



# Aboriginal and Torres Strait Islander Visual Arts and Crafts

## Issues paper



The Commission has released this issues paper to assist individuals and organisations to prepare submissions. It contains and outlines:

- the scope of the study
- the Commission's procedures
- matters about which the Commission is seeking comment and information
- how to make a submission.

**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.**

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## **The Productivity Commission**

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- how to make a submission (see attachment B).

Participants should not feel that they are restricted to comment only on matters raised in the issues paper. The Commission wishes to receive information and comment on issues which participants consider relevant to the study's terms of reference.

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## **Key study dates**

Receipt of terms of reference	5 August 2021
Due date for submissions	13 December 2021
Release of draft report	May 2022
Final report to Government	November 2022

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The artwork used in the cover is adapted from  
*River of Knowledge*  
by Luke Penrith





# 1. What is this study about?

Aboriginal and Torres Strait Islander visual arts and crafts are of global cultural significance and an important part of our shared identity. For Aboriginal and Torres Strait Islander people<sup>1</sup>, 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, art generates income for artists and creates 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 at attachment A). We will look at everything from original fine art to household items, clothing and tourist souvenirs that use Aboriginal and Torres Strait Islander images. However, performing and literary arts are outside the scope of the study.

We have also been asked to consider problems in visual arts and crafts markets — such as the proliferation of inauthentic arts and crafts and the unethical treatment of artists — and make recommendations for governments to address them.

Our study follows decades of inquiries into Aboriginal and Torres Strait Islander arts and crafts markets. These stretch from the late 1980s (the Altman (1989) review) to the recent 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 2018), which was the impetus of this study. We will draw on the findings and insights of relevant inquiries, research and submissions, noting that art sector participants have contributed much time and effort to improve policies and laws as part of previous processes.

This paper sets out our initial understanding of the Aboriginal and Torres Strait Islander visual arts and crafts markets and asks questions we would like participants' views on. Participants do not need to answer all our questions, and can focus on any relevant issues, regardless of whether a specific question has been asked. More information on how participants can engage with us during this study is in section 9.



## Questions on the contributions this study can make

What issues should this study focus on?

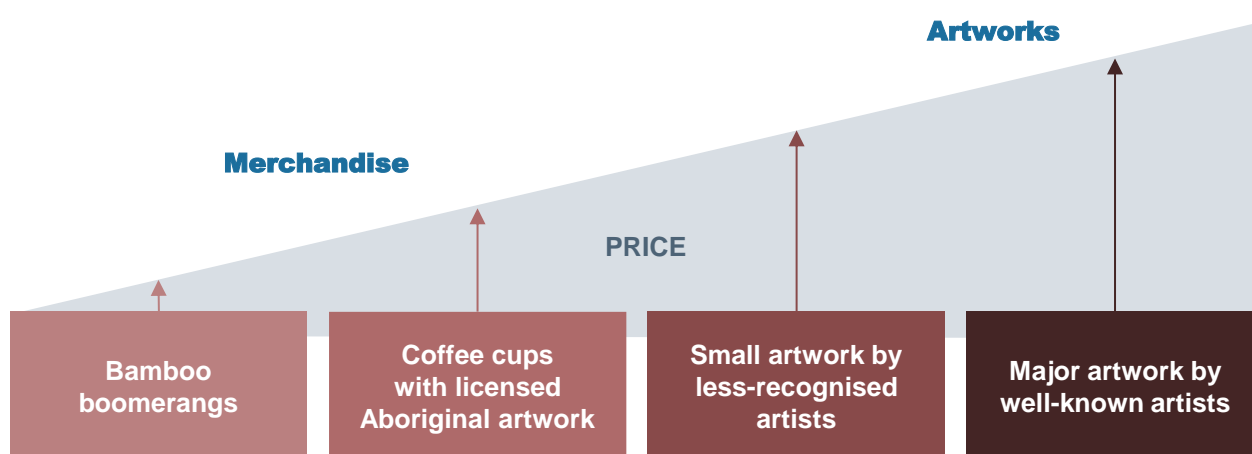
Given the number of previous inquiries into the Aboriginal and Torres Strait Islander visual arts and crafts markets, what are the main contributions this study can make?

<sup>1</sup> In this study, 'Aboriginal and Torres Strait Islander people' is used to refer to Aboriginal and/or Torres Strait Islander people.

## 2. The markets for Aboriginal and Torres Strait Islander visual arts and crafts

Markets for Aboriginal and Torres Strait Islander visual arts and crafts are diverse. They include original artworks that depict local or regional stories and styles, and use different media such as bark, wood, canvas and digital platforms to convey meaning. They also include souvenirs marketed to tourists and designs printed on household items and clothing (figure 1 is illustrative of the different products in these markets).

**Figure 1 – The Aboriginal and Torres Strait Islander arts and crafts spectrum**



Original arts and crafts often take the form of paintings, drawings, prints, sculptures, carvings, baskets and other artefacts that range in value from hundreds of dollars to hundreds of thousands (and sometimes millions) of dollars.

