Cth), ss. 13, 186)³⁶. Although IP Australia assesses each application to make sure it meets the legislative requirements for registration (IP Australia 2020a), it is not uncommon for disputes to arise about whether the decision to register a patent was correct (Davison, Monotti and Wiseman 2016, pp. 649–650).

A requirement for registration would likely also be accompanied by higher administrative costs. This includes the cost to government of setting up and maintaining the register, as well as the costs to traditional owners of registering their cultural assets. A registration process will also front-load dispute resolution costs — it would require disputes about ownership to be resolved before registration. In contrast, an unregistered rights approach would mean that dispute resolution costs are incurred only when there is a ‘live’ issue to be resolved.

³⁶ A patent protects a new invention (including a device, substance, method or process) and grants the patent holder exclusive commercial rights to the use of the invention (IP Australia 2020a).

There is evidence to suggest that a requirement for registration would be burdensome for traditional owners, and hence dissuade them pursuing registration.

[Registration] would place an additional burden on artists ‘to register their cultural property before it is protected’ and is therefore not ideal ... ICIP should be automatically protected ‘by virtue of its existence’ in the same way that copyright protects ‘works’ upon their creation. (Whinn, sub. 22, p. 3)

One example of this is the *Aboriginal Heritage Act 2016* (Vic), which allows for intangible heritage to be registered in the Aboriginal Cultural Heritage Register. Once registered, intangible heritage can only be used with the formal agreement of the relevant traditional owner organisation. But take up remains low:

The registration of intangible property on the Aboriginal Cultural Heritage Register has proven decidedly ineffective as only one registration of intangible heritage on the Aboriginal Heritage Register has occurred since provisions were introduced into the AHA in 2016. (VAHC 2021, p. 44).

Moreover, registration is not compatible with the aspects of Aboriginal and Torres Strait Islander cultures that are secret or sacred. It was for this reason that the University of Technology Sydney proposed that there should be one or more confidential registers, alongside a public one (UTS Indigenous Knowledge Forum et al. 2014, p. 135).

The regime proposed in the [University of Technology Sydney] Submission to IP Australia’s public consultation divides such a database into several registers to be administered by a competent authority: a confidential register of ‘knowledge holders’, a public register of ‘knowledge resources’ and a confidential register of ‘knowledge resources’. An additional feature is recognition that two registrars are required, one female and one male, to attend to women’s business and men’s business respectively, demonstrating the need to be sensitive to the customary law of Aboriginal and Torres Strait Islander communities. (Stoianoff and Roy 2015, p. 778)

However, this approach would undermine one of the core benefits of a registration-based regime: certainty and transparency about what cultural assets are protected. This is because information about registered things would be split over several separate registers and the contents of the confidential registers would not be available to the public.

Overall, the Commission considers that a registration-based model is unlikely to be workable — the evidence indicates that there is little appetite on the part of traditional owners to pursue registration. This would suggest that the expected benefits of registration, in the form of greater certainty about the allocation of rights, are unable to be realised even under a registration-based model. For this reason, the Commission’s view is that new cultural rights legislation should recognise cultural assets as attracting protections automatically, without requiring traditional owners to seek registration.

That said, some of the benefits of registration could be captured by having an optional registration system. This could be analogous to voluntary copyright registration in some international jurisdictions, whereby the registration itself can be used to help prove ownership in court (WIPO 2022b). The Commission welcomes feedback on whether a voluntary registration system would be useful and about how it could work.

Time requirements?

A further consideration is whether there should be time limits on protections. As noted in chapter 6, intellectual property laws usually offer time-limited protections, whereas ICIP is generally understood to be perpetual in nature (Janke and Dawson 2012, p. 10). On this matter, the Law Council of Australia said:

Due to the continuing nature of First Nations culture, ICIP also includes physical items created based on First Nations cultural heritage, existing beyond the limits of copyright duration. (sub. 19, p. 5)

WIPO asserted that rights in relation to ICIP broadly should be recognised in perpetuity:

Protection not limited in time is justified by the fact that the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time. (WIPO 1985, p. 22)

This also accords with the ‘indefinite character’ of native title determinations (ALRC 2015, p. 145; *Western Australia v Ward* (2002) 213 CLR 1 at [32]), whereby the native title is considered to prevail indefinitely unless and until the determination is found ‘no longer to be correct’ (Native Title Act, s. 13).

Time-limited protections for intellectual property are justified because those laws are about protecting things that are ‘new’. In broad terms, the expiry of intellectual property protections after a specified time period aligns with the fact that, after some time, ideas or inventions cease to be novel — and should rightly enter the public domain. By contrast, the focus of new cultural rights legislation would be on protecting things that are traditional or customary — in other words, things that are ‘old’. Therefore, if anything, the emphasis should not be on when protection *ends*, but rather when it *begins*.

The Commission considers that, functionally, this issue is covered by the requirement for a court to assess the cultural asset’s connection to tradition or custom (outlined above). On this basis, there is no additional need to specify concrete time requirements for when protections for cultural assets begin or end.

Other threshold criteria?

The Commission is also seeking feedback on whether other threshold criteria should be applied, so as to limit what cultural assets are protected. For example, should there be a requirement for an asset to be ‘culturally significant’ in order to attract protection?



Information request 7.1

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?

7.4 Who could take action?

The second limb for the court to consider would be who the traditional owner of the cultural asset is — and, in particular, whether it is the claimant. As set out above, this would determine whether that claimant has standing to bring a claim.

In practice, this would mean that a claimant would need to establish their ownership in court — that is, show that they are a traditional owner of the cultural asset. The court would make an assessment about whether the claimant is or is not a traditional owner, based on the facts of the case. The following subsections discuss what criteria the court would take into account in making such a determination.

Who could be a traditional owner?

Culture is widely regarded as being collectively owned by communities or groups, not individuals (box 7.7). To give effect to this principle, the new cultural rights legislation would need to recognise groups or communities as capable of being traditional owners.

Box 7.7 – Culture is owned collectively

Culture is widely considered to be collective or shared, and is at the heart of Aboriginal and Torres Strait Islander community identities (HoRSCIA 2018c, p. 1). As the Law Council of Australia said:

ICIP rights are collective; cultural expression and knowledge originate from a community and are passed on from generation to generation. Culture can be expressed continuously by communities, and in a variety of formats, with an associated diversity of permissions and restrictions. (Law Council of Australia, sub. 19, pp. 4–5)

For this reason, ownership of cultural assets is commonly attributed not to individuals, but rather to the groups or communities to which those individuals belong. For example:

Due to the collaborative nature of many First Nations artworks and stories, which are passed down through the generations, many works are deemed to be owned by the community or ‘mob’ rather than by one person. (Whinn, sub. 22, p. 1)

Traditional cultural expressions are directly connected to identity and form the basis of a collective cultural sensibility — a community. Traditional cultural expressions are not owned by individuals because they express the identity of the collective and therefore is an essential part of the cultural heritage of the community. (Callanan, sub. 5, p. 15)

On this basis, the recognition of cultural rights must be rooted in the premise that those rights are held collectively. Individuals are able to access cultural assets and benefit from cultural rights by virtue of their membership in a group — but do not themselves own cultural assets or rights. This is the case, even where an individual is appointed to make decisions about cultural assets on behalf of the group as a whole.

One challenge is that, for the most part, the Australian legal system only recognises individuals, corporations and some government agencies as having legal personality. This is important because having legal personality confers upon an entity the ability to have rights and obligations in the eyes of the law (Black 1910) — this would include the ability to be recognised as a traditional owner, along with the rights and obligations that accompany that title.

Generally speaking, communities and groups (unless incorporated) are not recognised as having legal personality. This means that there are limited provisions for collective rights (Callanan, sub. 5, p. 31, Whinn, sub. 22, p. 1). In part, the challenge of recognising communities or groups as having legal personality relates to the fact that they are less well-defined than natural persons and incorporated entities.

Having been established to create an avenue for property owners to assert their property rights, our legal system remains centred around individual personhood. The concept of communal property rights is one that needs to be properly addressed by law. First Nations communities are the custodians of vast amounts of traditional knowledge and culture, and deserve to have the ability to assert their ownership over such cultural property. (Elsdon 2019, p. 20)

But the general rule that communities and groups lack legal personality is not an insurmountable problem. The Commission has identified two alternative or complementary options for enabling communities and groups to be recognised as traditional owners. Feedback is being sought on the merits of these options and on whether there are other options.

The first option is to recognise one or more individuals as acting on behalf of a community or group (a ‘representative’ action). Under this option, a court would determine, as part of a case, whether the claimants are appropriate individuals to bring a claim on behalf of others. This is analogous to the operation of the Native Title Act, which recognises the ‘communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters’ (s. 223(1)).³⁷

Allowing individuals to represent their community or group would also align with the view that there is a ‘practical need for a representative procedure in Aboriginal arts cases’ (Abrahams 1996, p. 167). As was noted at the UNESCO–WIPO Forum on the Protection of Folklore:

... representative procedure is appropriate in virtually every case of Aboriginal arts abuse. The primary reason for this is because of the essentially ‘communal nature of ownership of Aboriginal art and designs under Aboriginal customs and law’. (Puri 1997, p. 16)

This approach would also give the community or group greater latitude in nominating their representatives. This could help address the Law Council of Australia’s concern that ‘classical procedural barriers of standing (who can sue) intersect with cultural obligations and permissions (who should sue)’ (sub. 19, p. 7).

Currently, representative proceedings are permitted in the Federal Court of Australia (*Federal Court of Australia Act 1976* (Cth), Part IVA)³⁸ — although some commentators argue that these rules are not effective at facilitating representative proceedings in practice (Abrahams 1996, p. 172; Seymour 2001, p. 89). On this basis, there may be a need for bespoke provisions about representative actions in the new cultural rights legislation.

A second option is to formalise the recognition of community or group through a register. That is, communities or groups could seek registration in order to be recognised as having legal personality — and hence as being capable of having legal rights and obligations. Functionally, this would be analogous to the Australian Security and Investment Commission’s register of companies and organisations (ASIC 2022), whereby registration of a company creates a new legal entity that has rights and obligations in its own right (ASIC 2021).

It would also be similar to the list of federally recognised tribes in the United States, whereby legal status is granted to recognised tribes. Those tribes are recognised as having tribal sovereignty (that is, rights in relation to self-government) and are entitled to receive certain federal benefits, services, and protections (US BIA 2020b). At present, there are 574 federally recognised tribes (US BIA 2020a).

In practice, however, it is likely that a registration requirement for communities and groups would have similar costs and risks to a register of cultural assets (discussed in section 7.3). That is, a register would be costly to set up and maintain — and, if registration is on an opt-in basis, there is no guarantee that communities and groups will choose to be registered.

³⁷ A person can make a native title claim on behalf of a group if they have been authorised by all members of the group to do so, and belong to the group themselves (Native Title Act, s. 61(1); NNTT 2017)

³⁸ One or more persons may bring a representative claim in the Federal Court of Australia where: seven or more persons have a claim against the same person; the claims arise from the same, similar or related circumstances; and the claims share a common issue of law or fact. The proceedings may be commenced on behalf of some or all of the affected persons (Federal Court of Australia Act, s. 33C(1)).

Connection with the cultural asset

In determining whether the claimant is a traditional owner, a court should be required to consider the strength and nature of the claimant's connection to the cultural asset. This mirrors the requirement to show a 'connection with land or waters' in order to establish native title (Native Title Act, s. 223(1)(b)).

Like the native title regime, there would also need to be an element of contemporaneity — that is, the claimant's connection to the cultural asset should be a 'live' one or a 'continuing reality'. The Australian Law Reform Commission explained this requirement in the context of native title:

... s 223(1)(b) is expressed in the present tense, and requires inquiry into the present connection of claimants with land or waters ... The Full Court of the Federal Court has observed that this means that connection involves an element of continuity, deriving from 'the necessary character of the relevant laws and customs as "traditional"'. (ALRC 2015, p. 128)

The native title regime also demonstrates how a claimant's connection to the cultural asset could be demonstrated in practice. For the purpose of native title, connection to Country can be established through evidence of:

- continued acknowledgment and observance of traditional laws and customs (*Bodney v Bennell* (2008) 167 FCR 84, [48]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92])
- knowledge of ceremony, song, dance and body painting (Koch 2013)
- using language (*Ward v Western Australia* (1998) 159 ALR 483).

Given the interconnected nature of ICIP (chapter 6), it is possible that similar types of evidence could be used to establish a claimant's connection to culture, and hence to a cultural asset.

Enforcement by a government authority?

A further option is for the legislation to grant regulatory powers — and thereby standing — to a government authority ('a cultural rights regulator'). This would be a complementary measure, additional to the ability of traditional owners to enforce their rights.

Separate contravention provisions

One way to give effect to this would be to include separate provisions that would make misuse or misappropriation of cultural assets a contravention of the Act ('contravention provisions'). Under this option, the regulator would have standing in its own right to take action in response to the misuse or misappropriation of cultural assets.

In line with the standardised powers given to regulators (as set out in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth)), a cultural rights regulator's powers could include:

- monitoring powers, which can be used to monitor compliance with the contravention provisions
- investigation powers, which can be used to gather information about potential contraventions
- the power to issue infringement notices
- the power to apply to a court for civil penalty orders and injunctions
- the power to accept and seek enforcement of undertakings relating to compliance with the provisions (Attorney-General's Department 2020).

Compared to enforcement by traditional owners, a regulator:

- could better target systemic issues, by making strategic decisions about which cases to pursue
- would not be required to demonstrate that it has standing to bring a case
- could seek civil penalties (the quantum for which are stipulated in legislation) rather than damages, circumventing the need to produce detailed evidence about the extent of harm.

However, because the regulator would have a standalone set of powers (separate to the cause of action available to traditional owners), contravention provisions would not be a simple ‘bolt on’ to the mechanism discussed in this chapter. The design of contravention powers for a regulator would require a separate body of work that would need to consider issues such as: what the legislative remit of the regulator should be; what the powers of the regulator should be; what acts or conduct would be prohibited by the contravention provisions; and what penalties the regulator should be able to seek.

Representative action

A second route would be to enable a government authority to take representative action on behalf of traditional owners. In essence, this would involve the authority ‘stepping into the shoes’ of a traditional owner — that is, it would have standing in its capacity as a representative. This would be similar to the Australian Competition and Consumer Commission’s powers under the Australian Consumer Law to take representative action on behalf of individuals (*Competition and Consumer Act 2010* (Cth), Sch. 2, s. 277).

However, the benefits of representative action by government authorities are questionable, especially if the regulator’s remit pertains to systemic issues (PC 2021, p. 108). In part, this is because representative actions are not significantly different from actions taken by the affected parties (traditional owners) themselves — meaning that cases tend to focus on a specific set of facts rather than a pattern of behaviour. Although regulator-led enforcement could ease the burden on traditional owners, there is evidence to suggest that representative actions can still require considerable investment from the represented parties. In the context of the Australian Consumer Law:

... representative actions also in practice require significant time and effort of the affected consumer(s) to assist the regulator, which some consumers may not be willing or able to invest.
(PC 2021, p. 108)

More evidence is needed

The Commission is seeking feedback on the merits of giving regulatory and enforcement powers to a government authority and how it could work in practice.

At this stage, there is limited evidence about what the additional benefits from a cultural rights regulator would be, over and above the net benefits of enforcement by traditional owners. For this reason, the Commission is currently not inclined to recommend that a mechanism for enforcement by a government authority be initially included in the cultural rights legislative regime.

Once the legislation has been in effect for several years, there will be a better evidence base to assess whether there are still gaps or shortfalls in the regime and what additional mechanisms need to be put in place in response. At that point, the government should commission a review of how the legislation is operating. This review should consider whether the evidence indicates a need for a cultural rights regulator and, if so, what its powers and governance arrangements should be.



Information request 7.2

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?

7.5 What would count as an infringement?

The third element of a cultural rights claim is about whether the traditional owner's cultural rights have been infringed. The claimant would be required to show that the cultural asset has been used to create a cultural expression and that this was done without authorisation from the traditional owner. Together, these two elements would mean that there has been an infringement of the traditional owner's cultural rights, unless an exception applies.

This subsection considers what types of uses might be potentially infringing, what is meant by the requirement for authorisation and what exceptions should be included in the regime.

What types of uses?

The new cultural rights legislation would need to include provisions that set out what counts as a 'use' that has the potential to be infringing. The WIPO and the Pacific Islands model laws provide some insight into what could be considered a use for this purpose (box 7.8). The Commission is seeking feedback on whether a similar definition should be adopted in the new cultural rights legislation. In particular, feedback is being sought on whether an infringement should require use in material form or a minimum level of use — each of these is discussed in further detail below.

Box 7.8 – Approaches in model laws: what counts as a use?

In 1985, the World Intellectual Property Organization devised model laws for protecting 'expressions of folklore'. It proposed that the following uses should be in scope:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes
 - (b) musical instruments

Box 7.8 – Approaches in model laws: what counts as a use?

(c) architectural forms. (WIPO 1985)

In 2002, the Office for the Pacific States of UNESCO drafted model laws for protecting traditional knowledge and expressions of culture, with the following acts being potentially infringing uses:

- (a) to reproduce the traditional knowledge or expressions of culture;
 - (b) to publish the traditional knowledge or expressions of culture;
 - (c) to perform or display the traditional knowledge or expressions of culture in public;
 - (d) to broadcast the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;
 - (e) to translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture;
 - (f) to fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;
 - (g) to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture;
 - (h) to create derivative works;
 - (i) to make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;
 - (j) to use the traditional knowledge or expressions of culture in any other material form ...
- (Secretariat of the Pacific Community 2002)

Requirement for material form?

One issue relates to whether there should be a requirement for the use to be 'material form'. The model laws discussed in box 7.8 specifically do not require 'material form'. In other words, those laws would cover the use of cultural assets in non-material forms — say, live performances or broadcasts. This differs from the approach in copyright law, where there are limited protections in relation to things not in material form (Copyright Act 1968, ss. 31, 101).³⁹

To some extent, this question is outside the scope of this study. This is because the terms of reference require the Commission to focus on visual arts and craft, such as paintings, drawings, sculptures, carvings and textiles — or, in other words, things that have material form. However, as noted above, it is possible that non-visual arts and crafts would also benefit from cultural rights protections. If this is found to be true, there could be a case for infringement not to require use in material form.

³⁹ Under the Copyright Act, material form is satisfied by 'any form (whether visible or not) of storage' (s. 10). This includes things that are: written down on paper or something else, recorded by keystrokes saved on a computer, recorded on film, recorded on tape, recorded as software code saved on a computer or recorded digitally onto a device (Business Queensland 2016).

Requirements about the extent of the use?

A further issue is whether an infringement should require a minimum degree or extent of use.

For example, in the context of copyright law, an infringement requires the use of a ‘substantial part of the [original] work’ (Copyright Act 1968, s. 14). There is no precise benchmark for what constitutes a substantial part of a work and courts typically look at the question through a qualitative lens, rather than a quantitative one. In the *Carpets Case* (box 5.5), the court accepted that there were four major considerations that determine whether copying is substantial:

First, the volume of the material taken, bearing in mind that quality is more important than quantity; secondly, how much of such material is the subject-matter of copyright and how much is not; thirdly, whether there has been an *animus furandi* [(intent to steal)] on the part of the defendant; ... fourth, the extent to which the plaintiff’s and the defendant’s [works] are competing works. (*Ravenscroft v Herbert and New English Library* (1980) RPC 193 at 203, quoted in *Milpururru v Indofurn Pty Ltd* (1994) 54 FCR 240 at 260)

A similar ‘check’ on what counts as an infringing use is contained in the WIPO and Pacific Islands model laws, which specify that there is no infringement for uses that are ‘incidental’ (Secretariat of the Pacific Community 2002; WIPO 1985). For example, the WIPO model laws include a caveat that:

The provisions of Section 3 [which require authorisation to be sought] shall not apply also where the utilization of the expressions of folklore is *incidental*. (WIPO 1985, emphasis added)

Although these laws frame incidental use as an exception to infringement, they could equally be applied as a threshold requirement on the extent of use that is required.

The Commission is seeking feedback about whether the legislation should include a minimum threshold about the degree or extent of use required — and, if so, what that threshold should be.

Use without authorisation

A key part of a claim would also involve establishing that the use had taken place without authorisation. This aligns with the view that those seeking to use cultural assets (or ICIP broadly) should first seek the authorisation of its traditional owners. Virtually every proposal for dedicated legislation has included provisions that would effectively require authorisation to be obtained (Janke and Dawson 2012, p. 25; Janke and Frankel 1998, pp. 191–192; Secretariat of the Pacific Community 2002; Stoianoff and Roy 2015, p. 780; WIPO 1985).

The Commission considers that whether authorisation has been granted should be a question of fact, not form. That is to say, to determine whether a person had been granted authorisation to use a cultural asset, a court should look at the overall facts and circumstances of the case, and not rely solely on whether there is a written agreement in place. This approach would recognise the reality that authorisation can be given orally, conferred through rites or ceremonies, or even implied by a pattern of behaviour. It would also enable a court to consider, based on the evidence, whether a person purporting to grant authorisation had the authority to do so.

This contrasts with more formalistic approaches suggested elsewhere. For example, under the Pacific Islands model laws, the relevant parties would be required to enter into an ‘authorised user agreement’ in a form prescribed by the laws (Secretariat of the Pacific Community 2002) — by implication, non-compliance with these requirements would have the effect of not conferring authorisation on the prospective user. In a similar vein, Janke and Dawson suggested that there should be a requirement for ‘adequate documentation of the free, prior and informed consent of the Indigenous owners to an arrangement which contains the sharing of ownership, control, use and benefits’ (2012, p. 25, emphasis added).

On balance, the Commission considers it preferable not to prescribe the form that authorisation must take. One reason for this is increased flexibility, which would enable traditional owners to grant authorisation in the form they choose — including through customary law processes. In practice, it would allow users to rely on non-documentary evidence to show that authorisation had been given. Conversely, it would also mean that the contents of a written agreement could be rebutted by evidence about what the parties had actually intended. This would, in part, address issues of the type that have surfaced in relation to copyright agreements, where there is evidence of artists being induced to sign contracts under false pretences (Desart, sub. 4, p. 13; chapter 10). As a whole, overreliance on formality has the potential to undermine the principles of free, prior and informed consent in relation to authorisation decisions.

Exceptions

To strike the right balance between the interests of traditional owners and the interests of those seeking to access and use cultural assets, the new cultural rights legislation will need to include an exceptions regime. As noted above, where an exception applies, the use of a cultural asset will be deemed to be not infringing. The onus would be on the person seeking to rely on the exception to make the case that the use is covered by the exception.

Below, options for what could be included as exceptions are canvassed. The Commission is seeking feedback on what exceptions should be included in the new cultural rights legislation and whether there should be limits on when those exceptions apply.

Copyright-style exceptions

In the context of copyright laws, ‘fair dealing’ exceptions allow for the use of copyrighted material without permission from the copyright owner, so long as the use falls within one of the defined categories and its use is considered ‘fair’ in the circumstances. These categories include: research or study; criticism or review; parody or satire; and reporting news (Copyright Act, Part III, Div 3). There are also some limited exceptions in relation to reproducing works temporarily and reproducing works for personal use (among others).

As a matter of practicality and reasonability, similar types of exceptions would be needed in relation to cultural rights (Janke and Frankel 1998, pp. 192–193). The WIPO model laws include the following exceptions:

- (i) utilization for purposes of education;
 - (ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice;
 - (iii) borrowing of expressions of folklore for creating an original work of an author or authors
- ... (WIPO 1985)

The Pacific Islands model laws provide for exceptions in relation to: face to face teaching; criticism or review; reporting news or current events and judicial proceedings (Secretariat of the Pacific Community 2002).

Based on the copyright regime and the model laws, the Commission’s preliminary view is that there should be exceptions in relation to: research, study or education; criticism or review; reporting news or current events; court proceedings or legal advice; and personal use.

An exception for traditional and customary uses

A further exception would likely also be required for customary and traditional uses. As WIPO explained:

... there should be a general exception for indigenous peoples to continue to preserve their collective's ability to maintain and recreate diverse content of [traditional cultural expressions] and [traditional knowledge], as recognized in [the United Nations Declaration on the Rights of Indigenous Peoples] and other human rights instruments. (WIPO 2022c)

This echoes the view put forward in the *Our Culture, Our Future* report that 'the legislation should not inhibit the further cultural development of materials within their originating communities. That is, customary and traditional use should not be affected' (Janke and Frankel 1998, p. 195). Consistent with this view, a carveout for customary uses is included in the Pacific Islands model laws (Secretariat of the Pacific Community 2002).

It is possible that traditional and customary uses would largely or wholly fall within the scope of uses that are authorised — especially if a fact-based approach is taken to ascertaining whether authorisation has been given (discussed above). Nevertheless, the inclusion of a clause that explicitly covers traditional and customary uses could provide additional clarity for borderline cases.

A further consideration is that, in Australia, European occupation has disrupted the connection to culture and Country for many Aboriginal and Torres Strait Islander people. This includes entire communities and groups being displaced from or dispossessed of their lands:

The history of forced resettlement on reserves, the placing of many thousands of children in institutions, and the loss of land and culture are evident in the disadvantages still experienced by many Aboriginal people today. Even without forcible removal, Aborigines often had little choice but to 'come in' to the cities, rural centres or pastoral stations. (ALRC 1986, p. 21)

as well as the forcible separation of children from their families and cultural groups:

Indigenous children have been forcibly separated from their families and communities since the very first days of the European occupation of Australia ... between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. (HREOC 1997, pp. 22, 31)

As a result, some Aboriginal and Torres Strait Islander people are still in the process of reconnecting with their cultures — sometimes in a manner that is independent of cultural authorisation and community. To account for this, there could be a need to explicitly specify an exception for Aboriginal and Torres Strait Islander people who make use of cultural assets as part of reconnecting with their cultures.

What remedies would be available?

Once it has been shown that a traditional owner's rights have been infringed, the traditional owner would be able to seek remedies (or relief) in relation to that infringement. A court would determine what remedies are appropriate on a case by case basis, having regard to the facts and circumstances.

The new cultural rights legislation should specify that certain remedies are available for traditional owners. The remedies available under copyright laws should also be available for cultural rights infringements — this includes injunctions, damages and an account of profits (Copyright Act, s. 115(2)).

- An **injunction** is a court order that requires a party to do, or refrain from doing, a specific thing. In relation to intellectual property, an injunction can be used to prevent continued or further infringements (IP

Australia 2016b). Similarly, under the new cultural rights legislation, an injunction could be issued to prohibit a person from continuing to engage in conduct that infringes a traditional owner's cultural rights.

- **Damages** refers to a sum of money that is paid to the claimant. Typically, damages are awarded to compensate a person for harm or loss (Judicial Commission of New South Wales 2007, p. 7051).
 - Where losses are non-monetary (as is likely for many cultural rights cases), assessing the extent of harm can be challenging (but see the Carpets Case, where damages were awarded for cultural harm — box 6.5). Box 7.9 considers options that would enable damages to be awarded even where proof of harm is difficult.
 - Australian copyright law also provides that damages are not available where an infringement is unintentional (Copyright Act, s. 115(3)), and it may be appropriate for the new cultural rights legislation to include similar provisions.
- An **account of profits** may be awarded where an infringer has sold or benefited financially from the infringing goods. The infringer is required to pay the owner a sum equivalent to their profit from using the owner's property (IP Australia 2016b). Because this option is about recouping benefits, it would also bypass the need to provide evidence about harm — though it has been noted that 'claims for profits tend to be quite complex and quite risky in terms of achieving a successful outcome' (Yates 2016).

Past reviews have also identified other remedies that could be appropriate in relation to the misappropriation of Aboriginal and Torres Strait Islander cultures. In 2000, the *Cracking Down on Copycats* review of the Copyright Act found that cultural harms are sometimes best addressed through non-pecuniary remedies, and recommended amendments to the Copyright Act accordingly:

The Committee recommends that the Copyright Act 1968 be amended so as to provide the following remedies in actions for the infringement of copyright:

- a provision for the Court, in determining what other remedies it should grant, to take into account whether or not the defendant has apologised to the plaintiff; and
 - an order that the defendant attend the plaintiff at a time and place specified in the order and listen to the plaintiff explain the significance of the work and its infringement.
- (HoRSCLCA 2000, p. 71)

The *Our Culture, Our Future* report also suggested that customary law remedies should be available in certain circumstances (Janke and Frankel 1998, p. 192). The resolution of disputes via customary law processes is discussed further in section 7.6.

Box 7.9 – Damages: when proving harm is difficult

In general, damages are aimed at compensating a claimant for losses or harm that they have suffered. But there are some rules which enable damages to be awarded independent of harm to the claimant, or in the absence of concrete evidence about the level of harm incurred. This can be useful where harm is difficult to prove, such as where harm is non-monetary.

Statutory damages

In some overseas jurisdictions (including the United States and Canada), statutory damages are available for infringements of copyright. This means that the quantum of damages can be calculated in accordance with a formula set out in legislation, as an alternative to assessing damages on a compensatory basis. It

Box 7.9 – Damages: when proving harm is difficult

has been previously recommended that provisions for statutory damages be incorporated in Australia's copyright laws (HoRSCLCA 2000, p. 68), but this proposal has not been adopted.

Incorporating provisions for statutory damages in the new cultural rights legislation would mean that damages for infringements could be considerably more straightforward to assess.

The user principle

In the United Kingdom, damages are sometimes awarded in accordance with the 'user principle', whereby the award of damages represents the payment of a 'reasonable sum' for the use of the property in question (Yates 2016). This is essentially restitution for an unpaid licensing/hire fee, and enables damages to be awarded even where actual harm or loss from the use cannot be shown.

One option is for the new cultural rights legislation to also specify that damages may be assessed in accordance with the user principle. This could enable claimants to have damages assessed by reference to the financial benefit they would have received if the use of the cultural asset had been authorised.

Additional damages

In intellectual property law, courts are also able to award 'additional damages' (HoRSCLCA 2000, p. 68; IP Australia 2017, p. 68). This means that, even in instances where only nominal harm can be established, a court may be able to exercise its discretion to award additional damages. When deciding the quantum of additional damages, courts are not confined to looking at how much harm has been incurred. Courts can also consider factors such as: the flagrancy of the infringement, whether the infringer derived a benefit from the infringement, what sum is required to provide a deterrent effect (Yates 2016).

In the context of cultural rights, a similar provision for additional damages could help circumvent the challenge of substantiating cultural harm; claimants who are only able to show nominal harm would still be eligible for an award of additional damages.

**Information request 7.3**

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?

7.6 Institutional arrangements

Forums for resolving disputes

Previous sections in this chapter have focused on how disputes about cultural rights would be resolved in court. But, in reality, the vast majority of disputes are resolved before they end up in court. Sometimes, they can be resolved through discussions between the parties involved; other times, disputes can be managed through structured dispute resolution processes (Attorney-General's Department 2012, p. 7).

From a public policy perspective, supporting parties to resolve disputes is desirable because it reduces pressure on the court system. For the parties involved, resolving disputes outside court is cheaper, can be less stressful and can give them more control over how their dispute is handled (PC 2014, p. 283). This subsection considers options for dispute resolution outside court.

Alternative dispute resolution

Alternative dispute resolution (ADR) is a term for processes that help people resolve their disputes outside of court. This includes processes that give advice, facilitate parties to reach an agreement or make a determination about the dispute (figure 7.3).

