AUSTRALIA COUNCIL FOR THE ARTS

SUBMISSION TO THE STANDING COMMITTEE ON INDIGENOUS AFFAIRS INQUIRY INTO THE PROLIFERATION OF INAUTHENTIC ABORIGINAL AND TORRES STRAIT ISLANDER 'STYLE' ART AND CRAFT PRODUCTS

NOVEMBER 2017
Dear Secretary,

The Australia Council is pleased to have this opportunity to contribute to the Parliamentary Standing Committee on Indigenous Affairs Inquiry into the proliferation of inauthentic ‘Aboriginal and Torres Strait Islander style’ art and craft products.

As the Australian Government’s principal arts funding and advisory body and national advocate for the arts, the Australia Council has a statutory role to support Aboriginal and Torres Strait Islander arts practice. We are committed to strengthening Australia’s Aboriginal and Torres Strait Islander arts and cultural ecosystem and increasing markets and audiences for First Nations arts and culture at home and abroad. We are also committed to supporting the realisation of sustainable career paths for Australian artists, which are fundamental to the future of vibrant Australian arts and culture.

Australia’s unique Indigenous artistic and cultural heritage is embedded in thousands of years of cultural expression, living culture and evolving practice. First Nations arts are central to identity, place and belonging and have an important place in the ongoing survival of Indigenous cultures. They also make a rich contribution to the vibrancy of Australia’s cultural life. For this contribution to continue, it is important that Aboriginal and Torres Strait Islander artists and their communities have the tools to control and protect their cultural expressions and to realise the economic, social and cultural benefits of participation in the arts.

In this context, the Australia Council recommends the Committee consider options to address the proliferation of inauthentic ‘Aboriginal style’ arts and craft products as a matter of priority, including potential amendments to Australia’s intellectual property and consumer protection regimes as well as non-legislative mechanisms such as protocols, authenticity labels and awareness raising activities.

Tony Grybowski
Chief Executive Officer
Australia Council for the Arts
EXECUTIVE SUMMARY

1. The Australia Council has a statutory role to support Aboriginal and Torres Strait Islander arts practice and is committed to strengthening Australia’s Aboriginal and Torres Strait Islander arts and cultural ecosystem and increasing markets and audiences for First Nations arts and culture at home and abroad.

2. Through our funding programs and strategic initiatives the Australia Council supports many Aboriginal and Torres Strait Islander artists and arts organisations who practice, promote, sell and distribute their own authentic art and craft products. In 2016-2017, Council invested a total of $13.1 million in arts and cultural activities with a primarily First Nations focus.

3. The Australia Council considers that the proliferation of inauthentic Aboriginal and Torres Strait Islander ‘style’ arts and craft products and merchandise comes at a significant cost to Aboriginal and Torres Strait Islander artists, their communities and the broader Australian public.

4. The Australia Council recommends the Committee consider options to address this issue as a matter of priority, including potential amendments to Australia’s intellectual property and consumer protection regimes as well as non-legislative mechanisms such as protocols, authenticity labels and awareness raising activities.
1. INTRODUCTION

1.1 Australia Council support for First Nations arts and culture

The Australia Council has a statutory role to support Aboriginal and Torres Strait Islander arts practice\(^1\) and is committed to strengthening Australia’s Aboriginal and Torres Strait Islander arts and cultural ecosystem.

One of the four key goals in our Strategic Plan, *A Culturally Ambitious Nation*, is to encourage all Australians to cherish Aboriginal and Torres Strait Islander arts, and the Australia Council supports First Nations artists, organisations and communities to participate in arts and cultural activity by investing in the creation, development, production and distribution of artistic and cultural works. In this context, the Australia Council works to increase markets and audiences for First Nations arts at home and abroad, with a view to making the cultural expressions of Aboriginal and Torres Strait Islander people a source of pride for all Australians.

In the delivery of our support for Aboriginal and Torres Strait Islander arts, the Australia Council attaches importance to ensuring that our investment in the sector is delivered in collaboration with First Nations artists and communities. In particular, Council’s Aboriginal and Torres Strait Islander Arts (ATSIA) Strategy Panel provides expert strategic advice to ensure the effective delivery of programs and other strategic activities.

In 2016-17 a total of $13.1 million was invested in arts and cultural activities with a primarily First Nations focus through direct project grants, multi-year funding to the Major Performing Arts Companies and small to medium arts organisations, strategic development opportunities and grants in other areas of practice. Council’s dedicated funding to Aboriginal and Torres Strait Islander people, groups and organisations is assessed wholly by Indigenous peer assessors.

Increasing opportunities for First Nations artists is a key strategic focus of the Council, realised through a number of initiatives aimed at increasing the platforms and distribution channels for sharing First Nations artistic works, and building the capacity of First Nations artists to leverage them. In 2016-17 Council provided significant funding for strategic initiatives as well as national and international development activity with a First Nations focus. This strategic work is informed by the Council’s research program which includes First Nations arts as a focus area. The Council also supports young Aboriginal and Torres Strait Islander people to practise and experience their culture by supporting the intergenerational transfer of Indigenous arts and culture knowledge through our *Chosen* program, and recognise the outstanding contribution of Aboriginal and Torres Strait Islander artists through our annual National Indigenous Arts Awards.

1.2 Scope of this Submission

This submission examines the proliferation of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products and merchandise. It focuses, in particular, on options to protect the artistic and cultural expressions of Aboriginal and Torres Strait Islander people, promote the commercialisation of authentic expressions and reduce the misappropriation of traditional cultural expressions through the proliferation of inauthentic arts and crafts merchandise. In this submission, references to ‘Indigenous’, ‘First Nations’ and ‘Aboriginal and Torres Strait Islander’ artists are used interchangeably.