These artworks are produced by a diverse range of artists in various settings, for instance:

- in some remote and regional communities, artists work with the support of art centres. Art centres provide the infrastructure and connections that enable many artists to create and market their art at art fairs, galleries and online stores
- many artists work independently of art centres — either by choice or because they live and work in regions that are not serviced by art centres, including in regional towns and metropolitan centres. Independent artists may work by themselves or be part of art collectives. Artists may sell their artworks directly to consumers online or as part of fairs or local markets, sell to dealers or enter exclusive trading relationships with commercial galleries.

Some artists work with organisations that support their professional development and boost their market opportunities. These organisations work with artists to develop their negotiation, marketing and price-settings skills, while others create physical and online marketplaces for artists to display and sell their works. Some of these organisations connect artists with large corporate and government buyers. Unfortunately, there are also examples of artists being treated unethically by the intermediaries they work with.

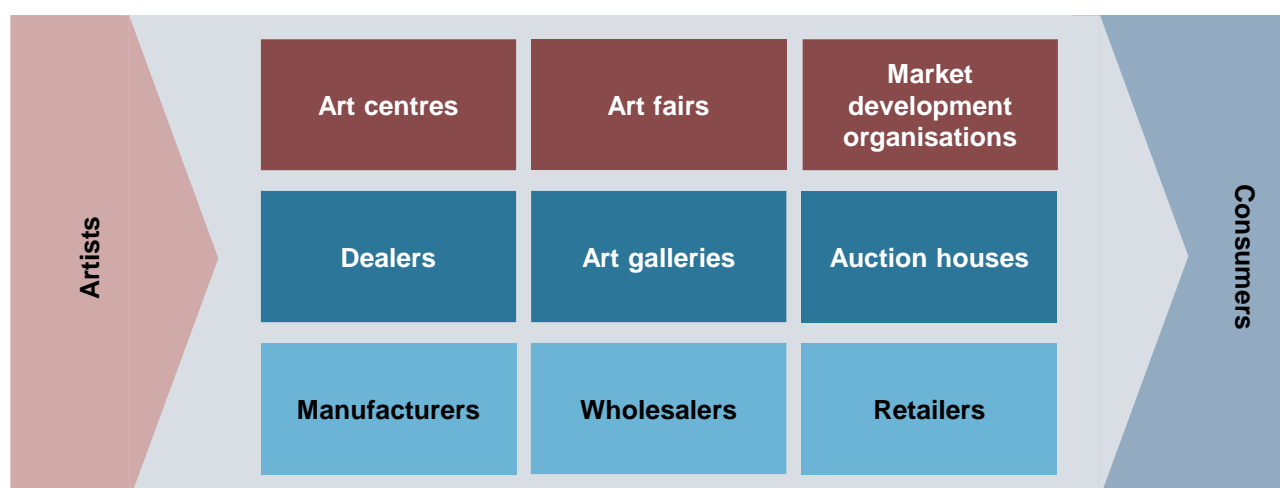
Artworks are traded in the thriving secondary market, which comprises private and auction house sales. Some of the proceeds of sales in the secondary market flow back to artists as part of the Resale Royalty Scheme (section 3).

In addition, the Aboriginal and Torres Strait Islander arts and crafts markets include merchandise and mass-produced products. Mass-produced arts and crafts include reproductions of artistic works, household items, souvenirs, fabrics and fashion. Some of this merchandise is made under licence from an Aboriginal or Torres Strait Islander person, art centre or community, whereas other products are manufactured without the approval of artists and communities — and considered to be fake or inauthentic (section 4). Inauthentic products typically retail at lower prices than authentic arts and crafts.

Mass-produced arts and crafts are sold to consumers in a variety of stores, from retailers at airports and other stores geared to tourists, to museum gift stores and department stores. In some cases, art centres supply these retailers, but many retailers also buy from wholesalers who sell a mix of locally produced and imported products.

A simplified depiction of the Aboriginal and Torres Strait Islander visual arts and crafts supply chain is presented in figure 2.

**Figure 2 – Simplified Aboriginal and Torres Strait Islander arts and crafts supply chain<sup>a</sup>**



a. Some artists sell directly to consumers.

The sale of arts and crafts is an important source of income for artists. For example, art sales are the main source of income for more than a third of artists in some remote communities and supplement the incomes of many more artists (Throsby and Petetskaya 2016, 2018, 2019a, 2019b) — although artists are not always fairly compensated for their works (section 7). Arts and crafts can also provide other opportunities to generate incomes for Aboriginal and Torres Strait Islander communities, support cultural tourism and broaden non-Indigenous people's understanding of Aboriginal and Torres Strait Islander cultures, traditions and history.