ADR is considered preferable to going to court or tribunals as it is generally a low cost, flexible and informal means for parties to reach a resolution (Ramsay, Abramson and Kirkland 2017, pp. 8, 25). In the context of disputes relating to intellectual property, IP Australia said:

ADR provides flexibility. IP disputes can be complex, involving technical matters and multiple jurisdictions. Through ADR, participants can set the rules and conditions that best meet their circumstances. This could include the appointment of an appropriate subject matter expert, type and the procedures around the ADR process. (2016a)

Figure 7.3 – Types of alternative dispute resolution services

Facilitative processes that assist parties to reach agreement	Advisory processes that provide advice	Determinative processes that make a decision
• Negotiation • Facilitation • Conciliation	• Expert appraisal • Case appraisal • Neutral evaluation	• Arbitration • Expert determination • Private judging
May have enforceable outcomes	Typically do not have enforceable outcomes	Typically have enforceable outcomes

Source: Adapted from Ramsay, Abramson and Kirkland (2017).

It is likely that many disputes about cultural rights could similarly benefit from ADR. However, given that disputes about cultural rights will almost certainly involve Aboriginal and Torres Strait Islander people and communities, the success of ADR in some cases may hinge on whether culturally responsive ADR services are available. The Commission is seeking feedback on what needs to be done to ensure that dispute resolution services are culturally responsive.

Tribunals

Tribunals are independent statutory bodies that are established to provide a forum for resolving specific types of administrative and civil disputes. Compared to courts, they provide relatively informal and timely avenues for resolving disputes (PC 2014, p. 345). Some matters are determined through hearings, but tribunals can also provide ADR services.

Tribunals hear matters in well-defined areas. Some of these areas relate to identifiable segments of the population — for example, at the Commonwealth level, there are tribunals for veterans' affairs, migration, and native title (ALRC 2004). This could make the tribunals a well-suited mechanism for resolving cultural rights issues, if specialisation in cultural rights cases were to enable tribunal members to build and maintain the cultural capability to manage those disputes.

A specialised tribunal would also mean that members could be appointed on the basis of their expertise. The *Our Culture, Our Future* report identified options for the composition of a tribunal:

The tribunal could consist of members from Indigenous communities and the legal profession; or it could be a system of tribunals made up of elders from local Indigenous communities; or a central/regional structure ... the tribunal could be a mediating body ... made up of traditional elders, customary and commercial users, legal and cultural advisers to mediate disputes concerning the commercial use of Indigenous Cultural and Intellectual Property. (Janke and Frankel 1998, pp. 189–190)

However, at this stage, it is unclear whether there is likely to be a critical mass of cultural rights cases so as to justify a dedicated (division of a) tribunal — or, indeed, so as to enable the benefits of specialising in such cases to be realised. The Commission welcomes feedback on the viability of resolving cultural rights cases through a tribunal system.

Customary law processes

Another option is to explicitly recognise customary law as a dispute resolution mechanism. This has been identified as the most appropriate means of dispute resolution where all parties to the dispute belong to the same clan:

Most commentators felt that customary law should apply if an Indigenous member of a clan exceeds authority ... Under Indigenous customary law, the traditional custodians meet to discuss the appropriate punishment where a member of the clan is the transgressor of authority. The decision to punish, and how, should be left in the hands of the community elders. (Janke and Frankel 1998, p. 192)

Recognising customary law as a dispute resolution mechanism may be beneficial if it enables disputes between Indigenous parties or communities to be more easily and effectively resolved, without the need to go through Western dispute resolution systems.

In practice, this option could require the new cultural rights legislation to explicitly acknowledge customary law processes as an alternative mechanism for resolving disputes. As an example, the Pacific Islands model laws include the following provisions.

33 Other mechanisms to resolve disputes

Nothing in this Part prevents the traditional owner or the other person concerned from attempting to resolve a dispute using ... customary law and practices. (Secretariat of the Pacific Community 2002)

Provisions about the interface between customary law processes and the court system could also be needed. For example, it might be necessary to include a provision that governs if and when a dispute that has already been resolved via customary law processes is eligible to be determined by a court. The Commission welcomes feedback on what is needed to enable cases to be resolved via customary law, where appropriate.

A statutory Cultural Authority?

In Australia, the question of whether and how ICIP should be protected has been in intertwined with the question of whether there is a need for a Cultural Authority to enable that protection. In 1998, the *Our Culture, Our Future* report advocated for a Cultural Authority that would be empowered to:

- Authorise uses of Indigenous cultural material.
- Provide general information on deals.
- Act as a watchdog over inappropriate and unauthorised use of Indigenous cultural material.
- Undertake public education and awareness strategies.
- Supply information on the existing legal system.
- Provide cultural information. (Janke and Frankel 1998, pp. 226–227)

This view was echoed in subsequent reviews (Janke 2009; Janke and Quiggin 2006, pp. 49–50). Likewise, some participants to this study supported the establishment of a Cultural Authority (AAAA, sub. 26, p. 96; UMI Arts Ltd., sub. 1, p. 6), although submissions included limited information about what the functions and powers of the Cultural Authority should be.

Whilst in principal support is given to support a National Indigenous Arts and Cultural Authority in going forward, the consultation process has not been conducted ... and neither has any terms of reference gone out ... Art stakeholders are wanting to establish an authority, but we don't know what it [is] going to look like. (UMI Arts Ltd., sub. 1, p. 6)

This subsection considers the case for the establishment of a Cultural Authority, but with two major caveats. First, it considers the case for a Cultural Authority in the context of Aboriginal and Torres Strait Islander visual arts and crafts, rather than all aspects of ICIP. This is because the terms of reference to this study direct the Commission to examine issues relating to visual arts and crafts specifically.

Second, it focuses on what is possible for a *statutory* Cultural Authority. The case for establishing a non-government cultural authority (such as in the form of a company, Indigenous corporation or a charity) is currently being considered by the Australia Council (Australia Council 2018).

Internationally, the establishment or designation of a statutory Cultural Authority tends to be a feature of ICIP regimes that require some form of registration, presumably because there is a need for a body to administer the register.⁴⁰ For example:

- the Pacific Islands model legislation provides for the establishment or designation of a Cultural Authority, whose functions include maintaining a register of 'authorised used agreements' and maintaining 'a record of traditional owners and/or knowledge and expressions of culture' (Secretariat of the Pacific Community 2002)

⁴⁰ The *Garuwanga* study of international approaches to protecting Indigenous knowledge revealed that, where countries approached the issue through the lens of protecting registered biological resources (including Brazil, Costa Rica, Ethiopia, India and Peru), a 'competent authority' was also tasked with managing access to those resources. (Wright, Stoianoff and Martin 2017).

- in South Africa, the National Indigenous Knowledge Systems Office was established to, among other things, maintain a register of Indigenous knowledge (South African Government 2019)
- in the Philippines, the *National Cultural Heritage Act of 2009* established a Philippine Registry of Cultural Property and designated the National Commission for Culture and the Arts as the competent authority for the administration and maintenance of that registry (Government of the Philippines 2009).

But, the cultural rights regime proposed in this chapter would not have registration as a key feature, which means that the establishment of a statutory Cultural Authority in Australia would not be required on those grounds.

In light of this, the Commission has considered what other possible functions a Cultural Authority might perform, based on feedback from consultation (table 7.1). For each of those functions, the Commission has also considered whether there is a need for it to be performed and whether it could be performed by a different body (table 7.1). Overall, this analysis demonstrates that those functions are, at this time, not required or could be performed by a body or organisation other than a statutory Cultural Authority.

Table 7.1 – Potential functions of a Cultural Authority

Function	Comments
1 Cultural rights regulator: monitoring and investigating the use of cultural assets; enforcement activity, either in its own right or on behalf of traditional owners (section 7.4).	The Commission has not recommended the establishment of a cultural rights regulator, at least initially (section 7.4).
2 Collecting agency: represent traditional owners in negotiations about the use of cultural assets and/or collect payments for the use of cultural assets on their behalf.	This role could be performed by non-government organisations (possibly with some government funding). This is what currently occurs for copyright licensing (chapter 3).
3 Facilitate access to cultural assets, including providing information and advice to those seeking to use cultural assets.	This role could be performed by non-government collecting agencies referred to above (as currently occurs for copyright licensing), in conjunction with existing government departments.
4 Provide alternative dispute resolution (ADR) services in relation to disputes under the new cultural rights legislation.	There are already existing ADR service providers. In any case, it is unclear what the demand for ADR services will be.
5 Responsibility for certain elements of the ICIP strategy (section 7.1), such as running education initiatives to improve awareness about issues relating to ICIP.	Responsibility could be given to an existing government department, such as the National Indigenous Australians Agency.
6 Administer and enforce a labelling regime for consumer products (discussed in chapter 5).	This function could be performed by an existing organisation, such as the Australian Competition and Consumer Commission.
7 Act as a national peak body for the Aboriginal and Torres Strait Islander visual arts and crafts sector (discussed in chapter 10).	This function could be performed by non-government organisation. The Commission is seeking information about how this should be done (chapter 10).

For this reason, the Commission is inclined not to recommend the establishment of a statutory Cultural Authority as part of the cultural rights legislation — at least initially. At this time, there do not appear to be any essential functions that could only be performed by a statutory Cultural Authority, though these may emerge as the cultural rights regime matures. In section 7.4, it was recommended that a review of the regime

should be undertaken, once the new cultural rights legislation has been in place for several years. This review could also revisit the question of whether, in light of evidence about how the regime is performing, a case has emerged for the establishment of a statutory Cultural Authority.



Information request 7.4

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?

8. Aboriginal and Torres Strait Islander artists' experiences of unethical conduct

Key points

- * **Aboriginal and Torres Strait Islander artists are at the heart of the visual arts and crafts market. Their work enables Aboriginal and Torres Strait Islander cultures to be celebrated, preserved and shared, strengthening their communities and providing opportunities for economic development.**
- * **To maintain the integrity of the market, all market participants — such as art dealers, galleries and merchandise producers — must respect artists' creative agency over their cultural expressions and conduct themselves ethically.**
 - Ethical conduct means market participants engage with artists respectfully, ensuring free, prior and informed consent, and pay them fairly.
- * **Study participants have provided examples of artists being treated unfairly or, worse, exploited. Many artists are affected by unfair contract terms, copyright infringement and plagiarism.**
- * **The social and economic circumstances of some artists, alongside broader market structures, contribute to the risk of unethical treatment. But many Aboriginal and Torres Strait Islander artists take actions to protect their own rights and interests.**
- * **Communities, industry participants and governments also work to empower artists and reduce unethical conduct in arts and crafts markets.**
 - Community organisations — in particular community-controlled art centres — assist artists in negotiating with intermediaries, as well as guiding their professional development.
 - The Indigenous Art Code, alongside other industry codes of conduct and protocols, sets out standards of ethical conduct. Artist support services educate artists on their rights and provide legal advice.
 - Government regulation, including copyright protection and the prohibition on unconscionable conduct, also provides protections for the rights of artists.
- * **The Indigenous Art Code is a key mechanism to encourage fair and ethical interactions between artists and other market participants, but the corporation that enforces the Code is under-resourced and overstretched. Further, Aboriginal and Torres Strait Islander artists can find it difficult to access legal assistance, and artist support services do not always reach those in need.**

Aboriginal and Torres Strait Islander artists (including craftspeople and designers) are at the heart of the Aboriginal and Torres Strait Islander arts and crafts market. The transfer of cultural traditions, knowledges and skills into artistic expression helps celebrate, preserve and share Aboriginal and Torres Strait Islander cultures, while making and selling artworks helps to empower communities and generate economic activity.

The value of Aboriginal and Torres Strait Islander arts and crafts relies on artists having agency over how their cultures are represented in their works; this value is significantly diminished if artists are pressured or coerced into making art. To maintain the integrity of the market, other market participants (including art dealers, galleries, merchandise producers and other artists) must respect artists' creative agency over their cultural expressions, and ensure fairness in market transactions. In this way, fair and ethical treatment of artists is not just 'the right thing to do', it is fundamental to the ongoing success of Aboriginal and Torres Strait Islander arts and crafts markets.

This chapter:

- sets out a basic definition of fair and ethical dealings with artists (section 8.1)
- voices the experiences of artists in their dealings with the market, and the impacts that mistreatment can have on artists and their communities (section 8.2)
- outlines the factors that contribute to unethical conduct (section 8.3)
- summarises how artists protect their interests, supported by their communities, industry participants and governments, and considers whether there is a case to do more to improve outcomes for artists (section 8.4).

8.1 What does fair and ethical engagement with artists look like?

Market transactions, such as selling goods or negotiating contracts, vary in terms of how fairly and ethically parties behave towards each other. Ideally, transactions are undertaken respectfully and freely between fully-informed participants, without coercion or undue pressure. In practice, there is often an imbalance in the bargaining power of buyers and sellers. In extreme cases, market conduct can be considered unethical, and may be illegal (box 8.1).

Box 8.1 – What do we mean by 'unethical conduct'?

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. Much of this conduct is illegal. However, situations where the outcome of a transaction is manifestly unfair, even if no explicit misconduct has occurred, can be viewed as unethical in some circumstances.

Two types of unethical conduct require further explanation.

Exploitation

Exploitation is an extreme form of unethical conduct where one party takes 'unfair advantage' of another's 'vulnerability' (Zwolinski and Wertheimer 2016). It parallels the common law notion of

Box 8.1 – What do we mean by ‘unethical conduct’?

unconscionable conduct, which refers to one party taking advantage of another’s ‘special disadvantage’ (for example, *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18).

A position of disadvantage might stem from individual circumstances, as well as broader systemic causes, such as the structure of a market. Exploitation can occur through a single transaction, or through ongoing working arrangements.

Some exploitative conduct may be harder to identify. This includes transactions that both parties agree to and benefit from, but that still see one party taking advantage of another. For example, an agreement may make both parties better off than they were before the agreement, but one party might benefit disproportionately, or the other party may benefit by far less than they could have if they had full information, or had the opportunity to make an alternative agreement or seek advice.

Unfair treatment

Some conduct does not constitute exploitation, and may not be illegal, but nevertheless violates community norms and seems ‘unfair’. For example, an artist may sign a licensing agreement that transfers their copyright to another party, without realising they have done so. The other party may not have acted unconscionably, yet the outcome seems unfair to some. The line between an ordinary business negotiation (where both parties bargain to maximise their own returns) and unfair treatment is not always a clear one.

Fair and ethical dealings in the Aboriginal and Torres Strait Islander arts and crafts market must also be placed in the context of history: a range of policies since colonisation have denied Aboriginal and Torres Strait Islander people’s agency in mainstream markets (chapter 2). These historical policies contribute to the ongoing power imbalances experienced by some Aboriginal and Torres Strait Islander people in contemporary arts and crafts markets.

In this study, the Commission is guided by the views of study participants and the broader literature on ethical dealings to consider the types of conduct that might be unfair or unethical, and whether those might justify further government or industry responses. Considering these views, the key aspects of fair and ethical engagement with Aboriginal and Torres Strait Islander artists are:

- *respectful and safe treatment*: artists are engaged with respectfully, their cultures are protected, and they practise their art in safe working conditions
- *free, prior and informed consent*: any verbal or written agreements are only made if artists are fully informed and able to understand the content of the agreement, are able to access legal advice prior to finalising the agreement, and are not subject to undue pressure or coercion
- *fair remuneration*: artists are able to access information on the pricing of their work along the supply chain and receive a fair share of the overall returns.

Some characteristics of the marketplace can promote fair dealings. These include: transparency (which helps ‘shine a light’ on unethical conduct), consumer education (providing information to consumers to help them make ethical purchases), access to justice for artists (ensuring they can raise issues and access redress in the event of unethical conduct), and artists having a choice between multiple avenues to market their works (allowing them opportunities to bypass working with unethical operators).

Different people can have their own understanding of whether certain conduct is ethical or not. For example, a survey of Darwin Aboriginal Art Fair attendees, conducted by the Indigenous Art Code Limited (IartC), found near consensus on some statements concerning fair treatment of artists (such as on whether artists should be given the opportunity to access independent legal advice on agreements they sign (IartC 2022a, p. 9)), but participants diverged on other matters. In particular, dealers and consumers disagreed on whether art dealers should be expected to be able to tell customers how much artists received in payment for their work (IartC 2022a, p. 4).

Further, unethical treatment does not necessarily imply ‘malicious intent’ by the offending party, with Arts Law, Copyright Agency and IartC (sub. 31, p. 48) instead emphasising the ‘systemic power imbalance that permeates relationships between Aboriginal and Torres Strait Islander people and non-Indigenous people’.

8.2 Artist experiences of unfair or unethical conduct

Many study participants have shared their personal experiences of what they consider to be unethical or unfair conduct from other participants within the visual arts and crafts market. These experiences include stories of poor treatment by some art dealers (including conduct referred to by some as ‘carpetbagging’), as well as problems with contracts, copyright infringement and plagiarism.

Disrespectful or unsafe conduct towards artists

Some participants, particularly in remote areas, shared experiences of poor treatment by dealers, in terms of working conditions and being coerced to work in order to fulfill obligations to kin.

Instances of alleged exploitation in remote areas

The most serious experiences of unethical treatment shared with the Commission relate to what is sometimes referred to as ‘carpetbagging’: where private art dealers in remote Australia exploit the circumstances faced by some artists in order to obtain valuable artworks at a cost well below market value. Barbara Moore from Tjala Arts (APYACC, sub. 17, pp. 17–18) relayed her experience of having her artistic and cultural agency exploited by dealers, particularly in the face of pressures imposed on her from family members and her obligations to them.

Ever since I became famous, carpetbaggers have been chasing me. ... A few years ago one carpetbagger brought lots of fake paintings that looked like mine to my house in Amata. ... They spoke to my family and then my family was pressuring me to do this for some easy money, even though they weren’t mine. I knew this was the wrong thing to do but I couldn’t say no to my family, they really needed the money. I felt very upset afterwards and felt shame.

This year I was in Alice Springs for my grand daughters medical appointment. I was anxious and stressed at this time and felt pressured by people to paint [at] a carpet baggers studio. Everyone just kept asking and asking me and told me that they needed the money so desperately. It is my duty to provide for my family and I felt very stressed by this and eventually said yes. ... I knew I have been ripped off by this lady carpetbagger and only paid a small amount of cash for these paintings. My paintings usually sell for much more money and I get a better payday from them because I am a very famous artist.

The National Association for the Visual Arts highlighted the 'small number of unscrupulous non-Indigenous dealers engaging in unsafe procedures', and noted that this behaviour is not equally experienced by non-Indigenous artists (sub. 23, pp. 2, 5). These practices can include:

- the offer of upfront non-cash payments to artists, in the form of vehicles, accommodation and goods (APYACC, sub. 17, p. 11) — these practices can result in underpayment, particularly if the condition of the vehicle or other goods is misrepresented (SSCECITA 2007, p. 101)
- poor working conditions, including workshop-like conditions in 'sheds' (APYACC, sub. 17, p. 15)
- abuse of kinship obligations by providing payments or loans to the family members of established artists, with the expectation the debt would be underwritten by future paintings (APYACC, sub. 17, p. 11)
- 'frail and elderly artists facing financial needs to provide for their families ... [being] forced to accept unequal terms of payment offered by art dealers' (Cheong, sub. 15, p. 3)
- abuse of the book-up system,⁴¹ and false attributions of authorship (Acker and Stefanoff 2016, p. 4).

These allegations have been noted by several government authorities. The Australian Competition and Consumer Commission (ACCC) (sub. 13, p. 3) agreed that 'some dealers are exploiting their dominant bargaining position and the circumstances of artists, including by having artists work under duress, or otherwise creating situations where it is difficult for artists to refuse to supply their artwork to a dealer'. The Minister for Indigenous Australians also noted the unethical behaviour of certain dealers taking artists away from home to make them paint, and buying Aboriginal artwork at a much lesser price, and on-selling it at 'incredible mark ups overseas' (Wyatt 2019, p. 11).

Dealers are not the only ones accused of exploiting artists. In 2022, a Queensland art centre CEO was jailed for using his position dishonestly to sell artworks for a personal advantage, including by issuing false certificates of authenticity to consolidate the impression of a legitimate sale (ORIC 2022b).

Unethical conduct can cause harm to artists and their communities

Study participants spoke about the harms that unethical conduct can cause an artist, their family and the broader community. Nyunmiti Burton, of the APYACC (sub. 17, p. 5) noted that unethical dealings:

... place the health and well-being of our vulnerable artists and staff at risk and cause conflict and violence in our families and communities. They also take our focus away from our core business and the important work of artmaking and impacting positive change in our communities.

Ingrid Treacle of Kaltjiti Arts (APYACC, sub. 17, p. 26) talked about the 'conflict and sadness' caused by carpetbagging in her community, as well as the risk of it affecting the reputation of the art centre. Tuppy Goodwin, Chairperson of Mimili Maku Arts (APYACC, sub. 17, Tuppy Goodwin video 2) spoke of the sadness at the loss of control felt by communities when stories, which belong to them and have been passed down through their ancestors, are 'stolen' for the profit of non-Indigenous dealers at the expense of the Aboriginal artists. Speaking of a dealer in Alice Springs, she noted:

This man is trying to be the boss of Aboriginal people, taking away the one thing that has kept us strong forever, our traditional culture and knowledge. ... He is stealing from Anangu, as he takes from us for his own benefit. He is making a lot of profit, and our art centres are crumbling down.

⁴¹ 'Book-up' is a type of informal credit offered by stores or other traders. It allows people to get goods or services and then pay the store at a later date. It is often the only form of credit available in remote communities (ASIC 2012, p. 2).

Nyurapya Kaika (APYACC, sub. 17, p. 15) also reflected on the impacts unethical dealing has on the local community, and described the conflicts that can follow.

When artists come back to community from Alice Springs there is always terrible fights, quite often there is violence. The police are called, and sometimes we ask for help from NPY Women's Council. Artists return to community ashamed, and the family members are disappointed and angry; they went to Alice Springs for a great deal, and they have come home with a bad deal, a broken down car. They are embarrassed.

In evidence to the 2018 Standing Committee on Indigenous Affairs, Gamilaroi/Gomeroi artist Jason Passfield (HoRSCIA 2018a, p. 35) noted the hurt felt by artists who experience exploitation.

I've seen it over 25 years of my career, where people have come into these communities and offered a carton of beer for some artwork or a carton of cigarettes or something like that. It's totally wrong. That's not helping the health issues or wellbeing of that person ... All of a sudden that artist, one day, might see their paintings reproduced all over the world or here in Australia and they're not making any money off it. So that person suffers from that. I've been involved with stuff like that as well, and it just hurts.

Allegations of exploitative treatment, even if not substantiated, have the potential to undermine the reputation of the market. For example, a 2006 newspaper article on 'The Desert's Tainted Brush' described a 'growing culture of fraud' (Rothwell 2006), and a 2008 Four Corners episode reported on allegations of art being made in 'sweatshops and, in some cases, virtual prisons for artists' (McDermott 2008). Some industry participants noted the impact that this reporting has had in creating an impression of widespread exploitation throughout the industry. Acker, Stefanoff & Woodhead (2013, p. 14) also noted that ongoing allegations around provenance of works, as well as occasional prosecutions, may have contributed to further cooling of the Aboriginal and Torres Strait Islander art market during the 2010s, as well as provoking 'considerable anxiety in the market'.

Some written agreements do not embody free, prior and informed consent

Artists have also relayed their experiences with unfair contracts in arts and crafts markets, particularly with agreements that do not reflect their fully-informed consent. Some Aboriginal and Torres Strait Islander artists have, without realising it, signed contracts for the sale of their artworks that also transfer their copyright. As Desart (sub. 4, p. 13) submitted:

Contract law is often used as a weapon against Aboriginal artists. Unscrupulous dealers hold up a signed piece of paper to justify their actions in purchasing or reproducing the work of vulnerable artists on terms that grossly undervalue the work and permit conduct which doesn't meet even minimum standards of ethical dealing. Artists often do not understand the document and have no access to legal advice before signing. Usually, the artist has no copy of whatever they have signed and is effectively deprived of any legal redress at the first hurdle due to lack of evidence.

The AAAA (sub. 26, p. 22) quoted the views of one of its members on how contracts can disadvantage artists:

Written contracts for many artists are problematic because they do not have the capabilities, resources or understanding of what is in the contracts, which leads to further exploitation. Examples of this can include contracts that have been signed by artists ascribing all copyrights over to suppliers for current and future works. Another example can be if an artist is exclusively

represented, including art centres, which can severely limit their future earning capacities from other opportunities. This is a fundamental removal of self-determination and an artist's rights to paint how, when, where, they want, and can become a restriction of trade.

Arts Law, Copyright Agency and IartC (sub. 31, p. 54) described unfair licensing arrangements as '[t]he most prevalent issue reported to our three organisations'. They provided examples of artists signing paperwork thinking it is a receipt and not realising it to be a licensing agreement, as well as cases of artists being pressured to sign agreements under duress and without being able to seek independent advice prior to signing. Their concern is that '[m]any of these behaviours have been normalised and entrenched in the market and so do not receive the same level of attention as instances of very severe mistreatment in the media and in the public consciousness' (Arts Law, Copyright Agency, IartC, sub. 31, p. 8). Final consumers may not be able to find out how works were originally acquired, including whether any contracts embody the free, prior and informed consent of the artist.

Similar allegations have been raised with the ACCC (sub. 13, p. 3), including of artists:

- signing contracts that they do not understand, which include terms they would not have agreed to (particularly around a dealer being able to amend artworks without proper consent, and in ways that could cause cultural offence)
- making agreements with dealers that include unfair remuneration.

The AAAA noted that these experiences can contribute to artists being distrustful of contracts (sub. 26, pp. 21–2). If artists are unwilling to use written contracts, there is scope for other forms of exploitation. Desart (sub. 4, p. 13) noted examples of poor practice where 'there is no written document just assertions that an artist 'agreed' and accepted 'payment' of some sort and so has entered a binding legal agreement'.

The AAAA (sub. 26, p. 22) also referred to contractual practices of government and corporations that do not seem to meet ethical standards, contending that:

Government and corporate procurement of artworks ... remain at an all-time ethical low, and include removal of artists rights through contracts, ownerships, earning rights such as royalties and licensing, minimal payments.

Issues with copyright can be common

Copyright infringement and plagiarism affect Aboriginal and Torres Strait Islander visual artists. AACHWA (sub. 20, p. 6), for example, noted that about a quarter of their artists had seen their own artwork, or the work of someone in their art centre, used without permission or 'in a way that made them unhappy'. Some sellers use international online platforms to misuse the work of artists, while other businesses reproduce artworks without permission (Arts Law, Copyright Agency, IartC, sub. 31, p. 54).

Copyright infringement can lead to direct economic impacts on artists through reduced income for their own work. As the onus is on artists to enforce their own copyright, it can create stress and costs for artists having to engage in copyright takedown processes on online platforms and other forums. These efforts are not always successful.

The Commission's analysis indicates a considerable degree of copyright infringement, particularly in the print-on-demand merchandise market. In a random sample of approximately 500 Redbubble product listings appearing in a search of terms including 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art', roughly 15% contained probable copyright infringements of Aboriginal and Torres Strait Islander artworks (chapter 4, section 4.2).

Some are concerned that Aboriginal and Torres Strait Islander artists are unfairly remunerated

Study participants have argued that Aboriginal and Torres Strait Islander artists do not always receive fair returns for their work. Artists whose artworks are sold directly through art centres commonly receive 50-60% of the sales price (Arts Law, Copyright Agency, IartC, sub. 31, p. 12), but the share of returns is less clear under other business models, including licensing or producing consumer products for wholesalers.

The Commission's analysis suggests 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; the average income of artists working through art centres in 2019-20 was just over \$2700 a year (chapter 3). There are a number of possible explanations for these results, including the large number of artists — many of whom work through art centres — who practise art for non-commercial reasons and earn little or no income from it.

The returns to artists vary between business models. Many independent artists directly engage with dealers and galleries, developing long-term relationships, with the prospect of greater recognition and returns. But Arts Law, Copyright Agency and IartC (sub. 31, p. 50) argued that this model can be problematic in particular locations, noting that:

It is common practice for some private art dealers, particularly those operating private art studios in towns like Alice Springs, to pay artists upfront and then sell that artwork for a price significantly higher than what the artist was paid for the work.

Artists who work through art centres may receive a smaller share of the income (if both art centres and galleries take a commission), but pricing is usually transparent and most artists can see the amounts their artworks earn (Arts Law, Copyright Agency, IartC, sub. 31, p. 12).

Unfair remuneration can be linked to uneven economic power in parts of the marketplace, including the disadvantaged position of some artists, and can be a consequence of a lack of transparency. As put by Arts Law, Copyright Agency and IartC (sub. 31, p. 50):

From our experience, much of the bad conduct ... is legal, but that doesn't mean it is fair. Because an artist will accept a small payment for their artwork because they are in need of the money doesn't mean it is fair for a dealer to pay the small amount. The discrepancy between what an artist is paid for their artwork and what the dealer sells it for is much contention for artists. This is particularly an issue when there is no transparency to the future sale price.

How common are instances of unethical conduct?

Concerns over unethical conduct towards Aboriginal and Torres Strait Islander artists are longstanding

There is a large body of anecdotal evidence that Aboriginal and Torres Strait Islander artists face unfair or unethical conduct in some parts of the market. Increasingly, concerns are focused on the impacts of unfair contracts, copyright infringement and plagiarism on the rights, wellbeing and economic returns to Aboriginal and Torres Strait Islander artists and their communities.

The concerns raised in this study echo those heard by previous inquiries into the sector, particularly in some parts of remote Australia. Allegations concerning the actions of some dealers in those areas have been made since the 1970s (APYACC, sub. 17, p. 8).

- In their review of *Competition and Consumer Issues for Indigenous Australians*, Altman and Ward (2002, p. xiv) noted that a 'significant amount of anecdotal evidence has emerged in the course of research in relation to the unethical practices of some private dealers'.
- The 2007 Senate Inquiry report *Securing the Future* also reflected concerns raised about unethical conduct, noting the contributing factors of artist circumstances and the difficulties in securing prosecutions (SSCECITA 2007, pp. 100–106). The report recognised 'that there is not necessarily clear agreement on one 'right' way to do business between artists and galleries or dealers' (SSCECITA 2007, p. 103).
 - The final Senate committee report supported the establishment of a voluntary industry code of conduct, the Indigenous Art Code, which was launched in 2010.
- The 2018 House of Representatives Inquiry into inauthentic art also noted that independent artists can be placed in a 'vulnerable position when selling their work', and highlighted specific examples of unethical conduct raised by participants, such as art centre staff being 'intimidated and threatened', as well as inappropriate payments for artworks, including drugs and alcohol (HoRSCIA 2018c, pp. 35–38).
 - The report recommended additional funding should be made available to Aboriginal and Torres Strait Islander organisations to support artists who have been affected by carpetbagging (HoRSCIA 2018c, p. 75).

Some quantitative evidence is available, but not conclusive

There is no comprehensive estimate of how commonly Aboriginal and Torres Strait Islander artists experience unethical conduct: many submissions provided examples of poor conduct, but few provided views on how widespread those examples are, or whether the situation is improving or not.

One snapshot illustrating the extent of unethical conduct was submitted by King & Wood Mallesons. Of the almost 5500 hours of pro bono assistance the firm provided to Aboriginal and Torres Strait Islander artists and art organisations over the past three years, at least 530 hours were in relation to disputes (as opposed to providing advice only) covering matters such as: copyright infringement, misappropriation of Indigenous Cultural and Intellectual Property, inequitable or unfair licensing structures, and deception or unconscionable taking advantage of artists (sub. 34, pp. 1–2).

