



Australian Government

Australian Government response to the
House of Representatives Standing Committee
on Indigenous Affairs

Report on the impact of inauthentic art and craft in the style of First Nations peoples

September 2020

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Overview

Aboriginal and Torres Strait Islander cultures are diverse and dynamic. They are essential to the wellbeing and identity of Aboriginal and Torres Strait Islander peoples, as well as being a vital part of Australia's identity. Culture plays an integral role in sustaining and strengthening Indigenous communities and provides opportunities for Aboriginal and Torres Strait Islander peoples to gain employment, develop professional skills and participate in the nation's economy.

The Australian Government has actively supported Aboriginal and Torres Strait Islander visual artists – the people at the heart of this issue – since the early 1970s. Today support is provided through a number of programs and frameworks including the Indigenous Visual Arts Industry Support program and the Indigenous Languages and Arts program.

The Indigenous Visual Arts Industry Support program provides approximately \$21 million annually towards the operations of over 90 Indigenous owned art centres, as well as a number of art fairs, regional hubs and industry service organisations that are at the heart of Australia's world-renowned Indigenous visual art movement. Together these organisations support more than 8,000 artists and over 450 arts workers, most in very remote Indigenous communities. The Indigenous Languages and Arts program contributes over \$20 million annually towards keeping cultural identity strong within local communities and enhancing Aboriginal and Torres Strait Islander people's wellbeing by funding activities that support participation in, and maintenance of, Australia's Aboriginal and Torres Strait Islander cultures through languages and arts.

The public submissions to this inquiry detailed clearly the deep offence and harm that inauthentic Aboriginal and Torres Strait Islander 'style' products cause to Aboriginal and Torres Strait Islander culture and economic opportunities. The products also mislead consumers.

The Australian Government will carefully consider the findings from this inquiry and the most effective ways to provide opportunities for Indigenous artists and designers, while supporting initiatives that give consumers, tourists and retailers the information they need to identify Aboriginal and Torres Strait Islander products in the marketplace. The Government will consider these findings in the context of the impact of the COVID-19 pandemic, which is currently impacting the Indigenous visual arts industry. Since March 2020, many Indigenous communities have been closed to travel due to health and safety concerns. Art centres, galleries and studios closed or scaled back their activities. Art fairs and industry events have been cancelled or postponed.

Australian Government response

The Australian Government's response to the *Report on the impact of inauthentic art and craft in the style of First Nations peoples* is set out below.

Recommendation 1:

The committee recommends as a matter of urgency that the Productivity Commission conducts a comprehensive inquiry into the value and structure of the current market for First Nations art and crafts. This inquiry should incorporate the following elements:

- a detailed structural breakdown of the different parts of this market and the operators within it;
- the total value of the fine art market stratified by the different avenues through which this art is produced, procured and sold;
- the total value of the souvenir and craft market stratified by the different avenues through which these products are produced, procured and sold;
- the market value of inauthentic souvenirs and art sold in Australia;
- the revenues generated by art centres;
- the barriers facing art centres and First Nations artists who wish to sell fine art or souvenir style items in mainstream markets; and
- a summary reflecting both the number and value of imported imitation low end Indigenous products, and a like summary for products made and/or licenced in Australia.

The Government **agrees to this recommendation.**

The Government will commission a Productivity Commission study into the nature and structure of the Aboriginal and Torres Strait Islander arts and crafts market, and policies to address deficiencies in the market. The study's scope and terms of reference will be developed in consultation with the Productivity Commission and relevant Aboriginal and Torres Strait Islander stakeholders.

Recommendation 2:

The committee recommends as a matter of urgency that the Australian Government consults with the Indigenous Art Code and the First Nations art sector on what resourcing is required for the Indigenous Art Code Ltd to fulfil its considerable potential, and provides this funding as a means of protecting both our unique Indigenous cultures and protecting the future and value of this market for Australian and International visitor purchasing.

The committee further recommends that a detailed evaluation of industry practices take place no later than two years after the provision of this funding. A mandatory code should be introduced if that review reveals few improvements in industry behaviour and little reduction in the prevalence of imitation First Nations art and craft.

The Government **agrees in part to this recommendation.**

The Indigenous Art Code (the Code) was established to guide ethical dealing between fine art dealers and Aboriginal and Torres Strait Islander artists. The Code has been funded through the Australian Government's Indigenous Visual Arts Industry Support (IVAIS) program since 2013.

