

Joint submission from
Arts Law Centre of Australia,
Copyright Agency and
The Indigenous Art Code Ltd.

Responding to the
Productivity Commission

Issues Paper – Aboriginal and Torres Strait Islander Visual Arts and Crafts



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9 February 2022

Aboriginal and Torres Strait Islander Visual Arts and Craft
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Dear Productivity Commissioners,

The Arts Law Centre of Australia (**Arts Law**), the Copyright Agency and the Indigenous Art Code Limited (**IartC**) are pleased to make the below joint submission to the Productivity Commission study into Aboriginal and Torres Strait Islander Visual Arts and Crafts. In response to the September 2021 Issues Paper released by the Productivity Commission (**Issues Paper**), the below submission will aim to address all issues and questions raised that are relevant to our three organisations' knowledge and experience.

We would like to acknowledge the Traditional Owners of the various lands on which our three organisations work and pay our respects to Elders past and present.

Please note that for the purposes of this submission, we respectfully use the terms 'Aboriginal and Torres Strait Islander', 'First Nations' and 'Indigenous' interchangeably to reference the Aboriginal and Torres Strait Islander people belonging to this country.

Aboriginal and Torres Strait Islander readers are advised that this document may contain names of deceased persons.

Arts Law is a not-for-profit national community legal centre for the arts that has protected and advocated for the rights of artists since 1983. Arts Law's dedicated service for Aboriginal and Torres Strait Islander artists, art businesses and art organisations, Artists in the Black (**AITB**), was established in 2004. Arts Law | AITB have provided legal advice and education services nationwide, with lawyers making hundreds of trips over the years to Aboriginal and Torres Strait Islander communities to meet face-to-face, to deliver workshops and advice, and to learn firsthand about the cultural, legal and social issues that face artists today.

The Indigenous Art Code (The Code) is about a fair go for Aboriginal and Torres Strait Islander Artists. The Code is a voluntary industry code of conduct administered by the Indigenous Art Code Ltd. The IartC has three membership categories: Artist Members, Dealer Members and Supporter Members. See IartC [Membership Policy](#). Businesses dealing in Aboriginal and Torres Strait Islander art are encouraged to become IartC Dealer Members and signatories to the Code. Once signatories, Dealer Members are required to adhere to the Code and ensure they are using fair, ethical and transparent practices when engaging with Aboriginal and Torres Strait Islander Artists.

The Code provides clear standards for dealings between dealers and Aboriginal and Torres Strait Islander Artists to deliver:

- a) fair and ethical trade in Artwork;
- b) transparency in the process of promotion and sale of authentic Artwork; and
- c) efficiency and fairness in how disputes are dealt with.

The Indigenous Art Code Ltd (**lartC**) is the organisation that administers the Code, through:

- a) administering voluntary membership of the Code and overseeing compliance;
- b) coordinating, liaising, and seeking the support of governments, regulatory and legal bodies, and associations and groups with a role in the promotion and sale of Artworks;
- c) furthering the Objects of the Company with the principal object being the promotion of Indigenous visual arts.

lartC is a limited liability public company, led by a [Board of Directors](#), drawn from the Aboriginal and Torres Strait Islander Arts sector and the wider community. The Board is independent of government and administered under the Australian Corporations Act 2001.

The Copyright Agency Ltd is a not-for-profit company limited by guarantee that collects fees and distributes royalties to its creator members for the reuse of text and images. Among its members are many visual artists across the country who use a variety of services, including the Resale Royalty scheme, which the Copyright Agency was appointed by the Australian Government to manage from its commencement on 9 June 2010. On 30 November 2017, after a successful five-year partnership, the Copyright Agency merged with Viscopy, further expanding the Copyright Agency's representation of the interests of visual artists across all media in Australia and New Zealand. Copyright Agency also provides philanthropic support to Australia's cultural community through their grants program, the Cultural Fund.

In 2016, following representations by Indigenous community members and artists, key peak bodies, Arts Law, the Copyright Agency | Viscopy (as they were then known) and lartC began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal-style' art and craft products and merchandise for sale across Australia that had no connection to Aboriginal and Torres Strait Islander artists and communities. The result was the creation of the **Fake Art Harms Culture** campaign, the core aim of which is to end the market of fake Aboriginal and Torres Strait Islander art in Australia by increasing consumer awareness and by advocating for meaningful law reform in settings such as this present study.