Arts Law, Copyright Agency and IartC (sub. 31, p. 59) said:

In our opinion, unfair and unethical dealings have been reduced in many market areas but still exist in others. ... The existence of any at all calls for change.

The APYACC argued that carpetbagging has worsened since the commencement of the Indigenous Art Code (sub. 17, p. 15). Arts Law, Copyright Agency and IArtC (sub. 31, p. 51) agreed that:

... there is undeniably a concentration of dealers conducting business in a way characteristic of carpetbagging located either in Alice Springs or working with artists based in Alice Springs or frequently travelling to Alice Springs from outlying communities.

When asked about the incidence of unfair dealings between dealers and artists, Stephanie Parkin (chair of the Indigenous Art Code) highlighted the complexity of issues that are often associated with these transactions, which make them difficult to track (SECLC 2019, p. 19).

I don't hear about it a great deal, frequently, but I do know about it second-hand; I haven't see it with my own eyes or heard about it from the people that have been directly affected by it. I think

that's important. If we are talking about these issues that are quite complex, there are different issues at play—issues around poverty and vulnerable people. It's a very complex area, and I think a cautious approach ... is warranted when dealing with these types of issues. It was a case-by-case basis a lot of the time, and there are a lot of intricate and complex details at play.

The experiences shared with the Commission concern market participants in the Central Desert region and the APY lands, and many of these allegations have been publicised (Allam 2020). A planned Australian Government-led summit in Alice Springs in April 2020 was cancelled because of the COVID-19 pandemic (AAAA, sub. 26, p. 24); this or a similar forum could be revisited to bring the industry together to discuss options to remove opportunities for unethical business practices in that region.

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).

Further, some types of conduct that many would consider to be unethical (such as underpayment or unfair contract terms) are not illegal (Arts Law, Copyright Agency, IartC, sub. 31, p. 50), which makes it more likely that such conduct goes unreported and is thus difficult to quantify.

One survey of a small number of independent artists around Alice Springs found that about half believed that they had been ripped off by a dealer (Acker and Stefanoff 2016, p. 9). However, few specific problems were reported, and most responses from artists 'indicated confidence in their ability to manage commercial relationships' (Acker and Stefanoff 2016, p. iii).

Copyright infringement and plagiarism appear to be relatively common in the visual arts generally. A survey of professional visual artists indicated that about one in three believe their copyright has been infringed, and a similar proportion believe that copyright protections are inadequate — although artists are becoming increasingly aware of their intellectual property rights and how to protect them (Throsby and Petetskaya 2017, pp. 103–108).

More comprehensive data on the extent of, and trends in, unethical conduct would support governments to calibrate regulatory and policy settings, and ensure artist support services can identify areas of unmet need for outreach and assistance. It would also help establish a shared understanding across the sector of the degree to which poor behaviour is widespread.



Draft Finding 8.1

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.

8.3 What factors contribute to the risk of unethical conduct?

Drawing on the information provided by study participants, the key sources of risk of unethical conduct towards Aboriginal and Torres Strait Islander artists can be broadly classified as either: the personal and structural circumstances faced by some Aboriginal and Torres Strait Islander artists, or the broader conditions and operation of the Aboriginal and Torres Strait Islander visual arts and crafts market.

Exploitation of Aboriginal and Torres Strait Islander artists is not, and should not be considered to be, inevitable. Instead, opportunities for exploitation and other unethical conduct can be linked to the specific circumstances that some Aboriginal and Torres Strait Islander artists face.

Artists' circumstances

Exploitation occurs when someone takes advantage of another's position of disadvantage (box 8.1). Some Aboriginal and Torres Strait Islander artists do experience specific disadvantages — such as economic precarity, remoteness, or poor reading, writing and numeracy skills — alongside structural and systemic factors beyond the individual (SCRGSP 2020).

Life in remote areas

Working on Country, maintaining strong connections to kin and culture, is a source of strength for many Aboriginal and Torres Strait Islander artists. But life in a remote area can also increase the risks of being exploited.

Artists in Utopia experience a number of constraints in their everyday lives that affect their creation of artworks. Constraints people are faced with encompass: poor housing quality and limited availability of housing, higher costs of fresh food and difficulties in purchasing it, humbug by family members, divisions within the community, poor infrastructure, poor health caused by low living standards, low levels of education and few job opportunities within the community. (Schmidt 2012, p. 93)

An estimated 42–66% of paid Aboriginal and Torres Strait Islander artists live in remote areas (chapter 3). Study participants described how life in remote areas can contribute to opportunities for unethical conduct (box 8.2).

Box 8.2 – The circumstances of artists in remote areas

Aboriginal and Torres Strait Islander artists in remote areas have substantially different outcomes and characteristics compared to those in regional and metropolitan areas. They are more likely to be older, less likely to be participating in the labour force, and have fewer alternative economic opportunities (chapter 3). As Sally Scales noted (APYACC, sub. 17, p. 28):

The APY Lands and many central desert communities are environments of extreme disadvantage. My family members and I live with a much lower life expectancy than mainstream Australia along with the social challenges that go hand in hand with societal disadvantage; higher rates of incarceration, family violence, intergenerational welfare dependency, food security issues, and chronic health conditions.

Box 8.2 – The circumstances of artists in remote areas

Arts Law, Copyright Agency and IartC (sub. 31, p. 50) connected these positions of disadvantage (which can also exist for artists in regional and metropolitan areas) to the risk of encountering poor conduct in the marketplace.

The issues that arise in these areas are due to the disadvantage many Aboriginal and Torres Strait Islander people face, which is overwhelmingly the result of centuries of colonial intervention. Artists, particularly those working independently, are often exploited by unethical practices due to an artist's age, poverty, medical conditions, social obligations, English literacy and numeracy, and displacement.

John Waight (Arts Law, Copyright Agency, IartC, sub. 31, p. 49) also pointed to the structural conditions that give rise to the risk of artists having no choice but to accept a poor deal.

Until the lack of accessibility to housing, food, and basic human necessities are fixed, artists will continue to be exploited. The most vulnerable are the most preyed on. If you have to keep the lights on or your family fed and a bad deal is the only deal you have, you will do what you have to, to survive.

Cultural and family obligations

A large proportion of artists, particularly in remote areas, are older, and have particular responsibilities to support and provide for kin. These cultural obligations and relationships can be a source of strength, and are a core part of Aboriginal and Torres Strait Islander people's identities (Woods, sub. 11, p. 6). Community ties are a source of empowerment, but, as discussed above, family obligations can put pressure on artists as providers, and some have alleged that particular art dealers take advantage of their cultural responsibilities in order to obtain works. Nyurapya Kaika (APYACC, sub. 17, p. 14), in discussing carpetbaggers in the APY lands, said:

... most often money is lent to young people and famous artists are required to pay back the debt. There is a cultural rule with Anangu that means the oldest generation of our society will always provide for younger generations, we will always help. This rule is different to the white world for us, it is different to being kind to your grandkids, it is a cultural obligation.

Obligations to family and kin can also lead to circumstances where an artist may need quick cash to support their family, and feel pressured to work 'upfront' for a private dealer, particularly if their regular art centre operates on a consignment model (these business models are outlined in box 8.3).

Work arrangements and access to services

Art centres are often the first port of call for artists who are concerned about interactions with other market participants. They can provide artists with some protections (their protective role is discussed in detail in the next section), although they can also contribute to oversupply of artists and artworks, especially where funding arrangements provide incentives for art production over other activities (chapter 9). However, many artists in regional and metropolitan areas, as well as some in remote areas, operate independently of art centres. Some do so by choice, fully aware of the risks and opportunities of dealing directly with market intermediaries (Acker and Stefanoff 2016, p. 13). In other cases, it may be because there is no art centre in their region (UMI Arts Ltd., sub. 1, p. 1), or because they are unable or otherwise uncomfortable to work within an existing art centre.

A significant number of artists sell to both art centres and directly to dealers. Acker and Stefanoff (2016, p. 13) found that about a quarter of independent artists in their Central Australian survey also sold to an art centre and noted that, although this allows those artists to pursue a range of opportunities to sell their artwork, it can affect the ability of art centres to assist artists to access support services.

While the ability of artists to exercise agency in how they work (and who they work for) is a key protective factor against exploitation (section 8.4), artists can still be taken advantage of if they lack access to the support system that is available through art centres and their associated networks. As Arts Law, Copyright Agency and IartC (sub. 31, p. 48) note, artists working independently, without art centre support, are most affected by 'poor behaviour'. This was also highlighted by the chairperson of AACHWA:

... independent artists, the ones away from art centres ... [their protection] ... really needs to be an important part of the conversation because they are being exploited by what are known as carpetbaggers and organisations that cherrypick. They pluck and remove artists from an arts centre by telling them: 'It's best that you work over here on your own without the protection of the arts centre. We're going to look after you.' Then we see the exploitation. There are some really good examples of where that happens in Western Australia and around Australia. (HoRSCIA 2018b, p. 14)

Market conditions and operation

Original artworks

Structural failures in art markets, such as market power imbalances and unequal (or asymmetric) information⁴² between artists, dealers and buyers, provide opportunities for unethical conduct. In some remote areas, there may only be one or two potential buyers, potentially giving them market power. As put by Arts Law, Copyright Agency and IartC (sub. 31, p. 48):

The often limited economic bargaining positions artists consequently find themselves in mean that even when an artist may be aware that the offer being made is unfair, they choose to take it in the absence of few other choices and knowing that if they don't say yes, the dealer will approach another artist.

Where a dealer has a better idea of the likely final selling price than the artist, the dealer is in a position to extract an outsized share of those returns by buying a work upfront at a low price and selling with a high margin.

If final consumers are not well-informed about the provenance of the artwork they are purchasing, including whether the work was obtained with full, prior and informed consent of the artist, then intermediaries can sell works that may have been procured unethically or whose origins cannot be authenticated.

Many buyers in the market have little-to-no knowledge regarding the state of the Indigenous arts market or the issues attached to authenticity and/or the ethical sale of works. A few agents possess a great deal of knowledge regarding these issues ... This educational asymmetry creates the conditions for arbitrage and other unethical behaviour. (TFFF, sub. 2, p. 2)

Market power and information flows are more uneven in some business models than in others (box 8.3; visual arts and crafts supply chains are described in chapter 3). For example, there are significant differences in both the timing of payments and the information available to artists, when art is sold on consignment compared to an upfront or direct-dealing model. There are also fewer public financial reporting requirements for private for-profit

⁴² That is, dealers may know more about the likely price of an artwork than the artist (or buyer), giving them an advantage when negotiating a one-off price for a work, merchandise licensing agreement or design service.

dealers, compared to not-for-profit art centres (Arts Law, Copyright Agency, IartC, sub. 31, p. 17). Many art centres are registered with the Office of the Registrar of Indigenous Corporations (ORIC).

Box 8.3 – How do different visual arts and crafts business models affect artists?

Art centres

In much of remote Australia, art centres act as an agent and engage with the market on behalf of artists. Art centre models differ: some operate under consignment, while others purchase work from artist members and either sell or consign the work to dealers or galleries, or sell directly to customers (box 3.4). Art centres are not-for-profit, and provide a range of other services for their member artists, including: materials and a working space, product documentation, professional development, and assistance with licensing agreements. Art centres keep records of sales, which are made available to the artist, and generally take a commission of 40-50%.

Consignment to a dealer or gallery

A work sold under consignment is transferred to a dealer or gallery, but the artist or art centre retains legal ownership until the work is sold (box 3.5). This delays payment, but ensures the artist or art centre receives income commensurate with the final sales price. A gallery will be responsible for exhibiting, marketing and selling the work, and will also take a commission. Some galleries offer professional development or other support services.

Independent artists who work directly under this model are generally established artists who have their own working space or materials, and are capable of negotiating consignment agreements.

Upfront dealer model

Some artists engage with dealers and galleries on an upfront basis, where they sell a work independently for a price negotiated upfront (box 3.5). Artists are paid on the spot, irrespective of whether the work sells. However, artists may only receive a small share of the final sales price if the dealer sells the work with a significant mark up. The dealer, who may sell the work directly to a customer, or to another dealer, is responsible for documenting and selling the work, and may not be required to maintain records. This model is more prevalent in the Aboriginal and Torres Strait Islander art market than in non-Indigenous art markets.

Direct sales to customers

Some artists sell directly to the final purchaser through art markets, art fairs, online platforms or other informal means (street sales) (box 3.7). The artist can set their own prices and receive most of the income, but they are responsible for their own materials and working space, marketing and business administration.

Licensing and other design services

Artists may also diversify their income by using their skills in other ways beyond making artworks. This can include: designing and licensing merchandise, graphic design services, or public art and architecture commissions. Artists may negotiate contracts over these services themselves, or with assistance from the Copyright Agency or art centres.

Source: Arts Law, Copyright Agency, IartC, sub. 31, pp. 11–18, 50.

Particular concerns have been raised with the upfront dealer model, as artists may not be able to see how much a work eventually sells for, and may end up accepting what turns out to be a very small share of the final price. In some cases, as Arts Law, Copyright Agency and IartC (sub. 31, p. 52) describe:

The artists are generally shocked by the price the dealer is selling the artwork for relative to the amount the dealer paid them for the artwork. Artists have expressed anger, frustration, in some cases, shame at knowing they have been ripped off.

The risk of unfair or unethical conduct can also be influenced by dynamics on the supply side of the market. In principle, a large number of artists chasing relatively few opportunities can increase the risk of unethical conduct: it can mean dealers and wholesalers have outsized bargaining power and can induce a 'race to the bottom' in terms of pricing and conditions. Professional artists can end up competing on price and conditions with non-professional artists (those who paint solely for non-financial reasons such as maintaining and passing on culture, or who have a second source of income). This can contribute to an oversupply of mid-range artworks, which potentially reduces their incomes — a situation mirrored by the relatively low incomes of professional artists more broadly (Throsby and Petetskaya 2017, pp. 9–10).

Where there is oversupply in the market, a dealer or wholesaler may be able to pressure artists to sign an agreement because 'if they don't say yes, [the business] will just go to another artist who will say yes and sign' (Arts Law, Copyright Agency, IartC, sub. 31, p. 54). This imbalance can also mean artists are reluctant to report unethical behaviour for fear of retribution and loss of opportunities (Arts Law, Copyright Agency, IartC, sub. 31, p. 49).

Merchandise and online sales

The same market circumstances can affect producers and designers of lower-priced artworks and merchandise. Artists may need to negotiate agreements, on a case-by-case basis, and from positions of unequal bargaining power in order to license their designs for merchandise (Arts Law, Copyright Agency, IartC, sub. 31, pp. 36, 54). This can result in artists signing contracts without free, prior and informed consent.

Increasingly, Aboriginal and Torres Strait Islander artists are selling their work online, with many art centres and some art fairs pivoting to online sales during the COVID-19 pandemic (Australia Council, sub. 24, pp. 10, 18). While online platforms allow artists to sell work directly to customers and access information on final sales prices, participants in online platforms also need to have the capacity to protect themselves against copyright infringement and plagiarism.

The rapid move online has raised concerns that these platforms can provide new opportunities for exploitation and unethical practices (Australia Council, sub. 24, p. 32). Some online platforms go to significant lengths to provide artists with fair contracts and remuneration, as well as to remove items that infringe copyright and signal to consumers that they only contain ethically-procured work. Other platforms only intervene on issues of copyright in limited cases. This can lead to a 'whack-a-mole' scenario in trying to remove illegally reproduced material (Arts Law, Copyright Agency, IartC, sub. 31, p. 54).

Although emerging forms of digital artmaking, such as non-fungible tokens (NFTs), create opportunities for artists, there are also risks of unfair treatment, including their works being copied or sold without their awareness, consent or any returns going to the artist. (Box 3.8, chapter 3, discusses NFTs.)

8.4 Protective factors

Allegations of exploitation, as well as concerns over how the benefits of arts and crafts markets are shared between artists and other participants, are not new. Communities, governments and other art sector participants are working with artists to reduce the incidence of exploitation, and the scope for other unethical conduct. Strengthening artists' agency, along with their communities, is key so they can actively promote and defend their own rights and interests. Some industry and government initiatives work with artists directly to strengthen capability, while other measures look to improve the conduct of dealers, manufacturers and other market participants (figure 8.1).

Figure 8.1 – Promoting ethical treatment of artists

Enabling artists' agency		Industry standards	
• Strong culture and communities • Community-controlled art centres • Artist support services • Access to justice		• Business operation & governance supports • Industry codes of conduct and practice • Procurement • Government regulation	

This section examines these existing protective factors and, drawing on the views of participants, considers whether there are gaps or issues with the current suite of government and industry responses.

Enabling artists' agency

The ability of Aboriginal and Torres Strait Islander artists to engage confidently to protect their interests (and those of their kin and community) and negotiate with marketplaces to their benefit — that is, to exercise agency — is further enabled by a collection of personal, social and industry factors. These can assist artists to protect themselves against unethical conduct that may exist in the marketplace.

Strong culture and communities

Irrespective of whether an Aboriginal and Torres Strait Islander artist works independently or through an art centre, strong family and community ties, coupled with community leadership, are empowering. These connections can:

- assist artists to be aware of, understand and exercise their rights
- support professional, career and business development
- reduce exposure to unethical market participants (for example, by banning unscrupulous operators from their communities) and minimise opportunities for unethical conduct.

Many artists are in a position where they can push back against unethical treatment. As Sylvia Ken from Tjala Arts (APYACC, sub. 17, p. 20) described:

... I have been asked many times by carpet baggers to come and paint in their sheds. One man even had a picture of me printed out and chased me down the Todd Mall, he was trying to get me to paint for him! I always say NO when these carpetbaggers chase me down and ask me to paint. I tell them I am just a visitor and I am going back to Amata to work. Sometimes these people offer me a second hand motor car for painting. I know that these people are stealing money from

Anangu, they are greedy and keeping too much money for themselves. They do not pay artists the proper way. Some of my family have worked in these sheds in Alice Springs, but not me. I know what happens in there and I do not want to go.

Jason Passfield, a Gamilaroi/Gomeroi artist, noted his confidence in getting a fair price for his artworks, which took account for the value of the stories and traditions contained in the art:

I believe there are a lot of carpetbaggers out there who come into communities and turn around and con artists into selling it cheaply. I don't sell much, but when I do I get my price; that's the price I want. They're not only getting a piece of Aboriginal art but they're also getting my story, they're getting me, and they're getting my family and tribal clan story lines. Each community around Australia has different symbols, and, yes, there are a lot of contemporary artists who aren't uneducated in these types of things. ... That has to be taught and discussed so we can process it further to allow a win-win situation, for everybody to have a good outcome.
(HoRSCIA 2018a, p. 34)

Acker and Stefanoff (2016, p. 13) also pointed to the confidence of independent artists, noting that most are aware of the risks they face in the industry and are capable of navigating those. They argue that their findings 'provide a counterpoint to the common and reductive characterisation of freelance artists as passive and disempowered or as victims of commercial forces'.

Study participants pointed to the strength of culture as a key factor underpinning artists. Vincent Namatjira (APYACC, sub. 17, p. 22) said:

To keep our culture strong and our art centres strong, we need to stay strong as a community, work hard in our art centres and keep trying to support our next generations of artists and children.

The younger generation needs to open their eyes, they need to work with focus and under the direction of the Elders, keeping our culture strong for into the future.

Other community-led programs support artists in engaging with the market. For example, organisations like the First Nations Foundation and Money Mob Talkabout (in the APY lands) assist Aboriginal and Torres Strait Islander people to strengthen their financial literacy, strengthening their ability to engage with the financial system and the broader economy.

Community-controlled art centres and peak bodies

In many parts of regional and remote Australia, community-controlled art centres and peak bodies are key supports for Aboriginal and Torres Strait Islander artists and their communities to mediate engagement with visual arts and crafts markets. In most cases, art centres are not-for-profit organisations, governed by an Indigenous board and registered with the ORIC, but often managed by an arts professional from outside of the community (chapter 9).

In remote areas, art centres play a key role in providing a safe place to make art, as well as a channel to market artworks (box 8.3). They also provide administrative assistance (such as documenting work), assist artists in engaging with the financial aspects of market transactions (by 'telling the money story') and, at times, provide capacity-building opportunities to enable artists to better manage their own work. Some art centres also function as agents and support artists to manage their careers: this can include assisting artists to develop a marketable style, provide guidance on pricing decisions, and avoid oversupplying the market.

In many areas, art centres are the first point of contact for an artist who feels they have been ripped off (AACHWA, sub. 20, p. 6), referring artists to make complaints under the Indigenous Art Code or seek legal advice from Arts Law. Many art centres are also members of a regional peak body, which represent art

centres and provide assistance and development opportunities to art centre managers and arts workers. There are also peak organisations that support independent artists, such as UMI Arts Ltd. and the Aboriginal Regional Arts Alliance.

Some study participants argued that supporting art centres is the main way to ensure fair and ethical dealings in the marketplace (Agency Projects, sub. 3, p. 3), while others emphasised their importance in the local community. Sally Scales (APYACC, sub. 17, p. 28) submitted:

The reason why we need to protect our Art Centres is quite simply because we already live with more than our fair share of adversity and life-hurdles. Art Centres represent the opposite - they are full of opportunity and they're the best bloody thing we've got.

In a submission to the House of Representatives Inquiry into developing Indigenous enterprises, community-controlled art centres were identified as the 'antidote' to the problem of people who exploit artists:

... some operators when purchasing quantity from our people pay the lowest prices and on some products marking up the same product 300 and 400% and higher in some instances ... if one or more local Indigenous enterprises could be financially set up to service our people and bring some equity to our mob and our mob only sell to them in order to control the local Indigenous art and craft market it would not only benefit our local mob but encourage other Indigenous people and businesses to participate and set up operations. (Leo 2008)

Although a valuable protective factor for artists, art centres vary in how effectively they support artists. Art centres need to balance their cultural and social functions with the commercial pressures of the market, as they compete with, and sell works to, private dealers and galleries. In achieving this balance, often with limited resources, art centres may have difficulty competing to keep established or 'core' artists, who may find it more profitable to work directly with galleries, for example, but who are vital for the financial viability of the centre.

The capacity of art centres to support artists and communities thus depends on the quality of art centre governance, including how the board balances those social, cultural and commercial aspirations and imperatives, as well as the capabilities of the art centre manager and staff. Training to support these skills is important to maintaining the sustainability of art centres (chapters 9 and 10).

Artist support services

Other services — largely sector-led but, at times, funded directly by governments — provide other forms of support to artists.

The Arts Law Centre of Australia — Artists in the Black

'Artists in the Black' is a program run by the Arts Law Centre of Australia (Arts Law), a not-for-profit community legal centre. Operating since 2004, the program is designed to provide accessible legal advice for Aboriginal and Torres Strait Islander artists, including on referral from art centres, IartC, and other sources. Arts Law provides a range of services, some under a fee model, including:

- model contracts for sale, copyright licencing and consignment of artworks
- advice on licensing agreements (under the 'Licensing the Right Way' project)
- legal advice following alleged unethical treatment (such as exploitation or copyright infringement), as well as referrals to other pro bono legal services
- education services for artists, including workshops.

Arts Law is partly funded by government grants; in 2020, it received \$920 000 in grant funding, representing about 56% of total revenue of \$1.65 million across all of its functions (Arts Law 2021, p. 19).

Study participants noted the valuable pro bono services that Arts Law provides (UMI Arts Ltd., sub. 1, p. 12; Bana Yirriji Art Centre, sub. 25, p. 2), although some also noted that the organisation has limited resources and does not always assist artists with more time-intensive or complex matters (UMI Arts Ltd., sub. 1 pp. 12-13; Desart, sub. 4, p. 13).

AACHWA (sub. 20, p. 6) noted that 60% of their surveyed members thought it was easy to get help in the event of copyright infringement, with their art centre helping them seek assistance from Arts Law. However, they also noted that 'the legal costs involved, additional administration requirements and the length of the legal process were cited as deterrents to art centres taking action'.

Further, there are suggestions that independent artists are less aware of, or less able to access, Arts Law services. In their survey of a sample of artists outside art centres in central Australia, Acker and Stefanoff (2016, p. 10) found that 84% of respondents were unaware of Arts Law and their services for Aboriginal and Torres Strait Islander artists. Almost all independent artists surveyed were either unaware (83%) or unsure (15%) of where to get support in the event of 'difficulties' in the marketplace (p. 10).

The Copyright Agency

The Copyright Agency is a membership-based collecting society for visual arts copyright holders. They collect and distribute copyright royalties on behalf of member artists, as well as collecting resale royalty on behalf of all Australian artists. The Agency also facilitates licensing agreements between artists and merchandise producers or others who seek to license Aboriginal and Torres Strait Islander artworks, and works with international affiliates on licensing fees (Copyright Agency, sub. 30, p. 1). The Copyright Agency also assists artists with concerns over breaches of copyright or licensing agreements.

The Copyright Agency is funded through a share of licence fees and royalties from their customers (Arts Law, Copyright Agency, IartC, sub. 31, p. 22).

National industry bodies

The National Association for the Visual Arts (NAVA) is the peak body representing and advocating on behalf of the professional interests of the Australian visual arts, crafts and design sector. NAVA provides services for their members, including Aboriginal and Torres Strait Islander artists, to support a professional arts practice. Their Code of Practice (currently under revision) is designed to represent best practice standards for the industry, and includes advice on appropriate pricing for independent artists to enable them to negotiate with other market participants (NAVA, sub. 23, p. 2).

In 2020, NAVA received \$223 000 in government grant funding, accounting for about 14% of its total revenue of \$1.6 million (NAVA 2021, p. 24).

The Aboriginal Art Association of Australia Ltd (AAAA) represents 'artists, individuals and organisations that produce, promote, protect, and support Indigenous Art, and the cultures that create and nurture that art' (sub. 26, p. 60). Its membership is made up of over 250 Aboriginal and Torres Strait Islander artists (both independent and art centre affiliated), over 50 trade members from commercial galleries, dealers, art centres, licensors, and mixed retail outlets marketing fine art and souvenirs, and nearly 500 supporter members.

The AAAA promotes ethical practice through mandating its own Aboriginal Art Code for all its members, and advocating ideas to policy makers on how to grow the Aboriginal and Torres Strait Islander visual art industry's economic, social and employment benefits and opportunities (sub. 26, p. 1).

Art fairs

As well as being a key sales platform for Aboriginal and Torres Strait Islander artists (chapter 3), art fairs can connect independent artists to professional development opportunities and enable networking, communication and improved awareness between artists, art centres and support services.

Some study participants highlighted concerns with how accessible art fairs are, particularly for independent Aboriginal and Torres Strait Islander artists. Issues include the high cost of stallholder fees at some art fairs (UMI Arts Ltd., sub. 1, p. 3) and perceived preference for artworks from art centres instead of independent artists (AAAA, sub. 26, p. 10). This can unduly constrain market opportunities for those artists.

Under the *National Indigenous Visual Arts Action Plan 2021–25*, the Australian Government has committed additional funding for art fairs to showcase the work of, and provide professional development to, independent artists (Australian Government 2021, p. 15).

Industry standards and purchaser behaviour

Industry standards aim to define and encourage best practice ethical interactions between artists and other participants, and aim to limit opportunities for market participants to act unethically.

The Indigenous Art Code

The Indigenous Art Code (the Code) sets a standard for market interactions between Aboriginal and Torres Strait Islander artists and art dealers (box 8.4). Its broad aims are to ensure:

- fair and ethical trade in Aboriginal and Torres Strait Islander artwork
- transparency in the process of promotion and sale of artwork
- that disputes arising under the Code are dealt with efficiently and fairly.

As an industry code of conduct, the Code establishes a standard of conduct for interactions between market participants with different levels of market power (being primarily artists and dealers). However, it also functions as a code of ethics, providing guidance on what ‘fair and ethical trade’ is. The code is administered by the Indigenous Art Code Limited (IartC). Though a non-Indigenous organisation, IartC has Indigenous board representation and membership among its dealer, artist and supporter members.

Signatories to the Code must ensure contracts involve the informed consent of artists, and the code certificate provides some assurance to consumers over the ethical provenance of the work in question. In addition to its formal dispute resolution functions relating to members, IartC also handles inquiries and complaints from artists, including complaints about dealers that are not Code members (IartC 2022b, 2022c). It does not provide legal advice, and instead refers those matters to Arts Law.

IartC is structured as a private company, with a 2.1 full-time-equivalent staff, and a 13 person board independent of government (Arts Law, Copyright Agency, IartC, sub. 33, pp. 3, 21). In 2020-21, about 78% of IartC’s income was from government grants (\$404 910 from a total of \$516 418), with the remainder largely from membership fees: dealer and support members pay annual fees of \$170 (plus GST).

Many contributions to this study agreed that the Code is a valuable mechanism for ensuring an ethical marketplace (Desart, sub. 4, p. 17; SA Government, sub. 21, p. 20; Australia Council, sub. 24, p. 6; AAAA, sub. 26, p. 22).

Box 8.4 – About the Indigenous Art Code

The Indigenous Art Commercial Code of Conduct was developed by the industry following the 2007 Senate Report into Aboriginal and Torres Strait Islander art. The Code commenced in 2010.

The Code is primarily aimed to improve the conduct of art dealers, who agree to meet certain requirements around engaging with Aboriginal and Torres Strait Islander artists and labelling products appropriately. Artists and non-artist supporters can also register for the Code. Currently there are 195 dealer members of the Code, with 340 artist members and 28 supporters.

The Code defines ethical transactions as being 'respectful, meaningful, transparent and fair', and requires dealers obtain the informed consent of artists. Grounds for expulsion from the code include: unfair or unreasonable conduct, undue pressure or influence, including threats; not acting in good faith; paying an artist by means of alcohol or drugs; unfairly taking advantage of, or exploiting, an artist; and, paying or agreeing to pay an artist an amount, or other consideration for the artist's artwork that is, in all the circumstances, against good conscience.

The Code also requires Code Certificates to accompany artworks sold by member dealers. Dealers that receive an artwork directly from an artist are required to create a Code Certificate for the artwork (unless it is valued at less than \$250 or artist does not want a certificate). The certificate must state: that it is an 'Indigenous Art Code Certificate'; the name of the artist(s) who created the work; where and when it was created (to the extent known); a description of the artwork; the identity of the Dealer Member; and a signed declaration confirming the accuracy of the details set out in the Code Certificate.

The Code is implemented by Indigenous Art Code Corporation, governed by a board representing the interests of artists, art centres and dealers. The Corporation administers membership of the code, oversees compliance and handles complaints, including referrals to other bodies. It also has engagement and advocacy functions to promote Aboriginal and Torres Strait Islander visual arts.

Source: Arts Law, Copyright Agency, IartC, sub. 31.

However, participants also highlighted concerns with the operation, enforcement and overall effectiveness of the Code.

- The Code is not mandatory, which means that unscrupulous operators have no reason to participate. In this regard, the Aboriginal Regional Arts Alliance (sub. 8, p. 6) described the code as 'an ad hoc, toothless tiger at present, reliant on self registration'.
- IartC is not Aboriginal and Torres Strait Islander-led, and does not provide assurance over the authenticity of works, nor does it signal that the supply chain is Aboriginal and Torres Strait Islander-controlled. First Hand Solutions (sub. 16, p. 3) noted that the Art Code certification 'provides some guarantees that non-Indigenous dealers are following ethical practices but doesn't provide the important information about whether it is an Indigenous organisation or not'.
- IartC has limited powers over its members. In cases of misconduct, the main option available is to expel dealer-members, but some argue that IartC appears unwilling to use those powers: MinterEllison (sub. 18, p. 4) noted that 'there is no evidence to suggest that any art dealer has ever been expelled'.
- IartC is not adequately resourced to undertake the functions necessary to improve practice in the sector (AAAA, sub. 26, p. 25). NAVA (sub. 23, p. 2) noted that the Code 'could take on a more active role in setting best practice conditions in the marketplace if it received appropriate funding to do so'.

