



Aboriginal and Torres Strait Islander visual arts and crafts

Study report



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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Terms of reference

I, Josh Frydenberg, Treasurer, 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 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. 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 Gallery of Australia and was previously an employee of the National Art School, Sydney and the National Association for the Visual Arts.

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Commissioner

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Commissioner

The artwork used in this publication is adapted from

River of Knowledge
by Luke Penrith



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 arts 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 at least \$250 million in 2019-20 — this includes about \$35 million in artwork sales through art centres and at least \$80 million in sales of merchandise and consumer products (mostly souvenirs).**
 - The average income for the 7300 artists who sold art through an art centre in 2019-20 was just over \$3200. For artists not working through art centres, average income was about \$6000.
- * **Inauthentic Aboriginal and Torres Strait Islander arts and crafts — which include Indigenous-style products created by non-Indigenous people, products that use Indigenous Cultural and Intellectual Property (ICIP) without the authorisation of traditional custodians, and products that infringe copyright — are a pervasive and longstanding problem.**
 - Non-Indigenous authored products accounted for up to \$54 million of spending, representing well over half of total spending on Aboriginal and Torres Strait Islander souvenirs in 2019-20.
- * **Sellers, and some buyers, might benefit from trading in inauthentic products. However, these products can displace sales of authentic goods, depriving communities of income, and can mislead consumers as they are often marketed in ways that suggest they are authentic, undermining trust in the market. Inauthentic products also cause broader harms, as they misrepresent Aboriginal and Torres Strait Islander culture. Traditional owners are not able to control whether and how aspects of ICIP, such as sacred symbols, are used in visual arts and crafts.**
- * **Balancing these considerations, there is a strong case for targeted legislative and regulatory reforms to better deal with inauthentic visual arts and crafts.**

New legislation to provide Aboriginal and Torres Strait Islander traditional owners with legal remedies where their cultural assets — such as sacred symbols and motifs — are used in visual arts and crafts without authorisation would recognise longstanding cultural practice while encouraging artistic innovation and collaboration.
- * **A mandatory disclosure requirement for Indigenous-style products *not* created or licensed by an Aboriginal and Torres Strait Islander person offers a proportionate and cost effective way of helping consumers distinguish between products and reducing unfair competition in the market.**
- * **Strong art centres, peak arts organisations and support services for artists — working through art centres or independently — are critical for future growth, but are under pressure. Aboriginal and Torres Strait Islander people are under-represented in management and leadership roles in the sector. An independent evaluation of Australian Government funding — undertaken in partnership with Aboriginal and Torres Strait Islander people — is needed to inform future funding needs, objectives and priorities.**
 - As part of this evaluation, the Australian Government should clarify roles and responsibilities for the long-term development of the Aboriginal and Torres Strait Islander visual arts and crafts workforce.

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, particularly in remote parts of Australia. About 19 000 Aboriginal and Torres Strait Islander people receive income from the sale of visual arts, and many Aboriginal and Torres Strait Islander people are employed as arts workers or work in related industries such as tourism. Aboriginal and Torres Strait Islander artists work in diverse settings across Australia — from independent practices or art collectives and co-operatives to community-controlled art centres. Aboriginal and Torres Strait Islander arts and crafts markets have 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

The growth of this market has benefited artists, consumers and communities. However, as the demand for Aboriginal and Torres Strait Islander visual arts and crafts has grown, so have production and sales of Indigenous-style arts and crafts made by non-Indigenous people and not as part of a licensing agreement with an Aboriginal and Torres Strait Islander artist.

Aboriginal and Torres Strait Islander artists and communities have been raising concerns about inauthentic products for many years. There is concern that these products crowd out authentic Aboriginal and Torres Strait Islander goods, weaken consumer confidence, and misrepresent Aboriginal and Torres Strait Islander cultures. Such concerns raise the question whether transactions in these inauthentic products should be subject to greater regulation. The case for regulatory intervention rests on the benefits outweighing the costs. In this market, the issue is whether gaps in consumer information and the broader harms from the sale of inauthentic products (especially those experienced by Aboriginal and Torres Strait Islander people) warrant regulatory measures.

Similar questions have been 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 and commissioned this study into the Aboriginal and Torres Strait Islander visual arts and crafts market.

While inauthentic visual arts and crafts were the principal motivation for this study, the Commission has been asked to examine deficiencies and barriers in the market and how they affect artists and other stakeholders.

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

Longstanding issues include unethical treatment of artists by some market participants, pressures facing art centres and independent artists and under-representation of Aboriginal and Torres Strait Islander people in leadership roles within the sector.

In conducting this study, the Commission has considered a wide range of views, including the aspirations of Aboriginal and Torres Strait Islander people seeking to safeguard their culture as it is expressed in visual arts and crafts, and the interests of those who may wish to use aspects of culture to create new artistic expressions. Many of the issues examined in this study — including authenticity, cultural appropriation, cultural harm and offence — are complex and difficult to measure; the options to address them invariably pose trade-offs. For example — similarly to intellectual property protections more broadly — creating a legal framework for the use of some aspects of Indigenous Cultural and Intellectual Property will give Aboriginal and Torres Strait Islander people avenues to protect their culture, but may affect the range of products made by others.

The Commission has sought to identify a suite of policy measures that — if implemented — are expected to strengthen the Aboriginal and Torres Strait Islander visual arts and crafts market and deliver net benefits for Aboriginal and Torres Strait Islander people as well as the broader community.

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

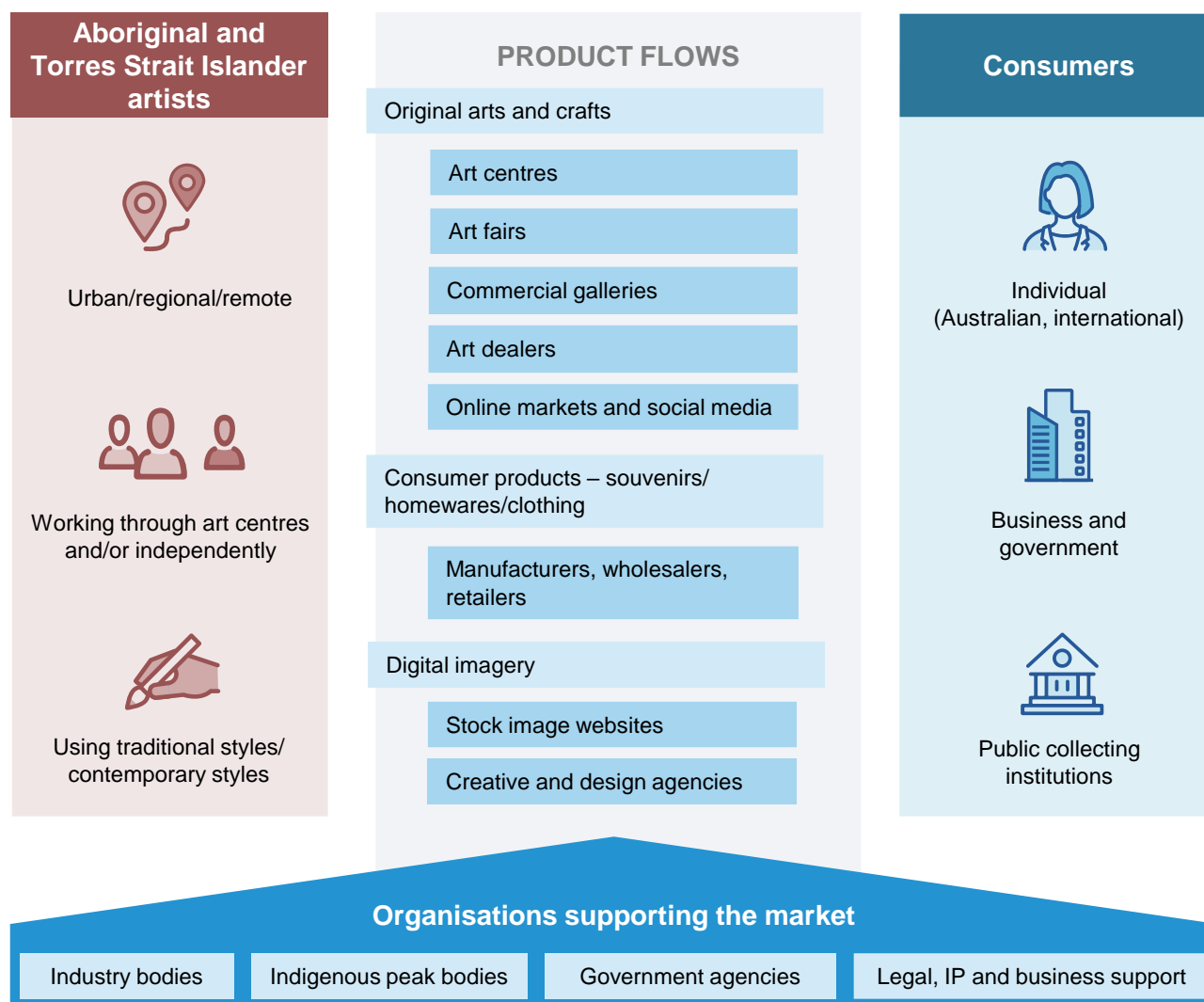
Aboriginal and Torres Strait Islander visual arts and crafts markets are strong, dynamic and growing

Since Yolŋu art was first sold from the town of Yirrkala in the Northern Territory nearly a century ago, commercialisation has transformed the way Aboriginal and Torres Strait Islander visual arts and crafts are consumed and has expanded the range of products and production methods. Aboriginal and Torres Strait Islander visual arts and crafts 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 other 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 (figure 1). The diversity of products — which range from artworks that sell for hundreds of thousands of dollars to low value souvenirs — coupled with numerous sales channels have created a complex marketplace.

Figure 1 – Aboriginal and Torres Strait Islander artists sell works through many channels

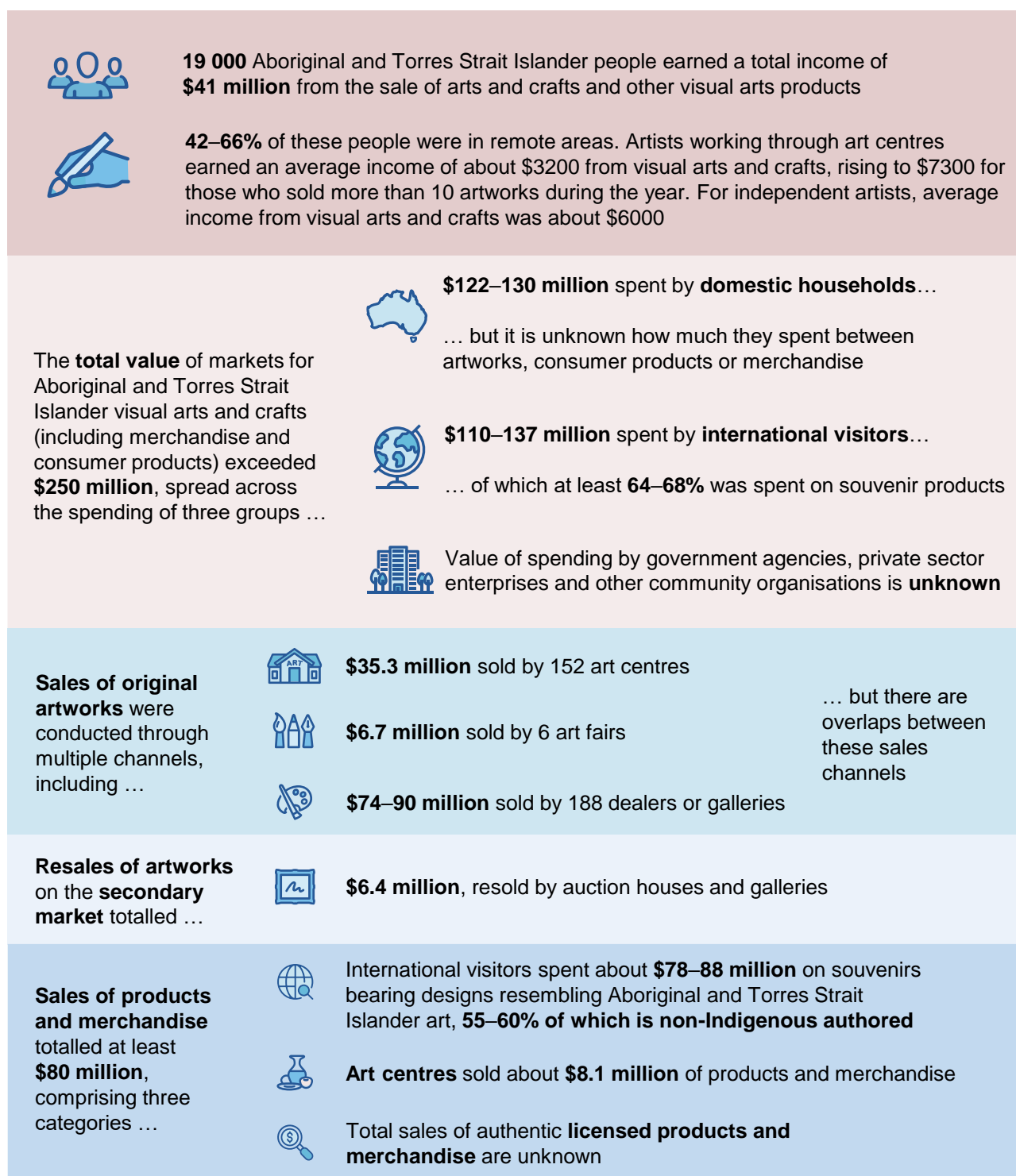


Visual arts and crafts make a substantial economic contribution to Aboriginal and Torres Strait Islander communities

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 at least \$250 million in 2019-20 (figure 2). This includes sales of authentic and inauthentic visual arts and crafts.

Aboriginal and Torres Strait Islander artists received about \$41 million from the sale of arts and crafts and other visual arts products. While some artists are well known and command high prices for their works, the income of most artists remains low — in 2019-20, the average income of artists who sold art through art centres was just over \$3200. The average income of independent artists (who do not work primarily through an art centre) was about \$6000. This reflects 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; the fact that many Aboriginal and Torres Strait Islander artists sell only a few artworks each year; and that a large part of the market comprises products such as souvenirs, many of which have no connection to Aboriginal and Torres Strait Islander artists.

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

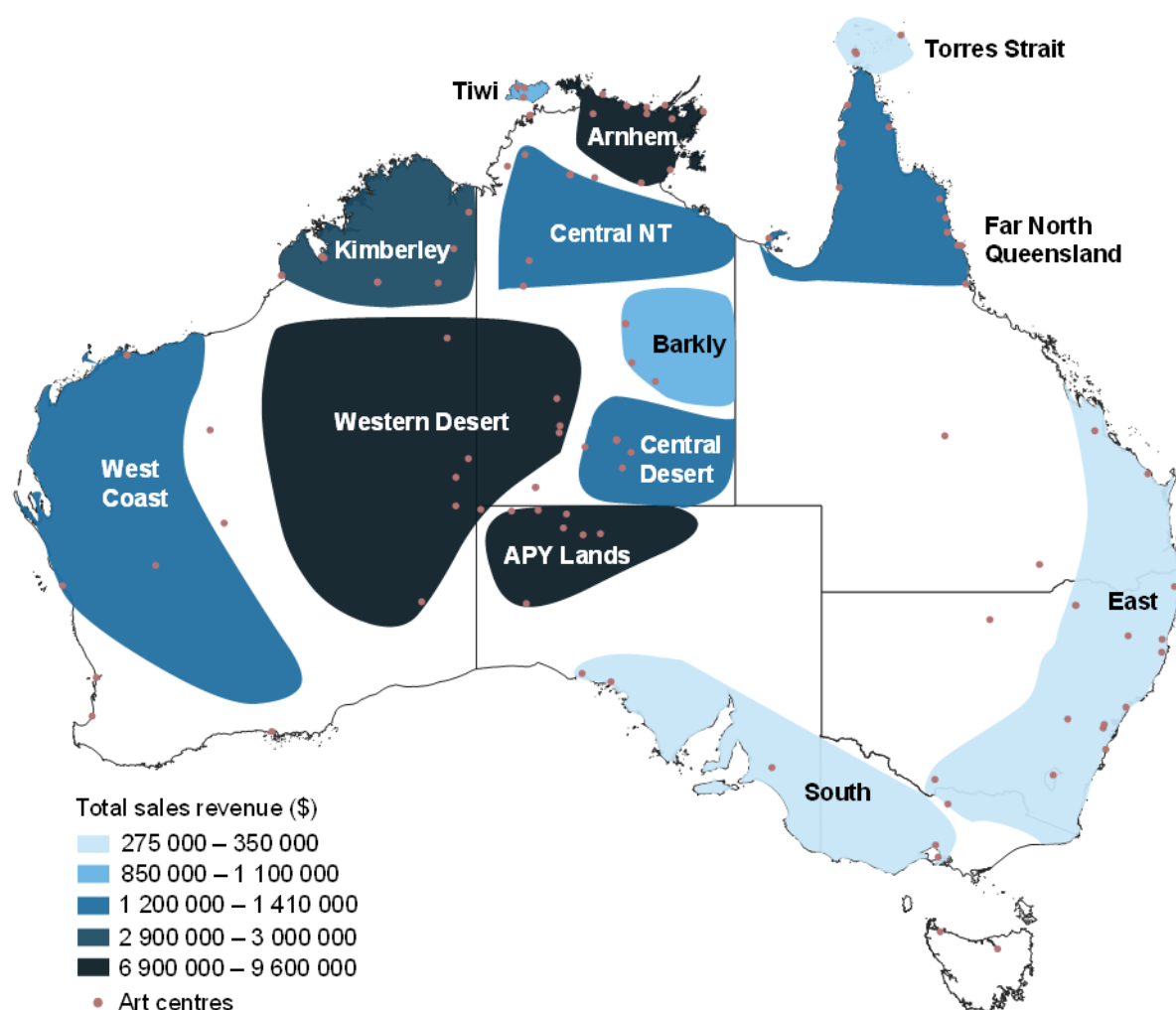


a. For most segments, such as income from arts and crafts, secondary market, spending by international visitors and domestic households, the estimates are for the 2019 calendar year, and have been adjusted for inflation to 2021 dollars. For art centres, art fairs and commercial galleries, the estimates 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 value of art sales across different regions (figure 3). A substantial share of artworks are produced by artists working at approximately 150 art centres. Most art centres are located in remote communities, where they are often one of the few (or sometimes, the only) organisations offering sustainable employment. 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 the value of art centre sales, although there has been a noticeable increase in the sales of cultural artefacts and sculptures.

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

Revenue from art centres



a. 'APY Lands' refers to Anangu Pitjantjatjara Yankunytjatjara lands. **b.** The geographic areas for the art regions are illustrative, not definitive boundaries. **c.** Data is for art centres, for the 2020-21 financial year (based on Desert SAM data), except 'East' which is for 2019-20 (based on unpublished Office for the Arts data, which covers art centres that receive funding under the Indigenous Visual Arts Industry Support (IVAIS) program). **d.** Dots represent the location of 113 out of an estimated 152 art centres. Art centres are not directly comparable in their service provision.

Sales of merchandise — including homewares, clothing and souvenirs sold by art centres and general retailers — have grown strongly, and account for about 30% 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 used by third parties. As a result of licensing, products bearing designs by Aboriginal and Torres Strait Islander artists are being mass-produced and sold by a wide range of

retailers. The average income from licensing agreements for Aboriginal and Torres Strait Islander artists increased by more than 50% between 2019 and 2021, but such agreements still account for a relatively small share of overall sales.

Although market growth has brought significant benefits, the prevalence of inauthentic art, limited legal protections, and shortcomings in government funding and workforce policy, prevent Aboriginal and Torres Strait Islander people from capturing the full economic benefits of their creative practices.

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

Inauthenticity is a multi-faceted concept, but the notion that some artwork is less authentic than other art is widely acknowledged. In the context of Aboriginal and Torres Strait Islander visual arts and crafts, assessments about authenticity typically depend on three factors:

- whether the product was created or licensed by an Aboriginal and Torres Strait Islander person
- where the product makes use of Indigenous Cultural and Intellectual Property (ICIP), whether the author has the relevant cultural authorisation to use that ICIP
- whether the product infringes the copyright of an Aboriginal and Torres Strait Islander artist's work.

In many cases, these attributes overlap — for example, mass-produced consumer goods that are made by non-Indigenous people may (and commonly do) use aspects of ICIP without authorisation or infringe copyright.

How big is the issue?

Non-Indigenous authored products are very common

The Commission estimates that up to 75% of Indigenous-style consumer products in the market are non-Indigenous authored.² In 2019-20, consumers spent up to \$54 million on non-Indigenous authored souvenirs, accounting for over half of total spending on Indigenous-style souvenirs.³ In this study, non-Indigenous authored products are artworks, crafts and consumer products that are Aboriginal and Torres Strait Islander in their design or style, but made by a non-Indigenous person, and not as part of a licensing or outsourcing agreement with an Aboriginal and Torres Strait Islander artist or designer.

Non-Indigenous authorship is less prevalent among original artworks than it is for souvenirs and merchandise. The House of Representatives concluded that: '[t]his is due in part to the buyers being more discerning and the need for galleries to protect their reputation by ensuring the provenance of more expensive artworks'.

Similarly, consumer products that are intrinsically Aboriginal and Torres Strait Islander (such as boomerangs or didgeridoos) are far more likely to be authored by an Aboriginal or Torres Strait Islander person, compared with other products such as general souvenirs, keyrings, magnets and coasters — between 80% to 90% of the latter are non-Indigenous authored (figure 4).

² Based on a random sample of over 850 online product listings from a selection of souvenir wholesalers and retailers.

³ This analysis draws on a large number of data sources, and uses both standard and less traditional quantitative techniques such as web scraping, whereby data is extracted from publicly available websites and placed into a format where it can be easily analysed.

Figure 4 – Some products are more likely to be authentic than others**Share of online Indigenous-style product listings, by authorship^a**

a. 'General souvenirs' is a combined category that includes bags, keyrings, magnets, stationery, coasters and other homewares and kitchenware. 'Other' includes products such as wooden crafts, clothing, bottle coolers and face masks.

Non-Indigenous authored artworks are particularly prevalent in stock image and online print-on-demand marketplaces.

- The Commission's analysis of a major stock image site indicated that over 80% of stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs were non-Indigenous authored, with the majority created by artists overseas. These images were used on book covers, websites and marketing materials of various organisations.
- Analysis of a random sample of listings⁴ from one of the largest online print-on-demand merchandise marketplaces found that about 60% of sampled listings were either non-Indigenous authored designs or potential copyright infringements of Aboriginal and Torres Strait Islander artists' works (discussed later).

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

ICIP is a term used to encompass all dimensions of Indigenous heritage and culture and is integral to the identities of Aboriginal and Torres Strait Islander people. By maintaining and sharing ICIP, Aboriginal and Torres Strait Islander communities transmit history, customs and cultures to future generations. Some aspects of ICIP are sacred to Aboriginal and Torres Strait Islander people and their use is governed by specific cultural protocols, including in visual arts and crafts

⁴ This included listings appearing under the search terms 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art'.

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

However, there are cases where elements of ICIP are used in the production of Indigenous-style visual arts and crafts without the authorisation of traditional custodians. Unauthorised use of ICIP may occur because artists are unaware of the traditional laws and customs that govern its use. In other 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.

Copyright infringements appear pervasive

Aboriginal and Torres Strait Islander artists' works, particularly designs and artworks, are often reproduced by others in breach of copyright law. The Aboriginal Art Centre Hub Western Australia, 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'.

One of the places where people may try to sell unauthorised reproductions is on print-on-demand marketplaces. Examining one of the largest online print-on-demand marketplaces, the Commission found that roughly 15% of listed Indigenous-style images are probable copyright infringements. Of these, almost 70% were readily identified as possible infringements of well-known Aboriginal and Torres Strait Islander artists' works.

While copyright infringement is a risk that all artists face, Commission analysis indicates that compared to listings for Australian art generally, listings of Aboriginal and Torres Strait Islander designs are twice as likely to be the result of a possible copyright infringement.

[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 *ACCC v*
Birubi Art (No 3) [2019]
FCA 996 at [53]

Why do inauthentic arts and crafts exist and persist?

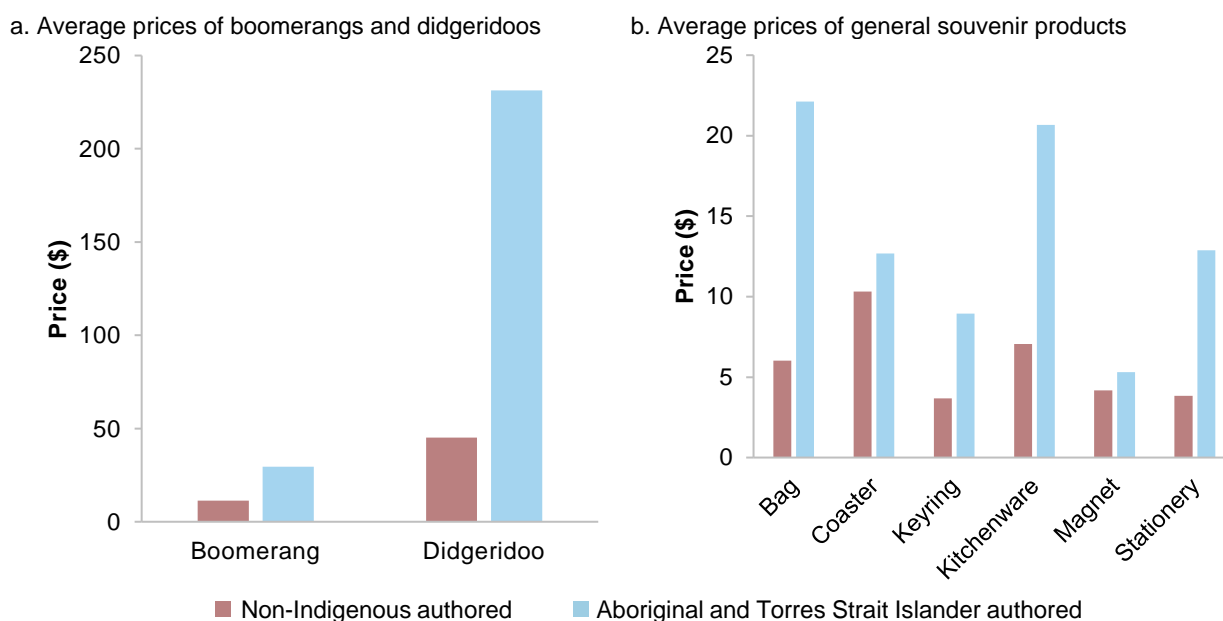
Non-Indigenous authored products are often indistinguishable from authentic products

Consumers of souvenirs and merchandise are not always aware of the concerns around the authenticity of Aboriginal and Torres Strait Islander visual arts and crafts, and the information available in the market can make it difficult for them to reach informed purchasing decisions. Although industry participants have put in place various measures, such as labelling, to provide better information to consumers, their reach has been limited.

Consumers cannot always rely on prices to distinguish between products, as inauthentic products are not always cheaper; Commission analysis shows that in some cases (coasters and magnets, for example) the prices of authentic and non-Indigenous authored products are very similar (figure 5). Nor is place of manufacture a reliable indicator of authorship, as most Indigenous-style consumer products — regardless of authorship — are manufactured overseas.

Marketing descriptions commonly displayed on inauthentic products, such as ‘Aboriginal designs’ or ‘handmade’, may not be illegal under consumer law, but they can create the impression that a product was made by an Aboriginal and Torres Strait Islander person when this is not the case. The fact that manufacturers use such branding points to the value that consumers place on authenticity. Survey data shows that when consumers (from domestic and international markets) were made aware of the distinction between authentic and inauthentic arts visual and crafts, many stated they would be willing to pay more for authentic products.

Figure 5 – Price is not always a good indicator of authorship



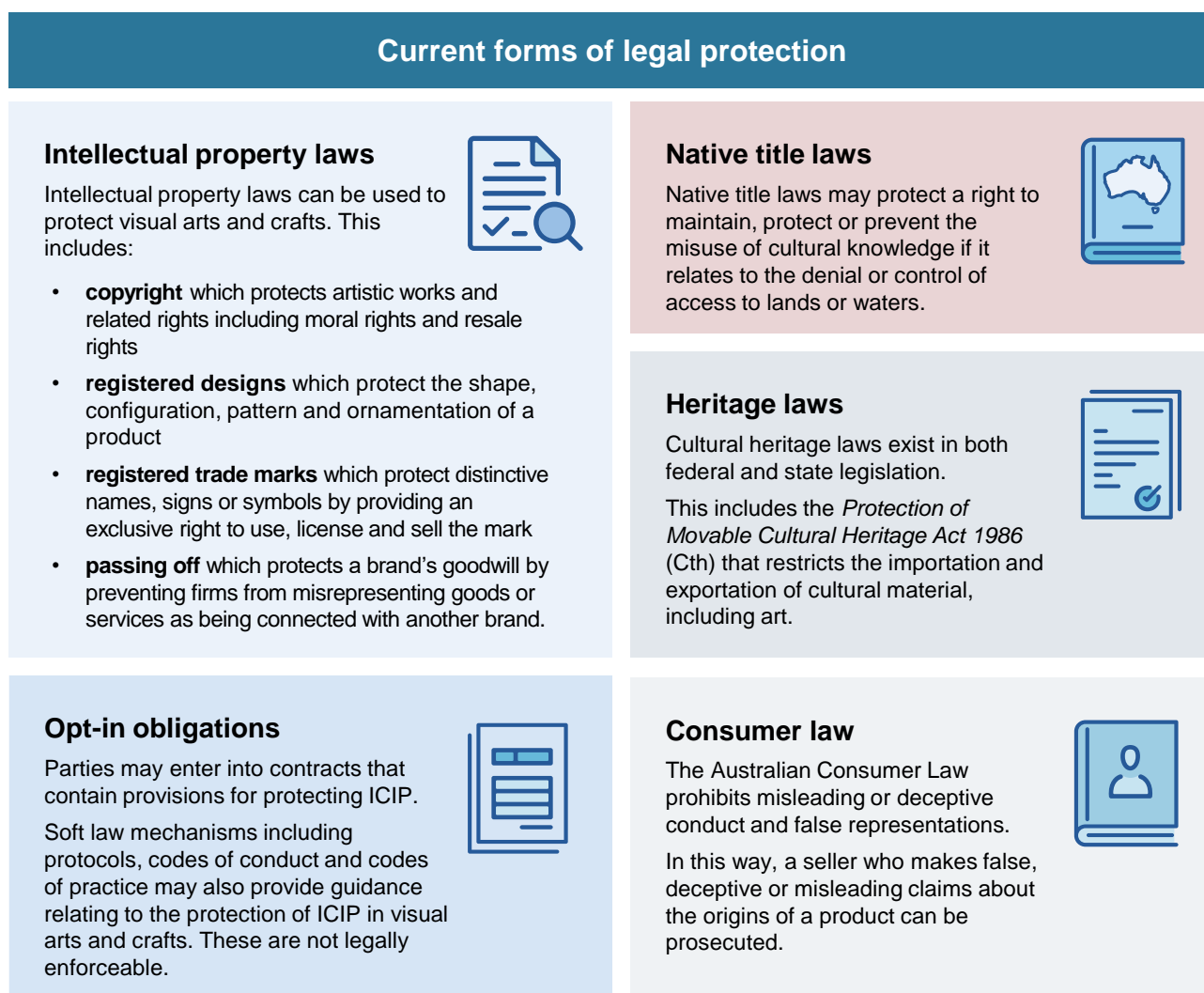
There are few legal limits on inauthentic visual arts and crafts ...

In most cases, the production and sale of inauthentic products is legal in Australia. 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 visual 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.

Moreover, there is no legal framework for the use of ICIP, which means that certain aspects of ICIP — including sacred symbols and motifs — can be used without the permission of traditional owners to create visual arts and crafts. Numerous examples of such conduct were raised with the Commission during the course of this study.

There are some laws and obligations that can help prevent the unauthorised use of ICIP in visual arts and crafts (figure 6) but no legal framework directly governs the circumstances under which ICIP can and cannot be used in their production. Existing laws only apply to the use of ICIP where it coincides with another action. For example, while copyright law prohibits the use of certain works without permission, it does not cover the underlying ICIP that is embedded in the work. The Australia Council and other organisations have developed protocols and guidelines to support better practices in the use of ICIP in visual arts and crafts, but these are not legally enforceable.

Figure 6 – Existing laws do not directly prevent the unauthorised use of ICIP in visual arts and crafts



... and accessing legal services to pursue remedies is difficult

Even where existing laws provide some protection against the production of inauthentic products, either artworks or merchandise, Aboriginal and Torres Strait Islander people can face significant barriers to

accessing the justice system to enforce their rights. The costs of legal action are often prohibitive, the processes are highly complex and, in some cases, artists and communities may be unaware of their legal rights. As Arts Law, Copyright Agency and Indigenous Art Code said:

[Funding] is insufficient to provide our core services to all potential artist clients and expand our capacity to provide access to justice to artists who need the advice and go without it. Each year, Justice Connect estimates that 8.5 million Australians — or roughly 1 in 3 people — have a legal problem; and that half of these people do not or cannot access legal assistance. Even assuming that a modest proportion of those people are artists, that leaves potentially tens of thousands of Australians with arts-related legal problems that go unsolved and unadvised every single year.

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. Such products can cause loss and misinterpretation of Aboriginal and Torres Strait Islander cultures as well as personal hurt and emotional distress for Aboriginal and Torres Strait Islander people and communities from seeing culture misrepresented and disrespected.

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, 2018,
sub. 102

Arts and crafts provide important economic opportunities for Aboriginal and Torres Strait Islander artists and communities. In remote areas, about 10% of working-age Aboriginal and Torres Strait Islander people earn income from visual arts and crafts sales. However, the presence of often cheaper non-Indigenous authored products affects the ability of Aboriginal and Torres Strait Islander artists to compete for market share. A survey conducted by Desart, 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 ... [o]ver 50% [are] finding it more difficult to get access to retail and wholesale outlets.

Further, while the presence of inauthentic products in the market expands consumer choice and some consumers may value lower-priced Indigenous-style products, regardless of authenticity, others purchase these products inadvertently, or are deterred from making purchases altogether due to concerns about inauthenticity.

Given the inherent challenges in quantifying intangible harms, we have not estimated the cultural impacts of 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 1).

Box 1 – Australian courts have recognised the significance of cultural harms

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

The ‘Carpets case’, as it became known, was the first time that the court considered and accepted cultural harm as a category of harm when assessing the amount of damages. 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 — that should be recognised and compensated for.

The court’s order for damages of \$188 640 was 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.

New legislation and policy changes could mitigate harms and help sustain sector growth

The substantial economic and cultural harms caused by the prevalence of inauthentic visual arts and crafts give justification for addressing information gaps and the patchy legal frameworks that enable this to occur.

The industry, with government support, has taken the initiative and developed protocols and codes. However, their effectiveness is limited by their voluntary nature.

Governments already play a significant role in this market, through existing (albeit limited) legal protections, and funding to art centres and initiatives to improve consumer information and awareness. In most cases, these policies have been operating for decades, but while they have supported the growth in the production of authentic Aboriginal and Torres Strait Islander visual arts and crafts — gaps in consumer information and legal protections remain.

The complexity of the issues means that a mix of responses is needed, including regulatory measures, dedicated legislation, education programs, voluntary measures and government strategies.

The Commission is recommending a suite of complementary legislative and policy changes that aim to sustain sector growth over time, while also helping Aboriginal and Torres Strait Islander cultures to continue thriving — to the benefit of all Australians:

- new cultural rights legislation to protect aspects of ICIP used in visual arts and crafts
- disclosure requirements for non-Indigenous authored products
- strengthening legal and other support services to Aboriginal and Torres Strait Islander artists
- evaluating — in partnership with Aboriginal and Torres Strait Islander representatives — all Australian Government funding directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector, to inform future funding needs and objectives
- clarifying objectives and responsibilities for workforce policy, to ensure Aboriginal and Torres Strait Islander people working (or aspiring to work) in the sector as artists, in support roles, or in leadership positions have access to the training they need and opportunities to develop sustainable careers.

Legislative change to strengthen protections for specific aspects of ICIP used in visual arts and crafts would reduce the scope for this ICIP to be misrepresented and misinterpreted, thereby safeguarding its integrity. It could also strengthen the economic opportunities available to Aboriginal and Torres Strait Islander artists and communities, including by enabling them to derive more benefits from the use of ICIP in visual arts and crafts. And depending on how they are implemented, stronger protections could also help Australia meet its international obligations in relation to First Nations peoples and their cultures.

There was a widespread view among participants in this study (and numerous past studies) that more should be done to shore up legal protections for aspects of 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.

Nonetheless, there is a balance to be struck between protecting aspects of ICIP and sharing it with others. Aboriginal and Torres Strait Islander artists have spoken about the importance they place on being able to share their cultures with the broader community, and it is through this process that new artistic expressions come about.

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

Amending existing laws would not be as effective as new dedicated legislation

Amending existing laws to strengthen protection for elements of ICIP used in visual arts and crafts is feasible (to some extent), but could lead to inherent tensions if amendments introduce conflicting policy objectives. For example, 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. Similarly, 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, stronger legal protections for ICIP in visual arts and crafts are intended to safeguard the integrity of ancient symbols and motifs.

Moreover, although amendments could fill specific gaps in existing laws, important gaps in protections would remain. For example, the Copyright Act could be expanded to recognise communal ownership (in line with the way Aboriginal and Torres Strait Islander people think about ICIP) or extend copyright protection in perpetuity. However, this would not address broader issues where important aspects of ICIP used in visual arts and crafts are not protected by copyright law — for example, where they do not satisfy originality requirements or do not fall within the scope of what is protected under the legislation.

Accordingly, in the Commission's view (and in line with the views of study participants, and the recommendations of a number of past reviews), the most effective option to improve recognition and protection of aspects of ICIP used in visual arts and crafts is via the development and introduction of dedicated, fit-for-purpose cultural rights legislation.

A model for legislating rights in cultural assets used in visual arts and crafts

The Commission recommends new legislation to formally recognise the interests of Aboriginal and Torres Strait Islander communities or groups (such as a mob or clan, language group, outstation or town) in their traditional cultural assets (such as traditional stories, sacred symbols and unique motifs) as they are expressed in visual arts and crafts ('cultural rights legislation').

In practical terms, the legislation would give traditional owners greater control over the use of 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. In particular, traditional owners could:

- control use of 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.

Our proposed model for cultural rights legislation would empower Aboriginal and Torres Strait Islander communities to take action against perceived cultural right infringements and to seek remedies most meaningful to them. It would also create a framework that supports collaboration and artistic innovation.

Cultural rights would accrue automatically without the need for registration. The rights would be inalienable, meaning that they could only belong to traditional owners and could not be transferred to another party.

The legislation would allow traditional owners to take legal action when their cultural rights are infringed — that is, where their cultural assets are used without authorisation (box 2), unless an exception applies. Although the legislation would not prohibit the use of cultural assets without authorisation per se, it would designate consequences for such behaviour, by enabling traditional owners to take legal action. This would create stronger disincentives against cultural misappropriation in visual arts and crafts, and hence lower its prevalence.

The legislative framework is intended to facilitate the use of cultural assets by others, including collaborations, consistent with the principles of free, prior and informed consent. This is because traditional owners could choose whether or not to authorise the use of their cultural assets and to define the terms under which their cultural assets can be used. The framework will provide greater clarity for artists about what is expected of them, by defining legal rights and obligations for users of cultural assets. In this way, the framework would facilitate artistic innovation and the continuous development of Aboriginal and Torres Strait Islander visual arts and crafts. While the legislation could constrain those wishing to directly imitate or copy certain aspects of ICIP for commercial use, such activities tend not to represent valuable artistic innovation.

Box 2 – How might cultural rights apply in practice?

Authorised use

Scenario: A person uses a traditional Indigenous motif in her artwork or product. The motif can be traced back to a traditional owner, who has granted the person permissions to use the motif.

Outcome: The person 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: A person uses a traditional Indigenous motif in her artwork or product. The motif can be traced back to a traditional owner, but the person does not have permissions to use the motif.

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

Multiple owners

Scenario: A person uses a traditional Indigenous motif in her artwork or product. The motif can be traced back to multiple Aboriginal or 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 person permission to use the motif in his artwork.

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

No identifiable traditional owner

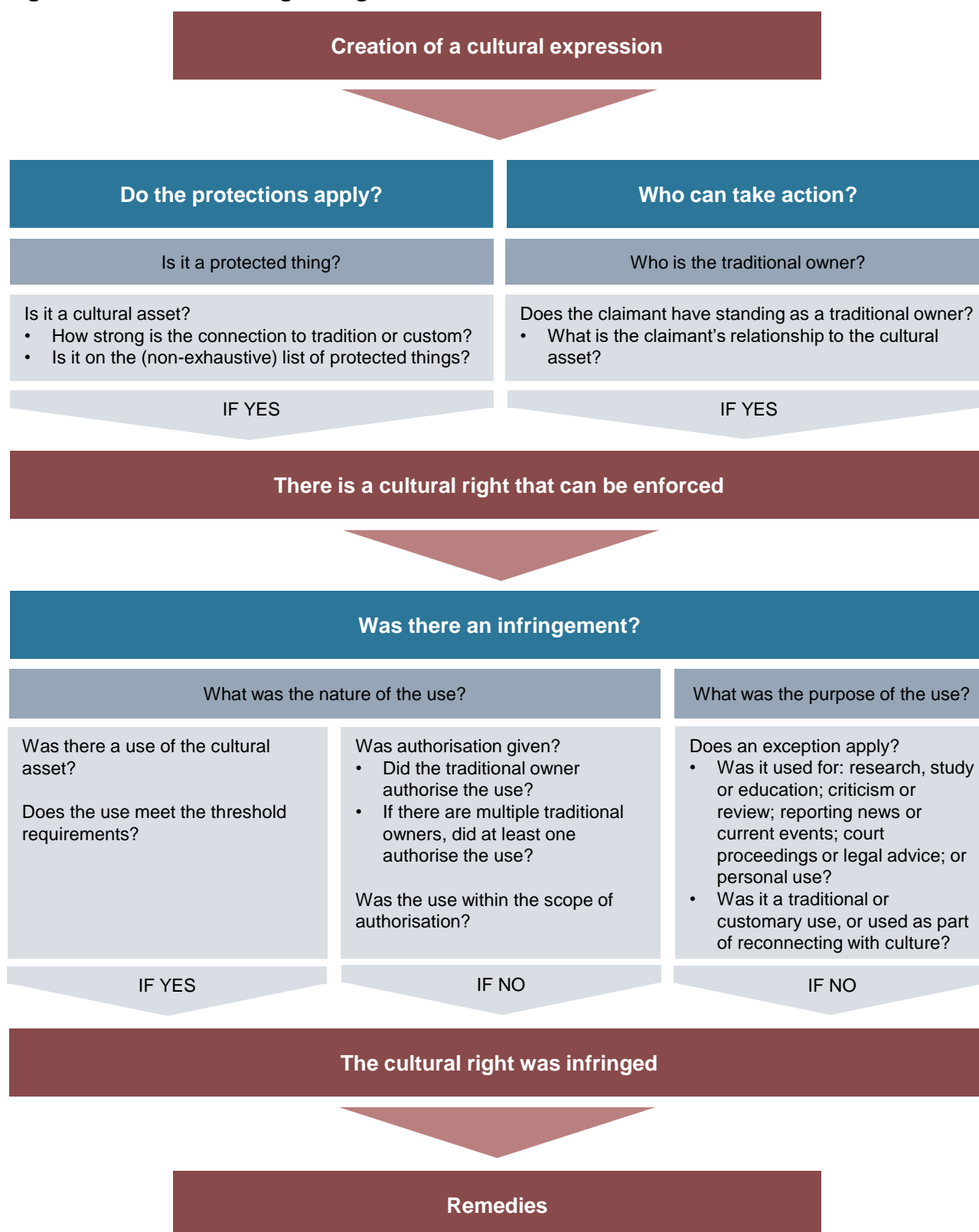
Scenario: A person uses an Indigenous-style motif in her artwork or product, but the motif is generic and cannot be traced back to any particular traditional owners. The artist has not sought any permissions to use the motif.

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

The new legislation would need to balance the interests of traditional owners and of others seeking to access and use cultural assets. To achieve this, checks and balances should be built into the legislative framework — 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 (figure 7). This includes an exceptions regime that would allow certain uses of cultural assets.

- The legislation should include exceptions for research, study or education; criticism or review; reporting news or current events; court proceedings or legal advice; and personal or private use.
- The legislation should not constrain customary and traditional uses, to ensure that the laws do not preclude Aboriginal and Torres Strait Islander people from practising their own culture.
- There should be an exception for Aboriginal and Torres Strait Islander people making 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.

Figure 7 – The cultural rights legislation framework



ICIP beyond visual arts and crafts

ICIP covers a wide range of traditional knowledges and cultural expressions beyond visual arts and crafts. In line with the terms of reference, this study has focused on the aspects of ICIP relating to visual arts and crafts. Nevertheless, many participants emphasised the need for any government response to recognise the interconnected nature of ICIP.

In the Commission's view, it would be very challenging to design a single, comprehensive set of laws that would effectively govern the different aspects of ICIP — and, to date, various attempts to do so have shown how difficult such a task is. This means that, similar to our approach to aspects of ICIP used in visual arts and crafts, a range of responses may be needed, which could include legislation (in addition to the new cultural rights legislation), declaratory measures, voluntary measures and government policies. To consider possible responses and coordinate the development of ICIP policy, the Australian Government should develop and publish a national ICIP strategy, which would provide an overarching framework in relation to ICIP. Such a strategy would 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. The strategy should be developed in partnership with Aboriginal and Torres Strait Islander people, with the input of State and Territory Governments.

Mandating the disclosure of non-Indigenous authorship will help consumers and Aboriginal and Torres Strait Islander artists

Non-Indigenous authored products often use aspects of ICIP and the introduction of cultural rights legislation is therefore expected to deter significantly the creation of non-Indigenous authored visual arts and crafts products. However, given the boundaries of the proposed cultural rights legislation (box 2), non-Indigenous authored visual arts and crafts products will continue to exist on some scale, especially among lower-priced products, where generic Indigenous designs are common.

Measures 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 non-Indigenous authored Indigenous-style products outright.

Many artists and producers provide consumers with information about authenticity, for example through Indigenous Art Code certificates. Industry-wide voluntary authenticity labelling — supported by government — 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 a label of authenticity for works created by an Aboriginal and Torres Strait Islander person, and a collaboration mark for products created with the input of a non-Indigenous person, or that were licensed for third-party use.

NIAAA Label of Authenticity mark



To be a Certified Indigenous Creator under the scheme, an applicant had to be 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. This was attributed 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 demonstrating authenticity. Broader criticisms 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 disclosure requirement is a pragmatic, proportionate and cost-effective policy response

A mandatory disclosure requirement for non-Indigenous authored products offers more promise. Such a scheme would apply to visual arts and crafts (and relevant consumer products) that are Aboriginal and Torres Strait Islander in their style or design but are *not* created or licensed by an Aboriginal and Torres Strait Islander person. Suppliers of these products would be required to disclose clearly and prominently, such as through a label, that their products are *not* the work of an Aboriginal and Torres Strait Islander person.

This approach would assist consumers to identify non-Indigenous authored products and reduce the unfair competition Aboriginal and Torres Strait Islander artists face from suppliers of these products. Consumers would benefit from having access to information to make purchases in accordance with their preferences about authenticity, without restricting their choices. This would improve trust in the market, and reduce consumer hesitancy when considering buying Aboriginal and Torres Strait Islander visual arts and crafts. Further, the amount of non-Indigenous authored products in the market would be expected to decline, reducing associated cultural harms.

A mandatory disclosure requirement for non-Indigenous authored products has substantial advantages over a voluntary authenticity labelling scheme.

- The mandatory nature of the requirement 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, though not expected to be large, would predominantly fall on those supplying non-Indigenous authored products. The compliance burden on Aboriginal and Torres Strait Islander artists — and on those producing goods under licence from an Aboriginal and Torres Strait Islander artist — would be very low as all of these products would be exempt from the disclosure requirement.
- Failure to disclose information about a product would enable regulators to take action under the ACL.
- Consumers and other industry participants would be able to report concerns about non-compliance to assist enforcement.

The effectiveness of a mandatory disclosure requirement will rely on enforcement; the Commission's analysis indicates that enforcement efforts focused on sales of mass-produced Indigenous-style souvenirs and other consumer products would be both efficient and cost effective. In these market segments, the prevalence of non-Indigenous authored products is highest and the direct involvement of Aboriginal and Torres Strait Islander artists is relatively low.

Disclosure requirements for non-Indigenous authored products 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 a potential future certification trade mark scheme.

How would a mandatory disclosure requirement for non-Indigenous authored products work?

The ACL appears to provide a good basis for implementing disclosure requirements that apply broadly to both imported and domestically made products. However, disclosure requirements could be implemented either through an information standard, a deeming provision, or a combination of both. What is important is that:

- the mandatory disclosure requirement results in useful information being provided to consumers in a clear and prominent way
- the obligations on suppliers are as clear as practicable and compliance burdens are minimised
- sufficient resources are available to ensure appropriate enforcement.

The implementation of a mandatory disclosure requirement raises some practical questions (table 1), including the scope of products covered by the scheme and the criteria that would determine whether authorship disclosure is necessary. Engagement with Aboriginal and Torres Strait Islander representatives of the sector should inform the design and development of the disclosure requirement.

Table 1 – Suggested approach for a mandatory disclosure requirement for non-Indigenous authored products

Product Coverage	Suggested approach
	<ul style="list-style-type: none"> The disclosure requirement should cover any product offered for sale in Australia that a reasonable person would consider includes an Aboriginal and Torres Strait Islander design or style (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product). It would potentially cover: arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise; and digital artworks and designs.
Authorship Criteria	Suggested approach
	<ul style="list-style-type: none"> Authorship in this context refers to creation by an Aboriginal and Torres Strait Islander person. It would also include products made 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.
Design and Implementation	Suggested approach
	<ul style="list-style-type: none"> Suppliers of designated products that do not meet the authorship criteria must disclose that those products have not been produced by or under licence from an Aboriginal and Torres Strait Islander person. Disclosure should be clear and obvious to consumers — such as a label attached to products where practicable or prominently included in product signage or descriptions. To facilitate compliance, a specified form of disclosure that would be deemed to comply with the disclosure requirement (such as a standardised label or set of words) should be developed. To facilitate implementation of the disclosure requirement the following will be required: <ul style="list-style-type: none"> awareness measures to inform suppliers a transition period for suppliers complementary awareness measures for consumers resourcing for monitoring and enforcing compliance.

A ban on non-Indigenous authored products?

Some sector participants (including participants in this study) strongly advocate for the introduction of a ban on the sale of non-Indigenous authored products. Bills to amend the Australian Consumer Law to include a ban on inauthentic products were introduced into Parliament in 2017 and 2019, but were not passed into law.

Proponents of a ban focus on how it could protect Aboriginal and Torres Strait Islander communities and culture. One participant said that a ban on non-Indigenous authored products would be a ‘clear statement of the law regarding the boundaries of acceptable and unacceptable conduct’ and, in doing so, ‘ensures that Aboriginal and Torres Strait Islander artists and communities can properly commercialise their artwork’. Similarly, the purpose of the 2017 bill was:

... to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations and thereby depriving Aboriginal and Torres Strait Islanders of the rightful benefits of their culture.

The proponents of a ban also highlight the benefits it could have for consumers: a ban, if effectively implemented, would mean that consumers could no longer be misled into purchasing non-Indigenous authored products.

Cultural rights legislation is a more suitable way to reduce cultural appropriation in visual arts and crafts and empower Aboriginal and Torres Strait Islander communities

In the Commission's assessment, the harms of cultural appropriation in visual arts and crafts, including in non-Indigenous authored products, are best addressed through dedicated legislation that would give traditional owners greater control over whether and how certain cultural assets are used in visual arts and crafts.

New cultural rights legislation as outlined above would enable a nuanced approach to protecting aspects of ICIP used in visual arts and crafts, compared to the 'one-size-fits-all' approach of a ban (which would necessarily involve firm rules that cannot easily account for the particular circumstances of cultural misuse and the extent of associated harms).

A product ban has costs and risks, including for Aboriginal and Torres Strait Islander artists

While new cultural rights legislation will not apply to *all* non-Indigenous authored arts and crafts that make use of Aboriginal and Torres Strait Islander styles and designs, it is expected to deter the more egregious and harmful misuses of cultural assets. What may remain in the marketplace is products using generic Indigenous styles (mostly used in non-Indigenous authored souvenirs). A ban on such products is not a proportionate policy response, given expected costs and risks.

A product ban restricts the agency of consumers to make decisions and risks unintended impacts on Aboriginal and Torres Strait Islander artists and communities.

- Products made by Aboriginal and Torres Strait Islander artists may be unintentionally restricted, particularly where overseas manufacturing is involved, or where artists are unable or unwilling to prove their Indigeneity to avoid the ban.
- A ban could create a perverse incentive for producers to engage in undesirable strategies to avoid having their products banned, such as engaging an Aboriginal and Torres Strait Islander person purely for the purposes of meeting eligibility criteria, with that person having no substantive or genuine creative input. While such incentives could also be created by other policy responses, they would likely be stronger given the possible losses for producers when products are excluded from the market.

Governments could do more to promote fair and ethical markets

Together with authenticity, ethical conduct of market participants is an important pillar supporting the integrity of Aboriginal and Torres Strait Islander visual arts and crafts markets. 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.

Such interactions are increasingly the norm; 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 4).

Box 4 – Artists’ experiences of unethical market interactions

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

The most serious experiences of unethical treatment shared with the Commission relate to what is sometimes referred to as ‘carpetbagging’: where some 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 motors 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 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)

[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

Others shared examples of artists being coerced into unfair contracts:

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)

In some cases, unethical 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 prices) may not be illegal, and there may be no remedy available.

Legal and other support services should be fit-for-purpose — and accessible to all artists

Governments fund support services, including those provided by Arts Law, the Copyright Agency and the Indigenous Art Code, to provide artists with information and advice, hear and respond to reports of unethical conduct, and empower artists to pursue their rights and maximise the economic benefits they derive from their artworks.

Alongside art centres and regional peak bodies, these services play an important role in helping artists when market transactions are unfair or unlawful. But their reach is limited and artists can find themselves unable to navigate the systems that are meant to assist them. In the most complex cases, legal assistance may be required and the costs are often prohibitive.

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.

Unethical conduct toward Aboriginal and Torres Strait Islander artists is a complex and often localised problem. A mandatory code would not address the systemic factors that give rise to unethical conduct, and would impose administrative burdens on artists and other industry participants. 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 Indigenous Art Code Limited — the corporation administering the Code — would enable it to influence conduct in the industry more effectively, including improving enforcement of code compliance, embedding better monitoring, evaluation and reporting processes, and collecting data on reported instances of unethical conduct.

Indigenous Art Code Limited 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 enforce the Code effectively. The corporation also provides important advice and support for artists, but does not receive funding for this role. The Australian Government could provide greater support to Indigenous Art Code Limited, alongside increased funding from dealer members through a modest increase in fees.

In 2021, the Australian Government announced plans to evaluate the Code. A modest increase to the Code's funding, amendments to some of its processes and the role it should play in artist outreach and referral, should be considered as part of the evaluation.

Beyond this review, the Office for the Arts (which administers the main funding program for the sector, discussed below) should consider ways to ensure that legal and other support services for Aboriginal and Torres Strait Islander artists have sufficient resources to cater for artists' diverse needs and locations. Improved access to legal support services will better enable Aboriginal and Torres Strait Islander artists to make use of legal mechanisms to enforce their rights — both existing (such as copyright law) and proposed

(under the cultural rights legislation). Without such services, the benefits of these laws will not be fully realised. Other measures related to training and skills (discussed below) would also help Aboriginal and Torres Strait Islander artists to understand and enforce their legal rights and negotiate fair agreements with other market participants.

A sustainable Aboriginal and Torres Strait Islander arts and crafts workforce should be a focus for governments

Aboriginal and Torres Strait Islander artists, designers and craftspeople have unique skill sets that enable the creation of valuable artworks and crafts. Alongside the core role of artists, other workers (including arts workers, gallerists, managers and curators) are vital to maintaining and expanding the industry.

To date, governments' efforts to strengthen the current and future Aboriginal and Torres Strait Islander visual arts and crafts workforce have been limited and fragmented. Many participants expressed frustration at the scant 'pipeline' of Aboriginal and Torres Strait Islander art centre managers and arts workers, and considered that this has been neglected by industry and governments over many years. As a result, Aboriginal and Torres Strait Islander people are under-represented in leadership, management and technical roles within the industry. Most art centres struggle to recruit suitably qualified Aboriginal and Torres Strait Islander art centre managers and other arts workers from their local community, and training that is suitable to artists' needs can be difficult to access.

Resource constraints facing art centres and other industry organisations are partly responsible — for example, art centre managers are often left with little time to devote to training, or to support and mentor local arts workers to pursue a management position.

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

Some industry participants have developed training courses, but funding constraints mean that only a small number of places are available. Professional development and training delivered through the Vocational Education and Training (VET) system are often not aligned with what the industry requires. For example, visual arts VET courses are predominantly focused on art production, with limited time spent on the business and technology skills required for arts workers and artists operating their own businesses. Moreover, many artists and arts workers learn valuable skills and practices from Elders, but this learning is often not formally recognised, limiting access to positions that may lead to senior management and leadership roles.

Governments are planning major investments in new galleries and cultural institutions dedicated to Aboriginal and Torres Strait Islander cultures. This is a prime opportunity to demonstrate leadership in

workforce development by providing a broader (and in some cases more targeted) range of opportunities for formal skills and professional development, as well as committing to inclusive and culturally safe recruitment and retention practices. As part of the evaluation of funding mechanisms (discussed below), the Australian Government should clarify roles and responsibilities for workforce development within the Aboriginal and Torres Strait Islander visual arts and crafts industry. Any workforce policy objectives should be determined through a co-design process with representatives from the industry.

Funding arrangements should enable a strong and sustainable sector

Governments play an important role in the Aboriginal and Torres Strait Islander visual arts and crafts market by providing financial assistance directly to artists, art centres and arts organisations. The bulk of targeted funding to the sector is delivered through the Indigenous Visual Arts Industry Support (IVAIS) program (primarily supporting art centres) and the Aboriginal and Torres Strait Islander Arts programs (which is open to independent artists). Approximately \$30 million was distributed via these programs in 2021-22.

Sector participants raised concerns about the suitability of funding programs to the needs of artists and arts organisations. For example, the social and community roles performed by art organisations often go unfunded while others in the sector — including some independent artists — miss out.

Many art centres are under financial pressure

While the Aboriginal and Torres Strait Islander visual arts and crafts sector is much broader than government-funded art centres, these community-controlled organisations are central to cultural and community life. Beyond their economic contribution, art centres fulfil many roles, including supporting families and culture (via the 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. However, 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.

The Australian Government has responded to some of the challenges facing the sector through the National Indigenous Visual Arts (NIVA) Action Plan 2021–25, which includes an additional \$25 million in funding (and a commitment to increase funding by \$5 million each year beyond 2025). 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 work with or 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.

An independent evaluation and shared decision-making should guide funding priorities

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 both art centre artists and independent artists, as well as the pipeline of new and emerging artists and art organisations.

To complement this evaluation, the Australian Government (led by the 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 would be in line with government commitments under the National Agreement on Closing the Gap and will help ensure funding is directed towards the outcomes and objectives that matter most to communities.

Summary of the Commission's recommendations

Current problem	Proposed response	Expected benefits
Aspects of Indigenous Cultural and Intellectual Property (ICIP) are 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 aspects of ICIP in visual arts and crafts, enabling further collaboration and artistic innovation. The legislation is expected to deter some of the more egregious and harmful misuses of cultural assets.
Visual arts and crafts that are Aboriginal and Torres Strait Islander in their style but made by non-Indigenous people are pervasive; they mislead consumers, put unfair competitive pressure on Aboriginal and Torres Strait Islander artists and cause cultural harm.	Introduce a mandatory disclosure requirement for Indigenous-style products that are <i>not</i> made by an Aboriginal and Torres Strait Islander artist, or reproduced under licence from an Aboriginal and Torres Strait Islander artist.	Consumers would have accurate information about the authorship of products — supporting demand for authentic goods — while imposing minimal costs on Aboriginal and Torres Strait Islander artists.
Some Aboriginal and Torres Strait Islander artists are not always treated fairly in the market.	Bolster the Indigenous Art Code by improving complaint and dispute resolution processes. Governments should modestly increase funding to the Indigenous Art Code, subject to an evaluation of the Code's effectiveness, and ensure legal and other support services are accessible to Aboriginal and Torres Strait Islander artists.	The Indigenous Art Code would expand its ability to promote ethical dealings in the market and support artists to enforce their rights. Aboriginal and Torres Strait Islander artists would be empowered and supported to negotiate fair contract terms and seek redress where their rights are breached.
Some art centres are struggling to source funding to fulfil key cultural and social roles in their communities.	The Australian Government — 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 the Australian Government to deliver funding that aligns with community priorities.

Current problem	Proposed response	Expected benefits
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.
Government policies to support the current and future Aboriginal and Torres Strait Islander visual arts and crafts workforce have been limited and fragmented	The Australian Government should clarify roles and responsibilities for workforce development within the Aboriginal and Torres Strait Islander visual arts and crafts sector, and set clear objectives for workforce development in partnership with the sector.	Clearer accountability for workforce policy objectives can address the under-representation of Aboriginal and Torres Strait Islander people in leadership and technical roles in the sector and create a sustainable pipeline of skilled Aboriginal and Torres Strait Islander arts workers.

Recommendations and findings

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



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



Finding 3.1

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

In 2019-20, the total value of spending on Aboriginal and Torres Strait Islander visual arts and crafts exceeded \$250 million. This estimate does not fully account for the sales of licensed consumer products containing designs from Aboriginal and Torres Strait Islander artists.

This estimate includes sales of original art made through art centres, commercial galleries, auction houses and other retailers, as well as souvenir products. About 55–60% of spending on souvenirs was on products made by non-Indigenous people, purchased predominantly by international visitors.



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 culture through art. About 10% of working-age Aboriginal and Torres Strait Islander people in remote areas earn an income from arts and crafts sales.

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.



Finding 3.3

Artworks by independent artists have a material presence in Aboriginal and Torres Strait Islander visual 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 estimates show that almost 2000 independent artists generate sales of almost \$13 million a year. About half of art dealer businesses sell the works of independent artists. In addition, independent artists produce commissioned artworks and sell directly to consumers through art fairs, online marketplaces and social media.

Of independent artists in regional and metropolitan areas, 56% are located outside the greater capital city region in their state or territory. There are substantial clusters of independent artists throughout the east coast of Australia, but independent artists are more dispersed along the west coast.



Finding 3.4

Art centres are the major source of production and sales of art from remote areas

The Commission estimates that sales of artworks produced by art centre artists totalled between \$30–48 million in the 2019-20 financial year, and about 7300 artists 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.

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



Finding 4.1

Several factors contribute to assessments of the authenticity (or not) of Aboriginal and Torres Strait Islander visual arts and crafts

Authenticity is a complex and contested concept. However, three factors have a significant bearing on assessments of product authenticity in the Aboriginal and Torres Strait Islander visual arts and crafts market:

- whether the product was made or licensed by an Aboriginal and Torres Strait Islander person
- where the product makes use of Indigenous Intellectual and Cultural Property (ICIP), whether the author has the relevant cultural authorisation to use that ICIP
- whether the product infringes the copyright of an Aboriginal and Torres Strait Islander artist's work.



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 Aboriginal and Torres Strait Islander visual arts and crafts dominate the consumer product (mostly wholesale souvenirs), digital, and print-on-demand merchandise markets.

- In the consumer product (wholesale souvenirs) market, approximately two-thirds to three-quarters of product offerings are made without the involvement of Aboriginal and Torres Strait Islander people, though prevalence varies by product category.
- Inauthentic products are commonplace in the print-on-demand merchandise market, including designs made by non-Indigenous artists and potential copyright infringements.
- In the digital art marketplace, over 80% of stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs are non-Indigenous authored.



Finding 4.3

Inauthentic visual arts and crafts have wide-ranging negative effects

The existence and prevalence of inauthentic visual arts and crafts in the market has wide-ranging and detrimental effects on both Aboriginal and Torres Strait Islander people and the broader Australian community. These include both cultural harms (such as cultural dilution and personal offence) 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 often misrepresent Aboriginal and Torres Strait Islander cultures and have the potential to mislead consumers.



Finding 4.4

Difficulties for consumers in identifying authentic products and gaps in legal protections for ICIP are the main enablers of inauthentic arts and crafts

Inauthentic Indigenous-style visual arts and crafts continue to exist and persist 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.

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



Finding 5.1

Stronger legal protection for Indigenous Cultural and Intellectual Property in Aboriginal and Torres Strait Islander visual arts and crafts would reduce misappropriation

Current laws do not enable Aboriginal and Torres Strait Islander people to directly control whether (and how) their Indigenous Cultural and Intellectual Property (ICIP) is used in visual arts and crafts. This means that ICIP is often used without the consent of traditional owners, and in ways that misrepresent and disrespect Aboriginal and Torres Strait Islander cultures.

There is a strong case for examining how legal protections for aspects of ICIP in visual arts and crafts could be strengthened to reduce misappropriation of ICIP in visual arts and crafts and better facilitate authorised uses of ICIP.



Finding 5.2

Dedicated legal protections are the best way to address 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 that promotes a fair allocation of benefits.



Finding 5.3

There are advantages to taking a multi-pronged approach to protecting Indigenous Cultural and Intellectual Property

Given its multi-faceted nature, it would be very challenging to achieve stronger legal protection for all aspects of Indigenous Cultural and Intellectual Property (ICIP) 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.



Recommendation 5.1

An Indigenous Cultural and Intellectual Property strategy to coordinate policy development

The Australian Government should develop and publish an Indigenous Cultural and Intellectual Property (ICIP) strategy to provide a coordinated policy framework in relation to different aspects of ICIP. The development of the strategy should be led by the Minister for Indigenous Australians, in partnership with Aboriginal and Torres Strait Islander people and with input from State and Territory Governments.



Recommendation 6.1

New cultural rights legislation should be introduced to empower traditional owners to decide how their cultural assets are used in 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.



Finding 6.1

A cultural rights regime must balance the interests of traditional owners and those seeking to access and use 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.



Recommendation 6.2

The foundational elements of the cultural rights legislation should be progressed

Building an effective and cohesive legislative regime for cultural rights will take time, but this should not hold up efforts to put the legislation into practice. The primary objective and focus of the initial rollout of the cultural rights legislation should be to develop the foundational elements needed to make the legislation work.

Once the new cultural rights legislation has been in operation for several years, the Australian Government should commission an independent review of the legislation. The review should evaluate how well the legislation is meeting its objectives and identify options for amending the legislation to improve its effectiveness.

Mandating the disclosure of non-Indigenous authorship



Finding 7.1

Some measures to help consumers assess the authenticity of Aboriginal and Torres Strait Islander art and craft products are in place but information gaps remain

Some approaches are already in place to help buyers assess if Aboriginal and Torres Strait Islander art and craft products are authentic. These include certificates of authenticity provided by artists and art dealers, as well as other branding, marketing initiatives and resources used to provide information and assurances to consumers.

However, this information is not provided consistently, and only limited information is provided for some products, particularly in the lower end of the market, including souvenirs and digital products.



Finding 7.2

Voluntary industry-wide labelling schemes for authentic products can be useful marketing tools but are unlikely to comprehensively help consumers distinguish products made by non-Indigenous people

Notwithstanding the possible marketing benefits to participants themselves, industry-wide voluntary labelling schemes (such as certification trade marks) are unlikely to be effective in substantially informing consumers about the Indigeneity or otherwise of product authors.

To be effective, voluntary labelling schemes would 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.

**Finding 7.3****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 non-Indigenous authored products. However, on their own their effectiveness in countering the market impacts caused by non-Indigenous authored products is limited, especially where the information used to promote and label products is confusing or ambiguous. Education and awareness-raising measures would be more effective if they were accompanied by initiatives that helped consumers distinguish between authentic and non-Indigenous authored products.

**Finding 7.4****Banning non-Indigenous authored 'Indigenous-style' products is not a proportionate policy option**

New cultural rights legislation is expected to reduce instances of cultural appropriation and consequently reduce the prevalence of non-Indigenous authored products that are Aboriginal and Torres Strait Islander in their style or design. Given this, and the costs and risks of implementing a ban on non-Indigenous authored products (including potential negative effects on Aboriginal and Torres Strait Islander artists) a ban is not likely to be a proportionate policy option.

**Recommendation 7.1****Mandatory disclosure where products are non-Indigenous authored should be required**

The Australian Government should introduce a mandatory disclosure requirement to address the information gaps in the market that make it difficult for buyers to determine if products are created or licensed by an Aboriginal and Torres Strait Islander artist.

This should be done by requiring the clear and prominent disclosure of non-Indigenous authorship where products that a buyer might reasonably consider to be of Aboriginal and Torres Strait Islander origin, design or style have not been produced by or under licence from an Aboriginal and Torres Strait Islander artist.