This history of collaboration between Arts Law, the Copyright Agency and lartC that led to the Fake Art Harms Culture campaign is what has led the three of our organisations to prepare and present the below as a joint submission to the Productivity Commission study. While our organisations share a national scope and a common mission of protecting and advancing the rights of Australian artists, our organisations are independent of each other and occupy vastly different spaces and roles in the Australian arts ecosystem. These differences aside, our collaboration on the Fake Art Harms Culture campaign revealed what could be achieved by pooling our knowledge and resources and working together on a shared purpose.

In the below submission, we hope to present the product of rigorous discussions between our organisations about the present conditions and practices of the visual arts market and propose options for potential law and policy reform. We do not pretend for an instant to be the final arbiter of what is good or fair or just and approach this study with humility. With respect to questions of cultural authority, we submit that the Commission defers to the experiences and perspectives of the relevant Aboriginal and Torres Strait Islander artists, communities and organisations across the country from which that authority originates.

We also respectfully acknowledge the work that many Aboriginal and Torres Strait Islander artists, communities and individuals have done over many decades and continue to do in the ongoing pursuit of recognition of rights.

With this important acknowledgement in mind, what we have hoped to do is present the consensus arrived at by our combined organisational skill, expertise and experience for the Commission's consideration. Where relevant, it will be made clear throughout the below submissions where certain information or a certain viewpoint is specific to only one of our organisations, or where the views of one organisation are endorsed or rejected by another. For any further points of clarity, each organisation may make a further separate

submission to the study.

We would like to acknowledge the assistance of Allens Linklaters and thank partners Ted Hill and Andrew Wiseman and their teams for their considerable efforts in research and drafting of sections below reviewing intellectual property laws, comments on codes of practice for the market and on amendments to the Australian Consumer Law.

Arts Law, the Copyright Agency and IartC welcome further questions about our submission and are available to discuss any of the issues raised with the Commission.

Contributors

Our contributors have been informed and shaped by the hundreds of artists who engage with our organisations every year. We could not write this submission without them and our effort in participating in this study is done with the hope that the findings have impact for those artists.

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Introduction

Our joint submission focuses on three key reform areas which we believe would improve the security, stability, productivity, and integrity of the Aboriginal and Torres Strait Islander visual arts market. These areas are:

- a) Amendments to the Australian Consumer Law (**ACL**) to be implemented to combat the fake art market (see responses to Issues 4, 5 and 6 below);
- b) A stronger regulatory framework to govern the market (see responses to Issues 6 and below); and
- c) A sui generis system to provide legal protection of Indigenous Cultural and Intellectual Property (**ICIP**) (see response to Issue 6 below).

These three reform areas are modest in their scope, especially in consideration of the immediate benefit they would provide to Aboriginal and Torres Strait Islander visual artists if implemented. As we will explore throughout the submission, all of the suggested reforms have precedents either in the visual arts sector more broadly, in other Australian industries or internationally.

In addition, our submission includes comprehensive analyses, in response to Issue 2 of the Terms of Reference, of the market for Aboriginal and Torres Strait Islander art and cultural products, with extensive definitions of the various models present in the industry and detailed research undertaken by the IartC and analysed by the University of Technology Sydney (UTS), which is included in Schedule 2.

It is well understood that the continuation of culture is not just for its own sake but contributes more broadly to a healthy and prosperous society. The special place of Aboriginal and Torres Strait Islander cultures has been directly acknowledged as a key tenet of the Australian Government's strategy for Closing the Gap – see, for example, the National Agreement on Closing the Gap, which expressly acknowledges “that strong Aboriginal and Torres Strait Islander cultures are fundamental to improved life outcomes for Aboriginal and Torres Strait Islander people.”¹

Several of the 17 Outcome Areas that sit beneath the National Agreement's Priority Reforms could be addressed in part by legislative reform to strengthen cultural protections and safeguards, namely:

- Outcome Area 8: Strong economic participation and development of Aboriginal and Torres Strait Islander people and communities.²
- Outcome Area 15: Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters.³
- Outcome Area 16: Aboriginal and Torres Strait Islander cultures and languages are strong, supported and flourishing.⁴
- Outcome Area 17: Aboriginal and Torres Strait Islander people have access to information and services enabling participation in informed decision-making regarding their own lives.⁵

In addition to the above Outcomes, it is clear that support for the Aboriginal and Torres Strait Islander art market more broadly enriches the social, economic and cultural lives of Aboriginal and Torres Strait Islander people and communities and contributes to all of the other goals of the National Agreement pertaining to health, safety, education, wellbeing and opportunity for First Nations people.

