



Aboriginal and Torres Strait Islander Visual Arts and Crafts

Draft report overview



This is a draft report prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

The Productivity Commission acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their Cultures, Country and Elders past and present.

Aboriginal and Torres Strait Islander people should be aware that this publication may contain the names of people who have passed away.

The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

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Opportunity for comment

The Commission thanks all participants for their contribution to the study and now seeks additional input for the final report.

You are invited to examine this draft report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by Monday 29 August 2022.

Further information on how to provide a submission is included on the study website: www.pc.gov.au/inquiries/current/indigenous-arts

The Commission will prepare the final report after further submissions have been received and it will hold further discussions with participants. The Commission will forward the final report to the Government in November 2022.

Commissioners

For the purposes of this study and draft report the Commissioners are:

Romlie Mokak Commissioner

Lisa Gropp Commissioner

Terms of reference

I, the Hon Josh Frydenberg MP, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake a study into the nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in these markets.

Background

The Australian Government recognises that art is an important way for Aboriginal and Torres Strait Islander peoples to tell stories, share and strengthen cultures and connection to Country, promote understanding of history, strengthen communities, and expand economic opportunities. Aboriginal and Torres Strait Islander art is a vital part of Australia's identity and makes a large contribution to the economy.

A significant and increasing proportion of products in the 'style' of Aboriginal and Torres Strait Islander arts and crafts that are sold in Australia are imitations that do not have any connection to Aboriginal and Torres Strait Islander peoples and provide no economic benefit to their communities. These products cause offence and harm to Aboriginal and Torres Strait Islander peoples and cultures and mislead consumers.

The House of Representatives *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (the Report), tabled in 2018, found that there is a lack of information and analysis on the markets for Aboriginal and Torres Strait Islander arts and crafts. Recommendation 1 of the report stated: The committee recommends as a matter of urgency that the Productivity Commission conducts a comprehensive inquiry into the value and structure of the current markets for First Nations art and crafts.

The Government Response to this Report was tabled in Parliament on 2 September 2020. The Government agreed to Recommendation 1 of the Report, stating: The Government will commission a Productivity Commission study into the nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in these markets.

Scope of the inquiry

The Productivity Commission is asked to examine the value, nature and structure of the markets for Aboriginal and Torres Strait Islander arts and crafts and policies to address deficiencies in the markets.

In undertaking the study, the Commission should:

1. examine the nature and structure of the different parts of the domestic and international markets including authentic and inauthentic products
2. identify deficiencies and barriers in the markets and how they affect artists and other stakeholders
3. assess costs, benefits, governance arrangements, risks, practicalities and implementation challenges of any policy responses. In doing so, the Commission should have regard to:
 - 3.1 both regulatory and non-regulatory responses to the problems in the relevant markets, including education and social marketing measures, labelling and other certification arrangements, industry codes and the role of existing consumer and intellectual property laws

- 3.2 the impacts on Aboriginal and Torres Strait Islander artists, and more broadly, the Australian Indigenous and the wider community from policy and regulatory reform
- 3.3 the advantages and disadvantages of current initiatives that intend to remedy problems in the Aboriginal and Torres Strait Islander art and craft markets, and the lessons that can be learnt from them
- 3.4 proposing possible policy and regulatory responses to address the identified deficiencies in the markets
- 3.5 where it is feasible, indicate any quantitative estimates of the benefits, costs and commercial impacts of policy reforms.

In undertaking this research, the Commission should also consider:

4. House of Representatives Standing Committee reports, including the *Indigenous Affairs inquiry into the impact of inauthentic art and craft in the style of First Nations peoples* and submissions received as part of the development of the Indigenous Visual Arts Industry Action Plan being led by the Australian Government and to be released in the first half of 2021.

Process

The Commission is to consult broadly, particularly with Aboriginal and Torres Strait Islander peoples, communities and organisations. The final report should be provided within 15 months of the receipt of these terms of reference.

The Hon Josh Frydenberg MP
Treasurer

[Received 5 August 2021]

Disclosure of interests

The *Productivity Commission Act 1998* specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions they must disclose those interests.

- Commissioner Mokak advised that one of his family members is an employee of the National Art School, Sydney and was previously employed by the National Association for the Visual Arts.

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Acknowledgments

The Productivity Commission thanks members of the community as well as organisations and government agencies who have provided data and other information for use in this study. We would particularly like to thank Aboriginal and Torres Strait Islander people and organisations, who generously shared their stories and insights with the Commission. We would like to thank Desert and Aboriginal and Torres Strait Islander art centres for supporting our work by contributing data.

The artwork used in this publication is adapted from
River of Knowledge
by Luke Penrith



Abbreviations

AAB	Aboriginal Arts Board
AACHWA	Aboriginal Art Centre Hub of Western Australia
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCO	Aboriginal and Torres Strait Islander community-controlled organisation
ACL	Australian Consumer Law
ADR	Alternative dispute resolution
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANKA	Arnhem, Northern and Kimberley Artists
APY	Anangu Pitjantjatjara Yankunytjatjara
ATSIC	Aboriginal and Torres Strait Islander Commission
Australia Council	Australia Council for the Arts
AWEP	Arts Worker Extension Program
BWA	Better World Arts
CCA	Competition and Consumer Act 2010 (Cth)
CPA	Creative Partnerships Australia
CTM	Certification trade mark
DAAF	Darwin Aboriginal Art Fair
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
GFC	Global Financial Crisis
GIVAI	Growing the Indigenous Visual Arts Industry
HoRSCIA	House of Representatives Standing Committee on Indigenous Affairs
IACA	Indigenous Art Centre Alliance
IACB	Indian Arts and Crafts Board
IartC	Indigenous Art Code Limited
ICIP	Indigenous Cultural and Intellectual Property
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources
ILA	Indigenous Languages and Arts
IP	Intellectual property
IPP	Indigenous Procurement Policy
IVAIS	Indigenous Visual Arts Industry Support

KALACC	Kimberley Aboriginal Law and Culture Centre
NATSISS	National Aboriginal and Torres Strait Islander Social Survey
NAVA	National Association for the Visual Arts
NFT	Non-fungible token
NIAA	National Indigenous Australians Agency
NIAAA	National Indigenous Arts Advocacy Association
NIACA	National Indigenous Arts and Cultural Authority
NIVA	National Indigenous Visual Arts
ORIC	Office of the Registrar of Indigenous Corporations
QAGOMA	Queensland Art Gallery and Gallery of Modern Art
RIS	Regulatory Impact Statement
SAM	Stories Art Money database
TAFE	Technical and Further Education
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
VET	Vocational Education and Training
WIPO	World Intellectual Property Organization

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 art 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 about \$250 million in 2019–20 — this includes \$30–47 million in artwork sales through art centres and at least \$83 million in sales of merchandise and consumer products (mostly souvenirs) bearing Aboriginal and Torres Strait Islander art and designs.**
 - While a small number of artists command high prices, the average income for the 5800–7700 artists who sold art through an art centre in 2019–20 was just over \$2700. For independent artists, average income was about \$6000.
- * **Inauthentic arts and crafts — predominantly Indigenous-style consumer products not created by Aboriginal and Torres Strait Islander people — are a pervasive and longstanding problem. They disrespect and misrepresent culture and, by misleading consumers and denting confidence in the market, they deprive Aboriginal and Torres Strait Islander artists of income. Inauthentic products accounted for well over half of spending on Aboriginal and Torres Strait Islander souvenirs in 2019–20.**
- * **Mandatory labelling of *inauthentic* products would raise consumer awareness and help them distinguish between authentic and inauthentic products, impose a negligible compliance burden on Aboriginal and Torres Strait Islander artists (and their commercial partners), and involve modest establishment and administration costs.**
- * **Some visual arts and crafts make use of Indigenous Cultural and Intellectual Property (ICIP), such as sacred symbols, without the authorisation of traditional custodians. This undermines customary laws and limits the economic benefits flowing back to Aboriginal and Torres Strait Islander people. Legal recognition and protection of ICIP is patchy, with very few limits on whether, how and by whom ICIP is used in visual arts and crafts.**
- * **A new law that strengthens protection for aspects of ICIP used in visual arts and crafts would formally recognise the interests of Aboriginal and Torres Strait Islander communities in their cultural assets, promote respectful collaborations and allow for legal action where protected cultural assets are used in visual arts and crafts without the authorisation of traditional owners.**
- * **Art centres assist thousands of established and emerging artists to practise their arts and crafts and engage in the marketplace; they fulfil important cultural and social roles. Other organisations provide vital services to artists — including addressing instances of unethical conduct from other market participants. Improving funding and the effectiveness of support services, as well as strengthening the Aboriginal and Torres Strait Islander arts sector workforce, will be critical for future growth. An independent evaluation of Australian Government funding to the sector — undertaken in partnership with Aboriginal and Torres Strait Islander people — is needed to inform future funding needs, objectives and strategic priorities.**

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. Aboriginal and Torres Strait Islander arts and crafts markets have grown and thrived because of the talents and skills of artists, the cultural value artists and communities derive from the practice of art and the works 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

Since Yolŋu art was first sold from the town of Yirrkala in the Northern Territory nearly a century ago, the sector has grown to generate sales of about \$250 million each year. About 19 000 Aboriginal and Torres Strait Islander people receive income from the sale of visual arts; and many more Aboriginal and Torres Strait Islander people are employed as art workers or work in related industries such as tourism. Many of these employment opportunities are created by community-controlled and led organisations, building on local strengths and skills.

But as the demand for Aboriginal and Torres Strait Islander art has grown, so have production and sales of inauthentic visual arts and crafts, which have no connection to culture and community. These products are not made by Aboriginal and Torres Strait Islander artists nor are they produced under a licensing agreement with an Aboriginal and Torres Strait Islander artist. Such inauthentic products erode the market share of authentic Aboriginal and Torres Strait Islander products, weaken consumer confidence, and misrepresent Aboriginal and Torres Strait Islander cultures.

Often, inauthentic products are made without cultural authorisation (or permission) from traditional owners to use Indigenous Cultural and Intellectual Property (ICIP — discussed in detail below). This disregards and disrespects traditional law and customs and means certain stories, images and styles are used in inappropriate ways or without compensation to the communities to whom these knowledges and expressions belong.

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

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

Concerns about inauthentic Aboriginal and Torres Strait Islander arts and crafts — and works produced without the relevant cultural permissions — have been raised by artists and communities for many years, and 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, which 'do not have any connection to Aboriginal and Torres Strait Islander peoples, provide no economic benefit to their communities ... and mislead consumers'.

What we have been asked to do and next steps

Following a recommendation from the House of Representatives, the Australian Government tasked the Productivity Commission with measuring the value, nature and structure of the markets for Aboriginal and Torres Strait Islander visual arts and crafts, identifying deficiencies and barriers in the markets and how they affect artists and other participants; and assessing costs, benefits, governance arrangements, risks, practicalities and implementation challenges of any policy and regulatory responses.