Such disclosure would facilitate informed purchasing decisions, reduce unfair competitive pressures on Aboriginal and Torres Strait Islander artists and likely reduce the prevalence of non-Indigenous authored products in the market. In developing the disclosure requirement, the Australian Government should engage effectively with Aboriginal and Torres Strait Islander people.

Strengthening legal and other support services for artists



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 and underpayment, which affect the rights, wellbeing and economic returns to Aboriginal and Torres Strait Islander artists and their communities. Data on reported cases of unethical conduct is not routinely collected.



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 corporation enforcing the code is under-resourced and overstretched.



Finding 8.3

Clear guidelines are not widely available to inform how governments can ethically procure and use Aboriginal and Torres Strait Islander art and design services

Governments have committed to support Aboriginal and Torres Strait Islander businesses through procurement, but procurement processes have not consistently demonstrated best-practice purchasing of Aboriginal and Torres Strait Islander art and design services. There is an absence of generally-available and specific guidelines for ethical and culturally-competent government procurement of Aboriginal and Torres Strait Islander art and design services.



Finding 8.4

The case for an ACCC-enforced mandatory or voluntary Indigenous art code is not strong

There is inadequate evidence of widespread unethical conduct to justify an ACCC-enforced voluntary or mandatory code of conduct for the Aboriginal and Torres Strait Islander visual arts and crafts industry. A government-imposed code risks being a blunt and costly tool that would not necessarily address the systemic imbalances that create opportunities for unethical dealings.



Recommendation 8.1 **Strengthening Indigenous Art Code Limited**

The Australian Government, in partnership with State and Territory Governments, should modestly increase funding to Indigenous Art Code Limited to support key processes, including:

- an enhanced complaints and dispute process, including a referral pathway to independent review of decisions and public reporting of compliance and educative actions and outcomes
- collecting and reporting on performance indicators to inform evaluation of the Code's effectiveness, including data on trends in reported unethical conduct.

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.



Finding 8.5 **Artists face difficulties accessing legal 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 legal and other support services for independent artists, particularly those working outside of areas serviced by art centres and regional peak bodies.



Recommendation 8.2 **Ensuring support services are accessible and centre artists' needs**

The Australian Government should identify gaps in and barriers to access to Aboriginal and Torres Strait Islander artist support services, and consider ways to ensure services are able to respond to the needs of all types of artists in all regions. The planned Australian Government evaluation of Indigenous Art Code Limited should consider what role the organisation should play in artist outreach and referral.

There is scope to improve government support to the sector



Finding 9.1 **Government funding is fragmented and can be difficult to track**

Aboriginal and Torres Strait Islander artists and art organisations receive funding from a multitude of sources, including targeted and mainstream arts programs and 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 how Aboriginal and Torres Strait Islander artists and art organisations benefit from mainstream programs.



Finding 9.2

Shortcomings in funding arrangements affect the ability of art centres and other art organisations to support artists and communities

The Indigenous Visual Arts Industry Support (IVAIS) program is the main source of funding to art centres. However, there are key issues limiting its effectiveness.

- IVAIS distributes over 95% of its funding to established organisations through non-competitive closed multi-year grants. While this can provide certainty for recipients, new art centres and other organisations that support Aboriginal and Torres Strait Islander visual artists find it difficult to access IVAIS funding.
- 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.



Recommendation 9.1

Australian Government funding should be evaluated to inform future arrangements

The Australian Government should commission an independent evaluation of the effectiveness of Australian Government expenditure directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector. The scope of the review should include the Indigenous Visual Arts Industry Support (IVAIS) program, the National Indigenous Visual Arts (NIVA) Action Plan and relevant Australia Council funding.

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 (having explicit regard to workforce development – recommendation 10.1)
- whether and what additional support is required to help meet sector priorities
- 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.



Recommendation 9.2

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 does not include shared decision-making between governments and Aboriginal and Torres Strait Islander people.

The Australian Government (led by the 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.

Building the Aboriginal and Torres Strait Islander arts workforce requires explicit and strategic policy intent



Finding 10.1

Gaps and deficiencies in training contribute to under-representation of Aboriginal and Torres Strait Islander people in some roles and positions in the visual arts industry

Aboriginal and Torres Strait Islander people are under-represented in leadership, management, and technical positions within the Aboriginal and Torres Strait Islander visual arts and crafts industry. Gaps and deficiencies in the training available perpetuate this situation.

- The scope and delivery of accredited visual arts and crafts training does not always meet the needs of current and aspiring Aboriginal and Torres Strait Islander visual arts workers, particularly in remote areas.
- Informal training, knowledge sharing and skills transfer, including that provided by community Elders and arts peak bodies, is not recognised in standard qualifications, limiting employment prospects.
- The small scale and remoteness of many arts organisations limits opportunities for formal on-the-job training such as traineeships and cadetships.



Finding 10.2

The Aboriginal and Torres Strait Islander visual arts and crafts workforce falls in a policy gap

There is no coherent national strategy to support the Aboriginal and Torres Strait Islander visual arts and crafts workforce. Development of the workforce falls in a policy gap between multiple frameworks and without clear objectives and accountabilities. This contributes to ongoing under-representation of Aboriginal and Torres Strait Islander people in key industry roles.



Recommendation 10.1

Improving government support for Aboriginal and Torres Strait Islander visual arts and crafts workforce development

The Australian Government should ensure that funding for the Aboriginal and Torres Strait Islander visual arts and crafts industry supports the development of a sustainable workforce.

As part of the Commission's recommended funding evaluation (recommendation 9.1), the Australian Government should:

- clarify responsibilities for developing the workforce of Aboriginal and Torres Strait Islander visual arts and crafts workers and leaders
- consider additional ring-fenced funding for:
 - art centres and arts hubs with capacity to provide on-the-job training and skills transfer to Aboriginal and Torres Strait Islander artists and arts workers
 - flexible and accessible professional development programs delivered by regional arts industry service organisations, where they address demonstrated need and build pathways to improved Aboriginal and Torres Strait Islander representation in the sector
 - improved access to programs that allow independent artists to strengthen business skills alongside their artistic practice.

Any changes to funding and workforce policy should account for:

- the outcomes of the National Skills and Jobs Summit and any workforce and training strategies for the broader arts sector developed under the National Cultural Policy
- the replacement of the Community Development Program
- the National Agreement on Closing the Gap priority reforms.



Recommendation 10.2

Public cultural institutions should expand opportunities for Aboriginal and Torres Strait Islander visual arts and crafts workers

Through their funding of cultural institutions, Australian, State and Territory Governments should demonstrate leadership in providing skills development, career pathways, and culturally safe workplaces for Aboriginal and Torres Strait Islander people in the visual arts and crafts industry. Institutions could:

- offer a wider range of identified Aboriginal and Torres Strait Islander cadetships and traineeships
- expand opportunities for secondments and mentoring, including with arts organisations in regional and remote areas
- implement targeted recruitment practices, such as cluster hiring and recognition of lived experience.

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 processes.

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. iv). 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 often intertwined with visual arts in Aboriginal and Torres Strait Islander cultures but are outside the scope of the study.

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

A 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 2018b) (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 Islander artists and art centres, which affect access to markets, digital connectivity, and the supply of arts 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.

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

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

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 (2018b), 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 (didgeridoos,⁵ 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 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

⁵ Didgeridoos are known by various names (including *yidaki* and *mandapul* in Yolŋu Matha) in Aboriginal languages.

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 – The 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 about 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 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

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

Adelaide. Several international galleries now sell Aboriginal and Torres Strait Islander art and international buyers also buy directly 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 and crafts 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 on *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. Some artists practice multiple forms.

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.

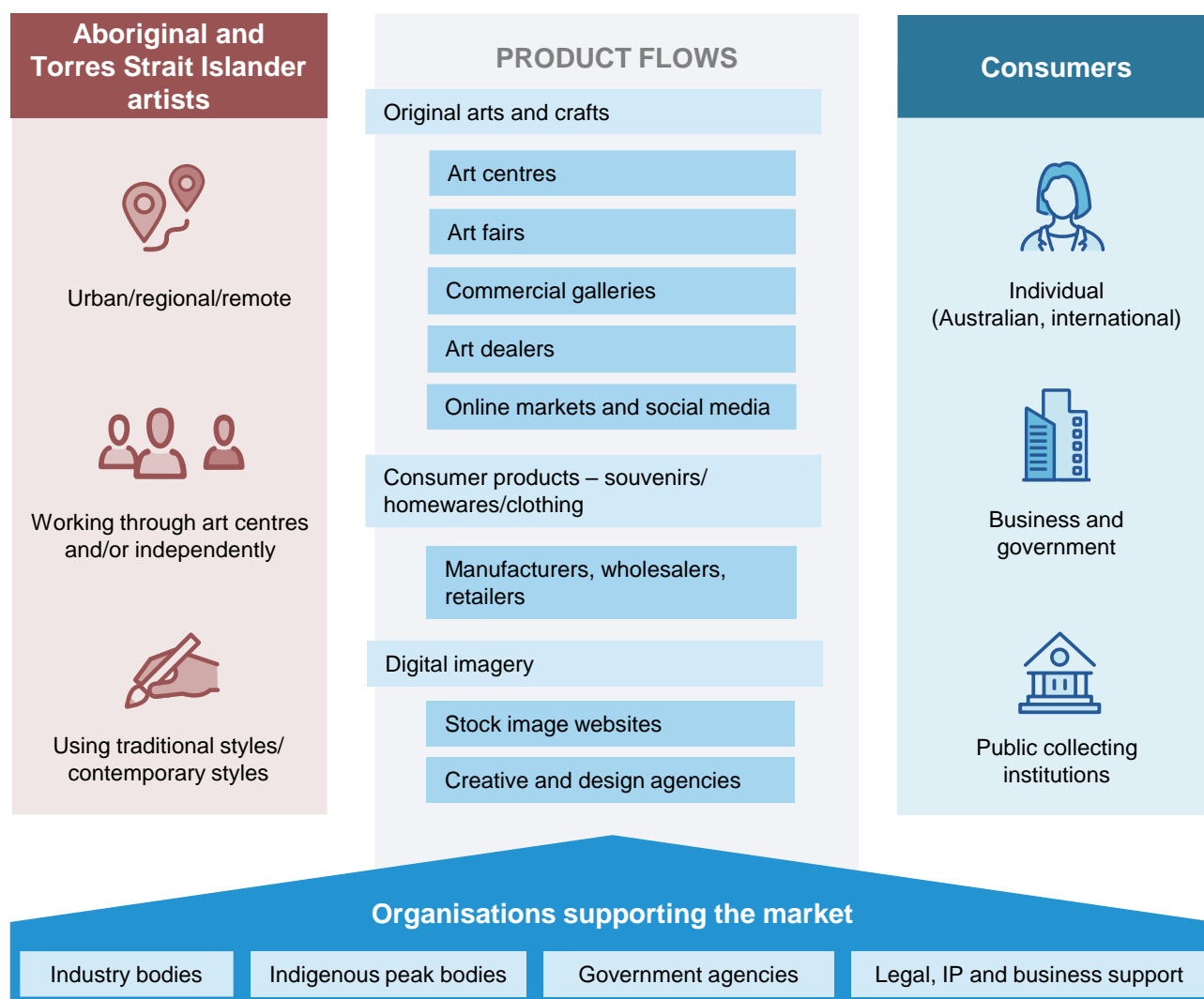
In estimating the size and nature of the market (chapter 3), the Commission has considered — where data allows — the volume and value of:

- visual arts and crafts produced by Aboriginal and Torres Strait Islander artists
- visual arts and crafts produced by non-Indigenous people that are Aboriginal and Torres Strait Islander in their style, design or appearance.

The authenticity issues associated with Aboriginal and Torres Strait Islander visual arts and crafts are discussed in detail in chapters 3, 4 and 7.

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 what are commonly referred to as ‘inauthentic’ arts and crafts (chapter 4).

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

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
- directly to consumers (both in physical retail settings and through online market places, websites 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.

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 and selling their work through other channels
- 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 (the roles of art centres are detailed in chapter 2).

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. Artists working outside art centres sell their work through a range of channels including commercial galleries and dealers, under licence to manufacturers and wholesalers, via commissions, through communication and design businesses and direct retail sales.

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 dealers or commercial galleries. Many artists value the freedom to choose how they will market their work to best meet their needs and the needs of their families.

Consumers of Aboriginal and Torres Strait Islander visual 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
- domestic and international 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, while balancing the interests of those seeking to access and use such intellectual property (chapters 5 and 6).

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, taking action 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 actions 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.

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 and 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 artworks 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 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 2020b), 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 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 co-design process with Aboriginal and Torres Strait Islander people.

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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Government agencies, businesses and other organisations that seek to use Aboriginal and Torres Strait Islander designs and digital imagery become skilled in identifying, procuring and paying fairly for authentic artwork.
Protecting Indigenous Cultural and Intellectual Property	<ul style="list-style-type: none"> • 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 people and communities have access to legal mechanisms to enable the protection of Indigenous Cultural and Intellectual Property.
Government support	<ul style="list-style-type: none"> • 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 are guided by Aboriginal and Torres Strait Islander people in the funding of Aboriginal and Torres Strait Islander visual arts and crafts. • 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 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 142 organisations and individuals to discuss the issues raised by this study. Of these meetings:

- 36 were with Aboriginal and Torres Strait Islander controlled organisations and businesses
- 24 were with individual Aboriginal and Torres Strait Islander people
- 32 were with government agencies (including 7 with Indigenous specific agencies)
- 2 were with international organisations and experts

COVID-19 restricted our ability to travel for face-to-face meetings during much of the study's duration and many meetings were held online. However, we did visit and hold meetings in:

- Shepparton/Goulburn Valley, Victoria
- Mornington Peninsula, Victoria
- Adelaide, South Australia
- Sydney, New South Wales
- Cairns, Queensland
- Darwin, Northern Territory
- Uluru and Alice Springs, Northern Territory.

Roundtables and webinars

The Commission hosted two roundtable meetings:

- 26 August 2021 — an initial discussion with key participants to identify issues to be explored in this study
- 29 August 2022 — a discussion with key participants about career pathways and capacity strengthening for Aboriginal and Torres Strait Islander people working in the visual arts and crafts sector.

On 31 August 2022, the Commission hosted an interactive webinar on its draft recommendation for cultural rights legislation to better protect Indigenous Cultural and Intellectual Property.

Submissions and brief comments

The Commission received 64 written submissions and 10 brief comments. Of the 64 submissions in total:

- 13 were from Aboriginal and Torres Strait Islander organisations
- 2 were from individual Aboriginal and Torres Strait Islander people
- 12 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 2018b). 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.

Following the release of its draft report, the Commission undertook targeted engagement with artists through Facebook, Twitter and LinkedIn and has received 92 comments, which we have drawn on in the report.

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.

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 of 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 (National Museum of Australia 2022b). 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 – The Aboriginal and Torres Strait Islander visual arts and crafts sector creates a range of benefits

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 be 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 people's 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.

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 and 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 *rärrk* (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 people's 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 Mowanjum 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 Kimberley 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 1972, after 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. Nevertheless they also asserted the value of Aboriginal cultures to audiences across Australia and internationally (Coleman 2001, p. 387). However, according to artist Richard Bell, 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, textiles, homewares — has increased its accessibility to consumers who may value a piece for its technical or aesthetic qualities over its cultural significance. Aboriginal and Torres Strait Islander art is increasingly present in the public domain, including through murals, graphic designs for publications, multimedia projects or spatial designs such as interiors and installations (box 2.2). 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)

Box 2.2 – Aboriginal and Torres Strait Islander art is used in many ways

Not all artworks created by Aboriginal and Torres Strait Islander 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. This advertising campaign consisted of bespoke photography and filming overseen by director

Box 2.2 – Aboriginal and Torres Strait Islander art is used in many ways

Malinda Rutter, a Bundjalung, Gidhabal 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 Elcho Island Arts and Milingimbi Art and Culture, using materials harvested and prepared through traditional methods (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. 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 and reconciliation (Saretta Art & Design 2019; Supply Nation 2020a). Saretta Art & 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 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).

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

For Aboriginal and Torres Strait Islander people, the issue of sovereignty has never been adequately addressed since colonisation. 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 lack of recognition of sovereignty has been associated with a loss of self-determination, with government policies determining 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, p. 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 move Aboriginal people from one reserve to another and remove Aboriginal children, as well as decide with whom these children were to be placed.

Over the years, Aboriginal and Torres Strait Islander people have pushed for greater representation in decision-making on issues that impact their lives. 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 countries 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 2020b, p. 366). This includes control over cultural traditions, customs and expressions (box 2.3). 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 domestic policies (Delaney, Maguire and McGaughey 2020b, p. 367).

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, the ACT and the Northern Territory; and in 2022, the 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 (ALP 2022).

Box 2.3 – 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.
- 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 have been an important tool used to advocate for political and social rights, including 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.

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. (Galarrwuy 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)

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 the Australia Council (2021b, 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, for the Yawuru people, the traditional owners of Broome, 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.

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.

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
<p>Connection to:</p> <ul style="list-style-type: none"> • Culture • Country • Family and kinship • Community • Spirit, spirituality and ancestors • Body • Mind and emotions 	<ul style="list-style-type: none"> • Country, culture and identity • Family connectedness • Contributions to the broader community • Self-determination, rights and autonomy • Health and material wellbeing 	<ul style="list-style-type: none"> • 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).

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 several murals. The projects enabled the exchange of Aboriginal ideas with non-Indigenous people, 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 (chapter 3).

The production of arts and crafts has become an important source of employment for many Aboriginal and Torres Strait Islander people, particularly 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, including 1511 'core' artists who sold ten or more artworks in the year (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 (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 \$3200 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 offers employment opportunities for arts 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 (Office for the Arts 2021a). 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 arts workers, which are staffed primarily by non-Indigenous people (chapter 10).

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 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 therapeutic benefits from participation in arts programs can promote successful outcomes in health and social areas. Several 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. These include creating a safe space for the community, language and culture; stable funding and staffing; and linking arts programs with other services (for example, health services or counselling) and opportunities (for example, jobs or education programs) (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 2017). At art centres, artists aged 60 or more produce 27% of all artworks, while female artists aged 50 or more produce 37% 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 2017)

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’ (WA Centre for Rural Health 2020).

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 New South Wales. Like the Torch program, these provide a range of benefits, including engaging inmates in a constructive activity, and the opportunity to 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 of how customary practices are placed at the heart of operations. There is a diversity in how art centres operate, reflecting the different needs of each community and the nature of the market that they have access to. Some operate as part of larger community organisations providing a range of services, while others have a narrower remit but usually help artists with much more than just the production and marketing of artworks. Nevertheless, each works in service of the communities it represents:

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 – Art centres have diverse roles

	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.

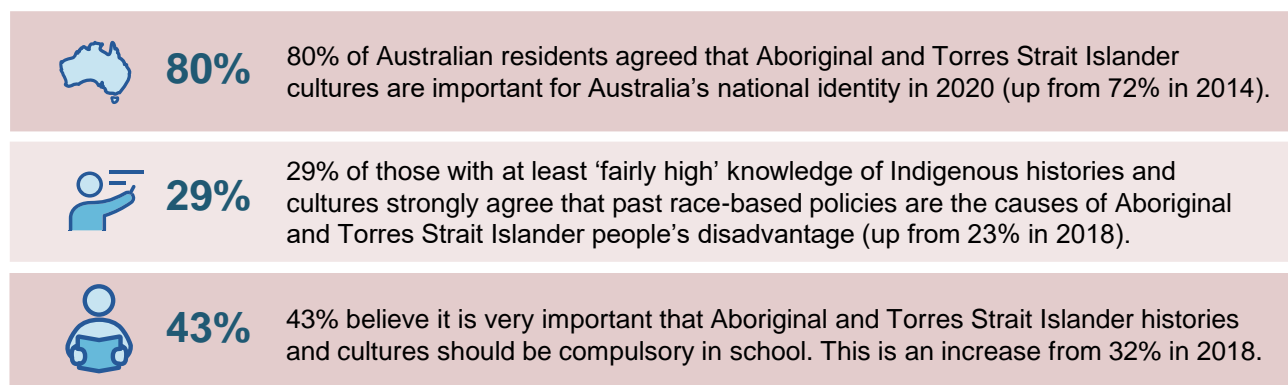
National identity and cultural fabric

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 80% 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' sentiments towards 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 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. (Arts Law Centre of Australia, HoRSCIA 2018, sub 64.1, p. 8). 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 has commissioned and displayed five Aboriginal and Torres Strait Islander liveries across its fleet. Through the Flying Art Series, Qantas notes it is '... 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; sub. 60, p. 2).

Aboriginal and Torres Strait Islander arts and crafts are 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 (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 involved students and staff making written pledges 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, along with artist Mahony Kiely incorporated these commitments to cover a mapiyal (platypus) sculpture (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.

- In the creative sector, 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).
- In the manufacturing and broader retail sector, 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.
- The tourism, accommodation and hospitality sectors 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 arts 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 (for example, stationery, kitchenware, clothing). Chapter 3 provides an assessment of the size and nature of Aboriginal and Torres Strait Islander arts and crafts markets.



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 2019-20, consumer spending on Aboriginal and Torres Strait Islander visual arts and crafts exceeded \$250 million. This includes spending on original artworks, secondary market sales and product sales.**
 - Artists received about \$41 million from the sale of arts and crafts and other visual arts products.
 - 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, about 19 000 Aboriginal and Torres Strait Islander people received income from the sale of visual arts and crafts, though many more did not earn income from their artmaking.**
 - Those who earned income from producing visual arts and crafts tended to be older artists located in remote areas, with strong language connections to their cultural group.
 - Visual arts and crafts provide an important source of income for many Aboriginal and Torres Strait Islander artists — in remote areas, artists who sell arts and crafts tend to have higher incomes than those who do not.
- * **Art centres play an important role in the production and sale of original artworks, mostly in remote areas, and provided an average income of \$3200 for artists and their families in 2019-20. Artists who sold more than 10 artworks had an average income of \$7300.**
- * **Independent artists have a material 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 — earning an average annual income of \$6000.**
- * **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 containing designs resembling Aboriginal and Torres Strait Islander art totalled at least \$78 million in 2019, purchased almost entirely by international visitors. An estimated 55–60% of spending on these souvenirs was on non-Indigenous authored products.**

Information about the size and structure of Aboriginal and Torres Strait Islander visual arts and crafts markets is important for determining policy.

This chapter examines the total value of markets for Aboriginal and Torres Strait Islander visual arts and crafts (section 3.1), and the key sources of income for Aboriginal and Torres Strait Islander people involved in the production and sale of visual art and craft (section 3.2). 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 in this chapter cover original artworks (section 3.3) and products containing Aboriginal and Torres Strait Islander designs and styles (section 3.4).

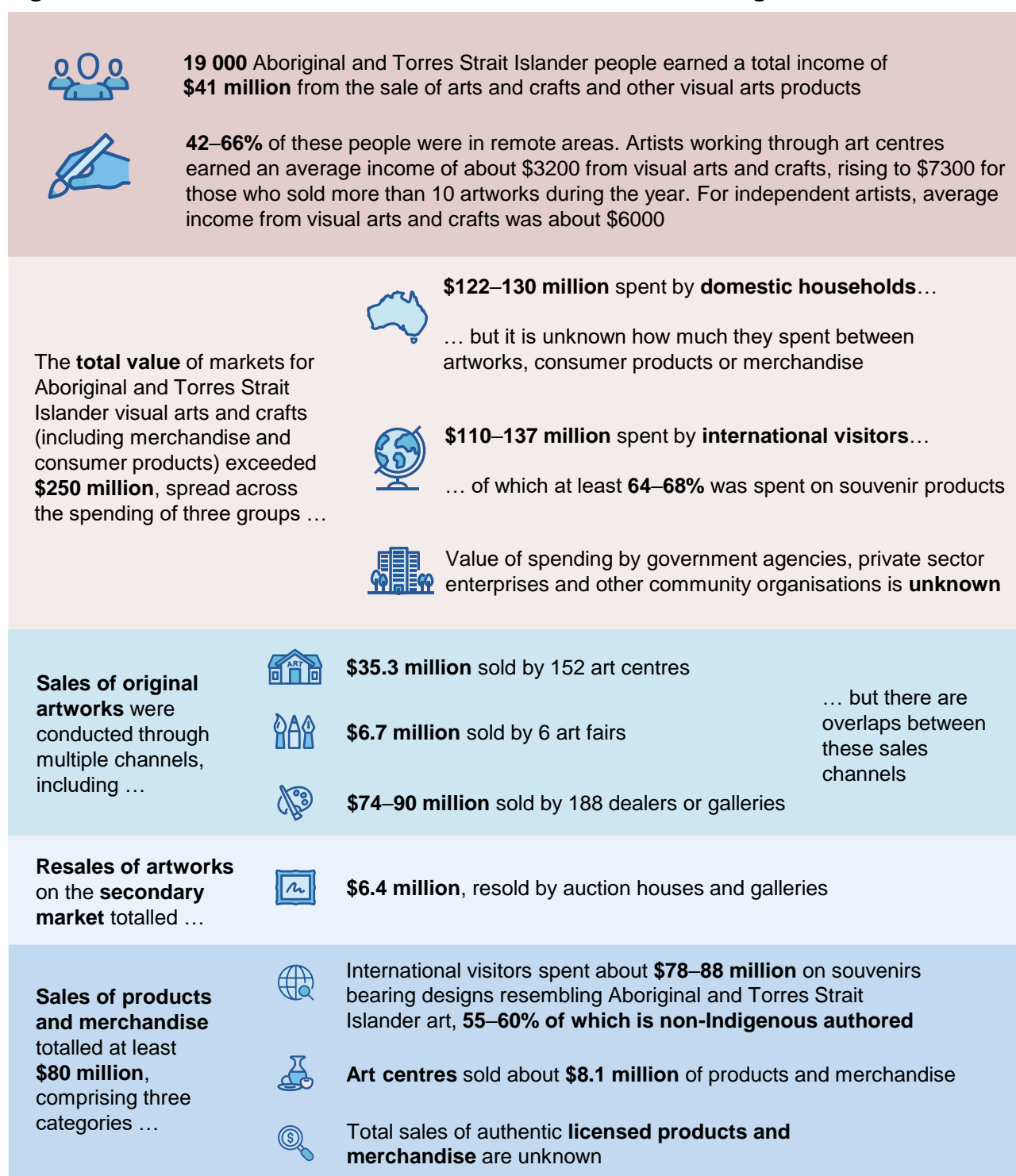
The estimates presented in this chapter cover all visual arts and crafts (including consumer products bearing art) that are Aboriginal and Torres Strait Islander in style or design, whether produced by an Indigenous or non-Indigenous person(s). The nature and prevalence of authenticity issues in the markets for Aboriginal and Torres Strait Islander visual arts and crafts are examined in chapter 4.

Data collections pertaining to the production and sales of Aboriginal and Torres Strait Islander visual arts and crafts are patchy (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 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 total value of markets. 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 Annual sales of Aboriginal and Torres Strait Islander visual arts and crafts exceed a quarter of a billion dollars

The Commission estimates that consumer spending on Aboriginal and Torres Strait Islander visual arts and crafts exceeded \$250 million in 2019 (figure 3.1). This estimate is conservative due to gaps in data sources — for example, it does not include a comprehensive estimate for the aggregate value of sales of Aboriginal and Torres Strait Islander designed or licensed consumer products, particularly those produced by major Australian retail stores. Gaps in data sources have also created overlapping estimates for market segments discussed below. The methodologies and data sources used to derive these estimates are examined in further detail in appendix C.

The markets for Aboriginal and Torres Strait Islander visual arts and crafts comprise two main segments: original artworks and consumer products. These segments are interrelated but distinct — for example, original artworks may be licensed for use on merchandise sold in product markets.

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.

Original artworks are sold through different channels, including commercial galleries, art centres, art fairs and directly to consumers (section 3.3, appendix B). Commercial galleries are by far the largest channel, generating an estimated \$74–90 million in sales in 2019,⁶ 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).

The consumer product market segment encompasses consumer goods that incorporate Aboriginal and Torres Strait Islander art and designs — for example, boomerangs, other woodcrafts, homewares, souvenirs, jewellery and fashion. 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) (section 3.4).

Buyers are diverse, and include tourists and commercial enterprises

Buyers of Aboriginal and Torres Strait Islander visual arts and crafts are diverse, varying with artwork and product types. While domestic buyers tend to purchase original Aboriginal and Torres Strait Islander artworks and licensed products, international visitors account for the bulk of souvenir sales.

The Commission estimates that domestic households spent \$121.5–129.5 million on Aboriginal and Torres Strait Islander visual arts and crafts in 2019. The latest available data shows that in 2015, domestic households spent about \$482.5 million on paintings, carvings and sculptures (ABS 2017). Based on historical data from the 1997 *Arts and Crafts Purchases Survey* and art centre data, the Commission estimated that at least 18% (nearly \$87 million) 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.

International visitors are almost entirely responsible for purchases of Aboriginal and Torres Strait Islander souvenirs and other licensed products from souvenir or gifts retailers, spending between \$78 and 88 million in 2019. From this total, the Commission conservatively estimates that \$43–54 million was spent on Indigenous-style products created without the involvement of Aboriginal and Torres Strait Islander artists, amounting to 55-60% of the total spending on souvenir products (appendix C). International visitors also spent an estimated \$35–51 million on original artworks and other crafts.

Government agencies, private sector corporations and non-government organisations purchase a substantial share of visual arts and crafts. Unlike most private buyers, governments and other organisations are more likely to commission Aboriginal and Torres Strait Islander artists to produce graphic designs for publications, multimedia campaigns, murals for public spaces or spatial designs for public installations in architectural settings. These commissions are often displayed in prominent locations and widely viewed by Australians.

⁶ This figure reflects total revenue from sales of Aboriginal and Torres Strait Islander artworks, not the net income or profit 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).

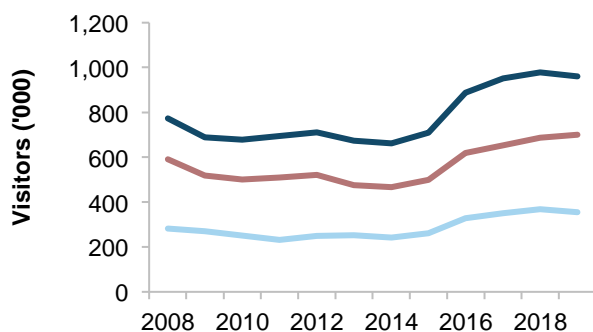
However, the aggregate value of government and corporate spending is not known. For example, the Australian Government reported that the value of new contracts with Aboriginal and Torres Strait Islander businesses totalled \$1.1 billion during the 2020-21 financial year (NIAA 2022d), but it is unclear what proportion is attributable to visual arts or crafts products. Between 2015 and 2018, the Australian Government spent at least \$0.9 million on 'editorial and design and graphic and fine art services' from Aboriginal and Torres Strait Islander businesses, 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.

Demand from domestic buyers has been rising

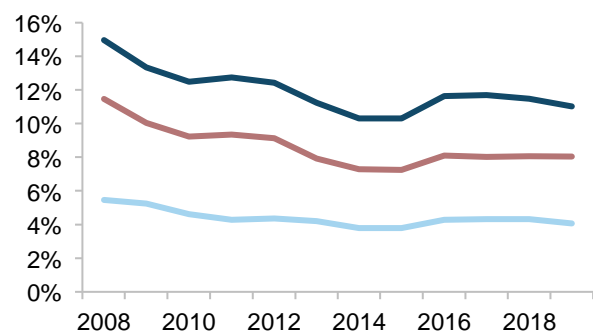
Prior to the COVID-19 pandemic, many international visitors participated in Aboriginal and Torres Strait Islander cultural experiences. Between 2008 and 2019, the number of international visitors who reported experiencing Aboriginal and Torres Strait Islander art, craft or cultural displays increased by about 18%, 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

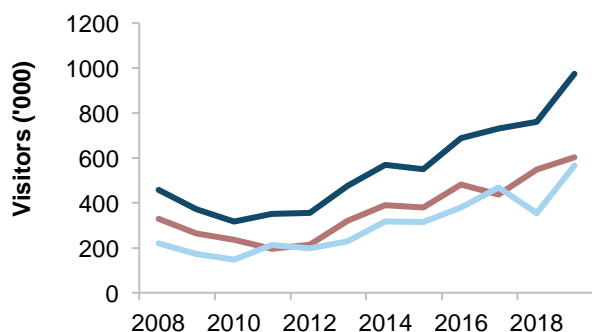
Source: TRA (2022a).

Over the same period, growth in the number of domestic travellers experiencing Aboriginal and Torres Strait Islander art, craft or cultural displays outpaced international visitors (figure 3.3).

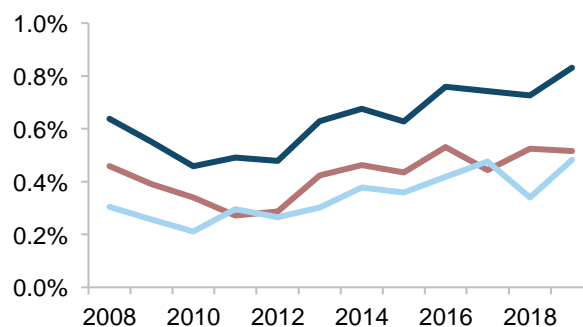
The stronger interest among domestic tourists in Aboriginal and Torres Strait Islander visual arts and crafts changed the sources of demand in the market. While current data is not available for the number of domestic overnight visitors who purchased Aboriginal and Torres Strait Islander arts, crafts or souvenirs, data for 2012 to 2014 indicates that their numbers increased significantly, eventually overtaking the number of international visitors who made purchases (figure 3.4, panel b). Over time, the number of international visitors purchasing Aboriginal and Torres Strait Islander arts, crafts or souvenirs has been decreasing (figure 3.4, panel a). Demand for souvenir products nearly 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).

Figure 3.3 – Domestic visitors participation 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



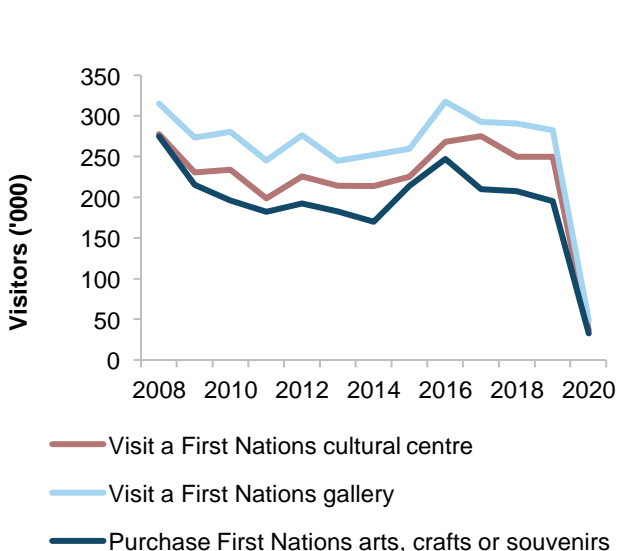
b. Share of domestic visitors who engaged in Aboriginal and Torres Strait Islander cultural activities



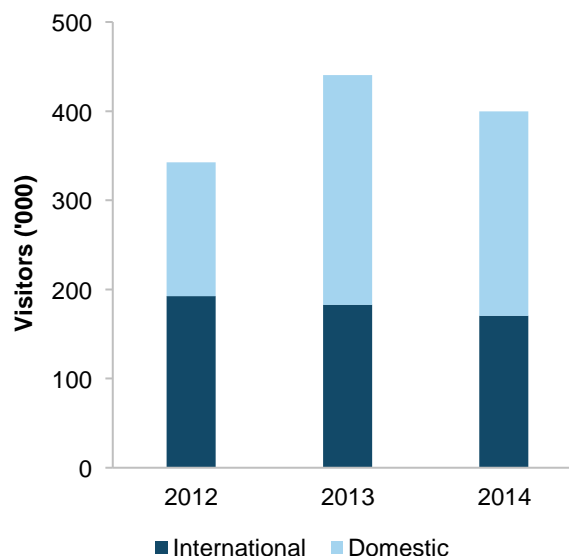
Source: TRA (2022b).

Figure 3.4 – Visits to First Nations cultural centres and galleries slightly declined from 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.



Finding 3.1

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

In 2019-20, the total value of spending on Aboriginal and Torres Strait Islander visual arts and crafts exceeded \$250 million. This estimate does not fully account for the sales of licensed consumer products containing designs from Aboriginal and Torres Strait Islander artists.

This estimate includes sales of original art made through art centres, commercial galleries, auction houses and other retailers, as well as souvenir products. About 55–60% of spending on souvenirs was on products made by non-Indigenous people, purchased predominantly by international visitors.

3.2 Aboriginal and Torres Strait Islander artists

Visual arts and crafts activities play an important role in the lives of many Aboriginal and Torres Strait Islander people. In 2019, an estimated 17% of Aboriginal and Torres Strait Islander people aged over 15 years made visual arts or crafts, and about 3% received an income from visual arts or crafts. Overall, the Commission estimates that there are about 19 000 Aboriginal and Torres Strait Islander people who earned income from the sale of arts and crafts in 2019-20.

Aboriginal and Torres Strait Islander visual artists live and work across Australia; many artists recognise their homelands or traditional country, although many live elsewhere. And while people of all ages participate in making arts and crafts (figure 3.5), those who generate income from the sale of art tend to be older (appendix B, figure B.7).

Artists use a wide range of artistic techniques, as well as different methods to sell their art. About 7300 artists sold art through art centres in 2019-20, with artist incomes from sales reaching \$23.6 million. In some cases, part of the income generated from sales is retained by the art centre as commission (section 3.3, appendix B).

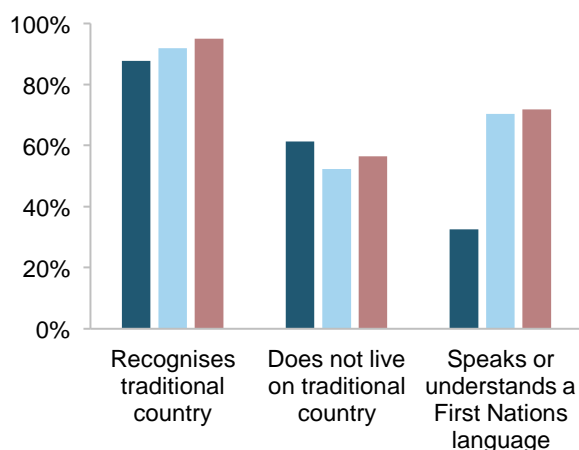
Independent artists have a material presence in markets for Aboriginal and Torres Strait Islander visual arts and crafts — the Commission's estimates based on limited data show that almost 2000 independent artists generate sales of almost \$13 million a year. About 1200 artists who work in remote locations but are not affiliated with an art centre earned about \$2.6 million in total; a further 789 working in regional and metropolitan areas earned about \$12–14 million (appendix C, section C.1).

There are also differences between artists in terms of the number of artworks they produce and sell, and the average price per artwork. 'Core artists' — defined as those who sold more than 10 artworks during the year — comprised fewer than a third of art centre artists but contributed about 81% of art centre sales. 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 \$3200, rising to \$7300 for core artists.

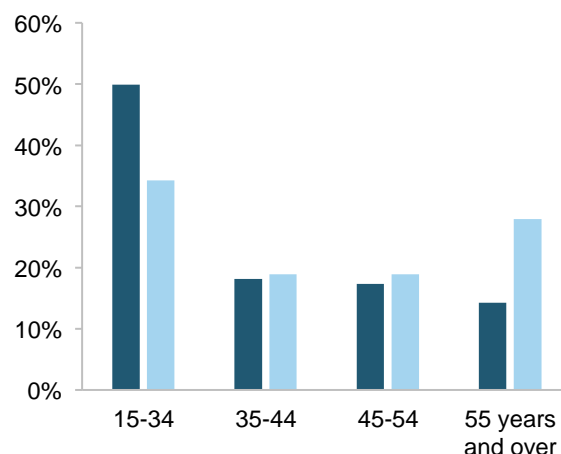
Figure 3.5 – Who makes visual arts and crafts?^a

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).

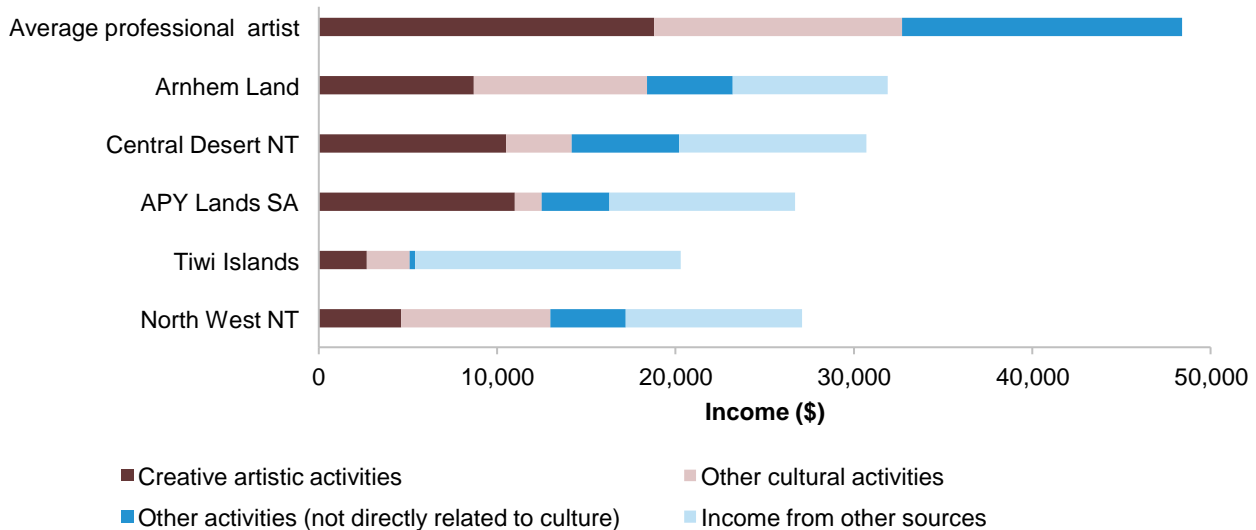
Visual arts and crafts are a significant source of earned income for artists located in remote areas

Most income-earning Aboriginal and Torres Strait Islander artists are 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 fewer 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 socioeconomic 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).

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 (UMI Arts Ltd., sub. 1, p. 3). However, across all remote art regions, most artists nominated 'income from other sources' as their main income stream. Other sources include government benefits, family members or community trust funds (mining and park royalties). Some artists, in particular those in North West Northern Territory and Arnhem Land (NT) also receive substantial income from activities such as teaching art and culture, cultural tourism and cultural interpretation.

While artists working in remote areas tend to have higher incomes than others in their community, their incomes remain significantly lower than those of average professional artists (Throsby and Petetskaya 2019c, p. 57, 2019a, p. 45, 2019b, p. 45) (figure 3.6). 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 (figure 3.7). Across all remote art regions surveyed, 69% to 80% of visual artists reported spending at least 2-3 full days per week creating art (Throsby and Petetskaya 2019c, p. 44, 2019a, p. 30, 2019b, p. 31).

Figure 3.6 – Aboriginal and Torres Strait Islander artists working in remote areas earn less income from creative activities compared to the average professional artist^{a,b}

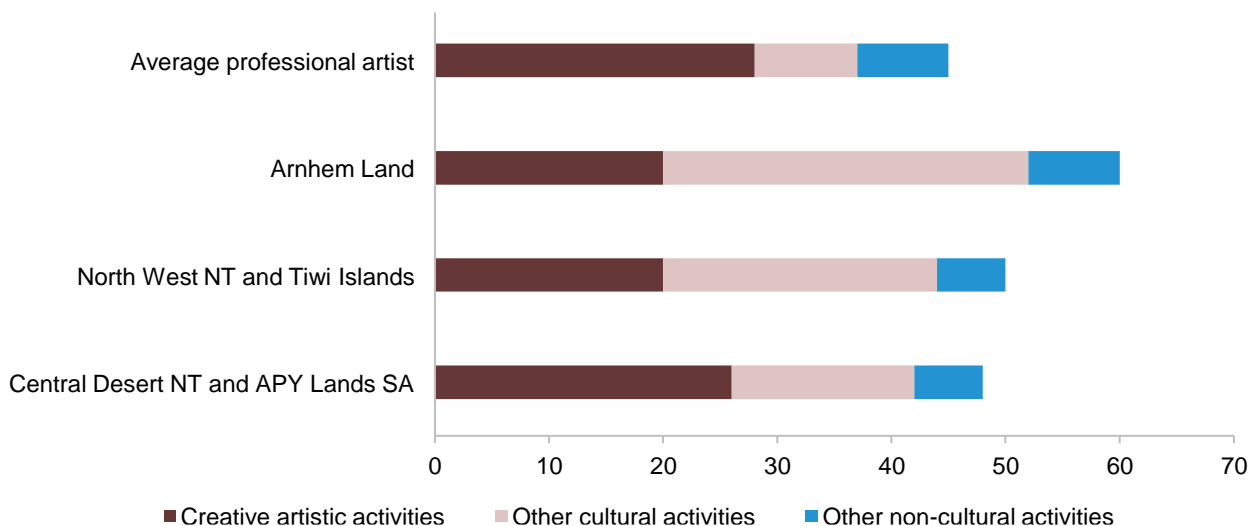


a. Creative artistic activities include visual arts, performing arts, writing or storytelling, composing or choreographing and multimedia work. For artists in remote areas, 'other cultural activities' include teaching others in arts and culture, caring for Country, serving on a cultural board, interpreting culture, among others. 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).

Figure 3.7 – First Nations artists located in remote areas spend on average similar amounts of time creating art compared to the average professional artist^{a,b}

Average weekly hours spent on cultural and non-cultural activities



a. For remote Aboriginal and Torres Strait Islander 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 several possible explanations for this difference. One is that artists working in remote areas do not always produce artworks for commercial reasons. For example, many paid artists in remote regions create artworks for other reasons, including for friends and their own enjoyment (Bartleet et al. 2019, p. 71), or 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, material quality and subjective quality of art produced by artists working in remote areas than professional artists working in regional and metropolitan areas.

The majority of artists who live in remote areas work through art centres (section 3.3, appendix B). In 2014, just over 6% of artists located in remote areas worked independently (Woodhead and Acker 2014b, p. 14). Work arrangements for artists working independently in remote areas are often transient, with many alternating between working with art centres and art dealers or galleries depending on their personal circumstances and preferences (Acker and Stefanoff 2016, pp. 8–10). Many of these independent artists are located in central Australia and directly sell their artworks to consumers in a range of locations, including caravan parks, hotels, motels, a hospital and Todd Mall in Alice Springs (Acker and Stefanoff 2016, pp. 1011). However, 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).



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 culture through art. About 10% of working-age Aboriginal and Torres Strait Islander people in remote areas earn an income from arts and crafts sales.

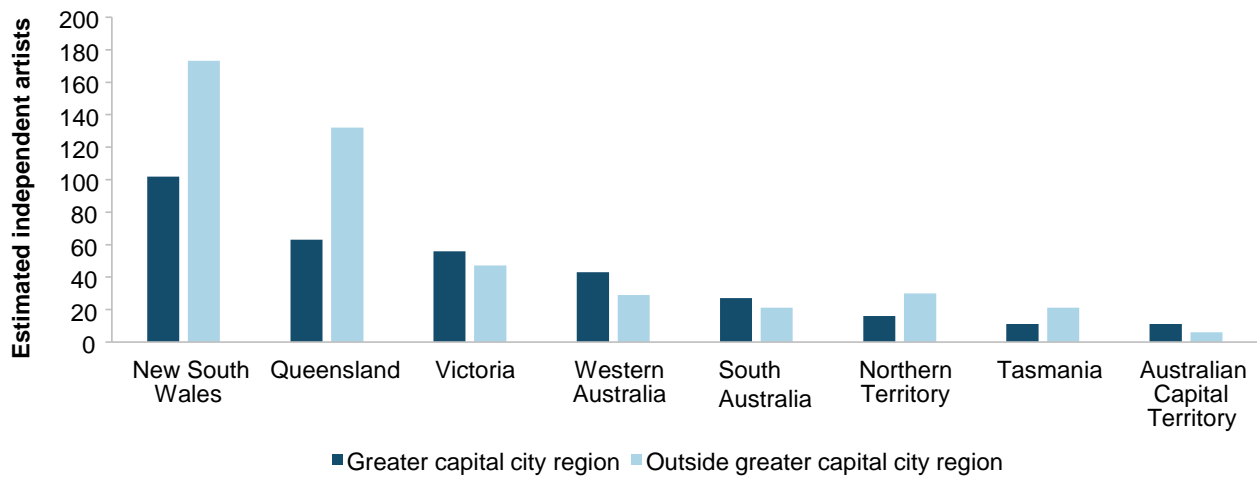
Artists in regional and metropolitan areas also benefit economically from the sale of their arts and crafts, although they are more likely to have access to a wider range of income sources.

Many artists in metropolitan and regional areas work independently

While most art centres are in remote locations, Aboriginal and Torres Strait Islander artists work across Australia. Many Aboriginal and Torres Strait Islander artists who live in metropolitan and regional areas work independently. Using information available online, the Commission identified 789 Aboriginal and Torres Strait Islander visual artists working in metropolitan and regional areas as at September 2022. Of these, 36% were located in New South Wales, followed by 23% in Queensland and 12% in Victoria (figure 3.8). Nationally, 56% of independent artists work outside the greater capital city region of their state or territory.

There are substantial clusters of visual artists along the east coast of Australia in the Gold Coast and Sunshine Coast in Queensland, and along the North, Central, and South Coast of New South Wales (figure 3.9). On the west coast, independent artists are more dispersed, with smaller clusters in Broome and Karratha. Most independent Aboriginal and Torres Strait Islander visual artists in Western Australia work in Perth or in the south-west corner of the state.

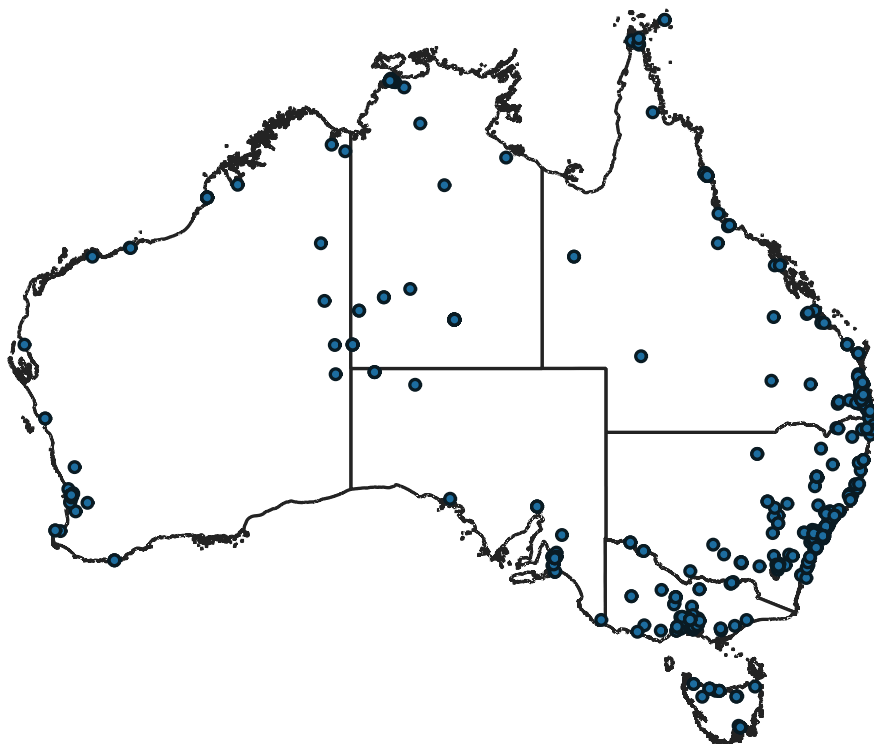
Figure 3.8 – Most independent artists located in regional and metropolitan areas work outside of capital cities in New South Wales and Queensland^{a,b}



a. This figure excludes independent Aboriginal and Torres Strait Islander artists working in remote areas of central Australia due to limitations in the online data sources. **b.** Greater capital city regions include Sydney, Brisbane, Melbourne, Perth, Adelaide, Darwin, Hobart and Canberra. As defined by geographic boundaries set by the ABS Census 2021, these greater capital city regions can extend well beyond the city centres. For example, the Greater Sydney region includes part of the Central Coast and the Blue Mountains.

Source: Commission analysis based on publicly available data.

Figure 3.9 – Most independent Aboriginal and Torres Strait Islander artists working in regional and metropolitan areas are located along the east coast^{a,b}



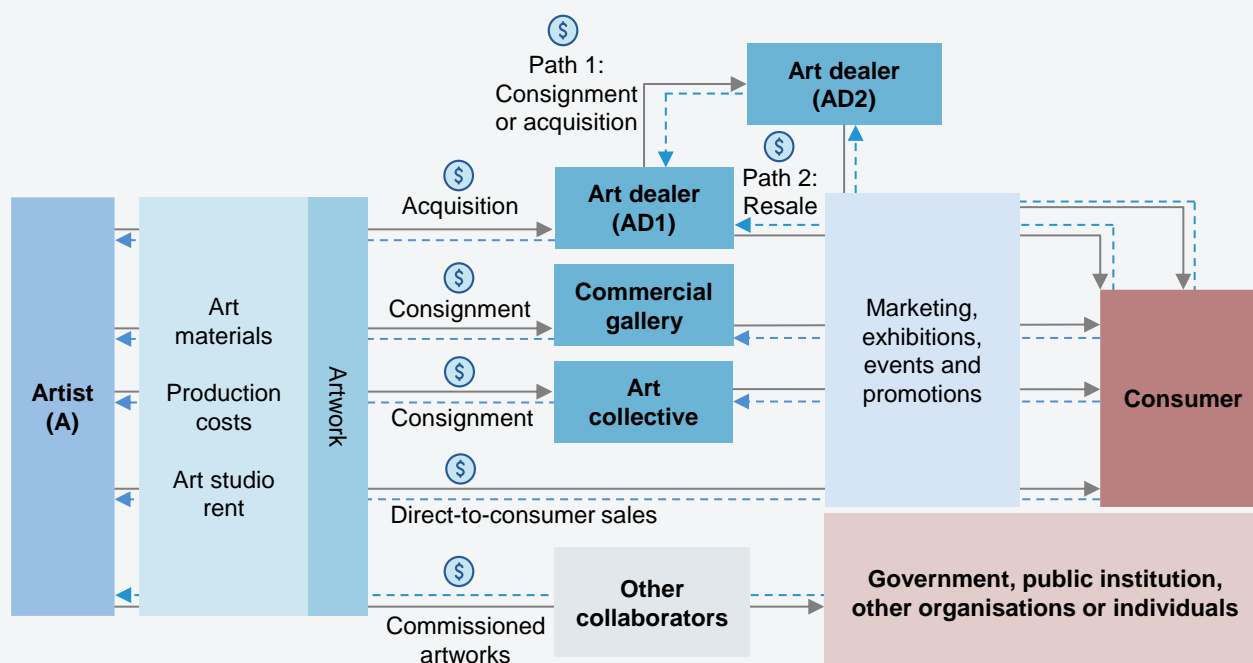
a. The dots indicate the approximate location of one artist, but not all dots are visible in this map due to overlapping within capital cities. **b.** The geographic distribution of independent artists located in remote central Australia should be interpreted with caution, as the online data sources likely underestimate independent artists working in these areas.

Source: Commission analysis based on publicly available data.

Independent artists sell their artworks using one or more working arrangements (box 3.1). Many established artists are represented by commercial galleries (Arts Law, Copyright Agency and IartC, sub. 31, p. 15). Most artists sell artworks and other related merchandise directly to customers (sometimes through art collectives or cooperatives that have galleries) or produce artworks on commission. As at July 2022, there were at least 189 artists registered or certified with Supply Nation,⁷ all working as either sole traders, part of a family business or as business owners. However, their creative practice is often not their only form of employment.

Box 3.1 – Independent artists use many channels to sell their artworks

Independent artists typically use one or more of the following methods 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, which is determined by the quality of the artist’s artworks, their reputation and their bargaining skills. 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.
- **Direct representation by commercial galleries.** Artists can consign their artworks to be sold at galleries and receive a percentage of the final sales price. 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 may 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

⁷ Supply Nation is a directory containing businesses with 50% or more Aboriginal and Torres Strait Islander ownership.

Box 3.1 – Independent artists use many channels to sell their artworks

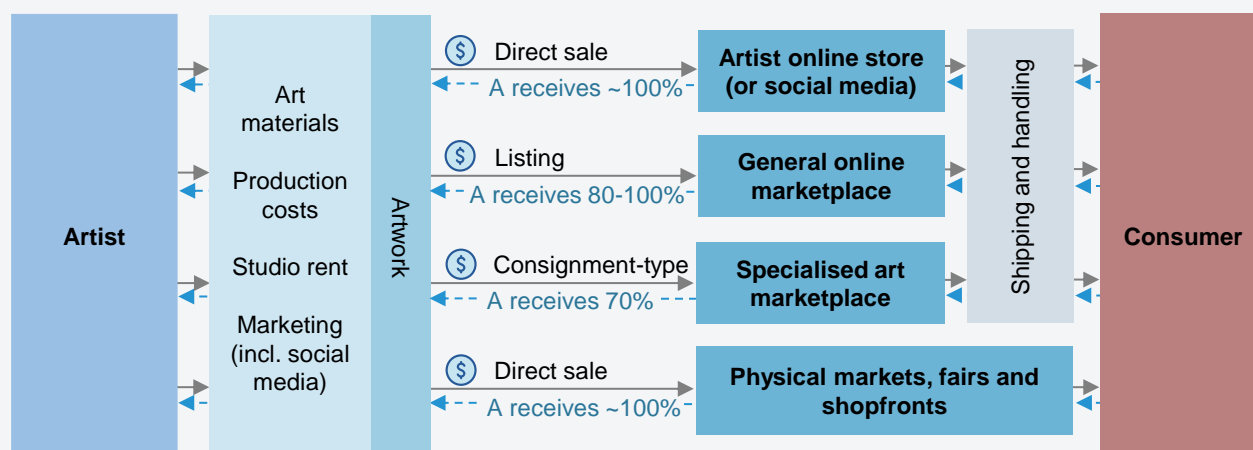
that aims to promote Aboriginal artists from language groups within New South Wales and provides them with opportunities to exhibit and sell their artworks, and other professional skills development opportunities (Boomalli 2022).

- **Commissioned artworks and designs.** Artists may receive commissions for specialised art for specific purposes or designs for use in publications.

Some independent artists have physical or online shopfronts to sell directly to consumers. Artists selling their works through physical markets incur a range of costs too but can directly connect with buyers, other artists and industry representatives.

Increasingly, online sales play a major role in artists' incomes. Artists can establish their own website or sell their art through online marketplaces, such as Etsy and ebay, which charge fees when art is sold. Some marketplaces specialise in art sales and provide additional services. For example, on Bluethumb, one of the largest online art market places, 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.

Artists can also use various social media sites such as Instagram, Facebook and TikTok to market and sell their original artworks. Artists can establish pages promoting their art-making practice and personal stories, and can choose to 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. Like selling through personal websites, social media requires ongoing management and can be time consuming to sustain (AACHWA, sub. 20, p. 8).



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 (chapter 8, box 8.3) — about half of its 201 member art dealer businesses sold artworks by independent artists (Arts Law, Copyright Agency and IartC, sub. 31, p. 88). An estimated 55% of 173 non-member organisations also sold artworks by independent artists. These member and non-member art dealer businesses include a mix of galleries, secondary market sellers, and retailers and wholesalers. Beyond art dealers, independent artists in regional and metropolitan areas have access to a range of sales channels. Income generated through each channel depends on commissions and other fees charged by intermediaries, such as galleries and online platforms (box 3.1).



Finding 3.3

Artworks by independent artists have a material presence in Aboriginal and Torres Strait Islander visual 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 estimates show that almost 2000 independent artists generate sales of almost \$13 million a year. About half of art dealer businesses sell the works of independent artists. In addition, independent artists produce commissioned artworks and sell directly to consumers through art fairs, online marketplaces and social media.

Of independent artists in regional and metropolitan areas, 56% are located outside the greater capital city region in their state or territory. There are substantial clusters of independent artists throughout the east coast of Australia, but independent artists are more dispersed along the west coast.

3.3 Original artworks and crafts

Original artworks account for the majority of revenue generated by the Aboriginal and Torres Strait Islander visual arts and crafts sector. Artworks made by artists not affiliated with art centres are sold directly to consumers or via galleries (box 3.1). However, most Aboriginal and Torres Strait Islander artworks are produced through art centres located in remote communities — they are sold directly by the art centre, either in shopfronts or online, or through an intermediary such as an art dealer or gallery.

Art centres mostly support artists located in remote areas by fulfilling an array of diverse roles, from general community service provision to services specific to art production (chapter 2, box 2.4). At the start of the artmaking 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 aspects of art centres, as well as the role played by government funding, are discussed further in chapters 9 and 10.

For the 2019-20 financial year, the Commission estimates that the total sales revenue of art centres was about \$43.4 million, of which \$35.3 million was attributed to artworks and \$8.1 million was earned from sales of products and merchandise. About 12 400 artists located in mostly remote areas practised art at these art centres, and about 7300 artists sold artworks through art centres. There are at least 152 art centres in

Australia,⁸ mainly in remote areas of South Australia, Western Australia and the Northern Territory, with a smaller number operating in Queensland, New South Wales and Victoria.

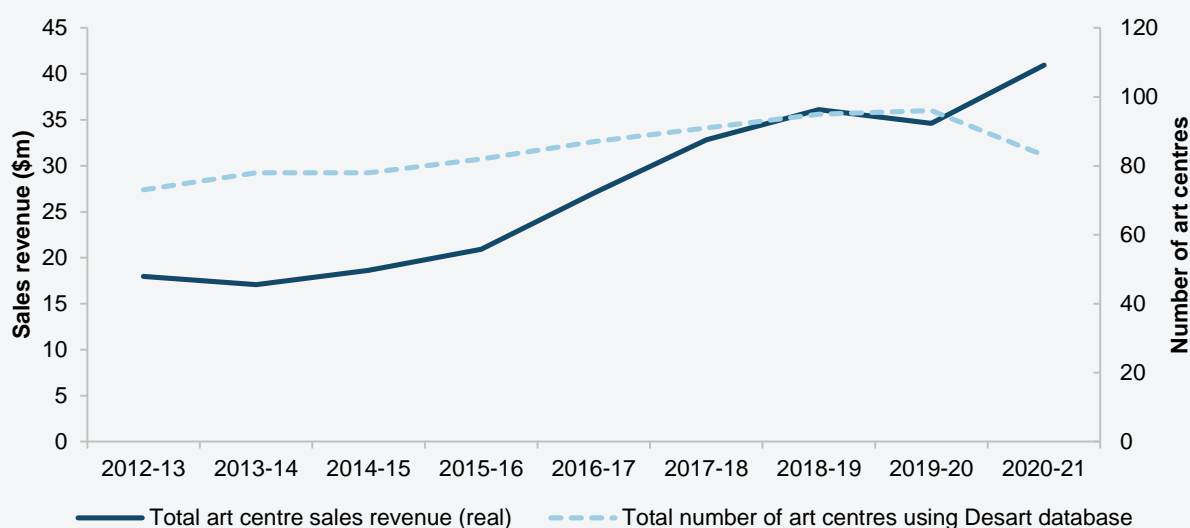
Artwork sales from art centres have more than doubled since 2012

Based on unpublished deidentified data from Desart's Stories Art Money (SAM) database (box 3.2), 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 3.10, panel a). This increase is due to a combination of increased real sales prices for artworks (appendix B, figure B.3) and growth in production from art centres (appendix B, figure B.2), but can also be partly explained by increased uptake of the SAM database.

Box 3.2 – 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, and manage artist records and inventory.

Uptake for this database steadily grew in the years leading up to the COVID-19 pandemic. In 2012, 12 art centres made use of SAM, with 63 others using a predecessor system — data provided to the Commission covers both SAM and its predecessor system. By the 2019-20 financial year, 96 art centres used SAM, which covers most of the (at least) 152 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.



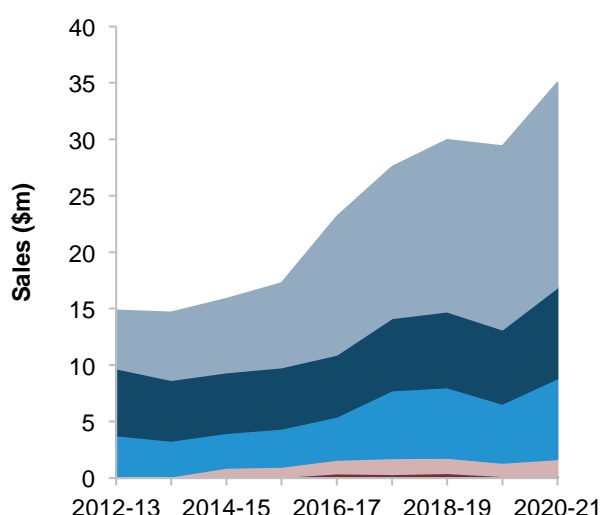
Sources: Desart (2022a); unpublished deidentified data from Desart (SAM database).

⁸ This estimate is based on the 81 art centres that received grants from the Indigenous Visual Arts Industry Support (IVAIS) program in 2019-20, 32 ORIC-registered medium-to-large art centres that were not IVAIS funding recipients and 39 ORIC-registered small art centres that were not IVAIS funding recipients.

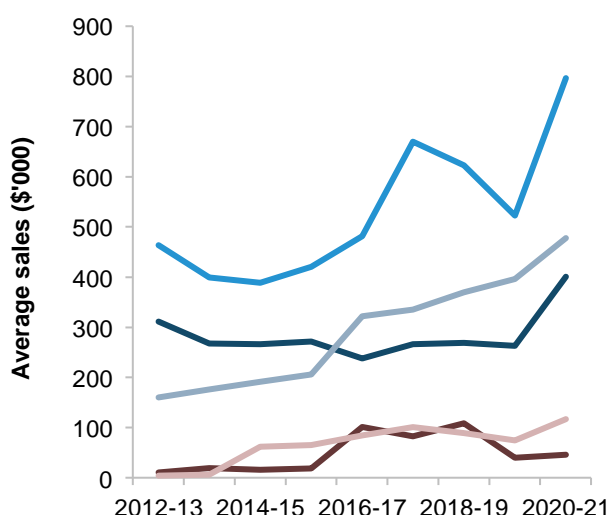
Sales growth was particularly strong among art centres in the Northern Territory, which more than tripled their total sales from \$5.1 million in 2012-13 to \$18.2 million in 2020-21 (figure 3.10) — however, this increase also reflects greater uptake of SAM by Northern Territory art centres. Between 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. Further insights from the SAM database are outlined in appendix B.

Figure 3.10 – 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



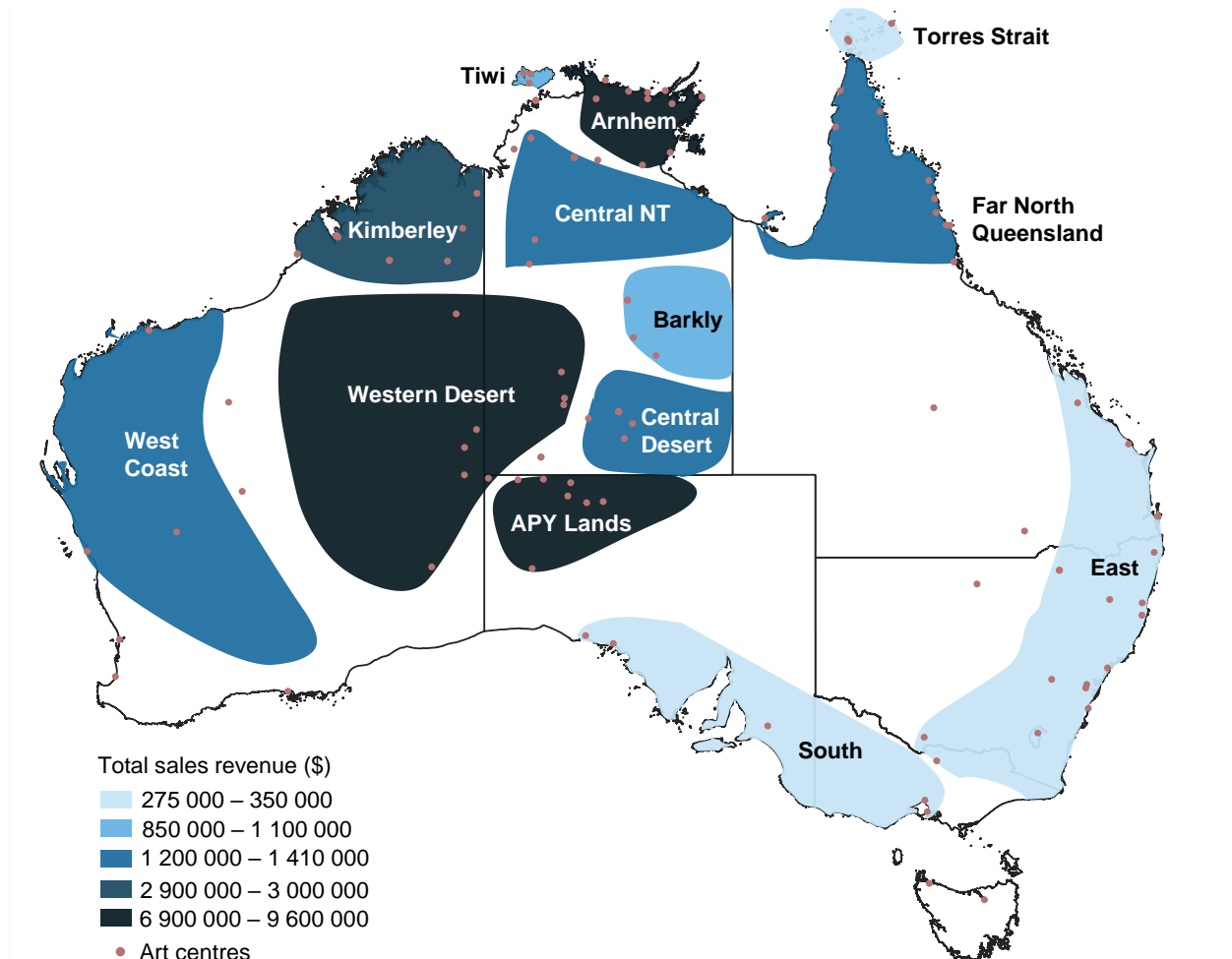
Victoria Queensland South Australia Western Australia Northern Territory

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).