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\(^1\) Section 9(1)(ba) of the *Australia Council Act 2013* (Cth) provides that it is a function of the Australia Council to support Aboriginal and Torres Strait Islander arts practice.
2. VALUING FIRST NATIONS ARTS AND CULTURE

Aboriginal and Torres Strait Islander peoples are the custodians of a living artistic and cultural tradition embedded in thousands of years of heritage and continuing practice. First Nations arts are contemporary expressions of rich knowledge systems and unbroken storytelling stretching back for millennia. They are a source of strength, resilience and pride for First Nations peoples and are central to Australia’s culture and identity.

Aboriginal and Torres Strait Islander artists make a significant contribution to the vibrancy of Australian arts and culture at home and internationally. The achievements of Aboriginal and Torres Strait Islander artists are well represented in Australian arts awards and have a proportionally higher presence at international arts events than other Australian artists.2 Almost all Australians agree that Indigenous arts are an important part of Australia’s culture and audiences for Indigenous arts are growing.3

The Australia Council acknowledges the vibrancy and diversity of Aboriginal and Torres Strait Islander arts and artists. First Nations art is not just art produced by artists living in remote parts of Australia or using solely ‘traditional’ practices. It is a living, evolving, contemporary art practice which takes place in cities, towns and communities across Australia from our most remote regions to our busiest urban centres.

Indigenous visual arts cover a range of practice areas including:

- painting
- printmaking (including etching)
- intaglio processes, screen print, linocut
- craft (including fibre and textile arts)
- ceramics, glass, wood, bead and shell work
- photography, multimedia and media.
- sculpture

Successive Australian governments have recognised the economic and social multiplier effect of arts and culture in Aboriginal and Torres Strait Islander communities. Cultural knowledge leads to jobs and income based on artistic activity, connections to country and cultural experiences. The Indigenous visual arts and craft sector provides significant economic, social and cultural benefits, with visual arts the largest economic contributor to the Indigenous arts sector.4 Indigenous visual arts make an important contribution to the Australian arts economy, and Indigenous artists produce some of Australia’s most valuable works of art.5

The economic and social impact of First Nations arts and culture is particularly pronounced in regional and remote communities. Almost one in ten First Nations people in remote Australia receive income from First Nations arts (8.8%), compared to 2.9% in regional Australia and 2.8% in major

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5 Ibid.
cities. In many remote communities arts and cultural production provide the only feasible pathway towards long-term economic and cultural sustainability, and art production is the main source of commercial income for many remote communities with art centres.

Between 1990 and 2015, Indigenous art centres generated over $200 million in art sales. 86% of those sales were from art products and 9% from merchandise products. Around 40 percent of art sales are reinvested in the art centres, which are community hubs. They provide employment opportunities and other social and cultural benefits, as well as producing and marketing some of Australia’s most dynamic visual art. The types of arts and craft products being sold range from artworks, sculptures, carvings, boomerangs, didgeridoos, woven products, glass products to merchandise like tea towels, bags and cushion covers.

Recent trends have seen an increase in the market for First Nations merchandise and art products targeted to the tourist trade rather than high end art collectors. The 2014 Cooperative Research Centre for Remote Economic Participation Research Report, The Art Economies Value Chain Reports: Art business trading practices and policy views noted that the “main growth in sales [for the First Nations art market] was anticipated in the private buyers’ market, both Australian and international buyers, particularly in the tourist segment.” Cultural tourism is one of the world’s largest and fastest-growing tourism markets, and is directly connected to the growing demand for First Nations ‘style’ arts and crafts, which are often consumed alongside experiential aspects of tourism.

The value of Aboriginal and Torres Strait Islander arts far exceed their economic impacts. Many Aboriginal and Torres Strait Islander people participate in Indigenous arts, which strengthen cultural identity, community connectedness and wellbeing. The Australia Council’s recent research Living Culture: First Nations Arts Participation and Wellbeing (which drew on a collaboration with researchers from the ANU Centre for Aboriginal Economic Policy Research) found that First Nations people who creatively participate in First Nations arts or attend First Nations festivals are more likely to be studying or intend to in the future, to feel able to have a say within their community, and to report happiness.

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10 Original products that are made, designed, or produced by an Aboriginal or Torres Strait Islander artist.
11 Goods manufactured in bulk either in Australia or overseas, are adapted or purchased from First Nations artists.
14 These results are reinforced by the Interplay Project, a multi-year project by the Cooperative Research Centre for Remote Economic Participation (CRC-REP). The Interplay Project worked with remote communities to map the interrelationships between First Nations community priorities of culture, empowerment and community; and government priorities of education, employment and health. Bringing together stories and numbers, the results suggest that practising culture, including through arts participation, is the key to improving wellbeing for Aboriginal people in remote Australia. Australia Council for the Arts 2017, Living Culture: First Nations arts participation and wellbeing. Australia Council for the Arts, available at [http://www.australiacouncil.gov.au/research/living-culture/](http://www.australiacouncil.gov.au/research/living-culture/)
3. THE PROLIFERATION OF INAUTHENTIC ABORIGINAL AND TORRES STRAIT ISLANDER STYLE ART AND CRAFT PRODUCTS

3.1 The proliferation of inauthentic First Nations art and craft products

In recent years, rapid technological change has increased the potential for misappropriation of Aboriginal and Torres Strait Islander art and craft products, as well as their commercialisation and mass reproduction.\(^{15}\) The online availability of Indigenous designs has facilitated unauthorised reproduction and enabled Indigenous ‘style’ designs to be produced at a fraction of the cost of authentic works, flooding the market and making it difficult for authentic products to compete.