- In their joint submission, IartC agreed that ‘the organisation is not equipped to handle all matters raised, namely those issues raised about non-IartC dealers and conduct research and other strategic work’ (sub. 31, p. 21).

Other concerns include that the IartC board is not representative of the sector (AAAA, sub. 26, p. 25)⁴³ and that the Code has not been as effective as expected (APYACC, sub. 17, p. 5, pp. 8–10). Under the *National Indigenous Visual Arts Action Plan 2021–25*, the Australian Government has committed to an evaluation of the effectiveness of the Code (Australian Government 2021, p. 21).

Some of these concerns can be linked to IartC’s capacity: many of the complaints it hears from artists are complex and take time to respond to appropriately, while reviewing dealer memberships and ensuring members comply with the code is also resource-intensive. It could also do more to monitor and report on the types and extent of unethical treatment in the sector more broadly, to build a shared understanding of where policy and regulatory change may be beneficial.

At present, IartC does not appear to fully meet the expectations of sector participants and the broader community. However, the organisation still plays a crucial role, particularly for independent artists, and the Code itself sets a high standard of ethical conduct. Broader take-up of the Code, alongside stronger enforcement, provides an opportunity to further improve outcomes for artists. But, at present, IartC is overstretched, and under-resourced to pursue those outcomes.

Many submissions suggested improvements to the implementation and enforcement of the Code to make it more effective at supporting ethical marketplaces, including calls for the code to be made mandatory across the sector. These proposals are considered in chapter 10, which includes the Commission’s recommendations concerning the Code.



Draft Finding 8.2

Enforcement of the Indigenous Art Code is constrained by resourcing

The Indigenous Art Code 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.

Other protocols and codes of conduct for ethical engagement

The Code does not apply to all interactions between Aboriginal and Torres Strait Islander artists and the marketplace. This is in part due to its voluntary nature, but also because it only applies to the commercial dealings between artists and private dealers. Other industry-led protocols have been developed to guide ethical conduct both alongside the Code, and outside of the Code’s remit.

- The *Indigenous Australian Art Charter for Publicly Funded Collecting Institutions* outlines ethical principles for all dealings between publicly-funded collecting institutions (such as the National Gallery of Australia) and Aboriginal and Torres Strait Islander artists, their representatives and communities when acquiring,

⁴³ The Code Constitution requires that the Board contain between two and four dealer members, up to three Aboriginal and Torres Strait Islander artists, up to two artist representative organisation members and up to eight members with other specialist expertise. The Board must also contain one art centre representative, as well as one dealer-member each from the Australian Commercial Galleries Association and Art Trade (the predecessor of the AAAA), and one director who is not affiliated with either organisation (IartC constitution ss. 11.1-2).

commissioning, displaying and decommissioning artworks. It is open to public collecting entities that are not eligible to sign the commercial Indigenous Art Code (OFTA 2009).

- The Aboriginal Art Association of Australia's Code of Conduct is mandatory for its membership (sub. 26, p. 21) and requires: respect for the artist, their rights and culture, open and honest dealings and appropriate remuneration for all market participants.
- Project grants provided by the Australia Council for the Arts are conditional on complying with their *Protocols For Using First Nations Cultural And Intellectual Property In The Arts*, which includes requirements around respect, self-determination, consent and benefit sharing with Aboriginal and Torres Strait Islander people (Terri Janke and Company 2019).
 - Some state government arts bodies have similar protocols, such as Create NSW (Create NSW 2021).
- NAVA's *Code of Practice for the Professional Australian Visual Arts, Crafts and Design* sector includes protocols for working with the Australian Indigenous Visual Arts and Crafts sector (NAVA 2001), a Code of Practice for Inter-Cultural Partnerships in Craft & Design, and advice on industry rates for artist fees to guide artists in pricing their artworks (NAVA, sub. 23, p. 2).

However, monitoring of these codes, including their level of compliance, can be limited (Arts Law, Copyright Agency, IartC, sub. 31, p. 22).

Procurement of art and design services

Government procurement is a key source of demand for Aboriginal and Torres Strait Islander businesses, and the Australian Government's Indigenous Procurement Policy is designed to provide Aboriginal and Torres Strait Islander people with more opportunities to participate in the economy (NIAA 2021a). The policy sets annual targets for the volume and value of government contracts to be awarded to Indigenous enterprises; a mandatory set-aside for procurements between \$80 000 and \$200 000;⁴⁴ and mandatory minimum Aboriginal and Torres Strait Islander employment requirements for contracts greater than \$7.5 million in specified industries (one of which is 'fine art and design services').

Beyond this, the Indigenous Procurement Policy does not include specific provisions on purchasing art and design services, and does not specify standards for ethical procurement. Standard procurement of design services (exceeding \$10 000) includes model clauses that require transfer of intellectual property to the purchaser, with no explicit recognition of Indigenous Cultural and Intellectual Property (ICIP; chapter 6).

Other Australian Government programs also provide opportunities for Aboriginal and Torres Strait Islander artists and their works. Many of these programs, including Art Bank, follow the *Indigenous Australian Art Charter for Publicly Funded Collecting Institutions* (DoCA 2019, p. 4). However, Arts Law, Copyright Agency and IartC (sub. 31, p. 56) raised concerns with the Cultural Gifts Program (an Australian Government program designed to encourage donations of culturally valuable works to collecting institutions by providing a tax deduction), noting that it does not require evidence of how works were initially obtained, which risks 'inadvertently support[ing] a marketplace that benefits from the unfair treatment of artists'.

In all of these areas, governments should demonstrate best-practice conduct when purchasing Aboriginal and Torres Strait Islander art or design services. Among other things, the free, prior and informed consent of Aboriginal and Torres Strait Islander artists must be obtained in relation to how their work is acquired, modified and presented, including when contracts are negotiated through third parties.

⁴⁴ Between 2015–16 and 2017–18, eight contracts for 'Editorial and Design and Graphic and Fine Art Services' were signed under this provision (Deloitte 2019, p. 52).

The Commission is interested in hearing about the barriers that Aboriginal and Torres Strait Islander artists and designers face when working within government procurement frameworks, and whether any improvements could be made to protect the rights and interests of artists.



Information request 8.1

- 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?

Government regulation

Government regulation of arts and crafts markets imposes obligations on all industry participants, including artists, and serves as another protective factor against unethical conduct.

Copyright protections and enforcement

Under Australian law, the creation of a work of visual art attracts a number of legal rights for the artist. These rights are designed to enable an economic return from their intellectual property. The key rights provided are: copyright, moral rights (both discussed in chapter 4) and a right to resale royalty (discussed below).

Copyright infringement (where a work is used without permission) and plagiarism (where substantial parts of a work are used or adapted without attribution or permission) are relatively widespread in the arts, including for Aboriginal and Torres Strait Islander artists (section 8.2).

The nature of copyright means artists are responsible for enforcing their rights, but not all artists are aware of this, and it is not always easy for artists to find where their work has been misused, make complaints, or issue takedown notices. This is even harder if alleged breaches occur overseas, or if online sales platforms are based overseas (chapter 4).

The specific shortcomings of intellectual property protections as they relate to the broader set of Indigenous Cultural and Intellectual Property rights are discussed in chapter 6.

The Resale Royalty scheme

From 9 June 2010, all Australian visual artists hold an enduring right to a resale royalty in their artworks, entitling them, in certain cases, to a share of the price of works resold after the initial sale by the artist.

Resale royalties are intended to provide visual artists with recognition of their ongoing rights in their art, as well as an additional source of income through royalties from commercial resale (Copyright Agency, sub. 30, p. 2). It also provides returns to artists and/or their families from subsequent increases in the value of artworks after the initial sale. In Australia, the Resale Royalty scheme is administered by the Copyright Agency and entitles an artist to 5% of certain resales of work where the price exceeds \$1000. It imposes an obligation on art market professionals who sell artworks (including auction houses, dealers and commercial galleries) to report sales that may be eligible for the royalty.

The right to a resale royalty is vested in the works of all visual artists, and the scheme currently benefits many Aboriginal and Torres Strait Islander artists. From the commencement of the scheme until 30 September 2021, nearly two-thirds of resale royalty recipients were Aboriginal and Torres Strait Islander artists, although only 38% of the total royalties paid went to those artists (Copyright Agency, sub. 30, p. 2).

The Commission's analysis of Copyright Agency data indicates that payments to Aboriginal and Torres Strait Islander artists have totalled about \$3 million over ten years (chapter 3; figure 3.24).

Some study participants emphasised the importance of the resale royalty for providing ongoing income to artists and their families, as well as providing information to artists and contributing to professionalism and capacity building for Aboriginal and Torres Strait Islander artists (Australia Council, sub. 24, p. 27; Copyright Agency, sub. 30, p. 2). Other participants, however, noted the costs the scheme imposes on dealers and galleries. The AAAA (sub. 26, p. 10) raised concerns that, because the initial transfer of work to an art centre can, at times, be considered the first sale, the initial sale to a customer can attract resale royalty.

Unconscionable conduct under the Australian Consumer Law

Unethical and unfair conduct between businesses (excluding financial products and services) is regulated under the ACL (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) and enforced by the ACCC. The ACCC's role includes bringing legal action and producing educational materials for dealers and artists on their rights and obligations.

Unconscionable conduct — an extreme form of exploitation — is prohibited under sections 20–22 of the ACL⁴⁵. Although unconscionable conduct is not defined explicitly, it is considered to be 'conduct against conscience by reference to the norms of society' (ACCC, sub. 13, p. 4). This conduct requires a level of severity that must go beyond being merely 'unfair', and, in some cases, requires that one party was in a position of 'special disadvantage', and that this was exploited by the other party.⁴⁶

Other provisions of the ACL regulating the conduct of art market participants include prohibitions against unfair terms in standard contracts (ss. 23–28) and harassment and coercion (s. 50).

Issues in enforcing the prohibition on unconscionable conduct

The ACCC (sub. 13, p. 4) noted the difficulties in enforcing the ACL in Aboriginal and Torres Strait Islander arts and crafts markets.

It is often difficult to prove that conduct between a dealer and an artist is severe enough to amount to unconscionable conduct. This can be exacerbated by evidentiary difficulties in demonstrating what occurred in the interactions between artists and dealers. ... Any assessments of such dealings need to be made on a case by case basis, assessing all the relevant circumstances.

Arts Law, Copyright Agency and IartC (sub. 31, p. 55) also highlighted:

... the burden on artists involved in providing evidence to support their claim and the prohibitive costs involved in pursuing court action for contractual disputes, undue influence, unconscionable conduct, or copyright infringement matters.

Other submissions also raised the difficulties in bringing action under these provisions, in part because of the challenge of obtaining suitable evidence and the unwillingness of artists to come forward (Cheong, sub. 15,

⁴⁵ Similar unconscionable conduct provisions exist in the *Australian Securities and Investments Commission Act 2001* (Cth), applicable to the provision of financial products and services. These equivalent provisions were tested in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, with respect to the 'book-up' system in remote Australia, involving unscrupulous dealers.

⁴⁶ Although this is true of unconscionable conduct as defined under common law (s. 20), the statutory definition (s. 21) does not require a finding of special disadvantage, instead outlining a number of matters that the court may have regard to in determining a contravention of s. 21 (s. 22).

p. 3). The Law Council of Australia (sub. 19, p. 7) noted that unconscionable conduct can be ‘difficult to investigate, prove, and prosecute’, further noting (p. 9) that:

Those artists who are able to identify problematic use of their culture often rely on pro bono legal support, assuming they are able to access it. Those who provide legal support to such artists must do so against the practical and structural barriers of geography, language, and culture.

Similarly, artists may be discouraged from taking action under the ACL if they risk being liable for costs if they lose; The Law Council of Australia (sub. 19, p. 7) questioned whether ‘the rules of Courts in relation to costs, particularly the ordering of security for costs, and where “costs follow the event”, discourage applicants from enforcing their rights or the ACL’. The Commission’s *Access to Justice Arrangements* inquiry similarly highlighted issues with adverse cost orders in the court system, including where these can represent a barrier to bringing an action (PC 2014, pp. 464–465).

Other enforcement mechanisms and regulatory instruments

Other forms of government enforcement and regulation also affect conduct in the sector.

- *Police enforcement*: The ACCC (sub. 13, p. 4) argued that, where artists are being made to work against their will, ‘the issue is more appropriately investigated by the police as a potential criminal matter, rather than through the ACL’.

However, as MinterEllison (sub. 18, p. 8) noted:

... unethical and unscrupulous behaviour by carpetbaggers falls into different categories and is not necessarily always ‘illegal’ (meaning that that some forms of unconscionable practices by carpetbaggers would be outside the police force’s remit).

- *Workplace health and safety*: Some allegations around unsafe working conditions, including those referring to ‘sweatshops’ (APYACC, sub. 17, p. 10), could amount to breaches of workplace health and safety against which action can be taken.
- *Fair Work Ombudsman*: Although most independent artists are self-employed, action by the Fair Work Ombudsman is possible in cases where artists are effectively (if not explicitly) treated like employees but do not receive their workplace entitlements.

Access to justice and support: a common thread

The evidence available to the Commission highlights some shortcomings in the current measures that promote ethical conduct in the market. More could be done to foster respectful conduct that provides artists with opportunities to express themselves creatively, be fairly remunerated and exercise their rights and agency.

Access to justice has a material influence on the ongoing prevalence of unethical conduct. Although governments have enacted laws to regulate conduct in markets — and some of the unethical conduct described to the Commission would be considered illegal under these laws — they are broad, economy-wide legislative arrangements that are not always accessible to Aboriginal and Torres Strait Islander artists, particularly in remote areas. Conduct in breach of these laws can be difficult or costly to prove in a court, which limits their effectiveness.

Other forms of unethical treatment, including unfair contracts, copyright infringement and underpayment, also appear to affect Aboriginal and Torres Strait Islander artists across the country. And although not all of this conduct is illegal, much of it may breach community norms. Community-controlled organisations, peak bodies and other industry service organisations provide tools and services to assist artists to deal with these issues, but there are suggestions that access to these is not sufficient. Legal advice and artist support services are not

always accessible for those most in need, including artists working independently and those outside of areas served by art centres and regional peak organisations.

There is scope to do more to empower Aboriginal and Torres Strait Islander artists to confidently engage in negotiations for selling and licensing their art, to defend their copyright under existing legal provisions, and to access redress if their rights are breached. The Commission's proposals for how government funding can further empower artists are outlined in chapter 10.



Draft Finding 8.3

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.

9. Government funding

Key points

- * Governments play an enabling role in the Aboriginal and Torres Strait Islander arts and crafts market by providing financial assistance to artists and art centres, and by funding support organisations and art fairs. The case for public financial support rests on the broader benefits (including cultural and social benefits) associated with the production and sale of Aboriginal and Torres Strait Islander arts and crafts.
- * The Australian Government provides the bulk of targeted funding to the sector through the Indigenous Visual Arts Industry Support (IVAIS) and the Aboriginal and Torres Strait Islander Arts programs. Approximately \$24.5 million was distributed via these programs in 2020-21 (excluding COVID-19 funding), supporting the work of approximately 8500 people.
 - However, funding under these programs has plateaued in real terms since 2014-15 and 2015-16 respectively. Average IVAIS funding per art centre declined in real terms from \$243 000 to \$227 500 since 2015-16, as more art centres received funding.
- * In addition to these programs, sector participants source funding from numerous Indigenous-specific and mainstream government arts programs, non-arts government portfolios and from outside of government. Reliance on a large number of small funding sources can impose a significant administrative burden on the sector.
 - State and territory governments have small funding streams available to art organisations and artists.
- * Art centres fulfill important cultural and social roles that are not explicitly funded under IVAIS.
 - Some art centres face great difficulty accessing funding to support cultural maintenance activities and provide critical social services. This is partly due to the IVAIS program's focus on art production.
- * Existing funding arrangements tend to favour incumbent organisations, with limited funding available to emerging or smaller art organisations and independent artists.
- * Capacity strengthening and career development for artists and art workers is a key objective of many funding programs. But there are gaps in terms of the availability of tailored training for remote art workers and independent artists, and governance training for art organisations.

Public funding for arts and crafts is justified by the broader social and cultural benefits associated with their production and consumption. The production of Aboriginal and Torres Strait Islander arts and crafts has cultural benefits (such as strengthening connection to Country, culture, and kin, and self-determination); local economic benefits (such as employment and economic development); and social wellbeing benefits (such as physical and emotional health, family and community safety, education), which accrue to Aboriginal and Torres Strait Islander artists and their communities; as well as other social and economic benefits to the wider Australian community (chapter 2).

Government investment in Aboriginal and Torres Strait Islander cultures and arts is consistent with the acknowledgement in the *National Agreement on Closing the Gap* (2020, p. 4) ‘that strong Aboriginal and Torres Strait Islander cultures are fundamental to improved life outcomes for Aboriginal and Torres Strait Islander people’, and is therefore integral to the Agreement’s overarching objective that Aboriginal and Torres Strait Islander people’s ‘life outcomes are equal to all Australians’ (JCOCTG 2020, p. 3).

This chapter examines government funding, primarily at the national level, that is available to the Aboriginal and Torres Strait Islander visual arts and crafts sector. Section 9.1 examines the sources and scope of current funding programs, including mainstream arts and non-arts programs. Sections 9.2 and 9.3 consider how funding arrangements support both economic and cultural and social benefits of arts and crafts, and empower artists and their communities.

9.1 Many (mostly small) funding programs support Aboriginal and Torres Strait Islander arts and crafts

Governments fund the production, exhibition and commercialisation of arts and crafts in many ways.

- Through their art agencies, governments provide operational funding to art organisations, and specific grants to artists and art organisations for art production and exhibition, and to boost employment and training in the sector – this is done through a mix of mainstream programs and some funding streams specific to Aboriginal and Torres Strait Islander visual arts and crafts.
- Non-arts agencies provide grants that fund business skills and support, as well as the auxiliary functions performed by some artists and art organisations, including tourism, social, and regional and economic development.
- Governments fund the establishment and operations of public institutions, such as museums and galleries, that collect and exhibit art and objects of significant cultural value. Many of these institutions have significant collections of Aboriginal and Torres Strait Islander arts and crafts, exhibitions and public programs.
- Governments also offer incentives to the private sector to invest in artworks and art projects.

This section discusses financial grants from governments intended to support the Aboriginal and Torres Strait Islander visual arts and crafts sector either directly (by funding art organisations or specific projects) or indirectly (for example, via employment or tourism programs).

The bulk of Indigenous-specific arts funding comes from the Australian Government

The two main Australian Government funding programs for Aboriginal and Torres Strait Islander visual arts and crafts are the *Indigenous Visual Art Industry Support* (IVAIS) program delivered by the Office for the Arts, and the *Aboriginal and Torres Strait Islander Arts* programs provided by the Australia Council for the Arts (Australia Council) (figure 9.1). Through these targeted programs, the Australian Government spent

about \$24.5 million (excluding recent COVID-19 payments) on Aboriginal and Torres Strait Islander visual arts and crafts in 2020-21, contributing to the income streams for approximately 8500 people.⁴⁷

Figure 9.1 – Office for the Arts and Australia Council funding 2020-21^{a,b}

Targeted programs for visual arts and crafts

\$21 million	Office for the Arts (ongoing)
\$8.5 million	Office for the Arts (time limited)
\$3.5 m	Australia Council

a. Office for the Arts (ongoing) refers to funding provided under the IVAIS program through the closed non-competitive grant process. **b.** Office for the Arts (time limited) refers to funding provided under the *Relief and Recovery Fund* (\$8.5 million).

Sources: Australia Council (pers. comm., 26 May 2022), Australian Government (2021), Office for the Arts (2021c).

In 2020-21, the IVAIS program provided 115 grants worth \$21 million to 79 art centres, seven industry service organisations, seven industry events (including the Cairns and Darwin Indigenous art fairs), and five regional hub organisations (figure 9.2). The majority of this grant funding is provided on a multi-year basis (median length of all grants funded in 2020-21 was three years)⁴⁸ and is delivered through a closed non-competitive grant funding process (Australian Government 2021, p. 5). Organisations that have met IVAIS program objectives in delivering grants awarded through open competitive grant processes or that have previously received funding through closed non-competitive funding processes, may be eligible to be recommended for multi-year funding.

A further \$25 million in funding (over five years) was announced in October 2021, as part of the Australian Government's *National Indigenous Visual Arts Action Plan* (NIVA Action Plan). The NIVA Action Plan, which will be administered under the IVAIS program, sets out ten actions to achieve a 'stronger, sustainable Indigenous visual arts sector' (Australian Government 2021, p. 13). The actions relate to infrastructure, professional development, support for independent artists, building digital capacity, reaching new markets in Australia and overseas, and protecting Indigenous artists' intellectual property and income.

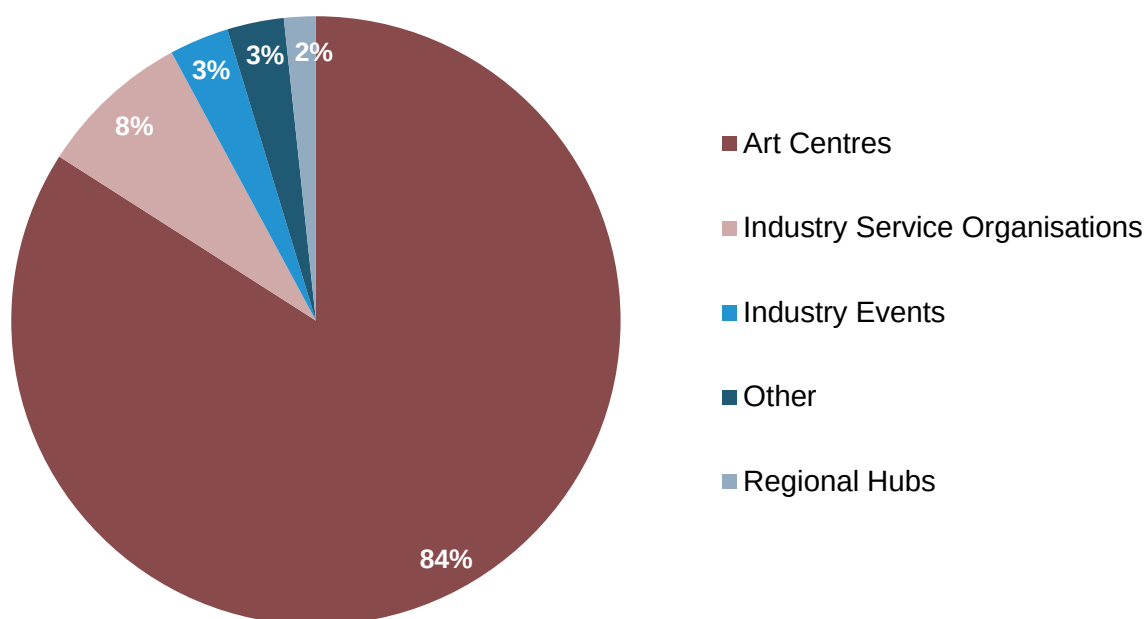
While the IVAIS program is focused on art centres and organisations that support the sector, independent Aboriginal and Torres Strait Islander artists, groups and organisations can apply for funding from the Australia Council. In 2020-21, the Australia Council provided funding of \$23.3 million to Aboriginal and Torres Strait Islander artists and organisations across all art forms, not just visual arts and crafts (which includes funding commitments for organisations across multiple years) (Australia Council, sub. 24, p. 46). The two primary streams of targeted funding to Aboriginal and Torres Strait Islander artists, groups and art organisations offered by the Australia Council are the *Aboriginal and Torres Strait Islander Arts* and the *First*

⁴⁷ This figure includes 8000 Aboriginal and Torres Strait Islander artists and more than 500 Aboriginal and Torres Strait Islander arts workers supported under IVAIS (Australian Government 2021, p. 5). While not included in this figure, the Australia Council supported 317 'First Nations' applications in 2020-21 across all art categories, including visual art (Australia Council, sub. 24, p. 46).

⁴⁸ Long-term funded, high performing organisations may have a maximum grant period of up to five years. In 2020-21, 49 of the 101 organisations funded under IVAIS were receiving funding for the maximum period.

Nations Arts Strategy Panel. In 2020-21, Australia Council invested approximately \$3.5 million for Aboriginal and Torres Strait Islander visual arts and crafts (pers. comm., 26 May 2022) (figure 9.1).

Figure 9.2 – IVAIS funding by organisation type 2020-21^{a,b,c,d}
% of total funding



a. Industry service organisations include: Aboriginal Art Centre Hub of WA, Ku Arts, Desart, Indigenous Art Centre Alliance, Arnhem, Northern and Kimberly Artists, Arts Law, IartC. **b.** Regional hubs include: APY Art Centre Collective, Arts North West, Arts Northern Rivers, Arts Out West, NSW Aboriginal Culture and Heritage and Arts Association Incorporated. **c.** Industry events include: Cairns Indigenous Art Fair, Darwin Aboriginal Art Fair, Revealed Emerging Artists Showcase (WA), SOUTHEAST Aboriginal Arts Market, National Gallery of Victoria, National Indigenous Art Fair, Melbourne Art Fair. **d.** Other category includes a grants awarded to Agency Projects, UMI Arts Ltd. and Barkly Regional Arts.

Source: Office for the Arts (2021c).

In January 2022, the Australian Government committed to build a \$316.5 million National Aboriginal and Torres Strait Islander Cultural Precinct in Canberra (Morrison and Wyatt 2022). The new precinct, Ngurra⁴⁹, will include a learning and knowledge centre, a national resting place to care for Aboriginal and Torres Strait Islander ancestral remains, and a new home for the Australian Institute of Aboriginal and Torres Strait Islander Studies (Morrison and Wyatt 2022). The Australian Institute of Aboriginal and Torres Strait Islander Studies art and object collection includes over 6000 items (AIATSIS 2021).

State and territory governments also provide targeted funding ...

State and territory governments provide funding through a mix of grant programs for independent artists, art projects and arts organisations to support exhibitions as well as creative and professional development; and operational funding to organisations that support sector development. Some state and territory governments provide funding to Aboriginal and Torres Strait Islander art centres, which are also funded by IVAIS. For example, the Queensland Government's *Backing Indigenous Arts (Indigenous Art Centres)* multi-year funding (2019–2023) provided just under \$1 million to 12 art centres and a peak body in 2020-21 (Arts

⁴⁹ 'Ngurra' is a word in multiple languages for 'home', 'country' or 'place of belonging' (Morrison, Wyatt 2022).

Queensland 2019); these same organisations also received just under \$2.8 million in IVAIS funding (OFTA 2021c). The Victorian Government's *Creative Victoria Organisations Investment Program* provided two art organisations funding of just under \$190 000 in 2020-21, while they also received \$150 000 from IVAIS in 2020-21 (box 9.1).

Box 9.1 – State and territory government investments in Aboriginal and Torres Strait Islander arts and crafts

Examples of state and territory government investments in Aboriginal and Torres Strait Islander arts and crafts in 2020-21 include:

- in 2020-21, the South Australian Government committed over \$4 million across a range of grants and funding programs to support the sector. This included \$1.19 million in organisational funding to Tandanya, Ku Arts and APY Art Centre Collective, and \$1.65 million (over three years) in art centre upgrades and staff housing (South Australia Government, sub. 21, p. 9)
- the Queensland Government, through its *Backing Indigenous Arts* initiative distributed \$3.2 million in operational funding annually to support 14 Indigenous Art Centres, the Indigenous Art Centre Alliance, the Cairns Indigenous Art Fair, Laura Dance Festival and Winds of Zenadth Cultural Festival (Arts Queensland, sub. 33, p. 4). This includes approximately \$1.1 million in funding through its *Indigenous Art Centres* stream (Arts Queensland 2019).
- the NSW Government, through *Create NSW Aboriginal Arts and Culture program streams*, provided about \$1 million in grant funding 2020-21 to visual arts and crafts (Create NSW 2020e, 2020f, 2020c, 2020d, 2020a, 2020b)
- the Victorian Government provides a number of grant programs through Creative Victoria that have specific 'First Peoples' streams. In 2020-21, they provided five IVAIS-funded organisations about \$930 000 in funding across five different streams — the majority of which was for COVID-19 related measures. This included funding under the *Creative Victoria Organisations Investment Program* for two IVAIS-funded art centres for \$187 455 (Victorian Government 2021).
- the Northern Territory Government provides base operational support to Arnhem, Northern and Kimberley Artists and Desert as well as funding towards the annual Darwin Aboriginal Art Fair and the Desert Mob event in Alice Springs (Northern Territory Government, sub. 28, p. 8). The Arts Trail initiative has seen an investment of \$100 million, providing infrastructure upgrades to existing galleries, art and cultural centres to become 'tourist ready' and to 'assist them to build the Northern Territory's reputation as an arts and cultural destination' (Northern Territory Government, sub. 28, p. 7).

In their most recent survey of art centres, Desart found that over the past ten years, grant funding has averaged 44% of total income (pre COVID-19) (2021b, p. 4). Proportion of total income from grants varied, from 62% in Queensland to 31% of income in South Australia in 2019-20 (Desart 2021b, p. 5). There is limited public reporting of state and territory funding, though some commitments made in 2020-21 are outlined in box 9.1.

State and territory governments have also made commitments to establish Aboriginal and Torres Strait Islander art and cultural centres in the Northern Territory, South Australia and Western Australia (DPC(SA) 2021; Government of Western Australia 2021a, p. 66, 2021b, p. 556; Northern Territory Government 2021, p. 6). The New South Wales Government, under its Cultural Infrastructure Plan, will

investigate business models and funding opportunities for a contemporary First Nations cultural centre (NSW Government 2019, p. 79).

These projects (including Ngurra), when completed, have the potential to raise awareness of Aboriginal and Torres Strait Islander visual arts and crafts, support artists' careers, and generate demand for ethically sourced art and merchandise. In addition to providing a market opportunity for artists (including retail sales), it also places governments in a position to promote high standards of ethical procurement when acquiring artwork for those centres. They will also address the current lack of dedicated national or state- and territory-based institutions that exhibit Aboriginal and Torres Strait Islander visual arts and crafts and provide professional development opportunities for Aboriginal and Torres Strait Islander people in these cultural institutions.

... and local governments have an increasing role in funding arts and crafts

Local governments play an increasingly important role in community art and cultural activities (HoRSCCA 2021, p. 49). Support for visual arts and crafts by local governments is provided through regional galleries, artist-in-residencies, public art projects, art training, specific art projects, and community art and cultural development projects (Myer 2002, p. 40). Local governments operate approximately 250 public galleries and museums regionally and in metropolitan Australia (HoRSCCA 2021, p. 23) and in 2019-20, local governments across Australia invested \$1.8 billion in the arts (across all artforms, and covering Aboriginal and Torres Strait Islander and non-Indigenous arts), approximately 25% of total investment in arts across all levels of government (OFTA 2021a table 2). Aggregate data is not available on funding provided specifically for Aboriginal and Torres Strait Islander visual arts and crafts at the local government level.

Many local councils provide arts and cultural grants to artists and community organisations to fund projects and events, as well as commissions of public art. Some have dedicated art programs that seek to promote Aboriginal and Torres Strait Islander arts and crafts. For example, the Brisbane City Council through its *Indigenous Art Program* 'transforms Brisbane's streets into an exhibition of Aboriginal artworks in various places and spaces, including large-scale banners, light boxes, vitrines, and projections, in Brisbane's laneways' (Brisbane City Council 2022). In 2022, the *OUTstanding* exhibition, an outdoor gallery will feature 12 internationally renowned Aboriginal and Torres Strait Islander artists.