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 total value of art sales 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 in the Barkly region (figure 3.11). Further analysis about differences in the economic characteristics of art regions can be found in appendix B.

Figure 3.11 – The scale of art sales varies greatly between art regions^{a,b,c,d}
Revenue from art centres



a. ‘APY Lands’ refers to Anangu Pitjantjatjara Yankunytjatjara lands. **b.** The geographic areas for the art regions are illustrative, not definitive boundaries. **c.** Data are for the 2020-21 financial year (based on Desart SAM data), except ‘East’ which is for 2019-20 (based on unpublished Office for the Arts data, which covers art centres that receive funding under the Indigenous Visual Arts Industry Support (IVAIS) program). **d.** The dots represent the location of 113 out of an estimated 152 art centres. Art centres are not directly comparable in their service provision.

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

Artworks produced at art centres are increasingly sold through consignment to commercial galleries

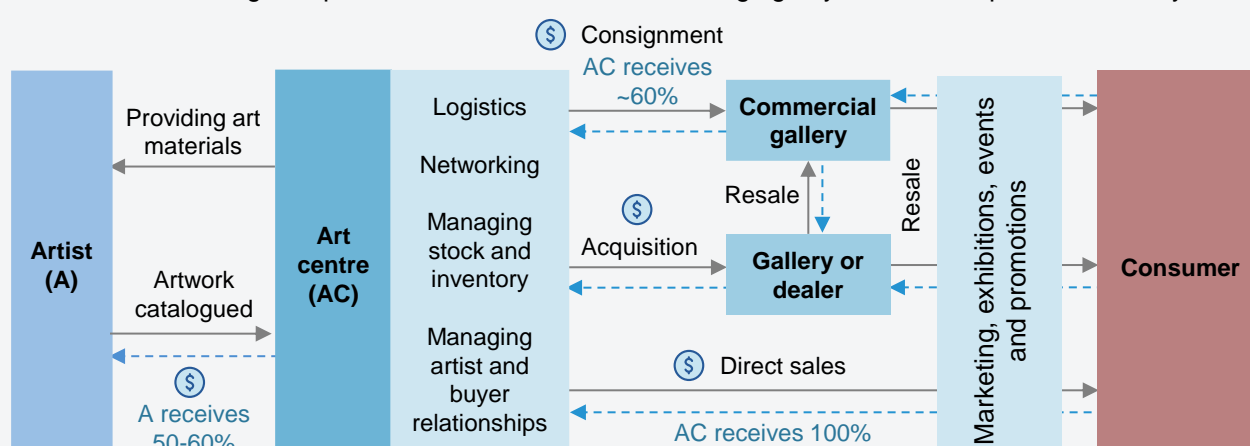
When artworks are ready to be sold, art centres can act as intermediaries and distributors to the market, connecting artists with buyers (box 3.3). Since 2017, art centres have increasingly used consignment agreements to sell artworks, with a small but growing share of sales occurring directly (appendix B). In particular, the share of online sales has grown rapidly, from about 1% in 2018 to just under 10% in 2020 (unpublished deidentified data from Desart).⁹ This increase has largely been due to art centres responding to

⁹ 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.

the COVID-19 pandemic by shifting sales to online channels. Across all sales methods, art centre artists on average receive between 50-60% of sales income.

Box 3.3 – 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. Art centres also act as 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 managing buyer relationships and inventory.



Art centre sales methods tend to range from selling through intermediaries 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 under consignment, 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 to the commercial gallery in exchange for upfront payment (chapter 8, box 8.2).
- **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.
 - For artworks priced over \$1000 that are sold by a wholesaler or dealer to another intermediary, the artist may be entitled to 5% of the sales price under the Resale Royalty scheme.
- **Direct sales.** These sales are conducted through art centres, community-owned galleries, or online art centre websites. They can 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.

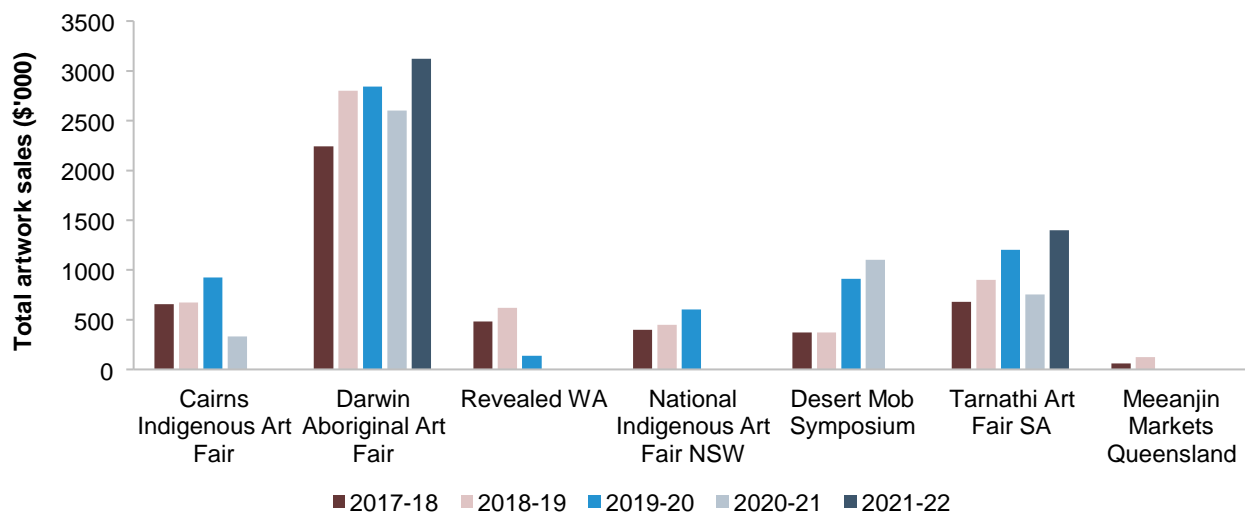
Source: Arts Law, Copyright Agency and IartC (sub. 31).

Art fairs and markets play an important role in artwork sales

In recent years, art centres have increasingly collaborated with Aboriginal and Torres Strait Islander 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 (figure 3.12).

Figure 3.12 – Art fairs are a growing avenue for art centre sales^{a,b}

Total artwork sales revenue from Aboriginal and Torres Strait Islander art fairs



a. 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, 2019b, p. 20, 2020, pp. 38–39, 2021a, pp. 30–32); First Hand Solutions, pers. comm. 20 August 2021; OFTA (2021f); 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 cultural and community events. 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 cultures.

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. This change has offered some advantages. For example, 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 (Office for the Arts 2021f), 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).



Finding 3.4

Art centres are the major source of production and sales of art from remote areas

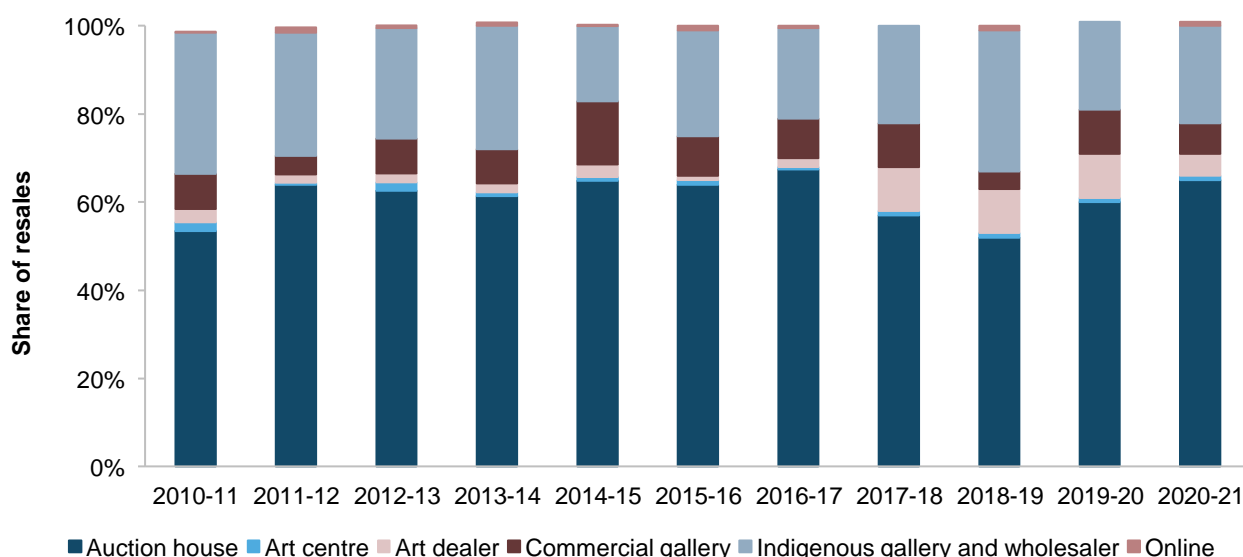
The Commission estimates that sales of artworks produced by art centre artists totalled between \$30–48 million in the 2019-20 financial year, and about 7300 artists sold at least one artwork. Total sales by art centres have more than doubled since 2012, but growth has been concentrated mostly in Northern 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.

Resales on the secondary market peaked in 2007 — but have not recovered from a post-GFC slump

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

Resales of Aboriginal and Torres Strait Islander art are mostly conducted by auction houses (figure 3.13). 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 3.13 – Most secondary market sales over \$1000 are sold by auction houses^{a,b}



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.

Source: Unpublished data from Copyright Agency.

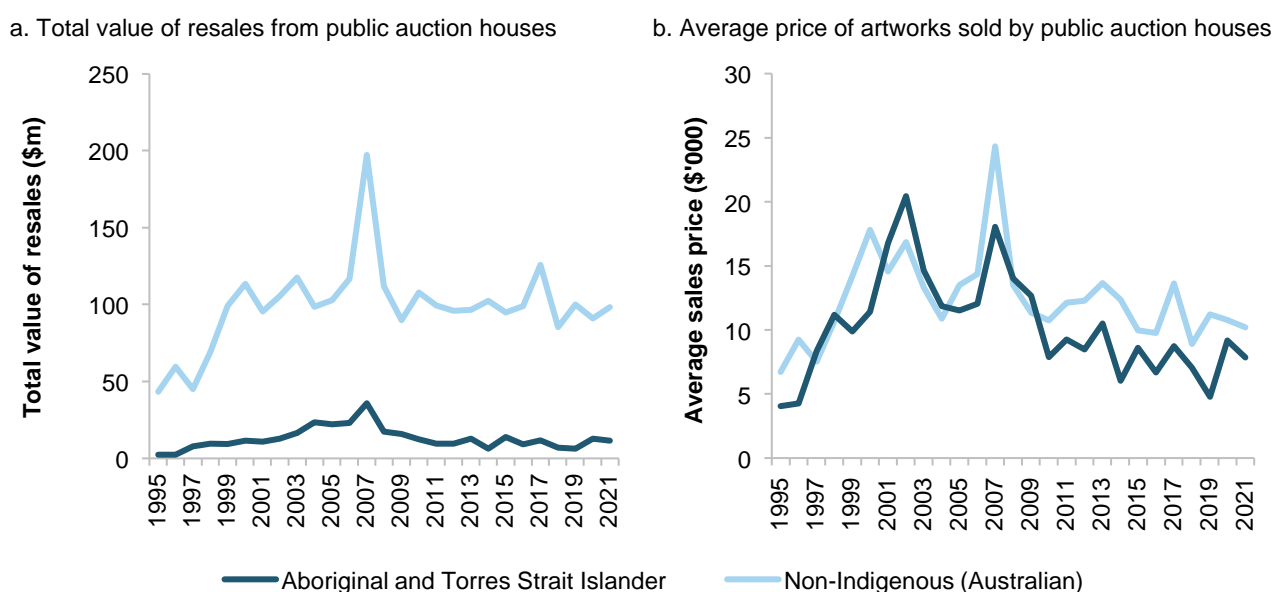
From the 1990s to the late 2000s, resales of Aboriginal and Torres Strait Islander art experienced sharp growth, peaking at about \$35.9 million in 2007 (figure 3.14, panel a). During this period, 'the top

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 an 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 dropped to \$17.5 million in 2008, and by 2021, have not recovered to their pre-GFC levels (figure 3.14, panel a). Average resale prices also dropped below those achieved by non-Indigenous Australian artists (figure 3.14, 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 3.14 – Resales of Aboriginal and Torres Strait Islander art collapsed after 2007 and have not returned to pre-GFC levels^a



a. Sales figures have been adjusted for inflation to 2021 dollars.

Source: Furphy (2022).

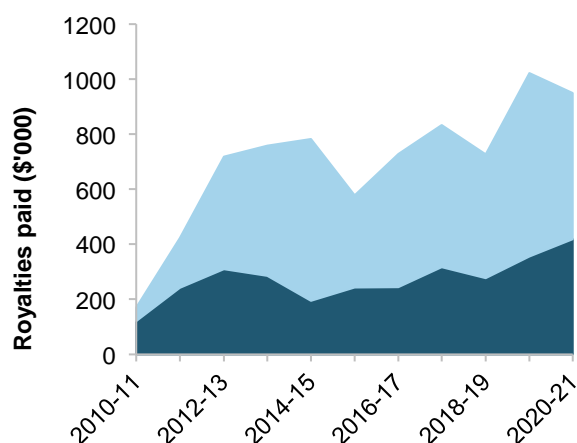
One potential reason for these trends is changes to rules for self-managed super funds (SMSFs) introduced by the Australian Government in 2011 (Lye and Hirschberg, sub. 7). These rule changes stipulated that SMSFs could not hold artworks as assets unless they were held for the sole purpose of providing retirement benefits (rather than current personal benefits), and included prohibitions on displaying artworks in investors' residential or business premises and requirements that artworks 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 only about 5% of Aboriginal and Torres Strait Islander artworks sold by private art businesses were to super funds (Woodhead 2014, p. 8).

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 3.15, panel a). A total of \$3 million has been paid to Aboriginal and Torres Strait Islander artists since the scheme was introduced in 2010.

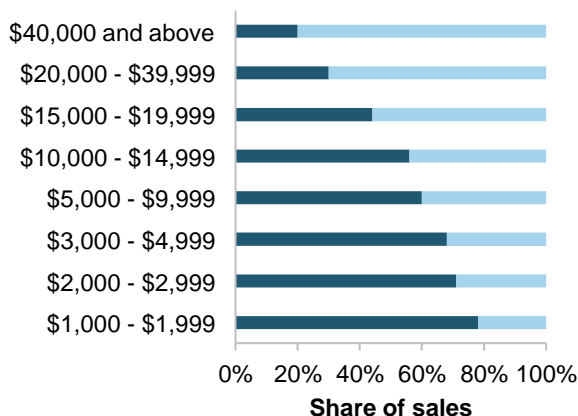
Figure 3.15 – Aboriginal and Torres Strait Islander artists and beneficiaries receive a substantial share of total resale royalties, primarily driven by lower-value resales^a

a. Royalties paid to artists or their beneficiaries



■ Aboriginal and Torres Strait Islander ■ Non-Indigenous (Australian)

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



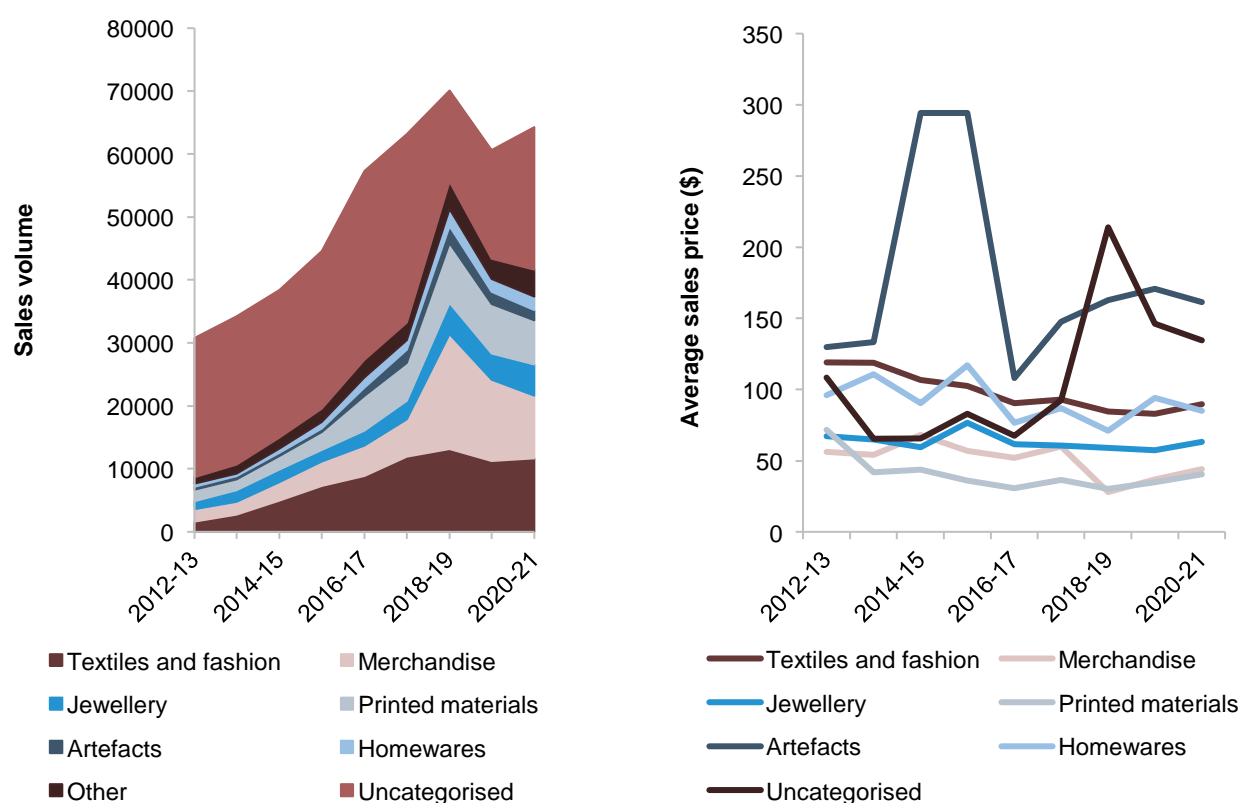
a. The years refer to financial years. Royalties paid have been adjusted for inflation to 2020-21 dollars.

Source: Commission analysis using unpublished data from Copyright Agency.

Most eligible resales of Aboriginal and Torres Strait Islander art were for lower-priced artworks (figure 3.15, panel b). For example, Aboriginal and Torres Strait Islander artworks comprised 78% of all \$1000 to \$1999 artworks covered by the scheme, but only 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 (appendix B).

3.4 Consumer products

Demand for consumer products bearing Aboriginal and Torres Strait Islander designs and styles has increased significantly over the past decade. These products are diverse — from fashion to charging cables — and can be found in a wide range of shops. Changes in the sales of merchandise at art centres are an example of this trend, doubling over the past decade (figure 3.16). During the 2019-20 financial year, art centres sold products totalling at least \$5.2 million.

Figure 3.16 – Sales of consumer products have increased over time

Source: Commission estimates from unpublished Desart (SAM) data.

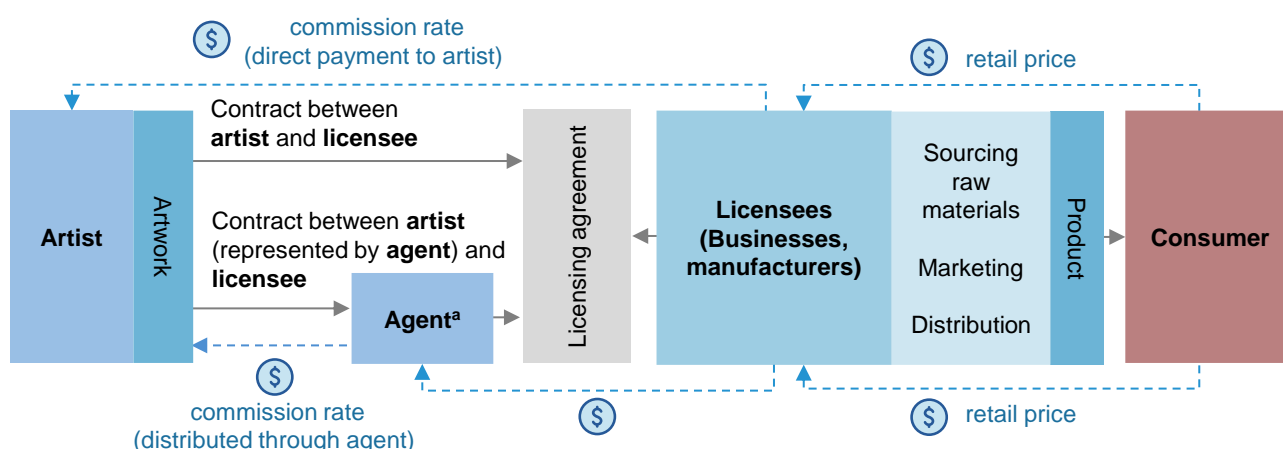
Licensed Aboriginal and Torres Strait Islander art products

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 or images may be printed onto a range of third-party products including clothing, merchandise and other household items. An agreement to let a third party use intellectual property is known as a *licence* (Arts Law 2010b). Licensing allows artists (including Aboriginal and Torres Strait Islander artists and communities) to retain ownership of their copyright, and to maintain control of how their work is used (Arts Law, Copyright Agency and IartC, sub. 31, p. 35).

Licensing can provide an additional revenue stream for artists (Arts Law, Copyright Agency and 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.

The process of licensing can be complex (figure 3.17). 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).

Figure 3.17 – 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 and IartC (sub. 31, p. 17).

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).

Income generated from licensing has been growing steadily

In recent years, Aboriginal and Torres Strait Islander artists have expressed strong interest in licensing their artworks. A recent survey of Desert 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. Some recent and well-known examples of collaborative licensing arrangements include:

- Warlukurlangu Artists Aboriginal Corporation's 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). The art centre generated about 25% of its income in the 2021-22 financial year from licensing agreements (Haskin 2022)
- Adairs collaborating with independent artists 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) (box 3.4).

Box 3.4 – Mangkaja x Gorman

In 2019, Gorman launched its Mangkaja x Gorman clothing collection, featuring the works of five artists from the Mangkaja Arts Resource Agency (Mangkaja Arts). Mangkaja Arts is an art centre located in Fitzroy Crossing in the northern parts of Western Australia. Artists in that region are ‘renowned for their uninhibited style and lively use of colour’ (Copyright Agency 2019).

A copyright licensing agreement was negotiated between Gorman and Mangkaja Arts, with support from the Copyright Agency, and is considered ‘a benchmark for future fashion licensing agreements’ (Copyright Agency 2019). The arrangement included fees paid to each individual artist, with some proceeds from the sale of garments being donated back to the art centre to fund a youth development program focusing on arts and education (Bamford 2020; MCA 2019).

One of the objectives of the collaboration was also to raise the profile of Mangkaja Arts and share the work of the artists. As Mangkaja Arts manager, Belinda Cook, said:

This project is a major opportunity to share with new audiences, younger audiences and those who have not yet been exposed to the brilliance of contemporary Indigenous art practice. We hope that this project will bring attention to not just our Mangkaja artists, but to the incredible art movement that is Australian Indigenous art — one that continues to be arguably the most successful and innovative art movement produced in Australia. (Belinda Cooke, quoted in Copyright Agency 2019)

And Lisa Gorman, creative director for Gorman, said:

There are other practical elements of the collaboration such as dual branding on swingtags, neck labels and hashtags in all marketing activity that direct the customer back to the artist and to possibly fuel a desire to continue to follow their work. (Lisa Gorman, quoted in MCA 2019)

The growth in income generated by agreements has been the result of 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) observed:

- a doubling in the number of artists needing licences — 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 income from licensing agreements generated by Aboriginal and Torres Strait Islander artists.

The Commission heard from a range of participants that royalties from licensing agreements mostly act as a supplementary income source rather than as a replacement for general income earned from sales, contract work and other commissioned artworks.

Beyond increasing their income, 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. Over time, this could result in increased sales of current and future products, and could also generate sales in the artist’s original works. One example of this is the Mangkaja x Gorman collaboration

(box 3.5), which resulted in a substantial increase in name recognition and stronger artwork sales for the Mangkaja Arts Resource Agency.

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. Products sold by Better World Arts are examples of licensing collaborations that have yielded significant cultural benefits (box 3.5).

Box 3.5 – Better World Arts: a collaborative operating model

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 operating model brings together Aboriginal and Torres Strait Islander artists and art centres, with traditional artisans based overseas. BWA works with Aboriginal and Torres Strait Islander artists from across Australia — in regional and remote communities and cities — to create artworks. Artworks are featured on products through contractual licensing agreements with artists, who are paid royalties as a percentage of sales. Traditional artisans in remote regions of Asia and South America are engaged 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) and online.

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 allows artists to earn a steady income, as royalties are paid per item sold rather than as a one-off licensing payment. In addition, BWA products enable 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.

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 chains and ensure that its products are authentic and respectful of the cultures that they represent.

Contracting directly with artists also ensures that their rights are respected, maintained and protected. Artists retain ownership over the intellectual property contained in their works 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

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

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 3.6).

Box 3.6 – 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.

Products designed by Aboriginal and Torres Strait Islander artists

Rather than license a specific artwork, Aboriginal and Torres Strait Islander artists often design products that are produced by others. This can take the form of print-on-demand manufacturing, such as 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).

The Commission estimates that, as at April 2022, 36% of products listed on Redbubble under search terms associated with Aboriginal and Torres Strait Islander art were attributable to Aboriginal and Torres Strait Islander artists. The remaining listings were by non-Indigenous users often based overseas, for products that were a mixture of plagiarised artworks and designs that had no connection to Aboriginal and Torres Strait Islander artists. The misuse of Aboriginal and Torres Strait Islander cultures on these marketplaces is discussed further in chapter 4.

In other cases, Aboriginal and Torres Strait Islander artists collaborate with manufacturers to produce and design products. One example of this is the production of printed textiles by artists and art centres (box 3.7)

Box 3.7 – How do artists and art centres produce printed textiles?

Aboriginal and Torres Strait Islander artists and designers use printing processes to produce fashion products at a larger scale than original artworks. Some art centres have in-house screen printing facilities they use to apply art onto textiles (Marrawuddi Arts and Culture 2022; Ngukurr Arts Aboriginal Corporation 2022). Others collaborate with providers of screen-printing services to produce textiles that incorporate Aboriginal and Torres Strait Islander designs.

- Publisher Textiles & Papers is a producer of hand printed textiles, wallpapers and clothing based in Sydney. In 2007, Publisher began working with art centres, to produce hand printed textiles bearing the designs of Aboriginal artists. Some of these textiles are sold directly by the art centres, whereas others are sold in store or online by Publisher. At present, Publisher has relationships with six art centres: Bábbarra Women's Centre, Merrepen Arts, Nagula, Ikuntji Artists, Injalak Arts and Bula Bula Arts (Publisher Textiles & Papers 2021).
- NORTH Home Textiles is a not-for-profit organisation that supports the development of textiles designed by artists in remote community art centres (NORTH 2022b). It developed fashion and homewares collections in collaboration with artists and also sold them through their retail arm. In 2018-19, NORTH reported \$111 792 in income from fashion sales and \$47 407 in income from upholstery sales, drawn from designs by Tiwi Islands art centres. By 2020-21, NORTH's total sales income had grown almost 70% to \$274 968, largely due to art centre-developed fashion collections. In 2022, NORTH announced that their retail enterprise would be closing after observing that a key gap in textiles development was no longer present in the fashion industry.

Casting our gaze over the industry as it stands now, it is abundantly visible that the gap we saw back then no longer exists. We feel excited to be watching such incredible First Nations designers emerge, alongside the integration of Indigenous designs into the mainstream market through meaningful and dignified collaboration processes. (NORTH 2022a)

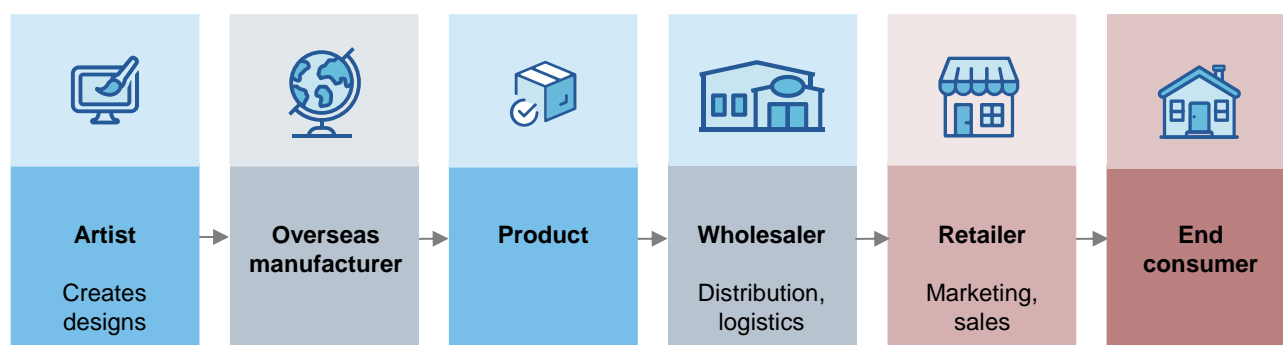
Mass-produced consumer products without a licence

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 make a range of consumer products typically for the souvenir market, including fridge magnets, keyrings, thongs, among others, that include Indigenous-style designs but are not made or licensed by an Aboriginal and Torres Strait Islander person.

These are produced 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 3.18 provides a general example of the supply chain for mass-produced consumer products without licensing agreements.

Figure 3.18 – An example of a supply chain for mass-produced consumer products



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, there is a strong likelihood that these products will not be manufactured using traditional materials or methods. For example, a boomerang or didgeridoo is traditionally made of wood, but some mass-produced didgeridoos or boomerangs are made of bamboo instead.¹⁰

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.

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 some consumers, are indistinguishable from those made by Aboriginal and Torres Strait Islander artists.

Such designs and artworks are not created an Aboriginal and Torres Strait Islander person, and often appropriate or misuse various elements of different Aboriginal and Torres Strait Islander communities' styles and designs. Where this is the case, such products may cause a range of economic and cultural harms. Chapter 4 discusses these issues in more detail.

¹⁰ 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. Authenticity in arts and crafts

Key points

- ✳ **There are different views about the criteria determining the authenticity of products in Aboriginal and Torres Strait Islander visual arts and crafts markets. However, three factors tend to have a significant bearing on assessments of product authenticity:**
 - was the product made by (or produced under licence from) an Aboriginal and Torres Strait Islander person?
 - where the product makes use of Indigenous Intellectual and Cultural Property (ICIP), such as storylines, motifs and symbols, does the author have the relevant cultural authorisation to use that ICIP?
 - does the product infringe the copyright of an Aboriginal and Torres Strait Islander artist's work?
- ✳ **Many products that are Aboriginal and Torres Strait Islander in their design or style ('Indigenous-style' products) are made by non-Indigenous people. Some of these use the work of Aboriginal and Torres Strait Islander artists without a valid licensing agreement. For example, up to 75% of Indigenous-style consumer products are not made or licensed by an Aboriginal and Torres Strait Islander person.**
- ✳ **There are many instances where ICIP is used in visual arts and crafts without the permission of traditional owners, and often in offensive and inappropriate ways.**
- ✳ **Aboriginal and Torres Strait Islander artists' arts and crafts, particularly designs and art works, are often reproduced by others. Such reproductions may constitute copyright infringements — for example, considerable copyright infringements are occurring in the print-on-demand market.**
- ✳ **Indigenous-style products that are created by non-Indigenous people, use ICIP without the relevant cultural permissions, and/or infringe the copyright of Aboriginal and Torres Strait Islander artists' work have wide-ranging and detrimental effects, including:**
 - loss and dilution of Aboriginal and Torres Strait Islander cultures, due to stereotyping and homogenisation
 - lost income opportunities for Aboriginal and Torres Strait Islander artists and communities
 - consumer hesitancy about purchasing Aboriginal and Torres Strait Islander arts and crafts, especially in segments of the market where inauthentic products are common and sold alongside authentic products.
- ✳ **These products persist for a range of reasons, including:**
 - difficulties for consumers in ascertaining the authenticity (or not) of products
 - a lack of understanding — on the part of some consumers and producers — about the harms caused by unauthorised use of ICIP and non-Indigenous authorship of Indigenous-style arts and crafts
 - limited legal restrictions on or requirements for using ICIP
 - barriers to accessing justice for artists and communities.

This chapter examines the key authenticity-related issues that affect Aboriginal and Torres Strait Islander visual arts and crafts (section 4.1). Section 4.2 presents evidence on the nature and scale of these issues. Section 4.3 examines the effects of inauthentic arts and crafts on Aboriginal and Torres Strait Islander people, communities and beyond (including consumers and the broader product markets). Finally, section 4.4 considers the main reasons why the production and sale of inauthentic Aboriginal and Torres Strait Islander arts and crafts continues to persist.

4.1 What determines authenticity?

Whether an item is ‘authentic’ — or to many, ‘real’, ‘genuine’, ‘true’ and ‘original’ — is an important consideration for consumers and producers of many types of product.

In the context of Aboriginal and Torres Strait Islander visual arts and crafts, products that are regarded as authentic tend to have distinct economic and cultural value compared with products considered to be inauthentic. Their cultural value comes from the history, culture and symbolism embedded in the product. Consumers are typically willing to pay more for authentic products (or at least would expect to pay less for inauthentic products) for this reason, resulting in authentic products generally having greater economic value than similar inauthentic products.

However, what authentic means is context-specific and means different things to different people.

A forged painting, for example, 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)

Authenticity is ‘a pretty vexed conversation, even within Indigenous Australia’ (AIATSIS, quoted in HoRSCIA 2018b, p. 14). Many consider that defining authenticity in the context of Aboriginal and Torres Strait Islander visual arts and crafts is not a straightforward task (HoRSCIA 2018b, p. 68). Some participants also queried the relevance of the term ‘authenticity’ to Aboriginal and Torres Strait Islander artists.

Our organisations’ experience is that the term authentic is not one used by most Aboriginal and Torres Strait Islander artists in relation to the work they create. The work these artists create belongs to them and the ICIP imbedded in those works belongs to them. It should be noted that the words authentic and inauthentic are predominantly used by a non-Indigenous audience to understand this issue. (Arts Law, Copyright Agency and IartC, sub. 31, p. 42)

The Commission 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.

Authorship is a key consideration

Despite significant variation in proposed 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 Island[er] culture. This means that the ‘author’ or ‘creator’ must be an Aboriginal or Torres Strait Island[er] artist or group of artists. (sub. 4, p. 9)

Generally, the Commission heard that Aboriginal and Torres Strait Islander authorship does and should be taken to include arrangements where Aboriginal and Torres Strait Islander artists enter into licensing agreements with (Aboriginal and Torres Strait Islander or non-Indigenous) third parties for reproduction of their works, or manufacturing of products depicting their designs. Indeed, deeming such licensed products to be authentic is critical for supporting the economic and cultural aspirations of artists and their communities.

Cultural authorisation is also an important factor

For some, the issue of cultural authorisation is also a key determinant of authenticity. Under customary law, authorisation is a requirement where a traditional cultural expression — a form of Indigenous Cultural and Intellectual Property (section 5.2) — is depicted in the work.¹¹ The need for authorisation to depict certain cultural expressions is grounded in the meaning and significance of art for Aboriginal and Torres Strait Islander people and communities as a means of storytelling and teaching passed down through generations (chapter 2).

Where certain Aboriginal and Torres Strait Islander cultural expressions are 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.

Only with the authority or permission of the relevant Aboriginal and Torres Strait Islander community can a reproduction, adaption, or style of work be considered authentic. Producing an art product or merchandise without that consent breaches the community’s custodial rights. (Arts Law, Copyright Agency and IartC, sub. 31, p. 26)

Indeed, in responding to the draft report — where the Commission posited a definition of inauthenticity mostly focused on authorship — some participants raised concerns about using a definition that does not deal with the issue of cultural misappropriation (Goss, sub. 40, p. 4).

A lack of authorisation can, in some participants’ views, make an artwork inauthentic, regardless of whether or not the work was authored by an Aboriginal and Torres Strait Islander artist.

There is no universally agreed definition of authenticity or inauthenticity ... Inauthentic art can also be defined as an ATSI [Aboriginal and Torres Strait Islander] person depict[ing] images and stories in their artwork without the custodian’s permission. (Indigenous Communications Group, sub. 43, p. 3)

¹¹ As such, there are some contemporary Aboriginal and Torres Strait Islander arts and crafts (that do not depict traditional cultural expressions) that do not require cultural permissions to be created, but are still considered authentic (where the work is created by an Aboriginal or Torres Strait Islander person, thus satisfying the authorship limb of authenticity) (chapter 2).

In its submission on the draft report, the Australia Council acknowledged that both Indigenous and non-Indigenous people misuse cultural expressions:

As the draft report notes, authenticity is complex. Findings from the NIACA [National Indigenous Arts and Cultural Authority] consultation highlighted that cultural appropriation is not only carried out by non-Indigenous people; it also occurs among First Nations people.

We welcome the diagram in the draft report that shows that there can be ICIP breaches that meet this definition of ‘authenticity’ which is focused on material that is First Nations made or licensed. Given authenticity is a contested term, the Productivity Commission could test the idea of whether ‘First Nations made or licensed criteria’ could be an alternative descriptor to ‘authenticity criteria’. (sub. 49, p. 10)

Additional considerations?

Although authorship and authorisation were the key requirements for authenticity raised by participants and the literature, other factors were also raised by participants. Copyright infringements were highlighted as a key example of inauthenticity, where Aboriginal and Torres Strait Islander artists’ artworks are reproduced without permission. The Law Council of Australia noted that ‘in the case of blatant copies or counterfeits, there is likely to be little controversy that such works are inauthentic’ (sub. 19, p. 3).

Some participants also considered that in order for a work to be considered authentic Aboriginal and Torres Strait Islander arts and crafts, additional criteria need to be met, namely the need for the work to embody, depict and reflect traditional cultural expressions in a recognisable way. Regarding the definition used in the draft report, one participant said:

I note the proposed definition and that it appears to be supported by a number of First Nations stakeholders. However, I have some concerns that it is inconsistent with descriptions of authentic Aboriginal and Torres Strait Islander Visual Arts and Craft in the draft report. In particular, a connection to a First Nations culture and community. In essence it focuses on the artist and does not include the traditional community whose TK [traditional knowledge] is the inspiration for the work. (Goss, sub. 40, p. 4)

However, such a requirement may result in contemporary art and craft made by an Aboriginal and Torres Strait Islander artist — art and craft that may not, visibly or otherwise, depict traditional cultural stories or expressions — being considered inauthentic Aboriginal and Torres Strait Islander art and craft. Desart noted this issue in its initial submission to this study:

In Desart’s view, there is no need to complicate the definition of Aboriginal / Torres Strait Island 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)

Finally, ethical treatment of Aboriginal and Torres Strait Islander artists is considered by some 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).

While ethical treatment of artists is an important issue and one that understandably affects people’s view of the authenticity of a work, the Commission, for the purposes of this study, considers this to be a distinct issue relating to market participants’ behaviour, rather than the authenticity or otherwise of a particular product.

This delineation does not detract from the fact that ethical dealings in the market for Aboriginal and Torres Strait Islander visual arts and crafts are essential. Chapter 8 discusses the ethical conduct toward Aboriginal and Torres Strait Islander artists in further detail.

In summary, it is clear that there are differing views about what makes a product in the Aboriginal and Torres Strait Islander visual arts and crafts market authentic or inauthentic. Moreover, what is inauthentic can be both user-specific and context-specific.

Given this, the Commission has approached the long-standing authenticity-related concerns in this sector by considering the product characteristics that influence individuals' assessments of authenticity, as discussed in the following section. The Commission does not consider that a single, strict definition of authenticity (or inauthenticity) is needed to examine and address the key issues affecting the market. Indeed, some commentators have expressed concern 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).



Finding 4.1

Several factors contribute to assessments of the authenticity (or not) of Aboriginal and Torres Strait Islander visual arts and crafts

Authenticity is a complex and contested concept. However, three factors have a significant bearing on assessments of product authenticity in the Aboriginal and Torres Strait Islander visual arts and crafts market:

- whether the product was made or licensed by an Aboriginal and Torres Strait Islander person
- where the product makes use of Indigenous Intellectual and Cultural Property (ICIP), whether the author has the relevant cultural authorisation to use that ICIP
- whether the product infringes the copyright of an Aboriginal and Torres Strait Islander artist's work.

4.2 There are different forms of inauthenticity

The Commission has sought to assess the nature and scale of three factors that have a significant bearing on assessments of authenticity in the Aboriginal and Torres Strait Islander visual arts and crafts market.

- whether the product was created or licensed by an Aboriginal and Torres Strait Islander person
- where the product makes use of Indigenous Intellectual and Cultural Property (ICIP), whether the author has the relevant cultural authorisation to use that ICIP
- whether the product infringes the copyright of an Aboriginal and Torres Strait Islander artists' work.

Non-Indigenous authorship was the most commonly raised authenticity concern in this study, but these forms of inauthenticity can overlap and arise in different combinations. For example, a non-Indigenous person may use ICIP in a work without authorisation or reproduce a copied work on a product. In other instances, an Aboriginal and Torres Strait Islander artist may not have the required authorisation to paint certain stories in a work.

Non-Indigenous authorship

Overwhelmingly, participants in this study as well as previous reviews have expressed concern about the prevalence of visual arts and crafts that are Aboriginal and Torres Strait Islander in their design or style

(referred to as 'Indigenous-style products') but made by non-Indigenous people without appropriate licensing agreements. In this study, these products are referred to as non-Indigenous authored products.

The concentration of such products varies across different product categories. Non-Indigenous authorship is less prevalent in the market for original artworks than in the market for souvenirs and merchandise. Indeed, the House of Representatives inquiry report that was the genesis of this study concluded:

First Nations fine art does not appear to be affected by authenticity issues to the same extent as the souvenir trade. This is due in part to the buyers being more discerning and the need for galleries to protect their reputation by ensuring the provenance of more expensive artworks. (HoRSCIA 2018b, p. xii)

In a similar vein, the degree of non-Indigenous authorship present may also depend on the setting in which the purchase takes place. Souvenirs available in certain tourist hotspots are generally more likely to be non-Indigenous authored products compared to souvenirs sold by an art gallery. Indeed, the Commission visited some souvenir marketplaces in tourist hotspots where almost all products sold appeared to be non-Indigenous authored. Conversely, the Commission visited some souvenir shops, galleries and airports in various locations where none or a minority of the products sold appeared to be non-Indigenous authored.

In the absence of other data sources on non-Indigenous authored products, the Commission analysed particular segments of the souvenir, digital stock image, and print-on-demand merchandise markets in order to better understand the prevalence of non-Indigenous authored products.

The results of this analysis are indicative of the prevalence of non-Indigenous authorship in these three markets. In particular, the data relates to *product listings* rather than the *quantity* of each product in stock and available in stores, or the *number of times* each image is downloaded and used. Further detail about the methods used to collect and analyse this data are in appendix C.

The consumer product market is a mixed bag

Aboriginal and Torres Strait Islander art and designs are often used in consumer products such as woodcrafts, homewares, souvenirs and jewellery (chapter 3). To assess the prevalence of non-Indigenous authored products in the consumer product market, and in the absence of other data sources on these types of products, the Commission collected data from online product listings from selected souvenir and gifts wholesalers and retailers representing a majority of sellers in the market. They sold a mix of Aboriginal and Torres Strait Islander authored and non-Indigenous authored products.

Of the products in this sample containing designs that could be associated with Aboriginal and Torres Strait Islander art, the Commission found that 69% to 76%¹² of over 860 product listings were non-Indigenous authored products. This is in line 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).

The Commission's analysis shows that souvenir products that are intrinsically Aboriginal and Torres Strait Islander (such as boomerangs or didgeridoos) are far more likely to be authored (or co-authored) by an Aboriginal and Torres Strait Islander person or produced under a valid licensing agreement (36% to 46% of such product listings were considered to be non-Indigenous authored) compared with products (such as

¹² Approximately 7% of product listings contained insufficient or contradictory information to ascertain, with a level of certainty, whether it is authored (or co-authored) by an Aboriginal and Torres Strait Islander person, or produced under a valid licensing agreement.

general souvenirs and gifts) that are not specifically related to Aboriginal and Torres Strait Islander cultures (83% to 89% were considered to be non-Indigenous authored) (figure 4.1).

Figure 4.1 – Non-Indigenous authored 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 non-Indigenous authored, Aboriginal and Torres Strait Islander authored or ambiguous



a. 'General souvenirs' contains products including bags, keyrings, magnets, stationery, coasters and other 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 and retailers.

The stock image market appears saturated with non-Indigenous authored art

Stock images — digital artworks and photographs that are licensed for general purposes (for a fee) — allow people to easily search for and find images, without having to engage a graphic designer or 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 art styles and motifs.

The Commission used web-scraping to gather data about stock image listings, to understand the scale of non-Indigenous authored images in this market. This exercise revealed that a significant proportion of the Indigenous-style stock images are made by non-Indigenous people (box 4.1). It also showed that Indigenous-style stock images are popular and are used around the world. In the course of undertaking this exercise, the Commission observed the use of non-Indigenous authored 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).

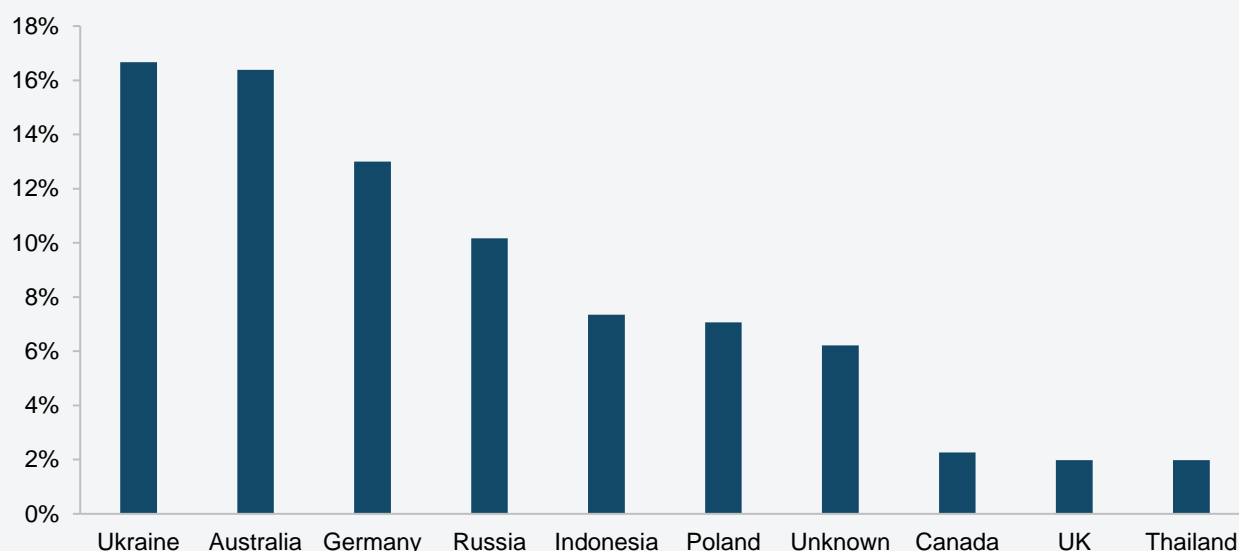
Box 4.1 – The stock image market

To assess the degree of non-Indigenous authorship in the stock image market, the Commission 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), customers in over 150 countries (Shutterstock 2022a) and an overall market share of over 60% (Datanyze 2022).

The Commission examined a random sample of Indigenous-style images uploaded to Shutterstock, drawing from search terms related to Australian Aboriginal art, and undertook additional analysis and reverse-image searches to assess whether or not listings were non-Indigenous authored.

In the sample, there was no evidence to indicate (on creator profiles, biographies or otherwise) that any of the stock images were created by Aboriginal and Torres Strait Islander artists, or produced under a licensing 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).

Top 10 countries of origin by share of 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. Some of these may have been created by an Aboriginal and Torres Strait Islander person, but there was insufficient information to conclude with certainty whether, and to what extent, this is the case. There was also insufficient evidence to determine whether any of the stock images (Australian or otherwise) were created under a licensing agreement with an Aboriginal and Torres Strait Islander person.

Non-Indigenous authored art is 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 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.

The Commission used web-scraping to gather data about print-on-demand product listings, to understand the scale of non-Indigenous authored images in the market. This showed that over 60% of over 400 sampled listings were likely made by a non-Indigenous person (box 4.2). Different forms of inauthenticity were detected.

- Over 36% of the listings in the sample were original Indigenous-style designs *not* created or licensed by an Aboriginal and Torres Strait Islander artist.
- About 13% of listings were non-Australian Aboriginal and Torres Strait Islander style designs being marketed as Australian Aboriginal and Torres Strait Islander designs.
- About 15% were likely copyright infringements of Aboriginal and Torres Strait Islander artists' works (discussed later).

Box 4.2 – The print-on-demand merchandise market

To understand the print-on-demand merchandise market, the Commission examined product listings on Redbubble.com (Redbubble), 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, Redbubble listings are likely representative of the broader print-on-demand merchandise market.

Indigenous-style designs and stock images made by non-Indigenous people are prevalent

The Commission examined a random sample of Indigenous-style images uploaded to Redbubble, drawing from search terms related to Australian Aboriginal art, and undertook additional analysis and reverse-image searches to assess whether or not listings were non-Indigenous authored.

Many Redbubble creators uploaded original (non-copyright infringing) designs depicting Aboriginal and Torres Strait Islander designs, styles and motifs. Some of these designs were listed by self-identifying Aboriginal and Torres Strait Islander artists — roughly a third of sampled listings were from Aboriginal and Torres Strait Islander artists.

However, the Commission estimates that over a third of the listings in the sample were original Indigenous-style designs *not* created by an Aboriginal and Torres Strait Islander artist or licensed by an Aboriginal and Torres Strait Islander artist. (Where a creator had not indicated that they are an Aboriginal and Torres Strait Islander person, it was assumed that they are not. However, given that Redbubble does not require creators to supply this information, it may well be the case that the proportion of listings attributable to Aboriginal and Torres Strait Islander artists is higher.)

Box 4.2 – The print-on-demand merchandise market

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 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 used descriptions such as ‘Aboriginal art’ or ‘Australian Aboriginal art’ with other generic descriptors, but instead depicted recognisable designs and styles from other countries such as India and Mexico, or generic patterns or stock images. In some cases, the product name did not mention ‘Australia’ or ‘Aboriginal’ — and instead described the design as ‘Indian Art’ or ‘African Ethnic Seamless Patterns’ — yet they appeared in searches for ‘Aboriginal art’ as phrases related to Australian Aboriginal and Torres Strait Islander art are used in the product search tags.

A smaller, but still significant proportion of the sampled listings were of this kind — approximately 13%. While such images do not depict Aboriginal and Torres Strait Islander designs, 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).

Lack of cultural authorisation

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, these cultural expressions — a form of ICIP — are frequently used in visual arts and crafts without the consent of Aboriginal and Torres Strait Islander people and communities. They can also be used out of context and without benefits flowing back to Aboriginal and Torres Strait Islander people and communities.

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 4.2). 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)

Other terms are used interchangeably to describe the culture and heritage of First Nations¹³ 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 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).

Figure 4.2 – 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.

¹³ For this study, the term ‘First Nations’ is used to describe the First Peoples of all countries collectively.

Use of ICIP in visual arts and crafts

Many participants in this study (and previous inquiries and reviews) spoke about the significant role that visual arts and crafts play in transmitting Aboriginal and Torres Strait Islander cultures (chapter 2, 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)

ICIP is commonly used in visual arts and crafts without permission

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).

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 can be 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 people 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)

As the markets for products containing Aboriginal and Torres Strait Islander style art and designs have expanded, ICIP has increasingly been used without the permission of traditional owners and in ways that are inconsistent with traditional laws and customs. Often this occurs when non-Indigenous people create Indigenous-style works.

There have also been reports of visual art and craft in the market depicting specific cultural motifs, storylines and/or styles, made by Aboriginal and Torres Strait Islander artists, but which lack the permissions from the relevant custodians of the depicted cultural expressions. Participants in the South Australian Government's consultation on the issue of inauthentic art and craft raised this issue:

Stakeholders reported a significant presence in the market of artworks that are considered to be inauthentic due to lateral cultural appropriation. Various artists and arts workers raised this issue and gave examples of work that they think is inappropriate, as it includes unauthorised Aboriginal-style designs and symbols, either specific or generic.

These works may be produced by Aboriginal people, but the styles, designs or ancestral stories are borrowed or derived from groups unrelated to the artist and the artist does not have permission to use them. (sub. 21, p. 13)

Overall, the use of ICIP could be viewed as a process of artistic innovation. But from the viewpoint of traditional owners, it often constitutes misappropriation, undermining customary laws and causing economic and cultural harms.

Copyright infringement

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). 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 and IartC, sub. 31, p. 54). 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, this unauthorised copying can constitute a breach of an artist's copyright (copyright infringement) — which is illegal under copyright law (box 4.3).

Box 4.3 – When do copyright and moral rights infringements occur?

Copyright

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, using either the whole or an important, essential or distinctive part of the copyright material without authorisation, and without an applicable exception under the *Copyright Act 1968* (Cth). Copyright infringement is illegal, and a range of penalties can be enforced (Australian Copyright Council 2019).

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).

Where the original Aboriginal and Torres Strait Islander artist is not appropriately attributed by the reproducer (irrespective of whether consent was obtained or not) and/or the work is used in a way that would negatively impact the original artist's reputation, this can also constitute a breach of the artist's moral rights.

Copyright infringement of Aboriginal and Torres Strait Islander art is occurring 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. Analysis, including reverse image searching, of the randomly sampled print-on-demand listings (box 4.2) indicated a considerable degree of copyright infringement, with roughly 15% being probable reproductions that breach the copyright of Aboriginal and Torres Strait Islander artists.¹⁴

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 often not reproduced in full, and instead were small extracts of the larger piece, and sometimes recoloured.

¹⁴ 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 artwork 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 of low resolution, 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 inconsistent or abrupt ways)
- the creator's Redbubble library contains a variety of miscellaneous designs of substantially differing styles and potential infringements of popular media franchises or other artworks.

While copyright infringement is a risk that all artists face, analysis of search listings for Australian art on Redbubble indicated that copyright infringement was more prevalent for Aboriginal and Torres Strait Islander artists' works than non-Indigenous Australian artists' works. The Commission analysed a sample of approximately 450 Redbubble product listings displayed from a search of 'Australian Art' and 'Australia Art'. Listings not related to Australia or not by an Australian artist were excluded, and the remaining listings were categorised as either depicting Aboriginal and Torres Strait Islander designs or not.

The analysis found that, when comparing designs that depicted Aboriginal and Torres Strait Islander designs and those that depicted 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.



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 Aboriginal and Torres Strait Islander visual arts and crafts dominate the consumer product (mostly wholesale souvenirs), digital, and print-on-demand merchandise markets.

- In the consumer product (wholesale souvenirs) market, approximately two-thirds to three-quarters of product offerings are made without the involvement of Aboriginal and Torres Strait Islander people, though prevalence varies by product category.
- Inauthentic products are commonplace in the print-on-demand merchandise market, including designs made by non-Indigenous artists and potential copyright infringements.
- In the digital art marketplace, over 80% of stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs are non-Indigenous authored.

4.3 Who is affected by these issues and how?

The creation and sale of Aboriginal and Torres Strait Islander visual arts and crafts that use ICIP without authorisation, are made by a non-Indigenous person and/or are copyright infringements of Aboriginal and Torres Strait Islander works have wide-ranging and detrimental effects, including:

- loss and dilution of Aboriginal and Torres Strait Islander cultures, including over time as a result of stereotyping and homogenisation
- lost opportunities and income sources for Aboriginal and Torres Strait Islander artists and communities
- broader consumer hesitancy around purchasing Aboriginal and Torres Strait Islander visual art and craft.

Effect on Aboriginal and Torres Strait Islander people and cultures

The creation of Indigenous-style products that are made by non-Indigenous people and/or without relevant cultural authorisation can cause substantial cultural harm.

Participants in this study as well as the House of Representatives Standing Committee on Indigenous Affairs (HoRSCIA) 2018 inquiry highlighted the theft and loss of cultures that results from these forms of inauthentic arts and crafts:

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)

The loss of ownership, responsibility and control of Aboriginal and Torres Strait Islander people's cultures was also emphasised:

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 Yiriki Art Centre, sub. 25, p. 2)

The cultural harm resulting from misuse of culture has been acknowledged and accepted by Australian courts. For example, in the *Carpets* case (appendix D, box D.4), a group of Aboriginal and Torres Strait Islander artists took action against a carpet importer that had reproduced their works onto carpets without authorisation and sold them for a profit. The works used cultural clan images, and in some cases 'were altered by the manufacturer which distorted the cultural message of the works' (Parkin 2020, p. 34). The Court accepted that the traditional economic framing and assessment of harm was not appropriate in this case and that cultural harms were significant — that is, harm that extended beyond the individual artist themselves to the community as a whole — which should be recognised and compensated for.

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 2022b; Blak Business 2021). As such, there is diversity and dynamism in Aboriginal and Torres Strait Islander cultures. However, this is masked as a result of the presence of arts and crafts that depict generic, stereotypical 'Indigenous' styles and motifs, typically made by non-Indigenous people. The styles and motifs are used in combinations that hold no meaning or significance to Aboriginal and Torres Strait Islander people, misrepresenting the underlying history and storylines.

Rising popularity of Aboriginal and Torres Strait Islander art, craft and cultures (in Australia¹⁵ and globally) (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.

¹⁵ A 2014 survey found that 64% of Australians have a strong or growing interest in Indigenous arts (Bridson et al. 2015, p. 19).

Products that incorrectly depict Aboriginal and Torres Strait Islander culture can give the perception of a single, generic, stereotypical 'Indigenous' culture, particularly to people who have limited knowledge about Aboriginal and Torres Strait Islander cultures (section 4.4). These products miscommunicate Aboriginal and Torres Strait Islander culture. Consumers are misled by these stories, and may end up misinformed. 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 misrepresentation of cultures risks the dilution of Aboriginal and Torres Strait Islander cultures.

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). When their cultures and ICIP are misappropriated, the effects can be deeply personal.

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 4.4).

Box 4.4 – 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 personal hurt caused by inauthentic arts and crafts, 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 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)

Box 4.4 – Hurt, emotional distress and a loss of self, identity and expression resulting from inauthentic arts and crafts

Others have described the loss of Aboriginal and Torres Strait Islander people's 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)

As a result, artists may 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)

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)

In the *Birubi Penalty Case*,¹⁶ evidence was given about the effects on cultural identity of using important cultural expressions without permission:

[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)

¹⁶ *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996.

Lost economic opportunities for Aboriginal and Torres Strait Islander artists and communities

The prevalence and pervasiveness of Indigenous-style arts and crafts that are created by non-Indigenous people and/or that misuse ICIP leads to economic harms for Aboriginal and Torres Strait Islander artists and communities.

Aboriginal and Torres Strait Islander people and communities do not benefit from the production and sale of non-Indigenous authored products, despite these producers essentially trading off of Aboriginal and Torres Strait Islander culture and tapping into consumer demand for products of a particular style. In addition, the presence of non-Indigenous authored products affects the ability of Aboriginal and Torres Strait Islander artists to compete in the market, with resulting negative effects on the viability of authentic products generally, and fewer economic opportunities and income streams for Aboriginal and Torres Strait Islander artists and communities.

The presence of non-Indigenous authored products affects the ability of Aboriginal and Torres Strait Islander artists to compete in the market

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 often 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 are often hand-crafted (chapter 3, box 3.6). In these cases, it is not possible for producers 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 profit margins (or even losses) being incurred by artists.

The prospect of competing with inauthentic products in the market was identified as a barrier to some Aboriginal and Torres Strait Islander artists and art centres engaging in third-party licensing of works. Participants noted concerns around creating licensed reproductions of their work ‘in a market flooded with cheap fake product’ (Desart, sub. 4, p. 11), where these licensed products compete directly with inauthentic products. For example, in a survey conducted by Desart, 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).

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, mass-produced 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, p. 227).

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 miss out on opportunities and income streams

Arts and crafts are an important way in which Aboriginal and Torres Strait Islander people earn income — through opportunities to create, display and sell their work, and the resulting income from these endeavours. For example, the Australia Council noted that:

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, Aboriginal and Torres Strait Islander artists may miss out on economic opportunities and income streams if customers inadvertently favour cheaper or more easily accessible inauthentic works. As 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 their styles appropriated, non-Indigenous artists are also financially benefiting 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 Yirriki Art Centre, sub. 25, p. 2)

Some consumers are misled or unaware of these issues

The existence of Indigenous-style arts and crafts that are created by non-Indigenous people and/or that misuse ICIP 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 visual 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 issues affecting Aboriginal and Torres Strait Islander people (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 Aboriginal and Torres Strait Islander arts and crafts more accessible to buyers across the world. 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 gift 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, 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).

Inauthentic products can also lead to broader consumer hesitancy

Once made aware of the distinction between authentic and inauthentic arts and crafts — most consumers (from both domestic and international markets) stated that they cared about buying authentic products and would be willing to pay more for authentic products (KPMG 2021, pp. 50–54). However, in practice it can often be very difficult for consumers to assess the authenticity or not of Aboriginal and Torres Strait Islander art and craft, which can lead to broader consumer hesitancy about making a purchase at all.

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).



Finding 4.3

Inauthentic visual arts and crafts have wide-ranging negative effects

The existence and prevalence of inauthentic visual arts and crafts in the market has wide-ranging and detrimental effects on both Aboriginal and Torres Strait Islander people and the broader Australian community. These include both cultural harms (such as cultural dilution and personal offence) 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 often misrepresent Aboriginal and Torres Strait Islander cultures and have the potential to mislead consumers.

4.4 Why do these issues exist and persist?

Authentic and inauthentic products are often indistinguishable

Many consumers may purchase inauthentic art and craft products due to a lack of awareness of the problems they cause. But even when consumers understand and appreciate the problem of inauthentic art and craft, they can still face difficulties identifying authentic products from inauthentic ones. While the

evidence from consumer surveys is mixed,¹⁷ 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 ... 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)

Difficulties in distinguishing authentic products from inauthentic ones arise mainly as a result of:

- consumers focusing on the aesthetic value and price (as an indicator of significance and value) of a product rather than the underlying story behind the work¹⁸
- reliance on place of manufacture as an indication of authenticity or otherwise
- 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.

Price and aesthetics may not be a good indicator of authorship

Consumers are generally willing to pay more for authentic Aboriginal and Torres Strait Islander products, as a result of the skill and cultural practices (including traditional manufacturing processes) that Aboriginal and Torres Strait Islander artists use in creating these products.

The Commission's analysis of wholesaler product listing data suggests that non-Indigenous authored products generally undercut those products created or licensed by an Aboriginal and Torres Strait Islander artist by a significant margin. There are large differences between the average prices of products created by an Aboriginal and Torres Strait Islander artist and those that are not (table 4.1). Across the most prevalent products in the sample, products that were authored (or co-authored) by an Aboriginal and Torres Strait Islander person, or produced under a valid licensing agreement, were on average 1.8 times more expensive than a non-Indigenous authored product of the same type.

However, the extent of the price differential varies across product types (table 4.1). There are cases where the price differentials between particular Indigenous and non-Indigenous authored products are small (or non-existent) (figure 4.3). As such, a consumer who relies on price to indicate authenticity may find it difficult to correctly distinguish between authentic and authentic products in some specific product markets.

¹⁷ A 2018 survey by consumer organisation CHOICE (HoRSCIA 2018, sub. 145, p. 1) found that almost half of surveyed consumers (62%) reported having difficulty distinguishing between authentic and inauthentic Indigenous art and craft products. 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).

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. 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.




Table 4.1 – Average prices and price differentials of souvenir products

	Average price of Aboriginal and Torres Strait Islander authored product (\$)	Average price of non-Indigenous authored product (\$)	Authorship 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 Indigenous and non-Indigenous authored products, and one wholesaler exclusively selling Aboriginal and Torres Strait Islander authored products.

Figure 4.3 – Price is not always a good indicator of authorship

(a) \$11 (approx.) boomerang choices

	\$10.82 6 inch Aboriginal and Torres Strait Islander authored
	\$10.82 8 inch Non-Indigenous authored
	\$10.82 (each) 18 inch Non-Indigenous authored

(b) \$3 (approx.) keyring choices

	\$2.50 Aboriginal and Torres Strait Islander authored
	\$2.95 Aboriginal and Torres Strait Islander authored
	\$3.00 Non-Indigenous authored
	\$3.30 Non-Indigenous authored

Source: Product listings of various online wholesalers selling souvenir products.

It is also often difficult for consumers to determine a product's authenticity by looking at the product itself. For example, a non-expert consumer will find it difficult to determine whether a product infringes copyright — and it is unrealistic to expect consumers to investigate which product is the original and then assess whether any misuse of Aboriginal and Torres Strait Islander cultural expressions has occurred prior to purchasing a product.

Place of manufacture is not a reliable authorship indicator

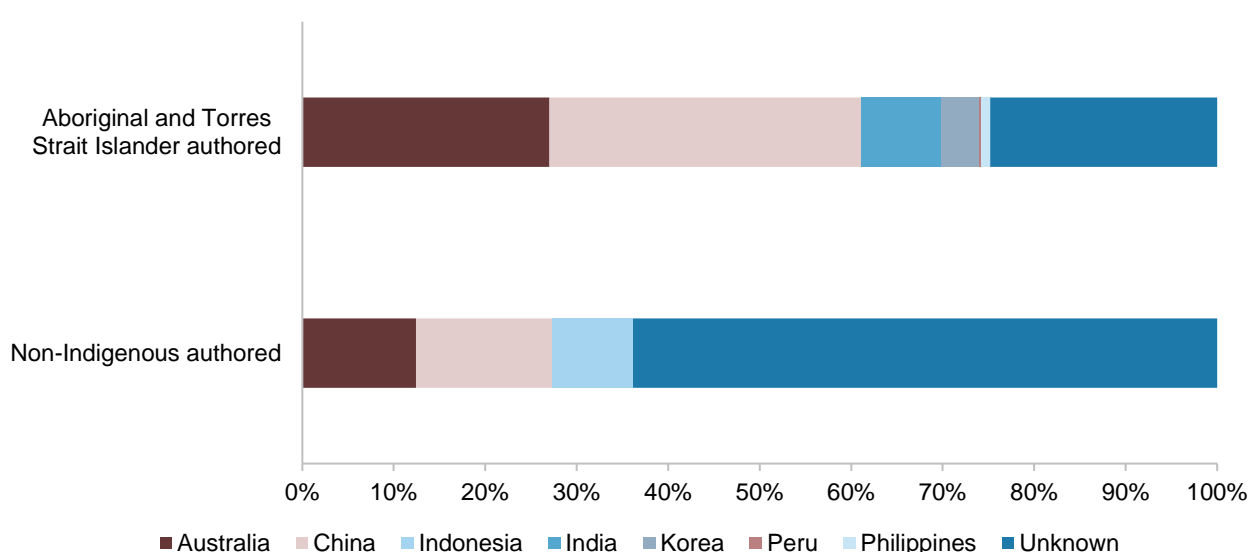
It may seem intuitive that consumer products that are not made in Australia — where the vast majority of Aboriginal and Torres Strait Islander people live — are likely to be non-Indigenous authored products. However, a product's place of manufacture is not in itself a reliable determinant of authorship.