This description of the structure of the Aboriginal and Torres Strait Islander visual arts and crafts markets relies on previous research and initial discussions we have had with art sector participants. However, it is a partial understanding of the markets as there are significant information and data gaps, particularly in relation to the size of the markets. The next section outlines these gaps and the main information sources we have identified to date to address some of them.

## What is the size of the markets?

As part of this study, the Commission will seek to estimate the size of Aboriginal and Torres Strait Islander visual arts and crafts markets. We will also endeavour to analyse income flows to artists, and the share of

the proceeds they receive from the sale of their works in comparison to art centres, galleries, dealers, manufacturers and retailers.

We will need to piece together various sources of information in undertaking this task as there is no single, or complete, dataset. Indeed, HoRSCIA (2018) noted the lack of information on the size of the arts and crafts markets.

While there is no comprehensive information on the size of the arts and crafts markets, an in-depth study of available datasets estimated that the sector was worth \$100–\$120 million in 2002 (Hoegh-Guldberg 2002). This estimate includes art centre, commercial gallery and auction sales (but excludes sales from other retailers, for which there was no reliable data). More recent estimates suggest the markets could be as large as \$300–\$500 million<sup>2</sup>.

There is good information on artists' income and artistic practices in particular remote art regions such as Arnhem Land, the Kimberley, North West Northern Territory and Tiwi Islands, the Central Desert and Barkly (Bartleet et al. 2019; Throsby and Petetskaya 2016, 2018, 2019a, 2019b).

However, there are significant information gaps in some parts of the markets. There is little information on artists working in urban and inner-regional areas, and few studies of remote area artists who work independently of art centres, or on arts and crafts buyers.

Data on mass-produced and merchandise arts and crafts is also limited. While there is information on these types of products sold by some art centres (such as jewellery, clothing and stationery), there is little information on retail and wholesale sales (Woodhead 2014).

There is scant information on the volumes of arts and crafts that are produced or reproduced without the authority of Aboriginal and Torres Strait Islander artists and communities. Some sector participants have attempted to estimate the number of inauthentic products on sale. For example, the Indigenous Art Code, Arts Law and the Copyright Agency undertook a 'mystery shopping' exercise of souvenir shops and other retailers catering to tourists and estimated that 80% of 'Indigenous-style' goods sold were inauthentic. Estimates of this sort are only an indication of the extent of inauthentic products on the market because they sample a small number of businesses; and cannot identify all goods made overseas under licensing arrangements with artists and art centres, or goods with unclear or no labels (Indigenous Art Code, Arts Law, and Copyright Agency 2019).

The Commission welcomes views and information that might help us to fill these information gaps. We are particularly interested in engaging with artists, from those operating in urban settings to those working in remote parts of Australia, either through an art centre or independently.



#### Questions on the nature, size and scope of the markets

Have we characterised the markets accurately? Are there any aspects of the supply chains that we have missed?

In addition to the sources listed above, what other data sources are there on the size and value of the overall market or parts of the market? What shares of income flow to artists, art centres, galleries, dealers, manufacturers, wholesalers and retailers?

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<sup>2</sup> *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996.





### Questions on the nature, size and scope of the markets

What information sources can we draw on to examine how many independent Aboriginal and Torres Strait Islander artists operate in the markets, including those in urban and regional areas? What information is there on how independent artists make their works, bring them to market and make a living?

What data is available on production and sales of souvenirs and other merchandise (licensed or otherwise)?

We know that some Indigenous-style arts and crafts are produced and sold without the authority of Aboriginal and Torres Strait Islander artists and communities. How can we estimate the extent of this type of market activity?

## 3. The role of governments

Governments play a large role in the Aboriginal and Torres Strait Islander arts and crafts markets. The Australian Government designs strategies to develop and invest in market opportunities for Aboriginal and Torres Strait Islander artists, such as the forthcoming National Indigenous Visual Arts Action Plan. Governments also 'set the rules of the game', by regulating how artists' and consumers' rights are legally protected.

### **Governments provide financial support to artists and the sector ...**

The Australian Government provides most of the support to Aboriginal and Torres Strait Islander artists and the sector through financial grants and programs.

- Through the Australia Council for the Arts (Australia Council), the Australian Government invested almost \$17.4 million in 2019-20 to support Aboriginal and Torres Strait Islander artists — almost a quarter of total Australia Council grants (Australia Council 2020).
- The Office for the Arts in the Department of Infrastructure, Transport, Regional Development and Communications administers programs including the Indigenous Visual Arts Industry Support (IVAIS) program, which funds market development opportunities. IVAIS provides \$21 million in grant funding each year to about 80 art centres, art fairs and regional hubs. IVAIS also funds broader market development initiatives such as the Indigenous Art Code.<sup>3</sup> The IVAIS program supports 8000 artists and 500 arts workers (Office for the Arts 2020, p. 5).
- The Office for the Arts also administers the Indigenous Languages and Arts Program, which aims to support Aboriginal and Torres Strait Islander peoples to express, preserve and maintain their cultures through languages and arts activities. The Australian Government spends about \$20 million annually on this program (Office for the Arts 2021).
- The Australian Government also supports the arts industry more broadly through tax concessions for professional artists and investors.