This draft report presents the Commission's findings on the size and structure of markets for Aboriginal and Torres Strait Islander visual arts and crafts, including inauthentic products. It makes draft recommendations to improve the operation of those markets to reduce the prevalence of inauthentic arts and crafts and the harms they cause, empower Aboriginal and Torres Strait Islander people to control and protect their cultural assets, and strengthen the capacity of artists and communities to participate in and benefit from trade in visual arts and crafts. The Commission is seeking feedback on these draft recommendations ahead of the publication of a final report in November 2022.

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

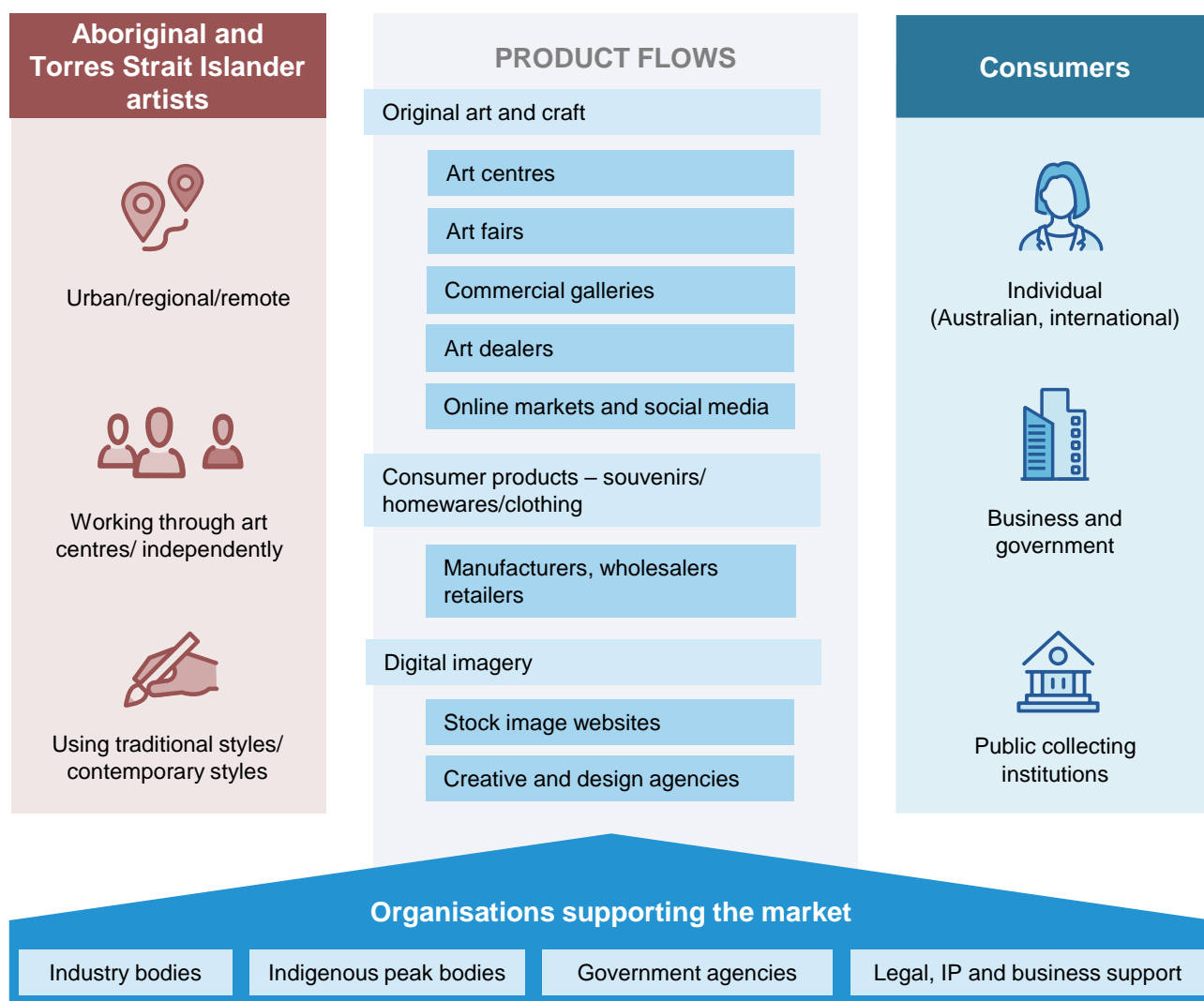
Aboriginal and Torres Strait Islander visual arts and crafts have been commercialised in Australia since the 1930s. While the practices, skills and knowledges that are central to art making have existed for thousands of years, commercialisation has transformed the way Aboriginal and Torres Strait Islander visual arts and crafts are consumed and expanded the range of products and production methods. Aboriginal and Torres Strait Islander visual arts and crafts — whether authentic or not — 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 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. The diversity of products — which range from artworks that sell for hundreds of thousands of dollars to souvenirs that are sold in tourist shops — coupled with the numerous sales channels have created a complex marketplace (figure 1).

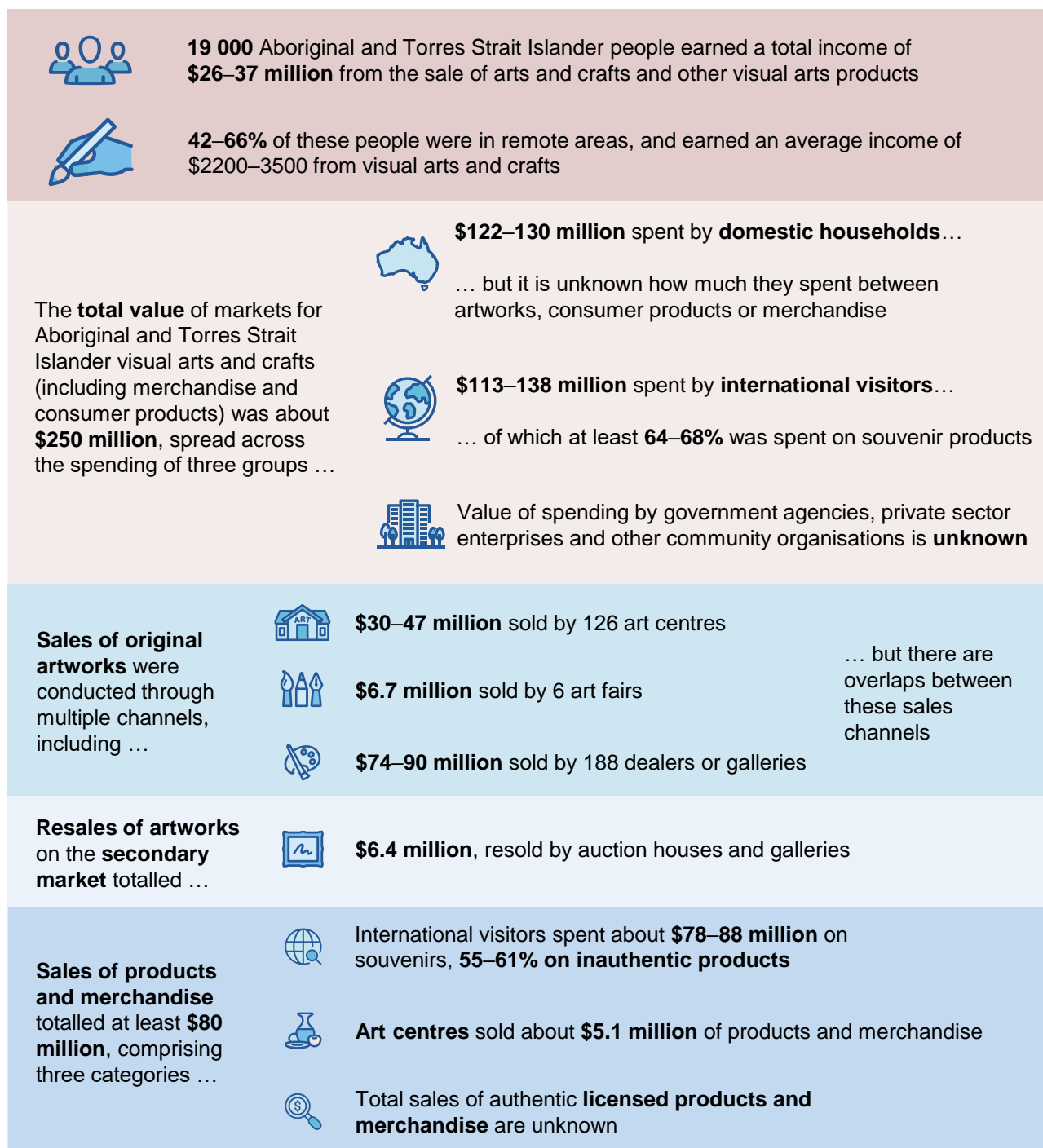
Figure 1 – Aboriginal and Torres Strait Islander arts and crafts supply chain



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

The economic contribution of Aboriginal and Torres Strait Islander visual arts and crafts has grown considerably. Most artworks are produced by artists working in approximately 120 art centres, mainly in remote locations. 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 art centre sales, although there has been a noticeable increase in the sales of cultural artefacts and sculptures.

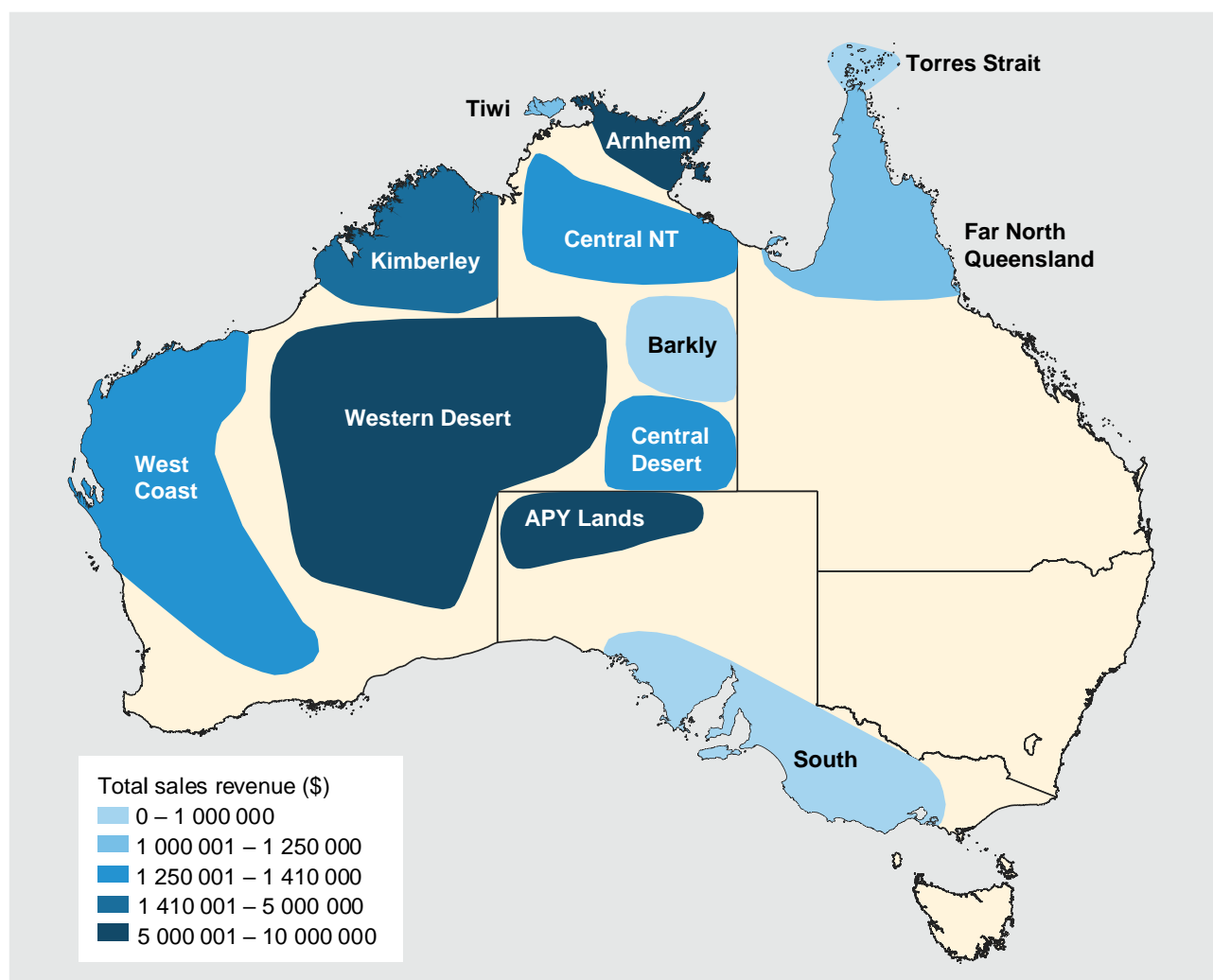
Figure 2 – Sales and income of key market segments in 2019-20^{a,b}