1 *Coalition of Peaks, National Agreement on Closing the Gap*, July 2020, p. 4[20].

2 *Ibid.*, p. 29.

3 *Ibid.*, p. 39.

4 *Ibid.*, p. 40.

5 *Ibid.*, p. 41.

This would also serve to bring Australia in line with key international human rights instruments, including Australia's commitments under the International Covenant on Economic, Social and Cultural Rights (ICESCR) – which are enshrined in Australian law – specifically Article 15, which states (emphasis added):

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
 - a) **To take part in cultural life;**
 - b) To enjoy the benefits of scientific progress and its applications;
 - c) **To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**
2. **The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.**
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Importantly, this study and the reforms for which we are advocating would align with further instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – endorsed by Australia in 2009 – which has a number of sections pertaining directly to cultural rights. This includes Article 31, which states that:

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.⁶

The sum of the above is that, in addition to being in the interests of respect, justice and fairness for Aboriginal and Torres Strait Islander artists, the reforms which we detail in the below submission concurrently progress Australia's ambitions to act meaningfully on Closing the Gap and ensure our compliance with international standards.

On the subject of human rights, if a study such as this is being undertaken, there is a further issue which need to be explored and addressed. Many submissions are likely to highlight details about the poor treatment of Aboriginal and Torres Strait Islander artists. In doing so, it is common to read "deficit-based" language about the plight of artists, suggesting that all Aboriginal and Torres Strait Islander artists are in

⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295, Art 31. See also, *inter alia*, arts 8, 11, 12, 13 and 15, esp. Art 11(2), which reads: "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

the same boat, and that all artists are being ripped off, taken advantage of and forced to create artworks in appalling conditions. From our respective experiences' this simply is not true – and while we do not for a moment wish to undermine the importance of hearing those stories of exploitation, our hope in this submission is to present an approach that focuses strongly on capability-building for Aboriginal and Torres Strait Islander artists.

At the same time, we also wish to draw attention to the everyday problems that we assist Aboriginal and Torres Strait Islander artists with, including but not limited to underpayment for an artist's work, copyright infringement of an artist's design or an artist signing an agreement that was not properly explained to them. Many of these behaviours have been normalised and entrenched in the market and so do not receive the same level of attention as instances of very severe mistreatment in the media and in the public consciousness. We believe, however, that it is important to highlight these activities and address them meaningfully in this study.

Aboriginal and Torres Strait Islander artists contribute to the cultural fabric of this nation. The Aboriginal and Torres Strait Islander art sector provides employment opportunities for thousands of Aboriginal and Torres Strait Islanders across the country. For many non-Indigenous Australians, it is a way of connecting with First Nations culture and, through that connection, a greater sense of understanding, community and reconciliation. We hope the findings and recommendations of this will build on First Nations artists' strengths and the contributions they make to the sector and the nation as a whole.

Over the years, many artists have approached the IartC, Arts Law and the Copyright Agency as well as numerous other peaks bodies and artist support organisations including, but not limited to, [Desart](#), [Arnhem, Northern and Kimberley Artists \(ANKA\)](#), [Aboriginal Art Centre Hub Western Australia \(AACHWA\)](#), [Indigenous Art Centre Alliance \(IACA\)](#), [Ku Arts](#), [Umi Arts](#) and [the National Association for the Visual Artists \(NAVA\)](#). The ongoing role that these and many other organisations play demonstrates the artists' commitment to expanding their knowledge and understanding of the visual arts sector and market, and the importance of providing effective business, legal and industry guidance and support to allow artists to be able to get on with their work. Each of our organisations could provide greater support to artists but currently face significant resourcing constraints.

The constraints our organisations face are experienced by many in the arts. The inability of any organisation working with Aboriginal and Torres Strait Islander artists to participate in studies and inquiries like this one is not due to a lack of interest, care or knowledge which would be beneficial for the public record. Rather, there is a sense of fatigue and ambivalence about whether such inquiries will have any meaningful impact that is proportionate to the resources required to make a submission. Our three organisations welcome the opportunity to contribute to inquiries such as this, however, the time and resources required to contribute to these inquiries in a meaningful way require us to divert already limited resources away from core operational activities.