State and Territory Governments also invest in artists and cultural sustainability. For example, the Northern Territory Government is investing \$100 million to expand the Arts Trail, which currently connects tourists to

<sup>3</sup> The Australian Government allocated an additional \$12 million in IVAIS funding in response to COVID-19.

cultural attractions and art centres and galleries. The expansion includes the development of the National Aboriginal Art Gallery, the National Indigenous Cultural Centre in Alice Springs and a 10-year museums master plan for Darwin and Palmerston (Northern Territory Government 2020).



### Questions on the effectiveness of government investments

How effective are government investments in independent artists and artists working with art centres, such as grant funding programs administered by the Australia Council and State Governments?

How effective are programs administered by the Office for the Arts and State Governments to support art centres?

How can government programs be improved?

## ... and set the rules for markets

Governments set two main types of laws that regulate the Aboriginal and Torres Strait Islander visual arts and crafts markets. First, intellectual property laws protect artists' rights over their works. Second, governments determine how arts and crafts can be marketed and sold to buyers.

The primary ways Aboriginal and Torres Strait Islander artists can protect their intellectual property rights is through the *Copyright Act 1968* (Cth).<sup>4</sup> Copyright enables artists to prevent others from copying and reproducing their works without their consent. The law also protects artists' moral rights, which require artists to be credited for their work and not have their works destroyed or treated in a way that negatively affects their reputation. These rights are time limited — lasting for the creator's life plus 70 years.

In addition, the intellectual property system enables artists to earn an income from the resale of their works in some circumstances. The Resale Royalty Scheme, administered by the Copyright Agency, gives artists a royalty of 5% of the sale price when their work is resold, if the sale is valued at \$1000 or more and was made by a gallery or dealer. About two-thirds of royalty recipients are Aboriginal or Torres Strait Islander artists (Copyright Agency 2020, p. 21).

Artists also have legal protections under Australian Consumer Law (ACL). They must not be subject to unconscionable conduct by art dealers — that is, conduct that is worse than unfair and 'against the norms of society' (ACCC 2010, p. 1).

The ACL protects art buyers by making it illegal for sellers to claim or imply that they are selling authentic Aboriginal or Torres Strait Islander visual arts and crafts when they are not. To the extent that it reduces misleading marketing of inauthentic products, the ACL aids Aboriginal and Torres Strait Islander artists and businesses.

In addition to these government regulations, there are voluntary codes of practice that support the ethical trade of Aboriginal and Torres Strait Islander visual arts and crafts. The most prominent of these is the Indigenous Art Code (Indigenous Art Code nd). Art dealers who sign up to the code pledge to maintain ethical standards in their dealings with artists. Other codes of conduct include those developed by the

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<sup>4</sup> In some cases, artists may also register their designs under the *Designs Act 2003* (Cth).

Aboriginal Art Association of Australia (AAAA 2016), the City of Melbourne's (2007) Code of Practice for Galleries and Retailers of Indigenous Art, and the National Association for the Visual Arts' code of practice, which is currently being revised (NAVA 2021).

While these government- and sector-led efforts support Aboriginal and Torres Strait Islander artists and communities, problems in arts and crafts markets remain, particularly the continued presence of inauthentic arts and crafts and the unethical treatment of artists, which are discussed in the next sections.

## 4. What is (in)authenticity and how is it determined?

Quantifying the volume of inauthentic arts and crafts is difficult because there is no universally-agreed definition of authenticity or inauthenticity. Indeed, some art sector participants question the usefulness of the term 'authenticity'. Many Aboriginal and Torres Strait Islander people do not use the term 'authenticity' to refer to artworks. The term can lead buyers to assume that only traditional-style arts and crafts are legitimate, which ignores that Aboriginal and Torres Strait Islander cultures are dynamic and constantly evolving.

The Indigenous Art Code uses a simple definition of authenticity — an artwork is authentic if it was handcrafted by an Aboriginal and/or Torres Strait Islander person, or is an ethically licensed reproduction (see below). This definition is supported by some in the sector (Parkin 2020, p. 79). However, there are some instances where a simple definition is inadequate. For example, sometimes Aboriginal and Torres Strait Islander artists depict stories or images in their work without the custodians' permission. Such work is considered inauthentic by some people, even though it was created by an Aboriginal and/or Torres Strait Islander artist.

Given the importance of obtaining custodians' permission to depict their stories and images, some art sector participants support the establishment of a dedicated permissions process. For instance, some submitters to HoRSCIA (2018) inquiry, including researchers and community arts and cultural development organisations, recommended that a National Indigenous Arts and Cultural Authority could support artists and licensees to contact Aboriginal and Torres Strait Islander groups and communities to consult with them on issues of authenticity, and could take on a regulatory role in policing inauthentic art.