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 scale of art production across different regions (figure 3). Most art centres are located in remote communities, where they are often one of the few (or sometimes, the only) organisations offering sustainable employment. In remote areas of Australia, up to 1 in 10 Aboriginal and Torres Strait Islander people earn income from the sale of arts and crafts — and many spend a significant amount of unpaid time in activities that promote cultural maintenance and cultural transmission, such as teaching artistic techniques to younger people.

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



a. Data refers to 2020–21. The geographic areas for the art regions depicted are intended to be illustrative, not definitive boundaries. **b.** While there are some art centres that operate in New South Wales, Victoria and south-east Queensland, the SAM database does not cover sales from these art centres. **c.** 'APY Lands' refer to the lands of the Anangu Pitjantjatjara Yankunytjatjara

Source: Commission estimates based on unpublished Desart data (Stories Art Money (SAM) database).

Sales of merchandise — including homewares, clothing and souvenirs sold by art centres and general retailers — have grown strongly, and account for at least 29% 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 mass-produced and sold by third parties. As a result of licensing, products designed by Aboriginal and Torres Strait Islander artists are being mass produced and sold by major retailers such as

Bunnings, as well as smaller ones. The average income from licensing agreements for Aboriginal and Torres Strait Islander artists increased by more than 50% between 2019 and 2021.

Overall, **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 about \$250 million in 2019–20**. Artists received about 10–15% of the total value of sales across all market segments. While some artists are well known and command high prices for their works, the income of most artists remains low — for artists who sold art through art centres in 2019–20, their average income was just over \$2700. The average income of independent artists was about \$6000. This reflects both 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, and the fact that many Aboriginal and Torres Strait Islander artists sell only a few artworks each year. Licensing agreements have increased in number and value; however, they still represent a relatively small share of overall sales.

While trade in Aboriginal and Torres Strait Islander visual arts and crafts has grown and diversified, there are some complex and longstanding issues affecting the sector. The prevalence of inauthentic art, limited legal protections and gaps in capacity across the sector impose economic costs and cultural harm and prevent the market from reaching its potential.

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

Inauthentic arts and crafts have long been a feature of the market. Indeed, the prevalence of inauthentic arts and crafts, and the seriousness of the harms they cause, were the impetus for this study.

While views on what constitutes authentic art vary, the notion that some artwork is less authentic, real or genuine than other art is widely acknowledged. The Commission considers that Aboriginal and Torres Strait Islander authorship — that is, an Aboriginal and Torres Strait Islander person created or authored the work or product — is the most important determinant of whether or not Aboriginal and Torres Strait Islander visual arts and crafts are authentic. That said, many Aboriginal and Torres Strait Islander artists choose to enter into licensing agreements with third parties (for example, to have their art reproduced or used in mass-produced merchandise); products resulting from these arrangements are also considered to be authentic (box 1). Many participants in this study saw authorship by an Aboriginal and Torres Strait Islander person as a key factor in determining authenticity.

Box 1 – The Commission’s definition of authentic Aboriginal and Torres Strait Islander visual arts and crafts

A product or artwork is considered *authentic* Aboriginal and Torres Strait Islander visual art or craft if it is:

- an original piece authored (or co-authored) by an Aboriginal and Torres Strait Islander person or
- produced under a licensing agreement with the Aboriginal and Torres Strait Islander artist(s).

Aboriginal and Torres Strait Islander visual arts and crafts that do not meet these criteria, including those that infringe the copyright of an Aboriginal and Torres Strait Islander artist’s work, or are Indigenous-style arts and crafts made by non-Indigenous people without licensing agreements, are considered *inauthentic*.

How big an issue are inauthentic arts and crafts?

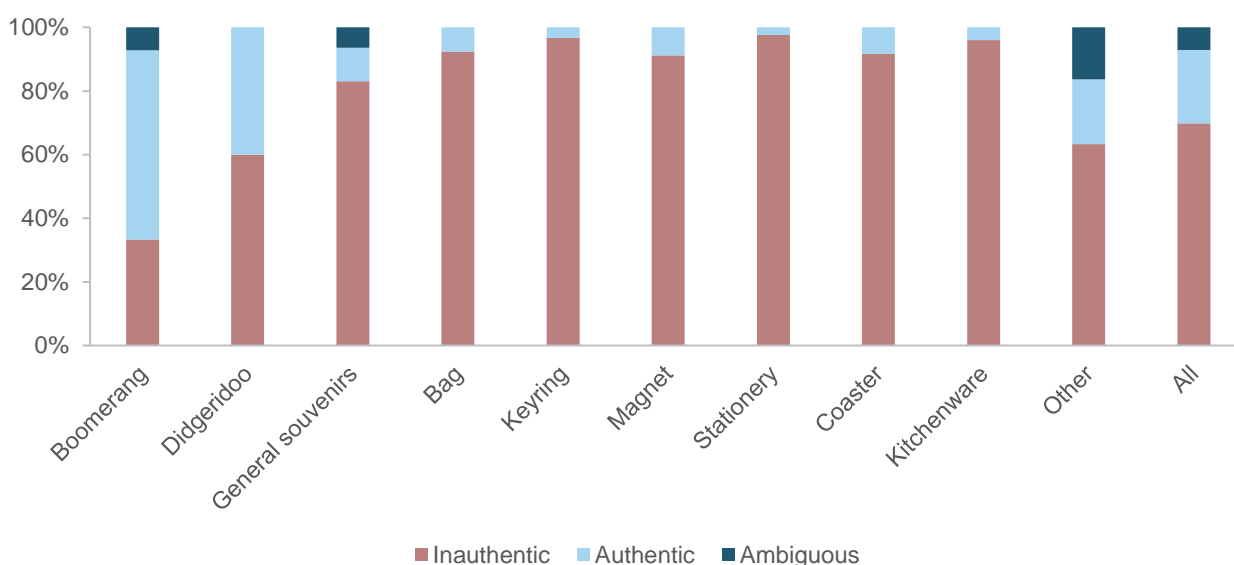
The Commission estimates that in 2019–20, spending on inauthentic Indigenous-style souvenir products totalled \$41–54 million, accounting for 55–61% of spending on Aboriginal and Torres Strait Islander souvenirs. The Commission’s analysis draws on a large number of data sources, and uses both standard and less traditional quantitative techniques such as web scraping.²

Three segments of the Aboriginal and Torres Strait Islander visual arts and crafts market are a particular focus for the draft report — the consumer products market (products that incorporate Aboriginal and Torres Strait Islander art and designs, such as woodcrafts, homewares, souvenirs and jewellery), the digital art marketplace, and the print-on-demand merchandise market.

Most Aboriginal and Torres Strait Islander consumer products (mainly souvenirs) are inauthentic

Across all the Aboriginal and Torres Strait Islander consumer products (predominantly souvenir-style products) in our sample³, the Commission estimates that two-thirds to three-quarters are inauthentic. Products that are intrinsically Aboriginal and Torres Strait Islander (such as boomerangs or didgeridoos) are far more likely to be authentic compared with other products (such as general souvenirs and gifts; keyrings, magnets and coasters) — 83% to 89% of the latter are considered inauthentic (figure 4).

Figure 4 – The share of product listings that are inauthentic, authentic or ambiguous^{a,b}



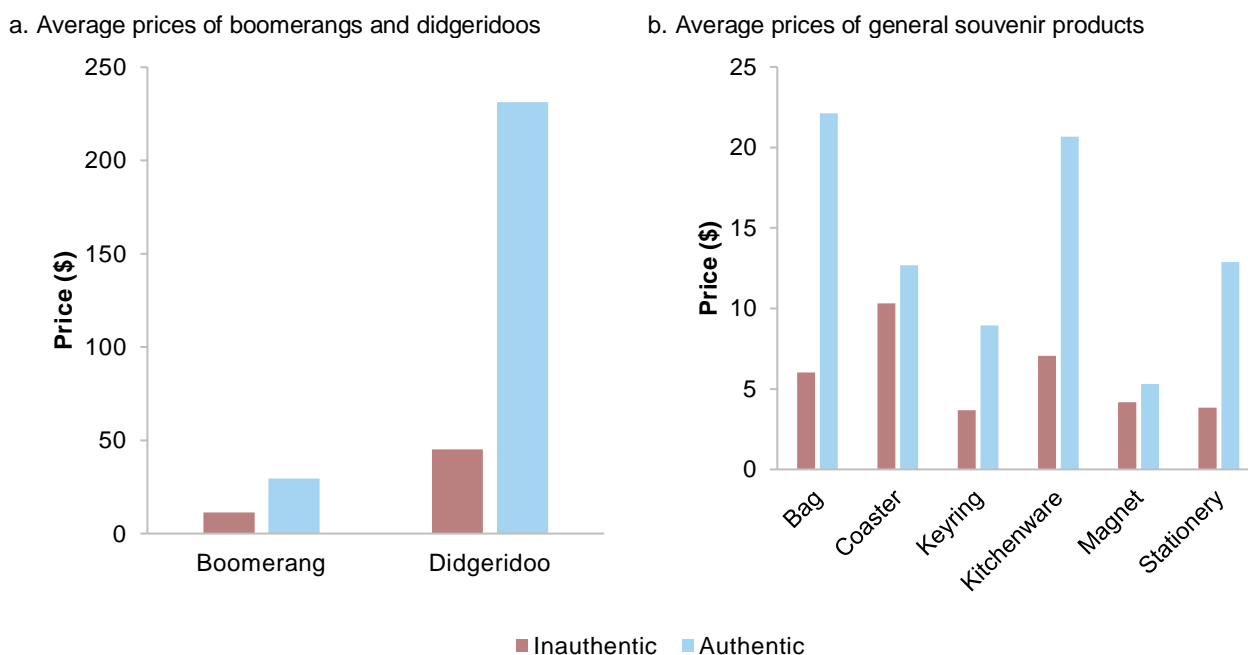
a. ‘General souvenirs’ contains products including bags, keyrings, magnets, stationery, homewares and kitchenwares, but not wooden crafts such as boomerangs and didgeridoos. ‘Other’ includes miscellaneous products such as wooden crafts, homewares, clothing, bottle coolers and face masks, among others. **b.** Ambiguous products contain labels that make contradictory or unclear claims about the involvement of Aboriginal and Torres Strait Islander artists in their design. Source: Commission estimates based on a sample of souvenir wholesalers selling authentic and inauthentic products.