In this context, anecdotal evidence indicates that exploitation of Aboriginal and Torres Strait Islander cultural expressions by third parties for commercial gain is widespread, and that there has been a proliferation of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products in recent years,\(^{16}\) including in the form of imported non-authentic Indigenous arts, crafts and souvenirs from other countries, which are then sold in Australia as ‘Aboriginal and Torres Strait Islander art’. Certainly, from our engagement with the Aboriginal and Torres Strait Islander arts sector we are aware of many cases of misappropriation and increasing proliferation of inauthentic First Nations art and craft products, consistent with the findings in *Indigenous Art – Securing the Future*.\(^{17}\)

Council notes the findings of the Arts Law Centre, Indigenous Art Code, Copyright Agency | Viscopy, and the Fake Art Harms Culture campaign regarding the widespread availability of inauthentic Aboriginal and Torres Strait Islander arts and crafts products in what they describe as a multi-million dollar market for commercially produced goods, and usually made in India, Indonesia, and China.\(^{18}\) These products are targeted towards the tourist market, regularly made from non-traditional materials, and often feature inauthentic designs.

Indigenous Art Code undertook an investigation into the proliferation of inauthentic Aboriginal and Torres Strait Islander arts and crafts products and found that approximately 80 percent of the shops selling Aboriginal ‘style’ souvenirs were selling items that were inauthentic.\(^{19}\) Similarly, Shain Jackson, a project leader for Authentic Indigenous: Arts Resurgence Campaign, a Canadian group that promotes authentic Indigenous artworks, has estimated that up to 90% of what is labelled ‘Aboriginal-style’ may not have been made by Aboriginal people.\(^{20}\)

The Australia Council would welcome targeted research to determine the extent of this issue.

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\(^{17}\) Senate Inquiry, 2007


\(^{19}\) Indigenous arts community lobby Government to make it illegal to sell fake Aboriginal-style souvenirs, available at http://www.abc.net.au/news/2017-01-17/calls-to-make-fake-aboriginal-style-souvenirs-illegal/8187042

\(^{20}\) “It’s exploiting culture’ Australia mulls bill to ban sale of fake Indigenous art’, CBC Radio 17/2/2017
3.2 The cost of inauthentic First Nations arts and craft products

In the view of the Australia Council, the costs of inauthentic Aboriginal and Torres Strait Islander arts and craft products are threefold. Firstly, such products misappropriates Aboriginal and Torres Strait Islander arts and culture. Secondly, they misleads Australian consumers. Thirdly, they deny Aboriginal and Torres Strait islander artists economic and other opportunities.

The proliferation of inauthentic Aboriginal and Torres Strait Islander misappropriates the traditional cultural expressions of Australia's First Nations communities, which are an integral aspect of a community’s social and cultural environment, as well as its identity. For Indigenous cultures, traditional cultural expressions are central to identity, place and belonging. They are an expression of a unique and continuing tradition and have an important place in the continuing survival of Indigenous cultures.

Misappropriation prejudices the interests of the rightful custodians of cultural expressions and causes cultural harm to First Nations artists and their communities in a range of ways, including through the misuse and distortion of heritage, which may result in a feeling of losing heritage and control over culture, as well as spiritual or physical harm.21 The impact of cultural harm arising from the misappropriation of traditional cultural expressions has been recognised as a matter of Australian law. In Milpurrurru v Indofurn Pty Ltd,22 Von Doussa J awarded special punitive damages in recognition, *inter alia*, of the cultural hurt suffered by the artists as a result of the company's misappropriation of the designs and motifs from traditional Arnhem land cultural stories.

Misappropriation may also reduce First Nations participation in arts and cultural practice, undermining the many positive impacts of participation in the arts.23 At the recent Cultural Legacy meeting of the Association of Northern, Kimberley, Arnhem Aboriginal Artists (ANKAA), a senior Northern Territorian Aboriginal artist and musician stated that the loss of traditional cultural expressions is theft of Aboriginal culture.24 A Mowanjum artist from Western Australia also stated that "it makes us not want to paint anymore."25

The proliferation of inauthentic Aboriginal and Torres Strait Islander arts and craft products misleads Australian consumers (and international visitors), who may purchase products on the erroneous assumption of authenticity – and even on the assumption that their investment will benefit Aboriginal and Torres Strait Islander artists and communities. In this context, misleading representations regarding the authenticity of First Nations products cause a detriment to consumers.

More broadly, the loss of consumer confidence in Aboriginal and Torres Strait Islander arts and craft products may have a chilling effect on the value and market for authentic works. This is articulated by Woodhead, who states “the lack of consistency of documentation and verification processes has resulted in a wide range of ‘certification’ documentation, with varying levels of traceability. This creates confusion for customers and even financial losses for businesses, while also undermining

