



Aboriginal and Torres Strait Islander visual arts and crafts

Study report

Overview



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

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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.

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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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See full report at www.pc.gov.au/inquiries/completed/indigenous-arts/report

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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 ampere [land] and our atweye [family]. When Aboriginal Law and our Ancestors are disrespected we feel terrible pain and fear for ourselves and our family. We don't know how to make it right, to heal the pain and protect the Law again, unless we get support from the wider community in solving this problem.

Jane Young from
Tangentyere Artists,
quoted in Desart,
sub. 4, p. 10

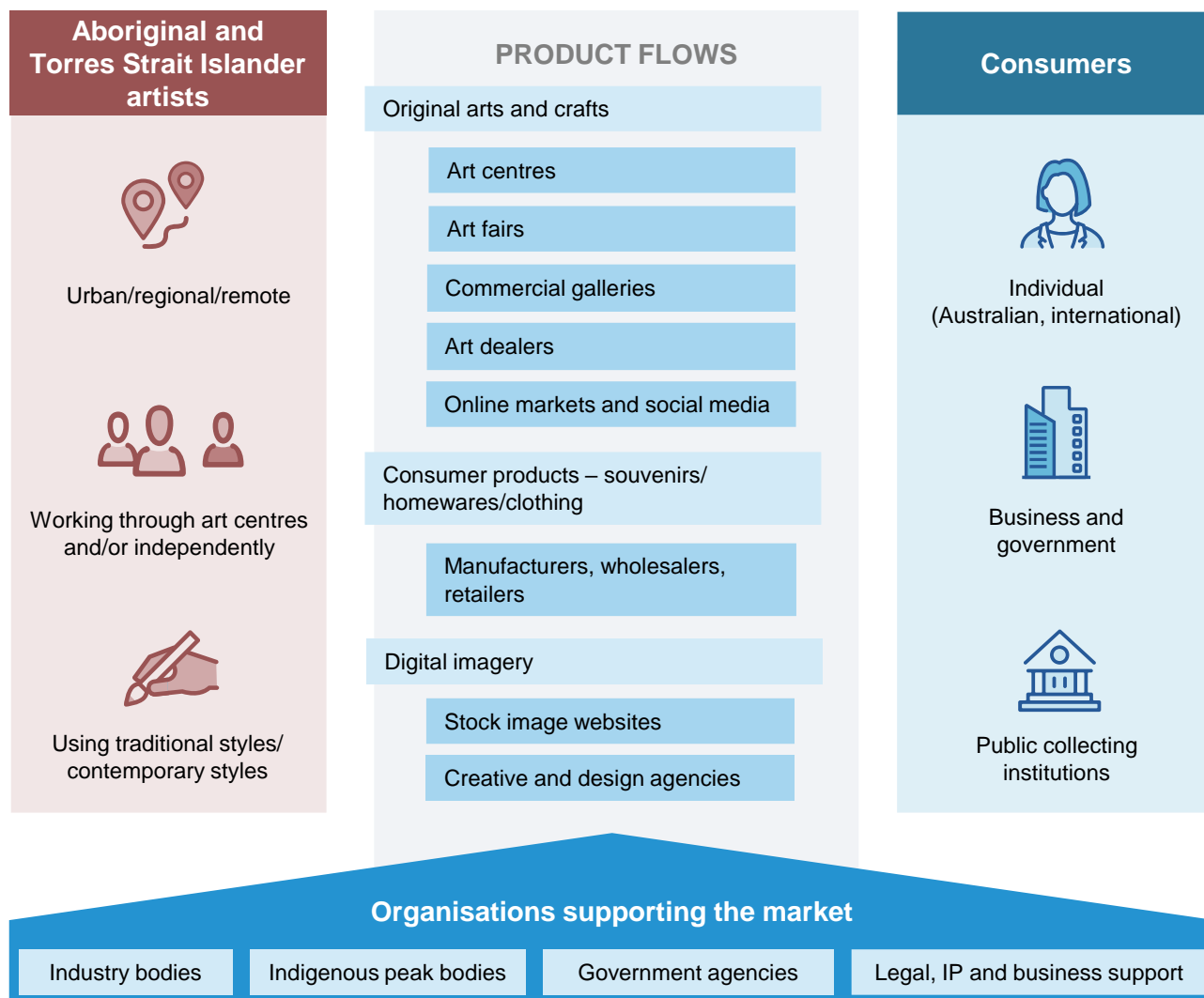
Aboriginal and Torres Strait Islander visual arts and crafts markets are strong, dynamic and growing