² Web scraping is a process where data is extracted from publicly available websites and placed into a format where it can be easily analysed.

³ A random sample of over 850 online product listings from a selection of souvenir wholesalers and retailers.

Across all products in the sample, authentic products were on average 1.8 times more expensive than an inauthentic product of the same type, although the price differential varies across products (figure 5). Whether a product is made in Australia or overseas is not a reliable way of ascertaining authenticity. Most consumer products — including most authentic products that are licensed by an Aboriginal and Torres Strait Islander artist — are manufactured overseas.

Figure 5 – Differences in the average prices of inauthentic and authentic products



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

The stock image market is saturated with inauthentic Indigenous-style art

Stock images — user-uploaded digital artworks and photographs that are licensed for general purposes (for a fee) — cover a vast array of topics and styles, including those that depict recognisable and popular Aboriginal and Torres Strait Islander styles and motifs.

The Commission’s analysis suggests that inauthentic Aboriginal and Torres Strait Islander art is rife in online marketplaces. In examining a random sample of digital illustrations on a major stock image site, there was little evidence to indicate that *any* of the stock images in our sample could be considered authentic Aboriginal and Torres Strait Islander visual art.

- Over 80% of stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs are inauthentic, made by overseas creators without evidence of any licensing agreement with an Aboriginal and Torres Strait Islander person.
- Approximately one in six of the sampled stock images originated in Australia, but there is insufficient information to determine whether any were created by Aboriginal and Torres Strait Islander people.

Information provided on the site indicated that these works are often downloaded and used. Precisely who uses inauthentic stock images is not known, though the Commission has observed the use of such images on book covers and on the websites and marketing materials of various organisations. Many inauthentic stock images are used to sell products on merchandise marketplaces.

Inauthentic Aboriginal and Torres Strait Islander art is also prevalent in the print-on-demand merchandise market

Print-on-demand merchandise marketplaces are online sites where artists can sell merchandise containing their designs, without the need to individually manage logistics (including production, inventory, shipping and handling) and payment systems. Creators upload images of their works to the marketplace, which are then selected by consumers, who also decide which item to print the design onto. Designs are only printed onto products when an order is placed by a consumer.

The Commission analysed a random sample of listings from one of the largest and most prominent online print-on-demand merchandise marketplaces. About 60% of sampled listings appearing under the search terms 'Aboriginal art', 'Australian Aboriginal Art', 'Australia Aboriginal Art', 'Australian Indigenous Art' and 'Australia Indigenous Art' were likely inauthentic. Various forms of inauthenticity were identified, including:

- copyright infringement of Aboriginal and Torres Strait Islander artists' works; approximately 15% of sampled product listings contained likely illegal reproductions that breached the copyright of Aboriginal and Torres Strait Islander artists
- inauthentic Indigenous-style designs and stock images authored by non-Indigenous people (over 35% of sampled listings).

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, both for Aboriginal and Torres Strait Islander people and the broader Australian community. These negative effects include:

- personal and cultural harms — often in the form of personal hurt and emotional distress, and sometimes leading to a challenging of one's Aboriginal and Torres Strait Islander identity — from seeing culture misrepresented and disrespected in inauthentic products
- economic harm, as inauthentic products can dent consumer confidence in the visual arts and crafts markets and crowd out authentic merchandise, leading to lost opportunities and income for Aboriginal and Torres Strait Islander artists.

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 into *The
growing presence of
inauthentic Aboriginal
and Torres Strait
Islander 'style' art and
craft products and
merchandise for sale
across Australia,*
2018, sub. 102

Given the inherent challenges in quantifying intangible cultural harms, we have not estimated the costs associated with 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 2).

Box 2 – The significance of cultural harms has been recognised by Australian courts

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

The case, which has become known as the ‘Carpets case’, was the first time that the court considered and accepted cultural harm as a category of harm when assessing the amount of damages to be granted. In doing so, 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 — which should be recognised and compensated for.

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

Why do inauthentic arts and crafts exist (and persist)?

A lack of consumer awareness coupled with limited legal barriers to the creation or sale of inauthentic Aboriginal and Torres Strait Islander visual arts and crafts enable the continued demand for these products.

For consumers, identifying inauthentic products can be difficult and some are unaware of — or indifferent to — their harms. A recent survey found most consumers do not think about authenticity when buying Aboriginal and Torres Strait Islander products, particularly low-cost products. Almost all the consumers surveyed who had purchased Aboriginal and Torres Strait Islander arts and crafts in the previous two years did not actively consider the authenticity of the product at the time of purchase — but nonetheless believed that they had purchased an authentic product.

Even when consumers understand and appreciate the harms of inauthentic arts and crafts, they still face difficulties distinguishing authentic products from inauthentic ones. Products may look similar and may be advertised using similar terms. Providing false or misleading information on product labels is illegal (and indeed, the Australian Competition and Consumer Commission (ACCC) has taken action against a wholesaler that incorrectly labelled their products as ‘Aboriginal made’). However, many of the descriptions used are not illegal but create the impression that a product is authentic, such as ‘Aboriginal designs’ or ‘handmade’.

Industry participants already use a range of approaches to help consumers identify and verify authentic Aboriginal and Torres Strait Islander visual arts and crafts. Governments also promote authentic arts and crafts via financial support to art centres and the Indigenous Art Code (box 6). Despite these efforts, it can still be difficult for consumers to distinguish authentic products from inauthentic ones, especially among lower-priced items.

For producers, there are few legal limits around the making or selling of inauthentic arts and crafts. 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 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. As a result, producing and selling inauthentic Indigenous-style visual arts and crafts is generally legal under Australian law.

Labelling *inauthentic* products would help consumers make better choices

A mandatory label on inauthentic products is a targeted and cost-effective policy response

Options 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 inauthentic products outright.

Voluntary authenticity labelling 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 two certification marks. One was a label of authenticity intended to identify authentic work created by an Aboriginal and Torres Strait Islander person. The second was a collaboration mark, used for products that involved assistance or input of a non-Indigenous person, or for products to be commercially used under a written agreement.

NIAAA Label of Authenticity Mark



To be a Certified Indigenous Creator under the scheme, an applicant had to be certified as an Indigenous person. This was defined as a person of Aboriginal 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. The limited adoption of the scheme was attributed

Box 3 – The boomerang tick logo: lessons from an unsuccessful certification trade mark scheme

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 providing authenticity documentation. Broader criticisms of the scheme 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 labelling scheme for *inauthentic* products offers more promise. Such a scheme would apply to Aboriginal and Torres Strait Islander visual arts and crafts *not* authored by (or made under a licensing agreement with) an Aboriginal and Torres Strait Islander person, and would require that these products carry an inauthentic warning label before being sold in Australia. This approach would assist consumers in distinguishing between authentic and inauthentic products and has substantial advantages over a voluntary authenticity label.

- The mandatory nature of the scheme 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 would predominantly fall on those producing inauthentic goods, rather than those producing authentic products.
- Failure to include a label where one should have been present would enable regulators to take action under the ACL.
- Consumers and other industry participants would be able to report concerns about compliance to assist enforcement.

A key advantage of a mandatory labelling scheme for inauthentic products over other labelling options is the very low compliance burden on Aboriginal and Torres Strait Islander artists — and on those producing goods under licence from an Aboriginal and Torres Strait Islander artist — as all of these products would be exempt from the labelling requirement. The effectiveness of a mandatory inauthenticity label will rely on enforcement; the Commission's analysis indicates that enforcement efforts will be best focussed on sales of mass-produced Aboriginal and Torres Strait Islander souvenirs and other consumer products, where the prevalence of inauthentic products is highest and the direct involvement of Aboriginal and Torres Strait Islander artists is relatively low.

Moreover, a mandatory inauthenticity label 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 even a potential future certification trade mark scheme.

A mandatory inauthenticity label also has some advantages over a prohibition on the sale of specified inauthentic products. For many years, a number of industry participants have been advocating for a ban on the sale of inauthentic Indigenous-style products in Australia through amendments to the ACL, arguing that a ban would be a relatively straightforward and effective way to mitigate the harm caused by inauthentic products. However, a ban could impose significant costs on Aboriginal and Torres Strait Islander artists if their products were inadvertently affected, and also could make it more likely that Aboriginal and Torres

Strait Islander artists would need to demonstrate their Indigeneity in order to avoid this outcome. Striking the right balance on product coverage would be difficult — taking a broad approach would capture more products but heightens the risk of errors (for example, authentic products incorrectly excluded from sale) that would be costly to resolve. On the other hand, a narrow ban focused only on the products easiest to identify as inauthentic would do less to reduce the cultural and economic harms caused by inauthentic products. A ban would also limit choice in the market, and consumers would arguably be better served by being able to make more informed choices. On balance, the Commission considers that a ban is unlikely to be the most appropriate response.

How would a mandatory label on inauthentic products work?

The proposed mandatory inauthenticity label could be implemented through an information standard under the ACL. A label would need to be applied to products that could reasonably be considered to be of Aboriginal and Torres Strait Islander origin but do not meet the authenticity criteria (box 1). The scheme could cover products offered for sale in Australia that include an expression or design (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product) that a reasonable person could consider to be a cultural expression, design or style of Aboriginal and Torres Strait Islander origin. This could potentially cover arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise containing Indigenous designs and expressions; and digital artworks and designs.

The Commission is seeking feedback on all aspects of the mandatory inauthenticity label proposal (table 1) to inform our recommendations for the final report.