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22 (1994) 130 ALR 659
23 Recent Australia Council research has highlighted the strong relationship between participation in the arts and cultural maintenance (such as speaking a First Nations language or recognising homelands) and mainstream outcomes (such as education and employment). In this context, First Nations arts engagement supports empowerment, community connectedness and wellbeing among First Nations Australians – misappropriation disempowers First Nations people, and undermines this strong foundation. See further: Australia Council for the Arts 2017, *Living Culture: First Nations arts participation and wellbeing*, Australia Council for the Arts, available at http://www.australiacouncil.gov.au/research/living-culture/
24 The Association of Northern, Kimberley, Arnhem Aboriginal Artists (ANKAA) Cultural Legacy meeting held in Darwin, Northern Territory on 14 August 2017
25 The Association of Northern, Kimberley, Arnhem Aboriginal Artists (ANKAA) Cultural Legacy meeting held in Darwin, Northern Territory on 14 August 2017
the provenance efforts of reputable agents. When combined with poor quality art products, dubious provenance and inconsistent art product documentation are undermining the brand.26

Arts and culture make a significant contribution to the economic and cultural life of Australia’s Indigenous and Torres Strait Islander communities, particularly in regional and remote Australia. The proliferation of inauthentic works denies Aboriginal and Torres Strait Islander artists’ economic opportunities, removing the market incentive for creation and denying any return of benefits to the communities who have developed and maintained the underlying cultural expression.27

Third-party commercialisation without consent results in the proliferation of arts and craft products without due consideration of the cultural and economic interests of traditional owners. In order to adapt to market demand, such commercialisation may distort, misrepresent or disrespect the underlying cultural expression. Not only does this have an immediate impact on Aboriginal and Torres Strait Islander artists and their communities, but over the long term the Australia Council considers there would be a significant detrimental impact to Australian culture and artistic practice through the loss of market incentives for the creation of First Nations artistic work and cultural products.

If unaddressed, this could result in a further decline of Aboriginal and Torres Strait Islander engagement in arts and cultural practice – we are already seeing concerning declines in arts engagement in remote communities.28 It goes without saying that any further decline in artistic production would disadvantage First Nations artists and their communities who are unable to access the cultural and economic benefits of arts practice as well as consumers who would be unable to access a diverse range of Australian works of art.

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28 There were declines in First Nations creative arts participation rates in remote Australia between 2008 and 2014-15 (38% to 33%), driven by declines in remote NT (44% to 35%) and remote Queensland (39% to 30%). There were also significant declines in creative participation among females in remote Australia (40% to 33%). Ref to Living culture
4. THE PROTECTION OF AUTHENTIC ABORIGINAL AND TORRES STRAIT ISLANDER ARTS AND CULTURAL EXPRESSIONS

4.1 Protecting Aboriginal and Torres Strait Islander arts and cultural expressions

Traditional cultural expressions are integral to the economic, cultural and social life of Indigenous communities, embodying know-how and skills, transmitting core values and beliefs and manifesting identity. As stated by Terri Janke and Robynne Quiggin:

“One foundational principle underlies development of Indigenous culture and arts. That is, the need for Indigenous peoples to control their intellectual and cultural property and to manage it in appropriate ways. In order to positively contribute to the integrity of Indigenous cultural life, arts infrastructure must support Indigenous control of ICIP management. An essential part of this support is acknowledgement of local community authority, communal rights over cultural heritage material, and engagement of Indigenous people through consultation and prior informed consent mechanisms. This must be balanced with acknowledgment of the authority of individual artists and encouragement of creativity and innovation.”

Protecting traditional cultural expressions contributes to economic development, encourages cultural diversity and helps preserve cultural heritage. However, Australia’s current legal framework provides only limited recognition and protection for traditional cultural expressions.

4.2 Defining authentic Aboriginal and Torres Strait Islander cultural expressions

The question of what constitutes authentic Aboriginal or Torres Strait Islander arts and crafts is a complex one, influenced by the distinctive features and means of production of the product, as well as the cultural context and circumstances of its design or creation.

In Australia, Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people have a living heritage. Their connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, music, performing arts, visual arts and media arts, are some of the mediums for transmitting Indigenous cultural heritage. In this context, visual arts are central to identity, place and belonging for First Nations Australians. They are an expression of a unique and continuing tradition and have an important place in the continuing survival of Indigenous cultures.

Under international law, cultural expressions are defined as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” However, what constitutes a traditional cultural expression remains unsettled as a matter of international law. In the ongoing negotiations in the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ‘traditional cultural expressions’ are currently defined as “any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested”, including (inter alia) “tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodworking, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms” which are “characteristic of a community’s cultural and social

31 Article 1(a) of the Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore
identity and cultural heritage” and “maintained, used or developed by such community or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”

It remains to be seen whether the international community will agree to the draft definition outlined above and, if agreement is reached, whether Australia will choose to become party to the Convention. In the meantime, consideration of the legislation of other national jurisdictions is instructive.

The Indian Arts and Craft Act of 1990 (US) defines an authentic Indigenous arts and craft products as “any art or craft product made by an Indian”. Similarly, the Law of Panama defines authentic Indigenous art and craft as “…[a] work of art, item of dress, craft or other form protected by patent or copyright …[which] was created using traditional Indigenous methods and/or by Indigenous hands.”

Other national laws similarly focus on the importance of the relevant Indigenous community to a determination of whether a work constitutes a traditional cultural expression, namely that its distinctive characteristic is “is traditional cultural heritage passed on from generation to generation; which means that-in contrast with the individual, personal nature of the creativity represented by literary and artistic works proper, it is the result of impersonal creativity of unknown members of the nation or communities thereof.”

Similarly, the Australia Council’s Protocols for working with Indigenous artists defines Indigenous visual arts as “art created primarily by Aboriginal and Torres Strait Islander people, or based on the cultural expression of Indigenous Australian people. Indigenous visual arts cover a range of genres including: painting, printmaking (including etching and other intaglio processes, screen print, linocut), craft (including fibre and textile arts, ceramics, glass, wood, bead and shell work), photography, sculpture, and multimedia.”