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

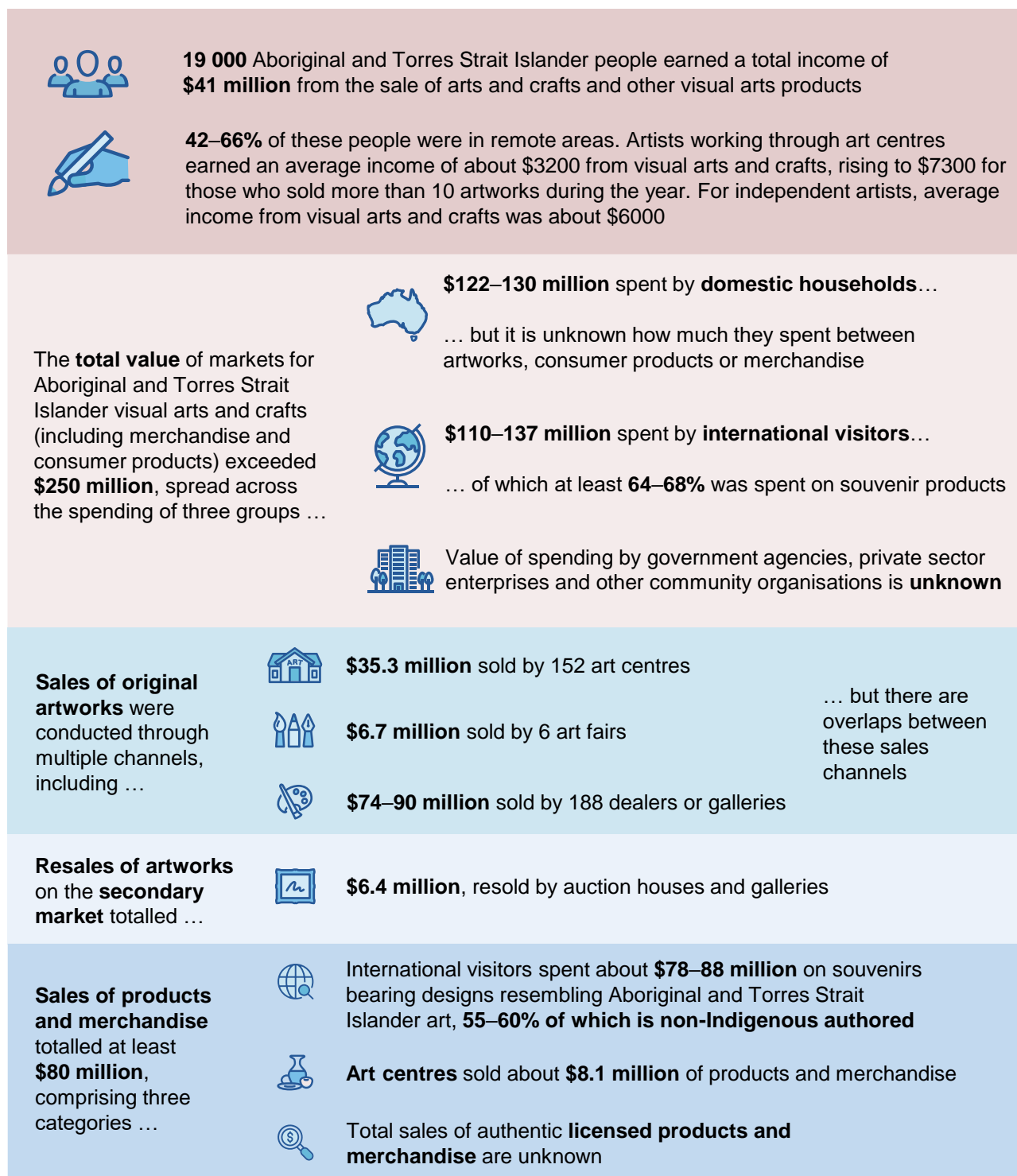


Visual arts and crafts make a substantial economic contribution to Aboriginal and Torres Strait Islander communities

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.