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 is widely considered not to 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. The Commission's analysis shows that approximately 88% of non-Indigenous authored and 73% of Indigenous authored products are made overseas (figure 4.4).

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 4.4 – Some but not all Aboriginal and Torres Strait Islander authored products are made in Australia, while most non-Indigenous authored products are made overseas
Share of products, by country of origin



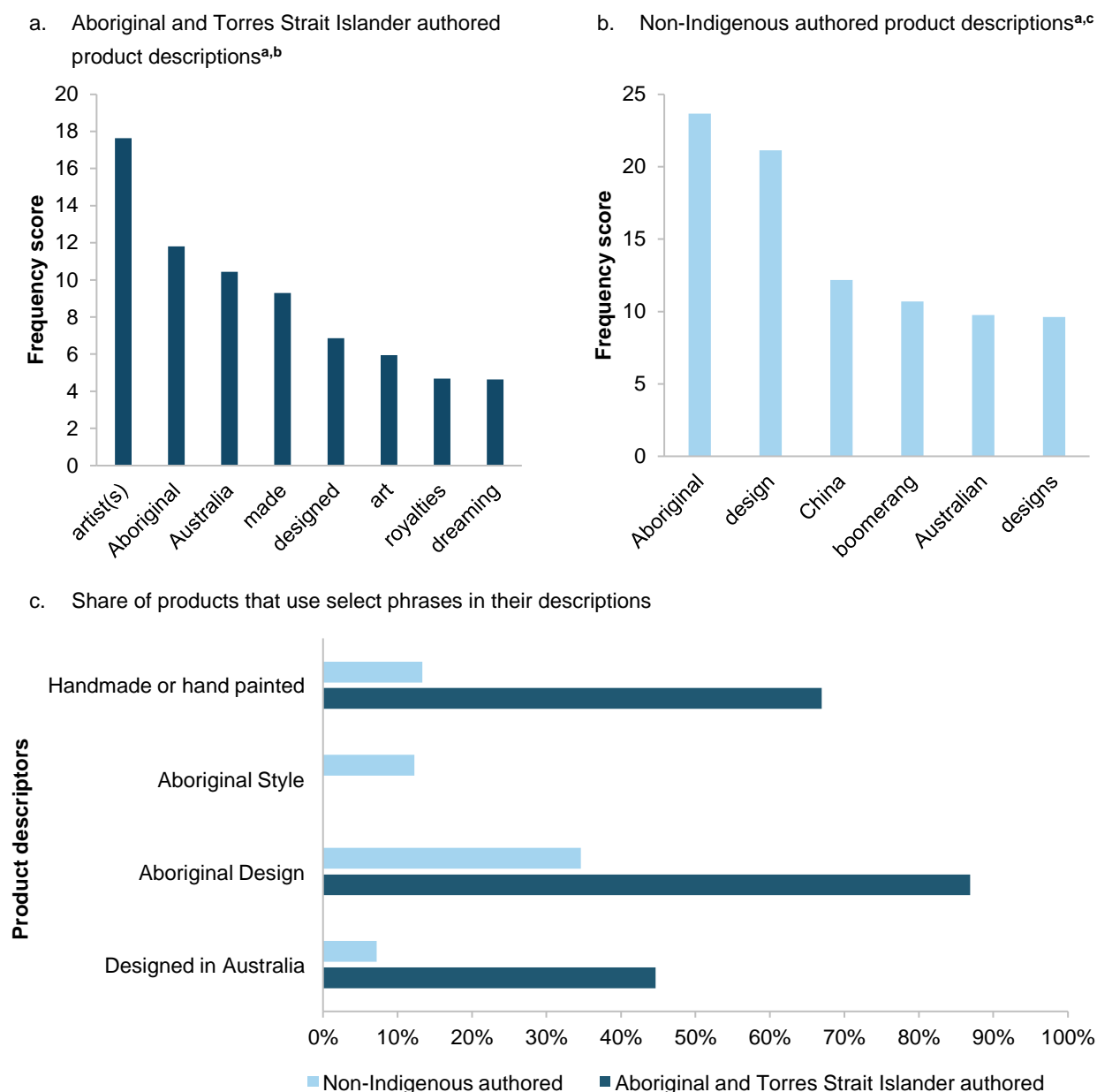
Source: Commission analysis using web listing data from five wholesalers selling both authentic and inauthentic products, and one wholesaler exclusively selling authentic products.

Terms used to describe products are often confusing or ambiguous

The Commission examined a range of wholesaler websites offering Aboriginal and Torres Strait Islander art and craft products, 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 authorship.

Figure 4.5 provides a summary of this analysis.

Figure 4.5 – Products are described similarly regardless of authorship^{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 Aboriginal and Torres Strait Islander authored products was approximately 59. **c.** The average number of words in a product listing for non-Indigenous authored products was approximately 7.

Source: Commission analysis using wholesaler listing data. Wholesalers include those specialising in Aboriginal and Torres Strait Islander authored products and wholesalers with a mix of Aboriginal and Torres Strait Islander authored and non-Indigenous authored products.

In the Commission's sample, individual words used in the descriptions of authentic and inauthentic products are largely distinct (figure 4.5, 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 products is required to ascertain whether a product is likely to be authentic or inauthentic based on its description.

Without background knowledge about Aboriginal and Torres Strait Islander arts and crafts, or even the time and ability to compare terms used in product listings in order to make an educated guess as to the authenticity of a product, it is easy for consumers to be misled.

Exacerbating this, phrases are 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 4.5, panel c). For example, the words 'design' and 'designed' could be read as being almost synonymous by the average consumer. However, they give rise to very different claims. Describing a product as 'Aboriginal designed' implies that the artist responsible for the work was an 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.

Participants highlighted the importance of consumer education to facilitate more informed purchasing decisions.

... Australian consumers should be empowered to become advocates for the protection of authentic art. To assist in the reduction of inauthentic art, education should be provided to First Nations people and artists, as well as the public (end consumers). (DACC, sub. 57, p. 6)

Similarly, the Queensland Government said:

Consumer education campaigns need to be implemented that highlight trusted suppliers and the value and integrity of authentic work. Altering consumer behaviour in relation to purchasing cheaper souvenirs and keepsake gifts will require a large, well-resourced, and ongoing campaign. It will also require greater support for the First Nations visual arts, craft and merchandise sector to respond to grow supply chains to meet market demand at appropriate price points. (sub. 60, p. 9)

Lack of legal protections

The use of ICIP in visual arts and crafts is not directly regulated, resulting in important aspects of culture being used without the consent of the relevant Aboriginal and Torres Strait Islander communities.

Compounding this issue, the production of Indigenous-style products by non-Indigenous people is only illegal where false and misleading representations are made or where copyright is infringed.

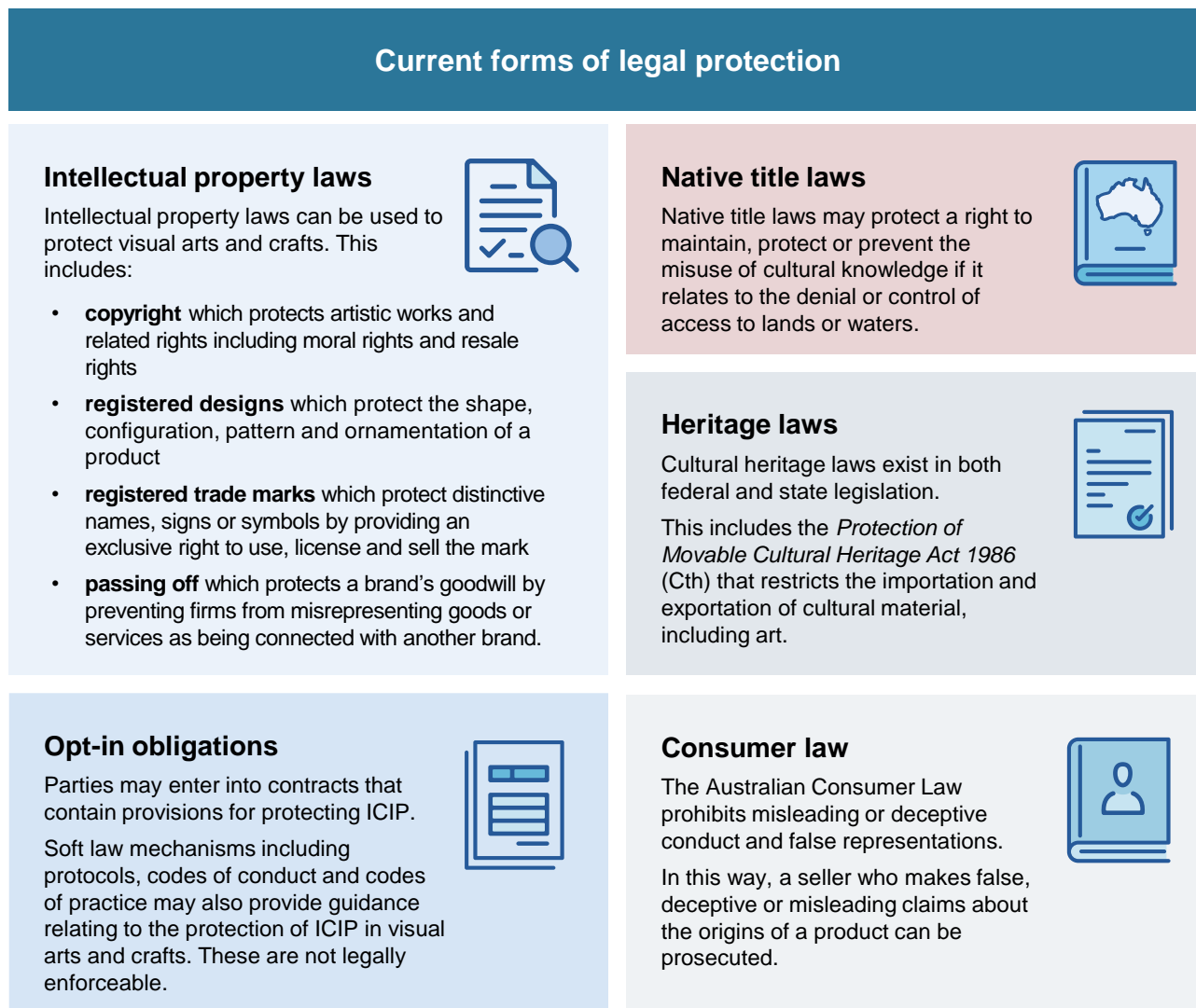
Existing laws do not prevent the use of ICIP in inauthentic products

There are some existing legal mechanisms and obligations that can help prevent the use of ICIP contained in inauthentic products (figure 4.6). However, it is often incidental coverage and the ability to determine when and

how ICIP is used is only available where it coincides with some other action. For example, while copyright law prohibits the use of certain works without permission, it provides only incidental limits on the use of ICIP.

Figure 4.6 – 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).

As the Department of Infrastructure, Transport, Regional Development, Communications and the Arts said:

It is generally acknowledged that current Australian legislation protecting copyright in works by individual artists does not apply well to Indigenous Knowledge because of factors such as ongoing community rights and ownership. (sub. 51, p. 4)

The shortcomings of existing legal mechanisms were widely acknowledged by study participants (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; Minter Ellison, sub. 18, p. 6; SA Government, sub. 21, p. 21; Whinn, sub. 22, p. 3).

Overall, there are very few limits on the use of ICIP in inauthentic products. This is because existing laws are not designed to provide systematic or reliable protection for ICIP.

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 shortcomings of current legal protections in their ability to protect Aboriginal and Torres Strait Islander cultural expressions are discussed further in chapter 5 and appendix D.

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 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. Producing general Indigenous-style products without contravening the Copyright Act and ACL is possible and legal.

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)

Similarly, legal remedies under the Copyright Act can be pursued where the work in question is a reproduction of an Aboriginal and Torres Strait Islander artist’s work. However, for many artists, the time and resource-intensive nature of seeking legal assistance to enforce copyright is prohibitive.

Access to justice

Even where existing laws provide some protection against the production of inauthentic works, a lack of awareness of their legal rights or the inability of Aboriginal and Torres Strait Islander artists to access appropriate legal resources contributes to the persistence of inauthentic products in the market.

As mentioned, copyright infringements are able to be prosecuted under the *Copyright Act 1968* (Cth). However, while some Aboriginal and Torres Strait Islander artists are utilising these legal protections to remove inauthentic products from the market, it is apparent that many others are unaware of or unable to access the legal services necessary to enforce existing legal and contractual rights and seek appropriate legal remedies.

Some copyright enforcement is taking place

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, 2022e). 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 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 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 involved 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 the above matters are 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.

But many artists are unable to access legal services to pursue legal remedies or are unaware of their rights

Despite the existence of these initiatives, there are still many instances where industry organisations are unable to provide required legal support. Arts Law, Copyright Agency and IartC highlighted this issue in their submission:

[Funding for the Arts Law Centre of Australia] is insufficient to provide our core services to all potential artist clients and expand our capacity to provide access to justice to artists who need the advice and go without it. Each year, Justice Connect estimates that 8.5 million Australians – or roughly 1 in 3 people – have a legal problem; and that half of these people do not or cannot access legal assistance. Even assuming that a modest proportion of those people are artists, that leaves potentially tens of thousands of Australians with arts-related legal problems that go unsolved and unadvised every single year. (sub. 31, p. 21)

The nature of online marketplaces means copyright infringement can be widespread. Stephen Hogarth (sub. 35, p. 1) reported sending ‘100s of takedowns a week now to websites like Amazon, Wish, Aliexpress, Zazzle, Redbubble plus heaps more’. Without financial support, the costs associated with engaging legal services can be prohibitive. Aboriginal and Torres Strait Islander artists may also face additional geographical, language or cultural barriers when attempting to engage legal services:

Many of the costs in enforcing consumer law are “hidden”, particularly in relation to enforcement. 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. (Law Council of Australia, sub. 19, p. 9)

Additionally, Aboriginal and Torres Strait Islander artists may be unaware of the legal rights afforded to them and subsequently do not seek legal remedies even where they have a legitimate cause of action.

[M]any of these artists are unaware of their legal rights and have very limited understanding, if any, of copyright. Some artists believe that if they have sold their original artwork to a business, then that organisation has the right to reproduce that artwork without their consent and without paying a licensing fee. The IAC [Indigenous Art Code] refers these artists to the Arts Law Centre of Australia for legal advice, but resources are limited and these actions are best taken before a contract is entered into, rather than by seeking remediation. (Indigenous Art Code, HoRSCIA, sub. 138, p. 3)

These limitations in accessing legal remedies mean that often, inauthentic products continue to go unchallenged in the market, and Aboriginal and Torres Strait Islander people are not compensated for the economic and cultural harms they experience.

Some people do not understand that they are misusing ICIP, and the harm it causes

It may be the case that people produce inauthentic Indigenous art and craft products because they genuinely do not understand that they are engaging in misuse of Aboriginal and Torres Strait Islander cultures and ICIP, 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 art and craft and cultures generally. For example, in the *Dreamtime Creations* case,¹⁹ the owner of a 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).

As summarised by Parkin:

Mr Antoniou’s defence was largely premised on his belief that there was a ‘world of distinction’ between Aboriginal fine art and souvenirs. Mr Antoniou explained that Aboriginal fine art are one-off works by Aboriginal people whereas souvenirs were not considered Aboriginal fine art. In Mr Antoniou’s view, anything that was hand painted was genuine and Aboriginal art. Further, because the name Ubanno Brown was a pseudonym, Mr Antoniou said he could add that name to works painted by Mr Goodridge without representing they were painted by an Aboriginal person. Interestingly, while there was a focus on the use of the pseudonym, its use does not change the

¹⁹ *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* [2009] FCA 1545.

fact of the Aboriginal style of painting which continues to give the impression that it is painted by an Aboriginal person. (Parkin 2020, p. 51)

Ultimately, the misuse in this case comes down to 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, p. 52, citing Desart, HoRSCIA 2018, sub. 87)

Artist and/or community education about the significance of Aboriginal and Torres Strait Islander art and ICIP, as well as the harms that misuse causes, is likely to be the main means of addressing this issue.

Artists do not always know how to obtain cultural permission

As discussed in section 4.2, there have been instances where Aboriginal and Torres Strait Islander people have reproduced ICIP (such as motifs or styles) that they do not have the cultural authorisation to use. This can be because they have not sought and obtained permission to depict from the custodians of the cultural expressions used in their work.

As noted by the South Australian Government, this 'lateral cultural appropriation' by Aboriginal and Torres Strait Islander artists is:

... usually unintentional, and occurs typically when artists are working independently, and do not have access to an art centre or other support structure to provide guidance. (sub. 21, p. 13)

Such misuse can be a result of Aboriginal and Torres Strait Islander people attempting to heal from the effects of colonialism and later government policies, by using art to reconnect with their culture and heritage (chapter 2). For example:

... it can occur when artists wish to express their Aboriginality but, for a range of reasons (e.g. dispossession, displacement, being of the Stolen Generation) may not know their own language group or heritage, or the appropriate visual language to use. It can result in artists making works for which they do not have cultural authority, or using derivative, well-known Aboriginal art styles, such as dot painting or cross hatching. (SA Government, sub. 21, p. 13)

As a result, it may be the case that these people and artists (as well as non-Indigenous arts and bodies) have very limited knowledge or understanding of the protocols and processes around obtaining cultural permissions.

Participants in this study have overwhelmingly emphasised the need for improved education and awareness of cultural protocols around the use of Indigenous cultural expressions, including seeking permission from custodians, the significance of cultural expressions and the permissions process, and the harms that arise when permission is not sought and granted.

There was discussion surrounding appropriation of cultural heritage and that the reason Indigenous art may be more targeted in this area is because it might be harder to track down where the work is from, people are not educated, have a lack of care, or don't understand the cultural connection tied to the work and the deeper meaning and messages behind it, which can be devastating on communities. (NAVA, sub. 42, p. 19)



Finding 4.4

Difficulties for consumers in identifying authentic products and gaps in legal protections for ICIP are the main enablers of inauthentic arts and crafts

Inauthentic Indigenous-style visual arts and crafts continue to exist and persist 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.

4.5 What does this mean for policy responses?

In light of the factors that contribute to the authenticity (or not) of Aboriginal and Torres Strait Islander art and craft products, and the wide-ranging negative effects inauthentic products have, a mix of policy responses is likely to be needed.

No single policy or legislative change will be sufficient; a sustained program that works with grassroots organisations (art centres and their peak bodies) through to nationally focussed entities such as ACCC and other compliance bodies can significantly change the dynamic around ‘inauthentic’ art and craft. (Desart, sub. 4, p. 12)

To this end, the Commission has considered a suite of policy options.

- Chapter 5 considers options for strengthening legal protections for aspects of ICIP, to facilitate and encourage artists to obtain relevant cultural permissions from traditional owners to use their cultural assets in visual arts and crafts.
- Chapter 6 outlines a proposed model for new legislation that would govern the use of aspects of ICIP in visual arts and crafts.
- Chapter 7 considers options for giving consumers accurate and readily available information about the authorship of Aboriginal and Torres Strait Islander visual arts and crafts, to facilitate informed purchasing decisions and consequently, a reduction in sales of non-Indigenous authored products.
- Chapter 8 considers options for improving access to justice to facilitate the use of both existing and future legal remedies to address infringements of copyright (and other legal rights of Aboriginal and Torres Strait Islander artists and communities).

5. Protecting Indigenous Cultural and Intellectual Property

Key points

- * **Aboriginal and Torres Strait Islander Indigenous Cultural and Intellectual Property (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 market for Aboriginal and Torres Strait Islander visual arts and crafts, ICIP is sometimes used without the permission of traditional owners and in inappropriate ways. The world's oldest living continuous culture is irreplaceable — conduct that misrepresents or disrespects this ICIP must be viewed in the context of what is at stake for Aboriginal and Torres Strait Islander people, the broader community and for Australia's national identity.

- * **Current laws provide some protection of 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.**

- * **Stronger protections for ICIP would likely reduce misappropriation of Aboriginal and Torres Strait Islander cultures and facilitate authorised uses of ICIP. The evidence presented to this study and previous reviews indicated a strong case for examining how legislative change can strengthen protections for ICIP.**

- * **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.**

- * **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.**

5.1 Are stronger protections needed?

Current legal protections are limited in their ability to protect Aboriginal and Torres Strait Islander Indigenous Cultural and Intellectual Property (ICIP). Existing 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 (appendix D).

While Aboriginal and Torres Strait Islander cultures are of intrinsic value to Aboriginal and Torres Strait Islander people and the broader Australian community, there is currently no law that governs how ICIP can and cannot be used. This means that people can largely use Aboriginal and Torres Strait Islander ICIP without permission — and in ways that disrespect, misrepresent and even demean Aboriginal and Torres Strait Islander cultures.

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 to the broader Australian community. Over time, community recognition of Aboriginal and Torres Strait Islander cultures has risen — in 2020, 80% of Australians agreed that Aboriginal and Torres Strait Islander cultures are important to Australia's national identity (chapter 2) 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). In its submission, the National Library of Australia highlighted the importance of ICIP to Australia's history and identity:

Our collections are rich in the documentation of Aboriginal and Torres Strait Islander cultures, collected and created by Indigenous and non-Indigenous people alike. They are full of culture, language and knowledge—full of truths, half-truths and frank misunderstandings. They have the power to grow, to heal and to wound. (sub. 55, p. 1)

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 5.1).

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)

Box 5.1 – 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 Northern Territory 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 Brisbane 2032 Olympic and Paralympic Games (Brisbane 2032) provides a once in a generation opportunity for First Nations peoples to realise social and economic outcomes through arts and cultural products, activities, and experiences, and create significant legacy benefits for Queensland's arts and cultural sector. There is a crucial need for attention and action now to ensure First Nations arts and cultural practices are protected from appropriation and that the First Nations arts and cultural sector and communities can determine best approaches to take up Brisbane 2032 opportunities. (Arts Queensland, sub. 60, p. 2)

There are no direct protections for ICIP in existing laws

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. 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 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 5.2).

Box 5.2 – 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).

Box 5.2 – Existing protections for ICIP: a worked example

- 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.

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 and IartC, sub. 31, p. 28).

The stories, customs, knowledges and symbols of the world's oldest living continuous culture are irreplaceable; conduct that misrepresents or disrespects 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.

The case for exploring stronger protections

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, sub. 49 p. 3; Bana Yirriji Art Centre, sub. 25, p. 2; Callanan, sub. 5, pp. 29–30; Cheong, sub. 15, p. 1; Dreamtime Art Creative Consultancy, sub. 57, p. 5; 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, emphasis in original)

When ICIP is used without permission, it is often in ways that disrespect and misrepresent Aboriginal and Torres Strait Islander 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 Strait Islander people, and for the preservation of Australian Indigenous culture for generations to come. (AACHWA, sub. 20, pp. 12–13)

Australia's legal and cultural institutions are uniquely placed to help to reduce the misappropriation of these cultures, which will have benefits in Australia and beyond. Importantly, for Aboriginal and Torres Strait Islander people, there is also 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 and IartC, sub. 31, p. 30)

Achieving this balance depends on the regulatory mechanism that is implemented. Fit-for-purpose protections that facilitate authorised uses of ICIP 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 people's customs and laws (section 5.2).

Depending on how they are implemented, stronger protections for ICIP could also help Australia meet its international obligations in relation to First Nations people and their cultures. Australia's international obligations are discussed further in section 5.2.

In this context, the Commission considers that there is a strong case for examining how legislative change can strengthen protections for ICIP to reduce misappropriation of Aboriginal and Torres Strait Islander cultures and facilitate authorised uses of ICIP. The remainder of this chapter considers the viability of different approaches.



Finding 5.1

Stronger legal protection for Indigenous Cultural and Intellectual Property in Aboriginal and Torres Strait Islander visual arts and crafts would reduce misappropriation

Current laws do not enable Aboriginal and Torres Strait Islander people to directly control whether (and how) their Indigenous Cultural and Intellectual Property (ICIP) is used in visual arts and crafts. This means that ICIP is often used without the consent of traditional owners, and in ways that misrepresent and disrespect Aboriginal and Torres Strait Islander cultures.

There is a strong case for examining how legal protections for aspects of ICIP in visual arts and crafts could be strengthened to reduce misappropriation of ICIP in visual arts and crafts and better facilitate authorised uses of ICIP.

5.2 What are the options for legislative change?

Over the course of the numerous studies and inquiries that have focused on Aboriginal and Torres Strait Islander art (box 5.3), many suggestions have been put forward for legislative change to strengthen ICIP protection. Some of these have focused on amendments to the existing IP legislation, while others have advocated for dedicated legislation.

Box 5.3 – Other processes 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).

Box 5.3 – Other processes have considered the need for standalone legislation

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 standalone (or '*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. Among other things, the Committee considered the scale of the sector, ways to 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

Box 5.3 – Other processes have considered the need for standalone legislation

begins a consultation process to develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions' (HoRSCIA 2018b, p. xxi).

Following this, IP Australia 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). In October 2022, the working group released its interim report, which outlines potential elements to protect Indigenous Knowledge (IK) including a new IK right, legislative measures aimed at deterring trade in inauthentic products, a National Indigenous Knowledge Authority and measure to support competitiveness of Indigenous business (Ninti One Limited 2022). A final report is due to be released in early 2023.

No legislative measure — whether in the form of amendments or new legislation — can completely eliminate misappropriation of ICIP in visual arts and crafts. 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 arts and crafts, including banning the importation of inauthentic products, labelling schemes and mandatory codes of conduct (chapters 7 and 8). 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, including:

- amending copyright law to recognise 'communal ownership of Indigenous cultural works' (Rimmer, HoRSCIA 2018 sub. 95, p. 9) or extending copyright protection for the works of specific Aboriginal artists in perpetuity (Arnold Bloch Leibler, sub. 38, p. 2).
- 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. 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 or copyright protection in perpetuity, 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 work is communally owned. Aboriginal and Torres Strait Islander styles and techniques would also remain unprotected.

Implementing ad hoc changes is unlikely to provide meaningful and cohesive protections for ICIP. 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 the use of 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. Arts Law, Copyright Agency and the Indigenous Art Code supported amendments to the ACL in the immediate term followed by stand-alone legislation in the future:

We support the HRSCIA's recommendation of standalone legislation as a long-term solution, and indeed, we have advocated for standalone legislation for some time. However, 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)

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. This Bill was not passed into law.

Incorporating these types of protections into existing laws could provide benefits given there are inherent structures and processes to be leveraged (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 and 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 (appendix D).

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 objectives 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, emphasis in original)

Similarly, while the focus of the Australian Consumer Law is on protecting the interests of consumers (COAG 2009), provisions to address unauthorised use of ICIP would be about protecting the interests of the traditional custodians of the ICIP as well as those who have been granted permission to use the 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 (ALACC and ADA, sub. 54, p. 3; Goss, HoRSCIA 2018 sub. 162, p. 10; National Library of Australia, sub. 55, p. 1). 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.²⁰

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 that prevent unauthorised uses of ICIP (intending to protect Indigenous cultures).

In response to the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill, the ACCC said that the ACL framework is not suited to addressing cultural misappropriation:

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)

Overall, the Commission considers that amendments to the ACL would not be an effective vehicle for protecting ICIP directly, although they could be used to address information issues in the Aboriginal and Torres Strait Islander visual arts and craft market. Moreover, the Commission does not regard amendments

²⁰ 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.

to the ACL to ban inauthentic arts and crafts as a cost-effective option — this issue is discussed further in chapters 6 and 7.

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 5.3).

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 and 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; Minter Ellison, 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)

There are a number of potential advantages (relative to amending existing laws) that arise 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 explicitly affirm the value of ICIP.

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 remains significant challenges because of increasing levels exploitation, inappropriate commercialisation and commodification by nonindigenous people. 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.

Opportunities for cross-cultural collaborations

Positive cross-cultural collaborations — including licensing arrangements — between Aboriginal and Torres Strait Islander artists and non-Indigenous people and organisations depend upon respect, trust, and mutually beneficial sharing among the relevant parties. 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)

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 5.4). Chapter 3 also discusses cross-cultural collaborations in the context of licensed products bearing Aboriginal and Torres Strait Islander artwork.

These types of 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 artistic innovation and cultural development through:

- the joint creation of new art and products
- appreciation of how to use different artistic techniques
- forming new perspectives of how different people and cultures see the world and a deeper understanding of the issues different cultural groups face.

Box 5.4 – 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 (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 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 the building and to grant any non-commercial use of the works that the museum required.
 - Artists were paid a fee, with their contracts including attribution clauses; community recognition clauses; annual reporting provisions; and the Indigenous visual arts protocols guide attached (the guide 'endorses the rights of Indigenous people to their cultural heritage and supports Indigenous creative practice' (Australia Council 2022d)).
- A curatorial guide was created for the Musée so that care of the works could be properly managed.

This 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).

Legal measures that provide clarity around appropriate pathways for the use of ICIP in visual arts and crafts would encourage additional instances of positive cross-cultural collaboration, promoting innovation within the sector and ensuring that Aboriginal and Torres Strait Islander people benefit from these positive presentations of their cultures.

The implementation of dedicated legislation offers a unique opportunity to design a framework that directly and clearly provides a framework for the authorised use of ICIP, and hence collaboration. By contrast, proposed amendments to existing legislation (for example, extending the length of copyright or banning the use of ICIP under the ACL) would not facilitate cross-cultural collaborations, as they would not provide a framework for the authorised use of ICIP.

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 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australian law. A number of other countries have taken steps to acknowledge and protect traditional culture through the implementation of national legislation.

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.

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 2022b). 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 5.5).

Box 5.5 – 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).

Box 5.5 – Examples of dedicated legislation overseas

- **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).
- **Mexico:** where the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican People and Communities prohibits the unauthorised use of Indigenous art and design. The Australian Copyright Council noted some key implementation issues that have arisen, namely a lack of clarity regarding the cultural heritage items/assets that are protected by the legislation, who in a relevant Indigenous community has the authority to grant permission and how disputes between communities or within a community, are to be resolved (Australian Copyright Council, sub. 50, p. 12).

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).

The Australian Government continues to consider the application of the principles outlined in UNDRIP in Australia. The United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) was introduced into the Australian Senate in March 2022 (Parliament of Australia 2022).

Further to this, in August 2022, the Senate referred an inquiry into the application of UNDRIP in Australia to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs. The Committee will 'inquire into international experiences of the implementation of UNDRIP, consider options for improving adherence to the UNDRIP principles in Australia, and will assess how the implementation of the Uluru Statement from the Heart can support the application of UNDRIP' (Department of the House of Representatives 2022).

This growing support for national legislation, both within Australia and internationally, reflects a globally held view that increased protection for ICIP is warranted. As a signatory of UNDRIP and a member of the World Intellectual Property Organization Intergovernmental Committee 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 for ICIP in visual arts and crafts would go towards reinforcing 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, thus facilitating third party use and collaborations. 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. Taking these considerations into account, the Commission has developed a model for new legislation that gives traditional owners greater control over how their ICIP is used in visual arts and crafts (including whether or not it is used by third parties or in collaborations) by incentivising a person to obtain proper authorisations before using ICIP in a work of art or craft (chapter 6).



Finding 5.2

Dedicated legal protections are the best way to address 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 that promotes a fair allocation of benefits.

5.3 Multiple measures are needed

A multi-pronged approach to protection and recognition

As discussed in chapter 4, ICIP covers a wide range of traditional knowledges and cultural expressions — not just visual arts and crafts. 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)

There are some regulatory measures in place that protect aspects of ICIP, such as native title and heritage laws (appendix D). This means that any new measures to protect ICIP would not exist or operate in a vacuum. Rather, they would ideally be part of a broader and coherent ICIP regime, both within Australia and internationally.

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 5.6 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) — that is, a blanket approach. 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 (appendix D). 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.

Box 5.6 – Multiple 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. Section 5.2 discussed options for new legislative measures and chapter 6 outlines 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

Box 5.6 – Multiple tools for protecting Indigenous Cultural and Intellectual Property

and Intellectual Property in the Arts (Terri Janke and Company 2019). Voluntary measures are discussed further in chapter 8.

- **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 2022d). 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 7). 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)’ (Government of South Australia, sub. 21, p. 13). Similarly, a report commissioned by IP Australia for protecting Indigenous Knowledge said that the implementation of new legislation ‘could be accompanied by a non-legislated resourcing package to make the system accessible to Aboriginal and Torres Strait Islander peoples, including education and communication strategies’ (Ninti One Limited 2022, p. 6)

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.

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 5.7). 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 5.7 – 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 7.

A coordinating strategy

One challenge of taking a multi-pronged approach to ICIP issues is coordinating the different policy and regulatory measures that may need to be taken. There is the potential for gaps and overlaps between different measures, and questions may arise as to how these measures would interact with each other. For example, the National Association for the Visual Arts expressed 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)

The Australia Council for the Arts said that its consultation on a cultural authority revealed concerns about some forms of ICIP being overlooked.

Some consultation participants argued strongly that focussing only on the arts creates an illegitimate distinction between interrelated forms of Indigenous knowledges and practices ... A concern was raised that fragmenting ICIP into arts and other knowledge categories has the potential to jeopardise the cultural rights inherent in other knowledges ... (sub. 49, p. 7)

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 development of the strategy should consider 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 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 legislative measures.

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), including the development of a National Cultural Policy, because, whereas those plans (would) focus on the arts, an ICIP strategy would encompass all elements of ICIP.

The cultural rights regime discussed in chapter 6 would form one element of the strategy. Participants in this study supported the development of an overarching ICIP strategy as a complement to legislative measures to protect ICIP (DITRDCA sub. 51, p. 4; Queensland Government, sub. 60, p. 9), noting that it could ‘guide the development of ICIP legislation and non-regulatory initiatives, including addressing funding and education/awareness issues and consider the establishment of a cultural authority’ (Ian Goss, sub. 40, p. 2).

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 people, not just about cultural outputs. The strategy should be developed in partnership with Aboriginal and Torres Strait Islander people, to ensure that Aboriginal and Torres Strait Islander perspectives and priorities about Culture and Country are centred. Input will also need to be sought from State and Territory Governments, noting that certain state laws (such as heritage laws) also contribute to the protection of ICIP, as well as relevant Australian government agencies (such as those responsible for intellectual property laws and the arts).

Its development should also have regard to the role for international cooperation in protecting ICIP and Australia’s international obligations (box 5.8). As one participant noted:

In relation to any strategic policy framework in this area I believe that the start point should be the UNDRIP which sets out clear obligations in relation to the rights of Indigenous Peoples. From my perspective the work of the WIPO IGC is directed at operationalising this declaration into hard or legally binding treaties, in particular, Article 31. (Ian Goss, sub. 40, pp. 2-3)

Box 5.8 – 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).

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 (appendix D).

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) since 2001. The latest revision of the draft articles for a TCEs treaty was presented to the 44th session of the IGC in Geneva, September 12 to 16, 2022. This text will be considered further at the 45th session of the IGC in December 2022 (WIPO 2022a).

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.

**Finding 5.3****There are advantages to taking a multi-pronged approach to protecting Indigenous Cultural and Intellectual Property**

Given its multi-faceted nature, it would be very challenging to achieve stronger legal protection for all aspects of Indigenous Cultural and Intellectual Property (ICIP) 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.

**Recommendation 5.1****An Indigenous Cultural and Intellectual Property strategy to coordinate policy development**

The Australian Government should develop and publish an Indigenous Cultural and Intellectual Property (ICIP) strategy to provide a coordinated policy framework in relation to different aspects of ICIP. The development of the strategy should be led by the Minister for Indigenous Australians, in partnership with Aboriginal and Torres Strait Islander people and with input from State and Territory Governments.

6. New cultural rights legislation

Key points

- * **The Commission has developed a model for new cultural rights legislation that would recognise the rights of traditional owners to make decisions about the use of aspects of Indigenous Cultural and Intellectual Property in visual arts and crafts.**
- * **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. The exceptions regime should also enable traditional and customary uses, as well as uses as part of reconnecting with culture.
- * **There are some areas where further thinking or evidence could help fine tune the implementation and operation of the legislation.**
 - Some questions can be resolved as part of the implementation process — and it is likely that the implementation process itself will uncover the need to obtain certain evidence or resolve certain issues.
 - Some evidence will only become available sometime after the legislation has commenced. Once the legislation has been in effect for several years, the Australian Government should commission a review of how the legislation is operating.
 - Future work to develop, implement and review the legislation should centre Aboriginal and Torres Strait Islander perspectives and priorities.

Dedicated legislation covering the use of Indigenous Cultural and Intellectual Property (ICIP) in visual arts and crafts has the potential to provide stronger and fit-for-purpose protections, as well as greater clarity about the allocation of cultural rights (chapter 5).

This chapter develops a model for the design of new dedicated legislation to protect and recognise cultural rights in relation to visual arts and crafts ('cultural rights legislation'). Given the scope of this study, the emphasis is on issues relating to visual arts and crafts — that is, the focus is on 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.

Section 6.1 outlines the framework for the design of the new cultural rights legislation, which would include a new cause of action for traditional owners to assert their rights in relation to cultural assets and their use in visual arts and crafts. 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 6.2)
- who could bring a cause of action under the legislation? (section 6.3)
- what would count as an infringement? (section 6.4)

Section 6.5 discusses what institutional arrangements could be needed to support the operation of the new cultural rights legislation.

6.1 The framework

At its core, the new cultural rights legislation would formally recognise the interests of Aboriginal and Torres Strait Islander communities or groups²¹ in their traditional cultural assets. In other words, it 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 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 cultural assets. That is, traditional owners would be empowered to decide who may use their 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 beyond Australia's borders would require international cooperation and cannot be achieved through domestic legislation alone (chapter 5, box 5.4). The legislation would also apply prospectively — to uses of cultural assets occurring after the commencement of the legislation.

²¹ A community or group could be, for example, a mob or clan, language group, outstation or town.

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 either 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 (chapter 5). In particular, it is not intended to preclude existing measures to protect other aspects of ICIP — such as the right to proper attribution (box 6.1) 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).

Box 6.1 – 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

Box 6.1 – Moral rights and communities

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.

This section gives an overview of the basic framework for the new cultural rights legislation. Later sections discuss 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 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 — indeed, many participants emphasised the need for protections to extend beyond just visual arts and crafts (box 6.2).

Box 6.2 – Beyond visual arts and crafts

Several participants said that legislative protections should extend beyond visual arts and crafts (Arts Law Copyright Agency and IartC, sub. 62, p. 22; Ian Goss, sub. 40, p. 3; Law Council of Australia, sub. 59, p. 5). For example, IP Australia noted, based on its consultations on Indigenous Knowledge:

There is value in broadening the scope of new stand-alone legislation as much as possible beyond the visual arts and crafts sector to reflect the views of Aboriginal and Torres Strait Islander peoples and provide the greatest degree possible of consistent protection to First Nations peoples' [Indigenous Knowledge] ... (sub. 61, p. 2)

Likewise, Dreamtime Art Creative Consultancy asserted:

... a wide range of intellectual property and knowledge could and should be covered by the new protective ICIP legislation, including IP, ICIP, traditional and contemporary knowledge, knowledge systems, foods and fibres, art, stories, narratives, designs, iconography, song, dance, music, medicines, languages, cultural protocols, dreaming and creation, air, sky, land and sea, water, and resources. (sub. 57, p. 8)

Some participants identified specific areas that they felt should also be covered by legislation. For example, the National Aboriginal and Torres Strait Islander Music Office pointed to music:

NATSIMO emphasises the importance of protection for all indigenous cultural expression ... The same issues that arise with the treatment of ICIP in visual arts are equally relevant to

Box 6.2 – Beyond visual arts and crafts

music. In our view, the use of ICIP in music is just as pressing an issue as it is for visual creative practices or commercial design. (sub. 56, pp. 3–4)

Similarly, the National Sound and Film Archives cited audio-visual materials:

The NFSA encourages the Productivity Commission to take a broad view of ICIP rights to acknowledge the creation and ownership of materials beyond arts and crafts. Any legislative regime must take into consideration cultural ownership in audiovisual materials and protect the inherent rights in the material. (brief comment 8)

And the National Library of Australia emphasised the need to cover research materials:

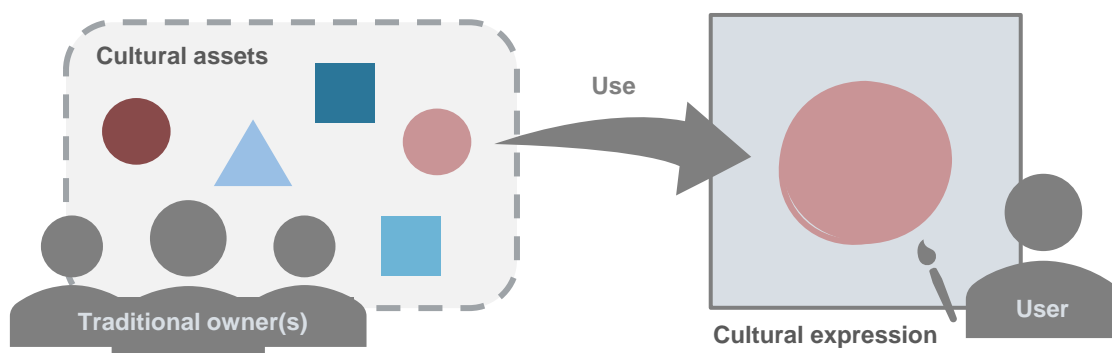
The Library receives daily requests for access to and use of ICIP material within its collection ... Many of these requests are from individuals and organisations (including media representatives and publishers) wishing to re-use ICIP material in public and commercial ways which lie beyond the visual arts and crafts sector, but which should none-the-less be subject [to] the proposed ICIP framework. The Library therefore recommends that the proposed ICIP right apply beyond the visual arts and crafts sector and extend to uses such as research and academic, publishing and display. (sub. 55, p. 4)

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 6.1).

- 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 or products. By definition, the use of a cultural asset results in a cultural expression.
- User: a person, whether or not the traditional owner, who uses a cultural asset to produce a cultural expression.

Figure 6.1 – Key terms



On this basis, the legislation can be characterised as providing protections for the underlying cultural asset, rather than for the resultant cultural expression (or what would be considered a ‘work’ under copyright law).

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 turn, this would give traditional owners a ‘starting point’ for negotiating and resolving disputes out of court.

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 6.3)
- the claimant is the traditional owner of the asset (or otherwise has standing) (section 6.4)
- the rights of the traditional owner were infringed (section 6.5)

Once an infringement has been established, a court would then consider what remedies are appropriate in the circumstances. Figure 6.2 depicts how these elements interact with each other and illustrates how a court might consider and decide a case. (That said, it is likely that most disputes would be resolved before they end up in court — other forums for resolving disputes are discussed in section 6.5.)

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.²² Later in this chapter, each element is discussed and options for introducing checks and balances are canvassed.

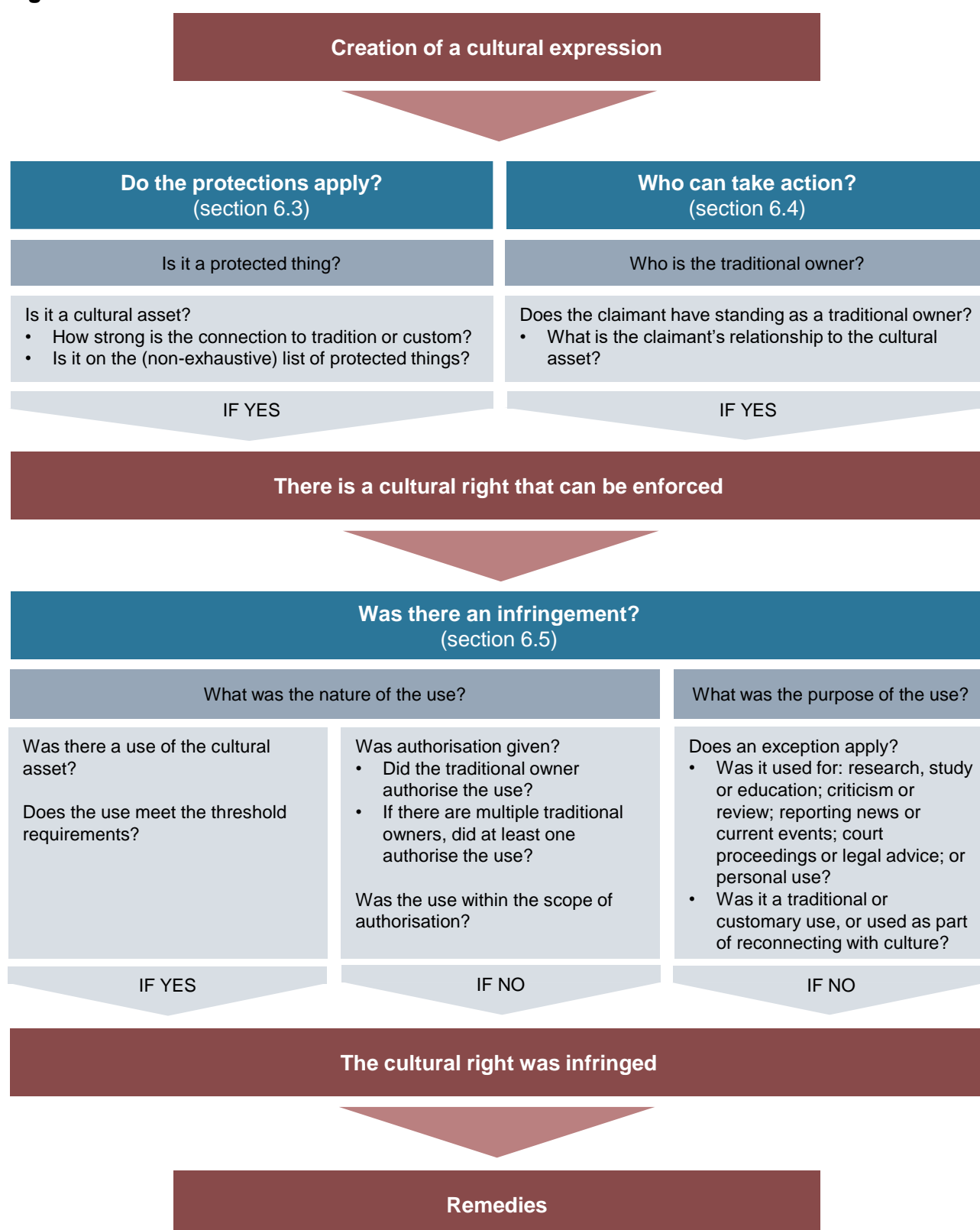
Interaction with customary law authorisation processes

In practice, the new cultural rights legislation would work alongside traditional cultural authorisation processes — 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 — including granting authorisation that is limited in scope or subject to certain requirements being met. 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 6.3 outlines how the Commission envisions these new cultural rights laws would apply, and the role that authorisation would play, in different scenarios.

²² 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).

Figure 6.2 – How would a case be decided?

Box 6.3 – How would cultural rights apply in practice?

Authorised use

Scenario: A person uses a traditional Indigenous motif in her artwork or product. The motif can be traced back to a traditional owner and the person has been granted permissions to use the motif by the traditional owner.

Outcome: The person 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: A person uses a traditional Indigenous motif in her artwork or product. The motif can be traced back to a traditional owner, but the person 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 person may have infringed the traditional owner's cultural rights.

Use exceeds scope of authorisation

Scenario: A person uses a traditional Indigenous motif in her artwork or product. The motif can be traced back to a traditional owner, from whom the person had previously been granted permissions to use the motif — but those permissions do not cover the creation of this particular artwork.

Outcome: The person 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: A person uses a traditional Indigenous motif in her artwork or product. 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 person permission to use the motif in his artwork.

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

No identifiable traditional owner

Scenario: A person uses an Indigenous-style motif in her artwork or product, 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).

No use

Scenario: A person creates an artwork or product that does not make use of an Indigenous motif.

Outcome: The cultural rights legislation does not apply.



Recommendation 6.1

New cultural rights legislation should be introduced to empower traditional owners to decide how their cultural assets are used in 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.



Finding 6.1

A cultural rights regime must balance the interests of traditional owners and those seeking to access and use 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.

The path to implementation

This study is the latest in a long line of inquiries about whether and how standalone legislation should be implemented (chapter 5, box 5.6). In designing the foundational framework for cultural rights legislation, the Commission has drawn on the considerable work that has already been done and the ongoing work that is being undertaken by various organisations. The Commission has also benefitted from submissions and comments made by participants in this study, including in response to the information requests included in the draft report.

The Australian Government has now 'committed to working with First Nations people to establish stand-alone legislation to protect traditional knowledge and cultural expressions ... and working with Aboriginal and Torres Strait Islander peoples to strengthen authentic and ethically produced First Nations arts' (Burney and Burke 2022). However, there is still work to be done to put such legislation into practice. This includes further work to develop the legislation and pin down its implementation and operational details. Given the scope of the Commission's terms of reference, the Australian Government will need to assign responsibility for implementing the cultural rights legislation to an appropriate agency (an implementing body).

In the Commission's view, the task of conducting further analysis and obtaining additional evidence should not hold up efforts to put the legislation into practice — rather, these tasks should be undertaken on the basis that they are part of the implementation process. In part, this is because it is likely that the implementation process itself will uncover the need to obtain certain evidence or resolve certain issues.

Issues for the implementing body

In the course of undertaking this study, the Commission has identified key issues that should be considered by the implementing body.

As noted above, many participants in this study contended that the scope of new cultural rights legislation should extend beyond visual arts and crafts (box 6.2). In this study, the Commission has recommended that such legislation cover, at a minimum, the use of ICIP in visual arts and crafts. A key issue for the implementing body to consider is whether the legislation should be extended to other types of arts and crafts, such as performance. For this reason, the implementing body will need to be given a wider mandate than the scope of this study, as noted by the Law Council of Australia:

... the task of investigating, designing, and implementing the legislation proposed in Draft Recommendation 7.2 should be undertaken by an expert body with a much wider mandate, such as the Australian Law Reform Commission (sub. 59, p. 5)

Another issue that will need to be considered is how the legislation would interact with existing laws, including Australia's international obligations in those areas of law (Law Council of Australia, sub. 59, p. 5). One such area is copyright law: for example, if a work infringes a traditional owner's cultural rights, how would the artist's rights under copyright law be affected? As a comparison, where a work infringes another person's copyright, an artist still gains copyright in the infringing work, although their ability to exercise their rights in relation to that work (such as their ability to license or reproduce the work) may be curtailed in practice. In principle, it could be desirable for infringements of cultural rights to be resolved in an analogous way — however, the implementing body will need to consider whether such resolutions would be consistent with Australia's international law obligations relating to copyright.

Participants also emphasised the importance of centring Aboriginal and Torres Strait Islander perspectives and priorities in any future work (Arts Law, Copyright Agency and IartC, sub. 62, p. 23; Arts Queensland, sub. 60, p. 11; ALACC and ADA sub. 54, p. 2; Law Council of Australia, sub. 59, p. 5). As Dreamtime Art Creative Consultancy said:

To achieve the right outcomes, ... it is imperative that communities drive the conversation ... This will assist to ensure that structures are in place for First Nations peoples to be the primary beneficiaries of their culture and ICIP, to grow and enhance the sector in a way which is First Nations-led. (sub. 57, p. 1)

In addition, given the developments in international law (chapter 5, appendix D), it is also desirable that the development of domestic legislation should have regard to those developments and, in particular, any obligations for Australia that are likely to arise from an international agreement (Ian Goss, sub. 40, p. 4, Law Council of Australia, sub. 59, p. 7).

Reviews of the legislation

Like any laws, building an effective and cohesive legislative regime for cultural rights will take time. Generally speaking, legislation is rarely perfect from the outset. In particular, certain evidence about what is needed to make the regime work well will only become available once the legislation has commenced.

For this reason, efforts to develop and improve the regime can and should be effected through reviews of and amendments to the legislation. As a benchmark, since its introduction, the Native Title Act 1993 (Cth) has been amended almost 50 times.

Therefore, the Commission considers that the initial rollout of the legislation should be about putting in place the foundational elements needed to make the legislation work. This should be done with a plan to build the

legislation over time. Once the legislation has been in effect for several years, a review should be undertaken to consider whether the legislation is meeting its objectives and what additional measures are needed to improve its effectiveness.



Recommendation 6.2

The foundational elements of the cultural rights legislation should be progressed

Building an effective and cohesive legislative regime for cultural rights will take time, but this should not hold up efforts to put the legislation into practice. The primary objective and focus of the initial rollout of the cultural rights legislation should be to develop the foundational elements needed to make the legislation work.

Once the new cultural rights legislation has been in operation for several years, the Australian Government should commission an independent review of the legislation. The review should evaluate how well the legislation is meeting its objectives and identify options for amending the legislation to improve its effectiveness.

6.2 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

As discussed above, the object of protection would be a cultural asset — that is, the underlying idea or concept that embodies Aboriginal and Torres Strait Islander traditions. Put another way, what is protected is the cultural ‘input’ (the cultural asset) rather than the creative ‘output’ (the cultural expression) — noting that the protection of creative outputs is the domain of existing copyright laws.

The legislation should set out legislative criteria for assessing whether something constitutes a cultural asset. One such criterion should be the strength of its connection to tradition or custom (discussed further below). 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. The onus would be on the claimant to show that the criteria is met, so as to establish that there is a cultural asset that is eligible for protection.

By necessity, there will be some grey area about whether something meets those criteria. It will not be possible to provide 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, there will be an important role for courts to play in assessing whether something is eligible for protection. That is, the 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.

Connection to tradition or custom

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 there should be 'no requirement for originality or novelty' (IP Australia, sub. 61, p. 3; Ninti One Limited 2022, p. 5), on the basis that the:

... 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 be 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 to acknowledge that traditions can evolve over time. This is because 'living Aboriginal and Torres Strait Islander cultures are not fixed but continuously evolving, with new expressions of those cultures being developed over time' (Arts Law, Copyright Agency and IartC, sub. 62, p. 22). In 2015, the Australian Law Reform Commission recommended a similar acknowledgement in relation to native title laws (box 6.4). 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.

Box 6.4 – 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

Box 6.4 – Connection to Country: Review of the Native Title Act

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).

Relationship to ‘traditional cultural expressions’

Some participants suggested that the focus of the legislation should adopt the terminology of ‘traditional cultural expressions’ — rather than ‘cultural assets’ — to align with work being undertaken by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Currently, the Intergovernmental Committee is in the process of negotiating international agreements for the protection of traditional knowledge, traditional cultural expressions and genetic resources (chapter 5, appendix D). To date, it has developed draft articles for the protection of traditional cultural expressions and ‘has almost reached consensus for the definition for [traditional cultural expressions] and the criteria for protection of [traditional cultural expressions]’ (Ian Goss, sub. 40, p. 22).

Once agreed, these articles are expected to create new international obligations for Australia in relation to the protection of traditional cultural expressions. There will also be more certainty about the scope of the term ‘traditional cultural expressions’, and how it relates to this report’s proposal about cultural assets. Current drafts indicate that the concept of ‘traditional cultural expressions’ is intended to refer to the ways in which cultures are expressed (that is, the creative or cultural output), rather than the underlying cultural input (which is what is proposed to be protected in this chapter).

Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof. (WIPO 2019b)²³

²³ In this quote, the square brackets indicate text that is still subject to negotiation.

The development of domestic legislation should have regard to any international developments, including how any domestic legislative concepts (such as a ‘cultural asset’) relate to those set out in international agreements (such as ‘traditional cultural expressions’).

Registration requirements?

One question is whether registration of cultural assets 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 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).²⁴ 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 registration requirement would likely 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 would 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.

²⁴ 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.

In principle, some of the benefits of registration could be captured by having an optional registration system. This would be analogous to voluntary copyright registration in some international jurisdictions, whereby the registration itself can be used to help prove ownership in court (WIPO 2022c). The National Library of Australia noted that a voluntary registration system for cultural assets could similarly ‘provide evidence in court cases and simplify contact for users’, which would also ‘make managing Library requests more straightforward’ (sub. 55, p. 2). But the Commission’s engagement did not uncover any appetite on the part of traditional owners to participate in a voluntary registration system. For this reason, the Commission does not recommend the establishment of a voluntary register at this stage.

Time requirements?

A further consideration is whether there should be time limits on protections. As noted in chapter 5 and appendix D, 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)

A report commissioned by IP Australia for protecting Indigenous Knowledge also proposed that there should be no set term of protection (IP Australia, sub. 61, p. 3; Ninti One Limited 2022, p. 5).

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.

6.3 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.

Communities as traditional owners

Culture is widely regarded as being collectively owned by communities or groups, not individuals (box 6.5). To give effect to this principle, the new cultural rights legislation would need to recognise communities or groups as capable of being traditional owners.

Box 6.5 – 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 2018b, 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 whole group.

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.

The Commission’s preferred 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)).²⁵

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)²⁶ — 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.

An alternative option is to formalise the recognition of a 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 6.3). 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. Moreover, there are already a range of ways that Indigenous groups can optionally gain standing through registration or incorporation, including registration with the Australian Security and Investment Commission or under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (ORIC 2022c).

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)).

²⁵ 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)

²⁶ 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)).

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 shown 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 (chapters 4 and 5), 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. In principle, the role of a cultural rights regulator could be undertaken by a statutory Cultural Authority (discussed in section 6.5) or by a separate regulatory body.

Separate contravention provisions

One way to give standing to a cultural rights regulator would be to devise 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.

In practical terms, contravention provisions could potentially be equivalent to a ban on ‘inauthentic art and crafts’ — which was supported by some participants (Arts Law, Copyright Agency and IartC, sub. 31, p. 37; Ku Arts, sub. 46, p. 2, Stephen Hogarth, sub. 35, p. 1). This is because those provisions could assign penalties to certain conduct (such as the production, sale or importation of specified products), which would effectively amount to a regulatory prohibition on that conduct. For example, imposing penalties on the production of boomerangs or didgeridoos by non-Indigenous people would effectively amount to a ban on those products. A ban was supported by some participants in this study (Ku Arts, sub. 46, p. 2, Stephen Hogarth, sub. 35, p. 1), including as an interim measure ahead of the introduction of dedicated ICIP legislation (Arts Law, Copyright Agency and IartC, sub. 31, p. 37) (discussed further in chapter 7).

However, because contravention provisions are separate from 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 would require a separate body of work to consider what is necessary and practicable to empower a regulator to target areas of concern. In this light, the design of the contravention provisions 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)

The evidence does not support having a cultural rights regulator at this time

Among participants, there were mixed views about the desirability of establishing a cultural rights regulator. Some participants expressed support for enforcement by a government authority (Arts Law, Copyright Agency and IartC, sub. 62, pp. 23–24; DACC, sub. 57, p. 11), but others questioned whether government-led enforcement is consistent with self-determination (Australia Council, sub. 49, pp. 11–12). The National Library of Australia highlighted the tension between these two views:

An agency resourced to undertake such actions could support communities and ensure rigor and accountability in the system. However, the establishment of and processes for decision making by such an agency would need to be led and verified by First Nations people. It may also be inappropriate for the complex community engagement and cultural judgements required to be centralised. (sub. 55, pp. 3–4)

Overall, there is insufficient evidence to indicate that having a cultural rights regulator would result in additional benefits, over and above the benefits that would accrue from enabling traditional owners to enforce their rights. Moreover, while there may be some benefits from greater enforcement, the Commission considers that government-led enforcement poses real risks to self-determination — it would not enable Aboriginal and Torres Strait Islander people and communities to directly decide whether and when to take action, or seek the remedies for infringement that are most meaningful to them. As some participants suggested, it may be possible to design a governance framework for a cultural rights regulator that is compatible with self-determination (Australia Council, sub. 49, p. 11; National Library of Australia, sub. 55, pp. 3–4), but this is not guaranteed and was not possible based on the information available at the time of this study. For this reason, the Commission has not recommended 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. As discussed above, the government should commission a review of how the legislation is operating several years after its introduction. 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.

6.4 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.

Uses of cultural assets

The new cultural rights legislation needs to include provisions that set out what counts as a 'use' that has the potential to be infringing. This is important because it would define the scope of uses that fall within the cultural rights regime, and hence a traditional owner's ability to make decisions about the use of their cultural assets. As outlined in section 6.1, a 'use' should require an action to give expression to a cultural asset, such as the incorporation of a cultural asset in art, craft or other works or products. The WIPO and the Pacific Islands model laws provide some insight into what types of activities could constitute a use (box 6.6).

Box 6.6 – 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;

Box 6.6 – Approaches in model laws: what counts as a use?

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
 - (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’.²⁷ 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.

Notably, the model laws, which cover more than just visual arts and crafts, specifically do not require ‘material form’ (box 6.6). In other words, those laws would cover uses of cultural assets in non-material forms — say, live performances or broadcasts. Some participants in this study also expressed support for having no material form requirements — and those participants tended to also take the view that the cultural rights legislation should extend beyond visual arts and crafts (National Library of Australia, sub. 55, p. 2; box 6.2).

²⁷ The Copyright Act provides some guidance about what constitutes material form. Section 10 specifies that material form is satisfied by ‘any form (whether visible or not) of storage’. 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).

Ultimately, this question hinges on the desired scope of the cultural rights legislation. As noted above, it is possible that non-visual arts and crafts would also benefit from cultural rights protections — and this is an issue that should be considered as part of the implementation process for the cultural rights legislation.

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* (appendix D, box D.4), 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)

The Commission considers that the new cultural rights legislation should include a similar provision for incidental uses. As an example, the Australian Copyright Council described the need for such a provision for uses in film and television:

It is possible that an artistic work in an existing film ... may depict a cultural asset that would be protected by the cultural rights regime ... Careful consideration will need to be given as to how to achieve an appropriate balance between the rights and interests of the creators of the film and respect for ICIP that is central to any cultural rights regime. (sub. 50, p. 12)

What about reproductions, sales and imports?

As noted above, the use of a cultural asset results in the creation of a cultural expression, such as an artwork. One question that emerged is whether dealings in relation to those cultural expressions (such as sale, importation, licensing or reproduction of an artwork or product) would necessarily constitute a use of the underlying cultural asset (ACC, sub. 50, p. 12). This question is important because it determines whether those activities fall within the scope of the cultural rights regime and hence require authorisation from traditional owners. For clarity, the Commission’s view is that these dealings would not (and should not) automatically count as a use of a cultural asset.

However, there may be some instances where these dealings do constitute a use, such as a reproduction that recognisably incorporates a cultural asset. This means there will be two uses: an original use (the creation of an image that uses a cultural asset) and a secondary use (a reproduction of that image).

This leads to the question of who the user is in relation to the secondary use (the reproduction). To provide clarity in such instances, the legislation should provide that, where the original user (the creator of the

original cultural expression) is a voluntary party to the secondary use, the secondary use is also deemed to be done by the original user.

In practical terms, this means that if, for example, an artist enters into a licensing agreement for the reproduction of their artwork, the onus will be on the artist (the licensor) to ensure they have the necessary authorisations from the traditional owner, rather than on the licensee. This aligns with the expectation that a person purporting to grant a licence is responsible for making sure they have the power to do so. It also means that if a reproduction is created without the involvement of the artist (such as without the artist's knowledge or agreement), the reproducer will be considered responsible for the use.

Given that the legislation would operate domestically, it may also be desirable for the legislation to include provisions covering cultural expressions that are imported. Without such provisions, traditional owners would have no recourse where infringing uses occur overseas but products are brought into Australia.²⁸ For example, the legislation could empower traditional owners to take action against a person who imports a product that would be infringing if it were produced in Australia. The case for such provisions, as well as their design and scope, should be considered further by the body responsible for implementing the legislation.

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; Ninti One Limited 2022, p. 6; Secretariat of the Pacific Community 2002; Stoianoff and Roy 2015, p. 780; WIPO 1985).

There are several ways in which a use could occur without authorisation, including:

- no authorisation was been sought or granted at all
- authorisation was granted, but the use in question exceeded the scope of what was authorised (for example, authorisation was granted to create an artwork but not to license its reproduction)
- authorisation was granted subject to certain conditions or requirements, but those conditions or requirements were not met (such as a requirement for proper attribution of the community).

The Commission considers that whether authorisation has been granted — and the scope or terms of that authorisation — 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 in a particular way, 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. As such, a court could consider evidence about how authorisation is ordinarily granted within the community, and by whom.

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

²⁸ Australia's intellectual property laws also contain provisions that are designed to guard against the importation of infringing material. For example, under the Copyright Act there are provisions relating to the importation of copyrighted works into Australia for the purpose of sale or hire (ss. 37, 102). The Australian Border Force also has the power to seize goods that appear to infringe these provisions at the border (ABF 2020a).

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 concerns about unfair contracts (DACC, sub. 57, p. 12) — as 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.

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). In its submission, IP Australia identified a role for:

... possible exceptions for education and news reporting ... designed with Aboriginal and Torres Strait Islander peoples. Research into, or using, [Indigenous Knowledge] for academic or commercial purposes would require consent. (sub. 61, p. 4)

Like copyright law, the inclusion of these exceptions is to strike a balance between interests of rights holders and the interests of those seeking to make use of protected material. That said, careful consideration should be given to how such exceptions are incorporated into the new cultural rights legislation (ACCC, sub. 58, p. 7). The design and scope of the exceptions should not be directly imported from the copyright regime — rather, consideration should be given to what is needed in the context of cultural rights. This is because, as one participant noted, the policy rationale for copyright law (and its exceptions) differs from the policy rationale for cultural rights legislations (and its exceptions).

It is important to consider the harms that the legal protections are designed to protect against. Copyright protection is designed (in part) to ensure that artists can make a living from their work. Thus, the exceptions apply to situations where we think a use should be allowed even if the copyright owner disagrees (public good) and/or where the use is unlikely to materially affect the copyright owner’s market (private uses) ... However, ICIP protection is designed to guard against a very different kind of harm — cultural harm. This

harm can occur in situations where copyright harm will not ... For these reasons, I think it is likely appropriate for ICIP exceptions to be more narrowly tailored than copyright exceptions, or at least to take a different form. (brief comment 10)

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).

In this vein, the Commission considers that the legislation should include exceptions in relation to: research, study or education; criticism or review; reporting news or current events; court proceedings or legal advice; and personal or private use. In its draft report, the Commission made an information request about what the scope of those exceptions should be and what considerations should be taken into account in the drafting of those exceptions. However, there was not sufficient information for the Commission to reach a definitive view on this matter. For this reason, the body responsible for implementing the legislation should consider how such exceptions should be drafted, taking into account the perspectives of traditional owners as well as would-be users of cultural assets.

An exception for traditional and customary uses

A further exception is likely 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 2022d)

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). Similarly, in its submission, IP Australia outlined a proposal to protect Indigenous Knowledge that would have 'no restriction on commercial and non-commercial use of IK by its traditional owners or members of the owning community in accordance with relevant cultural protocols' (IP Australia, sub. 61, p. 3). Consistent with this view, a carveout for customary uses is included in the Pacific Islands model laws (Secretariat of the Pacific Community 2002).

The Commission considers that, as a matter of principle, the new cultural rights legislation should not constrain traditional and customary uses of cultural assets. The implementing body should assess what legislative provisions are needed to give effect to this outcome. 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 would provide additional clarity for borderline cases.

An exception for reconnecting with culture

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 result, some Aboriginal and Torres Strait Islander people are in the process of reconnecting with their cultures. To account for this, the legislation should explicitly specify an exception for Aboriginal and Torres Strait Islander people who make reasonable use of cultural assets as part of reconnecting with their cultures.

An exception for ‘reasonable efforts’?

During consultation, some artists expressed concern about using cultural assets inadvertently. Others also said that it may not always be clear whether authorisation is needed or from whom authorisation should be sought. For example, one participant said:

One of the problems for non-Indigenous people is knowing WHO to consult for permission to use any artistic image/music/etc. and HOW to know that all the correct person/group/elder and all stakeholders have contacted to give the correct authority. (Judy Thompsons, sub. 48, p. 2)

Some participants suggested that there should be an exception for inadvertent uses of cultural assets or where the traditional owner is unknown or unreachable — that is, the use would be deemed non-infringing if reasonable efforts had been made to identify or locate the traditional owner. In some respects, this issue is similar to the issue of orphan works under copyright law: it has been suggested that there should be an exception for the use of works where the copyright holder cannot be identified or located (box 6.7).

But other participants suggested that, for the use of cultural assets, the onus should be on users to adopt a risk management approach. For example, the National Library of Australia said:

Library practice — and advice to users of the collections — is that all reasonable attempts should be made to identify and liaise with ICIP holders. If this is not possible, then it becomes a case-by-case question of risk ... It is our recommendation that similar considerations be built into the scheme. (sub. 55, p. 3)

The Commission considers that a direct exception for ‘reasonable efforts’ would be a blunt response to the uncertainty faced by users of cultural assets — noting that a direct exception for orphan works under copyright law has also not been widely supported (box 6.7). Instead, the question of whether a user had made reasonable efforts to comply with authorisation requirements should be taken into account when remedies are assessed. The new cultural rights legislation should clearly state that a court may have regard to such considerations when it assesses remedies (discussed later) — for example, it may be appropriate for

a user who has made reasonable efforts to comply with authorisation requirements to pay less in damages for an infringement than a person who has not.