For these reasons, the Australia Council respectfully submits that the key elements of a definition of authentic Aboriginal and Torres Strait Islander arts and cultural products would include:

- A ‘product’ including but not limited to art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles;
- Featuring a design or artistic work created by an Aboriginal or Torres Strait Islander person; or
- Upon which an Aboriginal or Torres Strait Islander traditional cultural expression appears or is manifested, irrespective of content, quality or purpose; and,

32 Article 1(a) of the Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore
33 Article 1(a) of the Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore
34 S104 (c)(1) Indian Arts and Craft Act of 1990- Indian refers to a First Nations person in the United States of America
37 Burundi, Cote d'Ivoire, Guinea, Kenya, the Philippines, Rwanda, Senegal and the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture.
38 Barbados, Cameroon, Central African Republic and Sri Lanka.
40 Australia Council for the Arts, Protocols for producing Indigenous Australian Visual Arts, Second edition, P.4

In circumstances of reproduction, the use of any such traditional cultural expression having been consented to by the original designer or traditional owner(s) of the expression.

Ultimately, however, the Australia Council considers that any definition of authentic Aboriginal and Torres Strait Islander arts and cultural products must be developed through consultation with Aboriginal and Torres Strait Islanders and their communities.

4.3 Current legal arrangements for the production, distribution, selling and reselling of authentic Aboriginal and Torres Strait Islander art and craft products and merchandise

Under Australian law, the principal legal mechanisms for protecting the traditional cultural expressions of Australia’s First Nations artists are under consumer protection law and through the intellectual property system.

(a) Consumer Protection

Section 18 of the Australian Consumer Law prohibits conduct that may be misleading or deceptive, or making false or misleading representations in trade or commerce, which includes the sale of artworks and other art and craft products such as souvenirs.

In ACCC v Australian Icon Products Pty Ltd (AIP) and others the sellers of souvenirs were prevented from making statements claiming that the souvenirs were made or painted by Aboriginal artists or were “Aboriginal art” when, in fact, they were not. In circumstances of misleading and deceptive conduct the ACCC – or any person or business that has suffered a loss as a result of the conduct - can take action against corporations and related individuals involved, and may apply to the court for an injunction or other orders.

While the Australian Consumer and Competition Commission (ACCC) has in the past used its powers to prevent misleading or deceptive conduct by prosecuting those who falsely market products as ‘Aboriginal-made’ or ‘authentic Aboriginal merchandise’, the Australian Consumer Law as currently drafted does not provide adequate protection against the misappropriation of traditional cultural expressions.

The scope of conduct prohibited under section 18 is narrow, capturing only representations which are false or misleading. This means that inauthentic products which misappropriate traditional cultural expressions are permissible as long as no assertion of authenticity is made. For instance, in ACCC v Farzad Nooravi and Homa Nooravi (trading as Doongal Aboriginal Art and Artefacts) the finding of misleading and deceptive conduct turned on the defendants’ actions in advertising artworks as ‘authentic’ when the artworks were created by three non-Indigenous white artists without consent of traditional owners.

(b) Intellectual Property

Aboriginal and Torres Strait Islander artists may also protect their original art works and designs under intellectual property law. The Designs Act 2003 allows individuals to register a design to obtain

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41 Blackman & Ors v Gant & Anor [2010] VSC 109
42 ACCC v Australian Icon Products Pty Ltd (Federal Court Proceedings Q33 of 2003); ACCC v Australian Aboriginal Art Pty Ltd, Henry Peter De Jonge, Bruce Leslie Read (Federal Court Proceedings Q131 of 2003).
43 ACCC v Farzad Nooravi and Homa Nooravi 920080 FCA 2021
It is also possible to use the trademark system to assist in the protection of traditional cultural expressions, including through the registration of Indigenous words and symbols under the Australian Trade Marks Act 1995, as well as the use of certification trademarks to identify authentic Indigenous arts. A certification trade mark shows that a trader’s goods and services meet an official set of standards. Standards commonly certified include quality, content, manufacturing method and geographic origin, but standards relating to cultural authenticity have been used in the past.

However, Council notes that Indigenous artists and their communities face particular challenges in respect of the recognition and enforcement of intellectual property rights. While there is increasing awareness of the need to prevent misuse of Indigenous cultural and intellectual property by both the community and the courts – including successive decisions which have extended Copyright Act 1968 protections to better accommodate Indigenous property rights, there nevertheless remain significant barriers for First Nations artists and communities who seek to assert their property rights.

As outlined above, most traditional cultural expressions form part of longstanding cultural traditions which are passed down across generations, shared throughout a community and often do not have an identifiable ‘author’. The existing intellectual property regime – with requirements of individual ownership, originality and limited terms of protection - does not appropriately reflect the manner in which arts and cultural works are created in Aboriginal and Torres Strait Islander communities.

Further, Australia’s intellectual property system is of only limited utility in preventing the misappropriation of the style of First Nations works, such as painting in dots or using symbols that may be directly taken from Aboriginal and Torres Strait Islander art and reproduced on souvenirs or other mass-produced arts and crafts products. Australia does not have legislation that prevents alteration, distortion or misuse of traditional symbols or designs that may be part of the heritage of particular Indigenous language groups. As a result, First Nations artists may be unable to obtain or enforce the intellectual property rights necessary to enable them to protect and commercially exploit their cultural expressions.