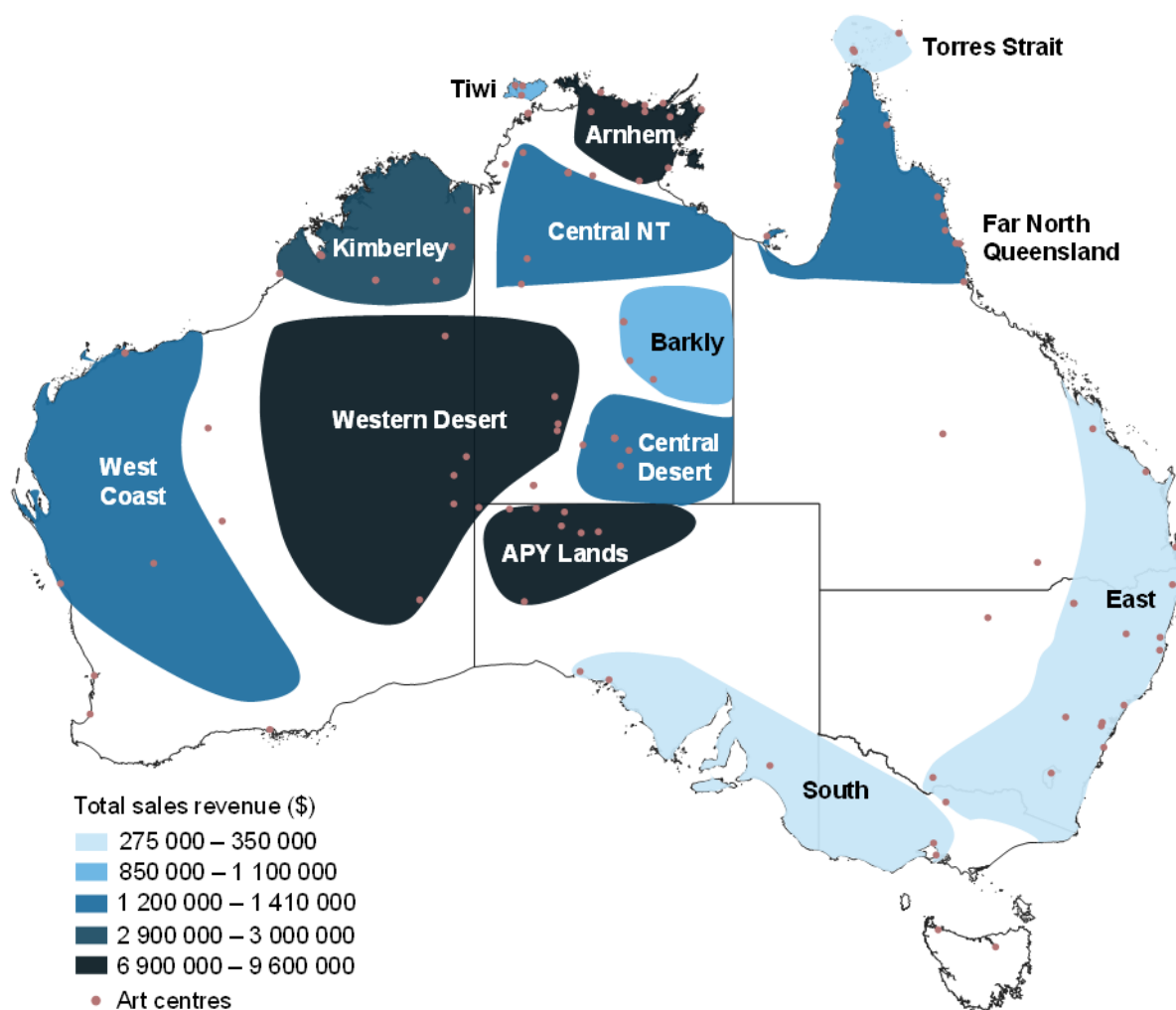
Figure 2 – Sales and income of key market segments in 2019-20^{a,b}



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.