Local governments are also working in partnership with Country Arts South Australia to support Aboriginal arts workers to create opportunities and build capacity of local artists and communities in regional South Australia (South Australia Government, sub. 21, p. 7).

Mainstream arts funding provides some support to Aboriginal and Torres Strait Islander arts and crafts but how much is not clear

Mainstream arts programs such as Australia Council's Visual Arts funding stream, the Office for the Arts' Regional Arts Fund, and state and territory mainstream arts programs also play a role in financing Aboriginal and Torres Strait Islander artists and art organisations. In 2019-20 the total pool of funding provided for arts and cultural activities, facilities and services by the Australian and state and territory governments was \$1.9 billion and \$1.2 billion respectively (OFTA 2021a table 2).⁵⁰ Total expenditure on visual arts and crafts activities, facilities and services by the Australian and state and territory governments was \$42.9 million and \$50.1 million respectively, and includes funding for the creation or exhibition of visual arts and crafts (not part

⁵⁰ These amounts do not include the \$4.27 billion and \$50.1 million in COVID-19 funding provided by the Australian Government and the state and territory governments respectively to the arts sector (OFTA 2021a table 2).

of a collection in a public museum or gallery), trade fairs, marketing and market development, and other support for visual artists and art workers (OFTA 2021a table 2). Data on the amounts accessed by Aboriginal and Torres Strait Islander artists and organisations is not available.

Identifying the impacts of policies and programs on Aboriginal and Torres Strait Islander people relies on accurately identifying Aboriginal and Torres Strait Islander program participants. Data on Aboriginal and Torres Strait Islander status is not collected in all government administrative data, preventing its use for evaluating the impacts on Aboriginal and Torres Strait Islander people (PC 2020a, p. 331). Accessing this data under mainstream government programs has been an ongoing problem and better data is needed.

Funding to the sector is also provided by many non-arts portfolios

Aboriginal and Torres Strait Islander artists and organisations are able to access government funding from a range of programs outside arts portfolios. For artists, these grants or programs may contribute to developing and/or supporting their art practice, while for organisations they can contribute to strengthening their capability and the impact they have in the sector.

According to Australian Government grants data, organisations that received IVAIS funding or reported as solely operating an 'art centre' (as opposed to other functions, such education or health), received funding from about 100 different types of grant programs advertised in the period between 2017-18 to 2020-21.⁵¹ Most grants were funded by the National Indigenous Australians Agency's (NIAA) *Indigenous Advancement Strategy*, providing about \$39.9 million in funding to these organisations in 2020-21 (table 9.1).

NIAA grants, including for activities supporting culture and capability under the Indigenous Advancement Strategy, do not fund activities that are the responsibility of mainstream funding sources, such as art production or employment at art centres that could be funded under the IVAIS program. Between 2018-19 and 2021-22 four art related projects were eligible for funding from the Indigenous Advancement Strategy: infrastructure works to two art centres, an outdoor art project and a professional development program (\$1.8 million) (NIAA, pers. comm., 15 September 2021).

The NIAA also administers a range of other significant programs that interact with the Aboriginal and Torres Strait Islander arts and crafts sector, such as the *Community Development Program*⁵², the *Indigenous Skills and Employment Program*, *Indigenous Local Employment Fund*, the *Aboriginal Benefit Account*, and the *Army Aboriginal Community Assistance Programme*.

Many other non-art agencies also provide funding and support to the sector through:

- health and social services programs including the National Disability Insurance Scheme (NDIS) and the Commonwealth Home Support Program (CHSP) (Arts Law, Copyright Agency, IartC, sub. 31, p. 11)
- employment and industry support programs such as the Australian Government's Jobactive and New Business Assistance programs⁵³, and the joint Australian and South Australian Government's The Circle

⁵¹ This figure is based on 144 organisations that received IVAIS funding or were registered under ORIC as an arts centre; it excludes Macquarie University, which received over 212 grants over the period from the Australian Government.

⁵² The Community Development program is being replaced by the Remote Engagement Program in 2023, with the new program to be co-designed and trialled with Aboriginal and Torres Strait Islander peoples over two years (Wyatt 2021).

⁵³ Mainstream employment service Jobactive offers specialised support to Indigenous Australians (Australian Government 2022b). The New Enterprise Incentive Scheme (NEIS) provides the New Business Assistance program to help start and develop small businesses and is delivered by a network of NEIS providers (Department of Education, Skills and Employment (Cth) 2022).

- First Nations Entrepreneur Hub (South Australian Government, sub. 21, p. 11) and Commonwealth and state and territory procurement programs
- tourism support programs such as the Northern Territory's Arts Trail initiative (Northern Territory Government, sub. 28, p. 7).

The extent to which Aboriginal and Torres Strait Islander artists and art organisations benefit directly from these programs is not clear, as data collected is not sufficiently detailed. Better data will need to be collected in coming years, given the reporting commitments governments have signed up to as part of the National Agreement on Closing the Gap (JCOCOTG 2020).

Table 9.1 – Key non-arts grants received by some organisations

Organisations registered through Office of the Registrar of Indigenous Corporations that run an 'arts centre' or receive IVAIS funding (144 organisations), 2017-18 to 2020-21

Agency	Grant program	Number of grants over the 4 years	Annualised 2020-21 funding (\$ million)
NIAA	Indigenous Advancement Strategy (IAS) – Safety and Wellbeing	38	9.00
NIAA	IAS – Children and Schooling	30	6.46
NIAA	NAIDOC Week Grants	25	0.02
DITRDC	Indigenous Languages and Arts Program	25	0.55
NIAA	IAS – Jobs, Land and the Economy	15	15.92
NIAA	IAS – Culture and Capability	14	0.85
NIAA	Aboriginals Benefit Account	14	1.78
NIAA	IAS – Remote Australia Strategy	11	0.21
DITRDC	Local Roads and Community Infrastructure Program	10	2.30
NIAA	IAS – Indigenous Rangers	9	6.33

Source: Australian Government (2022a).

... and by philanthropy and corporate sponsorship

Philanthropy and corporate sponsorship have been important contributors to the Aboriginal and Torres Strait Islander arts and crafts market. Creative Partnerships' (2020, p. 5) *Giving Attitude* survey showed the total value of private sector support for the arts and cultural sector in 2019-20 was \$540 million.⁵⁴ The Australia Council's *National Arts Participation Survey* found 10% of Australians aged 15 years and over donated money to the arts (Australia Council 2020b, p. 57). There is a lack of data on philanthropy as a source of funding specifically for the Aboriginal and Torres Strait Islander arts and crafts market but there are a number of examples of significant contributions.

Many foundations and family trusts have provided philanthropic funding to the Aboriginal and Torres Strait Islander sector. The Tim Fairfax Family Foundation, for example, has provided \$2.4 million since 2016-17 to

⁵⁴ Some private sector data included in this total was for 2019 calendar year (Creative Partnerships Australia, Instinct and Reason and Wavelength 2020).

Aboriginal and Torres Strait Islander art organisations for capacity building activities (sub. 2, p. 1). The Ian Potter Foundation has also awarded funds to the sector in recent years, including \$229 950 to NorthSite Contemporary Arts to support ‘pathways into leadership for Indigenous arts professionals’, \$950 000 to the Darwin Aboriginal Art Fair Foundation to further develop their digital platform and \$360 000 to Tjanpi Desert Weavers to fund a creative development program (The Ian Potter Foundation 2019, 2021).

Philanthropy can be a major source of funding for art organisations. For example, The Torch project, which provides art, cultural support and arts industry support to Aboriginal and Torres Strait Islander offenders and ex-offenders in Victoria, received 43.5% of its total income in 2019-20 from donations and bequests, totalling about \$679 000 (Australian Charities and Not-for-profits Commission 2021).

Corporate sponsorship can also be significant for some Aboriginal and Torres Strait Islander artists and art organisations. For example, BHP Billiton is the principal partner of Martumili Artists in Newman, Western Australia, contributing \$4.4 million towards the construction of the multi-purpose art centre in 2011 and providing over \$4 million between 2007 and 2016 in supporting program and operational costs (BHP Billiton 2016). BHP Billiton also provided \$4 million to support the inaugural Tarnanthi festival in 2015, a further \$17.5 million over six years to 2021 and will continue to provide further sponsorship to enable the event to continue until 2024 (South Australian Government, sub. 21, p. 5).

Organisations, such as Creative Partnerships Australia (CPA) and Agency Projects, facilitate philanthropy along with co-investment from governments in the Aboriginal and Torres Strait Islander arts sector. Agency Projects noted that they are responding to an identified need in the sector to connect potential investors to projects that are ‘Indigenous-led, built on trust and mutual respect, and delivered to budget in a timely and effective manner’ (sub. 3, p. 1). As part of the NIVA Action Plan, the Australian Government is funding CPA to pilot ‘a fund raising approach and associated guide to encourage greater philanthropic support for art centres’ (Australian Government 2021, p. 12). The first edition of the fundraising guide by CPA was released early 2022 (CPA 2022).



Draft Finding 9.1

The big picture of government funding is hard to piece together

Aboriginal and Torres Strait Islander artists and art organisations receive funding from a multitude of sources, including targeted and mainstream arts programs and various non-arts portfolios across all levels of government, as well as from philanthropy and corporate sponsorship. Outside of the few targeted programs, data on funding provided to Aboriginal and Torres Strait Islander visual arts and crafts is not reported. As a result, it is hard to determine the overall amount of funding available to the sector, or assess how well different funding streams are addressing the needs of the sector.



Draft Finding 9.2

The National Indigenous Visual Arts Action Plan provides a time-limited funding increase

The Aboriginal and Torres Strait Islander visual arts and crafts sector has seen recent injections of funds both directly through the Australian Government's National Indigenous Visual Arts Action Plan, and indirectly through commitments to establish Aboriginal and Torres Strait Islander art and cultural centres.

The National Indigenous Visual Arts Action Plan provides \$25 million of additional funding to the sector over five years, including for infrastructure upgrades and building digital capacity.

The governments of the Northern Territory, South Australia and Western Australia are funding art and cultural centres in their respective jurisdictions while New South Wales is investigating similar opportunities. The Australian Government has also committed to establishing a National Aboriginal and Torres Strait Islander cultural complex in Canberra, which will include art and artefact collections.

9.2 Key issues with funding arrangements

The Commission has heard from study participants that government funding is critical to the success and sustainability of the Aboriginal and Torres Strait Islander arts and crafts market. The peak service organisation Aboriginal Art Centre Hub of WA noted:

Government funding is the primary financial resource for Indigenous art centres. Without government funding, Indigenous art centres in Western Australia would not have adequate financial resources to operate. (sub. 20, p. 2)

However, many participants noted significant concerns about current funding arrangements. These include:

- the amount of funding available for art centres has not grown in real terms
- smaller art organisations and independent artists find it difficult to access funding
- the administrative burden imposed by funding arrangements
- funding programs tend to focus on art production and do not adequately recognise the broad roles cultural and social fulfilled by art organisations in remote communities.

Primary funding programs have plateaued in real terms ...

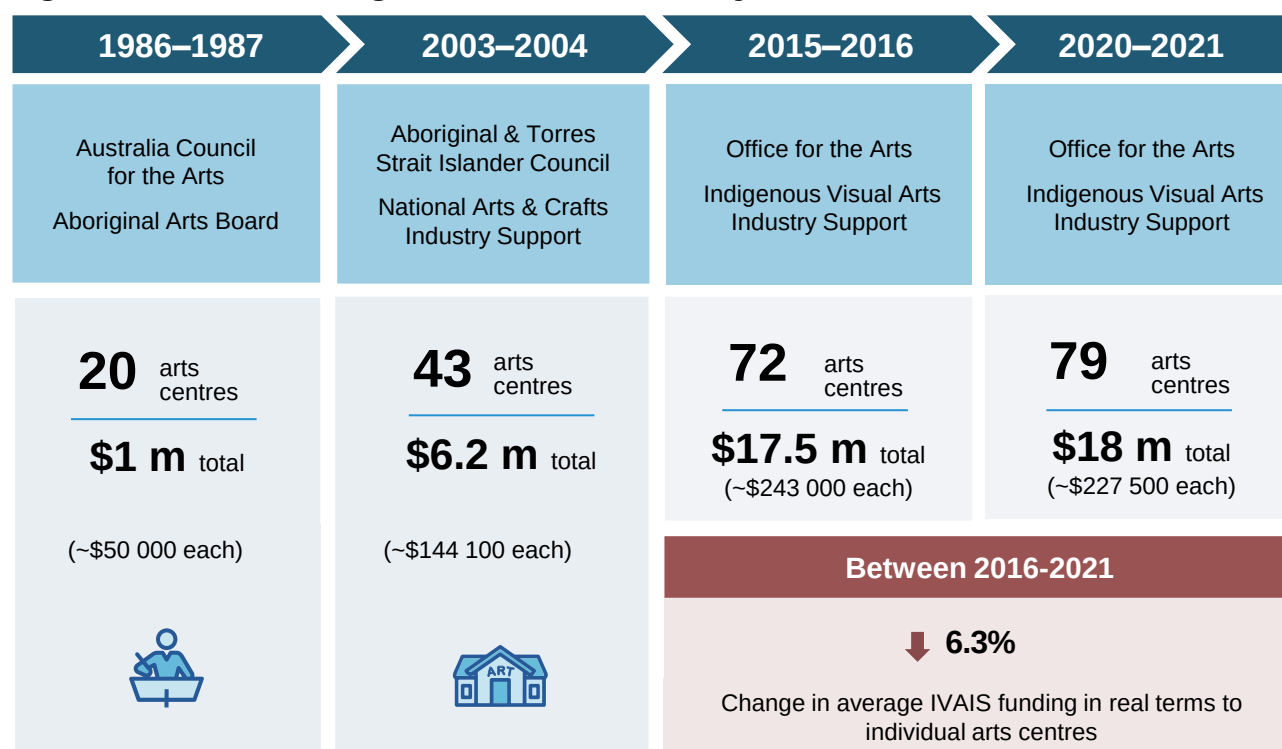
Programs to fund the operational costs of remote art centres have existed in some form since 1971 (DITRDC 2021b, p. 5). Historically, as more art centres received funding, total funding increased more than commensurately. But more recently total funding has not matched an increase in the number of centres.

In 1986-87, the Australia Council funded operating expenses of 20 art centres with approximately \$387 000 in grants (Australia Council 1987, pp. 60–62). Over time, funding responsibility moved to the Office for the Arts, and other funding programs merged to eventually becoming the IVAIS program that exists today.⁵⁵ Overall IVAIS funding dropped by 5% in real terms between 2015-16 and 2020-21, and funding to individual art centres on average dropped by 6.3% during this period (figure 9.3).

⁵⁵ In 2009-10, funding and responsibility for the employment of arts workers was devolved directly to art centres through the Indigenous Employment Initiative (Acker 2016, p. 3). In 2015-16, this initiative came under the IVAIS program, which was expanded to include funding for Aboriginal and Torres Strait Islander arts workers.

Funding under the Australia Council's Aboriginal and Torres Strait Islander Arts program across all arts categories in 2020-21 was \$4.69 million.⁵⁶ This compares with \$4.96 million in 2016-17, a 5% decline in real terms.⁵⁷

Figure 9.3 – IVAIS funding to art centres over the years^a



a. Funding represented in 2021-22 dollars using CPI up to March 2022 quarter.

Sources: ATSIIS (2004, p. 37), Australia Council (1987, pp. 60–62), Office for the Arts (2018, 2021c).

Some of this plateauing in funding has been offset through emergency payments to assist some in the sector recover from the impacts of the COVID-19 pandemic, and more substantially through the NIVA Action Plan. However, this support is time limited and is unlikely to address some of the ongoing needs of the sector.

... and accessing IVAIS can be difficult for new entrants

IVAIS largely provides closed non-competitive grants, offering stability in funding for existing organisations, particularly in regional and remote areas where other sources of funding may be more limited. On the other hand, new entrants have limited opportunities available to access the IVAIS funding pool.

IVAIS funding is difficult to attain if arts centres are not already funded or arts centres are not invited to apply for the funding. (AACHWA, sub. 20, p. 3)

⁵⁶ Includes annualised four year funding of \$3.3 million and represented in 2021-22 dollars using CPI up to March 2022.

⁵⁷ Includes annualised four year funding of \$3.9 million and represented in 2021-22 dollars using CPI up to March 2022. Funds in 2020-21 that did not exist in 2016-17 were not included in the estimating the change over time. This included funding from the First Nations Arts Strategy Panel which in 2020-21 had \$515 448 allocated for the Cherish creative practice, workforce and entrepreneur streams that may have been accessed by visual arts and crafts artists (Australia Council 2021a).

According to Creative Economy (sub. 9, p. 13), 'the growth of art centres has proliferated in the last 10 years and it is estimated up to a further 50% of art centres remain unfunded'.

Current IVAIS multi-year and one-off funding allocations are based on a number of criteria including historical funding, and 'demonstrated expertise and capacity of the organisation to undertake the grant activity' (DITRDC 2021b, p. 10). The latter is based on an assessment of whether the organisation has the capacity to manage and acquit funding, and has appropriate governance structures in place (DITRDC 2021b, p. 10). Grant applications are assessed by a departmental officer 'based on their merits', with an internal moderation process 'to ensure consistency in the evaluation and to finalise grant recommendations within the available IVAIS budget' (DITRDC 2021b, p. 11). To be eligible for the non-competitive grants, an organisation must be an 'existing multi-year funded organisation or ... invited to deliver program specific activities' (DITRDC 2021b, p. 7).

One avenue to demonstrate expertise and capacity to the Office for the Arts is through participating in their one-off open competitive grants processes. The IVAIS open competitive grant rounds held in 2018-19, 2019-20 and 2020-21 awarded \$3 232 277 (OFTA, pers. comm., 25 May 2022). In contrast, just over \$63.6 million has been provided over the same period through the closed non-competitive closed grants process.⁵⁸ Creative Economy described the \$400 000 available in the December 2020 IVAIS open competitive funding round as 'inadequate and inequitable' (Creative Economy, OFTA 2020, sub. 35, p. 5). Prior to the introduction of the one-off open competitive grants in 2018-19, there was no formal mechanism for Aboriginal and Torres Strait Islander art organisations who were not historical multi-year funding recipients to apply for funding under IVAIS.

The outcome of the most recent open competitive funding round, held in December 2021, awarded just over \$5 million to be delivered in 2021-22, 2022-23 and 2023-24 (OFTA, pers. comm., 25 May 2022). In the past, funding for the competitive grants has been dependent on what is committed through the non-competitive grant process (DITRDC 2021c, p. 6). However, additional funding has been made available under the NIVA Action Plan, which commits funding to 'invest in up to an additional 8 Indigenous art centres in regional and remote locations to increase jobs' each year over five years from 2021 (Australian Government 2021, p. 15).

IVAIS funding is reported to support 8500 artists and art workers, but it is unclear how far this funding reaches across all those in the sector that require support (Australian Government 2021, p. 5). Better data on the types of practising artists could provide information about differences in need across the sector, but could also point to barriers for artists to access support from IVAIS-funded organisations.

Some of the less established art regions potentially miss out on support. As noted by the Aboriginal Regional Arts Alliance:

The art centre model may work well for some artists and communities but when looking Australia wide we don't believe that it is representative of the sector. There is no one size fits all model. There needs to be a recognition by Government that there are a diverse range of ways in which Aboriginal artists and communities work, produce and sell their arts and crafts. Policies, programs, supports and funding need to be flexible to recognize this diversity and to enable equitable access to support. (sub. 8, p. 8)

⁵⁸ The periods may not entirely align as the closed non-competitive grants are estimated from financial years 2018-19, 2019-20 and 2020-21 (OFTA 2019, 2020b, 2021c).

Multiple funding sources impose an administrative burden

Many art organisations access multiple funding sources (over and above their IVAIS funding) (box 9.2). The administrative burden in both applying for funding, and then if successful, meeting reporting requirements can be onerous and result in resources being diverted from core activities. This is not uncommon across the community services sector: for example, inefficiencies in multiple grant funding was also observed for providers of children and family services in the Northern Territory (PC 2020b, p. 76).

Box 9.2 – Examples of sources of funding for art centres

Waringarri Arts Aboriginal Corporation

In 2019-20 the Waringarri Arts Aboriginal Corporation expended \$779 262 in grant funding, including:

- Government (Arts): \$853 046 (IVAIS, ILA, Country Arts WA, Department of Local Government, Sport and Cultural Industries (WA), Australia Council, Department of Culture and the Arts (WA).
- Government (other): \$174 769 (Department of Social Service, NIAA, Prime Minister and Cabinet, WA Tourism Commission).

This compares with \$82 552 in donations, \$25 000 in sponsorship and \$758 079 in art sales and commissions and \$458 344 in fees for services.

Papunya Tjupi Art Centre Aboriginal Corporation

In 2019-20 the Papunya Tjupi Art Centre Aboriginal Corporation expended \$1.01 million in grant funding, including:

- Government (Arts): \$704 422 (IVAIS, Department of Tourism, Sport and Culture (NT), Australia Council).
- Government (other): \$250 337 (Department of Trade, Business and Innovation (NT), NT Government, NIAA Aboriginal Benefits Account, Australian War Memorial, Indigenous Business Australia, Business Growth Program, Central Australian Youth Link Up Service).
- Peak body: \$11 408 (Desart).

This compares with \$1.25 million from the sales of goods in 2019-20.

Ninuku Arts Indigenous Corporation

In 2018-19 Ninuku Arts expended \$568 401 in grant funding:

- Government (Arts): \$564 200 (IVAIS, Arts SA, Country Arts SA).
- Peak body: \$4200 (Ku Arts).

This compares with \$5974 in donations and \$504 803 in sales.

Sources: Brian Tucker Audit (2019, p. 11, 2020b, p. 18, 2020a, p. 13).

Meeting funding application requirements requires applicants to redirect limited resources with no guarantee of a positive result. The Aboriginal Art Centre Hub of WA, for example, reflected that ‘applying for funding can be an overwhelming process’, with some art centres diverting operational funding to outsource the process to consultants (sub. 20, p. 5). They further noted that ‘the majority of applications are unsuccessful’, and the lack of success creates a ‘sense of exclusion’ which ‘can deter centres and artists from applying for future funding’ (AACHWA, sub. 20, p. 5).

The Tjanpi Desert Weavers also highlighted the burden of sourcing multiple funding opportunities in their submission to the *Consultation Paper on Growing the Indigenous Visual Arts Industry* (2020):

Art Centres ... run more and more projects to maintain funding income and end up in a vortex of applications and acquittals that detract from operations and base KPIs. Historically, the IVAIS program provides operational funding which is immensely helpful but it has remained stagnant in the amount received by an individual Art Centre since at least 2009 due to the burgeoning number of Art Centres and the overall amount provided to the Department. (Tjanpi Desert Weavers, OFTA 2020, sub. 4, p. 1)

Identifying appropriate funding opportunities and writing a successful application require time and expertise. Independent artists, without the support of an established art organisation, need to understand the funding landscape (including what grants are available at any point in time), the application requirements, and the relevant closing dates, and have the capacity to apply for various funding opportunities. Some Aboriginal and Torres Strait Islander artists face additional barriers in applying for funding, such as having limited English literacy skills, internet and phone network issues, and limited access to services to assist with applications.

Advice and support for putting together and submitting grant applications is available from the Office for the Arts and Australia Council as well as mainstream state and territory arts agencies. But it is not clear how well used this is by Aboriginal and Torres Strait Islander artists and art organisations. In their submission, the peak industry service organisation Aboriginal Art Centre Hub of WA stated:

Greater access to government support, advice and seminars during the funding application process would empower art centres and individuals to develop knowledge and experience in submitting, acquitting and reporting funding, reduce engagement costs, avoid replication of funded resources and foster collaboration and engagement. (sub. 20, p. 5)

If funding applications are successful, the reporting requirements can also be onerous and burdensome on Aboriginal and Torres Strait Islander artists and art organisations. A number of study participants highlighted this burden.

Funding assessment and reporting needs to be more flexible to [recognise] the different circumstances of artists and communities across Australia. (ARAA, sub. 8, p. 4)

There is a need for national approaches to address key issues including ... reducing the administrative burden of multiple funding applications and reporting tasks for First Nations arts businesses. (Arts Queensland, sub. 33, p. 6)



Draft Finding 9.3

Primary funding sources from the Australian Government have plateaued in real terms in recent years

The Australian Government provides targeted annual funding of about \$24.5 million to the Aboriginal and Torres Strait Islander visual arts and crafts sector through its key art funding programs: the Indigenous Visual Arts Industry Support (IVAIS) and the Australia Council's Aboriginal and Torres Strait Islander Arts programs.

After increasing for many years, since 2015-16, total IVAIS funding has declined in real terms by 5%. Average funding for art centres — the main recipients of government support — has fallen by 6.3%, as the number of funded art centres has increased while funding under the program has remained fixed.

Since 2016-17, funding to the Aboriginal and Torres Strait Islander Arts Program under the Australia Council has fallen in real terms by 5%.

The recent funding commitments through the National Indigenous Visual Arts Action Plan will assist a number of art centres over a five year period, but there has been no change to the ongoing operational funding provided by IVAIS.

IVAIS funding is focused on art production ...

The IVAIS program guidelines explicitly preclude funding activities that 'are primarily focussed on community development or cultural maintenance' (DITRDC 2021c, p. 9). Rather, the program is focused on activities that support the development of the 'Indigenous visual arts industry', access to markets and the professional development of Aboriginal and Torres Strait Islander artists, art centre staff and board members (DITRDC 2021c, p. 9).

This differs from funding programs provided by the Australia Council and for many state government funding programs, the objectives of which retain a focus on supporting artists to practise their art and cultural maintenance. These programs are largely available to independent artists and art groups.

Over the years, the objectives of funding programs for Aboriginal and Torres Strait Islander arts and crafts have evolved. The focus for IVAIS has shifted from providing opportunities to practise art and preserve culture to a more commercial focus (box 9.3).

This change in focus appears out of step with the expectations of many in the sector. As part of submissions received through the Australian Government's *Consultation Paper on Growing the Indigenous Visual Arts Industry* (2020, p. 8), industry participants noted that 'Indigenous art and culture are closely linked and dependent on each other' and that the 'growth of the Indigenous visual art market needs to happen in a way that supports Indigenous culture and is sustainable over a long time.' As chapter 2 noted, strengthening cultural connection is fundamental to ensuring that arts and crafts practices contribute to improved wellbeing. As the CEO of Arnhem, Northern and Kimberley Artists also noted:

... it would be the view of the ... board and the majority of the membership that culture is the foundation not just for art — our organisation is an art organisation — but also for Indigenous livelihoods, health and wellbeing at large. This is particularly so in remote Australia and particularly pertains to Indigenous culture and Indigenous knowledge. Culture is foundational to Indigenous success and to improved outcomes ... (2016, p. 48)

Box 9.3 – Historical context of the Indigenous Visual Arts Industry Support program

The Australian Government has supported Aboriginal and Torres Strait Islander visual artists since the establishment of the Aboriginal Arts and Crafts Pty Ltd in 1971 and the provision of operational funding to Aboriginal art centres and grants to artists under the Aboriginal Arts Board (AAB) throughout the 1970s and 1980s.

Since its inception, the Board has placed a high priority on the creation and maintenance of Aboriginal Arts Centres as a means of assisting individual artists and communities to retain and develop their cultural traditions. The centres also enable them to gain some financial return from the orderly marketing of their work. (Australia Council 1987, pp. 26–27)

The AAB was established in 1973 to give Aboriginal and Torres Strait Islander people ‘full responsibility’ for developing programs in the arts under the then Australian Government policy to ‘revitalise cultural activities through the Australian Council for the Arts’ (Whitlam 1973, p. 1).

By 1987, the AAB described its role as providing ‘opportunities’ for Aboriginal and Torres Strait Islander people ‘to practise as artists’ and help ‘strengthen the cultural life of the Aboriginal community’ (Australia Council 1987, p. 25). The aims of the AAB had also expanded to include programs that ‘provide employment opportunities’ for Aboriginal and Torres Strait Islander people in arts related occupations, ‘assist the best professional work to emerge’ and ‘encourage the teaching and practice of Aboriginal culture’ (Australia Council 1987, p. 25).

The AAB was replaced by an Aboriginal Arts Committee on 1 July 1989, which maintained the funding programs of the previous AAB (Australia Council 1991, p. 62). As a result of recommendations from the Review of the Aboriginal Arts and Crafts Industry undertaken in 1989, the Aboriginal and Torres Strait Islander Commission (ATSIC) took over the responsibility for core operational funding of a number of community-based arts and crafts centres from the Australia Council’s Aboriginal Arts Committee in 1992, establishing the *Arts and Crafts Industry Support Strategy* (ATSIC 1992; DITRDC 2021b, p. 5).

The strategy was renamed in 1995 as the *National Arts and Crafts Support* program. In 2003–04 ATSIC participated, with other agencies, in the development of the *Indigenous art centres: strategy and action plan* (launched 3 October 2003). The action plan was ‘aimed at building a strong and sustainable Indigenous visual arts sector, characterised by a stable and profitable base of Indigenous art centres, producing and distributing works of artistic excellence’ (DCITA, ATSIS, and Australia Council 2003, p. 2).

When ATSIC was abolished in 2004, the National Arts and Crafts Support program was transferred to the Arts Portfolio. In 2012, it was renamed the *Indigenous Visual Arts Industry Support* program and, from 2015–16, includes funding for employment of Indigenous arts workers (DITRDC 2021b, p. 5).

In its submission to the *Growing the Indigenous Visual Arts Industry* consultation paper, Arnhem, Northern and Kimberley Artists (ANKA) strongly recommended that the Australian Government partners with ‘the Indigenous visual art and culture peaks to develop and resource a ‘Remote Indigenous Art and Culture Sector Strengthening Plan’ to sit alongside or within the Indigenous Visual Arts Action Plan 2021’ (ANKA, pers. comm., 13 May 2022, p. 21).

However, the resulting NIVA Action Plan does not include actions that specifically support cultural maintenance activities despite highlighting the interconnectedness between art production and cultural maintenance in the discussion on the sector's sustainable growth in the Plan (Australian Government 2021, p. 8).

... with limited opportunities to fund cultural maintenance activities

Cultural strengthening activities are not funded under Australian Government programs that directly support Aboriginal and Torres Strait Islander visual arts and crafts.

The Australian Government has funded cultural maintenance activities by art centres in the past through dedicated programs like the Regional Arts and Cultural Support Program (ATSIS 2004, p. 39) and the Indigenous Cultural Support Program (Acker 2016, p. 4). Currently, only the Indigenous Languages and Arts (ILA) program has a dedicated focus on cultural maintenance through language and traditional and contemporary arts. However, the majority of funding under this program is provided to language centres, with limited funds going specifically to arts and crafts activities. In 2021-22 (to February), five projects that included visual arts (in projects that included multiple artforms) have been funded through the ILA, receiving about \$266 000, from a program funding pool of about \$25 million year (OFTA, pers. comm., 9 February 2022).

Some state and territory governments also provide funding for cultural strengthening activities. For example, the Western Australian Government's Connecting to Country program funded about \$448 000 in 2020-21 (just under half of what was requested), including to activities involving visual arts and crafts (DLGSC (WA) 2021).