There have been calls for a national cultural authority for decades (Australia Council 2018, p. 2). Since 2018, the Australia Council has been consulting with Aboriginal and Torres Strait Islander people, communities and organisations to establish such an entity. As part of its engagement process, the Australia Council is organising a summit to begin discussions on establishing a National Indigenous Arts and Cultural Authority (Australia Council nd).

These issues are complex and we are seeking views on how we should think about authenticity, inauthenticity and processes to determine authenticity.



### Questions on defining and determining authenticity

What constitutes authenticity? When does it matter?

What criteria should be used to determine authenticity?



### Questions on defining and determining authenticity

Who should have the authority to make judgments regarding the authenticity of Aboriginal and Torres Strait Islander arts and crafts?

What processes should there be for artists to obtain permission from the relevant cultural authorities when needed?

## 5. What are the effects of inauthentic arts and crafts?

Art sector participants and the broader community are concerned about the prevalence of inauthentic arts and crafts for several reasons. Inauthentic products can deny Aboriginal and Torres Strait Islander artists the chance to earn a living when they ‘crowd out’ authentically made arts and crafts (HoRSCIA 2018, p. 2).

In addition, art that uses an Aboriginal or Torres Strait Islander style without respect for its cultural significance and without permission from the relevant cultural authority could result in cultural harm. This could cause offence to some people. The nature of the offence will differ, and in some cases, people may feel that their core values or sense of self have been undermined. However, even in cases where inauthentic products cause profound offence, they are unlikely to be illegal unless they make false claims about the product’s nature (Young 2005, p. 135).

Inauthentic arts and crafts may mislead buyers who assume they are purchasing authentic products. If prospective buyers cannot readily identify which products are (or are not) authentic, they may choose to avoid making a purchase altogether; or, once buyers realise they have inadvertently purchased inauthentic goods, they may be reluctant to make additional purchases. This could affect confidence in the markets and reduce artists’ and communities’ economic opportunities.

In addition to misleading consumers, art sector participants have said that inauthentic products undermine art’s educative role by using images in inappropriate contexts that confuse viewers and misrepresent stories. Inauthentic arts and crafts diminish opportunities for artists to pass on knowledge to future generations and teach non-Aboriginal and Torres Strait Islander people about Aboriginal and Torres Strait Islander cultures and traditions.

As noted earlier, authenticity raises many complex questions. For example, a non-Indigenous artist could choose to adapt styles or techniques developed by Aboriginal and Torres Strait Islander people, and use these to produce a different type of artwork, without claiming it as ‘authentic’. Some people may view such artwork as causing offence; others may consider that it adds to collective cultural expression if it is innovative or has aesthetic merit (Young 2006, pp. 459–460). This is not to say the negative effects of these works should be discounted because they have artistic merit, but to explore the conditions in which cultures evolve through learning and sharing from other cultures.

Cultures are dynamic, and can evolve through collaboration. However, not all collaborations benefit all parties equally, while in some cases, concerns about creating inauthentic art and causing offence may discourage artists from collaborating with others. We are interested in hearing about what respectful, mutually beneficial and meaningful collaboration looks like.



### Questions on the effects of inauthentic art

What are the negative effects of inauthentic art? Do they vary between different types of misuse or inauthentic product?

What does respectful, meaningful and mutually beneficial collaboration across different cultures look like?

## 6. What policy options are there to address inauthentic arts and crafts?

Broadly, there are three types of initiatives to address concerns about inauthentic arts and crafts. Some are aimed at increasing buyers' awareness of inauthentic products, and the problems they cause, while others focus on increasing Aboriginal and Torres Strait Islander people's legal protections over their cultures and art styles. In addition, there have been attempts to prohibit the sale of inauthentic arts and crafts. These three broad approaches are not mutually exclusive.

### Raising consumer awareness

Education campaigns, including the 'Fake Art Harms Culture' campaign, are aimed at raising awareness of the existence of inauthentic products and their negative effects. They support other awareness-raising efforts by governments, artists, art centres and dealers to highlight authentic works to buyers. Initiatives that are underway or being considered include:

- the Indigenous Art Code's (nd, pp. 5–6) certificates for authentic artworks valued at more than \$250. These certificates include information on the artist, and how and when the artwork was made
- Desart's recent trial of digital labelling in three art centres. The labels are QR codes that buyers can scan to access information on the authenticity of the art work (Office for the Arts 2020, p. 6)
- IP Australia's examination of labelling and/or certification trade marks for authentic arts and crafts as part of its project to 'better support Aboriginal and Torres Strait Islander people to benefit from and protect their Indigenous Knowledge' (IP Australia 2021a). IP Australia will present options to the Australian Government by the end of the year.