44 Many Aboriginal and Torres Strait Islander art centres are members of Viscopy, the Australian copyright collecting society for visual artists which allows users to license images of the works by arts centre artists for a negotiated fee. In 1999 the National Indigenous Arts Advocacy Association (NIAAA) registered two certification trade marks in conjunction with its Certificate of Authenticity program, which is no longer in operation. In that instance, Certification Trade Marks proved to be insufficiently flexible to take into account the different needs and situations of Indigenous communities around the country, and further complicated by an overly complex test for Aboriginality, resulting in over 75% of applicants failing to satisfy the test.

45 See for example Yumbululu v Reserve Bank of Australia (1991) 12 IPR 41; Bulun Bulun & M v R & T Textiles Pty Ltd (1998), 41 Intellectual Property Reports 513
46 Janke and Dawson note that whilst copyright laws provide rights to individual Indigenous artists, the communal rights of Indigenous clans and groups to their traditional cultural expressions needs further consideration. These issues have been explored by Milpururrru v Indofurn and Bulun Bulun v R & T Textiles. Indigenous artists have obligations to their communities through the customary law to deal with traditional cultural expressions, however this obligation is not sufficiently recognised through the broader intellectual property framework. See further: Janke T and Dawson P (2012), New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system.
47 The challenges inherent in copyright are only compounded for designs, with the Designs Act 2003 (Cth) replicating the limited protection available under the Copyright Act while adding the additional requirement of registration as a precondition for protection.
48 Designs and copyright protection do not extend to utilitarian aspects, concepts, formulaic or other non-original elements, colour, subject matter and techniques used to create a work, and permit the imitation of non-original elements or underlying ideas and concepts of works. As a result, elements of style often fall outside the scope of intellectual property protection. See further World Intellectual Property Organization, ‘Traditional Cultural Expressions/Expressions or Folklore: Legal and Policy Options’, WIPO/GRTKF/IC/6/3
4.4 Options to promote authentic products for the benefit of artists and consumers

The Australia Council considers there are a number of options that could be considered to promote authentic products for the benefit of artists and consumers.

(a) A label of authenticity

There is currently no consistency with the type of provenance documents provided to consumers of Aboriginal and Torres Strait Islander art and craft products. Some art centres provide certification, biographies, and essays on the artists. Private art businesses are known to provide personal guarantees, certificates of authenticity, biographies, photos of the work in progress, and descriptions of the works' stories. Many businesses selling Indigenous art base the level of provenance provided on the cost of the work, and there is anecdotal evidence of ‘fake’ documents, undermining the effectiveness of genuine provenance documentation.

The Australia Council supports the introduction of a label of authenticity which could be placed on art or cultural products and services to denote genuine Aboriginal or Torres Strait Islander origin. A number of jurisdictions currently protect consumers from inauthentic art and craft products through the utilisation of labels of authenticity. In 1999, the National Indigenous Arts Advocacy Association (NIAAA) developed and implemented a label of authenticity - a national certification system for the authentication of works of Aboriginal and Torres Strait Islander people. While the NIAAA system was later dissolved due to lack of use, Council considers there remains merit in considering whether a properly designed, implemented and publicised system could be successful.

Many art centres and galleries already have certificates of authenticity, which, if standardised, could provide the provenance of artworks, track sales, and help protect authentic Aboriginal and Torres Strait Islander arts and crafts. For these reasons, the Australia Council respectfully recommends that, in consultation with Aboriginal and Torres Strait Islander artists and their communities, consideration be given to the development of a label of authenticity and associated certification trade mark.

(b) Art Centres

The Australia Council considers the work of arts centres to be integral to the promotion of authentic Aboriginal and Torres Strait Islander arts and crafts. Aboriginal art centres are governed by Aboriginal people and help support Aboriginal artists careers. The artist receives a share of the income from works sold and a portion of sales is also reinvested in the art centre. These art centres promote and produce authentic Aboriginal and Torres Strait Islander arts and craft products, and

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51 Ibid at 13
52 Ibid at 12
53 For example, in New Zealand, the authenticity of products featuring traditional cultural expressions is protected through a label of cultural authenticity, the toi iho certification mark. For further information, see: http://www.toiho.co.nz/about-toi-iho/
54 Council notes that while the positive intentions of the NIAAA were widely acknowledged, not all people involved with Indigenous arts and culture were persuaded of the value of such a label. Brenda Croft, a member of the Gurindji nation and former Curator of Indigenous Art at the Art Gallery of Western Australia, raised several concerns, the most significant of which related to the use of the term "authentic". Croft’s concern was that the use of the term would require Indigenous artists to validate their identities to others. In her view the primary need is for public education so that non-Indigenous people (including buyers of art and craft works) have a better appreciation of the complexities of contemporary Indigenous cultural expression. See further Artlink Vol 20 #1, page 85.
enhance the wellbeing of the communities. Many of these arts centres receive funding through Australia Council grants.

Until recently, for example, the APY Art Centre Collective was able to maintain a presence in the Rocks, Sydney. This provided an outlet for the arts centre to promote their works at a high tourist area, where there is often a prevalence of inauthentic Indigenous art. By providing access to authentic Indigenous and Torres Strait Islander arts and crafts, it provides consumers with the ability to make an ethical and educated choice.

(c) Industry events

The Australia Council supports the promotion of Aboriginal and Torres Strait Islander arts and crafts through vital Aboriginal arts industry events. Events such as Cairns Indigenous Art Fair, the Darwin Aboriginal art fair, Blak art markets in NSW, Desertmob, Revealed markets in WA, and Tarnathi arts market in SA, are an excellent way to promote authentic products for the benefits of artists and consumers. For example, in 2016 the Cairns Indigenous Art Fair received 50,000 visitors and sold $670,000 worth of artworks to consumers, collectors and public institutions.