The Kimberly Aboriginal Law and Cultural Centre asserted that there is lack of policy coordination in this space and an absence of both a National Arts Policy and a National Indigenous Cultural Policy:

In particular, we are told that policy responsibility for 'Traditional Cultural Expression' or 'Cultural Maintenance' activities sit with NIAA, not with the Office of the Arts. But there is no funding in NIAA for 'Traditional Cultural Expression' and there is no policy framework around it. (HoRSCCA 2021, p. 14)

Programs and policies listed under the NIAA's Culture and Capability stream, relate to heritage, Indigenous broadcasting, Indigenous capability, Indigenous interpreters, NAIDOC and Reconciliation Australia. Without a specific program, 'funding to support the maintenance and strengthening of Indigenous cultural expression and conservation' through the Indigenous Advancement Strategy is undertaken under a range of programs, including Remote Australia Strategies and Jobs, Land and the Economy (table 9.1).

Funding for the many functions undertaken by art centres and to meet their infrastructure needs is inadequate

Art centres fulfil many roles in their communities (figure 2.3). The Indigenous Art Centre Framework, which underpins the IVAIS program, regards many of the auxiliary functions of art centres as out of scope:

Although beyond the scope of this Framework, it is recognised that Indigenous art centres are often at the heart of community life and can be central to the social and economic well-being of regional and remote communities. Many art centres and artists subsidise other support services for their communities such as nutrition, numeracy and literacy, training and employment, leadership, youth services and after school and school holiday programs, as well as facilitating access to government services. (DITRDC 2021a, p. 2)

In some ways, this is prudent. Art centres are diverse: they have different objectives, strengths and histories, reflecting the priorities of the communities they represent. Among the 79 art centres funded in 2020-21 under the IVAIS program, there was a mix of Aboriginal and or Torres Strait Islander organisations, Land Councils, city and shire councils, and a Heritage Trust, among others. Devising funding arrangements that support the

broad range of roles fulfilled by art centres would be complex and require considerable coordination across funding agencies. Some see the narrow focus on arts production as a strength, as it is a relatively simple funding and reporting arrangement (Desart, sub. 4, p. 6).

Nevertheless, art centre managers and art workers continue to fulfill important cultural and social roles beyond the 'operational' ones they are funded for under existing arts funding arrangements. Study participants have noted this includes providing transport, banking services, support for artists in their community life, direct care (for older artists) and assisting people to access health and aged care services despite receiving no formal recognition or resourcing for these roles (South Australia Government, sub. 21, p. 15; NARI, sub. 10, p. 2). These diverse, and often unfunded roles, leave staff with less time for their art centre roles.

There is arguably a case to better articulate, calibrate and enforce the priorities of remote-area funding to match the social and cultural roles provided by art centres and to respond to differences in how they operate (Acker and Woodhead 2014, p. 32). Without appropriate levels of funding to support art centres in meeting the needs of their communities, governments and communities are unlikely to see the full benefits that art centres can offer.

Funding to address the infrastructure needs of art centres has been a longstanding issue and highlighted in past inquiries (HoRSCIA 2018c; SSCECITA 2007). The focus of IVAIS on supporting the operational needs of art centres places significant strain on them — particularly those located in remote areas. The 2019 Infrastructure Australia audit highlighted the pressing infrastructure needs faced by remote art centres, noting that 'many of these facilities are no longer fit-for-purpose and suffer from poor maintenance. This infrastructure gap is present at both small and large scales' (Infrastructure Australia 2019, p. 448). This reflects the finding from the House of Representatives Standing Committee on Indigenous Affairs 2018 inquiry into *The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia*, and a number of submissions raised in this study. Desart, for example, highlighted the need for IVAIS to better recognise that 'the cost of doing business in regional and remote central Australia is significantly higher than in more populated urban areas' (sub. 4, p. 19). It also argued that governments and private philanthropy should work together to better meet the capital needs of remote art centres including, to: build, replace and/or maintain art centres to a reasonable standard; ensure staff and visiting professionals are accommodated in fit-for-purpose facilities; and 'acquire/replace critical operational assets including motor vehicles, office equipment (computers etc), studio equipment, etc.' (Desart sub. 4, p. 19). The NIVA Action Plan has made commitments to fund both digital infrastructure and up to 20 urgent capital projects per year until 2025 (Australian Government 2021, p. 15).



Draft Finding 9.4

Many roles that art centres fulfil are out of scope for arts funding programs

The Australian Government's flagship funding program for the sector, the Indigenous Visual Arts Industry Support (IVAIS) program, focuses on art production and operational costs.

Aboriginal and Torres Strait Islander community-controlled art organisations fulfil a range of important cultural and social roles within their communities, which are not funded under IVAIS. This increases the administrative burden on art organisations (as they seek to secure funding from other sources) and limits their ability to undertake activities highly valued by their communities.

Securing funding to meet the infrastructure needs of art centres has been a longstanding issue. While some funding has been made available for this purpose under the National Indigenous Visual Arts Action Plan, this commitment is only for five years at this stage.

9.3 Issues with funding arrangements for training and capacity strengthening

Working in an art centre or other art organisations requires a broad range of skills, from understanding workplace legal obligations, negotiating licensing agreements, writing grant applications, accounts management, marketing and sales, webpage development and management, logistics in transporting artwork, as well as art production. Many of these roles fall to the manager but others will be undertaken by arts workers, where funding is available, or by volunteers. Independent artists will also need many of these skills to produce, market and sell their own works.

The ability of visual arts and crafts production to provide a viable pathway towards economic empowerment for Aboriginal and Torres Strait Islander people is a concern for many communities. The IVAIS program, for example, by funding art centres in remote communities has enabled substantial economic opportunities to be realised both through artists being able to sell their works, and through the employment of local Aboriginal and Torres Strait Islander artists and art workers (chapters 2 and 3).

The Australian Government (through IVAIS and the Australia Council) as well as state and territory governments provide funding for professional development and training programs to remote art centres and independent artists in regional and urban areas. Nonetheless, many submissions and participants to this study have emphasised the importance of, and the need for, targeted capacity strengthening and development for Aboriginal and Torres Strait Islander artists and art workers, for both professional practice and leadership roles (AAAA, sub. 26, p. 91; AACHWA, sub. 20, p. 10; Australia Council, sub. 24, p. 19; NAVA, sub 23, p. 2; QUT, sub. 12, p. 3; UMI Arts Ltd., sub. 1, p. 9; Woods, sub. 11, p. 7). Key concerns include:

- Inadequate focus on the arts sector when it comes to the bigger picture of skills development for Aboriginal and Torres Strait Islander people
- the effect of high turnover of art centre managers, and the promotion of local arts workers into these roles
- limited structured training and professional development opportunities for artists and art workers
- access to governance training and support for art centre boards.

The arts sector is lacking a strategic approach to build its workforce

Investing in artists and art workers' skills through capacity strengthening and career development is a critical component of increasing economic opportunities and has been identified as a key objective for many arts funding programs. However, despite the growth of the sector over the past 30 years, the focus has been on supporting art production rather than on offering sustainable long-term careers for Aboriginal and Torres Strait Islander artists and art workers.

The *National Roadmap for Indigenous Skills, Jobs and Wealth Creation* (NIAA 2021b), for example, acknowledged the success of the Aboriginal and Torres Strait Islander arts sector in employment, and skills development, of Aboriginal and Torres Strait Islander people, but did not identify the sector as an 'area of focus' (unlike other industries that are singled out, such as aged care, biosecurity services (Indigenous Rangers), tourism, mining and resources).

The Roadmap references the NIVA Action Plan under the domain of jobs and 'what the Australian Government is already doing' (NIAA 2021b, pp. 18–19). Under the NIVA Action Plan, some time-limited funding has been provided to increase art centre workers' digital literacy and skills, governance training for board members, and connection to initiatives that aim to develop business skills under the New Enterprise Incentive Scheme. However, there is a risk that by not nominating the Aboriginal and Torres Strait Islander

arts sector as an area of focus under the Roadmap, strategic opportunities to develop the skills and careers of (existing and aspiring) Aboriginal and Torres Strait Islander artists and arts workers will be missed. Specific actions for change identified under the key domain of skills such as 'strategies to move Indigenous Australians from entry-level roles into higher skilled and paying technical, managerial and leadership careers' and 'partnerships between industry, schools and higher education to deliver a pipeline of talent' could be further developed for the arts sector as part of the Roadmap (NIAA 2021b, p. 12).

Career pathways are not clear

In the Roadmap (NIAA 2021b, p. 4), a lack of access to information about opportunities and pathways to training, jobs and business is identified as contributing to the challenges faced by Aboriginal and Torres Strait Islander people to participate in the mainstream economy. Participants to our study have raised this as a particular issue for the visual arts and crafts sector. The Northern Territory Government noted that during consultation for the *Creative Industries Strategy 2020–2024*:

... the Northern Territory Indigenous Visual Arts Industry identified that more work needs to be done in collaboration with government agencies to develop policies and programs that support appropriate training and genuine career pathways to actual and sustainable employment for Aboriginal and Torres Strait Islander artists and arts workers. (sub. 28, p. 7)

Creative Economy stated that 'capacity building programs in the sector are limited and inconsistent', and that while some programs for arts workers run by the peak bodies and others 'are good at providing opportunities and broadening horizons and contribute to retaining existing Indigenous artworkers ... [they] ... have proved to be limited in building employment pathways and careers to fully operate art centres' (sub. 9, p. 14).

With respect to capability development in the art centre model, the Aboriginal Art Association of Australia in its submission to the consultation paper on Growing the Indigenous Visual Arts Industry said:

Why are there still so few Aboriginal people in leadership and senior management roles in the art centre system? Almost 50 years down the track, everyone is still saying there should be indigenous art centre managers but where is the progress? If there are barriers to this skill transfer, those barriers should be identified, along with the immediate practical steps to begin removing the barriers. Removing the barriers will probably be a long-term process but it needs to transparently begin. This skill building process should be publicly tracked. (AAAA, OFTA 2020, sub. 27, p. 13)

The Aboriginal Art Centre Hub of Western Australia also highlighted these concerns.

There is currently a shortage of skilled workers qualified in the visual arts. The Federal Government can address this by reinstating the arts as a priority listing for secondary education supported by accessible and affordable tertiary pathways. Furthermore, peak bodies must be adequately funded to support the immediate training and professional development needs of arts workers. (AACHWA, sub. 20, p. 10)

Other sectors have had access to funding to establish clearer pathways for employment and professional development. For example, the Indigenous Rangers Program recently received an investment of \$636.4 million to create an estimated 2000 additional ranger jobs by 2028 in regional and remote Australia (Wyatt 2022). This includes \$25.3 million 'to support Indigenous Rangers to build the skills and capacity to undertake biosecurity fee for service work' by undertaking 'a Certificate IV in Tropical biosecurity and support for a bespoke Indigenous Biosecurity Traineeship' (NIAA 2021b, p. 16). The Indigenous Health Workforce Traineeships program is providing \$13.6 million over three years from 2020-21 to increase the number of

skilled Aboriginal and Torres Strait Islander people working in the Aboriginal and Torres Strait Islander primary health care sector and create viable career pathways (NIAA 2021b, p. 16).

With a number of Aboriginal and Torres Strait Islander 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 agreed by governments on Aboriginal and Torres Strait Islander employment, self-determination, leadership and empowerment.



Draft Finding 9.5

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.

High turnover in art centre managers affects local skill development

An art centre manager's role is extremely diverse and includes managing and supporting the development of their staff. The role of art centre managers in supporting artworkers is particularly important in very remote art centres where support from peak body organisations and other training providers is difficult to access (Seet et al. 2018).

However, many art centre managers only stay in the role for two to three years 'resulting in significant skills turnover problems for the Art Centres' (Seet, Acker and Whittle 2015, p. 781). A study which examined retention of art centre managers found that many of the 21 survey respondents undertook tasks well beyond what would traditionally be involved in managing a creative arts enterprise and that 'over time, the nature of this work/environment, particularly the unrelenting nature of after-hours work, imposes an excessive workload, and contributes to turnover and/or burnout in some managers' (Seet, Acker and Whittle 2015, p. 775). With such demands on art centre managers' time, and the high turnover rate, it is not clear that art centres are in a strong position to facilitate the upskilling of local artworkers.

Short tenure periods coupled with a limited number of quality of applicants, is often disruptive to the development of sustainable business practices and communities of artistic practice. (Arts Queensland, sub. 33, p. 5)

Having local artworkers with the skills to take on some of the activities fulfilled by art centre managers would reduce some of these risks, and help ensure continuity in the face of high turnover. A number of factors could improve attraction and retention of art centre workers, including:

- ‘better integration of the support for the development of art centre workers as leaders and integrators within their community’
- ‘support for mentoring, professional development and exchange opportunities for art centre workers (as opportunities for paid, meaningful work that meet the art centre workers’ career aspirations are important attraction and retention factors), in a culturally-relevant and holistic manner’
- ‘Art centre peak bodies ... to provide a tailored and a mix of off-site, structured and accredited training balanced by on-site mentoring, and coaching and information, based on the configurations of the art centre workers in different centres’. (Seet et al. 2018, pp. 30–31)

Some of the training and development opportunities currently provided by the sector are discussed in the next section.

Appropriate structured training and professional development opportunities are limited

There is a diverse range of employment opportunities in the Aboriginal and Torres Strait Islander visual arts and crafts sector, some requiring art workers to undertake structured training and accredited courses. However, vocational training options targeted at the visual arts sector provide limited training focused on art workers. While peak service organisations have tried to fill this gap with a mix of tailored training and professional development opportunities, places for these courses are limited. Further, training and professional development may not be accessible to many independent artists or art workers who do not have access to these peak service organisations.

Challenges with vocational training courses

The challenges that structured vocational training present for the Aboriginal and Torres Strait Islander arts and crafts sector are twofold: first, many courses have been inaccessible or difficult to complete due to the way they have been designed and delivered (e.g. delivered away from communities that need these training courses, or that are not culturally appropriate); and second, there is a lack of vocational training courses that cover the breadth of skills particular to the visual arts and crafts sector.

The vocational training opportunities tailored to the creative arts sector focus on art production, with limited time spent on the business and technology skills required for many arts workers and artists operating their own business. For example, the Certificate III in Aboriginal and/or Torres Strait Islander Cultural Arts offered by TAFE Queensland includes core units on cultural protocols and developing an understanding of, and producing, work that expresses the students’ Aboriginal and/or Torres Strait Islander identity (TAFE Queensland 2022). However, the elective units available do not cover the skills required for working in or managing an art organisation, or for independent artists to build their own business (such as digital literacy, marketing on social media, and logistics). Other vocational education courses provide these units but these are not specific or tailored to the visual arts and crafts sector.

Peak bodies have developed their own tailored programs

In the face of the gaps in structured vocational training courses, art centre peak bodies and service hubs have developed tailored professional development programs for arts workers (box 9.4).

Seet et al. (2018, p. 31) describe the importance of Desart's and ANKA's innovative training programs:

These started from a peak-body/organisational perspective, but they have been improved through customised training and professional development that is increasingly aligned to the values and motivations of arts workers as well as the needs of the industry and the community, thereby strengthening culture as well as building economic and social empowerment, that together, serve to underpin improvements in important aspects of Indigenous life like that of education, employment and health and well-being.

Box 9.4 – Aboriginal and Torres Strait Islander peak body training and professional development programs

The peak body organisations in the Aboriginal and Torres Strait Islander visual arts and crafts sector offer two kinds of skills development and training opportunities:

- a more informal approach consisting of workshops and presentations, group training, attendance at industry events
- a more formal approach where specific units of study are undertaken over a longer period of time and may have accreditation.

Examples of the first approach include the Ku Arts annual symposium and professional development program for arts workers who attend the Darwin Aboriginal Art Fair; and Desart's *Art Worker Program* which includes photography, curatorial and Stories Art Money Database workshops and industry engagement partnerships.

Arnhem, Northern and Kimberley Artists *Arts Worker Extension Program* (AWEP) has two professional development streams. The AWEP Foundation Program has elements of the more informal approach, as well as a two week interstate internship at major cultural and education institutions. The AWEP Pathways Program has a focus on connecting graduates from the AWEP Foundation programs to accredited training and higher education such as the Specialist Certificate in cross-cultural conservation and Heritage at the University of Melbourne.

Aboriginal Art Centre Hub Western Australia's accredited training program *Our Future: Aboriginal Arts Worker Program* is also a blend of the two approaches with a Perth-based component including internships at cultural institutions and tailored TAFE tutorials, with literacy and numeracy support provided throughout the program.

Indigenous Art Centre Alliance *Indigenous Artworker Program* is a 10-month program, which includes weekly online training and in-person practical sessions and field trips. Training covers personal development, and masterclasses in retail, curatorial administration and exhibition installation.

All training programs delivered by the peak bodies are in small groups. Indigenous Art Centre Alliance say this allows for training to be flexible, responsive and shaped to suit arts workers' needs and requests.

Sources: AACHWA (2022), ANKA (2022), Desart (2022b), IACA (2022), Ku Arts (2019b, 2019a).

More recently, the Aboriginal Art Centre Hub of WA (AACHWA) and the Indigenous Art Centre Alliance (IACA) have developed their own training programs. There is only funding for a few participants in these tailored programs each year; for example in 2021-22, the IACA Indigenous Art Worker Program supported seven arts workers and the AACHWA 'Our Future' program supported five arts workers in 2020-21.

The reach of training offered by industry service organisations and arts agencies is limited relative to the size of the sector (chapter 3), particularly as these training and professional development programs are only available to peak body members and may not be accessible to many independent artists.

The need for additional support to deliver appropriate training for arts workers was also highlighted by UMI Arts Ltd., who felt constrained by existing resources:

UMI Arts acknowledges the support that IVAIS provides to UMI Arts in capacity building our artist[s]. For this we are very grateful, although UMI Arts does view the need to provide other types of intense one on one workshops with our artist[s] as group work doesn't always work. People tend to not open up in large forums or able to speak freely due to confidential matters. ... If small traders/artist[s] had access to trainers to deliver specialised one on one business development or skill sets development as we feel this type of training delivery would be accessed more readily by artist[s]. (sub 1, p. 16)

There is limited professional support for independent artists

Independent artists work across a range of settings – from consignment for large galleries, to individuals operating as sole traders or small businesses that sell their work directly to consumers via local markets or online. Some are affiliated with art centres, others are not – either by choice or because there are none located where they live and work (chapter 3).

A number of study participants have suggested that support available to independent Aboriginal and Torres Strait Islander artists, particularly in urban areas, is limited. These views have also been expressed in past inquiries:

There is a strong perception that urban artists have more access to art industry services. This is not the case, many urban artists lack skill, education, financial means and exhibiting opportunities as do artists in remote centres. (Ms Jennifer Herd, SSCEC 2007, sub. 47, pp. 2-3)

Independent artists rely on a significant number of funding streams to access professional development, including mainstream grant opportunities. The Australia Council funds individual professional development through the annual *Aboriginal and Torres Strait Islander Arts Fellowship* and through its *Chosen and Custodianship*⁵⁹ programs. In 2019-20, \$206 000 was invested in five projects under the *Chosen Program* to support intergenerational artistic and cultural transmission through community-led cultural apprenticeships and residencies (Australia Council 2020a). It is not clear how many of the projects or artists selected for these programs specialise in visual arts and crafts. International fellowships and residencies are also available to Aboriginal and Torres Strait Islander artists through the Australia Council's Biennale Delegate and international residencies programs.

State and territory governments offer one-off grants to individuals to fund professional development opportunities or creative development, production and presentation of new work. For example, Creative Victoria offers a First Peoples Creative Industries Traineeship Program and is piloting a First Peoples Investment Program. The South Australian Government, through its State-wide Indigenous Community Arts Development Project, provides funding to Ku Arts to support approximately 150 independent artists in regional and remote areas outside the APY Lands where there are no Aboriginal art centres (South Australian Government, sub. 21, p. 4). In New South Wales, eight of the 14 Regional Arts Development Organisations employ Aboriginal Arts Officers who provide an outreach service 'crucial in ensuring artists are supported through professional advice and on the ground assistance' (Arts North West 2020, p. 10; Regional Arts NSW 2022).

⁵⁹ The Custodianship Program was designed by Aboriginal and Torres Strait Islander leaders to transform sustainability in culture, practice, community and the arts. It allows for 13 Aboriginal and Torres Strait Islander Cultural practitioners, artists and arts workers from across art forms and career levels to be guided by role models, cultural teachers and an Elder in Residence (Australia Council 2021b, pp. 65–66, 2021e).

More general business skills and support (including financial support) is provided by a number of agencies with responsibility for economic or industry development. For example, the Australian Government's Indigenous Business Australia offers tailored business support programs, such as the Business Development and Assistance Program. One recipient of this program noted the benefits in accessing this support:

... those workshops were so helpful because I realised all these years I had been underselling myself. The facilitator had me bring in some of my jewellery, and she asked, 'How much did it cost to make, how much is your time worth and how much are you going to sell it for to the galleries?' And when I told her, she said, 'You've just lost \$45', and I just about burst into tears ... My art has always been something that just comes from my heart. And it's so hard to place a value on what you produce when you are just doing it to put something beautiful out there. How do you put a monetary value on that? So now, I'm still creating from my heart, but I have also developed a good business mind. (Kathleen Buzzacott as cited in IBA 2015)

Training opportunities for independent artists can also come from private sector partnerships. For example, the National Gallery of Australia's Indigenous Arts Leadership program is co-funded by Wesfarmers Arts, and provides a tailored training program, offering professional and cultural development opportunities over two six-day residencies (NGA 2021).

While there are no comprehensive data on training and professional development support available to independent artists in the visual arts and crafts sector, it is clear that accessing grants through a competitive process can be challenging. For example, in 2019-20 Australia Council received 3579 applications for grant funding of organisations and individuals' art projects and career development, worth \$107.1 million. Due to limited funding, only 16% of grant applications were successful, receiving a total of \$17 million (Urquhart 2020, p. 61).

The Aboriginal Regional Arts Alliance (sub. 8, p. 3) argues that funding is not being equitably distributed to artists at all levels of development, and favours 'big name' artists. The Aboriginal Art Association of Australia believes 'the current approach to the industry, particularly at a federal level is overwhelmingly unbalanced to the detriment of independent artists' (sub. 26, p. 9).

The National Association for the Visual Arts provides general advice for the visual arts sector on pricing and artists' fees as well as online resources for members (NAVA 2022). However, the nature of this support does:

... 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. (NAVA, sub. 23, p. 2)



Draft Finding 9.6

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.

Governance training and support is important for the sustainability of art centres

Governance plays a critical role in the success of Aboriginal and Torres Strait Islander art centres and organisations. Training and support for establishing and maintaining good governance is important, but governance is not a one size fits all concept, and what is 'good' in one context may not work in another. As Desart noted 'each art centre has its own set of governance and business needs, opportunities and challenges' (sub. 4, p. 2).

Aboriginal and Torres Strait Islander registered corporations are required to develop a rule book as part of registration, which governs how the corporation should run.⁶⁰ These templates mostly cover what is often referred to as corporate or organisational governance, such as rules around membership, annual general meetings, and a focus on financial management and legal compliance. But governance, particularly in the context of Aboriginal and Torres Strait Islander organisations, is broader than this. In a survey of Indigenous governance practitioners, many identified:

Indigenous governance as a distinct modality with unique requirements in a challenging intercultural environment. This requires Indigenous people to respond to western legislative and policy demands as well as to Indigenous cultural and social priorities. (Bauman et al. 2015, p. xiii)

These respondents also distinguished between organisational and corporate and community governance, with community governance describing 'the complex set of relationships, cultural protocols, practices, responsibilities and understandings which inform decision-making' (Bauman et al. 2015, p. xiv). The implications of this for Indigenous governance is that it:

... has to account for these relationships, as well as for government imposed jurisdictional boundaries, policy and legislative requirements (including in relation to corporation membership rules and decision-making). These can cut across the cultural priorities reflected in the shared Indigenous design elements, sometimes giving rise to conflict amongst Indigenous people and the fragmentation of groups. (Bauman et al. 2015, p. xv)

Some art centres have developed and sustained effective governance structures that have contributed significantly to their artistic and economic success, and to community empowerment (Agency Projects, sub. 3, p. 3). Peak bodies also play a key role in promoting good governance within art centres (Desart, sub. 4, p. 2). ANKA highlighted that:

... the cohesion of the Indigenous memberships of ANKA and Desart has roots in Indigenous kinship and connections, predating state and territory borders ... bonds from strong working relationships, allegiances, and shared teaching and learning over extended periods. (ANKA, pers. comm., 13 May 2022, p. 23)

However, some arts organisations face significant challenges to establishing and maintaining good governance structures. Smith (2015, p. 13) noted governance requirements place heavy demands on Aboriginal communities where 'the workload of decision-making and accountability falls onto the shoulders of a few people' and people are 'over-governed' by advisory mechanisms that require considerable time and energy yet they are 'under-governed' by not having the 'time and support to build more culturally-legitimate, practically effective collective governance'.

⁶⁰ All corporation rule books must comply with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), which sets out standard, default set of rules for a corporation (ORIC 2022c).

In its review of corporate failures within Aboriginal and Torres Strait Islander businesses, the Office of the Registrar of Indigenous Corporations (ORIC) (2010, p. 6) found most corporations failed because of poor management or poor corporate governance, which can be improved by providing corporate governance support services.

AACHWA suggested there is ‘a need for funded governance and capacity development training for art centres to successfully meet their obligations and attain sustainability’ (AACHWA, sub. 20, p. 9). ANKA has argued that in responding to COVID-19 there is an opportunity to clarify what is required for long term sustainability and that:

This work requires time, collective effort, and genuine commitment to communication and governance structures especially to ensure Indigenous stakeholders from ‘remote’ communities and homelands, with English as a second or fifth language, have seats as partners at the table and genuine agency. (ANKA, pers. comm., 13 May 2022, p. 16)

ORIC currently supports and regulates over 3400 corporations (of these, only 259 report to being involved in the ‘Arts Centre’ industry) under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), including by providing training in good governance.

The NIVA Action Plan identifies governance skills as an area for investment, and includes a commitment for ORIC to determine the governance support that needs to be developed and implemented. ORIC is expected to consult with visual art service organisations in the first year to determine governance support needs, and implement any actions in consultation with at least two visual art service organisations. They are also expected to attend at least two art events to promote understanding of governance issues in the second year (Australian Government 2021, p. 16). However, it is not clear how much additional resourcing will be made available to ORIC to deliver on the NIVA Action Plan commitments or how future governance training and support will differ to what has been provided in the past. Chapter 10 discusses the importance of establishing funding arrangements that align with the priority needs of the sector (including appropriate support for governance) and makes draft recommendations that — if adopted — would help ensure these needs are met.



Information request 9.1

- 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?

10. Strengthening sector capacity

Key points

- ✳ **Government funding to Aboriginal and Torres Strait Islander artists and art organisations helps enable the cultural, social and economic benefits of visual arts and crafts markets.**
 - This includes operational and project funding to art centres and service organisations, project funding to independent artists, and contributions to industry-led initiatives, such as the Indigenous Art Code.
- ✳ **Total government funding for the Aboriginal and Torres Strait Islander arts and crafts sector is relatively small and in recent times has not matched growth in art centres. Current funding arrangements do not explicitly support the cultural and broader community wellbeing roles carried out by Aboriginal and Torres Strait Islander community-controlled art centres.**
 - The National Indigenous Visual Arts (NIVA) Action Plan 2021–25 has restored some funding through the Indigenous Visual Arts Industry Support (IVAIS) program, but this commitment is time-limited. Improving funding arrangements will be critical for future growth.
 - An independent evaluation of Australian government funding to the sector — undertaken in partnership with Aboriginal and Torres Strait Islander people — is needed to inform future funding needs, objectives and strategic priorities.
- ✳ **Current funding arrangements are not aligned with the shared decision-making approach governments have agreed to under the National Agreement on Closing the Gap.**
 - The Australian Government should develop a formal shared decision-making partnership with Aboriginal and Torres Strait Islander artists and organisations to help direct funding toward sector-identified priorities and strategic initiatives.
- ✳ **An effective Indigenous Art Code, supported by government, forms a key part of the sector's foundations. Establishing the Code as an ACCC-enforced mandatory or voluntary industry-wide code may increase coverage, but could have unintended consequences and impose costs on the sector.**
 - Instead, the Australian Government should modestly increase funding to the Indigenous Art Code in support of key enforcement priorities, subject to ongoing monitoring and evaluation of the Code's effectiveness.

The Aboriginal and Torres Strait Islander arts and crafts sector provides significant cultural, social and economic benefits with relatively limited levels of government assistance. This funding is vital to the sector, but as documented in chapters 8 and 9, it is often delivered in a manner that does not adequately support capacity building, including the artists' capacity to pursue their legal rights or the ability of art organisations to invest in workforce development. The remainder of this chapter considers how governments could improve the way they support the sector (figure 10.1).

Figure 10.1 – Strengthening sector capacity



10.1 Supporting better conduct in the sector

Governments can promote high standards of ethical conduct by strengthening the incentives for mutually-beneficial dealings between artists and other intermediaries, while reducing opportunities and incentives for unethical conduct by all parties. For example, governments can:

- promote ethical conduct by enhancing the financial and reputational benefits to market participants from ethical dealing — for example, by raising awareness (through educational campaigns or labelling regimes) to inform consumers; or by placing conditions on government purchasing of art and design services
- reduce opportunities to behave unethically by making unethical practices more detectable, harder to initiate, and more costly when discovered (PC 2015, p. 922) — by enforcing existing laws more effectively and maintaining pathways for affected parties to raise concerns, make complaints and access justice.

Governments already fund and administer a range of measures to support ethical conduct, alongside industry-led measures (chapter 8). This section considers how governments can help further raise the standard of conduct of participants in Aboriginal and Torres Strait Islander visual arts and crafts markets by:

- enhancing the effectiveness of industry self-regulation through increased funding for the Indigenous Art Code
- improving artists' access to justice by funding support services where unmet demand exists.

Supporting and monitoring industry self-regulation

The Indigenous Art Code (the Code) was launched by industry participants in 2009 to improve standards of ethical conduct in the Aboriginal and Torres Strait Islander visual arts and crafts sector through self-regulation. The Code is administered and enforced by Indigenous Art Code Limited (IartC; box. 8.4). Governments provide the bulk of funding to IartC: in 2020-21, IartC received government grants totalling about \$400 000, compared with revenue of almost \$40 000 from membership fees (IartC 2022e, p. 15).

Although the Code is one of many mechanisms that encourage ethical conduct in the market (chapter 8), it is a key non-regulatory tool to improve the conduct of dealers and other market participants towards artists. The Code itself is tailored to the specific characteristics of the sector, defining and prohibiting its members from engaging in certain practices that, although not illegal, likely fall short of broader community standards of fair conduct.

Study participants noted the importance of the Code in improving conduct in the sector, but many also raised issues with how the Code is administered, enforced and resourced (chapter 8). Some commented on the onerous process to resolve complaints, and the lack of meaningful consequences for dealer misconduct (APYACC, sub. 17, p. 9). Some participants also argued that IartC is under-resourced, and additional funding is needed to properly enforce the Code among its membership (NAVA, sub. 23, p. 2; SA Government, sub. 21, p. 21). And others noted that the voluntary nature of the code made it a 'toothless tiger' (ARAA, sub. 8, p. 6).

The remainder of this subsection considers the case for the Australian Government:

- prescribing in regulation the Code as either a voluntary or mandatory industry code under Part IVB of the Competition and Consumer Act 2010 (Cth) (CCA)
- increasing ongoing funding to IartC to enable more effective administration and enforcement of the Code.