Funding to the Code has increased from \$200,000 in 2018-19 to \$350,000 from 2019-20, with a national funding commitment from all states and territories and further funding from the Australian Government, to enable the Code to expand its remit to better promote ethical art dealing. The important and expanded role of the organisation was recognised at the September 2018 Meeting of Cultural Ministers where all jurisdictions agreed to provide additional support to the Code.

This additional funding will enable the engagement of a second staff member, expanded program delivery and travel to Indigenous visual art events and organisations. The additional resources will substantially increase the Code's capacity to support Aboriginal and Torres Strait Islander artists and arts organisations, promote ethical dealing and respond to inauthentic products.

Additional funding of \$30,000 was provided in June 2020 through IVAIS to support components of the organisation's *Our Art is our Lifeline* campaign which promotes the importance of continued support to Indigenous artists through ethical online purchasing.

The Government **notes** the recommendation for a detailed evaluation of industry practices no later than two years after the provision of new funding to the Code, and that consideration be given to the introduction of a mandatory code if industry behaviour has not improved.

The Government **notes** the recommendation to introduce a mandatory code of conduct, should the review reveal little improvement in industry behaviour.

Mandatory industry codes, set out in Part IVB of the *Competition and Consumer Act 2010*, regulate the conduct of participants in a particular market to provide a minimum standard of protection to firms and consumers, and to foster more efficient markets. Mandatory codes are binding on all industry participants.

Industry codes are a serious market intervention, and as a general principle, the Government only prescribes industry codes where there is sufficient evidence of market failure and industry has attempted to self-regulate without success. A compelling case for regulatory intervention must be made before Government considers prescribing an enforceable code of conduct. An industry will generally only be subject to government intervention where there is a demonstrable problem affecting other participants and consumers which the market cannot or will not overcome.

The report identifies a number of options that could be implemented to improve industry practices, and these options should be explored before any Government consideration of a new mandatory code of conduct.

Recommendation 3:

The committee recommends that the Australian Government establishes and funds a separate arm of the Indigenous Business Sector Strategy that is specifically aimed at art centres. This arm should incorporate the following aspects:

- a business advisory hub that will advise art centres on how to access mainstream souvenir markets;
- seed funding for art centres to build capacity, including staff training, to enter mainstream souvenir markets, including mentoring and monitoring strategies; and
- solutions to the lack of infrastructure, particularly housing, that prevents many art centres from hiring and retaining art centre managers.

The Government **notes this recommendation.**

The Indigenous Business Sector Strategy (IBSS) is a 10-year plan to improve the Indigenous business sector's access to business and financial support. It was developed following extensive consultation with the Indigenous business community and launched by the Government in February 2018. At this stage, it would not be practical to establish a separate arm of the IBSS specifically aimed at art centres given the IBSS is still in its early stages of rollout, and was developed in response to the needs identified by the Indigenous business sector.

Opportunities for targeted support for art centres will be considered under the existing structure of the IBSS. For example, if there is a local demand the Indigenous Business and Employment Hubs (initially located in Western Sydney and Perth, along with an Innovation Hub in Adelaide) could provide specialised advice and support for art centres. Advice could cover matters such as accessing mainstream souvenir markets, accessing seed funding and options to fund infrastructure.

Art centres in the Northern Territory are able to apply for funding through the Aboriginal Benefit Account (ABA). The ABA receives monies from the Commonwealth based on the value of royalties generated from mining on Aboriginal land in the NT. Funding can be utilised for services in the Northern Territory for land and property acquisition, construction or to improve infrastructure.

ABA funding is provided on the provision the project is a one off and projects are specifically for the benefit of Aboriginal people in the NT. All applications are reviewed by the ABA Advisory Committee (ABAAC). ABAAC considers applications based on the benefit for Aboriginal people in the NT and then provides advice to the Minister. Members of ABAAC are representatives from across the NT and are nominated by their respective land councils.

Recommendation 4:

The committee recommends that the Australian Government develops an Information Standard for authentic First Nations art in full consultation with First Nations artists and communities and the Indigenous Art Code.

The Government **notes this recommendation.**

The report sets out a wide range of potential policy responses to increase demand for authentic Aboriginal and Torres Strait Islander products. The Government supports an education campaign to assist consumers to make informed choices between authentic and inauthentic products.

Further, the Government (through IP Australia) has agreed in-principle to work with Indigenous communities to consider the viability of a certification trade mark (CTM) scheme for authentic products. If well designed and widely adopted by Aboriginal and Torres Strait Islander artists across urban, regional and remote locations, this could give artists the capacity for their product to stand out from imitations, and provide a further basis for a consumer information campaign.