Each section below aligns with the structure of the Issues Paper, retaining the major headings and numbers used in that document. As mentioned above, research undertaken by the Indigenous Art Code and analysed by UTS is attached in Schedule 2. Further additional materials may also be submitted by each organisation separate to this central submission.

1. What is this study about?

What issues should this study focus on?

Given the number of previous inquiries into the Aboriginal and Torres Strait Islander visual arts and crafts markets, what are the main contributions this study can make?

- 1.1 As noted in the Issues Paper (p. 1) and in the Executive Summary above, there have been a number of major studies and inquiries across multiple levels of government and between various government departments into every aspect of the Aboriginal and Torres Strait Islander art market. These inquiries and their resulting reports and recommendations have seen this market grow, develop, evolve and spread across the country and internationally over decades. In addition to these inquiries into the Aboriginal and Torres Strait Islander art market at large, there have been further public consultations and calls for submissions regarding draft bills and legislative amendments that pertain directly or indirectly to Aboriginal and Torres Strait Islander art and culture including, most recently, the inquiry into the destruction of the Juukan Gorge, and the calls for submissions around recent private members' bills to crack down on fake art.
- 1.2 At the outset, therefore, it is important to note the prevailing sense of frustration – to put it at its mildest – when, in the past, major inquiries have been conducted on related topics with little to show by way of meaningful, substantive reform. Our hope is that every study and submission on a given topic will be the last and that the political and public consensus around protecting Aboriginal and Torres Strait Islander arts and culture can be reflected in law and policy reform. Unfortunately, this has not been the case. Reports have been left to collect dust, recommendations have been ignored, and draft bills have failed to pass through Parliament.
- 1.3 Understanding the role of the Commission as a research, inquiry and advice body to the federal government on matters relating to industry, industry development and productivity (Productivity Commission Act 1998 (Cth) s 6), the critical contribution this study can make is to advise the government on the short, medium and long-term threats to the Aboriginal and Torres Strait Islander art market and to propose solutions that could be enacted today to minimise and eliminate these threats into the future.
- 1.4 At a minimum, this study should provide not only a detailed and incisive snapshot of the size, scale and scope of the Aboriginal and Torres Strait Islander art market as it stands in 2021–22, but also a view of the legislative and policy reform recommendations made by artists, art centres, industry peak bodies and other interested parties that will make this market more robust, more productive, more ethical, more transparent and fairer for the artists and cultural practitioners who share work, stories and culture with the viewing and buying public. It would also be beneficial for the study to examine the market's bottom line – namely, what proportion of the value of the market ends up in Aboriginal and Torres Strait Islander hands? We believe this would be a very tangible piece of analysis and research in addition to the understood social and cultural benefits of the market more broadly.
- 1.5 In addition to the analysis of the market and the identification of critical risks and threats to its success and growth, we would like to see the study delve into critical law reform areas and make appropriate recommendations to the Australian Government. From the perspectives of our organisations, this study should focus, at a minimum, on the following key law reform areas