Table 1 – Considerations for a mandatory labelling scheme for inauthentic products

	Suggested approach	Limitations and questions to consider
Product Coverage	<ul style="list-style-type: none"> The scheme should cover any product offered for sale in Australia that includes an expression or design (whether that is an object, such as a boomerang, or a dot or cross hatching design or pattern applied to another product) that a reasonable person could consider as being an Indigenous Cultural Expression, or of Aboriginal and Torres Strait Islander origin or style. It would potentially cover: arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandise containing Aboriginal and Torres Strait Islander designs and expressions; and digital artworks and designs. 	<ul style="list-style-type: none"> The intent of the scheme is to provide broad coverage of Indigenous-style products. It would be insufficient to limit the coverage to a specific list of artefacts or designs, even though it would create some ambiguity at the margins about whether a product is subject to the standard. One option to improve certainty could be a hybrid approach that also included a specific list of products subject to the standard. What are the pros and cons of different approaches to defining the coverage of the scheme? There would also be gaps, including overseas transactions; non-commercial transactions and the use of inauthentic designs in publications or advertising. Can or should these be addressed?
Authenticity Criteria	<ul style="list-style-type: none"> Authenticity in this context refers to authorship (creation) by an Aboriginal and Torres Strait Islander person (and would include products produced 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. 	<ul style="list-style-type: none"> While cultural permissions are important, this issue is outside the suggested scope of this initiative. Similarly, this initiative would not address ethical concerns about the commercial arrangements between Aboriginal and Torres Strait Islander artists and other market participants. Is this suggested approach to authenticity appropriate or are there other alternatives?
Design and Implementation	<ul style="list-style-type: none"> Suppliers of designated products that do not meet the authenticity criteria must label those products indicating that the product has not been produced by or under licence from an Aboriginal and Torres Strait Islander person. Labelling should be clear and obvious to consumers — attached to products where practicable or prominently included in product signage or descriptions. To facilitate implementation of the labelling standard the following will likely 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. 	<ul style="list-style-type: none"> How prescriptive should labelling requirements be? That is, should there be specific requirements on label contents or is a more flexible approach sufficient? What awareness measures and transition arrangements would be most beneficial? What education and awareness-raising measures would best support consumer decision making? Should specific measures be tailored to international tourists? What resources are required for administration and enforcing compliance? What evidence of compliance would suppliers of unlabelled products need to verify Aboriginal and Torres Strait Islander authorship? Are the existing enforcement tools for information standards sufficient?

Indigenous Cultural and Intellectual Property is often used in visual arts and crafts without the permission of traditional custodians

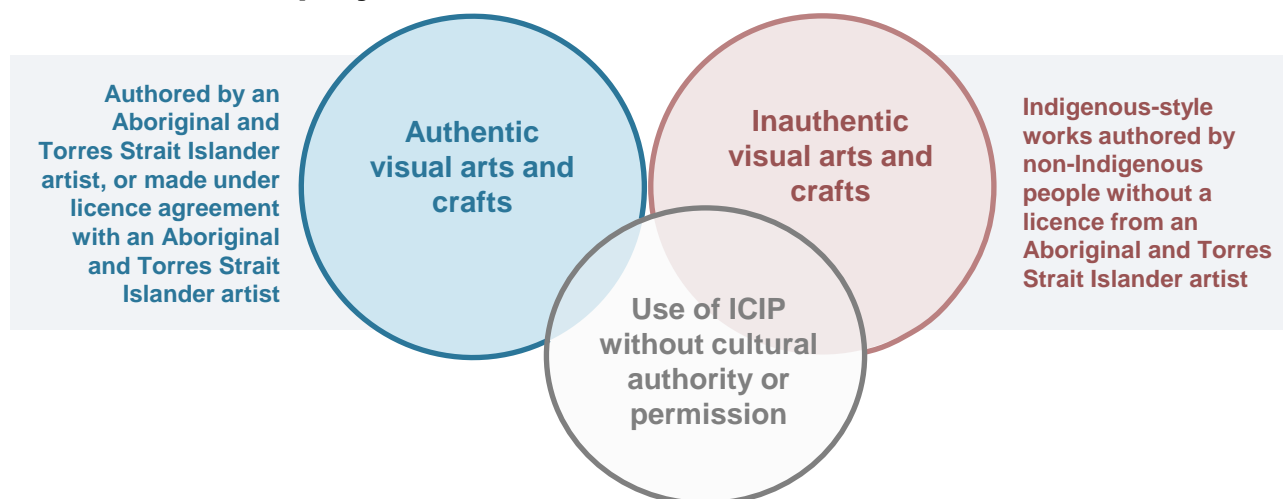
Aboriginal and Torres Strait Islander visual arts and crafts — both authentic and inauthentic — often contain traditional cultural expressions, which are forms of Indigenous Cultural and Intellectual Property (ICIP). Sometimes this ICIP is used without the permission (or authorisation) of traditional custodians, out of context, and without economic benefits flowing back to Aboriginal and Torres Strait Islander people and communities. This commonly occurs when inauthentic visual arts and crafts are produced (figure 6).

[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 *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996, para. 53

There can also be instances where authentic art containing ICIP is produced without permission, for example where an Aboriginal and Torres Strait Islander artist may not have the required authorisations. Customary laws impose rights, obligations and responsibilities on Aboriginal and Torres Strait Islander people in respect of their culture. For instance, certain knowledge may need to be kept secret or is only able to be used by certain members of a group. Similarly, Aboriginal and Torres Strait Islander artists are authorised to paint only certain stories. While there is room for individual creativity, certain subjects must be portrayed in particular ways. Unrestricted use of ICIP in visual arts and crafts without relevant permissions undermines customary laws.

Figure 6 – The interplay between authenticity, inauthenticity and Indigenous Cultural and Intellectual Property



ICIP is fundamental to Aboriginal and Torres Strait Islander people and a unique national asset

ICIP includes all aspects of Indigenous heritage and culture and is integral to the identities of Aboriginal and Torres Strait Islander people. It enables Aboriginal and Torres Strait Islander communities to transmit history, customs and cultures to future generations.

Aboriginal and Torres Strait Islander ICIP is unique to Australia and part of our national identity. This is reflected in how Australia identifies itself on the world stage, including the significant role that Aboriginal and Torres Strait Islander cultures play in Australia's tourism industry. Australian legal and cultural institutions can help promote and protect the integrity of Aboriginal and Torres Strait Islander ICIP, in a similar way to how other countries protect and promote their First Nations' ICIP.

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

ICIP is commonly used and misused in visual arts and crafts

Many study participants expressed deep concern about the unauthorised and inappropriate use of ICIP in visual arts and crafts because it disrespects and cheapens Aboriginal and Torres Strait Islander cultures and can bring shame on traditional custodians and their families.

The effects of unauthorised use of ICIP extend well beyond those directly involved; by misrepresenting traditional stories and customs, inappropriate use of ICIP can damage culture and challenge identity. It also presents incorrect interpretations of culture to non-Indigenous people.

Some unauthorised use of ICIP in visual arts and crafts occurs because artists are unaware of the traditional laws and customs that govern their use, and of the importance of seeking cultural permissions. In some 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. A range of protocols and other instruments have been developed to guide the use of ICIP in commercial settings and support good practice. In a legal context, however, there are few barriers to using ICIP without authorisation and in inappropriate and offensive ways.

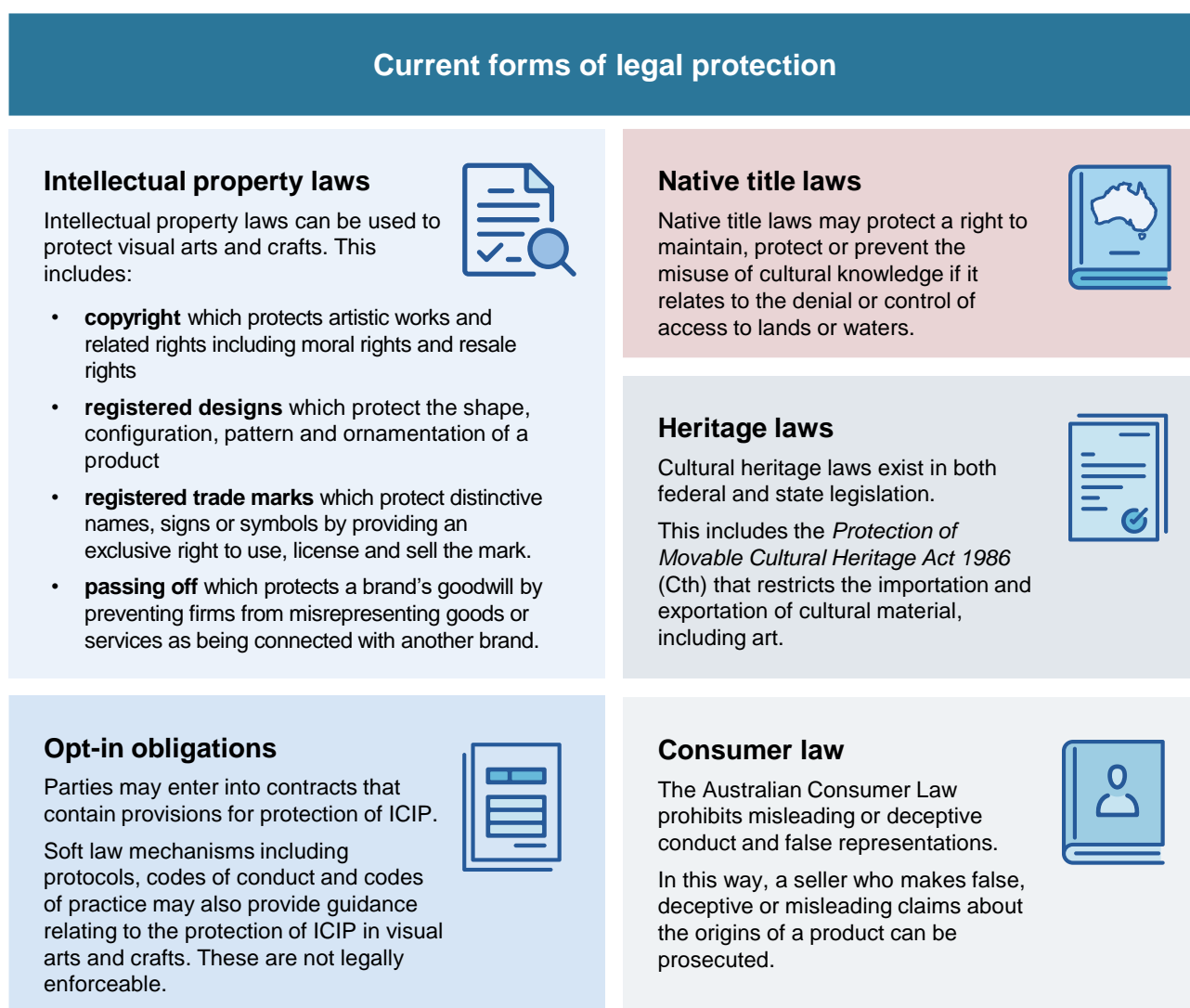
Legal recognition and protection of ICIP is patchy and incidental

No existing legal framework directly governs the circumstances under which ICIP can and cannot be used in the production of visual arts and crafts. A number of laws provide *some* protections in relation to whether and how Aboriginal and Torres Strait Islander ICIP is used (figure 7). However, because existing laws are not

designed for the purpose of protecting ICIP, protection is only available incidentally, where the misappropriation of ICIP coincides with other causes of action. As such, existing laws provide only limited and piecemeal coverage.

In practice, this means ICIP — including ancient stories, sacred symbols, and traditional techniques and styles — can be readily used in visual arts and crafts without the permission or authorisation of traditional owners. Many examples of ICIP being used without permission in inauthentic and authentic visual arts and crafts were raised with the Commission during the course of this study.