The Federal Court judgment in *ACCC v Birubi Art Pty Ltd* [2018] FCA 1595 made clear that the Australian Consumer Law (ACL) prohibits businesses from misleading consumers about the authenticity of goods, even in circumstances where authenticity is implied by symbols and imagery rather than a specific statement that a good is authentic. In June 2019, the Court ordered Birubi to pay penalties totalling \$2.3 million. The application of the ACL through the judgment has led to the souvenirs / artwork which were the subject of the case now being offered to consumers with fine print labelling giving advice to the effect that the products are made in Indonesia and are hand painted by Indonesian artists following original artworks by an Indigenous artist.

The ACCC will undertake compliance initiatives to provide greater clarity and awareness to souvenir wholesalers and retailers about their obligations under the ACL. An information standard remains a longer-term option if other responses are not effective to assist business and consumers to make informed choices.

As part of its consideration of non-regulatory labelling options, the Government has funded a trial to test the viability of using digital labels on authentic Indigenous products to assist consumers to make informed, ethical purchases and to increase economic and cultural opportunities for Aboriginal and Torres Strait Islander artists and designers.

This contemporary approach to labelling is being trialled by Desart, the peak body for central Australian Aboriginal art centres. Three Indigenous-owned art centres across the Northern Territory, Western Australia and Queensland are participating in the trial, which commenced on 1 July 2019.

The digital labels use QR Codes to provide a portal for consumers to obtain provenance and artist information, and can also be used by producers and wholesalers to promote and track products, and promote their organisations. Importantly, art centres using the new QR Code can continue to use their own unique branding, and determine what information is provided to consumers, thereby protecting their market presence and share.

The digital labelling trial is using Stories Art Money (SAM) as its platform. SAM is the national, web-based arts sales and cataloguing system used by around 90 Indigenous art centres, most in very-remote communities.

To provide consumers with an augmented experience, Desart worked with the three art centres participating in the trial to develop content relating to the product, artists or art centre that is activated when the product is scanned.

Digital labelling technologies are a low cost form of self-regulation, and build on existing labelling methods. Following the trial, stage two could involve extending the system to other Indigenous art centres that use SAM.

Recommendation 5:

The committee recommends that the Australian Government develops an information guide on authentic First Nations art to be provided to all arriving passengers at an airport or any other port of entry to Australia, with a preference for a short pre-arrival video presentation.

The Government **agrees in part to this recommendation.**

Options will be investigated on how best to guide consumers, including domestic and international tourists, on the purchase of authentic Indigenous products, and on the role of the Australian Consumer Law.

Tourism Australia will disseminate the information on the following channels:

- Essentials industry newsletter story
- Corporate website – tourism.australia.com
- Consumer website – Australia.com
- Aussie Specialist Program Indigenous module
- Share the information with the States and Territories through the Australian Standing Committee on Tourism.

The Aussie Specialist Program Indigenous module is an online training platform about Australia for travel agents around the world. More information can be found here: www.tourism.australia.com/en/about/our-programs/aussie-specialist-program.html?cid=DM11220&bid=14606604.

The Australian Competition and Consumer Commission and the Department of Infrastructure, Transport, Regional Development and Communications will contribute to the development of a Guide for consumers, with a focus on the application of the Australian Consumer Law.

Guidance material would also be developed if a voluntary certification trade mark scheme for authentic Indigenous products were to be adopted.

Recommendation 6:

The committee recommends that IP Australia develops a Certification Trade Mark scheme for authentic First Nations art and craft in full consultation with all relevant stakeholders

The Government **agrees in principle to this recommendation.**

The Australian Government supports initiatives that enhance the information available to consumers and enable them to make informed purchasing decisions. If well designed and widely adopted, a certification trade mark that indicates provenance and authenticity of Indigenous goods and services could help overcome a number of the problems that have been identified by the Committee. The Government sees value in investigating sector support for such a scheme.

There are differing views among stakeholders on this issue and IP Australia will work with Indigenous communities and industry peak organisations to consider whether a scheme can be developed that recognises and balances these different interests. In investigating this, IP Australia will take into consideration existing voluntary labelling schemes, including the digital labelling scheme that Desart is trialling, and other supply chain verification options that could be developed using different technologies.

Recommendation 7:

The committee recommends that additional funding be provided through the Indigenous Visual Arts Industry Support program to:

- enable First Nations organisations such as art centres to advise and support artists who have been affected by carpetbagging; and
- work with advisors from the Departments of Social Services, Employment and Prime Minister and Cabinet to plan a detailed program of interactive, financially viable assistance for First Nations artists or individuals who have been abused in this way, including a model to estimate any budgetary implications.

