

Aboriginal and Torres Strait Islander Visual Arts and Crafts

Brief comments received

Included are comments received as of August 2021, for which the submitter gave their permission for their comment to be published.

No.	Comment
1	This issue has been going on for far to long. I'm an artist and fb as example is targeting Indigenous users to advertise fake aboriginal design merchandise and when comments are made to either the company in question your name is blocked or a complaint to fb itself, nothing is done to stop this from being advertised as Aboriginal ...it needs to STOP
2	Please change the way art is registered and sold for the sake of all aboriginal and Torres straight islander people and communities. I personally have been watching this space for some time and as a result have started a business to do my part as a aboriginal man. Tourists don't want to buy non authentic aboriginal products. They also don't want or shouldn't be allowed to buy made in China products with aboriginal designs work on them. I know royalties still go to the artist in some case but it devalues the original artwork itself. This message is a subject matter that I am very passionate about and will be watching this space closely.
3	The NSW Aboriginal Culture, Heritage & Arts Association is an incorporated, not-for-profit representing NSW Aboriginal community controlled cultural spaces such as Cultural Centres, Knowledge Centres, Galleries, Museums and Keeping Places. All 16 core members are not-for-profits, most work with Aboriginal artists through providing gallery spaces for works for sale, some have workshops spaces for creating art (though many more members would also like to have these workshop spaces for artists) and/or run artists' programs, or are exclusively for artists across regional and urban areas. Because most members also have collections of cultural objects and work closely with their communities, there are strong connections to culture reflected in their artists' works. In the past year ACHAA has received funding from Create NSW, IVAIS, Australia Council and the NSW Aboriginal Land Council to support its advocacy, member conferences and a new website that will feature member centre artists' work for sale online. ACHAA is also supported by Museums & Galleries of NSW which provides in-kind staffing resource. ACHAA's current strategic plan seeks to source additional funding by 2023 to resource its own staff and be an independent Aboriginal Peak Body. ACHAA also supports the Indigenous Art Code and has applied to be a supporter member.

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	ACHAA strongly supports this inquiry with the request that the impacts on NSW Aboriginal artists and ACHAA member centres are considered in all aspects.
4	So important to do this. I would definitely like to see a system where a 'guarantee' can be provided when a First Nations piece of art or culture is purchased. Artists/producers need to be able to access the system relatively easily however, so it doesn't become only an elite group within the community who access it.
5	Fake Indigenous art should be banned completely. There is so much that needs to happen to rectify acknowledgement and respect of Indigenous culture - how can this happen if the Government doesn't contribute and put protections in place.
6	Aboriginal in indigenous art and souvenirs should all be made here in Australia by authentic people. If nothing else, hopefully we can have something that is fully Australian. Don't let corporate and small business owner greed destroy and dilute our Australian traditions and their artwork.
7	I am an Aboriginal law student with a strong interest in ICIP so I felt compelled to share my opinion on the draft report. A massive component of the draft report, as well as the bulk of the response to the contents has been related to the mass amounts of cultural theft occurring in the sales of inauthentic souvenirs. The primary suggestion in response to this was that there be a mandatory labelling scheme for inauthentic products. In a report that is supposed to be about alleviating harm to Indigenous communities has a tendency to focus on consumer choice. Why should consumers be allowed to make a choice between inauthentic and authentic products? You are not allowed to use the designs of a commercial brand like Nike and sell it, so long as there's a removal sticker that says 'not really Nike'. Consumers are not allowed to legally purchase knock-off items – trade mark counterfeiting is illegal. Why is this acceptable when it relates to Aboriginal artists and designers but not for billion dollar brands where the harm is less apparent? Cultural theft is still theft and is still a crime. As Arts Law have repeatedly stated why should we allow inauthentic products on the markets at all? The priority should not be given to allowing consumers the choice to buy fake knock-offs if they wish. The onus should be placed on consumers as it is with purchasing counterfeit products, where if you knowingly purchase counterfeit goods you are committing a crime. People who purchase in bulk with the intent to resell should be charged with commercial fraud as they would for the attempted resale of any other counterfeit product. To address the point that this idea of labelling inauthentic souvenirs is to alleviate the burden on Aboriginal artists and designers in proving their authenticity – this should be the focus, how do we alleviate the burden? Many other cultures already have systems in place, like Japanese ceramic artists. Different prefectures have signatures or signifiers to indicate which area the ceramics were made in. Finding a system that works in the Australian landscape should be the focus of consultation. If the PC wishes to continue to move forward with the labelling of inauthentic products, what are going to be the terms of compliance? If enforcement laws are applied as under the ACCC as suggested, what will happen with the money that the Australian government accrues from fining perpetrators? The royalties that the Australian government is receiving in relation to purchasing the license of the Aboriginal flag is being used to fund NAIDOC week. There needs to be a scheme where the communities that suffer harm receive the financial benefit of the enforcement of non-compliance. Whether this is through channelling the money similarly or through a new third party Aboriginal led organisation that uses the funds to invest into cultural projects within affected communities.
8	The National Film and Sound Archive (NFSA) welcomes a legislative regime to formally acknowledge Indigenous Cultural and Intellectual Property (ICIP) rights. The NFSA is one of the nine national Collecting Institutions (NCIs), which include the National Library of Australia, National Archives of Australia,