Figure 7 – Existing legal instruments provide varying degrees of protection for ICIP in visual arts and crafts



Sources: Australian Copyright Council (2019); *Competition and Consumer Act 2010* (Cth), Schedule 2; *Copyright Act 1968* (Cth); *Designs Act 2003* (Cth); IP Australia (2019a, 2019b, 2020c); *Native Title Act 1993* (Cth); *Protection of Movable Cultural Heritage Act 1986* (Cth); Sentina et al. (2017); Stratton et al. (2019); *Trade Marks Act 1995* (Cth).

There was widespread agreement among participants in this study that more should be done to shore up legal protections for 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. Such protection would reduce the scope for

ICIP to be misrepresented and misinterpreted in visual arts and crafts, thereby protecting its integrity. It may also strengthen the economic opportunities available to Aboriginal and Torres Strait Islander artists and communities, by enabling them to increase the benefits derived from the use of ICIP in visual arts and crafts.

Amending the patchwork of existing laws to strengthen protection of ICIP used in visual arts and crafts is feasible (to some extent), but could lead to inherent tensions in the policy objectives of the legislation. For example, 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, one of the key purposes of introducing stronger legal protections for ICIP in visual arts and crafts is the preservation, maintenance and transmission of culture. Similarly, 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.

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

In the Commission's view (and in line with the views of participants, and the recommendations of a number of past reviews), the preferred way to improve recognition and protection of ICIP in visual arts and crafts is via the development and introduction of dedicated legislation. Relative to amendments, this approach has the potential to provide stronger, more fit-for-purpose protections for the ICIP in visual arts and crafts, and greater clarity for the broader community. It would also be consistent with Australia's commitment to meeting its international obligations to recognise and protect ICIP.

Dedicated cultural rights legislation would give traditional owners control over their cultural assets

In this draft report, the Commission presents a model for dedicated legislation to recognise Aboriginal and Torres Strait Islander peoples' cultural rights in relation to visual arts and crafts. We are seeking feedback, including on the merits of such legislation and what it should look like, to help inform the recommendations in the final report.

Given the scope of this study, the emphasis here is on protecting the aspects of ICIP used in visual arts and crafts — namely, cultural assets. This is not to suggest that other aspects of ICIP such as scientific and ecological knowledge are unimportant or could not benefit from protective legislation. But various attempts to create a single, comprehensive set of laws that encompass all aspects of ICIP have shown how difficult such a task is. To achieve a coordinated approach to protecting and recognising ICIP, the Australian Government

should develop and publish a national ICIP strategy, which would cover all aspects of ICIP and provide an overarching framework and roadmap in relation to ICIP. Such a strategy could 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 — including the role of cultural rights legislation.

A possible model for cultural rights legislation

The Commission's proposed model for dedicated cultural rights legislation would formally recognise the interests of Aboriginal and Torres Strait Islander communities or groups (including, for example, a mob or clan, language group, outstation or town) in their traditional cultural assets, such as ancient stories, sacred symbols and unique motifs, as they are expressed in visual arts and crafts. It would give traditional owners greater control over 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. The legislation would give traditional owners the right to:

- control their cultural assets
- choose whether to authorise the use of their cultural assets
- place conditions on the use of their cultural assets (including payment)
- protect their cultural assets from misappropriation, including by taking legal action.

As proposed, cultural rights would accrue automatically, without the need for registration — similar to the way the existing copyright system operates. These rights would also be inalienable, meaning that they can only belong to traditional owners and cannot be sold or transferred to another party.

In effect, traditional owners would be able to take legal action in cases where certain cultural assets are used in visual arts and crafts without authorisation (box 4) unless an exception applies. Although the legislation would not prohibit the use of cultural assets without authorisation per se, it would enable traditional owners to take legal action where such behaviour occurs. This would be expected to create stronger disincentives against, and hence lower the prevalence of, cultural misappropriation in visual arts and crafts — though it would not directly address instances where 'generic' Aboriginal and Torres Strait Islander designs are used in consumer products (box 4).

While the proposed new legislation would enable traditional owners to protect cultural assets in cases where they are used without authorisation, it should not limit artistic innovation and the continuous development of Aboriginal and Torres Strait Islander visual arts and crafts where appropriate permissions are given. The new legal framework would encourage and support collaborations consistent with the principles of free, prior and informed consent. It would do so by identifying the boundaries around the use of Aboriginal and Torres Strait Islander cultural assets in visual arts and crafts and giving artists and designers greater clarity around rights and responsibilities.

As with existing copyright protections, the new legislation would need to balance the interests of traditional owners and of others 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 culture from evolving over time. The legislative regime should include checks and balances that consider the needs of Aboriginal and Torres Strait Islander artists and communities as well as non-Indigenous artists, researchers, students, reviewers and others. Therefore, the legislation would need to include a similar exceptions regime to that included in copyright legislation.

The legislation could also include an exception for customary and traditional uses, to prevent a situation in which the laws preclude Aboriginal and Torres Strait Islander people from practising their own culture in the way they choose. Further, the legislation could include an exception for Aboriginal and Torres Strait Islander people who make 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. This includes whole communities, groups and families being displaced from or dispossessed of their lands and prohibited from practising their culture.

Box 4 – How might cultural rights apply in practice?

Authorised use

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in her artwork. The motif can be traced back to a traditional owner and the artist has been granted permissions to use the motif by the traditional owner.

Outcome: The artist 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: An artist uses a traditional Aboriginal and Torres Strait Islander motif in his artwork. The motif can be traced back to a traditional owner, but the artist does not have permissions to use the motif from the traditional owner.

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

Use exceeds scope of authorisation

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in her artwork. The motif can be traced back to a traditional owner, from whom the artist had previously been granted permissions to use the motif — but those permissions do not cover the creation of this particular artwork.

Outcome: The artist has exceeded the scope of what she was authorised to do by the traditional owner. In doing so, the artist may have infringed the traditional owner's cultural rights.

Multiple owners

Scenario: An artist uses a traditional Aboriginal and Torres Strait Islander motif in his artwork. The motif can be traced back to multiple Aboriginal clans, each of whom can show that they are a traditional owner of the motif. One of those traditional owners has given the artist permission to use the motif in his artwork.

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

No identifiable traditional owner

Scenario: An artist uses a motif in her artwork that appears Aboriginal and Torres Strait Islander in its style, 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).

Achieving fair and ethical market interactions remains a challenge

The ongoing strength of Aboriginal and Torres Strait Islander visual arts and crafts markets hinges on the ethical conduct of market participants. 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.

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 5).

Box 5 – Artists’ experiences of unethical market interactions

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

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)

[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

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

Box 5 – Artists’ experiences of unethical market interactions

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)

Concerns around unethical behaviour toward Aboriginal and Torres Strait Islander artists have been raised for many years. In some cases, this 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 terms in contracts) may not be illegal, which makes it even harder to pursue remedies.

Improving industry standards

A number of industry-led initiatives have seen an improvement in industry standards; evidence provided to the Commission indicates that unethical dealings (or carpetbagging) have become less prevalent over the past ten years. However, in some places, unscrupulous practices persist.

Governments fund various support services for artists, such as those provided by Arts Law Centre, the Copyright Agency and the Indigenous Art Code (box 6) to ensure instances of unethical conduct are reported and addressed, and artists are empowered to pursue their rights and maximise the economic benefits they derive from their artworks.

Box 6 – Indigenous Art Code

The voluntary Indigenous Art Code came into effect in 2010 and is administered by Indigenous Art Code Limited (IartC). It has over 550 members, comprising dealer members, Aboriginal and Torres Strait Islander artist members and code supporters. Dealer members and code supporters are required to pay annual membership fees of \$170 (there is no fee for Aboriginal and Torres Strait Islander artist members), but it is primarily funded by government grants.

The main provisions of the Code cover general standards of conduct for dealer members, such as acting honestly and not engaging in misleading or deceptive conduct, and standards for dealing with artists, covering matters such as the content of agreements and the need to provide clear information and obtain informed consent.

A notable feature of the Indigenous Art Code is the requirement to issue Code Certificates for artworks (valued at more than \$250), which provide information about the artist and dealer member.

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.

A mandatory code is likely to be a blunt response to a complex and often localised problem. It would impose administrative burdens on artists and other industry participants, but would not address the systemic factors that give rise to unethical conduct. 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 the Indigenous Art Code would enable it to influence conduct in the industry more effectively, including a process of independent review being made available to artists and dealers involved in disputes under the Code, with de-identified outcomes of dispute resolution processes published to strengthen transparency.

The Corporation administering the Code 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 to enforce it effectively. Greater funding could come from industry participants, through a modest increase in fees paid by dealer members, and additional support from the Australian Government. The Australian Government announced plans to evaluate the Code. A modest increase to its funding, as well as amendments to some of its processes, should be considered as part of the evaluation.

Capacity in the sector is under strain

Some art centres are struggling to fulfil their cultural and social roles

While the Aboriginal and Torres Strait Islander visual arts and crafts sector is much broader than art centres, these community-controlled organisations are central to cultural and community life.

There are differences in how art centres across Australia operate, reflecting the priorities and needs of each region and the artists they support. In some remote communities, art centres are the only successful business, offering employment opportunities to the local community. Beyond their economic contribution, art centres fulfil many roles in their communities, including supporting families and culture (via 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. The Australian Government provides the bulk of targeted funding to the sector through the *Indigenous Visual Arts Industry Support* (IVAIS) and the *Aboriginal and Torres Strait Islander Arts* programs. Approximately \$24.5 million was distributed via these programs in 2020-21.

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.

Moreover, with total IVAIS funding plateauing in real terms over the past five years while the number of art centres being funded has increased, average funding to art centres has declined from \$243 000 to \$227 500 from 2015-16 to 2020-21. Some art centres may be forced to reduce or discontinue essential social and community services.

Some of this funding pressure has been relieved through the National Indigenous Visual Arts (NIVA) Action Plan (discussed below). However, this commitment is time limited.

Workforce and skills issues persist

Most art centres struggle to recruit suitably qualified Aboriginal and Torres Strait Islander art centre managers and other art workers from their local community. While local people have strengths in understanding the cultural and community expectations, there are other skills and qualifications that can be difficult to find among workers in communities, such as experience managing an organisation and relevant formal qualifications.

Many participants expressed frustration at the scant 'pipeline' of Aboriginal and Torres Strait Islander art centre managers and art workers, and considered that this has been neglected by industry and governments over many years.

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

Reliance on non-Indigenous staff residing outside of local areas can create issues for art centres — for example, high staff turnover leads to 'negative impacts including loss of trust and confidence in changing personnel, and loss of relationships from which the road to recovery is long' (SA Government, sub. 21, p. 16). High turnover can also hamper the ability of art centres to develop long-term projects or invest in the development of artists and artistic practices.

Gaps in training and professional development opportunities and a lack of career pathways for arts and crafts industry employment limit growth in the Aboriginal and Torres Strait Islander arts workforce. Resource constraints facing art centres and other industry organisations are partly responsible — for example, over-worked art centre managers are left with little time to devote to training, or to support and mentor local art workers to pursue a management position. Moreover, many artists and art workers learn valuable skills and practices from Elders, but this learning is often not formally recognised or accredited, limiting access to positions that may lead to senior management and leadership roles. For independent artists, there are only a limited number of targeted training and professional support options available.