Some art sector participants are calling for increased government investment in information campaigns and national labelling schemes to help buyers distinguish between businesses that sell authentic arts and crafts and those that do not. However, some art sector participants believe that consumers should not be relied upon for restricting the sale of inauthentic products. Further, a previous attempt at a national label — the National Indigenous Arts Advocacy Association label — did not succeed in part because administrative costs were considered too high. New technologies (such as QR codes or non-fungible tokens) might reduce administrative costs, but there were also other issues with the previous scheme. Critics argued the scheme disregarded art centres' processes, while some artists resented requirements to provide 'proof' of their Aboriginal and/or Torres Strait Islander identity (Altman et al. 2002, p. 15).

## Strengthening legal protections

Other efforts to deal with inauthentic arts and crafts seek to enhance Aboriginal and Torres Strait Islander people's legal rights to address misappropriation of knowledges and cultural expressions (that occurs via the production of inauthentic arts and crafts, and in other ways).

Many artists, art centres, legal experts and arts industry organisations consider that existing intellectual property laws are not a suitable mechanism for the legal protection of Aboriginal and Torres Strait Islander cultural expression. For example, the Chair of the Indigenous Art Code said:

Existing Australian intellectual property laws do not adequately recognise or protect Aboriginal and Torres Strait Islander culture and knowledge. Such laws do not sufficiently protect [Indigenous cultural and intellectual property] rights and have often had the negative impact of alienating Indigenous people from their cultural expression and knowledge. (Parkin 2020, p. 29)

IP Australia is considering standalone legislation to protect Indigenous Cultural and Intellectual Property (ICIP) and legally recognise custodianship of traditions, culture and art.

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 round, 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. This makes Indigenous Knowledge practices the world's oldest and most resilient systems of innovation. (Janke 2019, p. 2)

IP Australia has 'established a cross departmental Working Group to undertake a scoping study assessing if standalone legislation could assist Aboriginal and Torres Strait Islander people in protecting and commercialising their Indigenous Knowledge' (IP Australia 2021b). The working group is expected to report in mid-2022, after which consultations will commence.

## A prohibition on inauthentic products

Many artists and other sector participants support legislative changes to restrict the supply of inauthentic products. They contend that prohibitions would send a clear signal that there is no place for inauthentic products in Aboriginal and Torres Strait Islander arts and crafts markets.

Two private members' bills to amend the ACL were introduced to Parliament in 2017 and 2019 to prohibit the sale of inauthentic arts and crafts. Neither of these bills passed and a Senate Legislative Committee reviewing the 2019 bill noted some art sector participants thought that the retail-focus of ACL was not appropriate for protecting cultural and sacred objects, and did not allow for new interpretations of Indigenous Knowledge (and instead locked in traditional expressions). There were also administrative concerns about the bill — such as requiring artists to demonstrate their identity and the need for the Australian Competition and Consumer Commission (ACCC) to build administration and enforcement capacity. The Committee recommended further consultation to 'develop legislation to prohibit the sale of inauthentic Indigenous products sold as souvenirs, either through amendment of the *Competition and Consumer Act 2010* (Cth) or through another mechanism' (Senate Environment and Communications Legislation Committee 2020, p. vii).

We are interested in your views on the merits of these — and any other — initiatives to address inauthentic arts and crafts, including views on barriers to implementing reforms to date.



### Questions on what to do about inauthentic art

How effective have previous initiatives been at reducing the incidence and negative effects of inauthentic art? What gaps and problems have they encountered? When are approaches to verify or demonstrate authenticity inappropriate?

What else could be done to increase consumer awareness and demand for ethically produced art? Would further education campaigns be effective? What about labelling schemes or requirements?

What are the limits of the existing intellectual property protections? How can existing intellectual property laws be amended to improve protections for Indigenous Cultural and Intellectual Property or do we need standalone legislation?

What are the merits of, and concerns about, amending the Australian Consumer Law to prohibit the sale of inauthentic arts and crafts? Are there more effective ways to restrict the supply of inauthentic arts and crafts?

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

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

## 7. What issues arise in the interactions between artists and dealers?

Aboriginal and Torres Strait Islander artists have various ways to sell their art (figure 2). About 90% of artists in remote areas — for which there is data available — work with art centres that display and sell their art (Throsby and Petetskaya 2016, 2018, 2019a, 2019b; Woodhead and Acker 2014). Some artists sell directly to consumers, galleries, dealers or a mix of different types of buyer.

Regardless of how artists choose to sell their works, they should be treated ethically by dealers and other buyers. This means that artists are paid fairly and enter into fair and transparent licensing and contractual arrangements. But what constitutes a 'fair' deal is not clear cut, and indeed, unfair trades are not illegal so long as they do not pass the ACL's threshold for unconscionable conduct.

There is little information about the scale of unethical treatment of artists, but there is evidence that it is a material issue. Recent research into the visual arts and crafts sector in the Barkly region indicates that some artists experience 'carpetbagging' where artists are paid in-kind, receive unfair financial compensation or work under duress. And some artists are subject to 'fake sales' and have their works reproduced or licensed without their express consent or fair remuneration. The report also noted that artists working with art centres are more likely to be treated fairly than those working in communities without art centres (Bartleet et al. 2019).