Should the Code be prescribed as mandatory or voluntary?

A number of submissions suggested that industry standards could be improved by making the Code mandatory — either for all dealings with Aboriginal and Torres Strait Islander artists,⁶¹ or only for dealings in specific regions (APYACC, sub. 17, p. 10). Others called for registration of dealers who work with Aboriginal and Torres Strait Islander artists (ARAA, sub. 8, p. 5; Desart, sub. 4, p. 18).

There are three types of industry codes:

- self-regulation under voluntary industry-enforced codes (which the Code is currently)
- voluntary prescribed codes
- mandatory prescribed codes (Treasury 2017, p. 1).

Both voluntary and mandatory codes can be 'prescribed' under the CCA, which means they are defined under government regulation and are monitored and enforced by the Australian Competition and Consumer Commission (ACCC), which holds powers to undertake compliance checks and access certain information from industry participants (Treasury 2017, p. 6). A mandatory code is binding on all industry participants, while a voluntary code is only binding on those that agree to sign up.

Prescribing an industry code, particularly if made mandatory, would reduce opportunities for unethical dealings, but a prescribed code carries a range of costs, including compliance costs for industry and financial

⁶¹ AAAA, sub. 26, p. 25; AARA, sub. 8, pp. 6-7; Australia Council, sub. 24, p. 27; MinterEllison, sub. 18, p. 3; UMI Arts, sub. 1, p. 12.

costs to governments. To provide some assurance that the benefits of a prescribed code would outweigh those costs, current Australian Government policy requires a 'demonstrable problem' that the market cannot solve on its own, as well as a 'compelling case' from industry with strong evidence to justify why government involvement is needed (Treasury 2017, p. 8).

Prescribed industry codes of conduct (both voluntary and mandatory) have been proposed previously for the Aboriginal and Torres Strait Islander art sector (box 10.1).

Box 10.1 – Previous proposals for a prescribed Indigenous Art Code

The 2007 *Securing the Future* Senate inquiry, which contributed to the creation of the Indigenous Art Code, recommended that the industry be given the opportunity to self-regulate in the first instance. However, it also recommended that a prescribed code of conduct should be considered after two years if 'persistent problems remain' in the sector (SSCECITA 2007, p. 142). The Australian Government noted the recommendation and agreed to consider 'alternative policy approaches' if there was evidence of persistent problems two years after the commencement of the Code (Australian Government 2008, p. 8).

One of the objects of the Indigenous Art Code constitution is to:

seek government and stakeholder support for a Prescribed Mandatory Code and, if support is obtained, co-ordinate and liaise with government and governmental and regulatory bodies in relation to the establishment, implementation and operation of a Prescribed Mandatory Code. (IartC 2017, sec. 3.2(k))

More recently, and on similar lines to the Senate inquiry, the 2018 House of Representatives Standing Committee on Indigenous Affairs inquiry into *The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia* recommended that a:

... detailed evaluation of industry practices take place no later than two years after the provision of [additional] funding. A mandatory code should be introduced if that review reveals few improvements in industry behaviour and little reduction in the prevalence of imitation First Nations art and craft. (HoRSCIA 2018c, p. xx)

The Australian Government did not accept this part of the recommendation (Australian Government 2020, p. 7), noting that mandatory codes are a 'serious market intervention' that should only be used where 'there is sufficient evidence of market failure and industry has attempted to self-regulate without success'.

Prescribing an industry code of conduct under the CCA has two main aspects: the ACCC can take responsibility for regulating the code, rather than an industry body, and the code is defined under government regulation and given the force of law (Treasury 2017, pp. 3–4).

In regulating prescribed codes, the ACCC can access a range of monitoring, investigation and enforcement powers, as well as impose penalties on contraventions (Treasury 2017, p. 6). These powers can significantly exceed those currently available under the voluntary industry code: IartC does not have inspection powers, and suspension or termination from IartC membership is the only penalty available (IartC 2021, pp. 7–8).

Prescribing a code under a regulation legislation would require legal determinations for a number of matters, which would include:

- which products and services would be covered by the Code, which may require judgments about the authenticity of particular works (chapter 4) and whether lower-priced reproductions or merchandise are subject to the Code (noting that the existing Code focuses largely on conduct relating to artworks)
- whether and how the Code would apply to small businesses that market directly to consumers without intermediaries, such as Aboriginal and Torres Strait Islander artists who work as sole traders
- whether and how artists would need to demonstrate that their works are eligible to be subject to the Code: that is, whether artists need to prove that they are an Aboriginal and/or Torres Strait Islander person.

Each of these matters would require careful engagement across the sector. In their contributions to this study, sector participants held diverse views on the merits of a prescribed code, with different perspectives provided on how widespread exploitation is, and whether, with additional resources, the industry could address poor conduct itself through more effective self-regulation.

As prescribed codes are often designed to achieve minimum standards of fair conduct (Treasury 2017, p. 4), a prescribed Art Code may not set the same standard as that in place under the existing Code (Arts Law, Copyright Agency, IartC, sub. 31, p. 67). A code prescribed in a regulation provides less scope for change over time, compared to industry self-regulation.

The main argument made for prescribing a mandatory code of conduct is that unscrupulous dealers will not sign up to a voluntary code, limiting the coverage and impact of the existing Code on raising standards across the industry as a whole. As the ACCC (2011, p. 9) notes:

... if a code is aiming to correct a market failure issue caused by a minority group and the minority group does not become a signatory to the code, then the code is unlikely to achieve its objective.

A mandatory prescribed code would require all art dealers (that is, those who purchase Aboriginal and Torres Strait Islander art for the purpose of resale) to comply with the Code and be subject to ACCC investigation and enforcement powers. A mandatory code could reduce opportunities for unfair and unethical conduct, and make it harder for any unscrupulous dealers to continue operations.

A well-marketed mandatory code could also provide a strong signal to consumers (through labelling) about the ethical credentials of arts and crafts products. Depending on how much consumers value this in their purchasing decisions (and whether they are aware of the label), this could place a premium on the price of products sold under a mandatory code. Options for labelling Aboriginal and Torres Strait Islander arts and crafts more generally are discussed in chapter 5.

The Commission's assessment

The Australian Government should not prescribe a mandatory or voluntary code of conduct for the Aboriginal and Torres Strait Islander arts and crafts industry, unless there is clearer evidence of widespread and significant conduct issues that cannot be addressed through other means.

At this point, there is no industry consensus on the need for a prescribed code, and IartC itself does not recommend a mandatory code (Arts Law, Copyright Agency, IartC, sub. 31, p. 63). For a voluntary prescribed code, the strong powers of the ACCC enforcement, alongside the prescriptive, minimalist and inflexible nature of a code established under regulation, may discourage industry participants from signing up — particularly if they believe that membership of another industry code of conduct (such as the Aboriginal Art Association of Australia's Aboriginal Art Code) provides them with similar reputational benefits. If fewer dealers are signed up to an industry-wide Code, this could undermine the steady progress made in raising standards over the past decade.

A prescribed mandatory code for the Aboriginal and Torres Strait Islander art sector is likely to be a blunt and costly response to a complex and often localised problem. A prescribed code would impose administrative burdens on artists and other industry participants, and create significant barriers to entry in the industry, but not address the systemic imbalances that give rise to unethical conduct.

The effectiveness of a prescribed code would depend on how it is defined, and the resources allocated to enforce it. If narrowly defined, a prescribed code may simply push unethical practices further to the margins, rather than eliminating them — especially in remote areas — risking unintended consequences. Of particular concern is the risk that Aboriginal and Torres Strait Islander artists who find themselves in difficult circumstances (examples of which were outlined in chapter 8) may be implicated in violating a mandatory code if they sell work to a non-code dealer, even if they must do so to meet essential needs, such as food, travel expenses back to their community, or to meet family obligations. (Similar issues would apply to any mandatory dealer registration scheme.)

Some study participants were apprehensive about a prescribed code being enforced by a nation-wide economic regulator, arguing that the ACCC would only have limited engagement with the sector (particularly in remote areas) and less capacity to perform the industry-specific educative functions currently undertaken by IartC (SA Government, sub. 21, p. 20). Arts Law, Copyright Agency, IartC (sub. 31, p. 67) similarly questioned whether the ACCC would investigate all matters reported to them, or whether it would take on other IartC functions, including referring artists to appropriate support services.

Although a prescribed code would provide the ACCC with stronger investigation and enforcement powers, these powers are rarely the first line of defence under existing codes. For example, the Horticulture Code of Conduct has a defined dispute resolution process between growers and traders, in addition to ACCC investigation and enforcement powers (ACCC 2018b). The ACCC (sub. 13, p. 9) noted that it cannot address all matters raised with it, instead focusing on ‘targeted action to maximise impact and leverage any outcomes across an industry sector’.

Overall, while there are market failures within the sector, a mandatory code is not clearly the best solution to address them. Many information imbalances, such as a lack of awareness on pricing, can be reduced through improved contracting practices (including artists becoming more aware of their rights) and better information provision (with assistance from art centres and other support services), while market power imbalances are mitigated by artists having an increasing number of channels to sell their art, including direct online sales.

The longstanding concerns about exploitation provided to the Commission in this study — although serious — affect a small number of artists in some remote areas. This poor conduct would not necessarily be addressed by an industry-wide prescribed code. As discussed below, improving on-ground enforcement of existing legal protections, alongside greater access to justice and redress, represents a clearer opportunity to improve practices in the sector.



Draft Finding 10.1

The case for an ACCC-enforced mandatory or voluntary Indigenous Art Code is not strong

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.

How could the effectiveness of the voluntary Code be improved?

Although the Commission does not recommend a prescribed Code, more could be done to improve the effectiveness of the existing voluntary industry code. The ACCC, in its role enforcing prescribed codes of conduct, has published guidelines for drafting effective voluntary codes (box 10.2).

Box 10.2 – Australian Competition and Consumer Commission guidelines for developing effective voluntary industry codes of conduct

The Australian Competition and Consumer Commission's 2011 guidelines provide advice on why and how to design and draft a voluntary code of conduct for a particular industry sector, including specific suggestions for objectives, rules and administration. According to the guidelines, the key components of effective code administration include:

- independent review of complaints handling decisions
- in-house compliance system, with sanctions for non-compliance
- consumer and industry awareness
- data collection
- monitoring, accountability & review
- assessment of competition implications
- performance indicators.

The guidelines also note the importance of stakeholder involvement, considering that the greater the involvement of industry stakeholders with the industry code, the greater the coverage of the code and the more likely it will achieve its objectives.

Source: ACCC (2011).

The guidelines suggest that a voluntary industry code of conduct is more likely to be effective when the body in charge of enforcing the code has widespread support of industry, comprises representatives of key stakeholders (including consumers, governments and other relevant community groups), and operates an effective system of complaints handling (ACCC 2011, p. 4). In its submission to this study, the ACCC reiterated that:

... codes of practice are generally only effective where there are consequences for non-compliance, and there is a dedicated body able to actively monitor and take effective action for non-compliance. (sub. 13, p. 5)

The administration of the Code meets many of these guidelines; for example, the composition of IartC's board is largely representative of the sector, incorporating dealers, art centres, representatives of peak organisations, and Aboriginal and Torres Strait Islander artists.⁶² However, the administration of the Code could be improved in other areas. Particularly:

- there is no independent review of complaints or disputes, a lack of transparency in the outcomes of complaint and dispute processes, and relatively limited penalties for non-compliance

⁶² IartC Constitution, section 11.

- no data on the effectiveness of the Code is published, nor has it yet published detailed performance indicators or any assessment of progress towards them
- no evaluation or independent review of the Code and its administration has been undertaken (although a government-led assessment of the Code was announced as part of the National Indigenous Visual Arts Action Plan 2021–25) (Australian Government 2021).

This subsection considers the potential for improvements in:

- code enforcement, including dispute resolution and complaints processes
- supporting take-up and improving consumer awareness of the Code
- monitoring, evaluation and review of the Code's effectiveness.

In response to concerns raised by study participants (chapter 8), this subsection also considers whether the Code is adequately resourced to undertake these functions effectively, and whether (and how) additional resourcing should be provided to support improved enforcement.

Code enforcement and dispute resolution

A 'fair and equitable dispute resolution system for disputes arising under the Code' is one of the purposes of the Code and forms one of the objectives of IartC,⁶³ alongside 'deal[ing] with issues relating to compliance with the Code'.⁶⁴ The ACCC guidelines similarly point to the importance of penalties for non-compliance with any voluntary code, and ensuring an effective in-house compliance system (ACCC 2011, pp. 10–11).

Some study participants pointed out that dispute resolution under the Code does not appear to be fair and equitable. APYACC (sub. 17, p. 9) highlighted the 'stressful and onerous' process of resolving disputes under the Code. Further, MinterEllison (sub. 18, p. 4) stated that 'there is no evidence to suggest that any art dealer has ever been expelled as a member from ... the Indigenous Art Code Limited'.

How can dispute resolution processes be improved?

Effective dispute resolution under an industry code should include:

- a complaints procedure for handling disputes between code members
- an escalation pathway to an administration committee or independent decision maker
- performance criteria for effective complaints handling (ACCC 2011, pp. 9–10).

These processes need to be transparent, and code members (including artists) should be aware of and feel comfortable accessing them.

In February 2022, IartC published their *Dealer Complaints, Disputes and Concerns Policy*, which, alongside a *Dealer Member complaints handling process map*, outlines how the Code deals with artist concerns over the behaviour of dealers (both Code and non-Code members) (IartC 2022b, 2022c). The principles underpinning the policy include that the process will be open and transparent, but also confidential with respect to personal information — alongside a further 'supplementary principle' that the privacy and confidentiality of the complainant and the subject of the complaint will be maintained (IartC 2022b, p. 4). The policy also includes a requirement to maintain a de-identified register of complaints, with regular review of the register to calibrate policy advocacy, approaches to dealer education, and content of the Code itself (IartC 2022d, p. 9).

The IartC policy largely aligns with the ACCC principles, in that it addresses the need for a complaints procedure and includes some defined performance criteria. However, the process does not include an

⁶³ IartC Constitution, s. 3.2(d)(iii).

⁶⁴ IartC Constitution, s. 3.2(h).

independent review and escalation pathway from the dispute resolution process. Such a pathway can play an important role in building the credibility of the complaints mechanism.

An area for improvement would be for IartC to refer significant or contentious decisions to an independent review. This independent reviewer could be an ombudsman such as the Small Business and Family Enterprise Ombudsman (which already provides alternative dispute resolution services under the Dairy, Horticulture and Franchising codes of conduct). Alternatively, services more tailored to Aboriginal and Torres Strait Islander people should be explored, with the objective of ensuring artists feel safe engaging in those dispute processes.⁶⁵

Should penalties for breaching the code be increased?

Some study participants view the Code as ‘toothless’ and lacking meaningful penalties for poor conduct by dealer-members (ARAA, sub. 8, p. 6). The only penalties available are suspension or expulsion from IartC, and these have not been visibly utilised (MinterEllison, sub. 18, p. 4).

The degree of penalties applied under the Code are ultimately a matter for the IartC membership, not government. There is a balance to be struck; as stricter penalties under a voluntary code may make sector participants hesitant to sign up and do little to deter poor conduct. (Similar concerns apply to a prescribed voluntary code of conduct, as discussed above). This can be mitigated if expectations on members are clearly defined, and the dispute resolution mechanism is considered fair and credible.

However, the lack of transparency in the outcomes of disputes, and the penalties imposed (if any), does risk undermining the credibility of the Code’s dispute mechanism. Ideally, all dispute outcomes would be published to demonstrate the Code is working effectively and taking action where needed. At a minimum, de-identified dispute outcomes, including penalties issued, should be regularly published by IartC.

Continuing to increase take-up and raise awareness of the Code

Part of the Code’s value is that, through labelling, it provides a signal to consumers that the artist was treated ethically. This provides benefits to dealer-members as well, as it provides a straightforward way for them to signal their ethical credentials. These benefits to dealers support the increased coverage of the voluntary Code, giving them incentives to become and remain members, while also improving consumer understanding of what ethical conduct in the sector entails.

However, there are concerns that many consumers are not aware of the Code, and this undermines the value of membership as a signal of ethical dealing (reducing the incentives of dealers to become members). IartC may not have the resources to actively promote the Code as a brand, alongside its other industry functions. Any educative initiatives should align with, rather than duplicate, other initiatives to promote authentic Aboriginal and Torres Strait Islander visual arts and crafts (chapter 5).

Monitoring and evaluating the effectiveness of the Code

One principle of the ACCC’s Guidelines is that an effective code of conduct is accountable to the industry through ongoing monitoring and evaluation. This requires data collection, coupled with clear performance indicators and public disclosure, along with regular review, to provide insight into the effectiveness of voluntary codes over time.

⁶⁵ For example, the Office of the Registrar of Indigenous Corporations has certain investigation and enforcement powers with respect to disputes involving Aboriginal and Torres Strait Islander corporations (which includes many art centres) (ORIC 2013).

Under the IartC Constitution, one of its objectives is to report on the operation and effectiveness of the Code in achieving its objectives.⁶⁶ Although IartC submits financial data to the Australian Charities and Not-for-profits Commission, which is subsequently published, no public reporting on the effectiveness of IartC has taken place. As provided in its joint submission with Arts Law and the Copyright Agency (sub. 31, schedule 2), IartC has undertaken research into the characteristics of its membership — although this is largely descriptive, rather than assessing how well the Code operates and demonstrating that to government, industry and the wider community.

Similarly, the IartC 2021–23 *Strategic Plan* provides some indicators of success, but these are high-level and not clearly defined. The Plan does, however, indicate that a '*Reporting and Data Collections Plan*' is being implemented (IartC 2022d, p. 8). This represents a clear opportunity to increase the quantity and quality of public reporting to improve transparency and accountability. And, as noted in chapter 8, more comprehensive data on trends and characteristics of unethical market conduct would support governments to assess whether the regulatory and policy settings for the sector remain appropriate.

Is the Code sufficiently resourced to undertake its functions?

Some study participants argued that IartC is not adequately resourced to undertake the important role it has to improve practice in the sector (AAAA, sub. 26, p. 25), while others stated that the Code could do more if properly resourced (NAVA, sub. 23, p. 2). IartC has noted that resourcing constraints influence its capacity to support all artists in accessing legal advice, particularly as IartC only employs 2.1 full-time-equivalent staff (Arts Law, Copyright Agency, IartC, sub. 31, p. 25). And, as discussed above, inadequate resourcing may also limit the ability of IartC to expand take-up of the Code among dealers, as well as improve consumer awareness of the Code. Concerns about adequacy of funding for support services are also discussed in chapter 9.

As noted above, IartC is funded primarily by governments through IVAIS grants, along with some contribution from dealer-members and supporters through annual fees (artists are not charged fees). The rationale for government funding is that supporting an industry-led effort, if effective, is less costly than implementing and enforcing a prescribed code of conduct.

Given constraints in other parts of the sector, it is important that additional support does not come at the expense of funding for community-controlled art centres and service organisations. This points to a need to ensure additional funding is at least partly matched by larger contributions from industry (through fees).⁶⁷ In the event that IartC is formally funded to refer artists to support services (as discussed below), additional resourcing from governments would be prudent.

Summing up: responsibility lies with industry, but targeted government funding can support improved outcomes

The Indigenous Art Code represents a significant achievement for the sector, and its ongoing implementation is a key way to maintain and improve standards of ethical conduct. However, more can be done to implement the Code more effectively, ensuring it remains fit-for-purpose as the sector evolves. Although responsibility for improvements to the Code primarily rests with industry, governments have a part to play through their role in funding IartC.

⁶⁶ IartC Constitution, s. 3.2(i).

⁶⁷ For example, the IartC annual membership fee of \$170 (ex GST) is below the 'associate' (\$200) and 'trade' (\$375) annual membership fees of the Aboriginal Art Association of Australia (AAAA 2020).

To improve transparency and strengthen credibility of the Code, IartC should clarify and enhance key processes, including dispute resolution, data collection, monitoring and public reporting. These functions should be coupled with greater resourcing, with contributions from governments as well as industry.



Draft Recommendation 10.1

The Indigenous Art Code can be strengthened through a joint commitment of government 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.

Responding to concerns over access to justice and redress

Access to justice and redress allows Aboriginal and Torres Strait Islander artists to resolve disputes and seek a remedy if they have been wronged. This is key to empowering artists to engage with markets safely without their rights being violated. A range of regulatory and legal tools already prohibit types of unfair and unethical conduct towards artists — but a law is only strong if it is widely understood and credibly enforced.

Ensuring artists can access a clear complaints pathway

After an artist encounters or experiences conduct that might be unfair or exploitative, it may not be apparent to them what, if any, recourse or redress they have, or who to ask to find out. Artists may be reluctant to come forward for fear of retribution from dealers, or the risk of being implicated in the behaviour (Arts Law, Copyright Agency, IartC, sub. 31, p. 49). For many artists in remote areas, art centres are the first port of call (AACHWA, sub. 20, p. 6), while others may contact Arts Law, IartC, or an Aboriginal legal service.

Artists, including independent artists, should have a clear and accessible point of contact — a 'one stop shop' — to communicate their concerns and access advice or investigation, as needed, by the most suitable organisations. This may include legal advice from Arts Law, dispute resolution under the Office of the Registrar of Indigenous Corporations (ORIC), or an investigation from the ACCC, the Fair Work Ombudsman or Safe Work Australia.

In effect, IartC is the point of contact, including for complaints outside of the direct remit of the Code (such as concerns with non-Code members), but this is not a formal function of the organisation — it is not an objective of the IartC Constitution, for example. IartC submitted that it lacks the funding needed to undertake this role effectively (Arts Law, Copyright Agency, IartC, sub. 31, p. 21). There is a risk that, because this role is not required under the organisation's constitution, it may not be maintained were organisational priorities to shift, or resources become more constrained.

The review of IartC's operations should consider whether IartC is the best organisation to act as this point of contact. Whether or not the function remains with IartC, the Australian Government should formally support this role and provide appropriate funding to ensure referral pathways are comprehensive, Aboriginal and Torres Strait Islander artists are aware of available services, and complaints procedures are accessible to independent artists.



Draft Recommendation 10.2

Artists should be aware of and able to access legal support services

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.

Difficulties in bringing legal action are not easily addressed

Certain types of unethical conduct, including coercion and threatening behaviour, are prohibited under the unconscionable conduct provisions of the Australian Consumer Law (ACL; chapter 8). However, the ACL is an economy-wide law, and study participants highlighted specific issues in how effective it is in protecting Aboriginal and Torres Strait Islander artists from unethical conduct. These include:

- the high threshold for unconscionable conduct, which can make it 'difficult to investigate, prove, and prosecute' (LCA, sub. 19, p. 7)
- awareness and accessibility of legal assistance (including pro bono representation), as well as availability of public interest litigation funding (for example, legal test cases)
- the rules of courts in relation to costs, which can discourage action — particularly the risk of an artist being liable for the costs of the other party if an action is brought and does not succeed (LCA, sub. 19, pp. 7–9).

These factors can make it difficult for artists to take legal action if they believe they have been wronged, and many reflect broader systemic issues that go beyond the visual arts and crafts sector.

A broader prohibition on unfair trading practices?

In response to concerns around the high bar set for unconscionable conduct under the ACL, the ACCC, in concert with State and Territory ACL regulators, has undertaken a regulatory impact assessment to, in part, consider whether the ACL should be amended to include a prohibition on 'unfair trading practices' (ACCC, sub. 13, pp. 4–5). This process is considering whether certain unfair business practices are unlikely to be covered by existing protections in the ACL, and what actions could be taken to limit those practices.

Including a prohibition on unfair trading practices in the ACL would expand the range of unethical conduct that is prohibited under the ACL, and may discourage unethical dealings with Aboriginal and Torres Strait Islander artists. However, similar to the existing prohibition on unconscionable conduct, a prohibition on unfair trading practices would not address the core difficulties of enforcing an economy-wide consumer law prohibition in the specific context of Aboriginal and Torres Strait Islander visual arts and crafts.

Criminal conduct

Some allegations raised with the Commission clearly relate to conduct that, if substantiated, would be criminal in nature (chapter 8; section 8.1). This includes where artists are being forced to work against their will.

Some participants highlighted issues with the policing of exploitative business practices in central Australia (APYACC, sub. 17, p. 12; MinterEllison, sub. 18, pp. 7–8). Policing in remote areas occurs in a complex environment, with many competing priorities. Such issues are outside the scope of this study; however, better access to legal support for artists is likely to be a useful tool towards ensuring allegations are addressed through the most appropriate channels.

10.2 Addressing shortcomings in government funding

Government funding to the Aboriginal and Torres Strait Islander visual arts and crafts sector helps enable the operation of many art centres and service organisations, the employment of art workers, and the professional and artistic development of artists.

However, although the number of organisations receiving funding has increased over time, the overall amount of funding under the two main Australian Government programs — IVAIS (Office for the Arts) and *Aboriginal and Torres Strait Islander Arts* (Australia Council) — has plateaued, in real terms, from 2015-16 and 2016-17 respectively (chapter 9).

This has presented challenges, both for already-funded recipients and for art organisations applying for funding for the first time. Study participants argued that the current amount of government funding does not adequately cover the non-operational costs of art organisations (such as infrastructure and other capital costs), or the full costs borne by Aboriginal and Torres Strait Islander community-controlled organisations in responding to the needs of their communities. There is limited information on the adequacy of funding for emerging or smaller art organisations, as well as independent artists (chapter 9).

This section considers how government funding can better support the Aboriginal and Torres Strait Islander visual arts and crafts sector, focusing on:

- the adequacy and effectiveness of IVAIS funding levels
- the balance between stable funding for incumbent organisations and accessibility for new entrants
- monitoring and evaluation of government funding.

Room to improve IVAIS funding effectiveness

The IVAIS program is the largest source of government funding for Aboriginal and Torres Strait Islander artists and arts organisations. It primarily funds the commercial operation of community-controlled art centres as well as peak services organisations and other support services. Smaller funding pools from other agencies, including the Australia Council, as well as State and Territory governments, provide additional funding, as well as funding artists' professional development or specific art projects.

As noted in chapter 9, the IVAIS funding pool available for ongoing funding has not grown in real terms over the past five years, although the Australian Government has committed an additional \$5 million per year over five years through the *National Indigenous Visual Arts (NIVA) Action Plan 2021–25* (Australian Government 2021) (box 10.3).

Box 10.3 – The National Indigenous Visual Arts (NIVA) Action Plan 2021-25

In 2021, the Australian Government committed additional funding of \$25 million under the *NIVA Action Plan 2021–25*. The NIVA Action Plan focuses on ‘building economic opportunities and safeguarding cultural practices in a modern digital environment’, and includes actions to:

- invest in Aboriginal and Torres Strait Islander art centres across Australia so that artists have better work spaces and opportunities
- create stronger markets and professional opportunities for Aboriginal and Torres Strait Islander artists who do not have access to a service organisation
- improve internet connection and access to digital infrastructure for Aboriginal and Torres Strait Islander art centres so that they able to improve their online selling, do their business better and develop new skills
- provide more training and professional development for: art centre managers, board members, Aboriginal and Torres Strait Islander arts workers and artists who are seeking independent business opportunities
- promote Aboriginal and Torres Strait Islander art and opportunities for Aboriginal and Torres Strait Islander artists overseas.

The NIVA Action Plan includes a commitment to invest, through IVAIS, in additional employment opportunities in up to eight art centres in regional and remote locations, and up to 20 infrastructure upgrade projects at art centres each year.

Source: Australian Government (2021).

This additional funding goes some way towards addressing recent plateauing in real funding, but, as the commitment is time-limited, newly-funded organisations may face uncertainty about their continuing operations. Moreover, depending on how it is implemented, this injection of funding will not necessarily address the shortcomings of existing IVAIS arrangements.

Promoting commercial viability

Many art centres in remote parts of Australia are still working to establish commercial viability. Despite experiencing sales growth from 2011-12, many art centres continue to rely on government grants.

The IVAIS program provides operational subsidies to Aboriginal and Torres Strait Islander art centres: in 2020-21, the median art centre funded by the IVAIS program received \$200 000 to cover part of their operational costs (such as wages and overheads). According to Desart, over a ten-year period to 2019-20, grants made up 44% of art centre income on average, although this proportion has decreased in the past three years (Desart 2021b, p. 4).

Over the same period, art centres have supported a growing number of artists.⁶⁸ In 2019-20, art centres represented over 19 000 active artists, compared with just over 5000 artists in 2004-05. However, only about 17% of artists per art centre produced more than 10 artworks a year (compared with a peak of about one-third of artists in 2012-13). This can affect art centres sales and commercial viability, if the costs of providing materials and other support to a larger number of artists are not recouped through higher sales or other income sources.

⁶⁸ Defined as any artist who produces, sells, is paid for or consigns an artwork during that year (Desart 2021b, p. 10).

A number of study participants commented on how government funding arrangements can help move art centres to a more commercially viable and sustainable footing. As noted in chapter 9, current IVAIS funding is narrowly focused on increasing the amount of art produced by funding recipients, which can come at the expense of other funding priorities that would support long-term commercial viability, such as strengthening capability within the art centre (discussed below).

Study participants have also highlighted infrastructure funding as a particular issue. For example, Desart has advocated for a dedicated infrastructure fund to address the sustained challenge of undertaking capital works for remote area social enterprises, noting that infrastructure investment ‘will multiply the operational investments already made’ (sub. 4, p. 6). Desart further noted that, under current arrangements, the funding available to acquire, maintain or replace art centre infrastructure is inadequate.

Each state/territory provides differing opportunities that support art centre acquisition and/or renewal of infrastructure. The funding amounts and administrative processes required vary depending on the jurisdiction (opportunity and process) and dependant on art centre management to secure funding: this situation has created an uneven landscape whereby acquiring essential infrastructure including buildings, vehicles, IT equipment, studio and office equipment is very much reliant on funding programs of each state /territory in which the art centre is located. (sub. 4, p. 19)

Study participants presented different perspectives on ways to improve the commercial success of arts organisations and reduce the focus of funding on art production alone.

One perspective is that art centres should operate on a more commercial footing — for example, by better understanding art buyers and thus improving sales. For example, the Aboriginal Art Association of Australia noted:

If those responsible for formulating and implementing policy are serious about [improved] economic outcomes, with the attendant improved non-economic benefits, a step change in approach must happen. Current funding policy is too, some would say overwhelmingly, focussed on art production. Ultimately what will change outcomes ... is a step change to better understand the art buyer. ... in the long term, the production of art for the sake of production will not change outcomes ... (sub. 26, p. 73)

Other participants argued that the objectives of the program should be refocused to prioritise a balance between commercial and cultural outcomes. These are not incompatible; Creative Economy observed that culture is the source of commercial value for Aboriginal and Torres Strait Islander arts and crafts:

... cultural and creative industries, including Aboriginal and Torres Strait Islander arts and crafts markets, [do] not operate in the vacuum of the market. Culture is central to a community’s way of life ... Culture then permeates into the outer layers and [is] subsequently manifested into goods and services that could generate economic value. (sub. 9, p. 5)

The CEO of Arnhem, Northern and Kimberley Artists also noted the difficulty in obtaining funding for cultural maintenance for art centres through existing cultural programs.