More generally, existing training courses may not be well aligned with the needs of Aboriginal and Torres Strait Islander arts workforce:

- relevant Vocational Education and Training (VET) courses are predominantly focussed on art production, with limited time spent on the business and technology skills required for art workers and artists operating their own businesses
- some art centres and art organisations find it difficult to access relevant governance training and support.

The Morrison Government released its *National Roadmap for Indigenous Skills, Jobs and Wealth Creation* in December 2021. The Roadmap contains activities that are highly relevant for strengthening capacity in the visual arts and crafts sector, such as mentoring, showcasing successful role models, culturally safe wraparound support to keep Aboriginal and Torres Strait Islander people in education and employment, and partnerships between industry, schools and higher education to deliver a pipeline of talent. However, the visual arts and crafts sector was not identified as a focus area.

Strengthening artists and their communities

Funding arrangements should enable a strong and sustainable sector

The Australian Government has responded to some of the challenges of the sector through the NIVA Action Plan 2021–25, which includes an additional \$25 million in funding. 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 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.

This additional funding appears to be directed at some of the issues and gaps raised by participants in this study. However, the funding commitment is only for five years at this stage.

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

Funding decisions should be informed by Aboriginal and Torres Strait Islander voices

Partnerships and shared decision-making between communities and the Australian Government are relatively rare in the Aboriginal and Torres Strait Islander visual arts and crafts sector. Some jurisdictional art funding agencies appoint peer panels or advisory groups to help inform their decision-making, but there is limited transparency about the way that these groups affect funding objectives and other policy decisions.

Under the National Agreement on Closing the Gap, all governments committed to ‘[build and strengthen] structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments to accelerate policy and place-based progress against Closing the Gap.’ While the visual arts and crafts sector is not identified as a priority policy area in the National Agreement, the principles of the Agreement apply. The Australian Government (led by the Australian Government’s 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 will help ensure funding is directed towards the outcomes and objectives that matter most to communities, rather than being exclusively directed by government.

A potential (but not the only) model could be to establish a national peak body, as has been created in other priority policy areas under the National Agreement on Closing the Gap, including in the legal, health, housing, and languages space. The design of such a body would need to be led by Aboriginal and Torres Strait Islander people, potentially across the arts sector. The Australia Council is currently working and consulting with sector participants on the development of a National Indigenous Arts and Cultural Authority, with a National Summit due to be held later in 2022. The Commission is seeking views on this and other approaches to fostering a shared decision-making partnership between Australian governments and the Aboriginal and Torres Strait Islander visual arts and crafts sector.

Summary of the Commission's draft recommendations

Current problem	Proposed response	Expected benefits
Inauthentic arts and crafts are pervasive and cause significant cultural and economic harm.	Mandatory labelling of products that are not made by an Aboriginal and Torres Strait Islander artist, or under licence from an Aboriginal and Torres Strait Islander artist.	Consumers would have accurate information about the inauthenticity of products — supporting demand for authentic goods — while imposing minimal costs on Aboriginal and Torres Strait Islander artists.
Indigenous Cultural and Intellectual Property (ICIP) is 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 ICIP in visual arts and crafts, enabling further collaboration and artistic innovation.
Some Aboriginal and Torres Strait Islander artists are not treated fairly in the market.	Bolster the Indigenous Art Code by creating an external dispute resolution capacity. Governments should modestly increase funding to the Indigenous Art Code, subject to evaluation of the Code's effectiveness.	The Indigenous Art Code would expand its ability to promote ethical dealings in the market and support artists to enforce their rights.
Some art centres are struggling to source funding to fulfil key roles in their communities, with average real funding from primary sources falling in recent years.	Governments — 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 governments to deliver funding that aligns with community priorities.
Decisions on funding priorities — including responding to current and future workforce needs — do not adequately take into account the priorities of Aboriginal and Torres Strait Islander people and communities.	The Australian Government should establish a formal shared decision-making partnership with Aboriginal and Torres Strait Islander artists and organisations.	Shared decision making would help communities and governments to direct funding toward pressing priorities and to identify strategic initiatives that support the sustainability of the sector.

Draft findings, recommendations and information requests

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



Draft 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



Draft Finding 3.1

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

In 2019-20, the total value of spending on (authentic and inauthentic) Aboriginal and Torres Strait Islander visual arts and crafts was about \$250 million. This includes sales of original art made through art centres, commercial galleries, auction houses and other retailers, as well as consumer products such as souvenirs and homewares. Some of the spending on these consumer products was on inauthentic arts and crafts — about 55–61% of spending on souvenirs was on inauthentic Indigenous-style products, purchased predominantly by international visitors.

**Draft 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 art and culture. 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.

**Draft Finding 3.3****Art centres support most of the production and sales of art in remote areas**

The Commission estimates that sales of artworks produced by art centre artists totalled between \$30–47 million in the 2019-20 financial year, from about 5800–7700 artists who 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.

Art centres rely on several methods to sell artworks, but have shifted towards sales through consignment agreements with intermediaries such as commercial galleries. Art centres have also moved towards selling art direct to consumers, either through their own galleries or through art fairs.

**Draft Finding 3.4****Artworks by independent artists have a material presence in Aboriginal and Torres Strait Islander 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 preliminary estimates based on limited data show that about 1700 independent artists generate sales of about \$10 million a year. About half of art dealer businesses sell the works of independent artists. In addition, independent artists produce commissioned artworks and sell direct-to-consumers through art fairs, online marketplaces and social media.

**Draft Finding 3.5****The total value of Aboriginal and Torres Strait Islander artworks sold on the secondary market remains below its peak**

Following strong growth up to 2008, resales of Aboriginal and Torres Strait Islander artworks collapsed following the Global Financial Crisis (GFC). The total value of resales has since remained below the pre-GFC peak, with average prices of Aboriginal and Torres Strait Islander artworks sold by public auction houses lower than resales of artworks by non-Indigenous artists.

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

Draft Finding 4.1



Visual arts and crafts are considered authentic Aboriginal and Torres Strait Islander arts and crafts if they are authored by an Aboriginal and Torres Strait Islander person, or produced under a licensing agreement

For the purpose of this study, a product or artwork is considered *authentic* Aboriginal and Torres Strait Islander visual art or craft if it is:

- an original piece authored (or co-authored) by an Aboriginal and Torres Strait Islander person, or
- produced under a licensing agreement with the Aboriginal and Torres Strait Islander artist(s).

Aboriginal and Torres Strait Islander visual arts and crafts that do not meet these criteria, including those that infringe the copyright of an Aboriginal and Torres Strait Islander artist's work, or are Indigenous-style arts and crafts made by non-Indigenous people without licensing agreements, are considered *inauthentic*.

Draft 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 products dominate the consumer product (mostly wholesale souvenirs), digital, and print-on-demand merchandise markets. Copyright infringement is also common in the print-on-demand merchandise market.

In the consumer product (wholesale souvenirs) market:

- approximately two-thirds to three-quarters of product offerings are inauthentic, though the prevalence of inauthenticity varies by product category
- on average, authentic products are nearly twice as expensive as an inauthentic product of the same type
- most consumer products are manufactured overseas regardless of their authenticity.

Based on random sampling, inauthentic products are commonplace in the print-on-demand merchandise market (over 60% of Aboriginal and Torres Strait Islander merchandise was found to be inauthentic) and even more prevalent in the digital art marketplace (over 80% of digital stock images depicting Aboriginal and Torres Strait Islander designs, styles and motifs were inauthentic).

**Draft Finding 4.3****The negative effects of inauthentic visual arts and crafts outweigh any benefits**

The existence and prevalence of inauthentic arts and crafts in the market has wide-ranging and predominantly detrimental effects on both Aboriginal and Torres Strait Islander people and the broader Australian community. These include personal and cultural harms (such as emotional distress, loss of identity and self) 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 disrespect and misrepresent Aboriginal and Torres Strait Islander cultures, and have the potential to mislead consumers.

**Draft Finding 4.4****Consumers' lack of awareness and difficulties in identifying authentic products, as well as the legal landscape are the main enablers of inauthentic arts and crafts**

Inauthentic Indigenous-style visual arts and crafts continue to be prevalent in the market 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.

A mandatory labelling scheme to reduce trade in inauthentic products

**Draft Finding 5.1****Some approaches to distinguish between authentic and inauthentic Aboriginal and Torres Strait Islander art and craft products are already in place**

Some approaches are already in place to help consumers distinguish between authentic and inauthentic Aboriginal and Torres Strait Islander artworks and other products. These include certificates of authenticity provided by art dealers (such as those produced in accordance with the Indigenous Art Code), as well as other branding and marketing initiatives used by artists and dealers to provide information and assurances to consumers. However, only limited information is provided for some products, particularly in the lower end of the market, including souvenirs and digital products.



Draft Finding 5.2

Voluntary industry-wide labelling schemes for authentic products are unlikely to be effective in materially reducing inauthentic arts and crafts

Notwithstanding the possible marketing benefits to participants themselves, industry-wide voluntary labelling schemes (such as certification trade marks) are unlikely to reduce the prevalence and harms of inauthentic products substantially.

To address information gaps in the market and allow consumers to distinguish between authentic and inauthentic products, voluntary labelling schemes 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.



Draft Finding 5.3

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 inauthentic products. However, on their own their effectiveness in countering inauthentic products is limited, especially where the information used to promote and label products is confusing or inaccurate. Education measures are more effective where they accompany measures that help consumers distinguish between authentic and inauthentic products.



Draft Finding 5.4

Banning inauthentic products is unlikely to be the most cost-effective response

A ban on the sale of inauthentic products could be an effective way to mitigate the economic and cultural harms they cause and prevent consumers from unwittingly purchasing inauthentic products.

However, there are substantial risks in imposing a ban. A broad ban would increase the risk of costly errors (for example, authentic products incorrectly excluded from sale). A narrow ban would not resolve the harms caused by many inauthentic products. A ban would also limit choice in the market, and consumers would arguably be better served by being able to make more fully-informed choices. Therefore, the Commission considers that a ban is unlikely to be the most appropriate response.



Draft Finding 5.5

Labelling inauthentic products is a targeted and cost-effective way of informing consumers and improving the functioning of the market for Aboriginal and Torres Strait Islander visual arts and crafts

A mandatory labelling scheme for inauthentic products could be a targeted and cost-effective option for addressing the issue of inauthentic Indigenous-style products. While it would not eliminate inauthentic products, it would improve the operation of the market, by helping consumers to distinguish between authentic and inauthentic products. A well-designed labelling scheme focused on inauthentic products would only impose minimal compliance burdens on Aboriginal and Torres Strait Islander artists.

**Draft Recommendation 5.1****A mandatory labelling scheme for inauthentic products should be developed**

The Australian Government should develop a mandatory information standard to require the labelling of inauthentic Indigenous-style products to indicate to consumers that they are not created by or under licence from an Aboriginal and Torres Strait Islander person.

In developing the standard, the Australian Government should engage effectively with Aboriginal and Torres Strait Islander people.