Box 6.7 – Orphan works and copyright law

An orphan work refers to a copyrighted work for which the author cannot be identified or located, which makes seeking permission to use that material impossible. Notably, however, works produced anonymously or pseudonymously are not orphans by default. Likewise, a refusal to grant permission or lack of response to a permission request does not create an orphan work (NSLA 2019).

Under the *Copyright Act 1968* (Cth), there is no specific exception for the use of orphaned works. This means that, unless another exception applies, a person who uses an orphaned work without permission is still considered to be infringing the rights of the copyright owner and risks legal action. But it has been argued that such an exception should be introduced.

Some users of copyright material have long argued that there should be a mechanism by which they can use an orphan work, without risk of being sued for infringement, if they can demonstrate they have taken appropriate steps to try to identify or locate the copyright owner. (ACC 2019, p. 1)

In 2013, the Australian Law Reform Commission made recommendations to limit liability for the use of orphan works. In particular, it recommended that, for uses of orphan works, only certain remedies should be available — rather than the introduction of a direct exception.

The Copyright Act should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement: (a) a reasonably diligent search for the rights holder had been conducted and the rights holder had not been found; and (b) as far as reasonably possible, the user of the work has clearly attributed it to the author. (2013, p. 310)

In reaching this recommendation, the Commission highlighted the underlying policy objectives:

... the ALRC considers that reform in this area should have the primary aim of making orphan works more widely available in the digital economy, while at the same time acknowledging and respecting authorship and creation ... At the same time, any orphan works solution also needs to ensure that identified copyright holders are adequately compensated. (2013, p. 296)

This recommendation was later supported in the Productivity Commission inquiry on Intellectual Property Arrangements (2016, p. 197). In 2018, consultation on copyright modernisation undertaken by the Department of Communication and the Arts revealed 'more common ground for a limitation of liability scheme than a direct exception for the use of orphan works by any user' (2018, p. 3).

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 considering a cultural rights case 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 (although in the Carpets Case damages were awarded for cultural harm — appendix D, box D.4). Box 6.8 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).

The legislation should also specify that non-pecuniary remedies are available. 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)

In the context of this study, the Australian Copyright Council said that the new legislation should provide 'remedies for infringement which are meaningful to First Nations communities', emphasising that pecuniary penalties may not be adequate to address cultural harms (sub. 50, p. 11).

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 6.5.

Box 6.8 – 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 that 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 has been previously recommended that provisions for statutory damages be incorporated in Australia's copyright law (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.

6.5 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, help parties reach an agreement or make a determination about the dispute (figure 6.3).

Figure 6.3 – 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
<ul style="list-style-type: none"> • Negotiation • Facilitation • Conciliation 	<ul style="list-style-type: none"> • Expert appraisal • Case appraisal • Neutral evaluation 	<ul style="list-style-type: none"> • 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).

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)

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 will hinge on whether culturally responsive ADR services are available.

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 or have been 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 sufficient cultural rights cases 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 body responsible for implementing the legislation should consider what dispute resolution options are needed to support the effective operation of the cultural rights legislation. This includes a consideration of what steps are required to ensure that dispute resolution services are culturally responsive. This issue should also be revisited as part of any future reviews of the legislation.

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.

To harness these benefits, the new cultural rights legislation should explicitly acknowledge customary law processes as an alternative mechanism for resolving disputes. This could be based on the Pacific Islands model laws, which 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)

Further work in this area should consider whether 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.

A statutory Cultural Authority?

In Australia, the question of whether and how ICIP should be protected has been 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). Recently, a report prepared for IP Australia about protecting Indigenous Knowledge identified an option for the creation of a National Indigenous Knowledge Authority, which would:

... work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK rights. This body could help reduce the burden on Traditional Owners to enforce the new IK rights which would otherwise require expensive legal action and to negotiate legal agreements. It would also help streamline processes for businesses working with IK and provide legal certainty...(Ninti One Limited 2022, p. 7)

And the Australia Council's *Bringing it Forward* report considered options for 'a proposed national body for First Nations arts and culture, with the working title of a "National Indigenous Arts and Cultural Authority (NIACA)" ... [which would] combine Terri Janke's idea for a national authority to protect Indigenous Cultural and Intellectual Property (ICIP) and a peak body for First Nations arts.' (2022a, p. 26)

In the present study, some participants also expressed support for 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 principle 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 for 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 — that is, a body established as part of the cultural rights legislation. The *Bringing it Forward* report considered the case for establishing a National Indigenous Arts and Cultural Authority more broadly, including the case for establishing a non-government Cultural Authority (such as in the form of a company, Indigenous corporation or a charity) (Australia Council 2018, 2022a).

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.²⁹ 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)
- 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. 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 6.1). 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.

On balance, the Commission has not recommended the establishment of a statutory Cultural Authority as part of the cultural rights legislation. In its consultations on a National Indigenous Arts and Cultural Authority, the Australia Council found that ‘there was a strong view that a national body for First Nations arts and culture should be owned, led and run by First Nations people’ (Australia Council 2022a, p. 88). That is, most of its participants preferred the introduction of a non-government body:

Our recent consultation highlighted that an important aspect of a self-determined national body for First Nations arts and culture would be its independence, particularly from government and corporate influences or interests that may compromise its mission and integrity ... Few NIACA consultation participants said they wanted a national body for First Nations arts and culture to be a statutory authority (15% of First Nations survey respondents). Participants stressed the importance of decolonising the structure of any national body. They said that a national body should be built on models that reflect First Nations cultures instead of Western cultural structures, including by avoiding hierarchy. Some suggested looking to the First Nations peoples of the Americas or Canada for legal models such as ‘an assembly of nations’. (sub. 49, p. 12)

Moreover, there do not appear to be any essential functions that could only be performed by a statutory Cultural Authority. In fact, the *Bringing it Forward* report found that many of the functions identified in table 6.1 could be performed by a non-government National Indigenous Arts and Cultural Authority, and the Commission considers that such a body could enhance the operation of the cultural rights legislation. That said, the need for a statutory body may emerge as the cultural rights regime matures. In section 6.1, it was recommended that a review of the regime should be undertaken, once the new cultural rights legislation has been in place for

²⁹ 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).

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.

Table 6.1 – 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 6.3).	The Commission has not recommended the establishment of a cultural rights regulator, at least initially (section 6.3).
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). ^a
3 Facilitate access to cultural assets, including providing information and advice to those seeking to use cultural assets about how to seek authorisation and from whom.	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. ^a
5 Responsibility for certain elements of the ICIP strategy (chapter 5), 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 7).	This function could be performed by an existing organisation, such as the Australian Competition and Consumer Commission. ^a
7 Act as a national peak body for the Aboriginal and Torres Strait Islander visual arts and crafts sector (discussed in chapter 9).	This function could be performed by non-government organisation (chapter 9). ^a

a. The Australia Council's *Bringing it Forward* report found that this function could be undertaken by a National Indigenous Arts and Cultural Authority. But most participants in that process considered that a National Indigenous Arts and Cultural Authority should be a non-government body (Australia Council 2022a, p. 88).

7. Addressing information gaps in the market

Key points

- ✳ **Non-Indigenous authored products containing Aboriginal and Torres Strait Islander styles and designs — such as souvenirs and other types of merchandise — are common in the market and often indistinguishable from authentic products. This can reduce income-earning opportunities for Aboriginal and Torres Strait Islander artists, mislead consumers and exacerbate cultural harms.**
 - Many individual artists and organisations already provide information about authenticity to consumers, often with the support of government funding. This can help consumers assess if a product is created or licensed by an Aboriginal and Torres Strait Islander artist — but there are information gaps, particularly in the souvenir market (where non-Indigenous authored products are rife).
- ✳ **Voluntary labelling and consumer education can improve the information available to consumers to some extent.**
 - Industry-wide voluntary labelling schemes, such as certification trade marks, help distinguish authentic work from non-Indigenous authored products but their effectiveness depends on high uptake by artists, which can be difficult to achieve.
 - Education and awareness-raising measures would be more effective if they were accompanied by initiatives that helped consumers distinguish between authentic and non-Indigenous authored products.
- ✳ **Regulatory interventions can be more effective at providing consumer information but must balance costs and benefits. A mandatory disclosure requirement for non-Indigenous authored products is a pragmatic and proportionate policy response.**
 - It would help consumers make more informed purchases and reduce unfair competitive pressures on Aboriginal and Torres Strait Islander artists. As a consequence, the amount of non-Indigenous authored products in the market would be expected to decline.
 - Focusing the disclosure requirement on non-Indigenous authored products would minimise compliance burdens on Aboriginal and Torres Strait Islander artists and not hinder other initiatives to promote artists' work or enforce their rights.
- ✳ **A ban on non-Indigenous authored products carries greater costs and risks, including the potential for unintended impacts on Aboriginal and Torres Strait Islander artists. The harms of cultural appropriation in visual arts and crafts would be better addressed through new cultural rights legislation.**

A substantial proportion of products in segments of the market for Aboriginal and Torres Strait Islander visual arts and crafts are inauthentic. As explored in chapter 4, there are three key factors that can deem a product inauthentic: copyright infringement; products that use Indigenous Intellectual and Cultural Property (ICIP) without authorisation; and products that are not created or licensed by an Aboriginal and Torres Strait Islander person (this category is referred to as non-Indigenous authored products in this study).

Existing legal frameworks deal with copyright infringement and provide incidental protection for ICIP (chapters 4 and 5). In chapter 6, the Commission outlined its recommendations for new cultural rights legislation that would offer stronger protection for certain aspects of ICIP used in visual arts and crafts. As non-Indigenous authored products often misuse ICIP, the new legislation is expected to reduce the prevalence of such products.

However, non-Indigenous authored products will continue to exist on some scale, especially among lower-priced products. For example, the proposed legislation would not apply to non-Indigenous products bearing generic Aboriginal and Torres Strait Islander motifs and designs that cannot be traced back to a specific community — including many common souvenirs and other merchandise.

Many such products are almost indistinguishable from authentic products. The adverse effects of this information gap include:

- Aboriginal and Torres Strait Islander artists being subject to unfair competitive pressures from suppliers of non-Indigenous authored products
- consumers being misled where they purchase products that they mistakenly thought were made or licensed by an Aboriginal and Torres Strait Islander artist or are dissuaded from making purchases due to uncertainty about products' authenticity
- non-Indigenous authored products being more prevalent in the market than they would otherwise be, which may exacerbate cultural harms.

Various measures can be used (on their own or in combination) to improve the information available to consumers and thereby reduce these adverse effects. Artists and other organisations already take steps to differentiate their products, while governments have also put measures in place to assist these efforts (section 7.1). This chapter discusses the scope for additional government support to assist Aboriginal and Torres Strait Islander artists promote the authenticity of their work (section 7.2), and regulatory approaches to address information gaps regarding product authenticity (section 7.3). Section 7.4 details the Commission's proposed approach and key principles that should be considered by the Australian Government and regulators in its implementation.

7.1 Current approaches to distinguish and promote the work of Aboriginal and Torres Strait Islander artists

Initiatives taken by artists, business and other organisations

Many artists, art centres and dealers apply their own labels and logos to promote and distinguish the authenticity or provenance of their artworks.

In particular, artists and dealers commonly provide 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. 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 and/or because market participants do not see significant risk in their branding being misappropriated. The usefulness of individual labelling approaches can depend on the reputation of the seller, but they can be an effective marketing tool (box 7.1).

Legal 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 (Arts Law 2010a).

Box 7.1 – Individual branding is promoted by retailers

The promotion of individual branding and the provision of authenticity information by third party retailers reinforces the effectiveness of providing this information.

One example is a range of pots and cushions 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).

Other retailers selling Aboriginal and Torres Strait Islander products also provide additional information about the artists or artworks used on products that they sell, including Kmart (2022), Officeworks (2022) and Spotlight (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 — for example, by displaying an organisation's logo on a gallery's website or on other advertising and authenticity documentation — as a way of providing assurances to buyers.

A prominent example is the Indigenous Art Code (IartC 2010), which aims to raise the standards of conduct in the industry and is partly funded by the Australian Government (chapter 8). Dealers who are members of the code and receive artworks directly from artists must 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.

The Aboriginal Art Code developed by the Aboriginal Art Association of Australia is another example (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 (\$1000, compared with the \$250 threshold in the Indigenous Art Code), which reflects

the Aboriginal Art Association of Australia's intention that its certificates of authenticity are aimed towards higher-end art, rather than souvenir-style products (HoRSCIA 2018, sub. 52, p. 10).

Issuing certificates under the auspices of a code can provide assurances about the veracity of the authenticity certificate and be used as a selling point. However, these schemes have limitations in addressing the proliferation of non-Indigenous authored products. Certificates of authenticity under codes of conduct only apply to certain artworks, do not cover lower priced products and are not independently verified by the organisations.

Membership of industry associations and codes of conduct is voluntary, so coverage is limited to those dealers who choose to participate. And in the absence of significant consumer awareness of the codes, 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.

Other industry initiatives are in train

Other industry initiatives to help consumers make assessments about the authenticity of 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).

Government support for digital labelling initiatives

The Australian Government has supported digital labelling using QR codes, which can be used to provide additional information about authentic products. The Government initially provided funding to Desart (the peak body representing art centres in Central Australia) for a digital labelling trial, and 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 range of benefits, in particular improving consumer understanding and knowledge of the product. It also provided development opportunities for arts workers. But there were challenges, including capacity constraints to resource the

labelling initiative, quality assurance concerns and the potential to create inequity between different-sized art centres and independent artists. The evaluation concluded that 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 argued 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. (sub. 4, p. 17)

QR codes might be 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 of their use. However, the QR code scheme still 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.

Digital labelling presents a relatively low cost way 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 improving information about the Indigeneity or otherwise of product authors.

The digital QR label has caused concern by some in the industry that it 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' (Aboriginal Art Association of Australia, sub. 26, p. 6).

Education and awareness raising initiatives attempt to improve the information available to consumers

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 existence and harms of non-Indigenous authored products (or unethically produced or sourced artworks more broadly); how to identify and avoid non-Indigenous authored products; and the cultural value and importance of art for Aboriginal and Torres Strait Islander people.

Existing initiatives by government, art centres and other industry organisations

Various resources have been developed to assist consumers with their purchasing decisions.

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 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). Other resources extend beyond guidance for purchasers to inform people about Aboriginal and Torres Strait Islander art and culture, such as those 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. An initiative of the Indigenous Arts Code, Arts Law and Copyright Agency, the campaign was launched at the Darwin Aboriginal Art Fair in 2016 to:

... address widespread concerns about the sale of artworks that 'look and feel' like Indigenous art but have no connection to Aboriginal and Torres Strait Islander culture or communities. (IartC 2019a)

Recent government proposals

Further initiatives were proposed by the 2018 HoRSCIA inquiry, which recommended measures to provide information to inbound international tourists.

In response, the then Australian Government indicated 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 various channels.

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)

These efforts can assist consumers, but information gaps persist

Existing branding and marketing initiatives can assist in identifying authentic products, and education and information resources can alert consumers to the harms of inauthentic products and give them advice on how to ascertain the authenticity of works. But gaps persist, particularly in the lower end of the market, such as souvenirs and digital products, where markers of authenticity are less obvious or compelling to consumers and products created without the involvement of Aboriginal and Torres Strait Islander artists are ambiguously marketed.



Finding 7.1

Some measures to help consumers assess the authenticity of Aboriginal and Torres Strait Islander art and craft products are in place but information gaps remain

Some approaches are already in place to help buyers assess if Aboriginal and Torres Strait Islander art and craft products are authentic. These include certificates of authenticity provided by artists and art dealers, as well as other branding, marketing initiatives and resources used to provide information and assurances to consumers.

However, this information is not provided consistently, and only limited information is provided for some products, particularly in the lower end of the market, including souvenirs and digital products.

7.2 Scope for strengthening existing measures to promote and distinguish authentic products

Building on existing initiatives, options for further government support to promote and identify authentic Aboriginal and Torres Strait Islander visual art and craft products include new labelling schemes — specifically a certification trade mark scheme for authentic Aboriginal and Torres Strait Islander arts and crafts — and further awareness raising initiatives.

Developing a certification trade mark scheme

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 enforce their intellectual property 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 7.2).

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.³⁰

Box 7.2 – 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

³⁰ 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 7.2 – What is a 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).

CTMs for Aboriginal and Torres Strait Islander arts and crafts have been used previously

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 using a boomerang tick logo (figure 7.1) (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 or Torres Strait Islander descent, who identified as an Aboriginal or 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 7.1 – NIAAA Label of Authenticity Mark^a



a. The collaboration mark was similar to the 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 that 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, so did not require additional branding. 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 2018b, 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).

Trade mark schemes have been used overseas

There are similar schemes in other countries, some of which have been operating for a relatively long time (box 7.3). However, they also appear to face similar constraints 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, 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 7.3 – 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 2022b). 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

Box 7.3 – International labelling schemes

of interest to take ownership of the program (Creative New Zealand 2010). 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 (Toi Iho Charitable Trust 2022a).

In the **United States**, the state of Alaska established the Silver Hand program to promote authentic original art works by Alaska Native artists. The Alaska State Council on the Arts administers the program. 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 World Intellectual Property Organization launched the project in 2016. 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 provided 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. For example, it was endorsed as one solution in the House of Representatives Standing Committee on Indigenous Affairs (HoRSCIA) 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 2018b, 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 non-Indigenous authored products and can be implemented 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 identified as authentic. For example, a study of the Canadian Igloo tag found that consumers valued the presence of the tag on artworks quite highly.³¹

³¹ 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).

Similarly, a recent study by KPMG found many consumers were willing to pay more for product information and certification to ensure the authenticity of Aboriginal and Torres Strait Islander arts and crafts (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 substantially improve the information available to consumers is limited. Such a scheme can have private benefits for participants, but in order to effectively improve information for consumers, 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 national CTM scheme would also need to be resourced. The common experience from previous schemes is that establishing a CTM is dependent on government funding and support, and while the schemes might become self-sustaining, ongoing funding could be necessary, which can make them vulnerable to future changes in government funding priorities.



Finding 7.2

Voluntary industry-wide labelling schemes for authentic products can be useful marketing tools but are unlikely to comprehensively help consumers distinguish products made by non-Indigenous people

Notwithstanding the possible marketing benefits to participants themselves, industry-wide voluntary labelling schemes (such as certification trade marks) are unlikely to be effective in substantially informing consumers about the Indigeneity or otherwise of product authors.

To be effective, voluntary labelling schemes would 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.

Scope for new education and awareness measures

Study participants have expressed support for new consumer education and awareness measures to raise awareness about the presence of and harms caused by non-Indigenous authored products in the market.

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, 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)

The effectiveness of such measures could be limited for several reasons.

- If information is not provided sufficiently close to the point of purchase, purchasers may overlook or not recall it.
- It can be difficult for consumers to identify non-Indigenous authored products, particularly among lower priced products, given prices and country of manufacture are often poor indicators of authenticity (chapter 4).
- There is a potential risk of awareness campaigns reducing consumer confidence in Aboriginal and Torres Strait Islander arts and crafts markets, 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 could help address these limitations.



Finding 7.3

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 non-Indigenous authored products. However, on their own their effectiveness in countering the market impacts caused by non-Indigenous authored products is limited, especially where the information used to promote and label products is confusing or ambiguous. Education and awareness-raising measures would be more effective if they were accompanied by initiatives that helped consumers distinguish between authentic and non-Indigenous authored products.

7.3 Regulatory options to help consumers identify non-Indigenous authored products

The prevalence of non-Indigenous authored products could also be addressed through regulatory responses, which will achieve broader coverage than voluntary measures. Regulatory responses could take one of two approaches: prohibitions on the sale of certain products; or mandatory disclosure requirements.

A product ban has costs and risks, including for Aboriginal and Torres Strait Islander artists

A prohibition or ban on the import and/or sale of non-Indigenous authored products would reduce the information gap facing consumers by largely removing the products from sale, preventing consumers from unwittingly purchasing such products. However, prohibitions are a relatively strong form of regulation, typically used where products are deemed unsafe, either to the individual or broader community, although in some cases they are used where particular practices cause offence.³²

The Commission does not consider that a ban would be a proportionate or appropriate response to the information gaps facing consumers in assessing the authenticity of products for a number of reasons.

- A product ban risks unintended impacts on Aboriginal and Torres Strait Islander artists.
 - Some provisions (such as those suggested in previous ban proposals restricting the use of certain expressions or production methods) may unintentionally ban products made by Aboriginal and Torres Strait Islander artists, particularly where overseas manufacturing is involved.
 - Some approaches to implementing a ban, such as the option of a mandatory certification scheme for Aboriginal and Torres Strait Islander visual arts and crafts raised by the ACCC (sub. 58), could impose substantial compliance burdens on Aboriginal and Torres Strait Islander artists and may lead to their products being banned (for instance, if artists are unable or unwilling to demonstrate that they are an Aboriginal and Torres Strait Islander person).
- The potentially substantial costs imposed on producers and sellers of products that would be subject to a ban could create a perverse 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 other policy responses would also create these incentives, they may be stronger under a ban given the possible losses for producers where products are excluded from the market.
- A ban would affect the commercial activities of non-Indigenous producers, even where they are not seeking to give the impression that their products have been authored by an Aboriginal and Torres Strait Islander person. This could include a chilling effect on the use of certain design elements. It could also limit artistic, satirical or political expression or commentary.
- A ban restricts the agency of consumers to make decisions.

³² For example, the word 'ANZAC' cannot be used for official or commercial purposes without permission from the Minister for Veterans' Affairs (DVA 2020).

As discussed in earlier chapters, some participants have proposed bans on the sale of non-Indigenous authored products as a way of reducing cultural appropriation and the harms this causes. For example, Arts Law, Copyright Agency and IartC advocated for a product ban ahead of a longer-term ICIP solution:

... 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)

However, the Commission has concluded that the harms of cultural appropriation should primarily be addressed through dedicated legislation that will give traditional owners legal protections for certain cultural assets (chapter 6). While such legislation will not apply to all arts and crafts that make use of Aboriginal and Torres Strait Islander styles and designs, it is expected to deter and/or prevent some of the more egregious misuses of cultural assets. Given this, and the expected implementation risks, potential negative effects on Aboriginal and Torres Strait Islander artists and impacts on consumers, the Commission does not regard a product ban to be a proportionate policy option.



Finding 7.4

Banning non-Indigenous authored 'Indigenous-style' products is not a proportionate policy option

New cultural rights legislation is expected to reduce instances of cultural appropriation and consequently, reduce the prevalence of non-Indigenous authored products that are Aboriginal and Torres Strait Islander in their style or design. Given this, and the costs and risks of implementing a ban on non-Indigenous authored products (including potential negative effects on Aboriginal and Torres Strait Islander artists) a ban is not likely to be a proportionate policy option.

Disclosure requirements could improve information available to consumers

An alternative way of providing consumers with information about the author or creator of Indigenous-style products is via a mandatory disclosure requirement.

Mandatory disclosure requirements already apply to a range of other products

Mandatory disclosure through product labelling requirements already applies to a range of products in Australia to address information gaps by alerting consumers to product characteristics that are not readily observable. These requirements can be enacted through various mechanisms, including country of origin labelling requirements on certain imported products and information labelling requirements under the ACL.

Country of origin labelling is often found on imported products (ABF 2020b). Specified products must include a trade description, which includes the name of the country where the goods were 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 some imported products, the label must be permanently affixed to the products, but in other cases can be attached to the packaging only.

Current import labelling requirements mean that many imported visual art and crafts products — whether produced under a 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, either because labelling was applied to bulk packaging rather than individual products, or it was been removed after products have been imported.

Under the ACL, there are mandatory standards that specify minimum requirements that products must meet before they can be supplied to consumers, including information standards that require certain warning or other information to be included on labels (Product Safety Australia 2022). 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 claims about free range eggs (box 7.4).

Box 7.4 – 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, free range 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 support for more regulation of the 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 to 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 conduct 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).

Increased disclosure requirements could address the information gaps created by non-Indigenous authored products

There are different ways in which increased disclosure through labelling requirements might be used in the Aboriginal and Torres Strait Islander visual arts and crafts market.

Option 1: Labelling all ‘authentic’ and ‘inauthentic’ Aboriginal and Torres Strait Islander visual 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. The key objective should be to ensure that any product that a reasonable person could infer as being produced by an Aboriginal and Torres Strait Islander artist would be covered.

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 would likely be the most practicable for this purpose. Addressing authorisation, such as by requiring producers to obtain the necessary ICIP authorisations before they label a product as ‘authentic’, would increase the compliance burdens on Aboriginal and Torres Strait Islander artists and be difficult to enforce, so issues of authorisation are better dealt with through cultural rights legislation (chapter 6).

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 them uncomfortable or offensive.

Implementing a requirement to label all products would provide more complete information to consumers. However, this option would impose additional compliance burdens on Aboriginal and Torres Strait Islander artists, not just on suppliers of non-Indigenous authored products.

Option 2: Labelling of non-Indigenous authored products only

An alternative approach that would impose lower compliance burdens on Aboriginal and Torres Strait Islander artists and producers would be to require labelling or some other form of disclosure only for non-Indigenous authored products.

This approach would require the same basic underpinnings as the option of labelling all products in terms of product coverage and authenticity (authorship) criteria.

However, it would only apply to non-Indigenous authored products that could reasonably be considered to be of Aboriginal and Torres Strait Islander design or style. Such disclosure could be thought of as a ‘warning label’ to consumers, alerting them that the product has not in fact been created by or under licence from an Aboriginal and Torres Strait Islander person.

The lower compliance burdens on Aboriginal and Torres Strait Islander artists are the key advantage of this approach compared to labelling all products. It would not impose obligations on Aboriginal and Torres Strait Islander artists, except in some circumstances where the regulator needs to verify whether unlabelled products have been authored by an Aboriginal and Torres Strait Islander person. 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 non-Indigenous authored products is high. This would also be important in minimising the costs of enforcement.

Mandatory labelling of non-Indigenous authored products should also not interfere with any branding or labelling approaches that Aboriginal and Torres Strait Islander artists choose to adopt to promote the authenticity of their work (such as individual or art centre branding, Indigenous Art Code certificates of authenticity, QR code labels, or a potential future CTM scheme).

Option 3: Setting criteria on certain labelling claims

A third, narrower, option could be to impose conditions on the use of certain claims in labelling or product descriptions for non-Indigenous authored products. This approach would focus on those products where labelling and advertising uses specified words or phrases (such as 'Aboriginal' or 'hand painted') that could give the impression the products were made by Aboriginal and Torres Strait Islander people. It would not apply to more ambiguous cases, such as where a non-Indigenous producer incorporates Aboriginal and Torres Strait Islander design elements into an artwork or product without making any claim that such design is Aboriginal and Torres Strait Islander in origin. In addition, this option 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 'Aboriginal artwork', the artist must meet the Indigeneity criteria set out in the standard.

This type of approach 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. 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 2018b, Recommendation 4).³³

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 Crafts Act of 1990 (box 7.5).

However, such a narrow approach might not materially increase the requirements already imposed by the ACL, which prohibit express and implied representations that something is authentic where it is not (as evidenced by the Birubi case).³⁴ It would also be unlikely to have much effect in raising consumer awareness about the existence and harms of non-Indigenous authored products.

³³ In the Government Response, Recommendation 4 was noted, with reference to the QR digital labelling trial (Australian Government 2020, p. 5).

³⁴ The case concerned non-Indigenous authored products made in Indonesia, where statements in product marketing about Aboriginal art, culture and people made in conjunction with statements that the products were hand crafted and painted were found to be false or misleading representations in breach of the ACL, because they 'suggested a relationship between Australian Aboriginal people and the production of the products which did not exist' (ACCC 2018b).

Box 7.5 – 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, stated 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)

Option 4: Restrict labelling disclosure requirement to imported products

Another option would be to restrict increased disclosure requirements to imported products. But such a change would not distinguish between licensed and non-Indigenous authored merchandise. And it could have the unintended effect of giving consumers the impression that all imported products are non-Indigenous authored.

To be more useful to consumers, import labelling requirements would need to distinguish between non-Indigenous authored products and imported products made under a licensing agreement with an Aboriginal and Torres Strait Islander artist. However, such a system would be more onerous to implement, in terms of enforcement and the compliance burdens. 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?

Comparing the key features of the options canvassed above (table 7.1) shows that a labelling regime that applies to all products sold in Australia offers greater coverage compared to labelling imported products only or a voluntary labelling scheme. And restricting the obligation to label only non-Indigenous authored products, akin to a warning label, would minimise the compliance burdens on Aboriginal and Torres Strait Islander artists and producers. In addition, it would not impede Aboriginal and Torres Strait Islander artists' options to use voluntary schemes to provide additional assurances about their products to buyers.

The Commission's draft report included a draft recommendation for labelling requirement for non-Indigenous authored products; reactions from study participants were mixed. Some participants (for example: KPMG, sub. 47; AAAA, sub. 53) were broadly supportive and saw such a requirement as a positive development in the face of complex challenges. To illustrate, the Australia Council for the Arts said:

The Australia Council welcomes the proposed labelling scheme for inauthentic products as a potential way to address challenges that have been faced by national authenticity labelling schemes in the past, including moving the burden away from First Nations artists and art centres and acknowledging local and regional responses to authenticity labelling in place. We believe resourcing for monitoring, enforcing compliance, and education and awareness raising will be essential to the scheme's success. We look forward to seeing the labelling scheme implemented and enforced among those who distribute inauthentic products. (sub. 49, p. 3)

But some participants (for example: NAVA, sub. 42; Ku Arts, sub. 46; Arts Law, Copyright Agency and IartC, sub. 62) remained in favour of banning non-Indigenous authored products. They also raised concerns that implementing labelling for non-Indigenous products could be viewed as legitimising non-Indigenous authored products. Other participants (for example: Ian Goss, sub. 40; Australian Copyright Council, sub. 50; eBay Australia and New Zealand, sub. 52; Law Council of Australia, sub. 59) raised questions about implementation, which highlight the complexity of addressing the problem and the need for careful design of new policy responses.

On balance, the Commission remains of the view the Australian Government should impose a mandatory disclosure requirement for non-Indigenous authored products where buyers may reasonably believe those products to be of Aboriginal and Torres Strait Islander origin, design or style. The Commission considers that such disclosure is the most pragmatic and proportionate way to help consumers make informed choices and reduce the prevalence of non-Indigenous authored products.

A mandatory disclosure scheme that identified authentic products, not just non-Indigenous authored products, could provide even better information to consumers. It could also simplify enforcement. However, the additional compliance burdens on Aboriginal and Torres Strait Islander artists would likely outweigh these considerations. Mechanisms to verify the authenticity of particular products may be highly valued by some buyers (including final consumers and retailers that wish to avoid stocking products perceived as unethical) but such decisions should be left up to Aboriginal and Torres Strait Islander producers.

Table 7.1 – Comparing mandatory disclosure/labelling options

	Labelling all products	Labelling non-Indigenous authored products	Setting labelling criteria	Import labelling
What is it?	Label all specified products as ‘authentic’ or ‘inauthentic’.	Only label non-Indigenous authored 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	All products containing Aboriginal and Torres Strait Islander designs and styles.	Non-Indigenous authored products containing Aboriginal and Torres Strait Islander designs and styles.	Applies to products that make certain claims of authenticity.	Applies to imported products only.
Expected effects	Provide greater clarity to consumers about products’ authorship.	Provide greater clarity to consumers about products’ authorship.	Could reduce misleading claims that suggest a product is authentic.	Could provide greater clarity to consumers about imported products’ authorship.
Compliance burdens on Aboriginal and Torres Strait Islander artists	Require artists to verify Indigeneity and label products.	No action generally required, but may require artists to verify Indigeneity if challenged.	No action generally required, but may require artists to verify Indigeneity if challenged.	May require artists to verify Indigeneity to license overseas manufacturing.
Compliance burdens on other suppliers of ‘authentic’ products	Need to ensure that products comply with labelling requirements.	May need to ensure that unlabelled products comply with authorship criteria.	May need to ensure that products meet authorship criteria where claims of authenticity are made.	Importers may need to demonstrate products meet authorship criteria.
Compliance burdens on suppliers of non-Indigenous authored products	Need to label products as not being created by an Aboriginal and Torres Strait Islander person.	Need to label products as not being created by an Aboriginal and Torres Strait Islander person.	Prevented from using specified phrases that suggest product is authentic.	Need to be label imported products as not being created by an Aboriginal and Torres Strait Islander person.
Enforcement issues and limitations	Enforcement action would need to be directed to the most egregious forms of non-compliance.	Unlabelled non-Indigenous authored products may be difficult to distinguish from authentic products 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.



Recommendation 7.1

Mandatory disclosure where products are non-Indigenous authored should be required

The Australian Government should introduce a mandatory disclosure requirement to address the information gaps in the market that make it difficult for buyers to determine if products are created or licensed by an Aboriginal and Torres Strait Islander artist.

This should be done by requiring the clear and prominent disclosure of non-Indigenous authorship where products that a buyer might reasonably consider to be of Aboriginal and Torres Strait Islander origin, design or style have not been produced by or under licence from an Aboriginal and Torres Strait Islander artist.

Such disclosure would facilitate informed purchasing decisions, reduce unfair competitive pressures on Aboriginal and Torres Strait Islander artists and likely reduce the prevalence of non-Indigenous authored products in the market. In developing the disclosure requirement, the Australian Government should engage effectively with Aboriginal and Torres Strait Islander people.

7.4 Implementing a disclosure requirement for non-Indigenous authored products

The ACL appears to provide a good basis for implementing a disclosure requirement that would apply to imported and Australian-made products. However, disclosure requirements could be implemented in different ways. What is important is that:

- the mandatory disclosure requirement results in useful information being provided to consumers in a clear and prominent way
- the obligations on suppliers are as clear as practicable and compliance burdens are minimised
- and sufficient resources are available to ensure appropriate enforcement.

Existing legal frameworks can be used to implement a disclosure requirement for non-Indigenous authored products

Implementing a mandatory disclosure requirement through the ACL could involve either information standards or deeming provisions.

Information standards

Under the ACL (s. 134 (2)) an information standard can be made for either goods or services of a particular kind to:

- make provision in relation to the content of information about goods or services of that kind; or
- require the provision of specified information about goods or services of that kind; or
- provide for the manner or form in which such information is to be provided; or
- provide that such information is not to be provided in a specified manner or form; or
- provide that information of a specified kind is not to be provided about goods or services of that kind; or
- 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).

As outlined above, information standards are already used for different products (box 7.4).

Deeming provisions

Another option is to amend the ACL to extend what would be considered a misleading representation. That is, a product that consumers might reasonably consider to include an Aboriginal and Torres Strait Islander expression or design could be deemed to be making a representation that it had been created or licensed by an Aboriginal and Torres Strait Islander person, *unless* there are express disclosures (such as through a label attached to the product or in a product description) that clearly state that the product *has not* been created by or under licence from an Aboriginal and Torres Strait Islander person. Breaches would then be contraventions of the misleading conduct provisions of the ACL (ss. 18, 29(1)(a) and 33).

This option was proposed by the ACCC as an alternative approach to an information standard for mandatory labelling because it might ameliorate concerns that labelling could be seen as legitimising non-Indigenous authored products, while also being ‘strongly aligned with the role and function of consumer law in dealing with misrepresentations’ (ACCC, sub. 58, p. 5).

The deeming provision could also impose specific requirements for the form of disclosure that would be required. For example, as the ACCC suggests (sub. 58, pp. 5–6), it could require that mandatory text explaining the harms of inauthentic products accompany the disclosure.

While this mechanism would legally operate differently to the information standard, and may not necessarily require a particular label on the product — for instance the disclosure may be provided in an accompanying product description — in practice, the outcomes in the market would be very similar. That is, non-Indigenous authored products would be clearly described as such, providing buyers with more accurate information.

It would also be subject to the same implementation considerations around facilitating compliance, ensuring effective enforcement and developing accompanying awareness measures.

Practical considerations

Irrespective of the legal mechanism used to enact the disclosure requirement, there are several factors to consider about how it should be implemented and what will be necessary to ensure the effectiveness of the disclosure requirement (table 7.2).

Table 7.2 – Suggested approach for a mandatory disclosure requirement for non-Indigenous authored products

Product Coverage	Suggested approach
Authorship Criteria	<p data-bbox="751 949 991 981">Suggested approach</p> <ul style="list-style-type: none"> • The disclosure requirement should cover any product offered for sale in Australia that a reasonable person would consider includes an Aboriginal and Torres Strait Islander design or style (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product). • It would potentially cover: arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise; and digital artworks and designs.
Design and Implementation	<p data-bbox="751 1281 991 1312">Suggested approach</p> <ul style="list-style-type: none"> • Suppliers of designated products that do not meet the authorship criteria must disclose that those products have not been produced by or under licence from an Aboriginal and Torres Strait Islander person. • Disclosure should be clear and obvious to consumers — such as a label attached to products where practicable or prominently included in product signage or descriptions. To facilitate compliance, a specified form of disclosure that would be deemed to comply with the disclosure requirement (such as a standardised label or set of words) should be developed. • To facilitate implementation of the disclosure requirements the following will be required: <ul style="list-style-type: none"> – awareness measures to inform suppliers – a transition period for suppliers – complementary awareness measures for consumers – resourcing for monitoring and enforcing compliance.

Product coverage should be broad

Defining the coverage of products that would be subject to the requirement is difficult because Aboriginal and Torres Strait Islander expressions, designs and styles are diverse and evolving. 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 clothing may be less apparent, or more contestable.

To achieve the intent of the requirements in reducing information gaps, coverage needs to be set broadly so that any artwork or other product that a consumer could reasonably perceive as being of Aboriginal and Torres Strait Islander origin would be covered. Accordingly, coverage should be defined along the lines of ‘any product that a reasonable person might consider as containing an Aboriginal and Torres Strait Islander design or style’.

Broad coverage will create some uncertainty at the margins about whether or not a product is subject to the requirement, adding to the complexity of implementing the requirement. However, broad coverage is essential to the disclosure requirement and trying to narrow coverage risks undermining the intent of the initiative.

Covered products should satisfy authorship criteria to be exempt from the requirement

Whether or not covered products need to be labelled will depend on whether they are created or licensed by an Aboriginal and Torres Strait Islander person.

In determining Indigeneity for the purposes of meeting this authorship criteria, the three-part definition already used by the Australian Government in other contexts should be used. That is, 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 disclosure requirement. Study participants also submitted that this definition would be best suited to demonstrating Aboriginal and Torres Strait Islander authorship:

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 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)

Notwithstanding these difficulties, a definition of Aboriginal and Torres Strait Islander authorship is required and the existing three-part definition appears the most practicable.

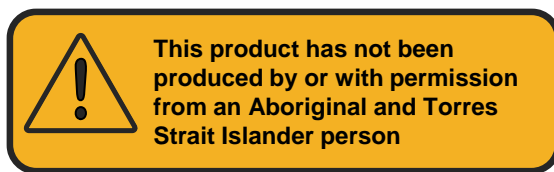
Standardised labelling for covered products that do not meet authorship criteria

One issue is what type of disclosure should be required and how prescriptive should it be.

Because the disclosure is focused on authorship, it should contain a statement such as ‘this product has not been produced by or with permission from an Aboriginal and Torres Strait Islander person’.

To aid with consumer awareness, facilitate compliance and aid enforcement monitoring, a standardised form of disclosure, both in terms of the words used and the design of a label, should be required in most cases. An example of what a required label might look like is illustrated below (figure 7.2). Using a specified label that is similar in appearance to other warning labels would increase the likelihood of the label being noticed by consumers and help address concerns that labelling could be misconstrued as an endorsement of inauthentic products.

Figure 7.2 – Example of how a warning label might look



How the disclosure requirement is legally implemented could vary and it may not be feasible to fully prescribe the form of the disclosure. Challenges could arise, for example, with secondary sales of original artworks where authenticity documentation is lost.

To accommodate these cases, exceptions should be created where an alternative form of disclosure is permitted. Consideration could also be given to allowing greater flexibility for suppliers to choose their own form of disclosure in these cases.

Other issues include the requirements for applying the label. Labelling would ideally be applied by the initial producer, or where products are packaged for sale. Another question is whether it should be necessary to individually label each item, or it would be sufficient to include the disclosure in product signage or online product descriptions. To maximise awareness, the label should be attached to individual items at the point of sale, either by incorporation into the packaging of the product, or as an adhesive label. However, for some items, such as very small souvenir products that are sold without packaging, it may be reasonable to allow for the labelling disclosure to be made in the product description at the point of sale. Similarly, for products sold remotely, the disclosure should be prominently included in the product description.

Raising awareness will be important for suppliers and consumers

As part of the implementation of a disclosure requirement, suppliers should be informed about their obligations to facilitate compliance, and consumers should have access to information about the new label.

All suppliers involved in the production and sale of non-Indigenous authored products (from manufacturers through to retailers) would need to be informed about their obligations and given sufficient time to comply with the new labelling obligations. A pre-announced or delayed start would be a simple approach. However, an alternative might be to have an initial period where no enforcement action is taken beyond informing suppliers about their obligations. This would provide additional opportunities to iron out any deficiencies in the practical operation of the disclosure requirement, such as whether suppliers' approaches to disclosure are effective in informing buyers, or if there are misunderstandings about compliance obligations in particular market segments.

Another consideration is what evidence suppliers of unlabelled products would need to verify that they complied with the disclosure requirement. For example, secondary suppliers (such as retailers) of unlabelled products could rely on the absence of disclosure from a supplier as a defence where unlabelled products are found to be non-compliant, or additional evidence, such as a declaration from the initial supplier that the products are compliant could be required.

Awareness raising measures for consumers would bolster the effectiveness of a non-Indigenous authorship disclosure requirement by providing additional context for why authorship is an important consideration. There are already consumer education resources and the Australian Government has committed to a new awareness raising strategy. These measures should be used to inform consumers about the new requirement.

A further mechanism to disseminate information materials could be to require suppliers making disclosures about non-Indigenous authorship to also provide specified information (either in full or through links such as QR codes) at the point of sale about the potential harms of these products (as suggested by the ACCC, sub. 58).

Enforcement should be well targeted

Success of the disclosure requirement will require sufficient well-targeted enforcement. Many participants (for example: Australia Council, sub. 49; ACCC, sub. 58) pointed to the need for strong enforcement, and the necessary resourcing that entails, as a critical factor to the success or otherwise of the initiative.

While resourcing will be important, and the Australian Government should ensure that adequate additional resources are allocated to administer the new requirement, a targeted approach to enforcement will be necessary to maximise the net benefits.

- **Enforcement should be targeted at the most egregious problems.** While non-Indigenous authored products can vary greatly in type, these products are most prevalent in certain market segments (such as mass-produced souvenirs, stock images and print-on-demand merchandise). Targeted monitoring and enforcement would therefore be key in achieving meaningful levels of compliance in a cost-effective way.
- **Discretion should be used to minimise burdens.** An important element of the initiative is minimising the compliance burdens, particularly on Aboriginal and Torres Strait Islander artists. Enforcement action will necessarily lead to instances where Aboriginal and Torres Strait Islander artists may need to verify their Indigeneity. However, by targeting enforcement activity and employing discretion in how investigations and enforcement actions are employed, these burdens can be minimised.
- **There should be clear pathways to report concerns.** Opportunities for people to report their concerns where they suspect non-Indigenous authored products are being sold will be important because industry participants will often be best placed to identify products that appear to imitate Aboriginal and Torres Strait Islander designs and styles.

The objectives and legal mechanisms for the disclosure requirement mean that primary responsibility for enforcement of the disclosure requirement would fall to ACL regulators, primarily the ACCC. However, because many non-Indigenous authored products are imported, further consideration should be given to how border monitoring and enforcement activities could be effectively employed. Border controls risk increasing the compliance burden on Aboriginal and Torres Strait Islander artists involved in licensing products manufactured overseas, and enforcement may be difficult due to the generic descriptions used to import products. But a requirement for importers to declare that certain product lines (covering say, souvenirs and homeware products) either do not contain designs that they reasonably believe would be considered as Aboriginal and Torres Strait Islander origin, or if they do, are compliant with the ACL provisions (either because they are appropriately licensed, or labelled as non-Indigenous authored products) could be explored.

Determining if the new requirement has been effective

New policy initiatives should be subject to a post-implementation review, to gauge their effectiveness, identify any unintended impacts and assess options for amendments. This initiative is no different and should be reviewed, potentially in conjunction with the cultural rights legislation review (chapter 6).

Gauging the effectiveness of the disclosure requirement is likely to be complicated because the objective of the measure — better informed buyers — is difficult to measure, but elements to consider will include:

- the extent of compliance with the disclosure requirement
- accessibility and usefulness of the disclosure to buyers
- the appropriateness of the approach to monitoring and enforcement.

Another element to consider is the impact of the disclosure requirement on market activity, given it is expected it would lead to a shift in the composition of trade from non-Indigenous product towards those produced by Aboriginal and Torres Strait Islander artists.

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.**
- * **Market integrity requires all participants — including art dealers, galleries and merchandise producers — to conduct themselves ethically and respect artists' creative agency over their cultural expressions. Ethical conduct requires participants to 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 experience 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 Aboriginal and Torres Strait Islander artists take actions to protect their own rights and interests. Communities, market participants and governments also work to empower artists and reduce unethical conduct in visual arts and crafts markets.**
 - Community-controlled art centres assist artists in negotiating with market participants, 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, including the Arts Law Centre of Australia, Copyright Agency and the National Association for the Visual Arts, educate artists on their rights and provide legal advice.
 - Government regulation, including copyright protection and the prohibition on unconscionable conduct, also protects the rights of artists.
- * **Concerns about unethical market conduct are not easily addressed, but a modest increase in funding to Indigenous Art Code Limited would allow for expanded complaints handling and clearer monitoring, evaluation and reporting processes.**
 - Legal and other artist support services should be refocused to centre the needs of Aboriginal and Torres Strait Islander artists.

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 only a moral imperative, but fundamental to the ongoing success of the Aboriginal and Torres Strait Islander visual arts and crafts market.

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, describes the impacts that mistreatment can have on artists and their communities, and outlines some of the factors that contribute to the risks of unethical dealings (section 8.2)
- summarises how artists protect their interests, supported by their communities, industry participants and governments (section 8.3)
- outlines the Commission's advice on how governments could support better industry conduct (section 8.4).

8.1 What do fair and ethical dealings 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. But in practice, there is often an imbalance in the bargaining power of buyers and sellers, creating an opportunity for the more powerful party to gain an advantage over the other party. 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 conduct 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.

Box 8.1 – What do we mean by ‘unethical conduct’?

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 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 in a single transaction, or through ongoing working arrangements.

Some exploitative conduct may be harder to identify. For example, transactions that both parties agree to and benefit from may still involve one party taking advantage of another: 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 can seem 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 Aboriginal and Torres Strait Islander visual arts and crafts markets 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 that, as emphasised by Arts Law, Copyright Agency and IartC (sub. 31, p. 48), permeate the relationships between Aboriginal and Torres Strait Islander people and non-Indigenous people, including in contemporary visual arts and crafts markets.

Different people can have their own understanding of whether certain conduct is ethical or not, and unethical treatment does not always mean the offending party acted maliciously. 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 art buyers 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).

In this study, the Commission has been 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 pay*: 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.

8.2 Artists' experiences of unfair or unethical conduct

Many study participants have shared their personal experiences of what they consider to be unethical or unfair conduct by market participants. These experiences include stories of poor treatment by some art dealers (including conduct referred to by some as 'carpetbagging'), as well as problems with unfair written agreements and underpayment.

Some Aboriginal and Torres Strait Islander artists also find their works plagiarised or imitated in violation of their copyright, particularly in online marketplaces. These forms of unethical market conduct are discussed in chapter 4.

Disrespectful or unsafe conduct towards artists

Some study participants, particularly in remote areas, shared experiences of poor treatment by dealers, including poor working conditions and being coerced to work in order to fulfill kinship obligations.

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 some individuals, primarily in remote Australia, exploit the circumstances of some artists in order to obtain valuable artworks at a cost well below market value. These people may be private art dealers, or other business owners, and are usually non-Indigenous (Arts Law, Copyright Agency and IartC, sub. 62, pp. 24–25).

Barbara Moore from Tjala Arts (APYACC, sub. 17, pp. 17–18) relayed her experience of having her artistic and cultural agency exploited, 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. I did not make these paintings but they tricked me and offered me a little bit of money to have my photo taken with these paintings and to sign my name. 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 (NAVA) 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 for artists, including 'sweatshops' as well as 'storage facilities and hot, grotty sheds' (APYACC, sub. 17, pp. 10, 30)
- 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)
- underpayment, such as where '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)
- dealers forcing artists to remain in the studio for long periods of time, in order to be remunerated (Arts Law, Copyright Agency and IartC, sub. 62, p. 24)
- abuse of the book-up system³⁵ or 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 then-Minister for Indigenous Australians also noted the unethical behaviour of certain dealers taking artists away from home to make them paint, buying artwork at a much lower price, and then on-selling it at 'incredible mark ups overseas' (Wyatt 2019, p. 11).

Other market participants have also been accused of exploiting artists. In 2022, a former 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).

Exploitation 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 communities feel when their stories are stolen for the profit of non-Indigenous dealers at the expense of 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.

³⁵ '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).

Nyurpaya 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.

In addition to the impacts on artists themselves, 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 had in creating an impression of widespread exploitation throughout the industry. Acker, Stefanoff & Woodhead (2013, p. 14) also noted that ongoing allegations concerning the 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 also relayed their experiences with unfair contracts, 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 Inc (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 and 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.

King & Wood Mallesons (sub. 34, p. 2) noted examples of inequitable and unfair licensing structures, as well as deception and unconscionable actions towards artists in negotiations. Similar allegations have been raised with the ACCC (sub. 13, p. 3), including where artists have:

- signed contracts that they do not understand, which include terms they would not have agreed to (particularly terms allowing a dealer to amend artworks without proper consent, and in ways that could cause cultural offence)
- made agreements with dealers that include unfair remuneration.

Study participants noted that these experiences can contribute to artists being distrustful of contracts (AAAA, sub. 26, pp. 21–22; Chamber of Arts and Culture WA, sub. 44, p. 3). If artists are unwilling to use written contracts, there is scope for other forms of exploitation: Desert Inc (sub. 4, p. 13) noted examples 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.

Some business have also been accused of 'black cladding': where a non-Indigenous business takes advantage of an Aboriginal and Torres Strait Islander person (or business) in order to access particular Indigenous-specific markets, including through corporate and government procurement (Supply Nation 2019).

Emerging issues in online marketplaces

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, 31). While online platforms allow artists to sell work directly to customers and access information on final sales prices, artists also need to protect their work against copyright infringement and plagiarism.

The rapid move online has raised concerns that these platforms can provide new opportunities for unethical practices (Australia Council, sub. 24, p. 32). Some online platforms go to significant lengths to provide artists with fair contracts, and actively remove items from sale that infringe copyright. Other platforms only respond to copyright claims in some cases, which can lead to a 'whack-a-mole' scenario in trying to remove illegally reproduced material (Arts Law, Copyright Agency and IartC, sub. 31, p. 54). These concerns are outlined in chapter 4.

Although emerging forms of digital artmaking, such as non-fungible tokens (NFTs), create opportunities for artists, they also create the risk of works being copied or sold without the artists' awareness or consent, and without them receiving any income.

Concerns that Aboriginal and Torres Strait Islander artists are paid unfairly

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 from art centres commonly receive 50-60% of the sales price (Arts Law, Copyright Agency and 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 Aboriginal and Torres Strait Islander artists received about \$41 million from the sales of their artwork in 2019-20, which represents about 30% of the value of original artwork sales.³⁶ The average income of artists working through art centres that year was just over \$3200 (chapter 3). This does not necessarily imply widespread underpayment: for example, a large number of artists, many of whom work through art centres, practise art for non-commercial reasons and earn little or no income.³⁷

The returns to artists vary between business models. Many independent artists directly engage with dealers and galleries and develop mutually-beneficial long-term relationships. But Arts Law, Copyright Agency and IartC (sub. 31, p. 50) observed that this model can be problematic in some circumstances, 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 sale price (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 and IartC, sub. 31, p. 12).

Unfair pay 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.

Concerns over fair economic returns for Aboriginal and Torres Strait Islander people have been raised in other parts of the supply chain, including the retail sector. Trading Blak (sub. 63, p. 1) referred to the

³⁶ There is a degree of uncertainty in these estimates, as artists generate income from sales of merchandise as well as artworks, and the estimated total value of sales includes some double-counting because of overlap between sales channels. There is no accurate data on income from merchandise sales or the overlap between sales channels (chapter 3).

³⁷ The average income of core artists (those who sold more than 10 artworks through an art centre that year) was \$7300, more than double the overall average.

'damaging exploitation from well-resourced, non-Aboriginal businesses that trade in Aboriginal culture and actively prevent opportunities for Aboriginal retail businesses'.

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 and underpayment 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 industry, 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), and were reiterated in a 2002 review of *Competition and Consumer Issues for Indigenous Australians* (Altman and Ward 2002, p. xiv). Parliamentary inquiries, including the 2007 Senate Inquiry report *Securing the Future* (which supported the establishment of a voluntary industry code of conduct, the Indigenous Art Code) and the 2018 House of Representatives Inquiry into inauthentic art, also reflected concerns raised about unethical conduct. These inquiries noted the contributing factors of artist circumstances and the difficulties in securing prosecutions for unethical conduct (SSCECITA 2007, pp. 100–106) and provided examples of art centre staff being 'intimidated and threatened' and artists being paid in drugs and alcohol (HoRSCIA 2018b, p. 35).

Available quantitative evidence is not comprehensive

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.

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 (sub. 17, p. 15) viewed that carpetbagging has worsened since the commencement of the Indigenous Art Code. Arts Law, Copyright Agency and IartC (sub. 31, p. 51) also accepted 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 by a Senate committee 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 seen 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.

A survey 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 artists 'indicated confidence in their ability to manage commercial relationships' (Acker and Stefanoff 2016, p. iii).

Legal firm King & Wood Mallesons (sub. 34, pp. 1–2) provided a summary of their assistance to the sector over the past three years, having provided almost 5500 hours of pro bono assistance (valued at \$2.47 million) to Aboriginal and Torres Strait Islander artists and art organisations across 58 separate matters. Most of this assistance concerned advice to artists, but at least 530 hours related to assistance on specific disputes concerning copyright infringement, misappropriation of Indigenous Cultural and Intellectual Property, inequitable or unfair licensing structures, and deception or unconscionable conduct towards artists.

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 and IartC, sub. 31, p. 49). The ACCC agreed that most 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 and IartC, sub. 31, p. 50), which makes it more likely that such conduct goes unreported and is thus difficult to quantify.

At present, comprehensive data is not routinely collected on reported cases of unethical conduct. More comprehensive data on the extent of, and trends in, reported unethical conduct would support governments to identify gaps in artist support services and other forms of government assistance. It would also contribute towards a shared understanding within the industry of how widespread poor behaviour is.



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 and underpayment, which affect the rights, wellbeing and economic returns to Aboriginal and Torres Strait Islander artists and their communities. Data on reported cases of unethical conduct is not routinely collected.

Why might artists encounter this conduct in the market?

Exploitation of Aboriginal and Torres Strait Islander artists is not, and should not be considered to be, inevitable. Instead, the risk of exploitation or other unethical conduct can be linked to the social and economic circumstances that some Aboriginal and Torres Strait Islander artists face, alongside broader market structures.

Artist circumstances

Some Aboriginal and Torres Strait Islander artists face particular circumstances — including economic precarity, remoteness, or poor English literacy and numeracy skills — that compound structural and systemic challenges (SCRGSP 2020).

Working on Country, maintaining strong connections to kin and culture, is a source of strength for many Aboriginal and Torres Strait Islander artists. Most paid Aboriginal and Torres Strait Islander artists are based in remote areas (chapter 3). But life in a remote area can contribute to the risk of being exploited. The Commission has heard from artists that the already high cost of living in remote areas, including food, fuel and other necessities, is worsening because of economy-wide inflation.

A large proportion of artists, particularly in remote areas, are older, and have specific responsibilities to support and provide for their families. These 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). Nyurpaya Kaika (APYACC, sub. 17, p. 14) said:

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.

However, family obligations can put pressure on artists as providers, and some have alleged that particular art dealers take advantage of these cultural responsibilities in order to obtain artworks at unfair prices.

Arts Law, Copyright Agency and IartC (sub. 31, p. 48) connected these circumstances, which also exist for some artists in regional and urban 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 and 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.

Market conditions and operation

Structural failures in art markets, such as market power imbalances and unequal (or asymmetric) information³⁸ 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.

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. This lack of awareness can create the conditions for unethical behaviour (TFFF, sub. 2, p. 2).

³⁸ 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.

Market power and information flows are more uneven in some business models, which affects artists differently (box 8.2; the different segments and sales channels of the visual arts and crafts markets 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 with an upfront or direct-dealing model.

In some communities, art centres play a key role in mediating transactions and counteracting power imbalances between artists and other participants.

However, many artists (particularly in regional and urban areas) operate independently of art centres, while a significant number sell to both art centres and directly to dealers. Many 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 unwilling to work through an existing art centre.

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 8.3), artists can still be taken advantage of if they lack access to the support system available through many art centres and their associated networks, including regional peak bodies.

The risk of unfair or unethical conduct can also be influenced by dynamics on the supply side of the market. 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. Where the market is oversupplied, or artists have few alternative employment options, 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 and 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 and IartC, sub. 31, p. 49).

Similar 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 limited information or unequal bargaining power, in order to license their designs for merchandise (Arts Law, Copyright Agency and IartC, sub. 31, pp. 36, 54). This can result in artists signing contracts without free, prior and informed consent.

Box 8.2 – 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 buyers 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 3.3). 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 generally take a commission of 40-50%, but maintain sales records that the artist can access to see the price of works sold.

Consignment to a dealer or gallery

A work sold under consignment is physically transferred to a dealer or gallery, but the artist or art centre retains legal ownership until the work is sold. This delays payment to the artist, but ensures they receive

Box 8.2 – How do different visual arts and crafts business models affect artists?

payment that corresponds with the actual sales price. The dealer or gallery will be responsible for exhibiting, marketing and selling the work, and will also take a commission of about 40% (box 3.3).

Independent artists who consign their work are generally established artists, with their own working space and materials, and experience in negotiating consignment agreements.

Upfront dealer model

Some artists engage with dealers and galleries on an 'upfront' basis, where they sell a work directly for an agreed price (box 3.1). Artists are paid immediately and irrespective of whether the dealer or gallery can sell the artwork, but the artist may only receive a small share of the final sales price if the dealer manages to sell the work with a significant mark-up. The dealer or gallery is responsible for documenting the work and does not always provide records of sales to the artists.

Paying artists upfront, in cash, 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 customers through art fairs, online marketplaces, social media or informally (such as street sales). The artist sets their own prices and receives most of the income, but they are responsible for their own materials and working space, marketing and business administration, and connecting with customers.

Licensing and other design services

Many artists also diversify their income by designing and licensing merchandise, providing graphic design services, or undertaking public art and architecture commissions. These types of work are usually commissioned under contracts, some of which are complex. Artists may be unsure of a fair rate of pay, or may not understand all of the terms in a contract.

Source: Arts Law, Copyright Agency and IartC, sub. 31, pp. 11–18, 50.

8.3 Many factors strengthen the position of artists in the market

Communities, governments and other art sector participants work with artists to reduce the incidence of exploitation and scope for other unethical conduct. Strengthening artists' agency, alongside their communities, is key for them to 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.

These protective factors affect the operation of the marketplace to promote fair dealings with artists. Some improve transparency, which helps 'shine a light' on unethical conduct, or provide information to consumers to help them make ethical purchases. Artist support services help artists to understand their rights, access independent advice before entering into a contract, and raise issues or access redress following unethical conduct. And artists can exercise their own agency to choose between multiple avenues to market their works, allowing them opportunities to bypass working with unethical operators.

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.

Community and culture

The ability of Aboriginal and Torres Strait Islander artists to engage confidently to protect their interests 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, help empower artists to negotiate confidently to both protect their interests and benefit from art markets. 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 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/Gomeri 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. (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 cultural practice as a key source of strength for 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.

Community-controlled art centres and regional 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. Art centres are not-for-profit organisations, typically governed by an Indigenous board and registered with the Office of the Registrar of Indigenous Corporations (ORIC) and managed by an arts professional (often from outside of the community; chapter 10).

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 8.2). 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.

Art centres are often the first point of contact for an artist who feels they have been ripped off (AACHWA, sub. 20, p. 6), and they usually refer artists to make complaints under the Indigenous Art Code or seek legal advice from the Arts Law Centre of Australia (discussed below). 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. Some regional peak bodies also support independent artists in their regions, while the Aboriginal Regional Arts Alliance NSW supports artists in regional New South Wales.

Some study participants emphasised the importance of art centres to 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 a 2008 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 can 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 but 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. Governance can be variable

between different art centres, and ongoing training is important for maintaining and improving art centre capability (chapter 9).

National peak bodies

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. 1). 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 original art and souvenirs, and nearly 500 supporter members (sub. 26, p. 1).

The AAAA promotes ethical practice through mandating its Aboriginal Art Code for all members, and advocating 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, pp. 1, 25).

The National Association for the Visual Arts 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 for Visual Arts, Craft and Design*, revised in 2022, aims to represent best practice standards for the industry, including advice on pricing structures to enable independent artists 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).

Government regulation and support services

Government regulation of visual arts and crafts markets imposes obligations on all industry participants, including artists, and serves as another protective factor against unethical conduct. A range of service organisations provide outreach to assist artists to understand their rights, and provide advice or legal assistance in the event of alleged 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 (chapter 4).

The nature of copyright means artists are responsible for enforcing their rights, but not all artists are aware of this, and many find it difficult to identify misuse of their copyright, make complaints, or issue takedown notices. This is even harder if alleged breaches occur overseas, or if online sales platforms are hosted internationally.

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 5 and appendix D.

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 and IartC, sub. 31, p. 22).

The Resale Royalty scheme

From 9 June 2010, all Australian visual artists hold an enduring right to a resale royalty in their artworks that entitles them, in certain circumstances, to receive a share of the price of works resold commercially after the initial sale.

The Resale Royalty scheme recognises the ongoing rights of visual artists in their artworks, and aims to provide an additional source of income (Copyright Agency, sub. 30, p. 2). It also provides returns to artists and/or their families where the sales price of an artwork increases substantially from the initial sale. Some study participants emphasised the importance of resale royalties for providing ongoing income to Aboriginal and Torres Strait Islander artists and their families, as well as providing market information to artists and contributing to professionalism and capacity building (Australia Council, sub. 24, p. 27; Copyright Agency, sub. 30, pp. 2–3).

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 subject to 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 start of the scheme until 30 September 2021, nearly two-thirds of resale royalty recipients were Aboriginal and Torres Strait Islander artists, although they received only 38% of the total royalties paid (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 since the scheme was introduced in 2010 (chapter 3).

Some study participants highlighted the costs the scheme imposes on dealers and galleries, and the complexity of complying with the scheme. For example, the AAAA (sub. 26, p. 10) raised concerns that the initial sale to a customer can attract resale royalty. If the art centre acts as the artist's agent to enable them to sell their work, the sale to a dealer would be considered the first sale. However, if the art centre purchases the work outright from the artist, any subsequent sale to a dealer or gallery would need to be reported and may attract a royalty (Copyright Agency 2015).

Arts Law, Copyright Agency and IartC also claimed that some dealers were not compliant with their reporting requirements under the Resale Royalty scheme (sub. 31, p. 16), calling for inspection rights to allow the Copyright Agency, as the administrator of the scheme, to review the finances of dealers to ensure they comply with their resale obligations (sub. 31, pp. 57–58; sub. 62, p. 35).

Providing an inspection right would likely identify some cases of royalty underpayment to Aboriginal and Torres Strait Islander artists and their families. However, there is no evidence that underpayment is widespread, nor that underpayment is a result of deliberate non-compliance.

Inspection rights would create additional compliance costs, both for dealers, who may need to amend record-keeping processes, and the Copyright Agency, who would need to resource any enforcement action. If resale royalty underpayment is relatively uncommon and largely due to private market participants failing to

understand their legal obligations, an inspection right may not be a proportionate response, particularly as the Copyright Agency already has the power to penalise non-compliance with resale (sub. 31, pp. 57–58). Instead, governments and industry should prioritise educating artists, dealers, and other market participants on the application of resale royalty, with the Copyright Agency enforcing penalties in cases of deliberate non-compliance.

Further, as Arts Law, Copyright Agency and IartC acknowledge, providing an inspection right would not address the key issue of whether the artist was paid fairly for their work initially (sub. 31, p. 57). Improved resale compliance would only provide limited benefits to a small number of Aboriginal and Torres Strait Islander artists.

If more comprehensive evidence of deliberate non-compliance with resale royalty is developed, such as through additional data collection on reports of misconduct undertaken by IartC (discussed below), then the Australian Government should consider the benefits and costs of implementing an inspection right, drawing off existing statutory licensing models administered by the Copyright Agency.

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, as well as producing educational material for dealers and artists on their rights and obligations.

Unconscionable conduct — an extreme form of exploitation — is prohibited under sections 20–22 of the ACL.³⁹ 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.⁴⁰

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). The ACL also prohibits false or misleading representations on products, including where a product falsely implies it was made by an Aboriginal and Torres Strait Islander person (chapter 4).

Issues in enforcing prohibitions under the ACL

The ACL is an economy-wide law, and its prohibitions only protect artists to the extent they deter other market participants from engaging in unethical conduct. This depends on the credibility of enforcement by the ACCC, among other factors. The ACCC (sub. 13, p. 4) noted the difficulties it faces in enforcing the ACL in Aboriginal and Torres Strait Islander visual 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.

³⁹ Similar unconscionable conduct provisions exist in the *Australian Securities and Investments Commission Act 2001* (Cth), applicable to the provision of financial products and services. Equivalent provisions were tested in the unsuccessful action under *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, with respect to the 'book-up' system in remote Australia.

⁴⁰ 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).

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, p. 3). The Law Council of Australia (sub. 19, p. 6) 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 their action is not successful. 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 Law Council of Australia (sub. 59, pp. 6–7) also proposed that protections under ss. 82(4) of the CCA could be extended to protect applicants from cost orders in certain cases. 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).

There can also be limits to the awareness of and access to legal assistance (including pro bono representation) for artists, as well as availability of public interest litigation funding (for example, legal test cases). However, many of these factors reflect broader systemic issues that go beyond the visual arts and crafts industry, yet make it difficult for artists to understand their rights and access legal assistance if they believe they have been wronged.

A broader prohibition on unfair trading practices?

In response to concerns about 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, a prohibition on unfair trading practices would not address the core challenge of enforcing an economy-wide consumer law in the specific context of Aboriginal and Torres Strait Islander visual arts and crafts.

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 some forms of unconscionable practices by carpetbaggers would be outside the police force's remit).

- *Workplace health and safety*: Some allegations of 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 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 — a situation known as 'sham contracting' (FWO 2022).

Some allegations raised with the Commission, such as where artists are forced to work against their will, clearly relate to conduct that, if substantiated, would be criminal. Participants raised concerns with the response of police to exploitative business practices in central Australia (APYACC, sub. 17, p. 12; MinterEllison, sub. 18, pp. 7–8). Such issues are outside the scope of this study; however, better access to referrals and legal support for artists will help ensure allegations are addressed through the correct channels.

The Arts Law Centre of Australia supports access to justice

The Arts Law Centre of Australia (Arts Law), a not-for-profit community legal centre, has operated 'Artists in the Black' since 2004 to provide accessible legal advice for Aboriginal and Torres Strait Islander artists, including on referral from art centres, Indigenous Art Code Limited, and other organisations. Arts Law provides a range of services, some under a fee model, including:

- model contracts for the sale and consignment of artworks, including copyright
- advice on licensing agreements (under the 'Licensing the Right Way' project)
- legal advice following alleged unethical treatment (such as unconscionable conduct or copyright infringement), as well as referrals to other pro bono legal services and the 'adopt a lawyer' program for art centres
- education services for artists, including workshops.

Arts Law is partly funded by government grants; in 2020, it received \$920 000 in grant funding across all of its service areas, representing about 56% of total revenue of \$1.65 million (Arts Law 2021, p. 19). A range of other legal firms also provide pro bono legal services to Aboriginal and Torres Strait Islander artists, with many supporting artists referred through Artists in the Black.

Study participants noted the valuable pro bono legal 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 Inc, sub. 4, p. 13). Artists attempting to access some of these services can also encounter long wait times or language barriers (Dreamtime Art Creative Consultancy, sub. 57, p. 14).

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).

Arts Law, in their joint submission (sub. 62, p. 30), also noted a number of barriers to artists' awareness and access to their services, including:

- lack of resourcing for face-to-face outreach in regional and remote areas
- the time commitment required to take a matter to court presents a disincentive for artists
- complexity in handling cross-jurisdictional and criminal allegations that may be beyond the scope of Arts Law to assist with
- difficulty in providing pro bono support to independent artists, compared with art centres.

Industry codes

Industry codes aim to define and encourage best practice ethical interactions between artists and other participants, and 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 8.3). 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.

Box 8.3 – 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 at improving the conduct of art dealers. Code members agree to meet certain requirements to engage with Aboriginal and Torres Strait Islander artists and label products. 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.