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	<p>National Gallery of Australia and National Museum of Australia, amongst others. The NFSA is also a key part of Australia's screen sector and maintains active international partnerships with peer organisations. Of the NFSA's nearly four million collection artefacts, some 30,000 are of First Nations provenance: documentary footage, feature films, television, radio, music, home movies and oral histories. While the scale of our First Nations collection is growing – particularly works by contemporary practitioners - much of the historical collection is not currently accessible or well understood. As collecting and cataloguing protocols for First Nations materials have changed over time, more work is required to understand what is held in our collection, who has cultural ownership of the material, and who can access it. This material represents a unique record of Australian First Nations knowledge and creative output – an invaluable resource to build understanding amongst all Australians, and for First Nations people to celebrate and revitalise Culture, including language. The work to research, catalogue, digitise and (where appropriate) repatriate First Nations content in our collection is critical. But it takes time and skill – and must be done by and in partnership with First Nations people. NFSA has established best practice policy and procedures when we or our clients access ICIP materials held in the collection. While our acknowledgement of ICIP rights is captured in our commitment under the NFSA Indigenous Strategy 2020-2023, particularly in the identified pathways of “reimagining representation of Aboriginal and Torres Strait Islander cultures”, “embedding Indigenous values, knowledges and perspectives” and “two way caretaking of cultural material”. Additionally, the NFSA's ICIP Protocol guides our day to day practice in recognising ICIP and working with appropriate communities to obtain permission to use and supply the First Nations materials that are held in the NFSA's collection. 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. The NFSA would welcome further consultation about appropriate legislative models as the Commission's work progresses.</p>
9	<p>While shifting the obligation to label inauthentic products from Aboriginal and Torres Strait Islander artists themselves and the turn away from labelling based on authenticity is both laudatory and represents a novel approach, how this scheme would work in practice remains an issue. Also, the focus on the hoped-for results of greater consumer awareness in this regard (that a consequence would be its support for consumer demand for authentic goods, almost implicitly) may be unrealistic. The harm caused to Aboriginal and Torres Strait Islander persons and peoples as a result of misappropriation and 'fakes', and their ability to seek appropriate redress and/or compensation based on that loss on their own terms, ought to be front and centre of any proposed response. Similarly, a critical decision about the approach of dedicated cultural rights legislation needs to be made at the outset, about the relationship between existing legislation and norms (for instance, in relation to the current copyright regime in Australia), that may protect some forms of ICIP or what the PC calls cultural assets (and neglect to protect others). Otherwise, the effectiveness of a separate piece of cultural rights legislation will inevitably be regarded as 'lesser' and akin to other efforts towards the generation of 'soft law' protections which, while admirable and perhaps appropriate and effective to an extent, are nonetheless non-binding and unenforceable. Within this, the importance of any legislation reflecting what Aboriginal and Torres Strait Islander persons, peoples and communities actually want, rather than amounting to an well-intended imposition, cannot be underestimated. Genuine support for Indigenous sovereignty and self-determination, and recognition of customary law, would resolve many of the tensions associated with this field (with ripple effects including greater levels of funding for communities, artists and art centres). Check-box or 'bandaid' solutions will only go so far.</p>
10	<p>I've just attended the information webinar delivered by Bonnie, and I very much appreciated the thought and care that has gone into the process so far. I think that better legal protection of ICIP is very much needed, and the draft proposed legislation seems to be on the right track. I'd like to make a comment</p>

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	<p>with respect to one question that was raised about what exceptions would be appropriate for ICIP protection. The possibility was raised for exceptions that mirror those in the Copyright Act - for reporting the news, etc. I'm not convinced that these exceptions would be appropriate. 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). To the extent that Indigenous artists wish to commercialise their art, the same copyright exceptions and protections will apply to them. 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 - e.g. in reporting the news, parody and satire. (And is particularly tricky because the ICIP protection is proposed to extend to cultural knowledge that is not in a material form.) 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. I have not fully thought through what appropriate exceptions might be, but I caution the Productivity Commission to hesitate before importing the copyright exceptions wholesale into any ICIP legislation. For context - I am a Senior Lecturer in Law at the Queensland University Technology, specialising in copyright law.</p>