**Information request 5.1**

How might a mandatory labelling scheme for inauthentic products operate in practice and what should be considered further in its design?

- Is the suggested approach to product coverage workable? Are there ways to provide greater certainty about coverage without unduly narrowing its scope?
- Are the authenticity criteria for the scheme appropriate? Do they pose any unintended consequences? If so, how could these be addressed?
- Are there any other considerations about the design and implementation of the standard?

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

**Draft Finding 6.1****Indigenous Cultural and Intellectual Property has intrinsic value**

Indigenous Cultural and Intellectual Property (ICIP) refers to all dimensions of Aboriginal and Torres Strait Islander heritage and cultures, from languages and performances to traditional scientific and ecological knowledge. It has intrinsic value to Aboriginal and Torres Strait Islander people and is a unique national asset that forms an important part of Australia's identity.

Expressions of ICIP in the form of visual arts and crafts are often more than creative outputs. They can play a role in transmitting and thereby preserving laws, history, culture and customs of Aboriginal and Torres Strait Islander people.



Draft Finding 6.2

Existing laws do not directly protect Indigenous Cultural and Intellectual Property in Aboriginal and Torres Strait Islander visual arts and crafts

Current laws provide some protection of Indigenous Cultural and Intellectual Property (ICIP) in visual arts and crafts. But these protections are piecemeal and do not enable Aboriginal and Torres Strait Islander people and communities to directly control whether and how their ICIP is used in visual arts and crafts. This means that Aboriginal and Torres Strait Islander ICIP is often used in inappropriate contexts without the consent of the relevant Aboriginal and Torres Strait Islander people and communities.

There is a strong case for examining how legal protections for ICIP in visual arts and crafts could be strengthened to reduce misappropriation and help to protect and preserve ICIP in visual arts and crafts.



Draft Finding 6.3

Dedicated legal protections may assist in addressing 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 and presents an opportunity to do so in a way that promotes a fair allocation of benefits.

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



Draft Recommendation 7.2

New cultural rights legislation should be introduced to recognise and protect cultural assets in relation to 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.

**Draft Finding 7.2****A cultural rights regime must balance the interests of traditional owners and those seeking access to 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.

**Information request 7.1**

What should be protected by the new cultural rights legislation?

- What is the best way to define what should be in scope for protection?
- Should there be limits on protection, such as conditions on when protections apply or threshold criteria for what is protected? If so, what should they be?

**Information request 7.2**

How should the legislation deal with the issue of standing to bring a cultural rights action?

- What criteria should determine whether a claimant has standing?
- What is the best way to recognise communities or groups as having standing?
- What are the merits, drawbacks and challenges of giving a government regulator the power to bring cases in relation to cultural misappropriation?

**Information request 7.3**

What types of conduct should be considered an infringement of a traditional owner's cultural rights?

- What types of uses of cultural assets should be recognised as having the potential to be infringing? For example, should there be a requirement for the use to be in material form or a substantial use?
- How should a court determine whether a user has been granted authorisation to use a cultural asset in a certain way?
- Should there be exceptions when cultural assets are used for certain purposes? If so, what should those exceptions be?

What should the legislation say about remedies for infringements of cultural rights?

- What suite of remedies are needed to achieve fair and just outcomes?
- What should the new cultural rights legislation say about how remedies are awarded?



Information request 7.4

What institutional arrangements are needed to support a new cultural rights regime?

- What types of dispute resolution options should be available? What is needed to ensure that dispute resolution processes are responsive to the needs of Aboriginal and Torres Strait Islander people and communities?
- Is there a case for a statutory Cultural Authority? What would its remit, functions and powers be?



Draft Finding 7.1

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

Given its multi-faceted nature, it is not clear that stronger legal protection for all aspects of Indigenous Cultural and Intellectual Property (ICIP) could be pursued 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.



Draft Recommendation 7.1

An Indigenous Cultural and Intellectual Property Strategy is needed to coordinate regulatory measures

The Australian Government should develop and publish an Indigenous Cultural and Intellectual Property (ICIP) strategy that sets out how policy and regulatory measures will address different aspects of ICIP. The development of the strategy should be led by the Minister for Indigenous Australians, in partnership with state and territory governments and Aboriginal and Torres Strait Islander people.

Some artists encounter unfair and unethical conduct



Draft 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, copyright infringement and plagiarism, which affect the rights, wellbeing and economic returns to Aboriginal and Torres Strait Islander artists and their communities.



Draft 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 company enforcing the code is under-resourced and overstretched.



Draft Finding 8.3

Artists face difficulties accessing justice 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 support services for independent artists, including those working outside of areas served by art centres and regional peak organisations.

There is scope to improve government support to the sector



Draft Finding 9.1

The big picture of government funding is hard to piece together

Aboriginal and Torres Strait Islander artists and art organisations receive funding from a multitude of sources, including targeted and mainstream arts programs and various 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 the overall amount of funding available to the sector, or assess how well different funding streams are addressing the needs of the sector.



Draft Finding 9.2

The National Indigenous Visual Arts Action Plan provides a time-limited funding increase

The Aboriginal and Torres Strait Islander visual arts and crafts sector has seen recent injections of funds both directly through the Australian Government's National Indigenous Visual Arts Action Plan, and indirectly through commitments to establish Aboriginal and Torres Strait Islander art and cultural centres.

The National Indigenous Visual Arts Action Plan provides \$25 million of additional funding to the sector over five years, including for infrastructure upgrades and building digital capacity.

The governments of the Northern Territory, South Australia and Western Australia are funding art and cultural centres in their respective jurisdictions while New South Wales is investigating similar opportunities. The Australian Government has also committed to establishing a National Aboriginal and Torres Strait Islander cultural complex in Canberra, which will include art and artefact collections.



Draft Finding 9.3

Primary funding sources from the Australian Government have plateaued in real terms in recent years

The Australian Government provides targeted annual funding of about \$24.5 million to the Aboriginal and Torres Strait Islander visual arts and crafts sector through its key art funding programs: the Indigenous Visual Arts Industry Support (IVAIS) and the Australia Council's Aboriginal and Torres Strait Islander Arts programs.

After increasing for many years, since 2015–16, total IVAIS funding has declined in real terms by 5%. Average funding for art centres — the main recipients of government support — has fallen by 6.3% as the number of art centres has increased while funding under the program has remained fixed.

Since 2016-17, funding to the Aboriginal and Torres Strait Islander Arts Program under the Australia Council has fallen in real terms by 5%.

The recent funding commitments through the National Indigenous Visual Arts Action Plan will assist a number of art centres over a five year period, but there has been no change to the ongoing operational funding provided by IVAIS.

**Draft Finding 9.4****Many roles that art centres fulfil are out of scope for arts funding programs**

The Australian Government's flagship funding program for the sector, the Indigenous Visual Arts Industry Support (IVAIS) program, focuses on art production and operational costs.

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.

Securing funding to meet the infrastructure needs of art centres has been a longstanding issue. While some funding has been made available for this purpose under the National Indigenous Visual Arts Action Plan, this commitment is only for five years at this stage.

Building the Aboriginal and Torres Strait Islander arts workforce requires a strategic approach

**Draft Finding 9.5****A strategic approach to building the Aboriginal and Torres Strait Islander arts workforce is lacking**

Art centres and other art organisations continue to face significant difficulty recruiting and retaining skilled art workers, especially in remote areas.

There is no strategic approach at the national level to build the pipeline of Aboriginal and Torres Strait Islander visual arts and crafts workers — and leaders — in remote, regional and urban areas.

The Aboriginal and Torres Strait Islander arts sector was *not* included as an area of focus under the National Roadmap for Indigenous Skills, Jobs and Wealth Creation, and there is a risk that strategic opportunities will be missed as a result. With a number of Aboriginal and Torres Strait Islander art and cultural institutions being built across the country, investment in career pathways and traineeships is required to ensure Aboriginal and Torres Strait Islander people lead — and are employed by — these institutions, and to meet broader policy goals as agreed by governments on Aboriginal and Torres Strait Islander employment, self-determination, leadership and empowerment.

**Draft Finding 9.6****Appropriate training and professional development opportunities appear limited**

Governments provide funding for professional development and training for workers in the visual arts and crafts sector. However, only a limited number of *targeted* training, professional development and support programs are available to existing and aspiring Aboriginal and Torres Strait Islander visual arts and crafts workers and artists. In particular, it is not clear how adequate or accessible professional development opportunities are for independent artists.



Information request 9.1

- What are the barriers facing Aboriginal and Torres Strait Islander people wishing to develop the skills required for leadership and senior management positions in the visual arts sector? For example, is funding support to study or gain accreditation while away from home a barrier?
- Is there merit in establishing an accreditation that formally recognises the practices, skills and knowledges learnt from Elders on Country?
- Are the professional development programs offered to arts workers (and independent artists) by art centres, industry service organisations and regional hubs delivering the skills required by the industry?
- Are these programs over-subscribed? If so by how much? If not, how can art workers be supported to attend?

Strengthening the sector



Draft Recommendation 10.3

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 programs.

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
- whether and what additional support is required to help meet sector priorities (for example, whether a sector-wide Aboriginal and Torres Strait Islander workforce strategy is required)
- 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.

**Draft Recommendation 10.4****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 is not characterised by shared decision-making between governments and Aboriginal and Torres Strait Islander people.

The Australian Government (led by the Australian Government's 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.

**Information request 10.1**

- What is the best approach to bring together the range of perspectives of the sector to establish a formal shared decision-making partnership with government?
- Does the sector support the development of a national peak organisation to advocate on behalf of the sector?
- What would be required to develop a national peak organisation? How should governments support this process?

**Draft Finding 10.1****The case for an ACCC-enforced mandatory or voluntary Indigenous Art Code is not strong**

Although there is some indication of ongoing unethical conduct in some remote areas of Australia, there is inadequate evidence that this conduct is sufficiently widespread to justify an ACCC-enforced voluntary or mandatory code of conduct for the Aboriginal and Torres Strait Islander arts and crafts industry. An industry-wide code risks being a blunt and costly tool that would not necessarily address existing shortcomings.



Draft Recommendation 10.1

The Indigenous Art Code can be strengthened through a joint commitment of government and industry

The Australian Government, in partnership with state and territory governments, should modestly increase funding to Indigenous Art Code Limited to support key priorities, including:

- an enhanced dispute resolution process, with a referral pathway to independent review of decisions and public reporting of deidentified dispute outcomes
- more detailed performance indicators to inform evaluation of the Code's effectiveness, alongside public reporting of progress.

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.



Draft Recommendation 10.2

Artists should be aware of and able to access legal support services

The Australian Government should ensure that legal support services for artists are accessible. Referral pathways should be comprehensive and accessible to independent artists, and promoted such that artists are aware of them.

Through its review of the Indigenous Art Code Limited, the Australian Government should assess whether it is the best organisation to undertake this role. Depending on the outcome of that review, the Australian Government should provide funding to the responsible organisation to maintain these referral pathways.



Information request 8.1

- Are there shortcomings in the processes that governments, large corporations and non-government organisations use to purchase Aboriginal and Torres Strait Islander art and design services?
- What changes could be made to enable artists to better engage with these procurement processes?