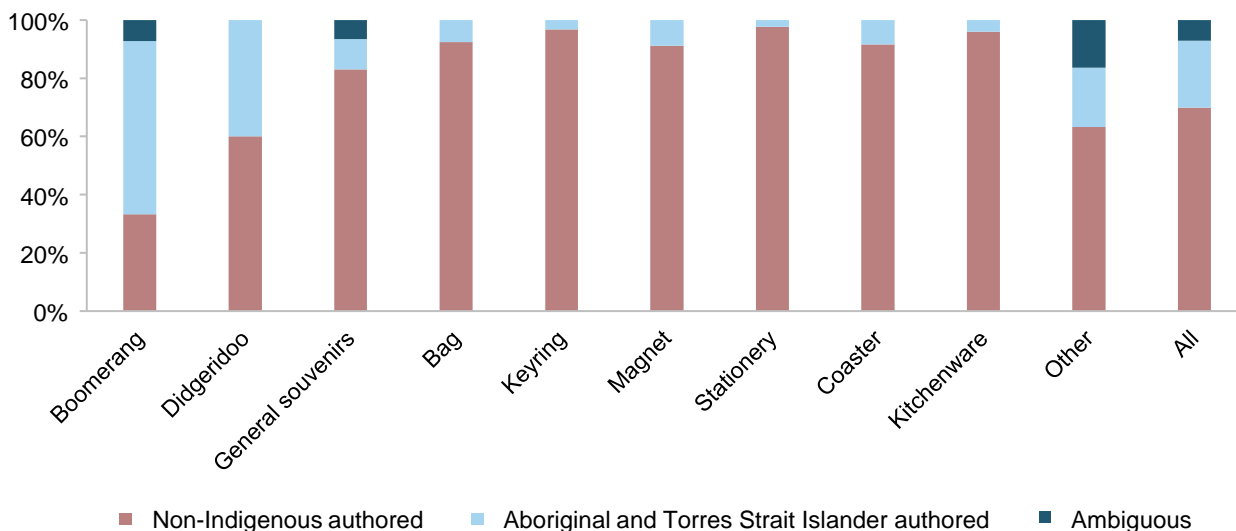
Non-Indigenous authorship is less prevalent among original artworks than it is for souvenirs and merchandise. The House of Representatives concluded that: '[t]his is due in part to the buyers being more discerning and the need for galleries to protect their reputation by ensuring the provenance of more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

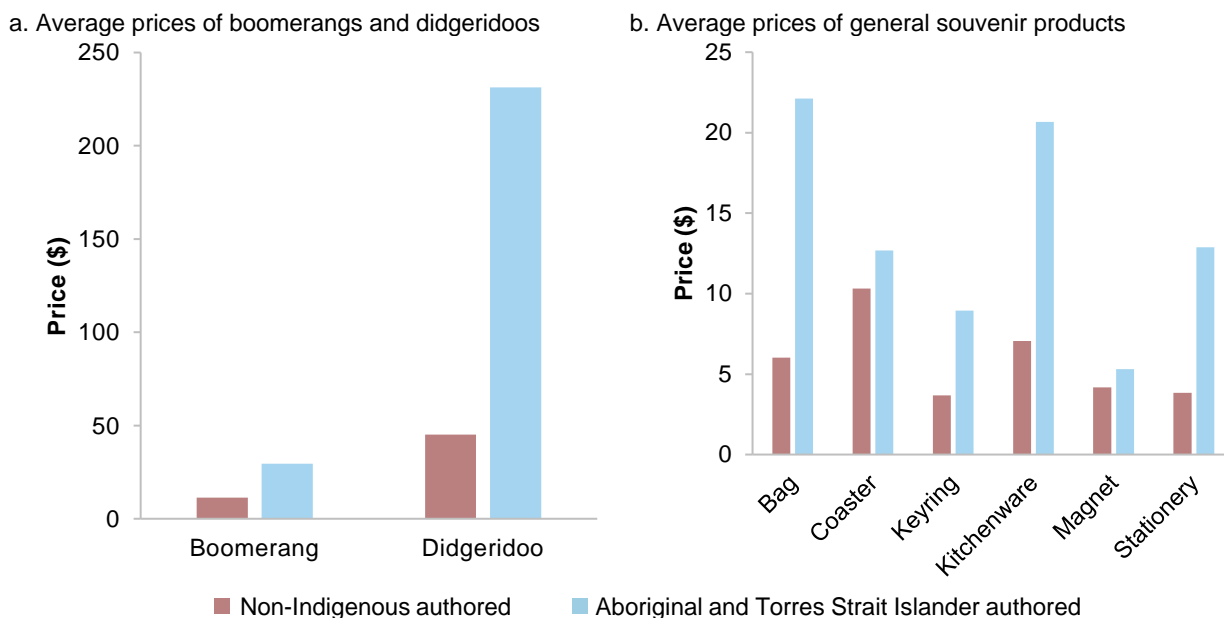
Non-Indigenous authored products are often indistinguishable from authentic products