(d) Ethical buying guide

An important aspect of promoting authentic Aboriginal and Torres Strait Islander arts and crafts is the education of consumers. Ethical Buying Guides, such as that produced by the Association of Northern, Kimberley, Arnhem Aboriginal Artists (ANKAA) provide consumers with information on identifying authentic Aboriginal art. Wide dissemination of such guide, especially in tourist areas, would help promote the buying and selling of authentic arts and crafts.

4.5 Options to restrict the prevalence of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products and merchandise in the market.

The Australia Council considers there are a number of options that could be considered to reduce the prevalence of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products.

(a) Recognition of Aboriginal and Torres Strait Islander intellectual property rights

In line with our legislative function to support and promote the development of markets and audiences for the arts, the Australia Council considers that incentives for the creation and production of artistic works and protection of creators’ rights are fundamental to maintaining a diverse and sustainable Australian arts sector.

Intellectual property rights are enshrined in Article 27 of the Universal Declaration of Human Rights, which provides that “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; (2) everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

These rights are further emphasized by Article 15 of the International Covenant on Economic, Social and Cultural Rights, Article 19 of the International Covenant on Civil and Political Rights and other international instruments, including Article 31 of the Declaration on the rights of Indigenous Peoples, which states that “Indigenous Peoples have the right to maintain, control, protect and develop their traditional cultural expressions.”

55 Australia Council Act 2013 section 9(1)(e)
56 Article 31, Declaration on the Rights of Indigenous Peoples
As outlined above, Aboriginal and Torres Strait Islander artists and their communities face particular challenges in relation to the recognition and enforcement of intellectual property rights. Introduction of specific legislation to protect the cultural and intellectual property rights of Indigenous communities would address gaps in the current framework. Janke and Dawson outline the form that such legislation could take in New Tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system, which was developed in response to consultation undertaken by IP Australia in 2012.  

Importantly, as articulated by Terri Janke, any such legislation should:

- Allow for the nature of Indigenous intellectual property rights to be defined according to customary law.
- Recognise the perpetual nature of indigenous folklore and knowledge.
- Exempt traditional cultural expressions from requirements of originality and material form.
- Enable moral rights of attribution to the indigenous communities rather than just individual artists.
- Provide a right of civil action against infringers.
- Establish collecting agencies for the charging of fees for the use of heritage.

The introduction of specific legislation to protect the intellectual property rights of Indigenous communities would be in line with the Declaration on the Rights of Indigenous Peoples, which Australia announced support for in 2009. Article 31 of the Declaration states that Indigenous peoples “have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

Effective intellectual property laws play a critical role in the realisation of diversity in the arts, as they function to incentivise and protect the creation, publication and dissemination of diverse cultural expressions, enhance respect and support for cultural diversity. Accordingly, legal frameworks which protect, promote and enable a diversity of cultural expressions enrich Australia by making our communities more vibrant and creative and ensuring that Australians from all backgrounds are given the opportunity to participate in and contribute to Australia and its social, economic and cultural life. The creation of Indigenous intellectual property rights would also enable First Nations communities to negotiate access and benefit sharing agreements, which would strengthen the ability of Indigenous and Torres Strait Islander artists and communities to benefit from the commercial exploitation of their traditional arts and culture.

In the absence of effective protection from misappropriation, the Australia Council notes that Australian artists, including Aboriginal and Torres Strait Islander artists, may be prevented or discouraged from strengthening, performing, exhibiting and distributing their arts and culture, a very real possibility which would diminish all Australians, undermining our diversity and cultural vibrancy and damaging our cohesion as a diverse, multicultural society.

While acknowledging the complexity of this issue, for the reasons outlined above, the Australia Council is of the view that consideration should be given to reform of the Australian intellectual property system to enable the recognition and protection of Indigenous intellectual property rights. Such reform which would play a critical role in preventing the misappropriation of First Nations cultural expressions, including authentic arts and crafts. Any legislative reform in this regard would need to consider the implications for creators’ income from their creative work over time, as well as

for audiences’ continued access to Australian works in Australia and beyond, and should be developed in consultation with Aboriginal and Torres Strait Islander people and their communities.

(b) Amendment of the Australian Consumer Law to penalise sellers of inauthentic Aboriginal and Torres Strait Islander arts and crafts products

Given the current challenges facing First Nations artists and communities in securing a remedy under the Australian Consumer Law, Council agrees with the recommendations of the Arts Law Centre, Indigenous Art Code, Copyright Agency | Viscopy, and the Fake Art Harms Culture campaign that it would be appropriate to amend the Australian Consumer Law to enable the ACCC to more effectively prevent the selling and distribution of inauthentic art and craft products.

This could be achieved through the implementation of a specific offence to supply or offer commercial goods to a consumer that include an Indigenous cultural expression unless it is supplied by or with the consent of an Indigenous artist or relevant Indigenous community, and would send an important signal about Australia’s commitment to reducing the misappropriation of Aboriginal and Torres Strait Islander arts and culture.

Any legislative reform in this regard should be developed in consultation with Aboriginal and Torres Strait Islander artists and their communities so as to draw on the expertise of Indigenous lawyers, advocates and cultural custodians.