Ethical transactions are as defined as being respectful, meaningful, transparent and fair, and the Code requires dealers to obtain the informed consent of artists. Signatories to the Code must act honestly towards artists, which forbids: 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 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.

The Code is implemented by Indigenous Art Code Limited (IartC), which is governed by a board representing the interests of artists, art centres and dealers. IartC administers membership of the Code,

Box 8.3 – About the Indigenous Art 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.

Sources: Arts Law, Copyright Agency and IartC, sub. 31; IartC (2017, 2019c, 2022c).

As an industry code of conduct, the Code establishes a standard of conduct for interactions between market participants with different levels of market power (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 Indigenous Art Code Limited. Though a non-Indigenous organisation, IartC has Aboriginal and Torres Strait Islander 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, 2022d). It does not provide legal advice and instead refers those matters to Arts Law.

IartC is structured as a private company, with 2.1 full-time-equivalent staff, and an independent board (Arts Law, Copyright Agency and IartC, sub. 33, pp. 4, 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 (IartC 2022f). Dealer and support members pay annual fees of \$170 (plus GST).

Many study participants agreed that the Code is a valuable mechanism for ensuring an ethical marketplace (Desart, sub. 4, p. 17; Government of South Australia, sub. 21, p. 20; Australia Council, sub. 24, p. 6). 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 are not obliged to participate. In this regard, the Aboriginal Regional Arts Alliance NSW (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’.
 - Trading Blak (sub. 63, p. 5) also viewed that Code membership was being ‘actively weaponised by Non-Aboriginal owned businesses as a marketing tool’ and risked misleading consumers to believe a business is Indigenous-owned.
- 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 much more active role in setting in 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; sub. 53, pp. 8–9)⁴¹ and that the Code lacks meaningful consequences for dealer misconduct and has not been as effective as expected (APYACC, sub. 17, pp. 5, 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 limited resourcing: 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 onerous. 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 section 8.4.



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 corporation 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 of Principles 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

⁴¹ The Code Constitution requires that the Board contain between two and four dealer members, one to three Aboriginal and Torres Strait Islander artists, one to two artist representative organisation members and one 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 the Australian Indigenous Art Trade Association (the predecessor of the AAAA), and one director who is not affiliated with either organisation (IartC Constitution, ss. 11.1-11.2).

communities when acquiring, commissioning, displaying, loaning and decommissioning artworks. It is open to public collecting entities that are not eligible to sign the commercial Indigenous Art Code (Office for the Arts 2009).

- The Aboriginal Art Association of Australia's Code of Conduct is mandatory for its membership and requires respect for the artist, their rights and culture, open and honest dealings, and appropriate remuneration for all market participants (AAAA, sub. 26, pp. 21, 25).
- 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 concerning 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 Visual Arts, Craft and Design*, updated in 2022, includes protocols for working with First Nations artists and art centres (NAVA 2001). NAVA (sub. 23, p. 2) also provide advice on industry rates for artist fees to guide artists in pricing their artworks.

However, monitoring of these codes, including their level of compliance, can be limited (Arts Law, Copyright Agency and IartC, sub. 31, p. 22).

8.4 Supporting ethical industry conduct

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.

Governments already fund and administer a range of measures to support ethical conduct, alongside industry-led measures (section 8.3). 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:

- improving the standards of how governments procure art and design services from Aboriginal and Torres Strait Islander artists
- enhancing the effectiveness of industry self-regulation through increased funding for Indigenous Art Code Limited
- improving artists' access to support services, including referrals to legal assistance.

Raising the standard of government procurement

Government procurement is a key source of demand for Aboriginal and Torres Strait Islander businesses. However, the Commission has heard from some Aboriginal and Torres Strait Islander artists that government agencies and businesses seeking to procure Aboriginal and Torres Strait Islander art for use in publications, public art, merchandise, clothing and for other purposes sometimes do not meet high ethical standards. Examples have included an unwillingness to pay artists fairly for their work, requirements that artists also assign their copyright to the procuring organisation, and unauthorised changes being made to the artwork. As part of its research, the Commission has also found instances of government agencies using non-Indigenous authored Indigenous-style designs (chapter 4).

Across procurement in general, Dreamtime Art Creative Consultancy (sub. 57, p. 15) noted the risk of:

... procurement contracts which contain clauses that redirect the ownership of IP, copyright and other key rights, from First Nations artists to purchasers. This also includes clauses that provide

purchasers with exclusive, worldwide, royalty-free IP rights to use in perpetuity that undermine the earning capacity of First Nations artists in the long term and drive them from their potential economic realisation from their own art and culture.

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 2022d). 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 \$200 000,⁴² and mandatory minimum Aboriginal and Torres Strait Islander employment requirements for contracts greater than \$7.5 million in specified industries (one of which includes 'design and graphic and fine art services').

However, the Indigenous Procurement Policy does not include specific provisions on purchasing art and design services, and does not specify standards for ethical procurement. Procurement model clauses can require transfer of intellectual property to the purchaser, with no explicit recognition of Indigenous Cultural and Intellectual Property (ICIP; chapter 5) (Department of Finance 2021).

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 of Principles 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'.

Many organisations are well-intentioned in looking to purchase graphic designs or artworks from Aboriginal and Torres Strait Islander artists, but a lack of information and cultural understanding can lead to poor practice. 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.

A first step to improve the ethical procurement of Aboriginal and Torres Strait Islander art and design is access to specific guidance on how to negotiate with Aboriginal and Torres Strait Islander artists and designers, including culturally-safe business practices and model contract terms.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS 2022a) and IartC (IartC 2019b) publish concise information to assist people to purchase ethically-sourced Aboriginal and Torres Strait Islander original artworks. Reconciliation Australia provides concise guidelines on the use of Aboriginal and Torres Strait Islander art for organisations developing Reconciliation Action Plans, which link to a range of more detailed sources for further information (Reconciliation Australia nd). However, these guidelines are only available to organisations registered to develop a Reconciliation Action Plan.

The Commission has not been able to identify any readily available guidelines that specifically assist government agencies to engage in ethical and culturally-competent procurement of Aboriginal and Torres Strait Islander art and design services, while complying with other procurement rules and requirements.

Kennedy (2015), a non-Indigenous researcher, proposed a protocol for procuring Aboriginal and Torres Strait Islander art and design that could provide a starting point for developing such guidelines. Aboriginal and Torres Strait Islander artists, designers and communications firms would need to lead the development of any guidelines on the procurement of Aboriginal and Torres Strait Islander art and design. Given their

⁴² 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).

expertise, the Australia Council or the Australian Institute for Aboriginal and Torres Strait Islander Studies may be well-placed to support the development of procurement guidelines.



Finding 8.3

Clear guidelines are not widely available to inform how governments can ethically procure and use Aboriginal and Torres Strait Islander art and design services

Governments have committed to support Aboriginal and Torres Strait Islander businesses through procurement, but procurement processes have not consistently demonstrated best-practice purchasing of Aboriginal and Torres Strait Islander art and design services. There is an absence of generally-available and specific guidelines for ethical and culturally-competent government procurement of Aboriginal and Torres Strait Islander art and design services.

Overseeing industry self-regulation

The Indigenous Art Code sets a standard for market interactions between Aboriginal and Torres Strait Islander artists and art dealers, and is administered and enforced by Indigenous Art Code Limited (box 8.3).

The Code is one of many mechanisms that encourage ethical conduct in the market (section 8.3). However, 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 industry, and defines (and prohibits) certain practices that, although not illegal, are likely to fall short of broader community standards of fair dealings.

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 (section 8.3). The remainder of this subsection considers the case for the Australian Government to:

- prescribe in regulation the Code as either a voluntary or mandatory industry code under Part IVB of the *Competition and Consumer Act 2010* (Cth) (CCA)
- increase ongoing funding to IartC to enable more effective administration and enforcement of the Code.

Should the Code be prescribed as mandatory or voluntary?

Study participants suggested that industry conduct could be improved by making the Code mandatory — either for all dealings with Aboriginal and Torres Strait Islander artists,⁴³ 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 (Desart Inc, sub. 4, p. 18; Aboriginal Regional Arts Alliance NSW, sub. 8, p. 5).

At present, the Code is a form of voluntary self-regulation. The CCA allows the Australian Government to prescribe either a voluntary or mandatory code (Treasury 2017, p. 1). A mandatory code is binding on all industry participants, while a voluntary code is only binding on those that agree to sign up.

‘Prescribing’ a code under the CCA incorporates the code into an Australian government regulation and places monitoring and enforcement under the remit of the ACCC. The ACCC holds powers to undertake compliance checks and access certain information from industry participants (Treasury 2017, p. 6).

⁴³ UMI Arts Ltd., sub. 1, p. 12; Aboriginal Regional Arts Alliance NSW, sub. 8, pp. 6-7; MinterEllison, sub. 18, p. 3; Australia Council, sub. 24, p. 27; AAAA, sub. 26, p. 25.

Both the 2007 Senate inquiry (SSCECITA 2007, p. 142) and 2018 House of Representatives inquiry (HoRSCIA 2018b, p. xx) recommended prescribing a code of conduct for the Aboriginal and Torres Strait Islander visual arts and crafts industry, and the constitution of the existing Code includes an objective 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))

The Australian Government has not accepted previous recommendations to prescribe a code of conduct and responded to the 2018 House Inquiry by 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' (Australian Government 2020, p. 3).

What would a prescribed code entail?

Prescribing an industry code of conduct under the CCA has two main implications: the ACCC, rather than an industry body, is responsible for enforcing the code, and the code is defined under government regulation and given the force of law (Treasury 2017, pp. 3–4). Further, a prescribed code can be made mandatory.

The powers available to the ACCC include monitoring, investigation and enforcement powers, as well as penalties on contraventions (Treasury 2017, p. 6). These powers can significantly exceed those available to IartC, which does not have inspection powers, and can only penalise a dealer by suspending or terminating their IartC membership (IartC 2021, pp. 7–8).

However, prescribing a code under a regulation legislation would require legal determinations for a number of matters, including:

- 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. Further, a code prescribed in a regulation, subject to parliamentary processes, provides less scope for change over time, compared with industry self-regulation.

A prescribed code can also be made mandatory across the industry and require all art dealers who purchase Aboriginal and Torres Strait Islander art for the purpose of resale to comply with the Code, 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 visual arts and crafts products.

A prescribed code also carries a range of costs, including compliance costs for industry and financial costs to the Australian Government. 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).

Sector participants are divided in their views

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. There is no consensus from artists and their representatives on the need for a prescribed code, and IartC itself does not recommend a mandatory code (Arts Law, Copyright Agency and IartC, sub. 31, p. 63).

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 education functions currently undertaken by IartC (Government of South Australia, sub. 21, p. 20). Arts Law, Copyright Agency and IartC (sub. 31, p. 67) similarly questioned whether the ACCC would investigate all matters reported to them, or whether it could 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 2018c). 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’.

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 and IartC, sub. 31, p. 67).

This would particularly limit the effectiveness of a voluntary prescribed code, where the strong powers of the ACCC enforcement, alongside the prescriptive and minimalist nature of a prescribed code, may deter 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 mandatory code does not address the core issue, and risks unintended consequences

The primary argument for making the prescribed code mandatory is to ensure unscrupulous dealers are bound by a strong industry code — otherwise, the coverage and impact of a voluntary code will be limited. 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 prescribed mandatory code for the Aboriginal and Torres Strait Islander art sector is likely to be a blunt response to market conduct that, although unclear in its extent, is predominately concentrated in a few regions (section 8.2). A mandatory code would impose administrative burdens on all artists and industry participants, and increase barriers to entry in the industry, but not address the systemic imbalances that create opportunities for 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, risking unintended consequences — particularly in remote areas. Of particular concern is the risk that Aboriginal and Torres Strait Islander artists may find themselves in breach of a

mandatory code if they sell work to a non-code member, even if they must do so to meet essential needs or family obligations. Similar issues would apply to any mandatory dealer registration scheme.

Overall, although there remains unethical conduct in the industry, there is inadequate evidence to justify a mandatory code as the best solution. Many information imbalances, such as a lack of awareness on pricing, can be reduced through improved contracting practices (including model contracts and artists better understanding their rights) and information provision through 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.

As discussed below, improving resourcing of IartC, alongside greater access to justice and other support services, represents a clearer opportunity to improve industry conduct.



Finding 8.4

The case for an ACCC-enforced mandatory or voluntary Indigenous art code is not strong

There is inadequate evidence of widespread unethical conduct to justify an ACCC-enforced voluntary or mandatory code of conduct for the Aboriginal and Torres Strait Islander visual arts and crafts industry. A government-imposed code risks being a blunt and costly tool that would not necessarily address the systemic imbalances that create opportunities for unethical dealings.

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 8.4).

The guidelines suggest that a voluntary industry code 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 (sub. 13, p. 5) 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.

Box 8.4 – 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

Box 8.4 – Australian Competition and Consumer Commission guidelines for developing effective voluntary industry codes of conduct

- 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 administration of the Code meets several of these guidelines, but there is scope for improvement. For example:

- the composition of IartC's board is largely representative of the sector,⁴⁴ but some study participants were concerned about the lack of meaningful representation for independent artists (AAAA, sub. 53, pp 8-9)
- 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
- 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.⁴⁵

Further, no evaluation or independent review of the Code and its administration has yet been undertaken. However, 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 outlines how this review could consider ways to:

- improve enforcement of code compliance, including complaints and dispute resolution processes
- support take-up and improved consumer awareness of the Code
- embed better monitoring, evaluation and review of the Code's effectiveness.

In response to concerns raised by study participants (section 8.3), 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.

Enforcing code compliance

Compliance with the code requires IartC to educate and advise dealers and artists of their obligations under the code, as well as addressing disputes or complaints made by artists or dealers. 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,⁴⁶ alongside 'deal[ing] with issues relating to compliance with the Code'.⁴⁷ The

⁴⁴ The IartC Constitution, section 11, requires the governing board to include dealers, art centres, representatives of peak organisations, and Aboriginal and Torres Strait Islander artists.

⁴⁵ In February 2022, IartC published its 2021–2023 Strategic Plan, which outlined some high-level performance targets for that period (IartC 2022e).

⁴⁶ IartC Constitution, s. 3.2(d)(iii).

⁴⁷ IartC Constitution, s. 3.2(h).

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).

Can complaints processes be improved?

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 ... Indigenous Art Code Limited'.

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 — moreover, there should not be a fee associated with making a complaint.

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, 2022d). 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 inform the calibration of policy advocacy, approaches to dealer education, and the content of the Code itself (IartC 2022e, p. 9).

The IartC policy addresses the need for a complaints procedure and includes performance criteria, in line with the ACCC guidelines. However, the process does not include an independent review and escalation pathway. 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 disputes to an independent review from an existing body. 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 processes in their entirety.⁴⁸ This would only relate to complex disputes under the Code itself; IartC should continue to refer artists to Arts Law in cases of alleged illegal conduct.

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 (Aboriginal Regional Arts Alliance NSW, 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

⁴⁸ 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).

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, aggregated and de-identified information on actions taken by IartC, including warnings and penalties issued, should be regularly published.

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 them with a straightforward way 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 buyers 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). There is a lack of information about the characteristics of art purchases, and currently no coordinated communications strategy to educate and inform prospective buyers (Dare, sub. 37, p. 1). 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 7).

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.

Under its Constitution, one of IartC's objectives is to report on the operation and effectiveness of the Code in achieving its objectives.⁴⁹ Although IartC submits financial data to the Australian Charities and Not-for-profits Commission, which is subsequently published, no public reporting on the operations or effectiveness of IartC is in place.

Similarly, the IartC 2021–23 *Strategic Plan* provides some indicators of success, but these are high-level. The *Strategic Plan* does, however, point to the implementation of a 'Reporting and Data Collections Plan' (IartC 2022e, p. 8), which represents an opportunity to improve transparency and accountability through internal data collection and public reporting. Further, improved reporting allows the Code to communicate the ethical credentials of the industry, which could support growth of the sector (Dare, sub. 37, p. 1).

IartC, in their joint submission (sub. 62, p. 29), acknowledges that:

IartC could play an important role in collating and sharing more data sets, but current under-resourcing means that systems to collect baseline data and ongoing metrics cannot be prioritised. Increased resourcing would allow IartC to provide data and reports for the benefit of the sector, rather than the deficit approach of complaint outcome reporting.

As noted in section 8.2, this could also include more comprehensive data on trends and types of unfair or unethical market conduct which, subject to confidentiality provisions, would support governments to assess

⁴⁹ IartC Constitution, s. 3.2(i).

whether the regulatory and policy settings for the sector remain appropriate. Arts Law, Copyright Agency and IartC (sub. 62, p. 30) agreed on the value of consistent centralised data on referrals for advice to help identify key issues in the sector.

Any public reporting of complaints or dispute resolution outcomes should aim to provide demonstration of IartC's operations without identifying individuals, while also highlighting the importance of preventative measures, including advice and education, that can bypass the need for formal dispute resolution.

Is IartC 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, Altman, sub. 39, p. 2), while others stated that the Code could do more if better resourced (NAVA, sub. 23, p. 2, Ku Arts, sub. 46, p. 2, DITRDCA, sub. 51, p. 5). IartC has also noted that its current resourcing limits its capacity to provide advice and referrals to all artists that make contact — particularly as IartC only employs 2.1 full-time-equivalent staff (Arts Law, Copyright Agency and IartC, sub. 31, p. 21). And, as discussed above, inadequate resourcing may also limit the ability of IartC to both expand take-up of the Code among dealers and improve consumer awareness of the Code.

As noted above, IartC is funded primarily by governments through Indigenous Visual Arts Industry Support (IVAIS) grants, along with contributions 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.

There is a clear case for modestly increasing government funding to IartC, particularly if the organisation takes on more comprehensive compliance, data collection and reporting obligations. However, this additional support should not come at the expense of funding for other industry supports, including community-controlled art centres, regional peak bodies, and other service providers. To support the effectiveness of the code and avoid government funds being diverted from other sector priorities, additional government funding should be matched, at least partly, by larger contributions from dealer member fees.⁵⁰

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 key to maintaining and improving standards of ethical conduct. However, more can be done to implement the Code more effectively and ensure 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.

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.

⁵⁰ For example, the IartC annual membership fee of \$170 (excluding GST) is below the 'associate' (\$200) and 'trade' (\$375) annual membership fees of the Aboriginal Art Association of Australia (AAAA 2020).



Recommendation 8.1 **Strengthening Indigenous Art Code Limited**

The Australian Government, in partnership with State and Territory Governments, should modestly increase funding to Indigenous Art Code Limited to support key processes, including:

- an enhanced complaints and dispute process, including a referral pathway to independent review of decisions and public reporting of compliance and educative actions and outcomes
- collecting and reporting on performance indicators to inform evaluation of the Code's effectiveness, including data on trends in reported unethical conduct.

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.

Improving access to artist support services

As described in section 8.3, a range of regulatory and legal tools, including copyright laws and bans on unconscionable conduct, already prohibit many types of unfair and unethical conduct towards artists. But these laws are only effective if widely understood and credibly enforced. Some of the unethical conduct described to the Commission is illegal under those instruments, but these are broad, economy-wide laws that are not always accessible to Aboriginal and Torres Strait Islander artists, particularly in remote areas. Misconduct can be difficult or costly to prove in a court, and artists may not be aware of these laws or their rights more generally.

A preventative approach, ensuring artists are aware of their legal rights and are equipped with the knowledge of how to engage with markets safely, is essential in the first instance. This can be supported in a few ways, including through outreach services that provide legal, financial and other business advice to artists. Access to independent legal and business advice can assist artists to negotiate fair pay, and ensure that artists understand both their own and the other party's rights and responsibilities under a contract.

In addition, access to justice and redress allows Aboriginal and Torres Strait Islander artists to resolve disputes and seek a remedy after suspected wrongdoing. This includes complaints to IartC about conduct of their members, or referrals to Arts Law to seek legal advice.

Access to support, both preventative and after the fact, is bolstered by the work of art centres and other co-operatives, peak bodies, and artist support services to provide education, advice and access to justice (section 8.3). These organisations operate in an informal network to refer artists to the right body to handle their concern.

However, this network has not been coordinated in a way that ensures access for all types of artists (including those who work independently of art centres), nor is it responsive to their needs and priorities. Access to support services can be made more complicated where artists are unsure of what, if any, advice or redress they can access, or who to ask to find out. The existing suite of service organisations are largely funded by government, which can hamper coordination. As put by Arts Law, Copyright Agency and IartC (sub. 62, p. 29):

The competitive nature of arts organisations relying on government funding can contribute to a scarcity mindset, limiting collaboration. This does not deliver the best outcomes for artists.

IartC has become the de facto point of contact for handling and referring a range of complaints from independent artists, including complaints concerning non-Code members. This is a valuable role but not a formal function of the organisation — it is not an objective of the IartC constitution, for example.

There are gaps in coverage: independent artists are not always aware of support services, and some artists may have limited access based on their location or the capacity limits of current service providers (DITRDCA, sub. 51, p. 5). Independent artists in many regions cannot access support through regional peak bodies. And, for Aboriginal and Torres Strait Islander artists, support needs to be provided in ways that account for cultural safety and accessibility (such as providing advice in multiple languages).⁵¹



Finding 8.5

Artists face difficulties accessing legal 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 legal and other support services for independent artists, particularly those working outside of areas serviced by art centres and regional peak bodies.

Centring the needs of artists in support service delivery

Governments should look to minimise unethical conduct in the marketplace by supporting Aboriginal and Torres Strait Islander artists to obtain advice on their legal rights, and ensuring they have access to support services following an allegation of illegal or unethical conduct. This would 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.

Ongoing gaps in access to support for independent artists require that the Australian Government refocus investments in support services to centre the needs of artists, ensuring that all types of Aboriginal and Torres Strait Islander artists have a clear and accessible point of contact to raise concerns, access advice or seek other assistance, as needed, with the most suitable organisation.

Further, the implementation of the Commission's recommendations to develop cultural rights legislation also hinges on artists and their communities understanding their rights and obligations, as well as having the resources to pursue legal action for potential infringements under that legislation (chapter 6). This may increase demands on existing legal support services (Arts Law, Copyright Agency and IartC, sub. 62, pp. 23-24).

In the first instance, the Australian Government, alongside sector participants, should map the availability of support services to different artist groups and regions, identify the gaps and limitations of the existing network of support services, and refocus funding to address those shortcomings.

The Australia Council pointed to the potential role of a national coordinating agency, which was raised in their engagement on a National Indigenous Arts and Cultural Authority (NIACA) (Australia Council 2022a, pp. 75–81). However, a single national organisation is unlikely to be accessible to artists in all locations, and different organisations at the community and regional level (including peak bodies and community-led organisations) will remain key in improving on-the-ground access to support.

⁵¹ There are broader systemic issues that affect Aboriginal and Torres Strait Islander people's access to justice for both criminal and civil matters (section 8.3). This topic sits beyond the scope of this study.

Similarly, although IartC currently plays a valuable role in providing advice to independent artists, it lacks the funding needed to undertake this role effectively (Arts Law, Copyright Agency and IartC, sub. 31, p. 51). There is a risk that, because this role is not required under the organisation's constitution, it may not be maintained if organisational priorities were to shift, or resources become more constrained.

The review of IartC's operations should consider what role IartC should play in artist outreach and referral, including whether it should be funded to act as the key point of contact for independent artists.

There are already many organisations supporting artists, and some study participants called for additional funding for existing support and referral services to expand capacity and coverage, particularly to enable in-person outreach (Australia Council, sub. 49, p. 3; Law Council of Australia, sub. 59, pp. 6–7, Arts Queensland, sub. 60, p. 11; Arts Law, Copyright Agency and IartC, sub. 62, p. 30). Any additional funding should be targeted to fill identified gaps in access, following a service mapping process.



Recommendation 8.2

Ensuring support services are accessible and centre artists' needs

The Australian Government should identify gaps in and barriers to access to Aboriginal and Torres Strait Islander artist support services, and consider ways to ensure services are able to respond to the needs of all types of artists in all regions. The planned Australian Government evaluation of Indigenous Art Code Limited should consider what role the organisation should play in artist outreach and referral.

9. Government funding

Key points

- ✳ **Governments play an enabling role in the Aboriginal and Torres Strait Islander visual arts and crafts market by providing financial assistance directly to artists, art centres, arts organisations and art fairs. The case for public financial support rests on the broader benefits (including cultural and social) 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)* program and the *First Nations Arts and Culture Panel* process. Approximately \$30 million was distributed via these programs in 2021-22, supporting the work of approximately 8500 people.**
 - In addition to these programs, artists and art organisations 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.
- ✳ **Existing funding arrangements tend to be more accessible to incumbent organisations, with limited funding available to emerging or smaller art organisations and independent artists.**
- ✳ **Art centres are diverse and fulfill several important cultural and social roles, but many of these functions are not explicitly funded under IVAIS. This restricts art centres' ability to undertake activities that are critical to their communities.**
- ✳ **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 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.**

Public funding for arts and crafts is justified by the wider 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, and 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 key issues with funding arrangements and potential ways to address those shortcomings. Developing funding mechanisms that centre Aboriginal and Torres Strait Islander people is considered in section 9.4.

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, hold exhibitions and run public programs.

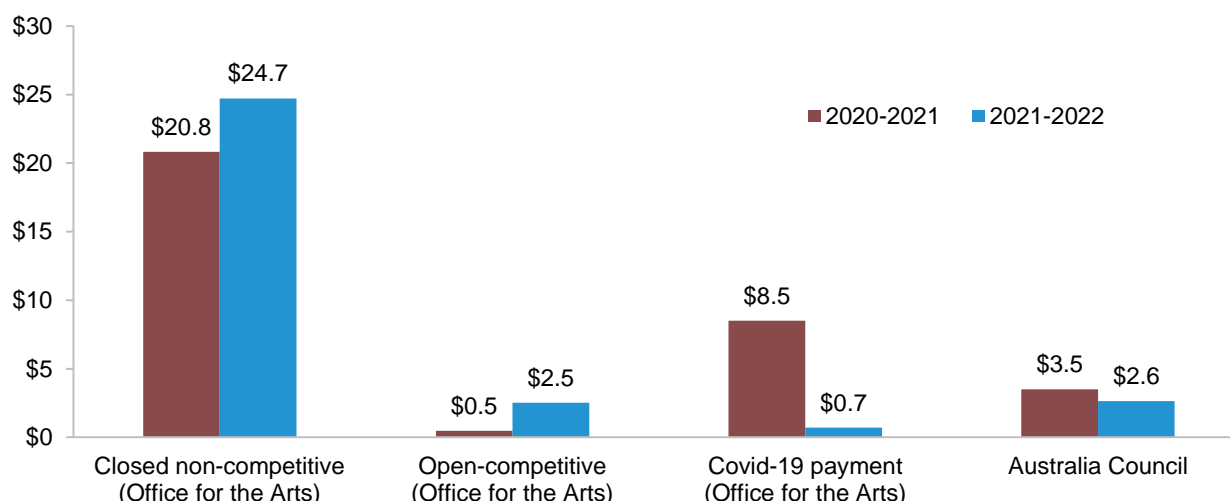
This section discusses financial grants from governments intended to support the Aboriginal and Torres Strait Islander visual arts and crafts sector either directly (by funding art organisations or specific projects) or indirectly (for example, via employment or tourism programs).

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 administered by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts through the Office for the Arts, and the Australia Council for the Arts’ (Australia Council) *First Nations Arts and Culture Panel* process

(figure 9.1). Through these targeted funding programs, the Australian Government provided funding of about \$30 million (excluding recent COVID-19 recovery payments) for Aboriginal and Torres Strait Islander visual arts and crafts in 2021-22, contributing to the income streams for approximately 8500 people.⁵²

Figure 9.1 – Office for the Arts and Australia Council funding (\$ million)^{a,b,c}
Targeted programs for Aboriginal and Torres Strait Islander visual arts and crafts



a. COVID-19 recovery payment (Office for the Arts) refers to funding provided under the IVAIS Relief and Recovery Fund delivered in 2020-21 (\$8.5 million) and the IVAIS Regional Arts Tourism Recovery Fund delivered in 2021-22 (\$0.7 million)

b. Closed non-competitive and open-competitive funding from Office for the Arts are the two grant opportunity components of the IVAIS program. Closed non-competitive funding is delivered to existing multi-year funded organisations **c.** Australia Council funding amounts represent grants with any involvement of a First Nations person in the creation of any artwork and are likely an overestimate of funding provided to create visual artworks by First Nations artists.

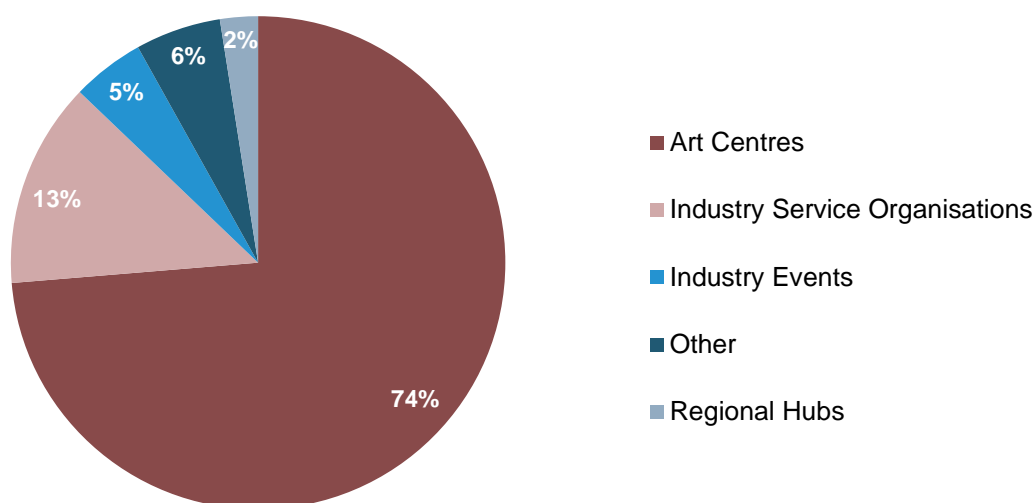
Sources: Australia Council (pers. comm., 13 October 2022), Australian Government (2021), Office for the Arts (pers. comm., 10 November 2022)

In 2021-22, the IVAIS program provided 125 grants worth \$27.2 million to over 80 art centres, seven industry service organisations, five industry events (including the Cairns and Darwin Indigenous art fairs), and six 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)⁵³ 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.

⁵² 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' activities in 2020-21 across all art categories, including visual art (Australia Council, sub. 24, p. 46).

⁵³ 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.

Figure 9.2 – IVAIS funding by organisation type 2021-22^{a,b,c,d,e}
% of total funding



a. Total funding includes both closed non-competitive and open-competitive grants **b.** Industry service organisations include: Aboriginal Art Centre Hub of WA, Desert, Indigenous Art Centre Alliance, Ananguku Arts and Cultural Aboriginal Corporation, Arnhem, Northern and Kimberley Artists, Arts Law, and Indigenous Art Code. **c.** Regional hubs include: APY Art Centre Collective, Arts North West, Arts Northern Rivers, Arts Out West, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Aboriginal Corporation, NSW Aboriginal Culture and Heritage and Arts Association Incorporated. **d.** Industry events include: Cairns Indigenous Art Fair, Darwin Aboriginal Art Fair, Carriageworks Ltd., First Hand Solutions Aboriginal Corporation (National Indigenous Art Fair), and Revealed Emerging Artists Showcase (WA). **e.** Other category includes a grants awarded to Agency Projects, Aurukun Shire Council, Nungalinga College Indigenous Corporation, Urapuntja Aboriginal Corporation, Juluwarlu Group Aboriginal Corporation, Aboriginal Art Co Ltd, Armidale ad Region Aboriginal Cultural Centre, Malang Indigenous Corporation, Baluk Arts Aboriginal and Torres Strait Islander Corporation, The Torch Project and NBN Co.

Source: Office for the Arts (2021b).

After little change since 2015-16, IVAIS funding to the sector increased by \$5.9 million in 2021--22 (figure 9.1). This is a result of the Australian Government's *National Indigenous Visual Arts Action Plan 2021-25* (NIVA Action Plan), which is providing additional ongoing funding of \$5 million per year (box 9.1). The NIVA Action Plan, which is being administered under the IVAIS program, sets out ten actions to achieve a 'stronger, sustainable Indigenous visual arts sector' (Australian Government 2021, p. 13). Of the \$5.9 million increase to funding in 2021-22, about a half went to infrastructure upgrades and building digital capability, just under 10% each was provided to new organisations and events, and the rest was allocated to organisations previously funded.

On average, IVAIS funding to individual art centres increased by about 2% in real terms between 2015-16 and 2021-22 (figure 9.3). Programs to fund the operational costs of remote art centres have existed in some form since 1971 (Office for the Arts 2021d, p. 5). Over time, funding responsibility moved from the Australia Council to the Office for the Arts, and other funding programs merged to eventually becoming the IVAIS program that exists today.⁵⁴

⁵⁴ 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.

Independent Aboriginal and Torres Strait Islander artists are not funded under IVAIS but can apply for funding from the Australia Council.⁵⁵ The primary stream of targeted funding to Aboriginal and Torres Strait Islander artists, groups and art organisations administered by Australia Council is via the *First Nations Arts and Culture Panel*.⁵⁶ In 2021-22, Australia Council provided funding of approximately \$2.6 million in Aboriginal and Torres Strait Islander visual arts and crafts (pers. comm., 13 October 2022) (figure 9.1).

Box 9.1 – The National Indigenous Visual Arts (NIVA) Action Plan 2021-25

In 2021, the Australian Government committed additional ongoing funding of \$5 million per year 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 through the IVAIS grants program, 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 of the five-year Action Plan
- 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 are 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.

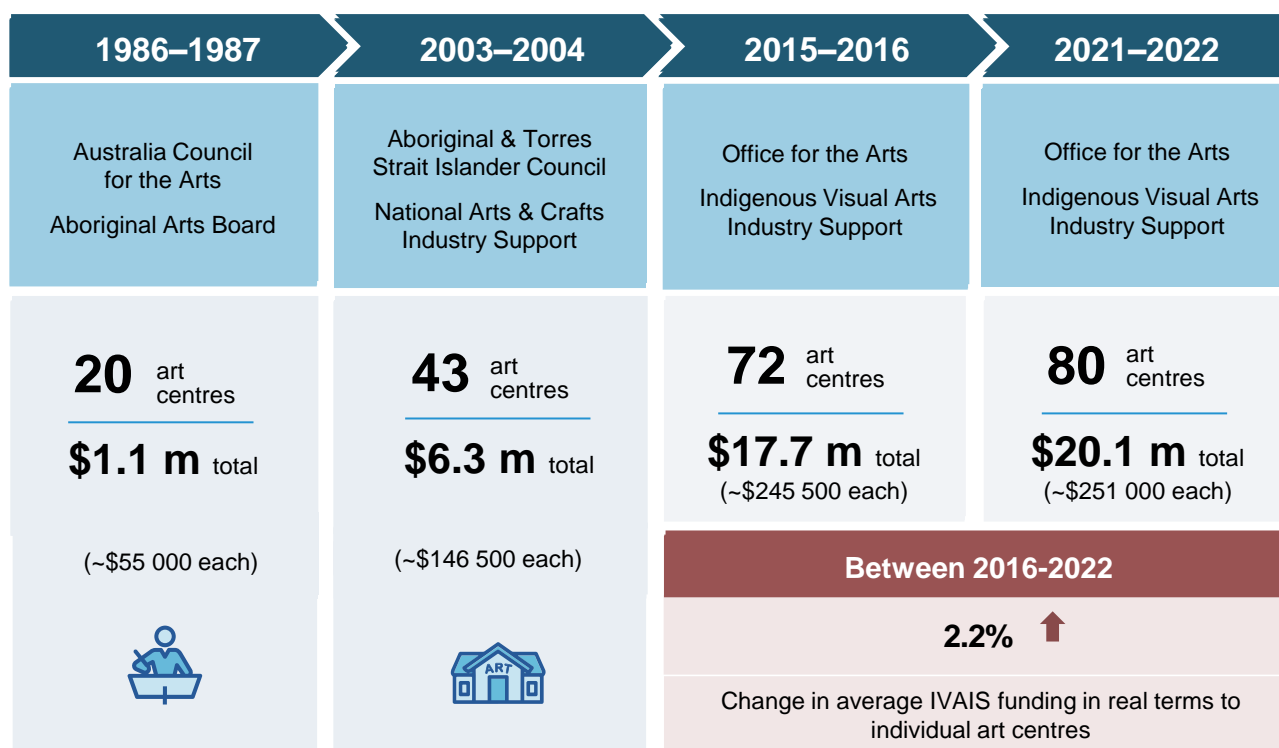
Source: Australian Government (2021).

In addition to the above two main funding programs, the Australian Government has recently announced the development of a cultural precinct and a new National Cultural Policy. 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, Ngurra⁵⁷, 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 Government is in the process of developing a new National Cultural Policy, which promises to centre First Nations arts and culture.

⁵⁵ 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).

⁵⁶ Programs funded via the First Nations Arts and Culture Panel in 2021-22 included applications under the Arts projects for individuals and groups grants, Arts Projects for organisations grants, Flourish – First Nations Textile Design and Fashion Innovation. Australia Council also provides a First Nations Emerging Career Development award and The Dreaming award (Australia Council 2022c).

⁵⁷ ‘Ngurra’ is a word in multiple languages for ‘home’, ‘country’ or ‘place of belonging’ (Morrison and Wyatt 2022).

Figure 9.3 – Funding to art centres over the years^a


a. Funding represented in 2021-22 dollars.

Sources: ATIS (2004, p. 37), Australia Council (1987, pp. 60–62), Office for the Arts (2018, 2021a).

State and Territory governments provide some 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. There is limited public reporting of state and territory funding provided specifically for Aboriginal and Torres Strait Islander visual arts and crafts. Some commitments made in recent years are outlined in box 9.2.

Box 9.2 – State and territory government investments in Aboriginal and Torres Strait Islander arts and crafts

Several State and Territory Governments have announced investments in Aboriginal and Torres Strait Islander arts and crafts in 2020-21 and 2021-22.

- 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 \$1.2 million in organisational funding to Tandanya, Ku Arts and APY Art Centre Collective, and \$1.6 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,

Box 9.2 – State and territory government investments in Aboriginal and Torres Strait Islander arts and crafts

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 grant funding in 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 about \$930 000 to five IVAIS-funded organisations (Victorian Government 2021).
- The Northern Territory Government provides operational support to Arnhem, Northern and Kimberley Artists and Desart 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).
- The Western Australia Government, through the Aboriginal Arts Commissioning Fund 2020-2023 provides up to \$300 000 per applicant to 'encourage the expression and preservation of traditional and contemporary regional Western Australian Aboriginal cultures, communities, and identities through arts'. In 2020-21, three Aboriginal Corporations, of which one was an art centre, received just under \$840 000 (Western Australia Government 2022).

In their most recent survey of art centres, Desart found that over the past ten years (2010-11 to 2020-21), grant funding has averaged 43.5% of total income (Desart 2022b, p. 5). The proportion of total income from grants varied, from 63% in Queensland to 22% of income in South Australia in 2020-21 (Desart 2022b, p. 6).

State and Territory Governments have also made commitments (totalling over \$750 million – chapter 10) 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), these projects place governments in a good position to promote high standards of ethical procurement when acquiring artworks for those centres. The new and planned cultural institutions will help address the current lack of dedicated national and state- and territory-based institutions that exhibit Aboriginal and Torres Strait Islander visual arts and crafts. They also represent an important avenue to provide employment and professional development opportunities to Aboriginal and Torres Strait Islander people (discussed further in chapter 10).

Local governments are expanding their 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 (HoRSCCA 2021, p. 23) and in 2019-20, they invested \$1.8 billion in the arts (across all artforms, and including 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). As with state and territory reporting, 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 South Australia, 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 Australian Government, sub. 21, p. 7).

Mainstream arts funding provides some support to Aboriginal and Torres Strait Islander arts and crafts

Mainstream arts programs such as the Australia Council's Visual Arts funding stream, the Office for the Arts' Regional Arts Fund,⁵⁸ 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).⁵⁹ 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 included funding for the creation or exhibition of visual arts and crafts (not part of a collection in a public museum or gallery), trade fairs, marketing and market development, and other support for visual artists and arts workers (OFTA 2021a table 2). Data on the amounts accessed by Aboriginal and Torres Strait Islander artists and organisations at these aggregate levels is not published.

⁵⁸ Regional Arts Australia administers the Regional Arts Fund (RAF) on behalf of the Australian Government. In 2021-22 the total funding of about \$2.2 million was allocated through RAF, 55% of which was granted to Aboriginal and Torres Strait Islander organisations or applicants (Regional Arts Australia, pers. comm., 16 September 2022)

⁵⁹ 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 (Office for the Arts 2021c table 2).

Funding to the sector is also provided by many non-arts portfolios but how much is not clear

Aboriginal and Torres Strait Islander artists and organisations are able to access government funding from a range of programs outside arts portfolios such as health, social services, employment and tourism. 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. Most grants were funded by the National Indigenous Australians Agency’s (NIAA) *Indigenous Advancement Strategy*, providing about \$40.5 million in funding to these organisations in 2020-21 (table 9.1).

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 (CDP)* the *Indigenous Skills and Employment Program*, and the *Indigenous Local Employment Fund*. CDP is of particular importance to the visual arts and crafts sector, as almost one third of artists undertaking unpaid non-cultural work (surveyed in some remote parts of Australia) participated in it (Throsby and Petetskaya 2019d, p. 3). This program supports job seekers in remote Australia and places them into work, including in art centres. However, artists felt that lacked the flexibility required to suit their needs. Many artists did not see CDP jobs at art centres as ‘real jobs’:

During the Survey, we also encountered occasional examples of some workers who would just be present in order to fulfil their time requirements of the CDP but would not contribute or perform any meaningful or productive work. (Throsby and Petetskaya 2019d, p. 5)

The CDP is being replaced by the Remote Engagement Program in 2023 as announced in the 2021-22 Federal budget, with the new program to be co-designed and trialled with Aboriginal and Torres Strait Islander people (Burney 2022).

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 and the Commonwealth Home Support Program (Arts Law, Copyright Agency and IartC, sub. 31, p. 11)
- employment and industry support programs such as the Australian Government’s Jobactive and New Business Assistance programs, the joint Australian and South Australian Government’s The Circle — 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. 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). Better data will need to be collected, managed and shared in coming years, given the reporting commitments governments have signed up to as part of the National Agreement on Closing the Gap (JCOCTG 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 ‘art 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).

Philanthropy and corporate sponsorship contribute to arts funding

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.⁶⁰ 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 arts and crafts sector. The Tim Fairfax Family Foundation, for example, has provided \$2.4 million since 2016-17 to Aboriginal and Torres Strait Islander art organisations for capacity building activities (sub. 2, p. 1). The Ian Potter Foundation has also awarded over \$1.5 million to the sector in recent years (The Ian Potter Foundation 2019, 2021). 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 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 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

⁶⁰ Some private sector data included in this total was for 2019 calendar year (CPA 2020)

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 in early 2022 (CPA 2022).



Finding 9.1

Government funding is fragmented and can be difficult to track

Aboriginal and Torres Strait Islander artists and art organisations receive funding from a multitude of sources, including targeted and mainstream arts programs and 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 how Aboriginal and Torres Strait Islander artists and art organisations benefit from mainstream programs.

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 concerns about current funding arrangements. These include:

- major funding programs are more accessible for more established art organisations
- funding programs do not adequately recognise the broad cultural and social roles fulfilled by art organisations in remote communities
- and the administrative burden imposed by funding arrangements.

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)

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' (Office for the Arts 2021d, 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 (Office for the Arts 2021d, 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' (Office for the Arts 2021d, 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' (Office for the Arts 2021d, 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 just over \$3.2 million (Office for the Arts, pers. comm., 25 May 2022). In contrast, just over \$63.6 million (95%) has been provided over the same period through the non-competitive closed grants process.⁶¹ Creative Economy described the \$400 000 available in the December 2020 IVAIS open competitive funding round as 'inadequate and inequitable' (Creative Economy 2020, 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 that 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 (Office for the Arts, pers. comm., 25 May 2022). In 2021-22, \$2.5 million funding was provided via the open-competitive round (figure 9.1). In the past, funding for the competitive grants has been dependent on what is committed through the non-competitive grant process (Office for the Arts 2021e, 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).

Some study participants argue the need of broadening the definition of art centres and reported that there are many cultural centres where artists come together and produce artworks, but are not recognised as art centres (ACHAA, sub. 45, p 2, NAVA, sub. 42, p. 6). 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)

Some of the less established art regions potentially miss out on support. Of the 106 medium and large art centres registered under the Office of the Registrar of Indigenous Corporations (ORIC),⁶² just over half (61) receive funds under IVAIS, with organisations from New South Wales, Tasmania, Victoria and the ACT being under-represented. None of the ten ORIC-registered medium or large art organisations in New South Wales

⁶¹ The periods may not entirely align as the closed non-competitive grants are estimated from financial years 2018-19, 2019-20 and 2020-21 (Office for the Arts 2019, 2020a, 2021a).

⁶² Defined as ORIC-registered organisations that have reported to have an art centre function, as of 8 February 2022.

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. (sub. 1, p. 15) 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.

Many functions undertaken by art centres are not explicitly funded

IVAIS is the main funding source for many art centres yet many of the functions they undertake are not supported under the program. Art centres fulfil many roles in their communities, both social (including health and education) and cultural (connection to Country and kin, cultural maintenance) roles (figure 2.2). They are also diverse: they have different objectives, strengths and histories, reflecting the priorities of the communities they represent.

Art centre managers and arts workers fulfill important cultural and social roles beyond the 'operational' ones they are funded for under existing arts funding arrangements. For example, 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 (NARI, sub. 10, p. 2; South Australian Government, sub. 21, p. 15). These diverse roles leave staff with less time for their art centre responsibilities. 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.

Aboriginal and Torres Strait Islander artists and art centres play an important role in cultural maintenance by providing a space for Elders to pass traditional knowledges and cultural expressions to future generations and sharing elements of this with the broader community. Elders have a critical role in cultural maintenance, underpinning continuing art practices and wellbeing outcomes for communities.

However, activities that support the transfer of traditional knowledges are rarely explicitly supported by government funding the same way as mainstream art education. The costs of cultural teaching in art centres are largely borne by the community and via in-kind payments (Throsby and Petetskaya 2019c).

The IVAIS program guidelines explicitly preclude funding activities that 'are primarily focussed on community development or cultural maintenance' (Office for the Arts 2021e, p. 9). IVAIS funds activities that support the development of the 'Indigenous visual arts industry', specifically through production, promotion, marketing, access to markets and the professional development of Aboriginal and Torres Strait Islander artists, art centre staff and board members (Office for the Arts 2021e, p. 9). In 2021-22, about 74% of IVAIS funding was provided for the operational activities, 12% for professional development, 5% for digital infrastructure

and capacity enhancement of the art centres, 5% for infrastructure upgrades, and 4% to promote domestic Aboriginal and Torres Strait Islander art fairs (Office for the Arts 2021b).

Previous Aboriginal and Torres Strait Islander arts funding programs have included cultural maintenance activities. Over time, the focus for these programs has shifted from providing opportunities to practise art and preserve culture to a more commercial focus (box 9.3).

Box 9.3 – A fifty year history: the Indigenous Visual Arts Industry Support program and its predecessors

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; Office for the Arts 2021d, 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 (Office for the Arts 2021d, p. 5).

In the past there have been dedicated funding programs to support cultural maintenance activities that have run alongside IVAIS and its previous incarnations. For example, the Australian Government directly funded cultural maintenance activities by art centres through 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.⁶³ Some State and Territory Governments also provide funding for cultural maintenance activities. For example, the Western Australian Government's Connecting to Country program funded about \$448 000 grants in 2020-21 (just under half of what was requested), including to activities involving visual arts and crafts (DLGSC (WA) 2021).

The focus of IVAIS funding 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* (2020b, 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. The CEO of Arnhem, Northern and Kimberley Artists (ANKA) 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 ... (as cited in ANKA (Arnhem Northern and Kimberley Artists Aboriginal Corporation) 2016, p. 48)

In its submission to the *Growing the Indigenous Visual Arts Industry* consultation paper, 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). ANKA's recommendations draw on commitments in the *National Agreement on Closing the Gap* to identify priority sectors for 'sector strengthening plans' and the potential for the remote Indigenous Art and Culture sector to be recognised in the future.⁶⁴ 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).

The Kimberley Aboriginal Law and Cultural Centre asserted that there is lack of policy coordination in this space:

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)

⁶³ In 2022-23 only two projects that included visual arts (in projects that covered multiple artforms) have been funded through the Indigenous Languages and Arts program, receiving about \$309 000, from a program funding pool of about \$21 million (Office for the Arts 2022).

⁶⁴ Currently there are no targets related to traditional cultural expressions, including visual arts, in the *National Agreement on Closing the Gap*. The initial sectors identified for developing sector strengthening plans are early childhood care and development, housing, health and disability.

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). This reinforces the fragmented nature of funding for the sector.

Some art centres need assistance to improve their governance but this is not always available

In addition to the many important roles art centres play in their communities, the Commission has also heard about the critical role of governance in the success of Aboriginal and Torres Strait Islander art centres and organisations (Ku Arts, sub. 46, p. 2). 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).

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. 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). The ORIC offers training and assistance, but its capacity is limited. 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 (Australian Government 2021, p. 16). However, it is not clear how much additional resourcing is being 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.

Funding for art centres' infrastructure needs is inadequate

Funding to address the infrastructure needs of art centres has been a longstanding issue and highlighted in past inquiries (HoRSCIA 2018b; 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, that the lack of infrastructure is a major issue for art centres in recruiting and retaining quality staff.

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)

It also argued that governments and private philanthropy should work together to better meet the capital needs of remote art centres (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).

Multiple funding sources impose an administrative burden

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* (2020b):

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, Office for the Arts 2020, sub. 4, p. 1)

Identifying funding opportunities and writing a successful application require time and expertise. Independent artists 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. 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)

Advice and support for putting together and submitting grant applications is available from the Office for the Arts and the 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 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)



Finding 9.2

Shortcomings in funding arrangements affect the ability of art centres and other art organisations to support artists and communities

The Indigenous Visual Arts Industry Support (IVAIS) program is the main source of funding to art centres. However, there are key issues limiting its effectiveness.

- IVAIS distributes over 95% of its funding to established organisations through non-competitive closed multi-year grants. While this can provide certainty for recipients, new art centres and other organisations that support Aboriginal and Torres Strait Islander visual artists find it difficult to access IVAIS funding.
- 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.

9.3 Addressing shortcomings in government funding

Existing funding mechanisms have substantial limitations, including that they do not fully recognise the social and cultural roles fulfilled by art centres and the differences in how they operate. This section considers how government funding can better support the Aboriginal and Torres Strait Islander visual arts and crafts sector, focusing on:

- aligning IVAIS funding with the needs of the sector
- the balance between stable funding for incumbent organisations and accessibility for new entrants
- monitoring and evaluation of government funding.

Aligning IVAIS funding with the needs of the sector

The focus of existing funding programs is primarily on arts production. Some in the sector see this as a strength, as it is a relatively simple funding and reporting arrangement (Desart, sub. 4, p. 6). However, art centres reflect the diverse needs and aspirations of their communities — some of which are much broader than increasing the numbers of artworks produced.

Some in the sector believe that government funding could help move art centres to a more commercially viable footing, and that this should be reflected in the objectives of programs such as IVAIS. 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. 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)

Commercial and cultural objectives 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)

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. A shared decision-making model may help in ensuring funding is allocated in accordance with the preferences of communities and the Aboriginal and Torres Strait Islander visual arts sector more broadly (section 9.4).

Recognising the diverse roles and challenges of art organisations

Although art centres and organisations fulfill many social and cultural roles in their communities, major funding programs do not provide funding support for such functions. If broader 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 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 Aboriginal and Torres Strait Islander community-controlled organisations (ACCOS) in their service delivery, relative to mainstream service organisations. Desert, for example, highlighted 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). 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 2019, p. 232).

Recognising the diverse and holistic service offerings of Aboriginal and Torres Strait Islander art centres requires more responsive and tailored funding arrangements. As art centres have varying levels of capability to engage with new markets, an organisational maturity model could be used as a basis for allocating funding (KPMG 2015). For example, a well-established art centre with good governance arrangements in place and high revenues may seek to shift from using government funding to support operational expenses towards investing in capability for the production of licensed arts and crafts. In contrast, a newly emerging art organisation may seek government funding to support operational expenses and governance training.

Balancing the funding requirements of new and incumbent organisations

IVAIS funding arrangements appear less accessible to new entrants, smaller organisations and artists who are not associated with an art centre or regional peak organisation. Recent IVAIS funding rounds, for example, have largely distributed grants through closed non-competitive processes to established remote art centres, with limited opportunities for new entrants to access this operational funding (section 9.2).

This makes it difficult for new arts organisations to establish their presence in the sector:

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 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)

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 in 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, 2019). The most recent round of Indigenous Rangers Program funding will also be provided over seven years, from 2021 to 2028 (NIAA 2021a).

However, the trade-off in limiting competition is that organisations in emerging art regions, or other innovative enterprises, may miss out on receiving 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. The National Association for the Visual Arts heard from members in their consultations for the National Cultural Policy that some new organisations decide against applying for IVAIS funding since everyone is competing against one another for the same funding pool, new organisations getting funded means funding for existing organisations being reduced (sub. 42, p. 17).

Increasing existing funding, particularly under IVAIS, that is available to support new (or unfunded) community-controlled art enterprises should be considered. Further support could also be provided to artists and art organisations to assist them in applying 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 (section 9.1), 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 administered 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. It should also take into account any policies announced from the development of the National Cultural Policy, which was in process at the time this report was published.⁶⁵

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 reporting of findings. This includes considering the wide range of perspectives across the sector, including, for example, artists who work primarily through art centres and artists who are not part of an art centre. It should go well beyond the NIVA Action Plan's commitment that evaluation and implementation will be 'informed' by stakeholder advice.

Specific areas for focus within the independent evaluation could include issues raised in section 9.2, in particular what data is collected and what data should be collected to assist evaluation of program effectiveness.

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)

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 2020b, p. 8). These broad principles, as

⁶⁵ Submissions to the National Cultural Policy (July - August 2022) called for increased and stable funding to the Aboriginal and Torres Strait Islander visual arts and crafts sector in general, and targeted financial support for small arts organisations and independent artists (ACHAA, sub. 45, p. 3; NAVA, sub. 42, p. 4).

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.



Recommendation 9.1

Australian Government funding should be evaluated to inform future arrangements

The Australian Government should commission an independent evaluation of the effectiveness of Australian Government expenditure directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector. The scope of the review should include the Indigenous Visual Arts Industry Support (IVAIS) program, the National Indigenous Visual Arts (NIVA) Action Plan and relevant Australia Council funding.

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 (having explicit regard to workforce development – recommendation 10.1)
- whether and what additional support is required to help meet sector priorities
- 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.

9.4 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 partners in the processes that establish the funding 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 9.4). 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.⁶⁶

Box 9.4 – 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).

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 IVAIS program does not have any formal arrangements for shared decision-making. Although the Office for the Arts engages with the sector in the course of existing funding decisions (such as the consultation

⁶⁶ Cultural outcomes for Aboriginal and Torres Strait Islander people are to be pursued under two socioeconomic outcomes of the agreement (15 and 16).

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
- decisions are made in partnership with Aboriginal and Torres Strait Islander people.

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), ‘governments 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)

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 disseminate resources and information more equitably to all sector participants, or take on roles similar to that of a cultural authority (discussed in chapter 6).

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 avoid duplication of 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).

The Australia Council found in its NIACA consultation, *Bringing it forward* (Australia Council 2022a), ‘overwhelming but qualified support for a national body for First Nations arts and culture’ (Australia Council, sub. 49, p. 9)⁶⁷. In addressing the qualifications raised in the consultation, including not duplicating existing bodies and services or taking funding away from the sector, Australia Council proposed:

A way forward that had traction was the idea of an organisation formed via a network or alliance of existing organisations across art forms and regions. This model could be similar to the Coalition of Peaks that works with governments on Closing the Gap. (sub. 49, p. 10)

The Australia Council convened the National Summit on First Nations Art and Culture, ‘Purrumpa’ to both celebrate the 50th anniversary of the establishment of the Aboriginal Arts Board and ‘come together to continue conversations about First Nations peoples’ self-determination, development and priorities for the national advocacy of First Nations arts and culture’ (Australia Council 2022e). Purrumpa provided an opportunity to discuss next steps in developing a NIACA.

Regional approaches

The sector could maintain regional approaches to representation, which brings together existing regional peak bodies with governments at all levels. Such an approach could feed into a NIACA, as discussed in the *Bringing it Forward: summary of findings from the consultation on a national body for First Nations arts and culture report* (Australia Council 2022a). In the report participants proposed a national body for First Nations arts and culture could be formed via a network or alliance of existing organisations, working as a two-way connector and best practice interface (Australia Council 2022a, p. 6). A regional approach 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 Codesign process (NIAA 2022c)
- 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.

Whether one of these approaches or something else entirely is adopted by the sector, establishing a formal decision-making partnership between the Aboriginal and Torres Strait Islander visual arts and crafts sector and the Australian Government 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

⁶⁷ Participants were involved in the study through consultations via an online survey, 15 written submissions, regional summits, expert roundtables, and over 40 consultation forums attended by more than 500 First Nations people (Australia Council 2022a).

absence of a coordinating mechanism, such as that previously operating through the COAG Cultural Ministers forum).

**Recommendation 9.2****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 does not include shared decision-making between governments and Aboriginal and Torres Strait Islander people.

The Australian Government (led by the 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.

10. Strengthening the workforce

Key points

- ✱ **Aboriginal and Torres Strait Islander people are under-represented in leadership, management, and technical roles within the Aboriginal and Torres Strait Islander visual arts and crafts industry.**
 - Under-representation means that Aboriginal and Torres Strait Islander people have limited influence over, and receive relatively few economic benefits from, an industry built on their culture.
 - This is a missed opportunity for the industry to benefit from the skills, perspectives and cultural knowledges of Aboriginal and Torres Strait Islander people, constraining future growth.
 - It also means new and planned cultural institutions may find it very difficult to recruit suitably qualified and skilled Aboriginal and Torres Strait Islander workers.
- ✱ **Gaps and deficiencies in training have contributed to this under-representation by limiting the development of Aboriginal and Torres Strait Islander visual arts and crafts workers and leaders.**
 - Accredited training options often do not meet the needs of current and aspiring Aboriginal and Torres Strait Islander visual artists and arts workers, particularly for those in remote areas. For example, some artists cannot access training focused on the digital and business management skills needed to operate as a sole trader.
 - Informal training, knowledge sharing and skills transfer, including that provided by community Elders, is often not recognised as part of standard qualifications.
 - The small scale and/or remoteness of many arts organisations limits opportunities for formal on-the-job training such as traineeships.
- ✱ **Policy responsibility for developing a workforce of Aboriginal and Torres Strait Islander visual arts and craft workers and leaders is fragmented, without clear, forward-looking objectives and accountabilities.**
- ✱ **Governments should ensure funding arrangements support the development of a sustainable workforce of Aboriginal and Torres Strait Islander visual arts and crafts workers and leaders.**
 - Evaluating Australian Government funding provides an opportunity to clarify responsibilities for workforce development and coordinate initiatives with the National Cultural Policy and other relevant policies.
 - Governments should demonstrate leadership in workforce development by ensuring new and planned public cultural institutions provide training opportunities and demonstrate inclusive recruitment practices.

Aboriginal and Torres Strait Islander people bring unique skills, perspectives, and cultural knowledges to their work in the visual arts and crafts sector. This contribution goes beyond the work of artists — and extends to arts workers, gallerists, managers, administrators and curators. These roles are diverse: the scope of arts workers' positions, for example, has expanded to include a wide range of tasks, such as supporting artists, managing commercial relationships with galleries, writing grants and contributing to the financial management and governance of art centres (IACA 2022b). Emerging roles include digital production and teaching positions at vocational education and training (VET) providers and universities (Fairley 2021).

But despite decades of market operation, Aboriginal and Torres Strait Islander people remain under-represented in many leadership, management and technical roles in the industry. Almost all remote community-controlled art centre managers are non-Indigenous and employed from outside the community (Acker, Stefanoff and Woodhead 2013, p. 17).

Under-representation means that Aboriginal and Torres Strait Islander people have limited influence over an industry built on their culture, and they receive relatively few economic benefits from its operations. Improving representation provides an opportunity for the industry to contribute to stronger employment outcomes for Aboriginal and Torres Strait Islander people.

Explicit policy focus on — and accountability for — workforce development is required to establish a 'pipeline' of Aboriginal and Torres Strait Islander visual arts and crafts workers and leaders. With a planned investment of over \$750 million⁶⁸ to build new Aboriginal and Torres Strait Islander arts and cultural institutions in the ACT, South Australia, the Northern Territory and Western Australia, workforce development is crucial to ensure there are suitably qualified and skilled Aboriginal and Torres Strait Islander people to lead and work in these institutions.

This chapter outlines the issues raised with the Commission that affect the workforce of Aboriginal and Torres Strait Islander visual arts and crafts workers (section 10.1) and explores opportunities for governments to strengthen the workforce (section 10.2). Some of the issues raised apply across the arts sector more broadly (such as precarious employment and limiting training opportunities) and for Aboriginal and Torres Strait Islander people across different sectors (including challenges in delivering formal training).

10.1 What are the industry's key concerns?

Investing in Aboriginal and Torres Strait Islander artists and arts workers through skills acquisition, training and career development has been identified as a key objective for many arts funding programs. However, despite the growth of the industry over the past 30 years, Aboriginal and Torres Strait Islander people remain under-represented in many roles in the industry. Desart noted that in Central Australia:

... only a handful of local Aboriginal people are employed in management positions in the arts industry, and apart from government funded Aboriginal arts worker positions in remote art centres, even entry level positions are occupied by only a few local Aboriginal workers. (Desart 2019a, p. 5)

⁶⁸ Funding announced includes: \$316.5 million for Ngurra in the ACT; \$200 million for Tarrkarri in South Australia; \$130 million for the National Indigenous Cultural Centre in Alice Springs and \$104 million for initial planning for the Aboriginal Cultural Centre Project in Western Australia (DLGSC (WA) 2022; DPC (SA) 2021; Morrison and Wyatt 2022; Northern Territory Government 2022; The Commonwealth of Australia 2022, p. 22). The South Australian Government announced a hold on progressing Tarrkarri on 31 October 2022 while a review is undertaken (due in early 2023) to 'examine how best to deliver the centre as a place of international significance' in the face of surging construction costs adding an extra \$50 million to the budget (Government of South Australia and Australian Government 2022; Shepherd 2022).

In its submission to the Office for the Arts consultation into 'Growing the Indigenous Visual Arts Industry', the Aboriginal Art Association of Australia pointed out that there has been little progress on workforce issues over time:

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)

A roundtable held by the Commission in August 2022 discussed a number of issues facing the Aboriginal and Torres Strait Islander visual arts and crafts workforce (box 10.1). Many of the concerns raised related to deficiencies in training, and limited career pathways and progression opportunities. The Commission is grateful for these contributions.

Box 10.1 – Key issues affecting career pathways, progression and training opportunities

Participants in the Commission's roundtable on career pathways and capacity strengthening outlined their concerns with the development of the Aboriginal and Torres Strait Islander visual arts and crafts workforce.

- Aboriginal and Torres Strait Islander people are under-represented in leadership and management roles, such as in galleries and museums. There are limited accessible pathways towards employment in the arts sector and this limits aspirations for artists and arts workers, as well as creating a significant burden on those in senior leadership roles to mentor many people across a broad range of roles.
- Arts sector businesses see a lot of value in employing Aboriginal and Torres Strait Islander people who bring significant cultural knowledge to their roles, but can struggle to find employees with the right skills set. Specific skills needed include digital literacy and, in some remote areas, general work-ready skills in numeracy and English literacy.
- Accredited training is rarely fit-for-purpose: delivery modes are often inflexible, too long and minimum enrolments are required to develop new courses. Courses targeted at artists often do not reflect the reality of how artists work or include business skills that would be helpful to artists operating as a sole trader.
- On-the-job training is important, but many arts businesses are small and training arts workers is costly. Art centre managers are overstretched and often do not have time to transfer skills and mentor staff. Unaccredited training, including learning on Country, is not formally recognised.
- Arts worker roles do not always provide a clear career path as many positions are short-term, and workforce casualisation limits employer investment in training and skills development.
- Where an Aboriginal and/or Torres Strait Islander arts worker is the only (or one of only a few) Indigenous person/s in a mainstream organisation, culturally unsafe experiences may lead them to leaving the position.

Deficiencies in training and skills development

The skills and training required across the industry vary. A curator requires a detailed understanding of art history, usually acquired through a university degree, while an art centre manager may not require tertiary qualifications, but would instead need a range of business management, marketing and digital skills. An arts worker would need technical studio skills, such as preparing canvases and safe handling and storage of artworks, but their training may also need to extend to business skills.

Many participants in this study emphasised the importance of, and the need for, targeted and culturally-appropriate training for Aboriginal and Torres Strait Islander artists and arts workers, for both professional art practice and developing the business and digital skills required for management and leadership roles (AAAA, sub. 26, p. 91; Australia Council for the Arts, sub. 24, p. 19; NAVA, sub 23, p. 2; Queensland University of Technology, sub. 12, p. 3; UMI Arts Ltd., sub. 1, p. 9; Woods, sub. 11, p. 7).

There needs to be a concerted effort to build on previous initiatives to establish training and educational programs and courses, including work placements in Aboriginal corporations, that are designed to invest in knowledge and skills development for Aboriginal people. This is especially important for Aboriginal young people in the early phase of their career and as a means for growing the workforce in art centres, arts and cultural organisations, government and business entities. (Ku Arts, sub. 46, p. 5)

There is an increasing need for remote art centre workers and artists to engage in capacity development programs to upskill in the business of administering and selling art, including remaining informed of artists' Indigenous Cultural and Intellectual Property (ICIP) rights. (AACHWA, sub. 20, p. 3)

However, the Commission heard that the training opportunities available to Aboriginal and Torres Strait Islander people working (or seeking to work) in the industry do not provide the mix of skills and professional development opportunities that workers are seeking.

Most accredited visual arts training lacks a focus on business skills

Most visual arts and crafts-focused training courses do not cover the full breadth of skills particular to the industry. The vocational training opportunities tailored to creative arts focus on artistic practice, with limited time spent on the business and technology skills required for artists to operate 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, it does not cover skills such as digital literacy, marketing on social media, and logistics, all of which are needed for working in or managing an art organisation, or for artists to build their own business. While there are many generic vocational education courses that cover business skills, artists and others in the sector argue that training tailored to the industry is required (Dreamtime Art Creative Consultancy, sub. 57, pp. 13–14; Ku Arts, sub. 46, pp. 4–5; AAAA, sub 26, pp. 57, 98; UMI Arts Ltd, sub. 1, p. 9; Arts QLD, sub. 60, p. 8; Government of South Australia, sub. 21, pp. 18–19; Queensland University of Technology, sub. 12, p. 2; NAVA, sub. 42, p. 9; Australia Council for the Arts, sub. 49, p. 13; ACHAA, sub. 45, pp. 2–3; AACHWA, sub. 20, pp. 3, 10).

General support for developing business skills (including financial support) is provided by a number of agencies with responsibility for economic or industry development. For example, Indigenous Business

Australia (IBA)⁶⁹ offers tailored business support services, assisting Aboriginal and Torres Strait Islander businesses to meet business goals, providing training in IT systems, business risk mitigation, strategic planning and other relevant topics (IBA 2021b). One artist who participated in this program noted the benefits of 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)

In 2020-21, IBA delivered business capability workshops to over 500 people (IBA 2021a, p. 30). No data is available on the number of artists who attended, and to what extent the capacity of IBA's services meets demand.

Across the industry, the Commission heard that artists are not always aware of the training and support options available to them. There is a case for governments and training providers to offer readily accessible information about what training options are available and how to access those. Recent arts strategies developed by State and Territory Governments include initiatives to improve access to information and resources to the Aboriginal and Torres Strait Islander arts community, including a focus on business skills, through initiatives such as cultural and training hubs (ACT Government 2022, p. 12; Queensland Government 2022, p. 14; South Australian Government 2022, p. 23; Victorian Government 2020, p. 13).

The structure and mode of delivery is often inflexible and not culturally responsive

The Commission heard that accredited training for visual arts workers is often inflexible, in terms of how training is delivered to those enrolled, as well as the requirements for development and delivery of courses, such as a minimum number of likely enrolments (box 10.1; Desart Inc, sub. 4, p. 20; UMI Arts Ltd, sub. 1, p. 9).

The challenges that Aboriginal and Torres Strait Islander people, particularly those living in rural and remote areas, face in engaging with the VET system are well documented. These include needing additional assistance with basic English language skills, adjusting to a new learning culture and longer training completion time than non-Indigenous students (PC 2020c, p. 410).