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



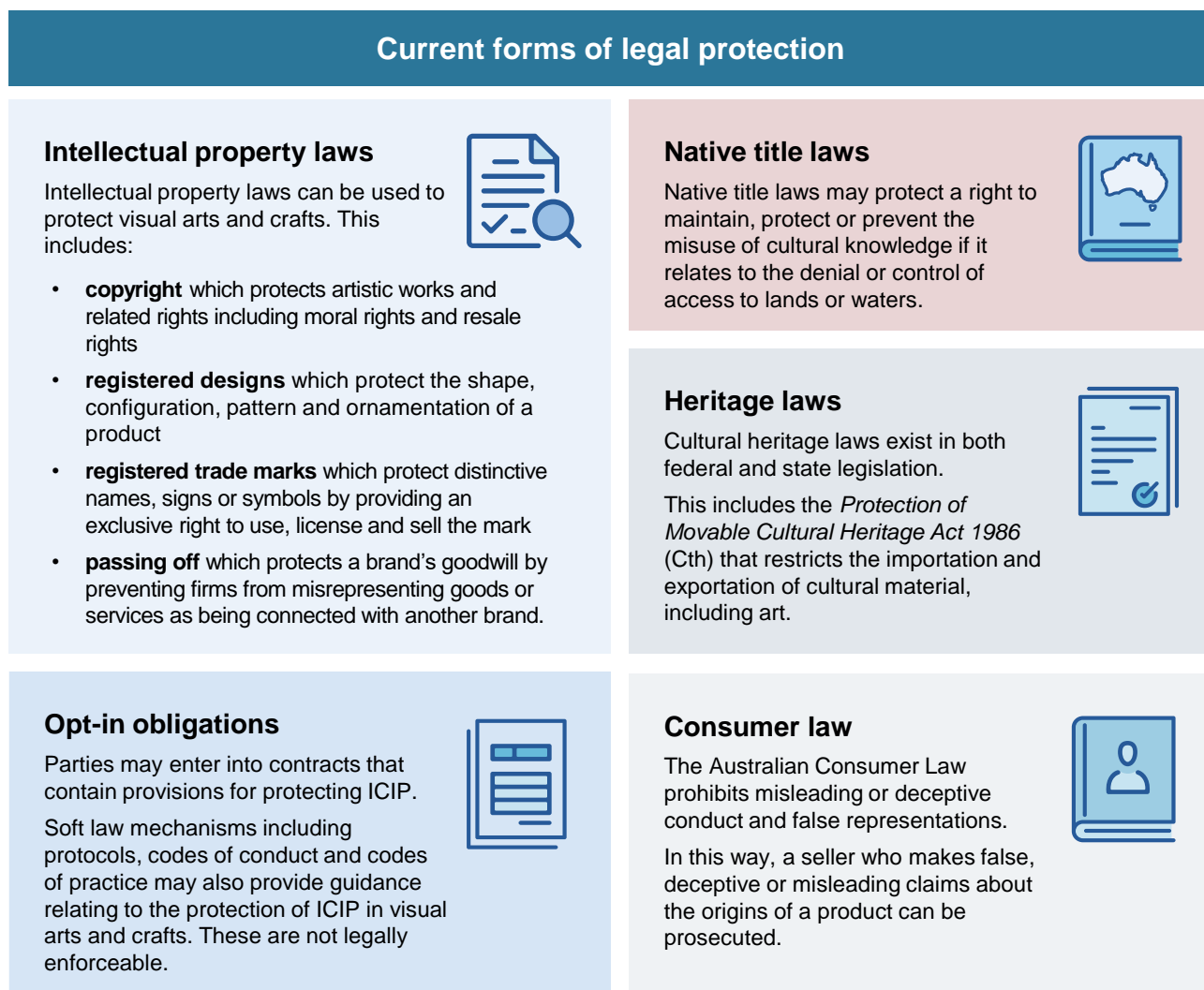
There are few legal limits on inauthentic visual arts and crafts ...