(c) Protocols

Another option to restrict the proliferation of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products is through the use of protocols for working with Indigenous artists. Protocols are appropriate ways of using Indigenous cultural material, and interacting with Indigenous artists and Indigenous communities. They encourage ethical conduct and promote interaction based on good faith and mutual respect. Responsible use of Indigenous cultural knowledge and expression will ensure that Indigenous cultures are maintained and protected so they can be passed on to future generations.

The Australia Council has protocols for working with Indigenous artists, including in the visual arts sector, which spell out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material. Specifically, the Protocols provide nine principles that safeguard cultural heritage. These principles include respect, interpretation, integrity and authenticity, secrecy and confidentiality, attribution and copyright, proper returns and royalties, continuing cultures and recognition and protection.

Adherence to these protocols is a condition of funding for applicants to our grants program who are working with Indigenous Australian artists and also serve as good guidelines for the general public to respect and consult with Aboriginal and Torres Strait Islander communities about selling and distributing Aboriginal and Torres Strait Islander arts. While these measures make an important contribution to the protection of authentic Aboriginal and Torres Strait Islander traditional cultural expressions, their capacity to restrict the proliferation of inauthentic products is limited by their voluntary nature.

(d) Indigenous Art Code

The Indigenous Art Code, which was a key recommendation of the 2007 Senate Inquiry into the Future of Indigenous Art, was developed initially by the National Association for the Visual Arts and

the Australia Council. The Code encourages good commercial practice and ethical conduct in dealing with both artists and artworks by setting standards for fair and ethical trades with artists, transparency with the promotion and sale of artworks, and ensuring a fair dispute resolution system for disputes arising under the Code.\textsuperscript{60} For artists, the Code provides a standard code of conduct for agreements with artists and record keeping and reporting. Under the Code, dealers must not misrepresent the authenticity or provenance of a work and whether the artwork has been created by an Indigenous artist.

The voluntary nature of the Code means that not all artists and galleries are signatories and has significantly limited its effectiveness as a mechanism to reduce the proliferation of inauthentic artworks. Artists, dealers, and consumers need to be aware of the Code for it to be effective. Council recommends the marketing of the Indigenous Art Code to artists and consumers in an effort to increase its utilisation. Consideration could also be given to making the Code mandatory for all dealers, galleries and other sellers of Aboriginal and Torres Strait Islander arts and crafts.

\textbf{(e) An awareness raising campaign}

While the measures outlined above each make an important contribution to efforts to restrict the proliferation of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products and merchandise in the market, the Australia Council considers that one of the most important mechanisms at the disposal of policy makers would be an awareness raising campaign to increase community understanding of the costs of inauthentic art and craft products, as well as other resources to enable regional Indigenous arts peak bodies to provide education to consumers about buying ethically sourced and authentic art.

The Australia Council recommends that more work is done to educate consumers and the industry about provenance practices, which will help ‘rebuild the brand’ of authentic First Nations works and contribute to artist and consumer confidence.

5. CONCLUDING REMARKS

The Australia Council has a statutory role to support Aboriginal and Torres Strait Islander arts practice and is committed to strengthening Australia’s Aboriginal and Torres Strait Islander arts and cultural ecosystem. The Australia Council considers that the proliferation of inauthentic Aboriginal and Torres Strait Islander ‘style’ arts and craft products and merchandise comes at a significant cost to Aboriginal and Torres Strait Islander artists, their communities and the broader Australian public.

In this context, the Australia Council respectfully recommends the Committee consider options to address this issue as a matter of priority, including potential amendments to Australia’s intellectual property and consumer protection regimes as well as non-legislative mechanisms such as protocols, authenticity labels and awareness raising activities.

\textsuperscript{60} The establishment of a code of conduct was a key recommendation of the 2007 Senate Inquiry report \textit{Indigenous Art – Securing the Future}.  

APPENDIX A

ABOUT THE AUSTRALIA COUNCIL FOR THE ARTS

The Australia Council is the Australian Government’s arts funding and advisory body. The Council’s purpose is to champion and invest in Australian arts, by supporting excellence across all art forms and leveraging investment to support and build a vibrant arts sector. The Australia Council is a national advocate for the arts and works to increase national and international access to Australian arts and culture.

The Australia Council was established as a Commonwealth statutory authority in 1975, and its functions were updated under the Australia Council Act 2013. They are to:

(a) support Australian arts practice that is recognised for excellence;
(b) foster excellence in Australian arts practice by supporting a diverse range of activities;
(ba) support Aboriginal and Torres Strait Islander arts practice;
(bb) support Australian arts practice that reflects the diversity of Australia;
(bc) uphold and promote freedom of expression in the arts;
(bd) promote community participation in the arts;
(c) recognise and reward significant contributions made by artists and other persons to the arts in Australia;
(d) promote the appreciation, knowledge and understanding of the arts;
(e) support and promote the development of markets and audiences for the arts;
(f) provide information and advice to the Commonwealth Government on matters connected with the arts or the performance of the Council’s functions;
(g) conduct and commission research into, and publish information about, the arts;
(h) evaluate, and publish information about, the impact of the support the Council provides;
(i) undertake any other function conferred on it by the Act or any other law of the Commonwealth;
(j) do anything incidental or conducive to the performance of any of the above functions.

The Australia Council is a Corporate Commonwealth entity under the Public Governance Performance and Accountability Act 2013.

The Australia Council’s Strategic Plan 2014-19, A Culturally Ambitious Nation, guides the work of the Council, including the four strategic goals:

- Australian arts are without borders
- Australia is known for its great art and artists
- The arts enrich daily life for all
- Australians cherish Aboriginal and Torres Strait Islander arts and culture.