Culture is foundational to Indigenous success and to improved outcomes ... and why we want to advocate strongly that the amount of funding given for culture should be increased is that there is worry at the moment about there being a bit of a vacuum for how culture is going to be funded moving forward. (2016, p. 48)

Pursuing either of these approaches would, at a minimum, require a rethink of IVAIS objectives, and may necessitate a shift in how IVAIS funding is provided. The focus of current funding arrangements on art production does not necessarily secure the commercial viability of art centres (particularly with the range of

cultural and social roles they often fulfil), nor does it necessarily protect the cultural assets that underpin art production, or promote the broader social and cultural benefits associated with Aboriginal and Torres Strait Islander visual arts and crafts.

Capacity-strengthening initiatives

Government funding supports capacity-strengthening initiatives provided by art organisations, as well as the transfer of expertise from non-Indigenous partners to Aboriginal and Torres Strait Islander art workers.

However, despite decades of market operation, almost all non-art making roles (such as art centre staff and management, gallerists, dealers and collectors — but with the exception of curators) are held by non-Indigenous people. Almost without exception, art centre managers are employed from outside the community they operate in (Acker, Stefanoff and Woodhead 2013, p. 17). Arts Queensland also noted that:

Most art centre managers are non-Indigenous people and there is a need to develop more effective succession planning and training to ensure First Nations peoples from local communities are recruited into management and leadership of these enterprises. (sub. 33, p. 5)

Expertise from non-Indigenous people does play an important role in expanding market opportunities for many Aboriginal and Torres Strait Islander artists and organisations, particularly in remote areas where expertise may not be readily available within the local workforce. For example, galleries and dealers with networks in major cities have information about market demand that would otherwise be largely inaccessible, and can provide access to a larger range of art buyers.

Art centres struggle to recruit suitably qualified managers from their community. The role requires specialist experience, networks, skills and qualifications that are difficult to attain in remote areas, including:

- demonstrated experience managing an arts and/or cultural organisation, gallery or art centre
- formal qualifications in arts, event management or equivalent extensive relevant work experience
- highly developed skills in program and project management, office administration, and background in development and implementation of information systems
- a strong track record of marketing and delivering safe and well-managed arts and cultural projects and exhibitions regionally, nationally and internationally (Bawinanga Aboriginal Corporation 2021, pp. 2–3).

External art centre managers are also difficult to recruit and retain in art centres located in remote areas, and relying on external managers can create issues for art centres — particularly as the considerable pressures placed on managers can lead to staff burnout and result in high turnover. This impairs the effective operation of art centres, and can lead to a 'loss of trust and confidence in changing personnel, and loss of relationships from which the road to recovery is long' (SA Government, sub. 21, p. 16).

As noted in chapter 9, regional peak bodies provide a range of programs aiming to strengthen career pathways for Aboriginal and Torres Strait Islander artists and art workers. But it is not clear from existing evidence why these initiatives are not effectively meeting reported gaps in capacity: whether it is due to the lack of a strategic approach to the workforce; an issue of availability and accessibility; or whether existing opportunities are not fit-for-purpose. Information request 9.1 invites further information on this question.

However, art centre and arts organisation resourcing is likely to be a constraint. A lack of funding can mean:

- art centre managers cannot devote time to training or mentoring local art workers to pursue a management position within the sector
- art centres cannot employ more people within the local community to promote succession planning and long-term transfer of expertise both from art centre managers and Elders
- service organisations or art fairs are limited in the services they can offer independent artists.

Recognising the many roles of community-controlled organisations

Aboriginal and Torres Strait Islander community-controlled organisations (ACCOs), including art centres, have a presence within, and the trust of, the community (PC 2020b, p. 246). They are governed by members of the local community. This can place them in a strong position to understand the needs and values of the local community, as well as how best to deliver services that meet those needs and reflect those values. The merits of the ACCO model is well established in multiple sectors, such as health and children and family services. The success of ACCOs relates to a number of common elements (box 10.4).

Although Aboriginal and Torres Strait Islander community-controlled art centres, alongside regional peaks and other service organisations, are the backbone of IVAIS investment in the Aboriginal and Torres Strait Islander arts and crafts sector, funding arrangements do not generally recognise or fund the many roles that art centres fulfil in their communities (chapter 9). For example, the manager of Ikuntji Artists (as cited in NARI 2021a) noted that, in caring for Elders in the community:

There was an expectation that the art centre looks after old people, but in what way was never really made clear. That starts from the expectation to pick people up on a daily basis and drop them off back home, as well as if we go on bush trips, organising special carers and paying for them and having disabled portable toilets with us. And you know, there's all these kinds of things that are taken for granted that we should be doing.

Box 10.4 – Elements of successful ACCOs

- **The community has ownership of and control over decision-making**, including being able to first define its own needs, and then design and direct how those needs are met.

Community ownership is considered important because it ensures authority and autonomy over all aspects of the project; builds the commitment and enthusiasm of all people involved in the program, including collaborators; and contributes to building community capacity so that communities can address their own needs. (Morley 2015, p. 5)

- **Culture is central to service delivery.** ACCOs are rooted in their community, cultures and country and therefore understand local context, history and community leadership. They can provide positive reflections on culture and prioritise Aboriginal and Torres Strait Islander world views — that is, relationally and holistically based on community and family obligations rather than the individual. ACCOs enshrine and support culture and cultural safety.

In practice, this means the service is delivered by local people ... according to local kinship and cultural protocols (e.g., respecting specific kinship responsibilities and avoidance relationships). This model, which makes culture a central consideration, is considered to be the main factor for the very high community acceptance of the service. (Morley 2015, p. 6)

- **Local Aboriginal and Torres Strait Islander staff work on the program or in the organisation.** These staff are able to communicate in appropriate language and in a way that matches their local social and cultural values. They also play an important leadership role within the community.
- **Existing community capacity and leadership is harnessed.** Recognising existing strengths and capacity within community. Strong leadership facilitates trust and flexibility, and is associated with being outward looking and encouraging connections with partners and other influential stakeholders (including government and local mainstream organisations).

Box 10.4 – Elements of successful ACCOs

- **Good corporate governance is in place.** Good governance refers to the 'structures, processes and institutional capacity' to exercise 'sound decision-making, representation and accountability' (Morley 2015, p. 7). Ingredients underpinning good governance include:
 - stable organisational structure
 - capable and effective institutions
 - clear rules for roles, responsibilities and decision-making
 - separation of powers
 - dispute resolution processes
 - sound financial and administrative management systems
 - effective and realistic development strategies
 - a strong cultural fit with the local community (Morley 2015, p. 7).
- **Strong and trusting relationships with partners are established.** This could include shared governance and/or funding arrangements with government or another organisation to support effective delivery of certain programs in communities. There are many protocols that have been developed to guide effective engagement and partnerships with Aboriginal and Torres Strait Islander organisations, and that focus on appropriate levels of participation and decision-making.

Art centres also play an important role in cultural maintenance and transmission, providing a platform for Elders to transmit essential knowledges and cultural practices to younger generations. While this may occur organically, it is not always a recognised function of art centres, and this important practice may not be prioritised if only formal training opportunities, provided by mainstream institutions, are recognised.

The practices, skills and knowledges that underpin artmaking existed for tens of thousands of years before modern arts and crafts markets emerged. Recognising the expertise that Elders bring to the sector, and providing opportunities to maintain and transfer those knowledges, is critical to underpinning further art practices and wellbeing outcomes. These practices, however, are rarely supported by government funding in the same way as mainstream art education.

If these community roles are not formally supported, art centres and organisations may choose to either discontinue providing certain functions (with the community missing out) or continue providing services without funding, which can strain their workforce and affect the commercial viability of the art centre.

As the Arnhem, Northern and Kimberley Artists have noted, despite the extraordinary success of the art centre model in supporting the Aboriginal and Torres Strait Islander artistic movement as well as delivering a range of community benefits in challenging environments, a number of art centres are in danger of becoming commercially unviable under existing funding arrangements:

Dynamic community enterprises with huge workloads, Art Centres are typically chronically understaffed and under resourced and are therefore vulnerable to not being able to weather set backs. Art Centres continue to do the work they do through enormous ingenuity and dedication on the part of staff, members and boards. Increasing IVAIS funding (or other) to Art Centres is one of the best ways to promote production and marketing of authentic products and also to provide rich cultural experiences for consumers. (HoRSCIA 2018, sub. 132, p. 9)

Funding also needs to recognise the difference in cost drivers for ACCOs in their service delivery, relative to mainstream service organisations. While these costs will vary depending on the services ACCOs provide,

there are some common costs that government funding often overlooks, particularly for service providers working in remote areas, including:

- higher costs of delivering services in remote areas
- capital and infrastructure costs, such as vehicles and housing for program staff
- governance and capacity strengthening
- monitoring and evaluation (PC 2020b, p. 232).

Recognising the diverse and holistic service offerings of Aboriginal and Torres Strait Islander art centres requires more responsive and tailored funding arrangements. This could be resource-intensive, with agencies and grant recipients negotiating outcomes (and how to measure these) across a wide range of organisations. And while some organisations are solely focused on the arts and cultural industries, there are other funded arts organisations that have much broader remits, including health services, land councils, and local governments (chapter 9). Given such a broad remit of potential services delivered, it is likely that, alongside greater funding, more autonomy in how funding is spent may be required, to reflect the full range of roles these organisations fulfil (section 10.3).

Balancing the funding requirements of new and incumbent organisations

Existing funding arrangements appear less accessible to new entrants, smaller organisations and independent artists who are not serviced by an art centre or regional peak organisation. Recent IVAIS funding rounds, for example, have largely relied on closed non-competitive processes, with limited opportunities for new entrants to access operational funding (chapter 9).

Of the 106 medium and large art centres registered under ORIC,⁶⁹ just over half (61) receive funds under IVAIS, with organisations from New South Wales, Tasmania, Victoria and the ACT being underrepresented. None of the ten ORIC-registered medium or large art organisations in New South Wales received IVAIS funding. And of the 156 small ORIC-registered art centres across Australia, only one received IVAIS funding. According to Aboriginal Regional Arts Alliance, arts funding agencies:

... are not recognizing the diversity, needs and challenges of the Aboriginal arts and crafts sector across Australia. There needs to be an overhaul to make funding programs more equitable, fair and accessible for Aboriginal artists and communities. (sub. 8 p. 4)

The Aboriginal Regional Arts Alliance (sub. 8, p. 8) noted that for some areas (like regional New South Wales), the art centre model may not be the answer to meeting the unique needs of independent artists, and that there needs to be a focused effort to engage key participants in the sector to identify what would work best for them.

UMI Arts Ltd. argued that funding agencies have been too focused on resourcing larger organisations 'to flourish and prosper at the expense of the smaller organisations', and that small organisations required more support to give them an opportunity to develop and expand (UMI Arts Ltd., sub. 1, p. 15). FORM, a Western Australian arts organisation, has advocated for greater support from IVAIS to assist new Aboriginal and Torres Strait Islander-owned art groups to grow through a dedicated 'seed program' that 'could act both as a support mechanism and transition path for art groups to develop into successful enterprises'.

FORM has witnessed a need for greater encouragement of and assistance for new Indigenous-owned and operated art groups who have a desire to transition into strong, stable and successful enterprises. This has been evident through our work in Roebourne with three art groups

⁶⁹ Defined as ORIC-registered organisations that have reported to have an art centre function, as of 8 February 2022.

who are all at varying stages of development and who are not currently receiving IVAIS funding. Two of these art groups, Juluwarlu Art Group and Cheeditha Art Group, are in the first five years of operating. While these art centres have committed artists, they are currently limited by low levels of resourcing and would benefit greatly from the ability to employ dedicated art centre managers and receive IVAIS operational and artworkers employment support. (FORM. 2020, p. 5)

Existing art centres can also experience challenges in accessing recurring funding. For example, Agency Projects noted that:

... in order to access funding, remote art centres have to dedicate a consistent amount of time and resources, which they do not always have and/or which require the assistance of non-Indigenous arts workers to prepare and submit applications. (sub. 3, p. 3)

Favouring incumbent funding recipients does have the benefit of providing those organisations with greater certainty in funding. Opening up the sector to competition every four or five years to allow new participants to get funding may present undue pressures on already stretched resources of art centres and organisations. In particular, funded art organisations may be required to prove their effectiveness at achieving outcomes at unrealistic and unhelpful timeframes, such as career development outcomes, which may require more than a four-year funding window.

The current approach of limiting competition for funding has some merit under these circumstances where community-controlled organisations have unique advantages to provide services to communities; there is little to be gained by requiring them to frequently reapply for funding. In fact, longer-term funding arrangements could be considered for funded organisations, in line with similar recommendations the Commission has made with respect to children and family services and human services provided in remote Aboriginal and Torres Strait Islander communities, which recommended a minimum of seven year contract terms for funded organisations (PC 2017, 2020b).

However, the trade-off in limiting competition is that organisations in emerging art regions, or other innovative enterprises, may miss out on receiving adequate support. While predictable funding streams are important to support incumbents to sustain their operations and meet their outcomes, this should not unduly come at the expense of other market participants with comparable needs.

Increasing existing funding, particularly under IVAIS, that is available to support new (or unfunded) community-controlled art enterprises should be considered. In addition, support could be provided to artists and art organisations to apply for competitive grants from mainstream funding or through initiatives like the Indigenous Advancement Strategy.

Improving monitoring and evaluation of government funding

It is difficult to assess the value and effectiveness of existing levels of government supports to the sector, given the difficulty of developing a comprehensive picture of government spending (chapter 9), coupled with the lack of evaluation of those programs. Inadequate evaluation of Aboriginal and Torres Strait Islander policies and programs is common across many program areas and all tiers of government; as noted in the background paper to the Productivity Commission's *Indigenous Evaluation Strategy*:

... while governments have designed and modified hundreds of policies and programs for Aboriginal and Torres Strait Islander people, and there has been extensive reporting on outcomes for Aboriginal and Torres Strait Islander people against the Closing the Gap targets, the evidence about what works, and why, remains thin. (PC 2020a, p. 3)

Evaluation of key programs that fund Aboriginal and Torres Strait Islander visual arts and crafts is seldom undertaken or made public. For example, UMI Arts Ltd. noted:

Organisations who receive funding have to provide reports to the funding bodies on the progress of the outcomes for which they are funded for. Unfortunately funding bodies never provide feedback or share information on these reporting outcomes ... It would be of great value if some of the art funding bodies are also monitored ... to ensure that they are making a difference and where funding is being directed. What outcomes are being achieved? How do some funding bodies measure their success? (sub. 1, p. 14)

An independent evaluation of the IVAIS program is required to assess both its effectiveness in fulfilling its existing objectives, including whether existing levels of funding to the sector are adequate to maintain the important roles of art centres and service organisations, and whether the objectives of the program reflect the priorities of the sector. The evaluation should be holistic, incorporating other Australian Government funding for Aboriginal and Torres Strait Islander visual arts and crafts, including that provided by the Australia Council, as well as considering links to and overlaps with State and Territory government funding.

This evaluation should also consider the implementation of the NIVA Action Plan, including how those additional resources could be delivered more effectively and what aspects should be incorporated within ongoing support for the sector. As such, the evaluation should be completed prior to the conclusion of the NIVA Action Plan in 2025. This evaluation should incorporate, and not duplicate, the planned mid-term review of the NIVA Action Plan due December 2023.

Evaluation of the suite of Australian Government funding programs must centre Aboriginal and Torres Strait Islander people, perspectives, priorities and knowledges. This means partnering with Aboriginal and Torres Strait Islander people in the sector through all stages of planning, designing, implementing the evaluation and on reporting of findings (irrespective of whether more formal shared decision-making arrangements are adopted, as discussed below). It should go beyond the NIVA Action Plan's commitment that evaluation and implementation will be 'informed' by stakeholder advice.

As noted in the Commission's background paper to the *Indigenous Evaluation Strategy*, evaluation is an exercise in assessing the value or merit of a policy or program — the metrics used to measure 'value' in an evaluation should reflect the lived experiences of those directly affected by the policy or program (PC 2020a, pp. 184–185).

... evaluations which are attempting to assess the extent to which programs, policies and practices contribute to strengthening community (in both Indigenous and broader societal contexts) need to take into account the extent to which Indigenous goals, terms of reference, equitable processes and outcomes are achieved. An evaluation of such scope requires particular process oriented research approaches, including models based around participatory action research or community education. It also requires moving beyond purely efficiency and effectiveness measures. (Walker, Ballard and Taylor 2002, p. 23)

Indeed, the Commission's *Indigenous Evaluation Strategy* outlines four guiding principles for evaluation (that they are credible, useful, ethical and transparent) in support of the overarching principle to centre Aboriginal and Torres Strait Islander people, perspectives, priorities and knowledges (PC 2020c, p. 8). These broad principles, as well as the more specific advice contained within the strategy, should guide the independent evaluation of Australian Government expenditure on Aboriginal and Torres Strait Islander visual arts and crafts.



Draft Recommendation 10.3

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.

10.3 Funding arrangements should centre Aboriginal and Torres Strait Islander people

The emergence and strength of the Aboriginal and Torres Strait Islander arts and crafts sector reflects considerable efforts by artists and their communities to celebrate, preserve and share their cultures. Aboriginal and Torres Strait Islander artists and art organisations have successfully pursued commercial opportunities by producing, exhibiting and selling their works, as well as undertaking design work and negotiating licences for the use of their art and designs.

Governments have supported these developments, but artists and communities have had a limited role in influencing decisions around government funding arrangements. To date, there has been limited shared decision-making between governments and Aboriginal and Torres Strait Islander people in the context of visual arts and crafts.

Shared decision-making means that Aboriginal and Torres Strait Islander people are included in the processes that establish the fundings objectives for the Aboriginal and Torres Strait Islander visual arts and crafts sector, providing an opportunity to guide funding towards activities that, in their view, will have the greatest positive impact on the lives of Aboriginal and Torres Strait Islander people.

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' (JCOTG 2020, p. 5). As noted by a survey participant engaged during the development of the National Agreement:

In order to effect real change, governments must work collaboratively and in genuine, formal partnership with Aboriginal and Torres Strait Islander peoples because they are the essential agents of change. (JCOTG 2020)

Shared decision-making is a key element of building strong partnerships between governments and Aboriginal and Torres Strait Islander people (box 10.5). And although visual arts and crafts are not explicitly identified as a policy priority area under the National Agreement, the principles of the Agreement provide

guidance on how to best ensure government funding prioritises those things that matter the most to Aboriginal and Torres Strait Islander people.⁷⁰

Box 10.5 – Principles of shared decision-making under the National Agreement on Closing the Gap

Under the National Agreement on Closing the Gap, shared decision-making requires:

- decision by consensus, where the voices of Aboriginal and Torres Strait Islander parties hold as much weight as those of government
- transparency, where matters for decision are in terms that are easily understood by all parties and where there is enough information and time to understand the implications of the decision
- that Aboriginal and Torres Strait Islander representatives can speak without fear of reprisals or repercussions
- hearing the voices of a wide variety of groups of Aboriginal and Torres Strait Islander people
- supporting self-determination, and understanding and respecting Aboriginal and Torres Strait Islander lived experiences
- aligning relevant funding for programs and services with jointly agreed community priorities (noting governments retain responsibility for funding decisions)
- partnership parties having access to the same data and information, in an easily accessible format, on which any decisions are made.

Source: JCOCTG (2020, p. 6).

However, most funding arrangements for Aboriginal and Torres Strait Islander visual arts and crafts do not demonstrate shared decision-making, and are not well aligned with the approach under the National Agreement.

- Some art funding agencies rely on advice from Aboriginal and Torres Strait Islander peer panels to assess and recommend the merits of project applications received, but these panels (like most peer assessment panels) are not involved in defining funding objectives, or in determining the scope of activities that can be funded under any given program. These decisions are usually left to the relevant Minister.
- Other art funding agencies have advisory groups, made up of industry experts, to help inform strategic decision-making. While agencies do strive to make them representative, it is unclear how effectively these panels reflect the diverse needs across the Aboriginal and Torres Strait Islander visual arts and crafts sector. There is also limited transparency on how these advisory groups affect policy decisions, so it is difficult to assess their effectiveness at promoting self-determination.

The Australian Government IVAIS program does not have any formal arrangements for shared decision-making. Although the Office for the Arts does engage with the sector in the course of existing funding decisions (such as the consultation process prior to the release of the NIVA Action Plan), more formal and transparent arrangements, incorporating elements of shared decision-making, would ensure that:

- engagement is representative of the sector: that is, it does not unduly preference incumbent organisations, and includes independent artists and designers alongside representatives of remote and urban art centres

⁷⁰ Cultural outcomes for Aboriginal and Torres Strait Islander people are to be pursued under two socioeconomic outcomes of the agreement (15 and 16).

- decisions are made in partnership with Aboriginal and Torres Strait Islander people.

Establishing a formal decision-making partnership between the sector and the Office for the Arts could further support coordination with other agencies and levels of government that also impact on Aboriginal and Torres Strait Islander visual arts and crafts (particularly in the absence of a coordinating mechanism, such as that previously operating through the COAG Cultural Ministers forum).

In the longer-term, a formal arrangement could be pursued formally under the National Agreement on Closing the Gap, where representatives from the Aboriginal and Torres Strait Islander community-controlled art sector would be engaged to establish common reporting requirements across layers of government — a significant step towards joined-up action between governments.



Draft Recommendation 10.4

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.

How could the sector be represented in a shared decision-making partnership?

Developing a formal partnership of shared decision making would require that Aboriginal and Torres Strait Islander artists and arts organisations all across the sector are represented. Already, several strong and well-established peak organisations represent artists and art centres in particular regions, but there is no single national peak organisation to represent them in negotiations with governments. As noted by the Kimberley Aboriginal Law and Cultural Centre (KALACC) (2021, p. 2), '[g]overnments are at present engaging meaningfully with the Coalition of Peaks. Without a peak body for Indigenous Arts and Culture we are left out of these important national discussions'.

The National Agreement on Closing the Gap identifies that an important element of a strong community-controlled sector is one where:

Aboriginal and Torres Strait Islander community-controlled organisations which deliver common services are supported by a Peak Body, governed by a majority Aboriginal and Torres Strait Islander Board, which has strong governance and policy development and influencing capacity. (JCOTG 2020, sec. 45c)

A key question for the sector is the form that national representation takes — noting that the design and functions of such a body would need to be led by Aboriginal and Torres Strait Islander people, and its scope may be broader than visual arts and crafts alone.

A government-funded national peak for visual arts and crafts

One model is for governments to fund a national peak body consisting of established representative organisations, while extending representation to other groups — particularly artists in the south-east and south-west of Australia.

National peak organisations have been successful in other policy areas such as health and legal policy. A strong national peak organisation would be able to directly advocate for the interests of Aboriginal and Torres Strait Islander artists and arts organisations with all levels of government that are responsible for funding. It would also be a repository of information about the health of the sector, and be able to holistically identify needs and opportunities. It could also more equitably disseminate resources and information to all sector participants, or take on roles similar to that of a cultural authority (discussed in chapter 7).

A national peak would require adequate resourcing, and, while this should not come at the expense of existing peak organisations, a national peak will likely need to draw on the capacity of these organisations, and may duplicate some of their functions.

A National Indigenous Arts and Cultural Authority

Another approach to national representation is to include visual arts and crafts within a broader representative body. The Australia Council has been working with Aboriginal and Torres Strait Islander people to develop a National Indigenous Arts and Cultural Authority (NIACA). As part of the discussion paper released by the Australia Council, a key priority of a NIACA could be:

Policy development, advocacy and representation on First Nations arts and culture ... [undertaking] ... a range of policy development, advisory services and advocacy activities to provide national leadership and meaningful representation for Aboriginal and Torres Strait Islander peoples on arts and culture issues. It could complement the work of National Congress and the Indigenous Advisory Council by focusing on First Nations arts and cultures as a priority area of national significance. (Australia Council 2018, p. 6)

In late 2022, the Australia Council will convene a National Summit on First Nations Art and Culture, 'Purrumpu':

Purrumpu will support the First Nations arts and culture sector and enable a national collective voice across all areas of artistic and cultural practice, to promote social, cultural, and economic development. Including important leadership on matters such as health and social wellbeing, ICIP, arts policy, creative industries, youth, digital technologies, and reflecting on the changing landscape of the industry over the past 50 years whilst looking forward to the future needs of First Nation arts and culture. (Australia Council, pers. comm., 16 May 2022)

Regional approaches

As an alternative to a national representative body, the sector could maintain regional approaches to representation, which brings together existing regional peak bodies with governments at all levels. This could encourage formal place-based partnerships, and make use of existing and prospective representative structures, including:

- 'local and regional voices' recommended as part of the Australian Government's Indigenous Voice Co-design process (NIAA 2022b)
- local decision-making policies at the state and/or territory level, such as the New South Wales Government's OCHRE, and the Northern Territory Government's Local Decision Framework

- Empowered Communities, which in 2015 was established as a way for the Australian Government to work with Aboriginal and Torres Strait Islander communities (Empowered Communities 2018).

However, this model must ensure that coverage of the sector is comprehensive, with artists in all regions able to be represented.

The Commission is seeking views on the strengths and weaknesses of each of these broad approaches, and the way governments can support the sector to take a leading role in determining policy priorities.



Information request 10.1

- 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?

A. Public engagement

This appendix outlines the engagement process undertaken and lists the organisations and individuals that have participated in this study.

- Following the receipt of the terms of reference on 5 August 2021, an advertisement was placed in The Australian, and a circular was sent to identified interested parties.
- An issues paper was released on 21 September 2021, to assist those wishing to make a written submission to the study. The Commission received 34 submissions prior to the release of the draft report (table A.1). The Commission also received a total of 3 brief comments. The submissions and brief comments are available online at www.pc.gov.au/inquiries/current/indigenous-arts.
- Consultations were held with representatives in Australia and internationally, including from Australian, State and Territory Government agencies, manufacturers, suppliers and their peak bodies, industry groups, consumer and community groups, and academics and researchers (tables A.2 and A.3).

The Commission would like to thank everyone that has participated in this study.

Table A.1 – Submissions

Participants	Submission
A New Approach (ANA)	006
Aboriginal Art Association of Australia Ltd (AAAA)	026
Aboriginal Art Centre Hub of WA (AACHWA)	020
Aboriginal Regional Arts Alliance (ARAA)	008
Agency Projects	003
APY Art Centre Collective (APYACC)	017
Arts Law Centre of Australia, Copyright Agency and the Indigenous Art Code Limited (Arts Law, Copyright Agency, IartC)	031
Australia Council for the Arts (Australia Council)	024
Australian Competition and Consumer Commission (ACCC)	013
Australian Copyright Council	014
Bana Yirriji Art Centre	025
Blakeney, Professor Michael	032
Callanan, Melissa	005
Cheong, Dr May Fong	015
Copyright Agency	030
Creative Economy	009
Department of Communities, Housing and Digital Economy (Arts Queensland)	033
Desart	004
First Hand Solutions Aboriginal Corporation	016
Glenn Bird Balang Crafts*	029
IP Australia	027
King & Wood Mallesons (KWM)	034
Law Council of Australia (LCA)	019
Lye, J. N. and Hirschberg, J. G.	007
MinterEllison	018
National Ageing Research Institute (NARI)	010
National Association for the Visual Arts (NAVA)	023
Northern Territory Government	028
Queensland University of Technology (QUT)	012
South Australian Government	021
Tim Fairfax Family Foundation (TFFF)	002
UMI Arts Ltd.	001
Whinn, Amy	022
Woods, Dr Kaely	011

a. An asterisk (*) indicates that the submission contains confidential material not available to the public.

Table A.2 – Meetings and visits**Participants**

Aboriginal Art Association of Australia (AAAA)
Aboriginal Art Centre Hub Western Australia (AACHWA)
Aboriginal Artists Agency (AAA)
Acker, Tim
Agency projects
AIATSIS (Australian Institute of Aboriginal and Torres Strait Islander Studies)
Alperstein Designs
Altman, Jon
ANU College of Arts and Social Sciences
APY Art Centre Collective (APYACC)
Arnhem, Northern and Kimberly Artists Aboriginal Corporation (ANKA)
Art Gallery of South Australia (AGSA)
Art Mob
Arts Law Centre of Australia (Arts Law)
Arts Queensland
Arts South Australia
Australia Council
Australian Competition and Consumer Commission (ACCC)
Baluk Arts
Better World Arts
Blackwell, Boyd
Blakeney, Professor Michael
Bluethumb
Bridge Studio
Buzzacott, Kathleen
Cairns Indigenous Art Fair (CIAF)
Close, Elizabeth
Cohen, Apoline
Cooee Art
Copyright Agency
Country Arts SA
Create NSW - Dept of Premier and Cabinet
Creative Economy
Creative Victoria
Croft, Associate Professor Brenda

Participants

Darwin Aboriginal Art Fair (DAAF)

Deloitte

Department of Foreign Affairs and Trade (DFAT)

Department of Industry, Science, Energy and Resources (DISER)

Department of Infrastructure, Transport, Regional Development and Communications (DITRDC), Copyright Policy and Reform Section

Department of Infrastructure, Transport, Regional Development and Communications (DITRDC), Office for the Arts

Department of Local Government, Sport and Cultural Industries (WA)

Department of Social Services (DSS)

Department of Territory Families, Housing and Communities (NT)

Desart

Douglas, Blak

Dreamtime Kullilla Art

Empowered Communities

Evans, Penny

Everard Advisory

Everywhen Artspace

First Hand Solutions Aboriginal Corporation

Gab Titui Cultural Centre - TSRA

Goss, Ian

Indigenous Art Centre Alliance (IACA)

Indigenous Art Code Ltd

Indigenous Business Australia (IBA)

Indigenous Communications Group (Balang Crafts)

IP Australia

Jam Factory

Janke, Terri

Jones, Jonathan

Kaiela Arts

Kaiela Institute

Kaptify Art

Karungkarni Art and Culture Centre

King & Wood Mallesons

Ku. Arts (Ananguku Arts and Cultural Aboriginal Corporation)

Martumili Artists

Meredith, Maree

Participants

Mitchelton Gallery of Aboriginal Art

Murra Wolka

National Association for the Visual Arts

National Gallery of Australia

National Indigenous Australians Agency (NIAA)

Ochre Dawn

Office of the Registrar of Indigenous Corporations (ORIC)

O'Sullivan, Professor Sandy

Pallett, Sonia

Paul Johnstone Gallery

Saltwater People

Shepparton Art Museum

Smith, Bronwen

Stoianoff, Professor Natalie

Sunderland, Associate Professor Naomi

Tandanya National Indigenous Cultural Institute

Tangentyere Artists

Taylor, Lea

The Torch

Throsby, Professor David

Tim Fairfax Family Foundation

Tjanpi Desert Weavers, NPY Women's Council

Torres Strait Regional Authority

Tourism Research Australia

UMI Arts

Van Aanholt, Biddy

Vivien Anderson Gallery

Warlukurlangu Artists Aboriginal Corporation

We are 27 Creative

Woodland, Dr Sarah

Woods, Dr Kaely

World Intellectual Property Organisation (WIPO)

WW Souvenirs

Yadhaa Connect / New South Wales Aboriginal Land Council

Yarn

Table A.3 – Roundtable

Participants

26 August 2021

Aboriginal Art Centre Hub of WA (AACHWA)

ANKA (Arnhem, Northern and Kimberley Artists Aboriginal Corporation)

APY Art Centre Collective

Arts Law Centre of Australia (Arts Law)

Australia Council for the Arts

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

Baluk Arts

Boomalli Aboriginal Artists Co-operative

Desart

Gab Titui Cultural Centre

Indigenous Art Centre Alliance (IACA)

Indigenous Art Code Limited

National Association for the Visual Arts (NAVA)

National Indigenous Australians Agency (NIAA)

Supply Nation

Terri Janke and Company Pty Ltd

UMI Arts

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