The Government **notes this recommendation.**

The Government acknowledges the significant hardship caused by carpetbagging, whereby a dealer takes advantage of an Aboriginal or Torres Strait Islander artist's need for cash or other goods or services, and offers significantly less than market value for an art work.

The outcomes sought through the Government's Indigenous Visual Arts Industry Support (IVAIS) program are:

- a professional, viable and ethical Indigenous visual arts industry that features strong participation and provides economic opportunities for Aboriginal and Torres Strait Islander people
- the continued production, exhibition, critique, purchase and collection of Indigenous visual art.

Each year, the IVAIS program contributes approximately \$21 million per annum towards the operations of over 90 Indigenous-owned art centres, and a number of art fairs, regional hubs and service organisations that are at the heart of Australia's internationally renowned Indigenous visual art movement. Approximately \$2.7 million of the annual IVAIS budget is provided to seven service organisations that support artists and art centres, and work to raise professional and ethical standards across the industry.

In response to the COVID-19 pandemic, on 9 April 2020, the Australian Government announced it would provide an additional \$7 million funding which will assist to make sure that Indigenous Art Centres funded through the Indigenous Visual Arts Industry Support program are well-placed to re-enter the market once the COVID-19 crisis has passed, and that IVAIS-funded Art Fairs are in place to assist to build the market for art by Aboriginal and Torres Strait Islander people.

The Indigenous Art Code (the Code) establishes standards for commercial dealings between dealers and Aboriginal and Torres Strait Islander artists to support fair and ethical trade in artwork, transparency in the process of promotion and sale of artwork, and that disputes arising under the Code are dealt with efficiently and fairly. It also has a role in educating artists, art centre staff and art dealers to encourage best practice in commercial dealings.

Arts Law Centre of Australia's (Arts Law's) *Artists in the Black* program provides specialised free or low-cost tailored legal assistance for Aboriginal and Torres Strait Islander

artists. This includes brokering significant pro-bono legal support for more complex cases and the Adopt a Lawyer program for art centres.

In addition to the tailored support offered by the Code and the Arts Law respectively in relation to ethical dealing and legal matters, five other Indigenous-owned and governed service organisations provide regionally specific professional development, training, referrals and advice to address endemic problems.

These organisations play a pivotal role in supporting artists and professional arts practice and include Desart and the Arnhem, Northern and Kimberley Artists Aboriginal Corporation (ANKA) in the Northern Territory, the Indigenous Art Centre Alliance in Far North Queensland, Ananguku Arts in South Australia and the Aboriginal Art Centre Hub of Western Australia. A number of these organisations received additional one-off funding in 2018-19 to support marketing and promotional opportunities for their member art centres.

The IVAIS funded network of Indigenous art centres and service organisations provides significant support and protection for artists in relation to unethical dealing. The Department of Infrastructure, Transport, Regional Development and Communications will continue to work with this group to identify any further action that can be taken in relation to this issue.

Recommendation 8:

The committee recommends that the Australian Government begins a consultation process to develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.

The committee is mindful of the current Australia Council inquiry into the feasibility of a National Indigenous Art and Cultural Authority. The committee fully supports the establishment of this body and recommends that it be part of the consultation process.

The Government **agrees to this recommendation.**

The Government recognises that the misappropriation of Indigenous knowledge and cultural expressions causes significant offence to Indigenous communities and damage to Indigenous culture and identity. Existing intellectual property (IP) laws provide certain types of protection in specific circumstances, enabling people to earn economic benefits from, and to be recognised for, their innovation and creativity. IP laws focus on individual ownership and do not reflect the emphasis of custodianship over proprietorship that is fundamental within Indigenous culture.

As noted by the Committee, developing stand-alone legislation would be a complex and long-term project, requiring significant engagement and consultation with Indigenous communities. The Government considers that further work is needed to assess the scope and feasibility of new legislation before the recommended consultation process could be commenced. The Government has asked the Intellectual Property Policy Group (IPPG), which coordinates IP policy development across government, to undertake this further assessment.

The Australia Council is providing interim secretariat support to the First Nations arts sector for the development of a National Indigenous Art and Cultural Authority (NIACA), including the facilitation of a national consultation process. In 2019, the consultation process included an online survey, a consultation paper and written submissions, consultation forums and regional summits. The consultation process will feed into a national summit on First Nations arts and culture, originally scheduled for October 2020, that has been postponed until October 2021 due to COVID-19. The IPPG's scope and feasibility assessment will take into account the Australia Council for the Arts' consultation on a NIACA.