Desart articulated the 'complex matrix of barriers faced by Aboriginal people entering the workforce', including from educational, cultural and social factors, in its *Aboriginal Art Workforce and Enterprise Development Program* (2019a, p. 9). The main barriers in Central Australia to engaging and retaining local Aboriginal people in employment and training are a lack of English literacy and numeracy skills (Desart 2019a, p. 5). Other areas identified in the Desart report included inadequate capacity of employers to resource effective traineeship programs and the ineffectiveness of Australia's VET system in the delivery of courses for remote Aboriginal learners.

⁶⁹ Indigenous Business Australia is an Australian Government statutory authority established to assist and enhance Aboriginal and Torres Strait Islander self-management and economic self-sufficiency.

The need for training that is delivered in ways that are suitable to the needs of the industry was also highlighted by UMI Arts Ltd.

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 ... we feel this type of training delivery would be accessed more readily by artist[s]. (sub 1, p. 16)

Similar concerns about the appropriateness of accredited courses and the importance of providing access to courses on foundational skills to Aboriginal and Torres Strait Islander people in remote and regional areas have been raised under the Indigenous Rangers program:

Skills development initiatives are being taken by particular ranger organisations and partnerships but the availability of courses with the right content and the access to courses and trainers in remote and regional areas remains a challenge. The individual training needs of rangers and ranger organisations can vary considerably. For some, gaining the foundational literacy and numeracy skills is essential for certificate-level training. Others require training in specialised fields such as biosecurity monitoring and compliance activities and the use of data and mapping software. (NIAA 2022e, p. 31)

These issues were also recognised in a review into Australia's VET system (the Joyce Review). The review noted that better training outcomes occur when Aboriginal and Torres Strait Islander people 'are taught by local trainers and able to engage in their learning on Country and in their own language' (Joyce 2019, p. 109).

The Joyce Review made a number of recommendations, targeting the delivery of, and access to, foundational skills for Aboriginal and Torres Strait Islander people. More recently, the Jobs and Skills Summit included a commitment by the Australian Government, in partnership with States and Territories, to 'reinvigorate foundations skills programs to support workers and vulnerable Australians to gain secure employment choices' (Australian Government 2022b, p. 2).

Training provided within the industry is often constrained by funding and not formally recognised

There are a number of small-scale initiatives offered outside of the formal education system that provide training and professional development opportunities for Aboriginal and Torres Strait Islander arts workers. These include training programs provided by peak bodies (box 10.2) and other art collectives and hubs to fill the gaps in the VET system. Scholarships are also offered by various arts agencies and institutions.

Over time, such training programs have made a significant contribution to the industry. Research that examined Desart's and Arnhem, Northern and Kimberley Artists' programs concluded that:

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. (Seet et al. 2018, p. 31)

Box 10.2 – Aboriginal and Torres Strait Islander arts peak body training and professional development programs

Aboriginal and Torres Strait Islander visual arts and crafts peak bodies offer two kinds of skills development and training opportunities:

- informal training, including workshops and presentations, group training, attendance at industry events
- formal training, with specific units of study offered over a longer timeframe, which may be accredited.

Examples of informal training are 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.

More recently, the Aboriginal Art Centre Hub of Western Australia (AACHWA) and the Indigenous Art Centre Alliance in Queensland have developed their own training programs. The New South Wales Aboriginal Culture, Heritage and Arts Association Inc is also seeking to develop a training program (sub. 45, p. 2).

Aboriginal Art Centre Hub of 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.

The Indigenous Art Centre Alliance's Indigenous Artsworker 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, with the Indigenous Art Centre Alliance noting that this allows for training to be flexible, responsive and shaped to the needs of arts workers.

Sources: AACHWA (2022), ANKA (2022), Desart (2022c), IACA (2022a), Ku Arts (2019b, 2019a).

Creative Economy (sub. 9, p. 14) noted that 'capacity building programs in the sector are limited and inconsistent', and that while some programs run by 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'.

Further growth of these training initiatives is constrained by lack of funding. For example, the Indigenous Art Centre Alliance's Indigenous Artsworker Program supported seven arts workers in 2021-22, and the AACHWA 'Our Future' program supported five arts workers in 2020-21 (AACHWA 2021; IACA 2022a). The Commission heard that the number of places available at these courses falls short of demand. Further, these

opportunities may not be accessible to artists or arts workers who lack access to those regional peak service organisations or other support organisations in the sector.

These types of training are often not recognised by the VET system, which means arts workers who have completed the program may still not be eligible for standard qualifications that are required to access further education or employment. This is particularly the case for training provided by community Elders on Country.

There is often no funding available for such training, which limits the ability of organisations to offer the type of training required:

Other educational initiatives that involve family and community members include training provided by arts centres, ranger organisations, culture and language centres and other organisations. But these organisations rarely have an appropriate budget or funding to support teaching activities, so the workers are likely to go unpaid. [There is a] need to acknowledge the long-term educational benefit that these organisations can provide, and to ensure that they and their staff are properly supported for providing educational services. (Throsby and Petetskaya 2019c, p. xiv)

Rather than looking to accredit these ways of learning, Arts Law, Copyright Agency and IartC advocated for greater recognition on the part of employers of cultural knowledge:

Education and a perspective shift are required for non-Indigenous staff and leaders in the arts to recognise non-Western modalities of education and professional development and what they can bring to an organisation or initiative. It is not accreditation that is required but employment that allows Aboriginal and Torres Strait Islander artists and arts workers paid time for cultural learning and obligations, recognised as personal and professional development relevant to their career. (sub. 62, p. 33)

Training gaps exist for independent artists, particularly in urban areas

Several study participants have suggested that training and professional development opportunities available to independent Aboriginal and Torres Strait Islander artists, particularly in urban areas, are limited (box 10.1; NAVA, sub. 42, pp. 2, 5). This includes training for artists to develop their artistic practice and their business skills, such as pricing, bookkeeping and digital capability.

There are extremely limited opportunities for Aboriginal and Torres Strait Islander artists working outside of the art centre model to have access to similar opportunities, with very few organisations doing this work and none of them properly resourced to undertake comprehensive programming and development support for independent artists. (Arts Law, Copyright Agency and IartC, sub. 62, p. 33)

The National Association for the Visual Arts (NAVA) provides general advice for visual arts practitioners, including advice on pricing, through online resources for members (NAVA 2022). However, NAVA (sub. 23, p. 2) noted that 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.

According to Arts Law, Copyright Agency and IartC, independent artists face numerous barriers to accessing training, including, but not limited to:

- not knowing what opportunities are out there and where to start
- how to work with galleries
- where to sell their work

- access to affordable studio spaces
- what their rights are
- a lack of confidence and experience with grant writing, exhibition proposal and budget development, reporting and the inevitable administration of professional arts practice. (sub. 62, p. 33)

The Commission heard similar concerns directly from artists (PC 2022). Training initiatives largely remain outside the VET and university sector. This can make it very difficult for independent artists to progress to leadership and management roles in the visual arts and crafts industry (given these generally require formal accredited qualifications).

Funding to access training can be a significant barrier. Independent artists rely on numerous funding streams to develop their practice and business skills. Accessing grants through these processes can be challenging, with low success rates. For example, in 2019-20, the Australia Council received nearly 3600 applications for grant funding of organisations and individuals' art projects and career development, worth \$107 million. Due to limited funding, only 16% of grant applications were successful, receiving a total of \$17 million (Urquhart 2020, p. 61). The Australia Council funds individual professional development through the annual *Aboriginal and Torres Strait Islander Arts Fellowship*, international fellowships and residencies (such as through the Biennale Delegates Program) and through its *Chosen*⁷⁰ and *Custodianship*⁷¹ programs, although these largely benefit a small number of well-established artists. The Aboriginal Regional Arts Alliance NSW (sub. 8, p. 3) argued 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 Ltd stated that 'the current approach to the industry, particularly at a federal level is overwhelmingly unbalanced to the detriment of independent artists' (sub. 26, p. 9).

State and Territory Governments also offer one-off grants to individual artists to fund professional development opportunities or artistic development, production and presentation of new work. For example, the South Australian Government, through its State-wide Indigenous Community Arts Development Project, provides funding to Ku Arts to support approximately 150 independent artists (for example through workshops) in regional and remote areas outside the Anangu Pitjantjatjara Yankunytjatjara Lands where there are no Aboriginal art centres (Government of South Australia, 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).

Training opportunities for independent artists can also come from cultural institutions and 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). Mentorship is also a key aspect of the program, drawing on past alumni to fulfil these roles and continue their involvement and professional development with the program.

⁷⁰ The *Chosen Program* aims to support intergenerational artistic and cultural transmission through community-led cultural apprenticeships and residencies (Australia Council 2020a).

⁷¹ The *Custodianship Program* was designed by Aboriginal and Torres Strait Islander leaders to transform sustainability in culture, practice, community and the arts. In 2021-22 13 participants were 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 2021a, pp. 65–66, 2021c). In 2021-22, the Australia Council consulted on a new First Nations leadership program which will be launched mid-2023 (Australia Council 2022b, p. 25).

Support for career pathways and on-the-job training is limited

Career pathways are poorly defined

Career pathways — clear, established stepping stones towards increasingly senior roles — in the creative and cultural sector can be poorly defined relative to those of many other sectors. Arts careers are 'often rather fragmented with multiple entry and exit points through an individual's lifetime' as well as being more likely to be non-standard — such as self-employed, working part-time or having temporary contracts — and workers are likely to hold multiple jobs (OECD 2022, pp. 120-121).

Aboriginal and Torres Strait Islander artists similarly told the Commission about the 'portfolio' nature of many arts careers, where artists may only be able to dedicate a small amount of time to their practice or other arts-related work, instead needing to work full-time in other sectors to maintain their income. This also impedes career progression. Full-time, salaried jobs, such as curators and gallerists, are highly competitive and usually require university qualifications, while self-employed artists can have insecure and low incomes, especially while establishing their careers.

Career planning often starts in secondary school. Participants to this study have raised concerns about the disconnect between arts in schools and potential career pathways (ANA, sub. 6; NAVA, sub. 42; ACHAA, sub. 45; Arts QLD, sub. 60).

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. (AACHWA, sub. 20, p. 10)

According to Desart's *Workforce and Enterprise Development Program* (2019a), which maps out the jobs that will be required in a National Aboriginal Art Gallery in Alice Springs, career pathways should start as early as middle school:

This program structure will see ... a clear pathway from middle-school to high school to work experience and then through university courses with cadetships, or traineeships with accredited training, into ongoing jobs within the arts and culture, and tourism sectors. (Desart 2019a, p. 10)

In the National Roadmap for Indigenous Skills, Jobs and Wealth Creation (NIAA 2021b, p. 3), a 'lack of access to information about opportunities and pathways to training, jobs and business' is identified among a number of other challenges faced by Aboriginal and Torres Strait Islander people looking to participate in the mainstream economy. Participants in this study have raised this as a particular issue for the visual arts and crafts sector.

During the consultation to develop the Strategy [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. (Northern Territory Government, sub. 28, p. 7)

The absence of clear and accessible pathways into senior roles, particularly in smaller arts organisations, contributes to the under-representation of Aboriginal and Torres Strait Islander people in those positions. Such under-representation can become a cycle, as it can be difficult for people to see the range of career opportunities available in the industry for Aboriginal and Torres Strait Islander people.

A significant barrier to engagement in training and employment programs is the lack of visibility of local Aboriginal language speakers gaining qualifications and establishing successful careers. In general terms, Aboriginal people living in tradition-oriented communities in Central Australia lack

self-belief when faced with the prospect of pursuing a career as it is not uncommon to have no-one in their peer group who has completed year 12 or benefitted from vocational training. (Desart 2019a, p. 5)

Formal on-the-job training opportunities are limited

Formal on-the-job training can be provided through a traineeship or cadetship, where a worker earns a vocational qualification while undertaking paid work. As visual arts and crafts sector qualifications are not listed on the Australian Priority List 2022–24 (DEWR 2022), subsidised traineeships are not usually available in the industry and employers are responsible for funding the full costs of trainees in the workplace.

The large number of small (including remote) organisations in the Aboriginal and Torres Strait Islander visual arts and crafts industry means traineeships are not always feasible. Arts Law, Copyright Agency and IartC cited the size of organisations as a common barrier to staff development:

One of the most common barriers to developing Aboriginal and Torres Strait Islander staff into leadership roles is the under resourcing of small to medium and grassroots arts organisations across the board. A lack of consistent and appropriate levels of funding has seen organisations needing to achieve more with less, and overworked and underpaid arts professionals are experiencing burnout at alarming rates. Nurturing Aboriginal and Torres Strait Islander staff and creating a culturally safe workplace is rarely prioritised in a highly stressed and sometimes toxic or competitive work environment. (sub. 62, p. 32)

This strain on small organisations, particularly art centres, is well documented. An art centre manager's role includes managing and supporting the development of their staff, yet with competing demands on their time (section 9.2), and the high turnover rate (Seet, Acker and Whittle 2015, p. 775), it is not clear that many 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 [are] often disruptive to the development of sustainable business practices and communities of artistic practice. (Arts QLD, sub. 33, p. 5)

Many small arts organisations rely on freelance workers or individual entrepreneurs, operating in precarious conditions that revolve around temporary, project-based work (OECD 2022, p. 168). These conditions make it difficult for small organisations to commit to structured training programs, such as traineeships, which require one to two years to complete. Desart raised their concerns that '[t]he trend toward casualisation of artworker employment will inhibit and disadvantage Aboriginal artworkers employment, career and professional development and employment entitlements (superannuation, long service entitlements etc.)' (sub. 4, p. 20).

Where traineeships are funded, and employers are supported to maintain a culturally safe workspace, strong employment outcomes can be achieved. Creative Victoria's First Nations Creative Industries Traineeship program, operated by ArtsReady (box 10.3), is an example of government investment in such an approach. However, the requirements of participating in the program, such as having a dedicated supervisor and the time to undertake the training required of the trainee host, would likely limit the type of organisation able to participate.

Box 10.3 – ArtsReady and Creative Victoria – First Nations Creative Industries traineeship program

The ArtsReady program ‘assists employers in the arts, cultural and creative industries to engage young Australians in traineeships’ in every State and Territory in Australia. The program ‘prepares participants to graduate as job ready ... offering on the job work experience’ for trainees as well as providing accredited training relevant to the role. National not-for-profit company AFL SportsReady delivers the ArtsReady program.

In 2019, ArtsReady partnered with the Victorian Government to run the First Peoples Creative Industries Traineeship program, offering 12 month paid placements in a range of creative industries in both Melbourne and regional Victoria (for example, in fashion, gaming, festivals, museums, design, music and the arts). The traineeship program was an outcome of the First Peoples Action Plan for the Creative Industries 2018–20 as a joint partnership between Small Business Victoria, Jobs Victoria and Creative Victoria. The program was designed for Victorian-based First Peoples aged 18 to 24.

Mentoring and cultural safety were key to success

In addition to fully funding the traineeships (the paid employment role and nationally recognised Certificate III or IV in Business), the Victorian Government also provided funding to train and support host organisations in relation to cultural protocols and safe practices. It also funded mentor and First Peoples Liaison Officer roles within the First Nations Creative Industries Traineeship program. Testimonials from participants have emphasised the importance of funding those wraparound services:

Having the support of an Educator and ... my Field Officer as well really allowed me to gain confidence within both study and work ... I was also lucky enough to have 2 First Nations mentors ... They encouraged me and spoke to me about my future; encouraging me to try what I speak of and helped me build my networks amongst respected peoples. (Dakota McCarthy cited in ArtsReady 2022b)

The program makes it affordable to have someone as a trainee. We wouldn’t be able to bring Tiffany on without that support, so that has been amazing ... It was great that the program paired the trainee with a First Peoples mentor. They were rigorous with checking in and making sure things were going well. (Beck Palmer cited in ArtsReady 2022a)

Sources: Andrews (2019); ArtsReady (2021).

In other sectors, governments have provided funding to enable on-the-job training opportunities for Aboriginal and Torres Strait Islander people. For example, as part of a \$746 million investment in the Indigenous Ranger Program over 2021–2028, the Australian Government provided \$25 million to support Indigenous Rangers in remote areas to undertake a Certificate IV in tropical biosecurity and participate in an Indigenous Biosecurity Traineeship, to enable them to undertake fee-for-service biosecurity work (NIAA 2021b, p. 15, 2021a). Similarly, the Indigenous Health Workforce Traineeships program includes \$13.6 million in funding between 2020-21 and 2023-24 to create viable career pathways for Aboriginal and Torres Strait Islander people working in the Aboriginal and Torres Strait Islander primary health care sector (NIAA 2021b, p. 15).

No comparable investments have been made in the visual arts and crafts industry. With a number of Aboriginal and Torres Strait Islander cultural institutions being built across the country, a lack of clear career

pathways, coupled with inadequate access to training and skills development, may limit the availability of skilled Aboriginal and Torres Strait Islander people to lead — and be employed by — those institutions.



Finding 10.1

Gaps and deficiencies in training contribute to under-representation of Aboriginal and Torres Strait Islander people in some roles and positions in the visual arts industry

Aboriginal and Torres Strait Islander people are under-represented in leadership, management, and technical positions within the Aboriginal and Torres Strait Islander visual arts and crafts industry. Gaps and deficiencies in the training available perpetuate this situation.

- The scope and delivery of accredited visual arts and crafts training does not always meet the needs of current and aspiring Aboriginal and Torres Strait Islander visual arts workers, particularly in remote areas.
- Informal training, knowledge sharing and skills transfer, including that provided by community Elders and arts peak bodies, is not recognised in standard qualifications, limiting employment prospects.
- The small scale and remoteness of many arts organisations limits opportunities for formal on-the-job training such as traineeships and cadetships.

10.2 Opportunities for governments to strengthen the Aboriginal and Torres Strait Islander visual arts and crafts workforce

The ongoing under-representation of Aboriginal and Torres Strait Islander people in key roles and positions within the Aboriginal and Torres Strait Islander visual arts and crafts industry raises the question of whether governments should do more to strengthen this workforce.

The benefits of strengthening the Aboriginal and Torres Strait Islander visual arts and crafts workforce go beyond direct employment outcomes: as highlighted by the National Roadmap for Indigenous Skills, Jobs and Wealth Creation, the broader Australian economy can benefit from a greater recognition and utilisation of the unique skills, knowledges and cultures held by Aboriginal and Torres Strait Islander people (NIAA 2021b, p. 10).

Participants in the Commission's roundtable on career pathways and capacity strengthening provided ideas for strengthening the workforce and improving representation in key roles (box 10.4).

Not all suggestions raised with the Commission fall under the scope of industry-specific policies or programs, particularly in the short term. Many relate to economy-wide issues relating to the accessibility of training and skills development, while some challenges Aboriginal and Torres Strait Islander people face in the industry, such as precarious and contract-based employment models, can be prevalent across the broader arts and culture workforce. These are beyond the scope of this study.

Box 10.4 – Ideas and opportunities to strengthen skills and career outcomes

Participants in the Commission's roundtable on career pathways and capacity strengthening provided suggestions for ways to build the Aboriginal and Torres Strait Islander visual arts and crafts workforce.

- Important skills are developed on Country through cultural learning, and this should be recognised and invested in consistently, rather than through ad-hoc, one-off project grants.
- Regional peak bodies and other service organisations provide professional development and leadership opportunities through a combination of peer-to-peer and structured learning with TAFEs. They also facilitate relationships (locally and within the broader arts sector) and provide opportunities for city-based arts workers to work in technical and administrative roles in art centres in regional and remote areas, as well as internationally.
 - However, the work of peak bodies could be better supported, and lessons about 'what works' shared with the sector more broadly.
- Training and skills development needs to be flexible, accessible and culturally safe. Alternative models include:
 - finding ways to engage with primary and secondary students through the school curriculum, and supporting students to transition to employment in the arts workforce
 - tailored funding for accredited training that recognises small numbers of participants in remote areas, including face-to-face training opportunities and use of micro-credentials
 - government funding for traineeships, where employees can study and build their skills.
- An online portal, tailored to Aboriginal and Torres Strait Islander artists and arts workers, could provide a one-stop-shop for identifying relevant training options, assisting people with accessing training, and sharing good practice.
- Professional development could be supported through greater use of co-employment arrangements, sharing roles between institutions and organisations and creating opportunities for secondments in different parts of the sector.
- Indigenous Visual Arts Industry Support funding could be expanded to support mentorships, traineeships, peer-to-peer learning in art centres and other arts organisations, as well as programs provided by peak bodies and new art organisations in south-east Australia.
- The size and scope of proposed cultural institutions provide an opportunity not only to employ and develop Aboriginal and Torres Strait Islander arts workers through formal traineeships and other programs but also for Elders, board members and other cultural leaders to hold leadership positions in these institutions.

Other suggestions relate to accessible fit-for-purpose training for Aboriginal and Torres Strait Islander people, including in remote areas. The Commission's 2020 *National Agreement for Skills and Workforce Development Review* recognised issues with vocational training funding arrangements for remote Aboriginal and Torres Strait Islander students and recommended that governments consider implementing block funding to enable additional support services for those students (PC 2020c, p. 54).

In this study, the Commission has focused on three areas where all governments could better support the Aboriginal and Torres Strait Islander visual arts and crafts workforce. These are:

- clarifying responsibility within government for long-term policy leadership on workforce issues and accountability for employment outcomes in the industry
- identifying options for how government funding to the industry could support skills development and career progression
- funding new and existing public arts and cultural institutions to prioritise training, professional development and cultural safety for Aboriginal and Torres Strait Islander arts workers.

Clarifying responsibility for policy leadership and accountability for outcomes

There is no national-level policy that specifically considers the needs of the Aboriginal and Torres Strait Islander visual arts and crafts workforce. The Australia Council views this as a major gap in the policy landscape (sub. 49, pp. 12–13) that contributes to a lack of attention to skills gaps, fit-for-purpose training and skills development opportunities, and career pathways for Aboriginal and Torres Strait Islander workers.

Policy responses are fragmented between governments

Support for development of the Aboriginal and Torres Strait Islander arts and crafts workforce is limited and fragmented across the Australian, State and Territory Governments. It is not always clear which ministers or government agencies in the different jurisdictions are ultimately responsible for setting objectives and priorities for workforce development in the industry.

The Australian Government supports workforce development through the Indigenous Visual Arts Industry Support (IVAIS) program. IVAIS grants encourage the provision of professional training and development for artists, board directors and staff, and fund art centres to hire and train arts workers (Office for the Arts 2021d, p. 10). A small amount of IVAIS funding, alongside funding under the Australia Council's *Visual Arts and Crafts Strategy* (Australia Council 2022f), is provided to industry service organisations, including regional peak bodies, to deliver professional development programs (outlined in box 10.2).

Some State and Territory Governments have also set aspirations to develop the Aboriginal and Torres Strait Islander visual arts and crafts workforce.

- The Queensland Government's *Grow 2022–2026* program includes initiatives to support focused employment and career development initiatives for First Nations practitioners, as well as initiatives to strengthen business skills and capacity across First Nations arts and cultural organisations (Arts QLD, sub. 60, p. 6).
- The Northern Territory's *Creative Industries Strategy NT 2020–2024* sets a goal to 'prioritise Aboriginal workforce and enterprise development' across the creative industries, including visual arts (Northern Territory Government and Chamber of Commerce Northern Territory 2020, p. 10).

In contrast, study participants noted the lack of government focus on workforce development in other jurisdictions. For example, the Aboriginal Culture, Heritage and Arts Association (sub. 45, p. 3) pointed to the lack of an arts workforce strategy in New South Wales and noted that existing programs and courses do not fit the needs of New South Wales artists.

The absence of a national workforce strategy stands in contrast to some similar industries. For example, the draft *Indigenous Ranger Sector Strategy 2022–28*, developed by the National Indigenous Australians Agency, provides a national strategic intent towards 'the continuing development and diversification of

professional Indigenous ranger organisations and land and water management workforce', with more specific actions relating to building human capital and career development pathways (NIAA 2022e, p. 20).

Arts and culture employment was not prioritised under the *National Roadmap for Indigenous Skills, Jobs and Wealth Creation*, which notes that, across the broader economy, there is need for:

... [a] greater focus on workforce development and encouraging advancement of Indigenous Australians beyond entry level positions and into more technical, managerial and leadership roles, addressing bias and discrimination that create barriers to employment and career advancement, and shifting from individual jobs to a focus on building sustainable and successful careers across a range of different industry sectors. (NIAA 2021b, p. 18)

Such needs also affect the Aboriginal and Torres Strait Islander visual arts and crafts industry, but the absence of a industry-specific strategy means the Aboriginal and Torres Strait Islander visual arts and crafts workforce now operates in a gap between multiple frameworks and without clear workforce development objectives.

Existing training and employment programs provide opportunities for a subset of individual Aboriginal and Torres Strait Islander artists and arts workers, but they do not operate within a coherent framework to build a sustainable workforce, address skill gaps and reflect the aspirations of Aboriginal and Torres Strait Islander people and the needs of the industry. This policy void contributes to the under-representation of Aboriginal and Torres Strait Islander people across many roles and positions in the industry. Further, it risks limiting the ability of new and planned arts and cultural centres to meet their employment aspirations.



Finding 10.2

The Aboriginal and Torres Strait Islander visual arts and crafts workforce falls in a policy gap

There is no coherent national strategy to support the Aboriginal and Torres Strait Islander visual arts and crafts workforce. Development of the workforce falls in a policy gap between multiple frameworks and without clear objectives and accountabilities. This contributes to ongoing under-representation of Aboriginal and Torres Strait Islander people in key industry roles.

What could governments do?

While the IVAIS program funds art centres, regional peak bodies and industry service organisations to deliver some professional training and development programs, this does not constitute a strategic approach to developing a skilled Aboriginal and Torres Strait Islander visual arts and crafts workforce.

The Commission has recommended that the future objectives of government funding for the industry should be co-designed with Aboriginal and Torres Strait Islander people (chapter 9, recommendation 9.2), following an evaluation of existing funding arrangements (recommendation 9.1). Any objectives for workforce development would need to be developed collaboratively with sector representatives, with funding priorities reflecting demonstrated demand and based on a shared understanding of which approaches to training, skills development and career pathways are more likely to succeed.

Without pre-empting the outcomes of that process, the Commission has considered how future funding arrangements could support workforce development.

Broaden the scope of training delivery models, including to independent artists

Most Australian government funding to support the Aboriginal and Torres Strait Islander visual arts and crafts workforce is provided through art centres and regional peak bodies. Although this funding contributes to training and professional development opportunities (box 10.2), it also reflects a relatively narrow view of the workforce. It is not a delivery model that suits independent visual artists, arts workers in emerging fields of practice (such as digital art and the fashion industry), or workers in regions without an art centre.

Training opportunities should be better suited for the needs of independent artists, with a particular focus on business administration and digital capacity. Some participants provided suggestions on how to do so, with Dreamtime Art Creative Consultancy (sub. 57, pp. 13–14) suggesting roles for both the Australia Council and Indigenous Business Australia to develop arts practice and improve business skills. Arts hubs and other service organisations in regional and urban areas can also deliver training.

For arts workers, suggestions include micro-credentials (where individual vocational courses can be recognised even if they do not result in a full qualification), and better recognition of prior learning, including cultural learning on Country and peer-to-peer on-the-job training. The potential value of flexible delivery is well-established, although there are structural challenges within the VET system in accrediting these types of qualifications, particularly for courses with small enrolment numbers (section 10.1).

The Australian Government could look at how to better support existing training solutions the sector itself has developed, including (but not limited to) the regional arts peak bodies and other arts service organisations. (box 10.2; Australia Council for the Arts, sub. 49, p. 13). For example, regional peak bodies provide training that is tailored to their local areas, but this is often not accredited (section 10.1). The Australian Government could consider how to enable accreditation of these informal but more tailored training options, or more explicitly recognise the value of peak body-led training when making recruitment decisions, such as those made by public cultural institutions.

Consider the role funding mechanisms can have in strengthening the workforce

Existing funding structures (including the amounts of funding available) can limit the ability of art centres and regional peak bodies to respond to the need for training and professional development, including through on-the-job training and mentoring.

IVAIS funding conditions require that projects funded under its grants do not duplicate other programs (Office for the Arts 2021d, p. 9). Although this is sensible in principle, it does presume that other grant programs operate effectively to address these other needs. More broadly, it reflects the focus of grants administration on the requirements of the funder, rather than coordinating grants access based on the needs of applicants. The evaluation recommended by the Commission (recommendation 9.1) could consider how this limitation operates in practice, and whether it limits art centres and regional organisations from accessing funding under IVAIS for activities that might benefit workforce development.

Some art centres face capacity constraints that limit the time and resources that can be allocated to support on-the-job training and skills transfer from art centre managers to Aboriginal and Torres Strait Islander artists and arts workers (section 10.1). The Australian Government should ensure that art centres and hubs receive adequate funding to enable those on-the-job training opportunities.

Future funding arrangements could ring-fence a share of funding for defined professional development priorities, and allow for a broader range of delivery methods to ensure training is tailored to the needs of artists and arts workers. This should also recognise the importance of recruiting Aboriginal and Torres Strait Islander people with lived experience in those training and education roles to provide fit-for-purpose delivery (NAVA, sub. 42, p. 9).

Coordination with other relevant government policies

The policy vacuum around the Aboriginal and Torres Strait Islander visual arts and crafts workforce means that existing policies do not consistently recognise the capacity of cultural industries in improving economic participation and employment outcomes, especially (but not solely) in remote areas. The Australia Council emphasised that the arts are a key area of strength for Aboriginal and Torres Strait Islander people, and therefore 'should be central in cross-portfolio workforce audits, investment and strategies for First Nations people's professional development and economic participation' (sub. 49, pp. 12–13).

Four key areas of policy have direct effects on the Aboriginal and Torres Strait Islander visual arts and crafts workforce:

- the National Agreement on Closing the Gap, whose priority reforms include creating formal partnerships and shared decision mechanisms (recommendation 9.2) and building the community-controlled sector
- Aboriginal and Torres Strait Islander employment policies, such as the National Roadmap for Indigenous Skills, Jobs and Wealth Creation as well as specific employment programs, such as the Community Development Program (CDP)
- broader skills and workforce policy, such as the outcomes of the national Jobs and Skills Summit, including the commitment to develop a framework for micro-credentials within the vocational training system (Australian Government 2022b, p. 3)
- and policies that affect the broader cultural sector, such as the National Cultural Policy.

The consideration of objectives for the Aboriginal and Torres Strait Islander visual arts and crafts workforce should take into account the strategic direction set by these policies, as well as the specific settings of programs that directly affect employment.

The CDP is of particular importance in this context. The CDP aims to support job seekers in remote Australia to build skills, address barriers to employment and contribute to their communities (NIAA 2016). Study participants noted the impact of the existing CDP in creating circumstances that discourage artists from participating in income-producing arts practices (Altman, sub. 39, p. 4), and that artists are not necessarily recognised as workers under the program's requirements (NAVA, sub. 42, p. 7; Ku Arts, sub. 46, p. 4).

The Australian Government has committed to replace the CDP with a new Remote Engagement Program in 2023, developed in partnership with Aboriginal and Torres Strait Islander people (NIAA 2022b). The design of this new program can be expected to affect the capacity of visual arts organisations to improve workforce participation and provide access to training opportunities in remote areas.



Recommendation 10.1

Improving government support for Aboriginal and Torres Strait Islander visual arts and crafts workforce development

The Australian Government should ensure that funding for the Aboriginal and Torres Strait Islander visual arts and crafts industry supports the development of a sustainable workforce.

As part of the Commission's recommended funding evaluation (recommendation 9.1), the Australian Government should:

- clarify responsibilities for developing the workforce of Aboriginal and Torres Strait Islander visual arts and crafts workers and leaders
- consider additional ring-fenced funding for:
 - art centres and arts hubs with capacity to provide on-the-job training and skills transfer to Aboriginal and Torres Strait Islander artists and arts workers
 - flexible and accessible professional development programs delivered by regional arts industry service organisations, where they address demonstrated need and build pathways to improved Aboriginal and Torres Strait Islander representation in the sector
 - improved access to programs that allow independent artists to strengthen business skills alongside their artistic practice.

Any changes to funding and workforce policy should account for:

- the outcomes of the National Skills and Jobs Summit and any workforce and training strategies for the broader arts sector developed under the National Cultural Policy
- the replacement of the Community Development Program
- the National Agreement on Closing the Gap priority reforms.

Public cultural institutions can do more to support career pathways and on-the-job training

Cultural institutions present a key opportunity for the Australian, State and Territory Governments to support the Aboriginal and Torres Strait Islander visual arts and crafts workforce. This is the case for both upcoming investments in Aboriginal and Torres Strait Islander cultural centres (section 10.1) and existing publicly-owned cultural institutions including galleries, museums and Aboriginal and Torres Strait Islander cultural centres.

Compared with smaller and more remote organisations, larger institutions have the scale to provide formal on-the-job training and qualification opportunities, as well as to demonstrate inclusive recruitment practices and culturally-safe workplaces. This can support upskilling in the sector and enable career pathways for Aboriginal and Torres Strait Islander people through to leadership and managerial positions. As noted by Arts Law, Copyright Agency and IartC (sub. 62, p. 33):

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

Further, as most existing and proposed cultural institutions are in major cities, providing additional training and professional development opportunities through cultural institutions would complement existing training in regional and remote areas.

In their submission to the National Cultural Policy, the Public Galleries Association of Victoria noted that public galleries increasingly employ Aboriginal and Torres Strait Islander people, despite multiple barriers that limit the scope of cultural institutions to improve Aboriginal and Torres Strait Islander employment outcomes, including:

- Inability to secure long-term funding of First Nations roles. Often these roles are funded for 12 months, making it difficult for galleries to recruit and retain First Nations staff.
- Remuneration is below that offered in allied industries and not commensurate with the expertise that First Nations people bring to the public gallery sector.
- Paucity of career pathways into the public gallery sector for local First Nations people.
- Scarcity of formal mentoring and professional development opportunities for First Nations staff while in these roles.
- The cultural burden of often being the only First Nations member of staff at the gallery. (Public Galleries Association of Victoria, National Cultural Policy 2022, sub. 885, p. 3)

Some cultural institutions have committed to improving Aboriginal and Torres Strait Islander representation: the Australian Museum and Galleries Association, the peak body for museums and galleries, is implementing *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries* to advance the participation and representation of Aboriginal and Torres Strait Islander people in museums and galleries. The roadmap includes commitments to increase opportunities for Aboriginal and Torres Strait Islander people, recognising that galleries and museums can 'lead the way' in running culturally inclusive workplaces. It also acknowledges the need to embed cultural safety in national institutions and connect Aboriginal and Torres Strait Islander staff members across the sector (Janke 2018, p. 24).

Governments could take various steps, particularly through funding mechanisms, to ensure existing and planned public institutions take a more active role in supporting the Aboriginal and Torres Strait Islander visual arts and crafts workforce. Any additional requirements placed on public cultural institutions, where these are designed to support the development of the workforce beyond that institution, should be funded by the relevant Australian, State or Territory Government, and be consistent with any broader priorities established for workforce development in the industry.

Existing programs, including the National Gallery of Australia and Wesfarmers Indigenous Arts Leadership Program, could be extended to support arts workers across different stages of their careers and encourage further participation of Aboriginal and Torres Strait Islander people (National Gallery of Australia, National Cultural Policy 2022, sub. 918).

Cultural institutions could trial the alternative employment models suggested to the Commission (box 10.4), such as secondments and mentoring arrangements with smaller arts institutions (particularly in regional and remote areas), and the opportunity for capacity building exchanges between regional and urban organisations (Australia Council for the Arts, sub. 49, p 13). This would support the professional development of Aboriginal and Torres Strait Islander artists and arts workers, and build networks and communities of practice across the industry.

Cluster hiring, where multiple Aboriginal and Torres Strait Islander employees are hired in one recruitment round, can provide a 'cultural safeguard' (Ku Arts, sub. 46, p. 4; NAVA sub 42, p. 2), by helping to avoid individual Aboriginal and Torres Strait Islander workers being placed in situations where they may be isolated or lack suitable support in the workplace. This would help retention, improve career prospects, and

minimise situations where a person may find themselves as the only Aboriginal and Torres Strait Islander person in a large organisation (NAVA, sub 42, p. 5; Ku Arts, sub. 46, p. 4).

Further, public arts and cultural institutions should, through their recruitment practices, recognise the value that the cultural knowledge of Aboriginal and Torres Strait Islander people can bring to the organisation through their lived experience.



Recommendation 10.2

Public cultural institutions should expand opportunities for Aboriginal and Torres Strait Islander visual arts and crafts workers

Through their funding of cultural institutions, Australian, State and Territory Governments should demonstrate leadership in providing skills development, career pathways, and culturally safe workplaces for Aboriginal and Torres Strait Islander people in the visual arts and crafts industry. Institutions could:

- offer a wider range of identified Aboriginal and Torres Strait Islander cadetships and traineeships
- expand opportunities for secondments and mentoring, including with arts organisations in regional and remote areas
- implement targeted recruitment practices, such as cluster hiring and recognition of lived experience.

Appendices

A. Public engagement

The Commission has actively encouraged public participation in this study. 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, and 30 submissions post the draft report (table A.1). The Commission also received a total of 10 brief comments, and undertook targeted engagement with artists through Facebook, Twitter and LinkedIn and has received 92 comments which we have drawn on in the report. The submissions and brief comments are available online at www.pc.gov.au/inquiries/completed/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)	6
Aboriginal Art Association of Australia Ltd (AAAA)	26, 53
Aboriginal Art Centre Hub of WA (AACHWA)	20
Aboriginal Regional Arts Alliance NSW	8
Aboriginal Culture, Heritage & Arts Association (ACHAA)	45
Agency Projects	3
Altman, Jon Charles	39
APY Art Centre Collective	17
Arts Law, Copyright Agency and IartC	31, 62
Arts QLD	60
Australia Council for the Arts	24, 49
Australian Competition and Consumer Commission	13, 58
Australian Copyright Council	14, 50
Australian Digital Alliance and the Australian Libraries and Archives Copyright Coalition	54
Bana Yirriji Art Centre	25
Blakeney, Professor Michael	32
Callanan, Melissa	5
Chamber of Arts and Culture WA	44
Cheong, Dr May Fong	15
Copyright Agency	30
Creative Economy	9, 41
Dare, Nichola	37
Department of Communities, Housing and Digital Economy (QLD Government)	33
Department of Infrastructure, Transport, Regional Development, Communications & the Arts	51
Desart Inc	4
Dreamtime Art Creative Consultancy	57
eBay Australia & New Zealand	52
First Hand Solutions Aboriginal Corporation	16
Glenn Bird Balang Crafts	29
Goss, Ian Patrick	40
Government of South Australia	1
Hogarth, Stephen	35
Indigenous Communications Group Pty Ltd	43
IP Australia	27, 61

Participants	Submission
King & Wood Mallesons	34
KPMG	47
Ku. Arts (Ananguku Arts and Cultural Aboriginal Corporation)	46
Law Council of Australia	19, 59
Leibler, Arnold Bloch	38
Lye, J. N. and Hirschberg, J. G.	7
MinterEllison	18
National Aboriginal and Torres Strait Islander Music Office (NATSIMO)	56
National Ageing Research Institute	10
National Association for the Visual Arts (NAVA)	23, 42
National Library of Australia	55
Northern Territory Government	28
NSW Aboriginal Land Council	64
Queensland University of Technology	12
Tim Fairfax Family Foundation	2
Tompkins, Judith	48
Trading Blak	63
UMI Arts Ltd.	1
Walker, John R	36
Whinn, Amy	22
Woods, Dr Kaely	11

Table A.2 – Public Engagement

Participants

Aboriginal Art Association of Australia (AAAA)
Aboriginal Art Centre Hub Western Australia (AACHWA)
Aboriginal Artists Agency (AAA)
Agency projects
Alperstein Designs
Altman, Jon
ANU Centre for Aboriginal Economic Policy Research
ANU College of Arts and Social Sciences
APY Art Centre Collective
Arnhem, Northern and Kimberly Artists Aboriginal Corporation (ANKA)
Art Gallery of South Australia (AGSA)
Art Lovers Australia
Art Mob
Artback NT
Arts Law Centre of Australia
Arts Queensland
Arts South Australia
ArtsReady
Attorney-General's Department, Copyright Policy and Reform Section
Australia Council for the Arts
Australian Border Force
Australian Competition and Consumer Commission (ACCC)
Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
Australian National University
Baluk Arts
BC Consulting
Better World Arts
Blackwell, Boyd
Blak Douglas
Blakeney, Michael
Bluethumb
Bridge Studio
Bunnings

Participants

Buzzacott, Kathleen

Cairns Airport

Cairns Indigenous Art Fair

Close, Elizabeth

Cooee Art

Copyright Agency

Country Arts SA

Create NSW - Dept of Premier and Cabinet

Creative Economy

Creative Victoria

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

Desart's Stories, Art and Money (SAM)

Dreamtime Kullilla Art

Empowered Communities

Evans, Penny

Everard Advisory

Everywhen Artspace

First Hand Solutions Aboriginal Corporation

Gab Titui Cultural Centre - TSRA

Gallery of Central Australia

Goss, Ian

Griffith University

Indigenous Art Centre Alliance (IACA)

Indigenous Art Code Ltd

Participants

Indigenous Business Australia (IBA)

Indigenous Communications Group (Balang Crafts)

IP Australia

Jam Factory

Janke, Terri

Jira Models

Jones, Jonathan

Kaiela Arts

Kaiela Institute

Kaptify Art

Karungkarni Art and Culture Centre

King & Wood Mallesons

Kluge-Ruhe Aboriginal Art Collection

Ku Arts (Ananguku Arts and Cultural Aboriginal Corporation)

Lagardere Australian Way Pty Ltd

Many Rivers

Martumili Artists

Maruku Arts

Meredith, Maree

Mitchelton Gallery of Aboriginal Art

Murra Wolka

Museum of Contemporary Art Australia

National Aboriginal Art Gallery Advisory Committee

National Association for the Visual Arts

National Broadband Network (NBN)

National Gallery of Australia

National Indigenous Australians Agency (NIAA)

Ochre Dawn

Office of the Registrar of Indigenous Corporations (ORIC)

Officeworks

O'Sullivan, Sandy

Pallett, Sonia

Parliament House, Canberra

Participants

Pau, Robert Tommy

Paul Johnstone Gallery

Pwerle, Charmaine

Regional Arts Australia

Saltwater People

Shepparton Art Museum

Smith, Bronwen

Stoianoff, Natalie

Tandanya National Indigenous Cultural Institute

Tangentyere Artists

Taylor, Lea

The Torch

This is Aboriginal Art

Throsby, David

Tim Fairfax Family Foundation

Tjanpi Desert Weavers, NPY Women's Council

Torres Strait Regional Authority

Tourism Research Australia

UMI Arts

Utopia Arts

Van Aanholt, Biddy

Vivien Anderson Gallery

Walkatjara Arts

Wallace, Ruth

Warlukurlangu Artists Aboriginal Corporation

We are 27 Creative

Woodland, Sarah

World Intellectual Property Organisation (WIPO)

WW Souvenirs

Yadhaa Connect / New South Wales Aboriginal Land Council

Yarn

Table A.3 – Roundtables

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

29 August 2022

Aboriginal Art Centre Hub of WA (AACHWA)
 Agency Projects
 ANKA (Arnhem, Northern and Kimberley Artists Aboriginal Corporation)
 Charles Darwin University
 Desart
 National Association for the Visual Arts (NAVA)
 Tarrkarri

B. Art centres

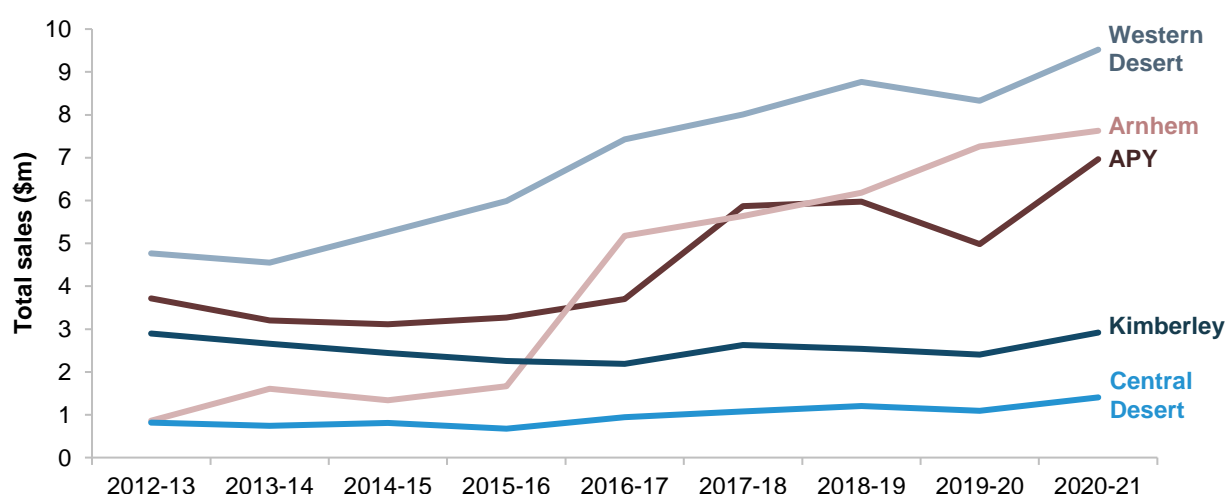
Art centres support Aboriginal and Torres Strait Islander artists located in remote areas (chapter 2, chapter 3). This appendix examines the economic characteristics and trends within art centres in greater detail. A large share of analysis in this chapter draws on analysis of unpublished deidentified data from Desart's Stories Art Money (SAM) database, which is used by most art centres (chapter 3, box 3.2).

B.1 Growth in art centre sales revenues varies across remote art regions

The growth in art centre sales revenue varies across art regions (chapter 3). 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 Anangu Pitjantjatjara Yankunytjatjara (APY) Lands art regions (figure B.1). Sales from Arnhem Land grew substantially between 2012-13 and 2020-21. This was partly due to an increase in uptake of the SAM database in the region, which triggered a leap in sales revenue from 2015-16 to 2016-17. Growth in the region remains strong when considering public audit data, with sales revenue more than doubling from 2012-13 to 2019-20 (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 B.1 – 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. Sales figures have been adjusted for inflation to 2020-21 dollars.

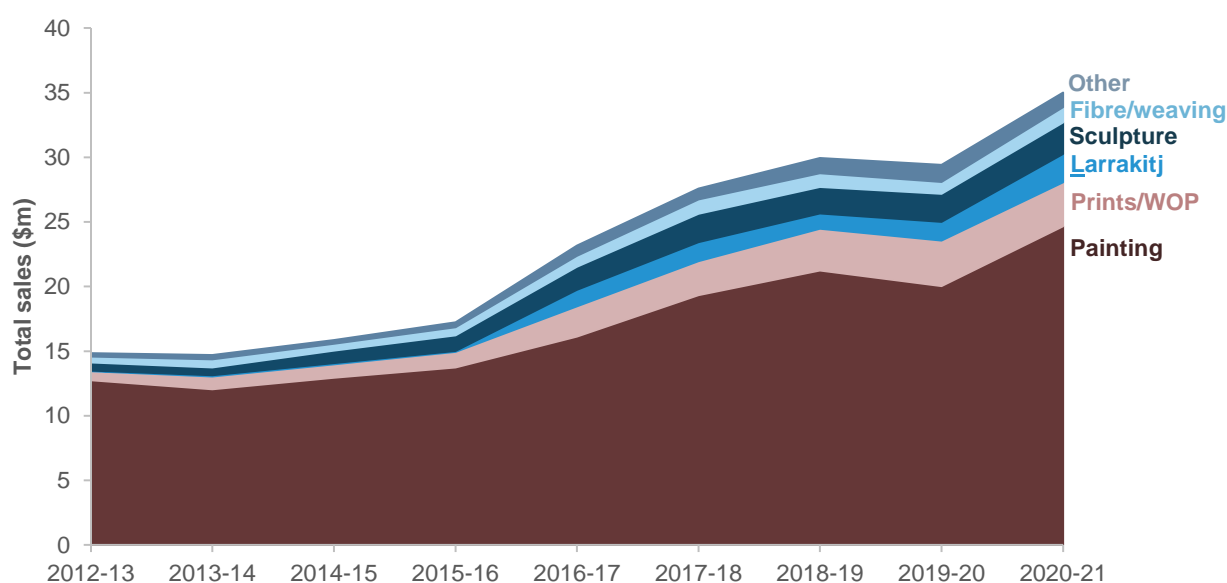
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

B.2 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 B.2). The five other most sold art forms include prints or works on paper, sculptures, *larrakitj*⁷² and fibre-based artworks or weavings. The increase of *larrakitj* (which are mainly produced in Arnhem Land) can be attributed to the uptake of SAM database in the region around 2015-16. Since 2015-16, prints or works on paper have substantially increased as a share of total art sales after previously accounting for 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).

Figure B.2 – Most artworks sold by art centres are paintings, but there has been growth in prints, sculptures and *larrakitj*^{a,b}



a. 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.

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

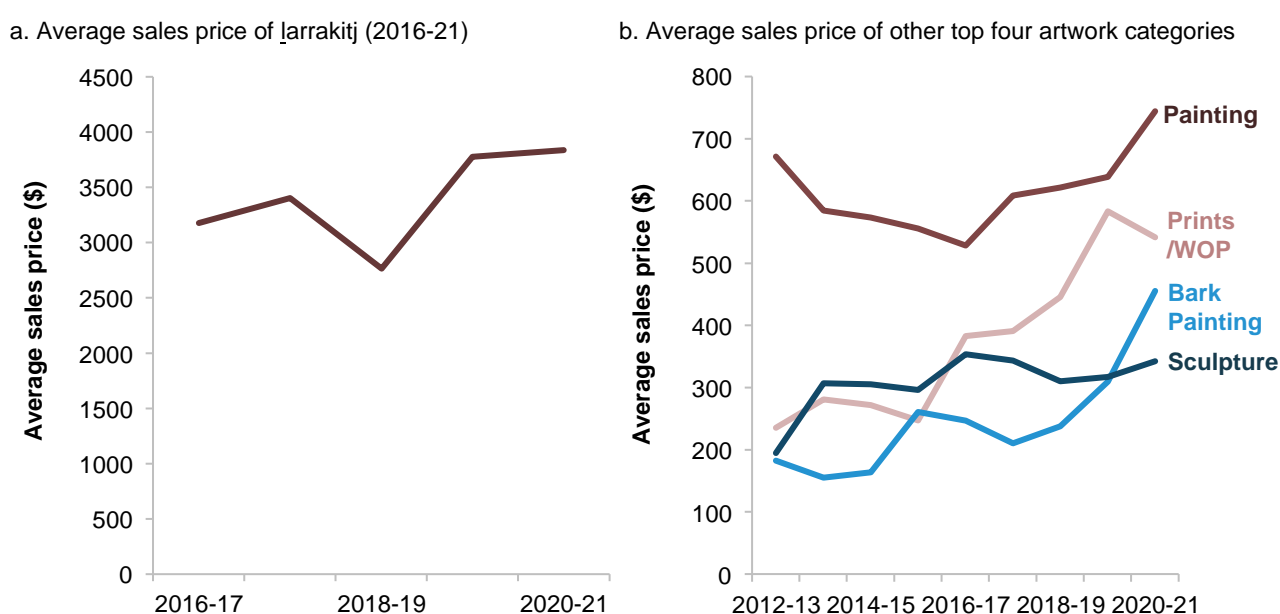
Of these categories, *larrakitj* artworks attract the highest average sales prices, and have experienced notable growth in recent years, increasing from \$3167 in 2016-17 to \$3837 in 2020-21 (figure B.3, panel a). However, due to the lengthy process of creating *larrakitj*, they are sold in relatively 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.

⁷² *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-Larrŋgay Mulka 2017c).

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 B.3, 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 B.3 – 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.** 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).

Since 2017, some art centre and independent artists have produced artworks sold through non-fungible tokens (NFTs) on emerging online marketplaces. NFTs act as digital certificates that purportedly provide owners with a unique claim of ownership over digital content (box B.1).

Box B.1 – 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.

Box B.1 – Non-fungible tokens (NFTs)

NFTs are sold on specialised online marketplaces, such as OpenSea, Rarible and Bluethumb Digital, and are frequently associated with emerging ‘metaverse’ virtual spaces (Park 2022). 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 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

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-intensive 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.

B.3 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 B.4, panels a and b). Buyers in these states accounted for

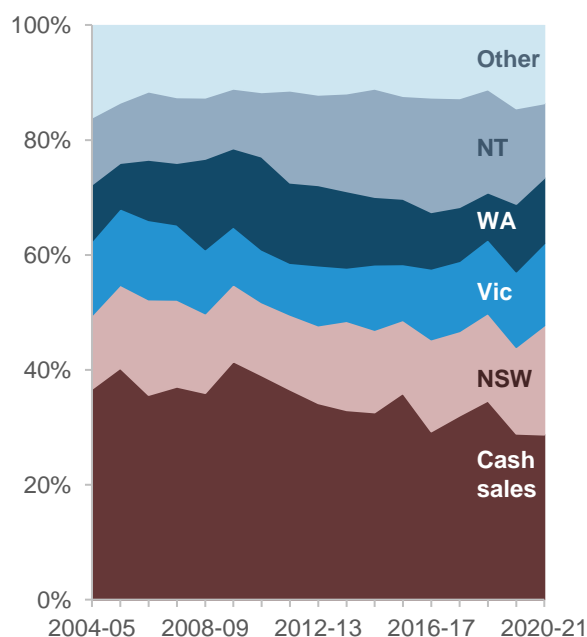
at least 57% of domestic sales in 2020-21, with their percentage shares remaining stable since 2004-05 (figure B.4, panel a). These buyers include commercial galleries, art collectors, public and private institutions and other consumers.

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.

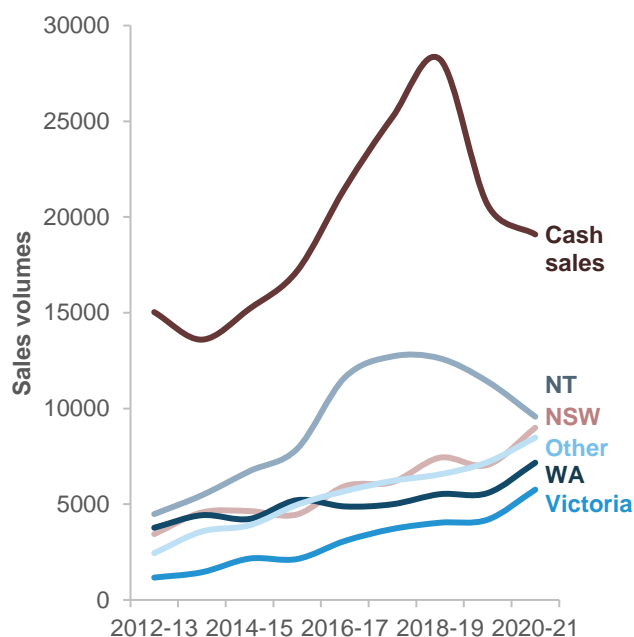
While sales volumes to buyers in all jurisdictions have generally increased, between 2019-20 and 2020-21, sales volumes to Northern Territory buyers experienced a substantial decline (figure B.4, panel b). This can be largely attributed to the effects of COVID-19 restrictions on tourism activity and art production.

Figure B.4 – A large volume of sales occurs in Victoria and New South Wales, but most artworks are sold in the Northern Territory^a

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



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



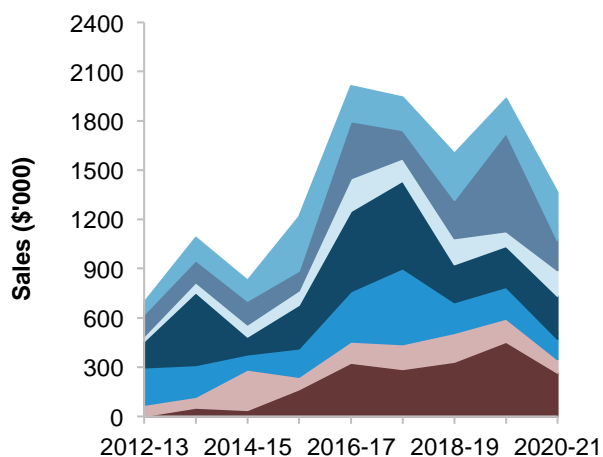
a. 'Cash sales' refers to sales where the locations of buyers were not recorded, which could include direct sales, smaller one-off sales or sales by art centres that do not record the locations of buyers. 'Other' refers to sales to buyers in Queensland, South Australia, Tasmania and the Australian Capital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

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

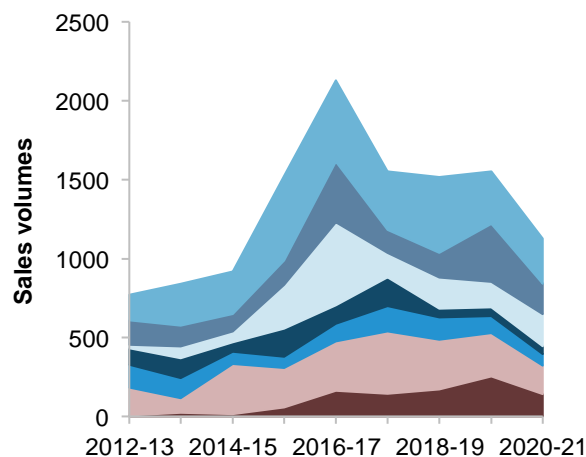
While most artworks are sold domestically, a small share has been exported to buyers mostly located across Europe, North America and South-East Asia. Annual overseas sales have doubled since 2012-13, growing from \$0.7 million to almost \$1.4 million in 2020-21 (figure B.5). Between 2012-13 and 2020-21, over 11 900 artworks were sold to overseas buyers for a total of \$12.7 million.

Figure B.5 – Overseas buyers account for a small but growing share of total sales^{a,b}

a. Total sales to overseas buyers



b. Number of artworks sold to overseas buyers



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

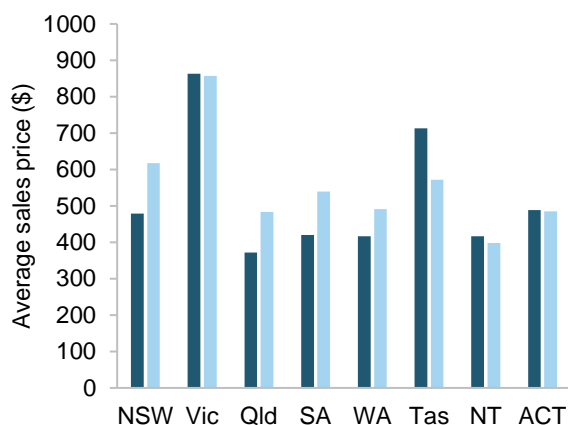
a. The years represent financial years. Sales figures have been adjusted for inflation to 2020-21 dollars. **b.** 'Other' includes Switzerland, New Zealand, New Caledonia, Netherlands and several other overseas jurisdictions.

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

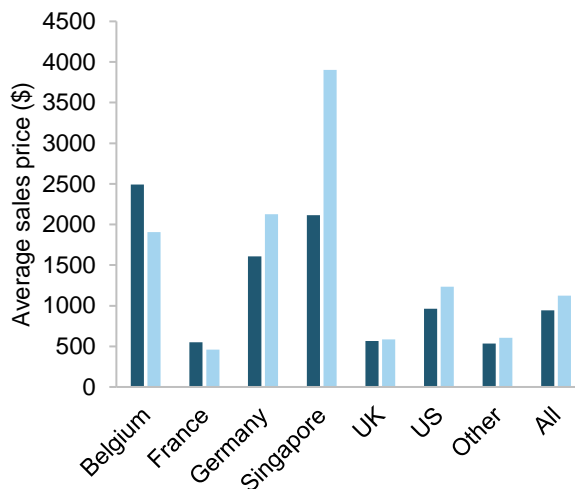
On average, overseas buyers tend to purchase more expensive artworks than domestic buyers. In 2020-21, artwork sales to overseas buyers had an average sales price of about \$1210, nearly double that of domestic purchases (\$650). Growth in the average sales price for artworks has been most significant 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 B.6). By comparison, the average price paid by domestic buyers has been relatively stable.

Figure B.6 – On average, overseas buyers purchase higher priced art^{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.

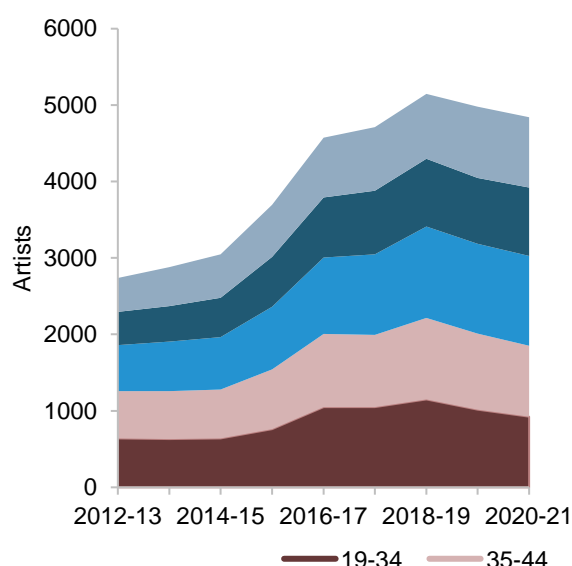
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

B.4 Most artworks are produced by older and female artists

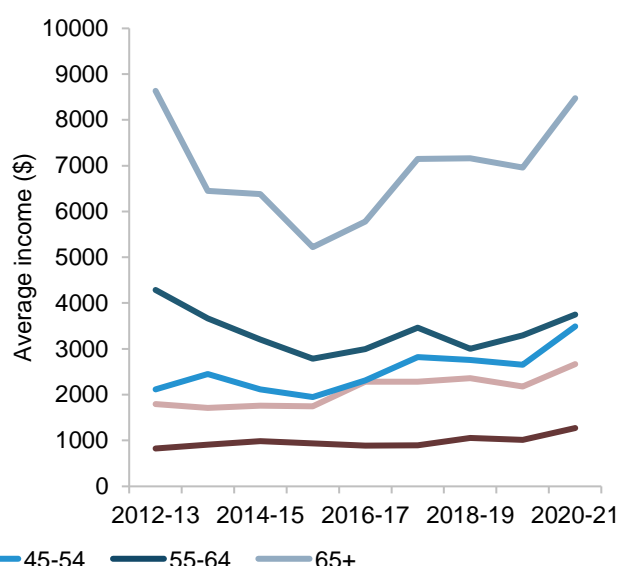
The number of artists who have sold at least one artwork per year has grown steadily since 2012-13, but most of the increase has been concentrated in older age groups (figure B.7, panel a). Of those artists who sell artworks, the largest group tends to be those aged over 44. On average, artists aged 65 or over earned the highest annual payments from art centres, reaching almost \$8500 in the 2020-21 financial year (figure B.7, panel b). This likely reflects older artists' higher level of experience, greater industry recognition, accumulated artistic skills and cultural expertise.

Figure B.7 – Most artists who sell art are aged over 44, with artists aged 65 or over receiving the highest payments from art centres^a

a. Number of artists who sold at least one artwork



b. Average payments to artists by age group



a. Average payments to artists have been adjusted for inflation to 2020-21 dollars.

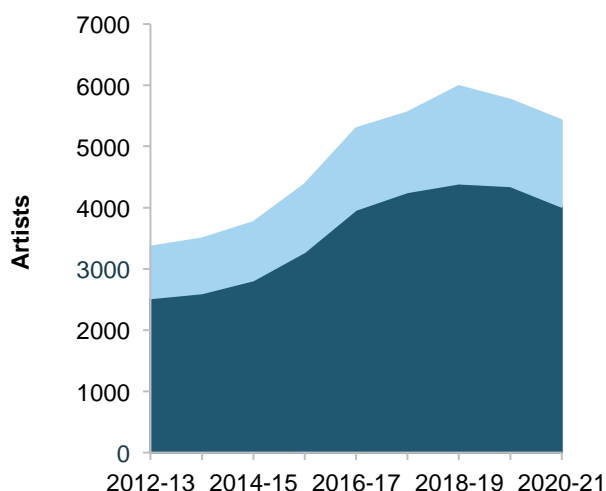
Source: Commission estimates based on unpublished deidentified data from Desart (SAM database).

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 B.8, 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.

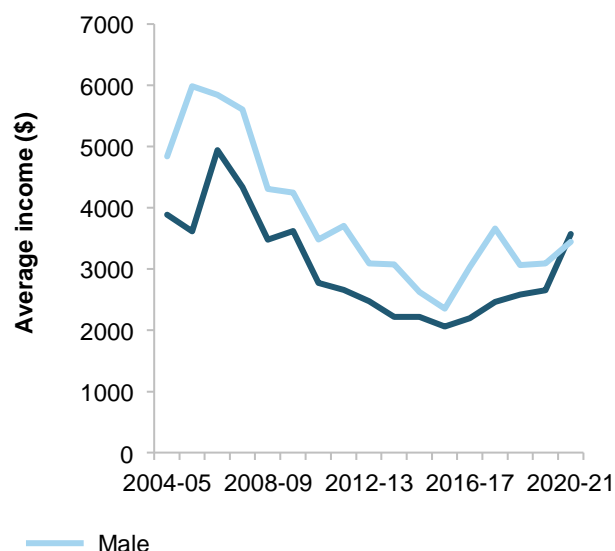
One explanation for this gap was that female artists tended to produce high volumes of lower-priced items, such as weavings and textiles (Woodhead and Acker 2014a, pp. 11,16–20). In recent years, demand for these lower-priced items may have increased, aided by growth in online sales (accelerated by the 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 B.8 – Most art centre artworks are produced by female artists, but female artists received lower total payments on average^a

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



b. Average payments to artists by gender



a. Average payments to artists have been adjusted for inflation to 2020-21 dollars.

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

B.5 Most artwork sales are attributable to a relatively small number of artists

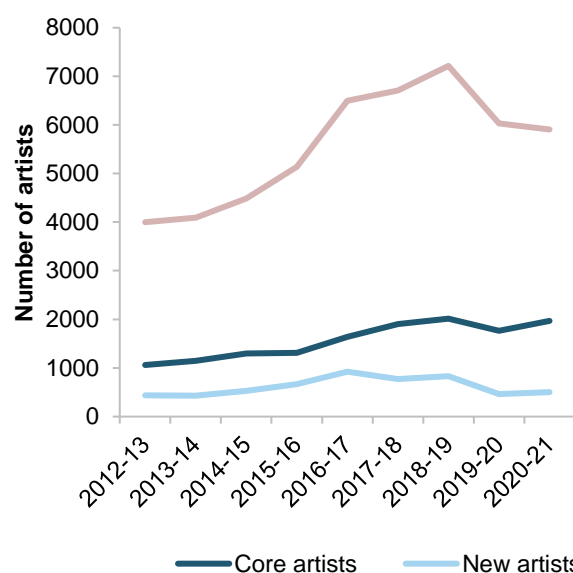
Artworks by core artists — artists who sold more than 10 artworks during a given financial year — comprise most of the sales revenue for art centres. In 2020-21, these core artists comprised just under a third of all art centre artists who sold at least one artwork (figure B.9, panel a), yet were responsible for 83% of art centre sales revenue — a small increase from 2012-13, when they were responsible for 78% of art centre sales revenue. In the same year, core artists earned on average over \$8100 from artwork sales, compared to \$3500 for art centre artists more broadly.

Compared to other art centre artists, core artists have higher incomes (figure B.9, panel b) driven by higher sales prices for their artworks and relatively higher art production. For example, in 2020-21 core artists produced an average of 30 artworks and received an average sales price of just under \$610, compared to the average of 10 artworks produced and \$582 sales price of artworks by art centre artists more broadly.

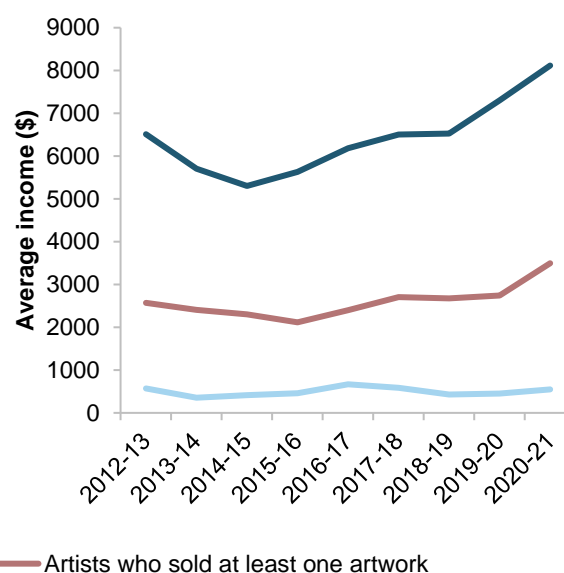
Although the annual total number of artworks produced by core artists has declined (figure B.9, panel c), average incomes of core artists have continued to increase. There are several potential explanations. First, core artists may have moved away from producing smaller artworks to larger artworks that are more time consuming but receive higher sales prices. In addition, core artists could be achieving higher levels of artistic productivity, producing higher quality artworks despite lowering overall artwork production.