Nevertheless, there are increasing opportunities for artists who are not affiliated with art centres to participate in ethical marketplaces and work with intermediaries that nurture their professional development. Aboriginal and Torres Strait Islander owned and operated businesses create opportunities for artists to sell directly to buyers at their markets and art fairs. Artists set their own prices and discuss their works with buyers, which can create future commercial opportunities for artists with corporate or government buyers. Artist



representatives, including peak bodies, also support artists to improve their negotiation skills, set price points, understand their legal rights and advocate for policy and legal change.

In addition, the Australian Government funds the Indigenous Art Code to promote ethical trade and support artists to enter into fair dealings with buyers. The code sets out ethical practices for dealers' interactions with artists. These include respecting artists' rights, adhering to cultural practices, and obtaining artists' informed consent before buying, reproducing or licensing their work. Dealers must demonstrate that they meet and maintain these standards to be members of the code. The Indigenous Art Code also advocates for artists subject to unremunerated or unfair licensing arrangements and connects them with legal support to enforce their rights (Indigenous Art Code nd).

Some participants in the arts sector are calling for the Indigenous Art Code to be mandatory and for the ACCC to increase enforcement activities to discourage unscrupulous dealers (HoRSCIA 2018, p. 60). Other participants believe the code should continue to be voluntary. The latter are concerned that a mandatory code could lower standards of ethical behaviour as a mandatory code would require businesses to meet minimum standards rather than best practice (Ayles 2018). There are also concerns that a mandatory code could be difficult to enforce and administratively burdensome for some businesses to meet. Aboriginal and Torres Strait Islander businesses may object to legal requirements to show that they comply with a mandatory code for sellers because working with the original creators of the authentic products is central to their operations.

Anecdotal evidence suggests that some Aboriginal and Torres Strait Islander owned and operated businesses are losing commercial opportunities because they do not participate in the Indigenous Art Code. Some of these businesses choose not to become members of the code because it is not an Aboriginal and Torres Strait Islander governed organisation and they do believe that they should not have to 'prove' that they operate ethically as defined by the code. Some buyers will not enter into commercial arrangements with businesses that are not code members even if they are Aboriginal and Torres Strait Islander owned and operated.

The Commission is interested in views on ways to promote and monitor the ethical trade of Aboriginal and Torres Strait Islander arts and crafts.



#### Questions on issues affecting dealings between artists and dealers

What do 'fair' and 'ethical' dealings between artists and dealers look like? How can best-practice ethical trade of Aboriginal and Torres Strait Islander arts and crafts be nurtured?

How prevalent are unfair and unethical dealings between artists and dealers? What information sources can we draw on to estimate the scale of harmful practices?

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

How well is the Indigenous Art Code working? How could it be improved? What are the pros and cons of moving to a mandatory code?

How well are other educative and advocacy initiatives working? What limitations do these face? What else should be done?



## 8. How can the contribution arts and crafts make to remote communities be sustained?

The production of visual arts and crafts is at the core of Aboriginal and Torres Strait Islander communities, enabling traditions and stories to be recorded and passed on to future generations, and promoting collaborations that enhance health, wellbeing and social cohesion (Bartleet et al. 2019). Visual arts and crafts production is also an economically viable enterprise, producing goods that are highly valued in domestic and international markets.

Some communities are expanding the range of products they offer and their marketing channels, as well as developing and hosting cultural festivals and other events. The majority of visual artists surveyed as part of research into remote communities strongly agreed that artistic activities bring in tourists, create jobs and training opportunities for young people, and create ways for communities to be economically sustainable (Throsby and Petetskaya 2016, 2018, 2019a, 2019b).

Government-funded art centres play a major role in supporting artists and communities, marketing art, promoting cultural tourism in remote areas and administering programs that promote art as a way to generate employment, help heal people and maintain connection to culture. Art centres and social enterprises work to enhance the contributions that arts and crafts make to communities in regional towns and metropolitan centres.

Some of these efforts may warrant additional investment to have a greater positive effect. For example, we heard that there is not enough investment in training opportunities for Aboriginal and Torres Strait Islander arts workers. Conversely, some government efforts may be counterproductive to the goals of sustaining vibrant communities. For example, the Community Development Program has been seen by some as 'busy work' and limits the number of hours that an artist can work on their art while maintaining access to program payments (Throsby and Petetskaya 2018, p. 5).

The Commission is interested in views on how to make the most of the economic opportunities that arts and crafts can make in Aboriginal and Torres Strait Islander communities.



### Questions about the role of art in communities

What government investments in the Aboriginal and Torres Strait Islander arts and crafts sector are working well to support communities? Are there better ways for governments to use these investments in arts and crafts to support Aboriginal and Torres Strait Islander communities?

How well is the art centre model working in supporting artists and communities? What could be done to improve the model? Where are the gaps? Is there insufficient focus on independent artists, or artists in particular regions?