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

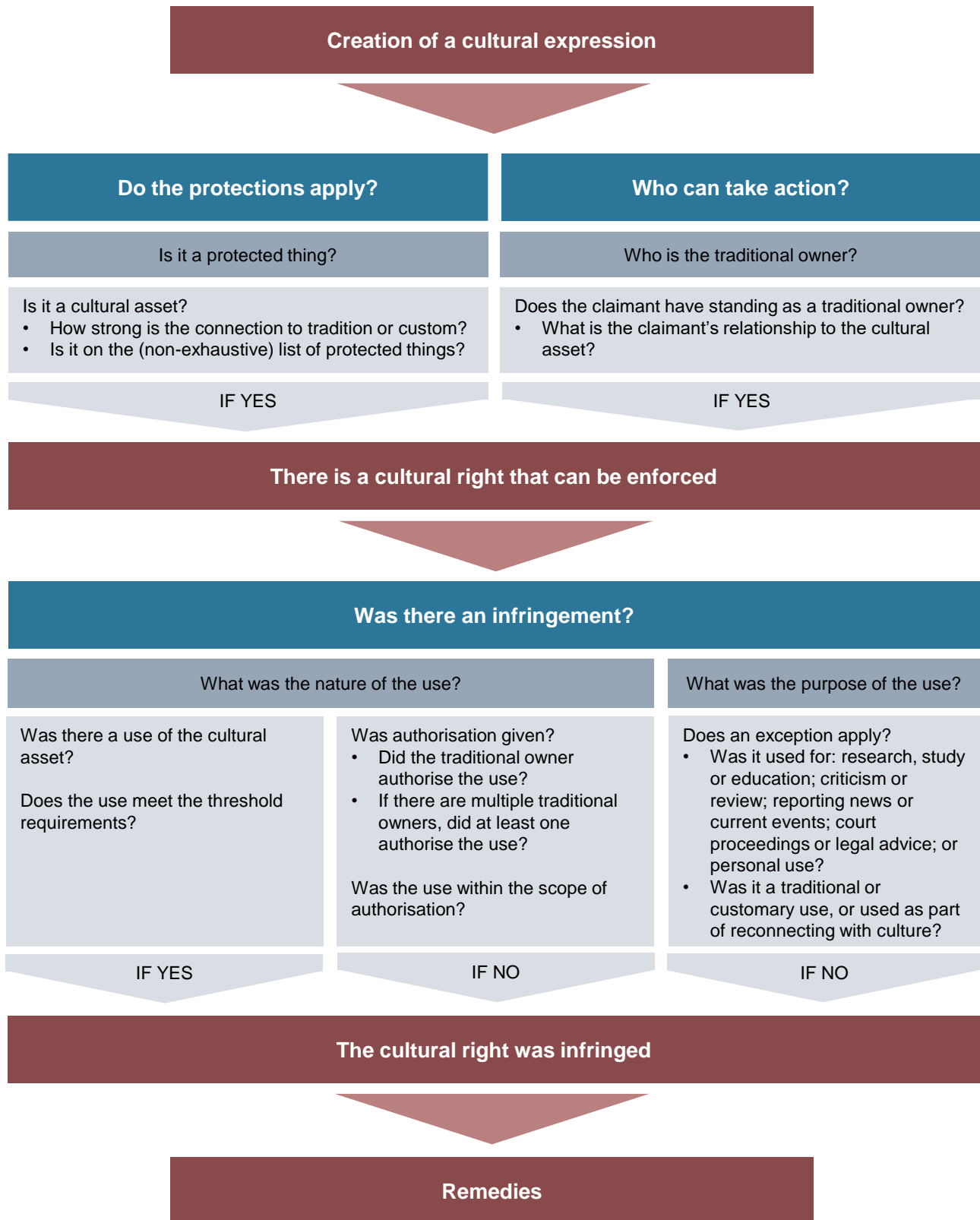
Scenario: A person uses an Indigenous-style motif in her artwork or product, but the motif is generic and cannot be traced back to any particular traditional owners. The artist has not sought any permissions to use the motif.

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

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Product Coverage</p>	<p style="text-align: center;">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.
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Authorship Criteria</p>	<p style="text-align: center;">Suggested approach</p> <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.
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Design and Implementation</p>	<p style="text-align: center;">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 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 motor cars, troopies, sometimes two cars each. They are asked to paint blanket sized paintings and they are pushed to work very long days for the carpet baggers. They are pushed to continue to work when they are tired. Sometimes there are non Indigenous people making paintings with the artists. In our Art 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
<p>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.</p>	<p>The Australian Government should establish a formal shared decision-making partnership with Aboriginal and Torres Strait Islander artists and organisations.</p>	<p>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.</p>
<p>Government policies to support the current and future Aboriginal and Torres Strait Islander visual arts and crafts workforce have been limited and fragmented</p>	<p>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.</p>	<p>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.</p>

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.