Figure B.9 – Core artist incomes have continued to increase despite declines in the average number of artworks produced and sold^{a,b}

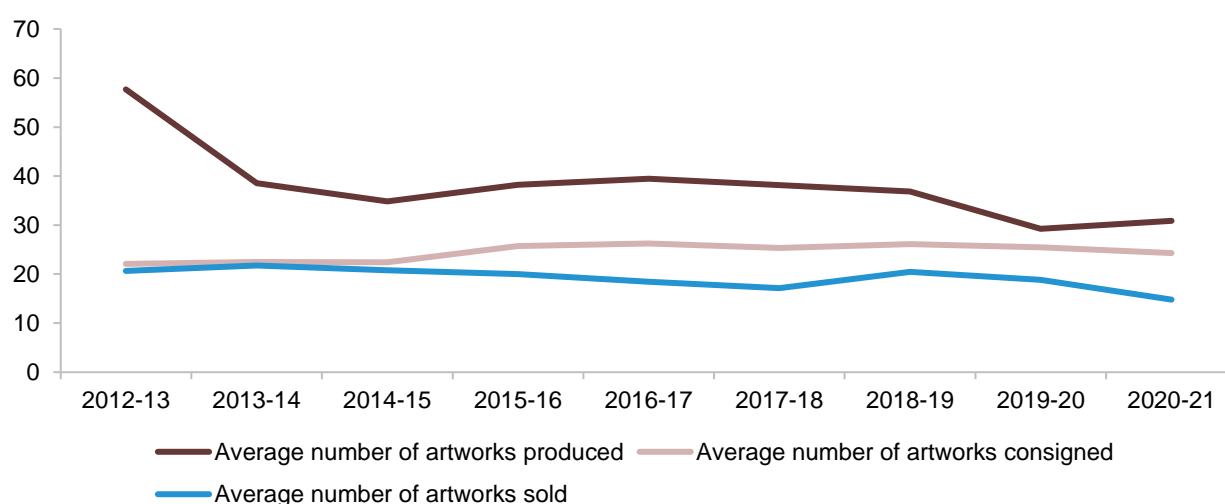
a. Total number of art centre artists over time



b. Average payments to artists over time



c. The average number of artworks produced, consigned and sold by core artists



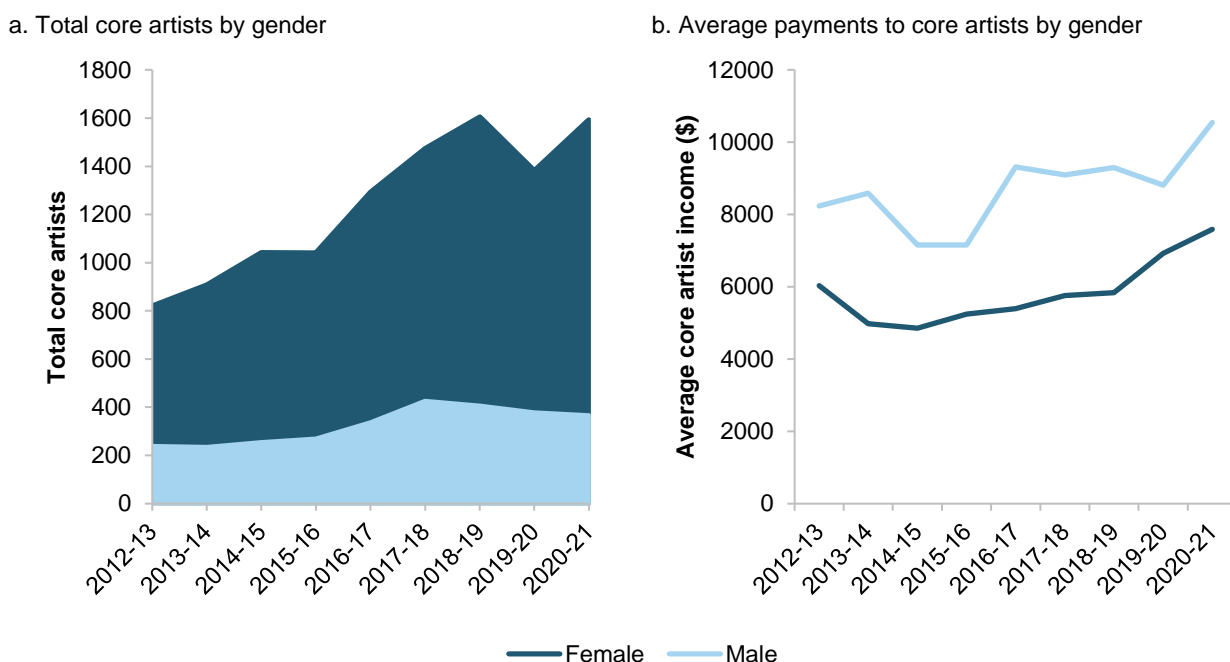
a. Core artists refer to artists who sold more than 10 artworks in a given financial year. New artists are those who have been entered into the SAM database for the first time. These categories are not necessarily mutually exclusive. **b.** Average payments to artists have been adjusted for inflation to 2020-21 dollars.

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

Female core artists account for most sales, but earn less than male core artists

While most core artists are female, their average earnings are significantly lower than male core artists. The proportion of female core artists has increased steadily since 2012-13, growing from 77% to 81% of core artists by 2020-21. However, during this period the gap between average female and male core artist incomes has persisted, though there were substantial fluctuations (figure B.10, panel b). This is despite the fact that the gender income gap closed for art centre artists more broadly (figure B.8).

Figure B.10 – Core artists are mostly female, but tend to earn less than male artists^a

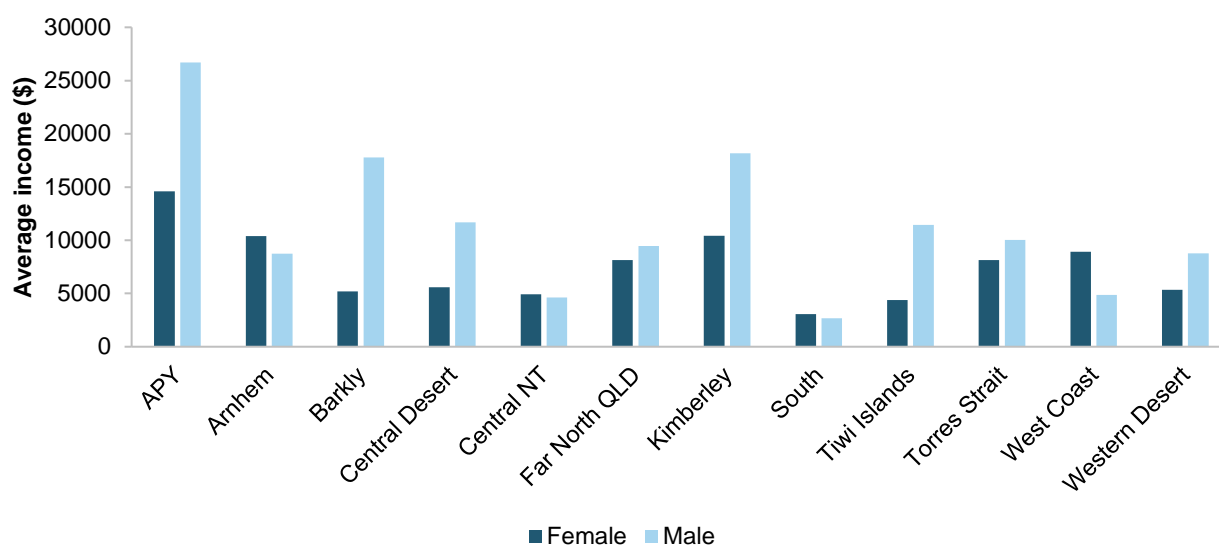


a. Average payments to artists have been adjusted for inflation to 2020-21 dollars.

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

The gender income gap is seen in most regions, with some exceptions (figure B.11). However, there are substantial variations in the size of the gap. For example, in Barkly, male core artists recorded average incomes three times as high as female core artists, compared with the 16% higher average incomes in Far North Queensland.

Figure B.11 – The gender income gap is seen in 9 out of 12 art regions



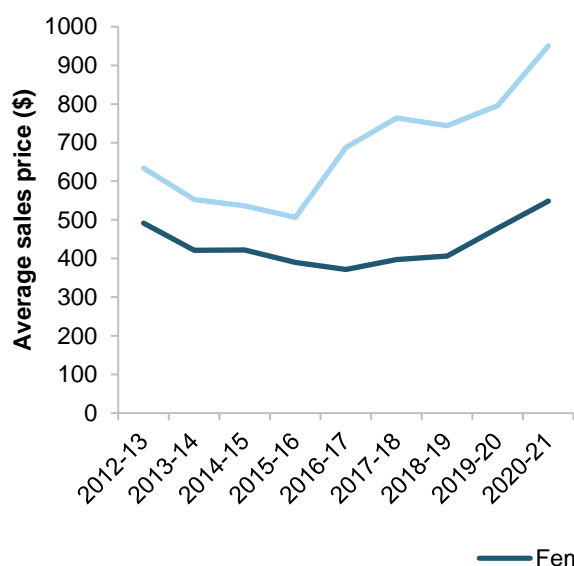
Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

This gap can be partly explained by the fact that the average sales price of artworks produced by female core artists is consistently lower — a gap that has widened substantially over time. In 2012-13, artworks by

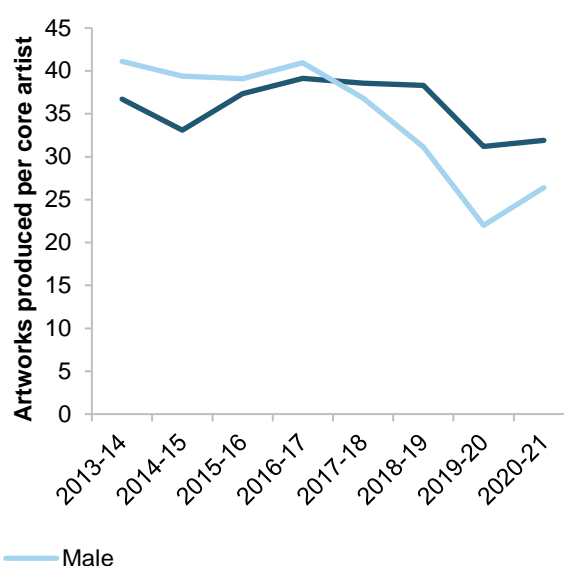
male core artists sold for prices 29% higher than their female counterparts, but this grew to 73% in 2020-21 (figure B.12, panel a). Over the same period, female core artists overtook their male counterparts in the number of artworks they produced (figure B.12, panel b).

Figure B.12 – Artworks by male core artists sell for higher prices than those produced by female core artists, although female core artists produce more artworks^a

a. Average sales price of artworks, by gender



b. Artworks produced by core artist, by gender

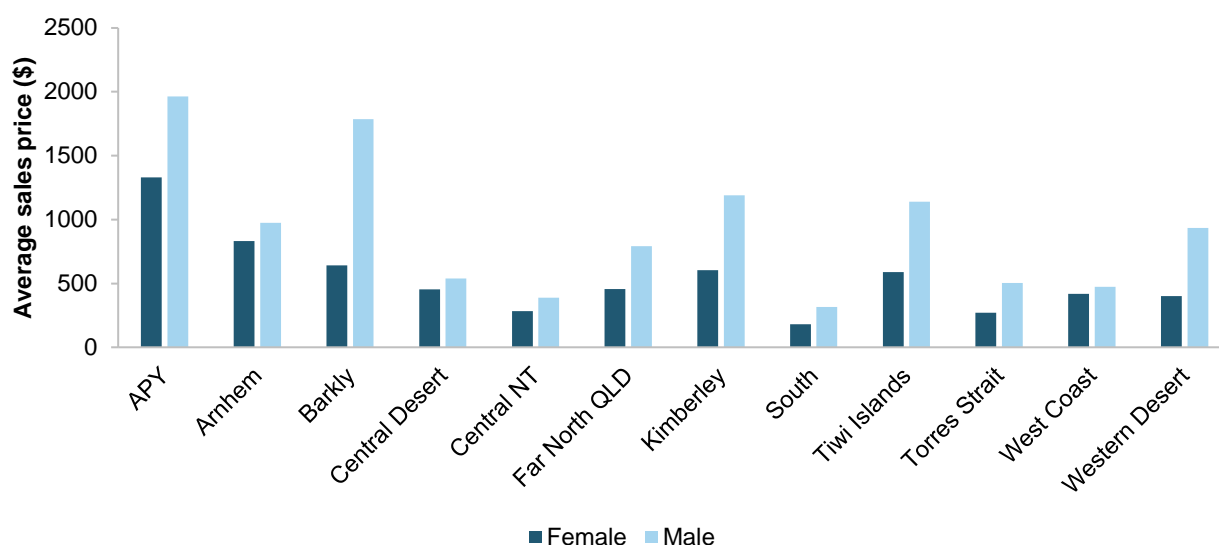


a. Average sales prices have been adjusted for inflation to 2020-21 dollars.

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

Artworks by female core artists receive lower sales prices across all art regions, including those where average female core artist incomes exceed those of their male counterparts (figure B.13).

Figure B.13 – Female core artists sell their artworks at lower prices than male artists
For the financial year 2020-21



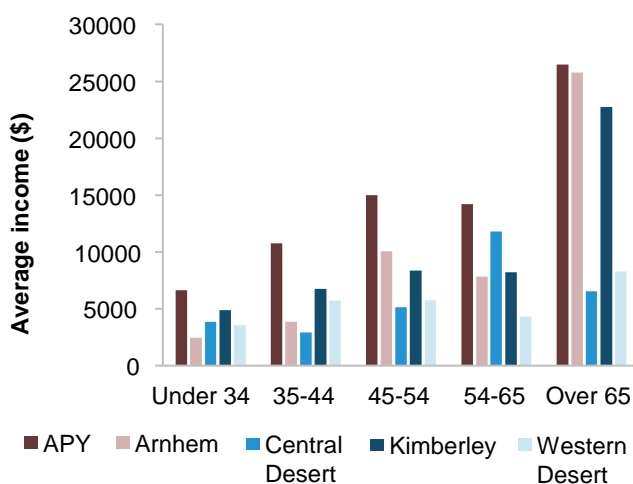
Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

Across different art regions, there are large variations in artist incomes and sales characteristics

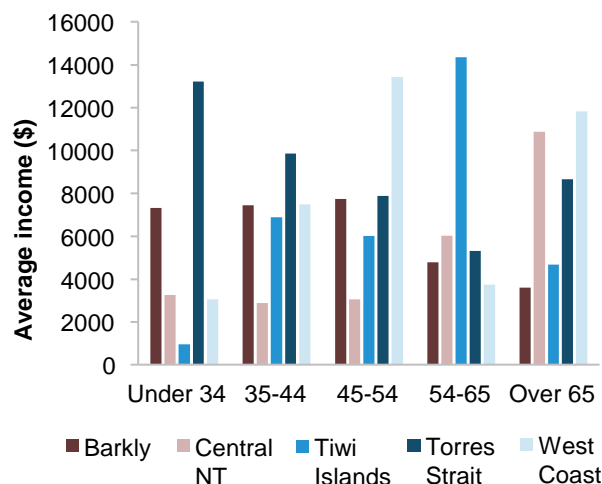
Among core artists, there are substantial variations in income and sales characteristics between different age groups within art regions. Among the five largest art regions, average incomes tend to increase with the age of core artists (figure B.14, panel a). Core artists aged 65 or over in the APY Lands, Arnhem and Kimberley art regions on average earned well above \$22 000 from sales of their art in 2020-21. This exceeded the \$18 100 average income earned by professional Australian visual artists from creative artistic activities (Throsby and Petetskaya 2017).

Figure B.14 – Among core artists in the five largest art regions, average income tends to increase with age, but the trend is mixed among smaller art regions

a. Average payments to core artists from art sales in 2020-21 in the five largest remote art regions



b. Average payments to core artists from art sales in 2020-21 in five smaller remote art regions



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

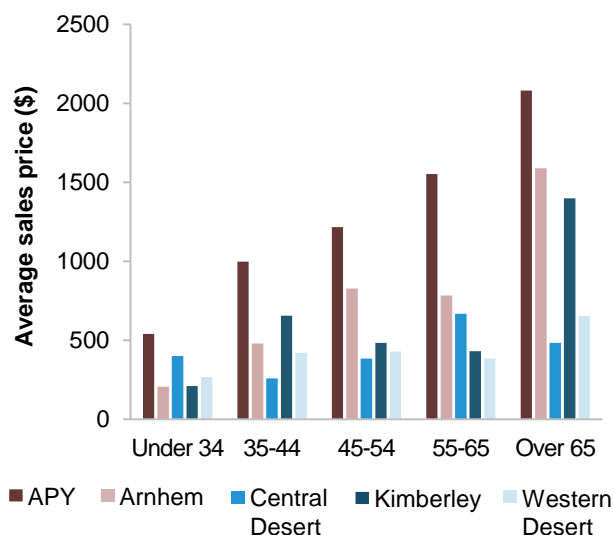
Across other age groups, core artists in APY Lands consistently earned higher incomes on average than their counterparts in other art regions. Similarly, when comparing average sales prices between age groups and art regions, artists from APY Lands are achieving average sales prices that far exceed other core artists (figure B.15, panel a).

Within smaller art regions, average earnings and average sales prices for artworks by core artists vary with age in a more inconsistent manner (figure B.14, panel b; figure B.15, panel b). For example, in 2020-21, core artists in the Torres Strait under the age of 35 earned substantially more than core artists 65 or over, whereas the inverse was true for core artists in Central NT.

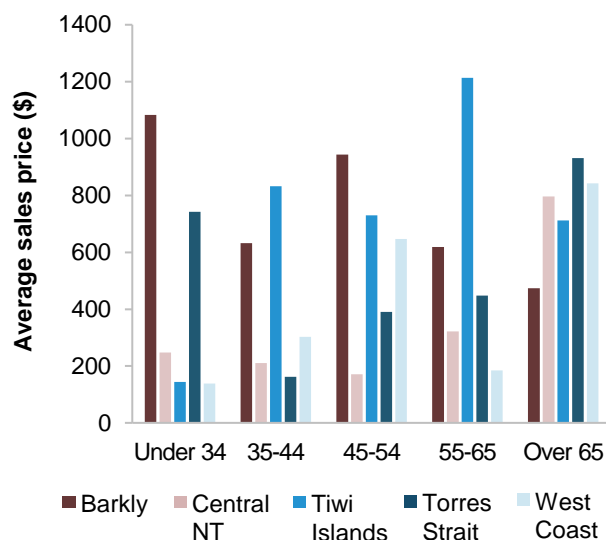
Some of these differences may be explained by the smaller numbers of core artists in smaller art regions. For example, there were only 18 core artists in the Torres Strait, 3 of whom were aged under 35, compared to the 685 core artists (123 that were aged under 35 years) in the Western Desert. There are also notable differences in age distribution when comparing these ten art regions. In four out of the five largest art regions, the largest age group of core artists was 65 or over (figure B.16, panel a), compared to the smaller art regions that tend to peak around the 45-54 or 55-64 age groups (figure B.16, panel b).

Figure B.15 – Average sales price tends to increase with age for core artists in the five largest art regions, but the picture in smaller art regions is mixed

a. Average sales price for artworks by core artists in 2020-21 in the five largest remote art regions



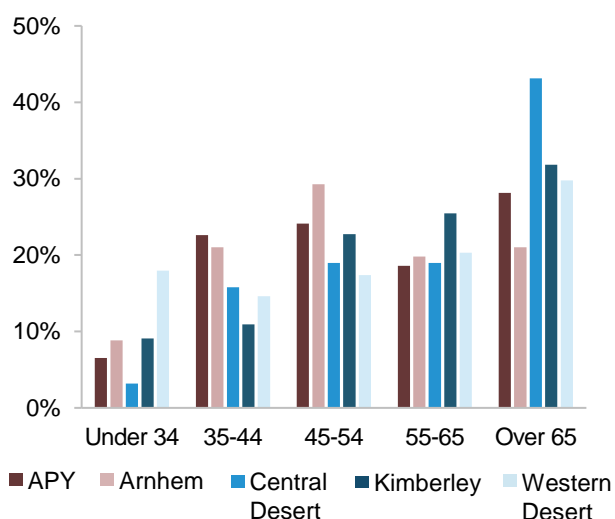
b. Average sales price for artworks by core artists in 2020-21 in five smaller art regions



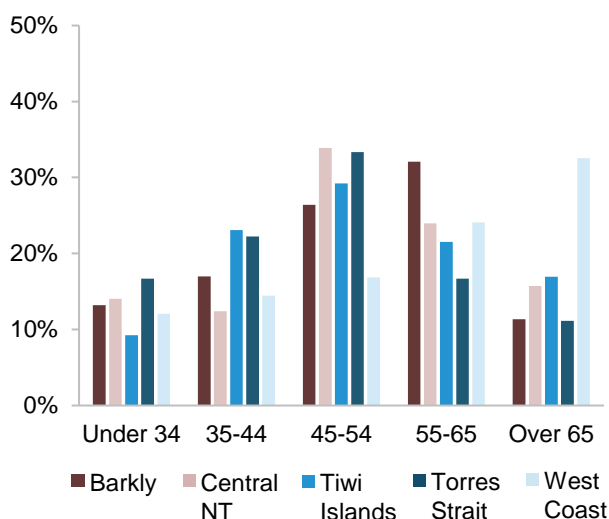
Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

Figure B.16 – Core artists in larger remote art regions tend to be older than those in smaller remote art regions

a. Age distribution of core artists in the five largest remote art regions in 2020-21



b. Age distribution of core artists in five smaller remote art regions in 2020-21

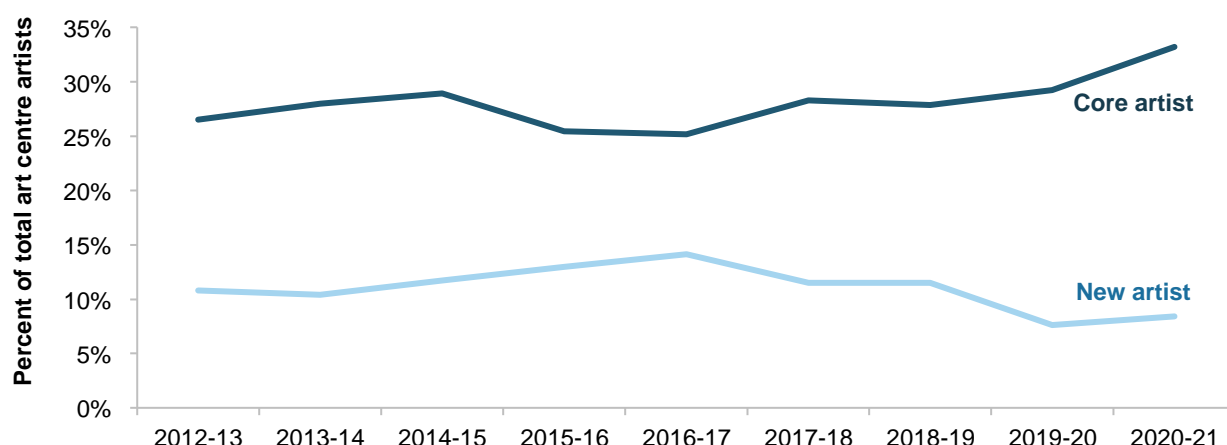


Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

B.6 New artists have declined in number in recent years

The total number of new artists is an indicator of the future productive capacity of art centres, as it may reflect early-career artists who later develop into core artists. It also can reflect changes in demand for art centre services. The number of new artists has fluctuated, peaking in 2016-17 at 14.1% of art centre artists (figure B.17). That number has since declined to 8.4% of art centre artists in 2020-21. This decline is partly due to effects from the COVID-19 pandemic, which interrupted art centre service provision.

Figure B.17 – The share of new artists has declined in recent years

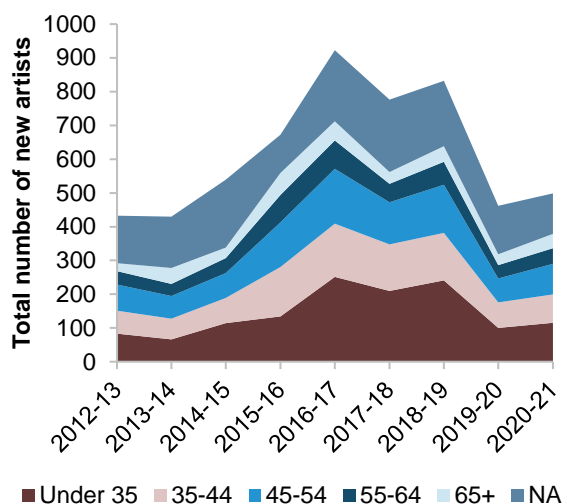


Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

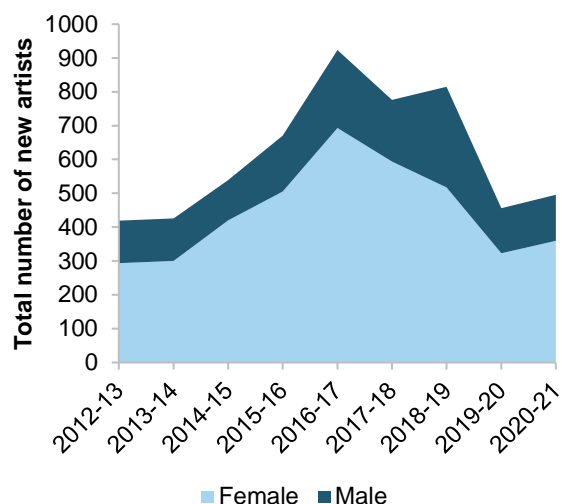
New artists are spread across various age groups, but are predominantly female. In 2020-21, at least 23% of artists were aged under 35, with almost 53% of artists aged 35 or over (figure B.18, panel a). These are likely conservative estimates due to missing age data for some new artists. In the same year, female artists also comprised 72% of new artists (figure B.18, panel b) and 81% of core artists (figure B.10).

Figure B.18 – New artists are spread across all age groups and are mostly female

a. Total new artists by age group



b. Total new artists by gender



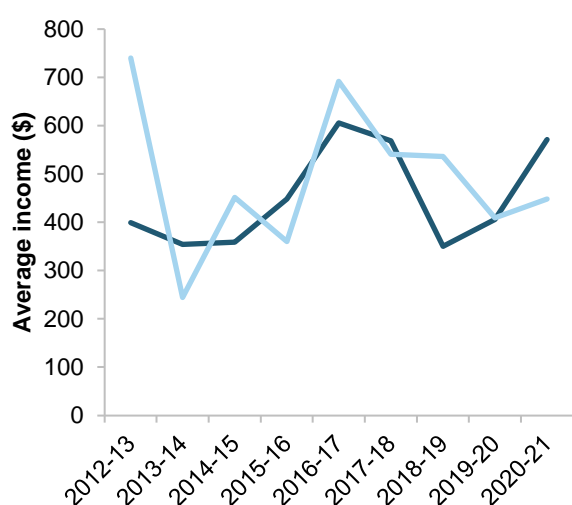
Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

The gender income gap for new artists fluctuates over time

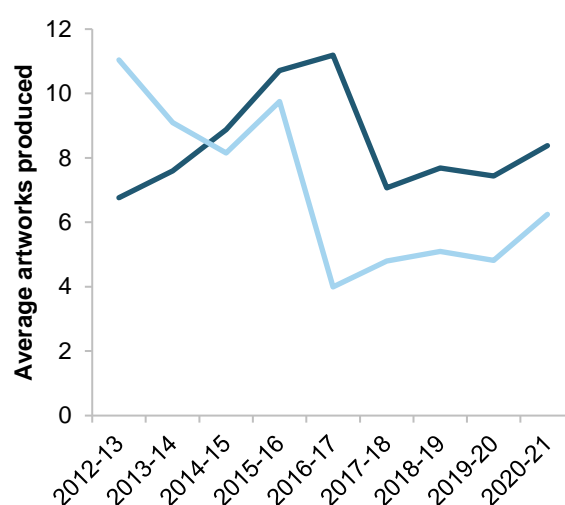
Unlike core artists, for new artists there is no consistent gender income gap. Indeed, in 2020-21, female new artists earned higher incomes from artwork sales than male new artists (figure B.19, panel a). However, new female artists consistently produce more than new male artists (figure B.19, panel b). In 2016-17, there was a spike in the average sales price of new male artists, likely related to the uptake of SAM in regions with more male artists — average sales prices of artworks by new artists have since equalised between genders (figure B.19, panel c).

Figure B.19 – The gender income gap among new artists fluctuates over time^a

a. Average payments to new artists, by gender

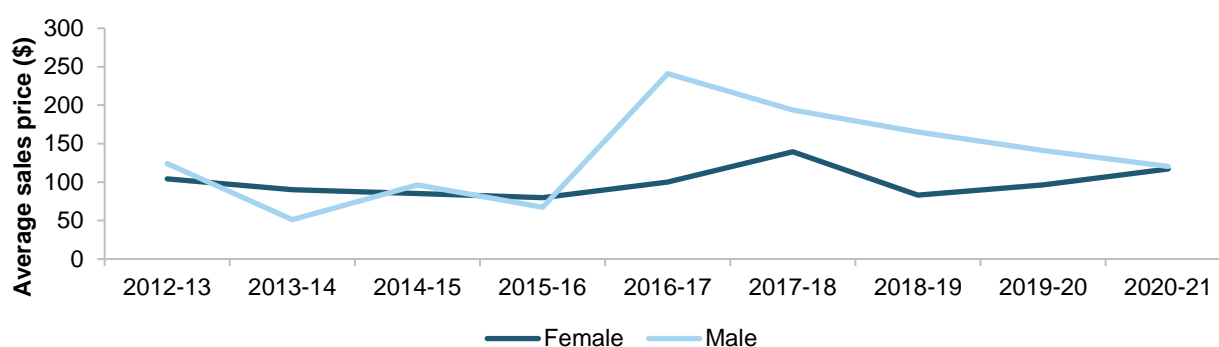


b. Artworks produced per new artist, by gender



— Female — Male

c. Average sales price of artworks sold by new artists, by gender



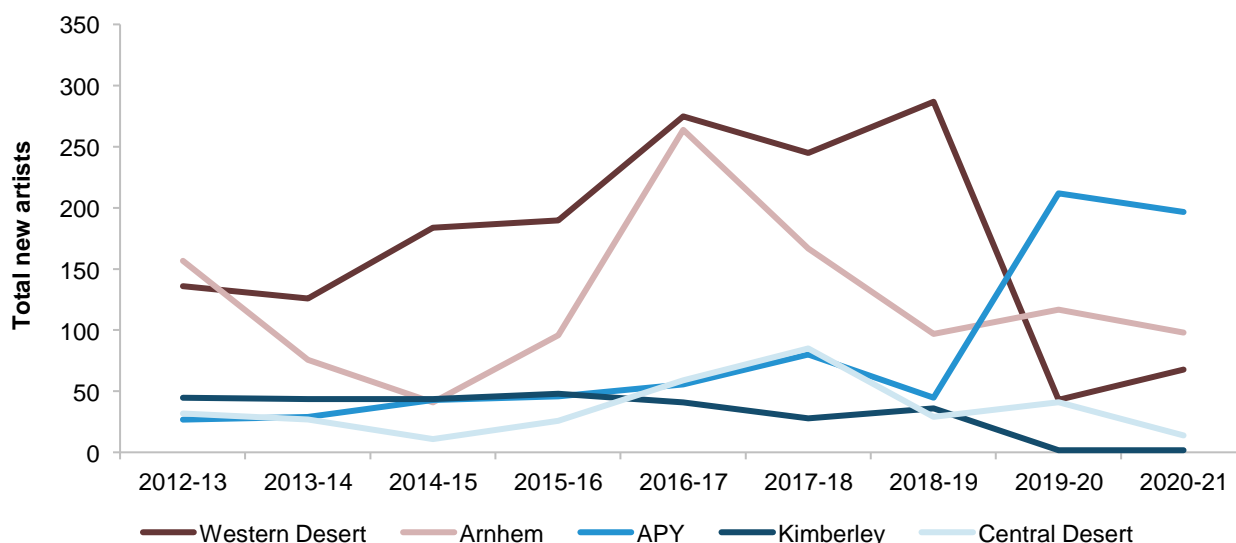
— Female — Male

a. Average payments to artists and average sales prices have been adjusted for inflation to 2020-21 dollars.

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

Across art regions, there is significant variation in the number of new artists. Since 2018-19, new artists in the APY Lands have more than quadrupled from 45 in 2018-19 to 212 in 2019-20. However, this was offset by a decrease in new artists in Western Desert art centres, dropping from 287 in 2018-19 to 43 in 2019-20. Among the largest art regions, new artists have stagnated in the Kimberley, where only 2 new artists were recorded in 2020-21 compared to 36 in 2018-19.

Figure B.20 – The number of new artists within the five largest art regions is volatile

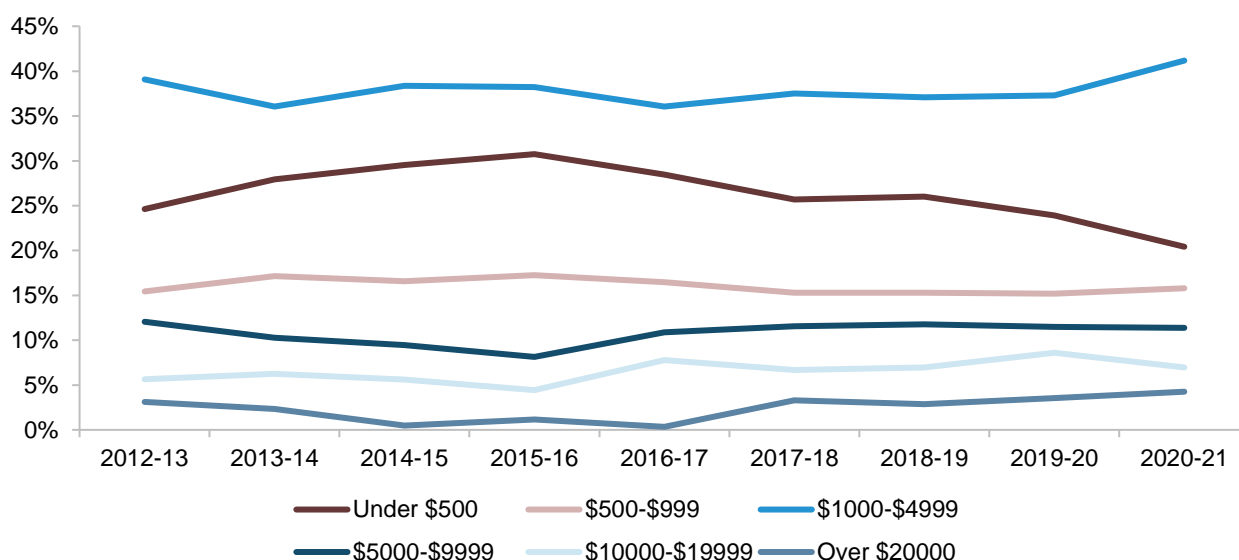


Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

B.7 Art centres have moved towards selling artworks for higher prices

Since 2012, art centres have gradually moved towards selling artworks at higher price points. Figure B.21 shows that artworks priced at \$500 or less comprised about 20% of art centre sales revenue by 2020-21, a noticeable decrease from the 31% peak in 2015-16. There has been a corresponding increase among most other price points, including artworks priced between \$1000-\$4999, which comprised about 41% in 2020-21.

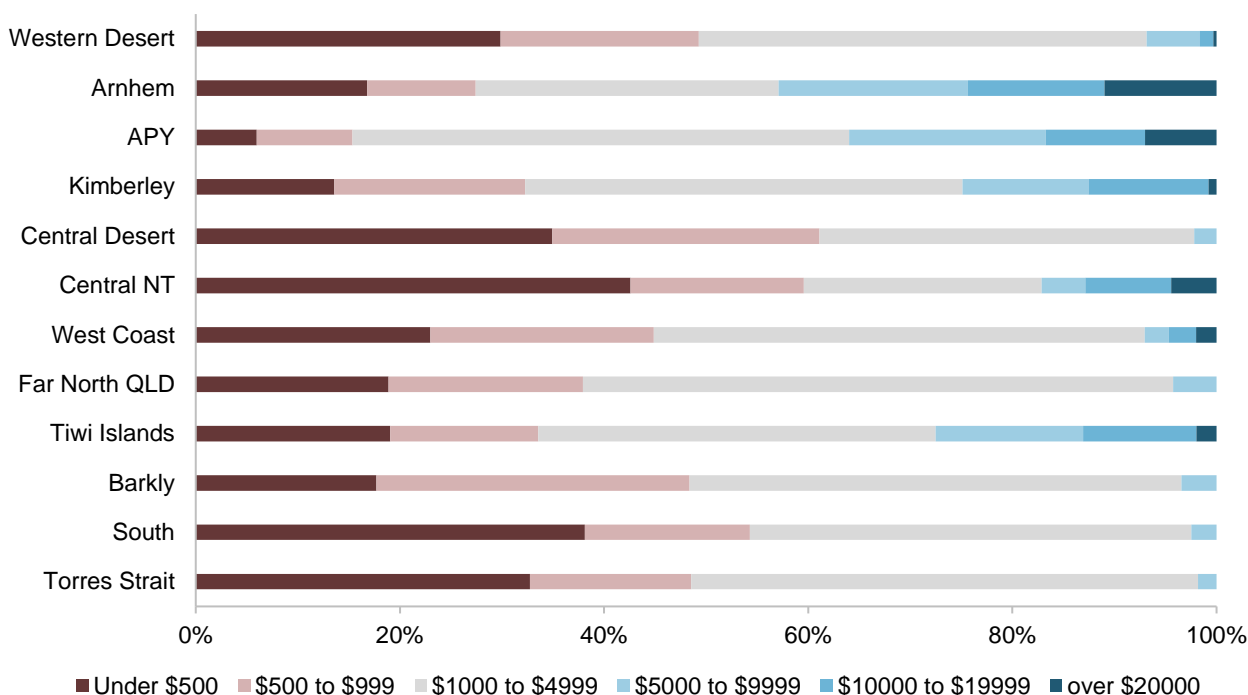
Figure B.21 – Sales of artworks priced under \$500 have decreased from their 2015-16 peak



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

By 2020-21, the majority of sales in most art regions were of artworks priced over \$1000, but some art regions derived a large share of their sales revenue from lower priced artworks. For example, in the Western Desert and Central Desert art regions, art centres received 49% and 61% respectively of their artwork sales revenues from artworks priced less than \$1000.

Figure B.22 – Most art centre sales revenue is from artworks priced below \$5000



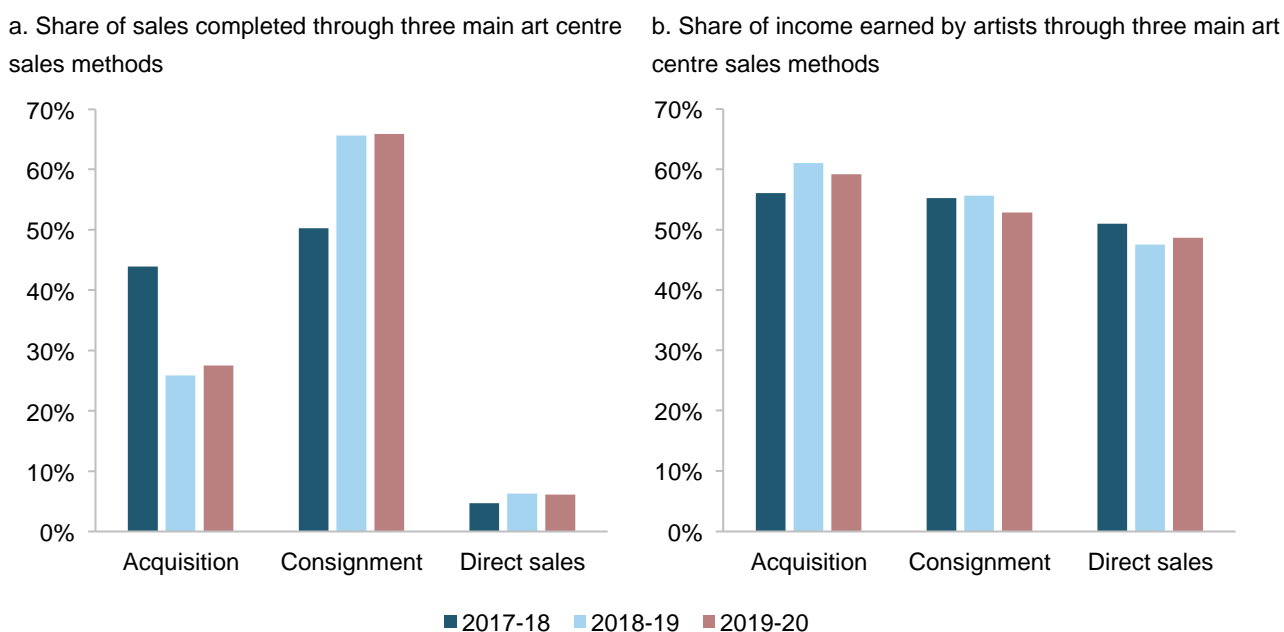
Source: Commission estimates based on unpublished deidentified data from Desart (Stories Art Money database).

Four art regions derived over 20% of artwork sales revenues from artworks priced over \$5000 — Arnhem, APY, Kimberley and the Tiwi Islands. Arnhem and APY received 42.9% and 36% respectively of sales revenues from artworks over \$5000. In addition, APY art centres are a notable outlier in their large share of sales attributed to artworks priced over \$1000, which is almost 85% of their sales. By comparison, 73% of Arnhem and 68% of Kimberley artworks sales were from artworks priced over \$1000.

B.8 Art centres are increasingly selling through consignment

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 B.23, 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 2019.⁷³ Across the sales methods, art centre artists on average receive between 50% and 60% of sales income (figure B.23, panel b).

Figure B.23 – Consignments have been increasingly used by art centres to sell visual arts and crafts^{a,b,c}



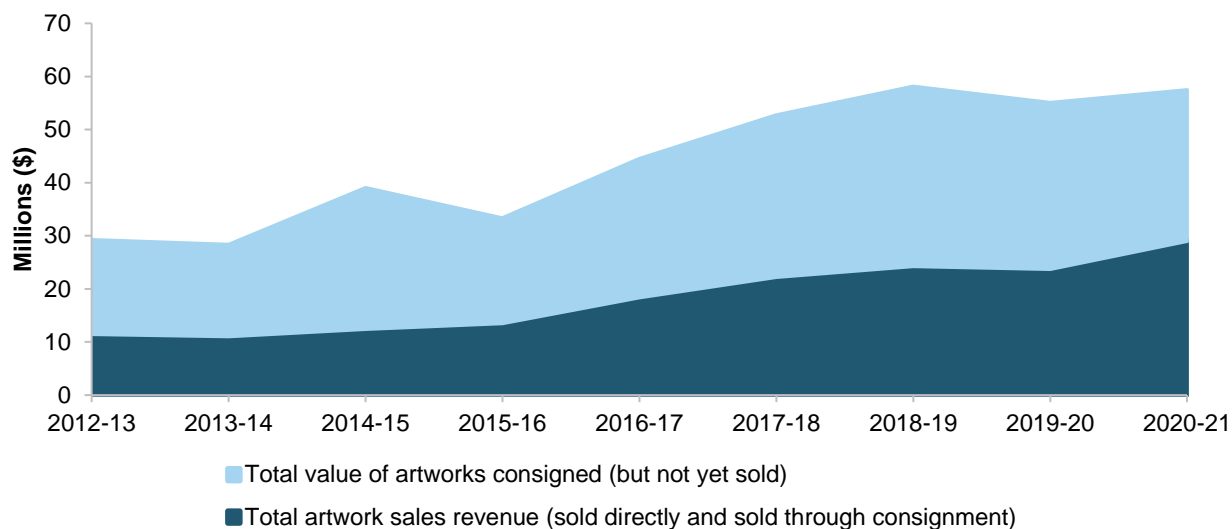
a. The estimates in these figures have been created using data from 81 IVAIS-funded art centres. In some cases, art centres subsumed sales by other business models under the 'consignment' category, such as direct sales to consumers and sales through markets and fairs. **b.** In panel b, averages for 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).

Since 2012-13, the total value of artworks consigned by art centres (but not yet sold) has almost always exceeded the total revenue from artwork sales (figure B.24). Similarly, the average price of artworks on consignment has consistently exceeded the average price of artworks sold by art centres — in 2020-21, artworks that were consigned but not sold had prices that were 59% higher than artworks sold by art centres (figure B.25).

⁷³ 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.

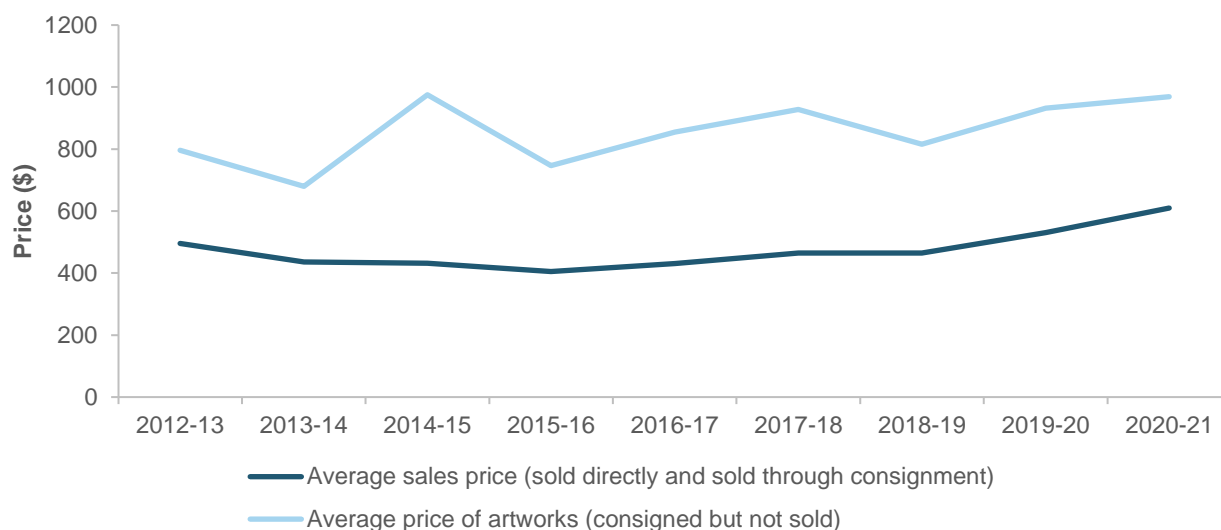
Figure B.24 – The estimated value of artworks on consignment but not yet sold almost always exceeds total artwork sales revenue from art centres^a



a. Value of artworks consigned and sales revenue have been adjusted for inflation to 2020-21 dollars.

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

Figure B.25 – Artworks on consignment have higher average prices than artworks that have been sold by art centres^a



a. Average prices have been adjusted for inflation to 2020-21 dollars.

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

C. Data and methodologies

This appendix outlines the data and methods used for estimating:

- the number of Aboriginal and Torres Strait Islander visual artists
- the size of markets for Aboriginal and Torres Strait Islander visual arts and crafts
- prevalence of inauthentic souvenir products, stock images and print-on-demand merchandise containing Aboriginal and Torres Strait Islander styles or designs.

C.1 Data about Aboriginal and Torres Strait Islander artists

The Commission drew on several data sources to estimate the number of Aboriginal and Torres Strait Islander artists. The availability, granularity and coverage of this data was mixed. The available datasets cover different aspects of the sector and 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
- Desert'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 sold 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 based on 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 publicly available sources of information (including the Indigenous Art Code, Supply Nation, Aboriginal Art Association of Australia, Yellow Pages, Buying Black directory, BlakLens directory and the unpublished comments from the Commission's artist social media campaign) was only able to identify 789 independent artists in regional and metropolitan areas.

The number of artists was used to estimate the total income of independent artists. The Commission estimates that in 2019, 1200 independent artists working in remote locations earned at least \$2.6 million, and 789 independent artists working in regional and metropolitan areas earned \$12–14 million.

C.2 Estimating the size of markets for Aboriginal and Torres Strait Islander visual arts and crafts

In estimating the size of the markets, the Commission drew on a range of data sources, including an art centre database, tourism surveys, ABS surveys and a secondary market sales database. Table C.1 outlines the data sources and estimation methods used for key figures.

Table C.1 – Data sources and estimation methods for key figures

	Value	Estimation method and data sources
Artists and their incomes	19 000 Aboriginal and Torres Strait Islander people earning income \$41 million total income	The proportion of Aboriginal and Torres Strait Islander artists receiving income from arts or crafts (via the 2014-15 ABS NATSISS), multiplied by 2019 ABS population estimates (rounded from 19 100) The sum of: <ul style="list-style-type: none"> • income earned by artists working through art centres: calculated as the share of artist income to sales revenue of IVAIS-funded art centres multiplied by the estimate of art centre revenue • income earned by independent artists: estimated using a count of independent artists (derived from data obtained from the Desert financial snapshot, IartC, AAAA, Yellow Pages, Supply Nation, Buying Black, Blackspace Collective, BlakLens) and data about average earnings (derived from the Making Art Work survey and AIHW data).
Domestic household expenditure	\$122–130 million	<p>Lower bound: Extrapolation from ABS (1997) data on arts and crafts, assuming that the ratio between household spending on Aboriginal and Torres Strait Islander arts and crafts in 1997 and 1998 tourism data on the proportion of overnight trips involving 'Aboriginal art, craft and culture' remained constant until 2019.</p> <p>Upper bound: Extrapolation from ABS (1997) data on arts and crafts, assuming that the ratio between household spending on Aboriginal and Torres Strait Islander arts and crafts in 1997 and 1997 domestic spending on 'shopping, gifts and souvenirs' remained constant until 2019.</p>
International visitor expenditure	\$113–138 million	<p>Lower bound: sum of spending by international visitors ('souvenirs' and 'other arts and crafts') (lower bound), with extrapolation from Bureau of Tourism Research (1999) data, assuming that the ratio between 'arts and crafts' spending in 1996 and 1998 art centre sales remained constant until 2019.</p> <p>Upper bound: sum of souvenir sales (upper bound), with extrapolation from Bureau of Tourism Research (1999) data, assuming that the ratio between 'arts and crafts' spending in 1996 and 2000 Tourism Research Australia data on international visitors experiencing Aboriginal arts, crafts and culture remained constant until 2019.</p>

	Value	Estimation method and data sources
Art centre sales	\$35.3 million in artwork sales	<p>The sum of:</p> <ul style="list-style-type: none"> average art centre sales income (using deidentified Desart SAM data for artwork and product sales) multiplied by an estimated 113 art centres (81 IVAIS-funded and 32 medium-to-large ORIC-registered corporations with art centres that do not receive IVAIS funding), adjusted for inflation to the 2020-21 financial year average art centre sales income (of the 14 smallest IVAIS-funded art centres) multiplied by an estimated 39 small ORIC-registered art centres (that do not receive IVAIS funding).
	\$8.1 million in product sales	Average art centre product sales income (using deidentified Desart SAM data for artwork and product sales) multiplied by an estimated 152 art centres, adjusted for inflation to the 2020-21 financial year.
Art fairs sales	\$6.7 million	Sum of sales revenue of art fairs reported in annual reports, sourced from unpublished IVAIS milestone report data and news publications, adjusted for inflation.
Commercial galleries sales	\$73.9–90.0 million from 188 dealers or galleries	<p>Lower bound: average sales revenue from commercial galleries (companies) reported from unpublished draft ATO taxation data for 2019-20 multiplied by gallery counts from unpublished Indigenous Art Code data.</p> <p>Upper bound: average sales revenue from commercial galleries (companies) reported from unpublished ATO taxation data multiplied by count of galleries selling Aboriginal and Torres Strait Islander art (drawing upon Yellow Pages, Aboriginal Art Association and Indigenous Art Code member pages).</p>
Secondary market sales	\$6.4 million	Australian Art Sales Digest public sales by auction houses.
Souvenir sales	\$77.7–87.8 million	<p>Lower bound: extrapolation from Bureau of Tourism Research (1999) data, assuming that the ratio between souvenirs spending in 1996 and 1997 data of 'shopping, gifts and souvenirs' from international visitors (from ABS Satellite Tourism Account) has remained constant until 2019.</p> <p>Upper bound: average earnings by 'other store-based retailing n.e.c' reported from unpublished ATO taxation data multiplied by count of 36 souvenir retailers/wholesalers, selling Indigenous authored and non-Indigenous authored souvenirs (\$87.8 million).</p>

C.3 Estimates about inauthentic products

To better understand major segments of the Aboriginal and Torres Strait Islander arts and crafts markets (such as souvenir products), novel techniques were used to gather information: web scraping and reverse image searches. The use of these techniques was motivated by a persistent lack of information across decades of inquiries, mounting anecdotal accounts of plagiarism in particular marketplaces, and a lack of analysis about Aboriginal and Torres Strait Islander visual arts products on emerging digital marketplaces.

Web scraping to estimate prevalence

Web scraping is a process where data is extracted from publicly available websites and placed into a format where it can be easily analysed. This is often done through code that automates at least part of the data extraction process, as the manual extraction of information from hundreds of web pages can be extremely time consuming. However, there are some constraints on what can be achieved through web scraping (box C.1) — from a practical perspective, this made it more suitable for gathering information about certain market segments rather than a comprehensive survey of all Aboriginal and Torres Strait Islander visual arts and crafts markets.

Box C.2 – Challenges associated with web scraping

There are notable limitations with web scraping methods. First, the quality of scraped data is highly dependent on the website. For example, if website owners do not provide consistent information across their web pages and have pages with missing product descriptions or prices, this can lead to messy and incomplete data that inhibits the quality of analysis. The extent of data that can be scraped also relies on the willingness of users to publicly share information. For example, not all sellers on Redbubble disclose their country of origin, and not all souvenir wholesalers disclose their prices to users who do not have a registered or approved account.

Data from scraped web pages provides a snapshot at a point in time. Websites are often transient, and product listings can be dropped as items become discontinued or unavailable. For example, on Redbubble, product listings may be altered or deleted. In some cases, entire users may be banned for misconduct, leading to their products being removed. To verify the accuracy of scraping, manual checks of the data were undertaken within a month of scraping activities, drawing on random samples of 20% of product listings. Problems detected through these checks were rectified soon after.

It can also be challenging to use web scraping to gather data that is representative of the whole population. In this study, there are no clear data sources on active souvenir wholesalers who do not have an online presence, or the market share that they represent. All that is known is that the share of online wholesalers is likely growing in line with broader e-commerce trends, as part of the effects of the COVID-19 pandemic on retailers.

For this study, web scraping was used to obtain data about the prevalence of non-Indigenous authored products in the product listings of souvenir wholesalers, stock image marketplaces (Shutterstock) and print-on-demand merchandise marketplaces (Redbubble). An example of how information is extracted from product listings is depicted in box C.2.

The scraped data was supplemented with additional manual inspections and classifications. This included:

- for souvenir wholesalers: an assessment about whether the products claimed any connection to Aboriginal and Torres Strait Islander artists; a check as to whether product listings contained additional information not otherwise captured in product descriptions (such as on the picture of a product's packaging)
- for Shutterstock listings: an assessment about whether the creators were located in Australia or identified as Aboriginal and Torres Strait Islander (creators located in other countries were presumed to not be Aboriginal and Torres Strait Islander people, unless there were indications to the contrary)
- for Redbubble listings: reverse image searches to assess whether they were potentially unauthorised reproductions (discussed further below see below).

Box C.3 – Web scraping to gather data from a product listing

Product listings on a website typically have a standard structure. As pictured above, they contain fields for prices, product names and product descriptions. Through web scraping, these fields can be converted into variables in a dataset, with each product listing forming one observation.

Details about the scraped datasets and the supplementary manual inputs are outlined in table C.2.

Table C.2 – Details about scraped datasets

Data source	Sample characteristics	Scraped variables	Manual inputs
Souvenir wholesalers	n = 860, from five souvenir wholesalers based in Queensland, New South Wales, Victoria and South Australia, each selling a mix of Indigenous authored and non-Indigenous authored products. n = 699, stratified random sample from 1500 product listings (by product category) from one souvenir wholesaler selling Indigenous authored products.	Price Product name Product description	Product type Authorship classification Country of origin
Stock image marketplace	n = 372, random sample from first five pages of search results from search terms under 'digital illustration' images: 'Aboriginal Art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art', 'Australia Indigenous Art'.	Price Frequency of use Popularity Creator Creator country	Creator's country of origin Authorship classification
Print-on-demand marketplace	n = 417, random sample drawn from first five pages of search results from search terms: 'Aboriginal Art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art', 'Australia Indigenous Art'. Filtered out Aboriginal flag products and products containing North American Indigenous art and motifs.	Price Product name Product description Product tags Creator Creator country	Creator's country of origin Authorship classification Identification of copyright infringements

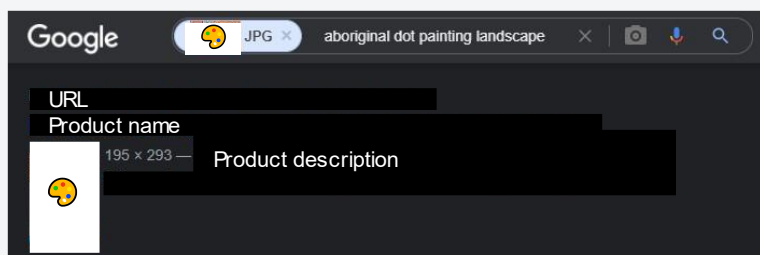
Reverse image searches to identify potentially illegal reproductions

Reverse image search tools are a type of search engine that allows users to upload images to search for instances where identical or similar images have been used. This can help identify the original image authors. For example, the Commission used reverse image searches to ascertain potential copyright infringements. It was also used to examine the prevalence of non-Indigenous authored stock image illustrations, including on online government resources, academic publications and other small business content. During this study, three free reverse image search tools were used as part of the RevEye Reverse Image browser extension for Google Chrome and Microsoft Edge: Bing, Google and TinEye. Box C.3 describes how the Commission used reverse image searches.

Box C.3 – Examples in the use of reverse image searches

Case 1: Determining the extent of the use of stock images

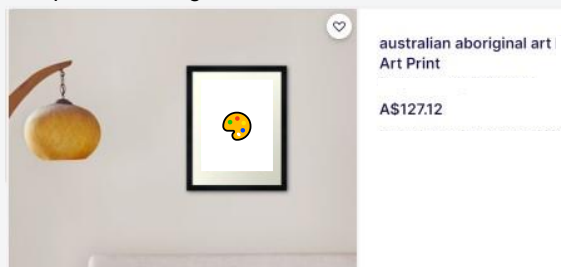
Stock images can be widely used across multiple forms of digital and physical media. Reverse image searches can reveal how extensive certain stock images are used. Below is an example of what the results from a reverse image search can look like. Some results can be false positives, so manual checks are required to confirm the uses of images.



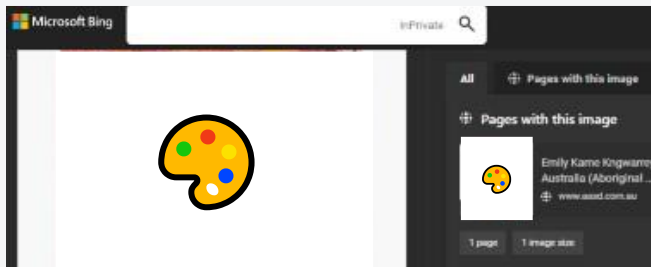
Case 2: Detecting potentially illegally reproduced artworks on online marketplaces

Reverse image search tools can also be used to identify instances of likely copyright infringement. Below is an illustration of how a reverse image search can identify the original source of an image.

The product listing



The search result



It is not unusual for only one reverse image platform to return a result that indicates the original source of the artwork, which is why searches were done on several platforms. In some cases, no platform was able to identify whether a work was a possible copyright infringement. However, there are sometimes other indicators that can be used to infer whether an image is likely to be a copyright infringement, such as whether the image is of a low resolution and whether it appears to have been hand painted on canvas.

Proxy indicators of authorship

As noted above, some of the scraped datasets were supplemented by an assessment about whether products were authored by an Aboriginal and Torres Strait Islander person or by a non-Indigenous person. To this end, the Commission identified characteristics that are likely to indicate whether an Indigenous-style art and craft product is an original piece authored or co-authored by an Aboriginal and Torres Strait Islander person, or produced under a licensing agreement ('proxy indicators'). These proxy indicators differed slightly depending on whether the product is physical or digital and are set out in table C.3.

Table C.3 – Proxy indicators of authorship

Physical products

Indigenous authored	Non-Indigenous authored
<ul style="list-style-type: none"> 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 8) 	<ul style="list-style-type: none"> The product is explicitly described as 'Aboriginal style' or 'Indigenous style'

Digital products

Indigenous authored	Non-Indigenous authored
<ul style="list-style-type: none"> Self-declaration that creator is Aboriginal and Torres Strait Islander Creator states the cultural group they are from 	<ul style="list-style-type: none"> 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 Use of an 'Indigenous style' stock image

While these proxy indicators are imperfect — for example, there are instances where art authored by an Aboriginal and Torres Strait Islander person is manufactured (or the artist is located) overseas — they provide a practical means of broadly identifying those products that are likely authored by non-Indigenous people and those that are not. In order to confirm the authorship of any individual product, case-by-case analysis is essential. The Commission considered all of the information available for each individual product listing considered to determine authorship.

Estimating spending on non-Indigenous authored products

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

Data about 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 estimate total 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 non-Indigenous authored products, the Commission used the 69–76% non-Indigenous authored 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 non-Indigenous authored Indigenous-style souvenirs totalled at least \$43-54 million. This estimate is conservative and should be interpreted cautiously.

D. Current approaches to Indigenous Cultural and Intellectual Property

This appendix examines the recognition that Indigenous Cultural and Intellectual Property (ICIP) has received at an international level and in Australia's legal framework. It discusses the existing legal protections for ICIP in visual arts and crafts in Australia, and the extent to which they can be used to preserve Aboriginal and Torres Strait Islander cultures and minimise misappropriation.

D.1 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 D.1). However, existing international instruments are non-binding and implementation at a national level has not been widespread.⁷⁴

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes a 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, has committed to taking actions to implement the UNDRIP (Macklin 2009).

In Australia's response to the Universal Periodic Reviews⁷⁵ 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 2020a, 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

⁷⁴ 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).

⁷⁵ 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.

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 2.3). 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.

Box D.1 – International instruments recognise the importance of ICIP

Some international instruments have recognised the importance of protecting ICIP.

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’⁷⁶(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). The provisions in the Declaration recognise the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions (box 2.3).

Australia is also a member of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (box D.2). 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).

⁷⁶ 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).

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.

Box D.2 – 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 [traditional knowledge, traditional cultural expressions and genetic resources] 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. At the September 2022 meeting, it was agreed that an ad hoc expert group on traditional knowledge and traditional cultural expressions be organised for December 2022 (WIPO 2022a).

These draft articles represent a key step towards the development of an international instrument. While significant progress on these issues has been made, 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 have not yet been agreed upon by all negotiators (WIPO 2019b). In September 2022, the draft articles were revised for further consideration at the 45th IGC meeting in December 2022 (WIPO 2022a).

One participant, commenting on the progress at an international level, said:

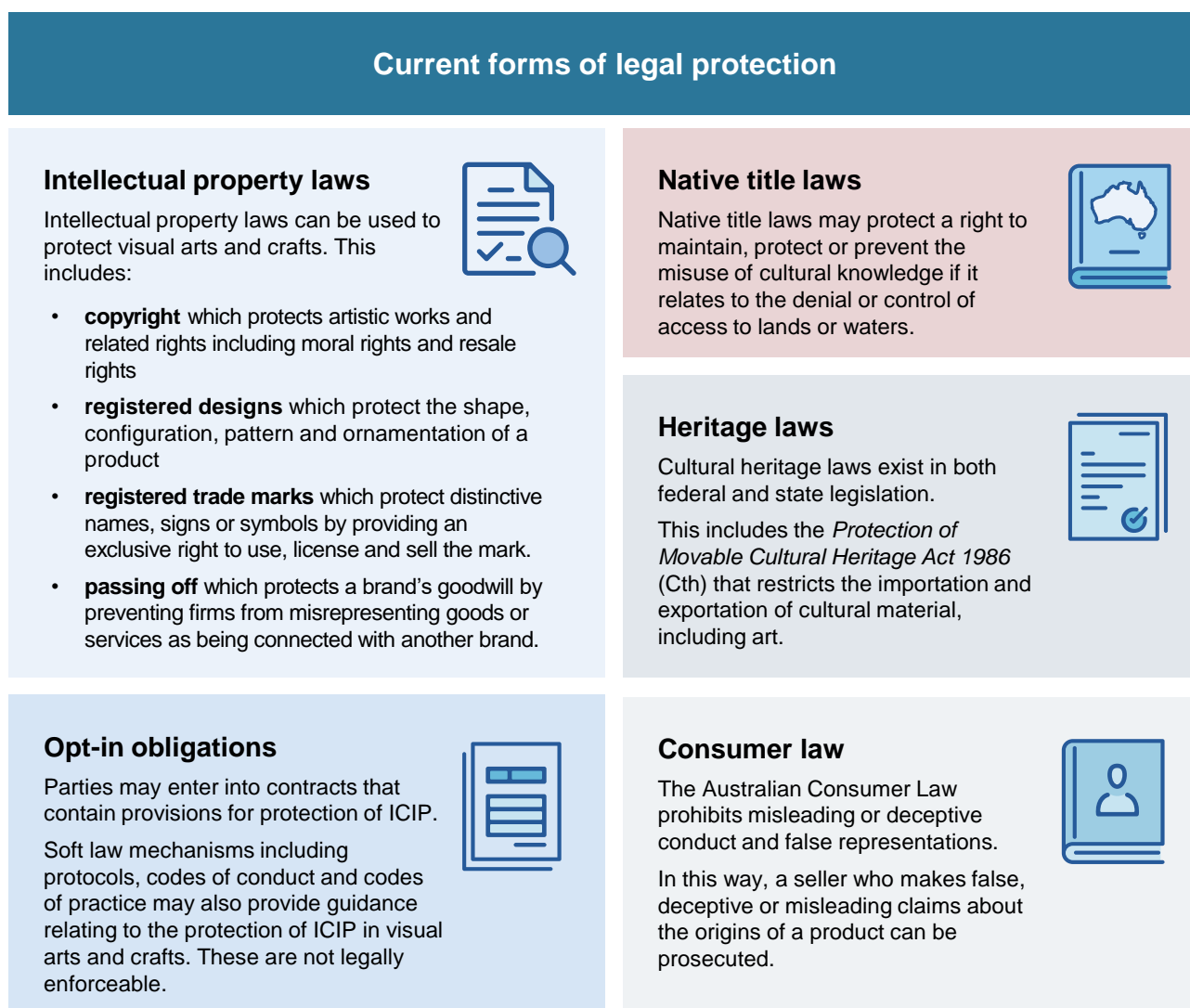
The failure, after 20 years of negotiations, to settle even the core issues for a draft text, suggests that a treaty to protect TCEs is likely to remain elusive. (Blakeney, sub. 32, p. 2).

D.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 D.1).

Figure D.1 – Existing legal instruments provide some protection

The instruments provide varying degrees of coverage for ICIP in visual arts and crafts



Source: *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).

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).

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 D.3). These laws apply to Aboriginal and Torres Strait Islander visual arts and crafts in the same way as they apply to other artistic works.

Box D.3 – Copyright protection

The *Copyright Act 1968* (Cth) provides a range of exclusive rights to authors and creators of original expressions to protect their works. For copyright to be enforced, 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 by a person 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).

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)

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.⁷⁷ One of the most significant cases is the *Carpets Case* (box D.4), 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).

Box D.4 – 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 D.5).

⁷⁷ For example, *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] FCA 1082.

Box D.5 – 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. 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 D.4), there may also be issues 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 and in this way, are communally owned. 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).

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 D.6).

Box D.6 – 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 2018b, 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 Ganalbingu 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 D.6 – 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 five 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 and 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 D.7).

Box D.7 – 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, among 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.

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.

Trade mark laws do not preclude non-Indigenous businesses from including ICIP in registered trade marks. When considering an application for trade mark 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 the reputation or goodwill of a business. 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 D.8).

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 D.9). This falls short of the expectations of many Aboriginal and Torres Strait Islander people and communities of 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 D.8 – 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.

Source: Australian Competition and Consumer Commission (2019a); Australian Copyright Council (2021).

Box D.9 – 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 D.9 – 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.⁷⁸ 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.⁷⁹ 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 desecration.⁸⁰ 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.

⁷⁸ A similar law is being considered in New South Wales. See the *Aboriginal Cultural Heritage Bill 2018* (NSW).

⁷⁹ *Aboriginal Heritage Act 2006* (Vic) s. 79B.

⁸⁰ 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 (Office for the Arts 2020c, 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 2022).

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
- the 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
- the City of Melbourne's Code of Practice for galleries and retailers of Indigenous Art
- the 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, the 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).

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
CDP	Community Development Program
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CPA	Creative Partnerships Australia
CTM	Certification trade mark
DAAF	Darwin Aboriginal Art Fair
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (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
IBA	Indigenous Business Australia
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

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