Can you point us to any examples of art or art centres being used to facilitate broader social, health and community objectives?

How can the economic, social and cultural contributions that arts and crafts make to communities be maximised?

## 9. How you can contribute

In undertaking the study the Commission will engage widely, particularly with Aboriginal and Torres Strait Islander people, communities and organisations, academics and other experts, and all levels of government.

### Submissions and brief comments

We are seeking written, oral (by phone) and video submissions from stakeholders and interested parties. Submissions can include relevant data and evidence, as well as your views or ideas about any of the matters raised in the Terms of Reference or in this issues paper. You do not need to address every issue raised in this paper and you are free to raise any other issues or ideas that are relevant to the study.

If you do not wish to make a public submission, you can also provide us with a brief comment via our website. If you make a brief comment, you may choose to remain anonymous. Attachment B provides further details on how you can make a submission, or a brief comment.

**Submissions and brief comments in response to this issues paper are due by 13 December 2021.**

We plan to release a draft report in **May 2022**. There will be further opportunity to provide submissions and comments after the draft report is released.

### Meetings and discussions

Meetings and discussions are central to our engagement process. These may be in person or via telephone or video conference.

We welcome suggestions on who we should speak to (including individuals, groups and organisations) and the preferred means for engaging with those parties.



#### Question on engagement

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

## Attachment A: 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 research study

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. 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]

# Attachment B: How to make a submission

## How to prepare a submission

Written submissions may range from a short comment outlining your views on a particular topic to a much more substantial document covering a range of issues. Where possible, you should provide evidence, such as relevant data and documentation, to support your views. Stakeholders are also welcome to make an oral submission by calling the Commission (details below).

## Publishing submissions

- Each submission, except for any attachment supplied in confidence, will be published on the Commission's website shortly after receipt, and will remain there indefinitely as a public document.
- The Commission reserves the right to not publish material on its website that is offensive, potentially defamatory, or clearly out of scope for the inquiry or study in question.

## Copyright

- Copyright in submissions sent to the Commission resides with the author(s), not with the Commission.
- Do not send us material for which you are not the copyright owner - such as pictures, photos and newspaper articles - you should just reference or link to this material in your submission.

## In confidence material

- This is a public review and all submissions should be provided as public documents that can be placed on the Commission's website for others to read and comment on. However, information which is of a confidential nature or which is submitted in confidence can be treated as such by the Commission, provided the cause for such treatment is shown.
- The Commission may also request a non-confidential summary of the confidential material it is given, or the reasons why a summary cannot be provided.
- Material supplied in confidence should be clearly marked 'IN CONFIDENCE' and be in a separate attachment to non-confidential material.
- You are encouraged to contact the Commission for further information and advice before submitting such material.

## Privacy

- For privacy reasons, all personal details (e.g. home and email address, signatures and phone numbers) will be removed before they are published on the website.
- You may wish to remain anonymous or use a pseudonym. Please note that, if you choose to remain anonymous or use a pseudonym, the Commission may place less weight on your submission.

## Technical tips

- The Commission prefers to receive submissions as a Microsoft Word (.docx) files. PDF files are acceptable if produced from a Word document or similar text based software. You may wish to search the Internet on how to make your documents more accessible or for the more technical, follow advice from Web Content Accessibility Guidelines (WCAG) 2.0: <https://www.w3.org/TR/WCAG20/>

- Do not send password protected files.
- Track changes, editing marks, hidden text and internal links should be removed from submissions.
- To minimise linking problems, type the full web address (for example, <http://www.referred-website.com/folder/file-name.html>).

## Oral submissions

- The Commission accepts oral submissions if you are unable to make a written submission or brief comment.
- Oral submissions are taken through a phone or video call, where Commission staff will record and write down your submission. Staff will then provide you with a written submission for your approval. Once you have approved your submission, we will publish it on our website.
- Information on how to organise an oral submission is below.

## Video submissions

- The Commission accepts video submissions if you are unable to make a written submission.
- More information on how to upload your video submission is available on the Commission's website: [www.pc.gov.au/inquiries/current/indigenous-arts](http://www.pc.gov.au/inquiries/current/indigenous-arts).

## How to lodge a submission

Submissions should be lodged using the online form on the Commission's website or by organising an oral submission with the Administrative Officer. Submissions lodged by post should be accompanied by a submission cover sheet, available from the Commission's website.

Online*	<a href="http://www.pc.gov.au/inquiries/current/indigenous-arts">www.pc.gov.au/inquiries/current/indigenous-arts</a>
Post*	Aboriginal and Torres Strait Islander Visual Arts and Crafts Productivity Commission GPO Box 1428 Canberra City ACT 2601, Australia
Phone	Please contact the Administrative Officer on 02 6240 3261

\* If you do not receive notification of receipt of your submission to the Commission, please contact the Administrative Officer.

## Due date for submissions

Please send submissions to the Commission by **13 December 2021**.

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