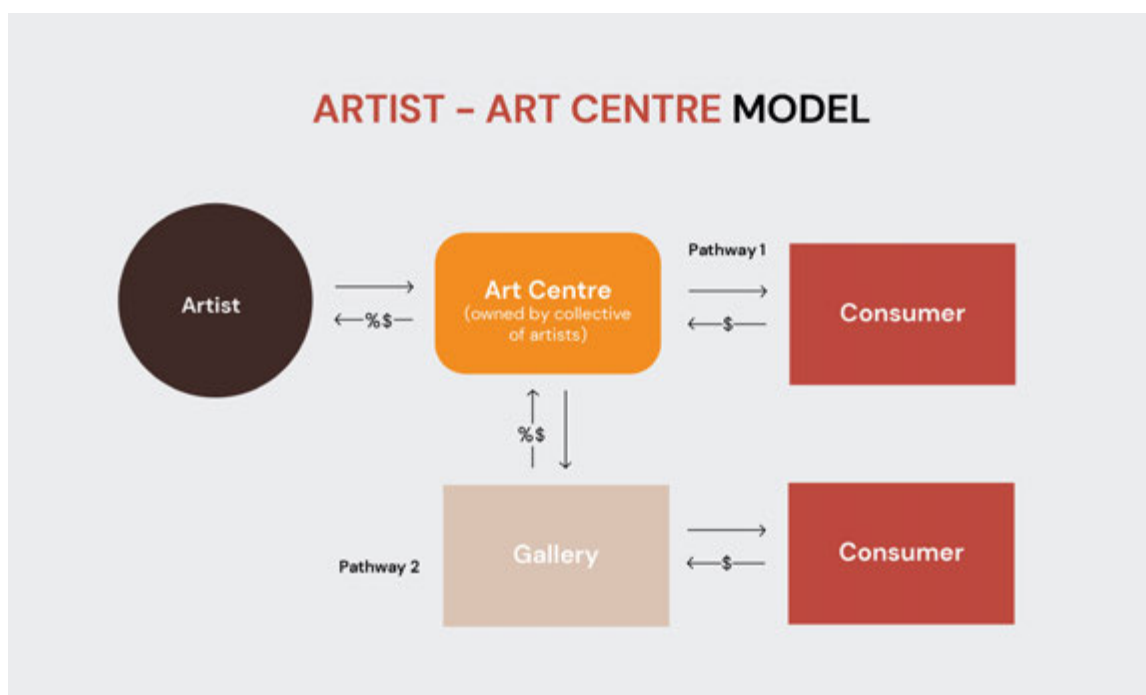
- a) Recommendation and support for amendments to the ACL to be implemented to combat the fake art and craft market (see responses to Issues 4, 5 and 6 below);
- b) A more robust regulatory framework to govern the market (see responses to Issues 6 and 7 below); and
- c) Recommendation and support for a sui generis system to provide legal protection of ICIP (see response to Issue 6 below).

2. The markets for Aboriginal and Torres Strait Islander visual arts and crafts

Have we characterised the markets accurately? Are there any aspects of the supply chains that we have missed?

- 2.1 lartC has been working on a project to map the various ways artwork can reach a consumer. The project looks at the five standard supply chains lartC sees in its work:
 - (a) the Art Centre model;
 - (b) the Consumer Direct model;
 - (c) the Gallery model;
 - (d) the Dealer-upfront model; and
 - (e) the Licensed product model.
- 2.2 We acknowledge that there are variations to each of the supply chains presented. This work is ongoing and will evolve as the market does.
- 2.3 The lartC promotes fair and ethical trade in Aboriginal and Torres Strait Islander artwork. Fair and ethical trade requires transparency. It is hoped that by objectively presenting some of the ways artwork can reach the consumer, we can provide clarity to the consumer and artists about how the dealers they work with are trading in their and other artists' work.
- 2.4 The work of Aboriginal and Torres Strait Islander artists reaches the consumer market in various ways. Too frequently, discussions about how to buy fairly and ethically are reduced to the generalisation that the only way to purchase authentically and fairly is to buy directly from one of the (over 70) Aboriginal and Torres Strait Islander owned and governed art centres. To say this disenfranchises artists who do not have an art centre to work with, artists who are working with dealers and galleries of their choosing, or artists deciding to work independently, negotiating the market on their terms. It is also damaging to the dealers operating in the Indigenous art market who do work fairly and transparently with artists, many of whom have longstanding relationships with art centres and artists working independently. Art Centres are fundamental to a vibrant, sustainable and fair market for Aboriginal and Torres Strait Islander art. It could be argued that if artists working independently of art centres had access to even some of the support and advocacy art centres provide their member artists, the market would be fairer.
- 2.5 The point of presenting the supply chains in this way is not to promote one over another but to provide information on how each model operates.
- 2.6 We understand there are many and varied ways the work of Aboriginal and Torres Strait Islander artists reaches the consumer. We also acknowledge the various government-funded schemes which have a role in the market. These include those connected to the Community Development Program (CDP) and new Remote Jobs Program (RJP) replacing CDP, National Disability Insurance Scheme (NDIS), Commonwealth Home Support Program (CHSP) previously Home and Community Care (HACC) and programs facilitated by prisons. We have not mapped these in particular. There is probably available data from the relevant state and federal agencies which support these programs.
- 2.7 This part of the submission is built upon the expertise, research and experience of lartC, Arts Law and the Copyright Agency support lartC's characterisation of the various models below and their analysis of the art market and find that it accurately reflects each organisation's experiences with artists, art centres, agents and others engaging in the market.

2.8 ARTIST – ART CENTRE MODEL

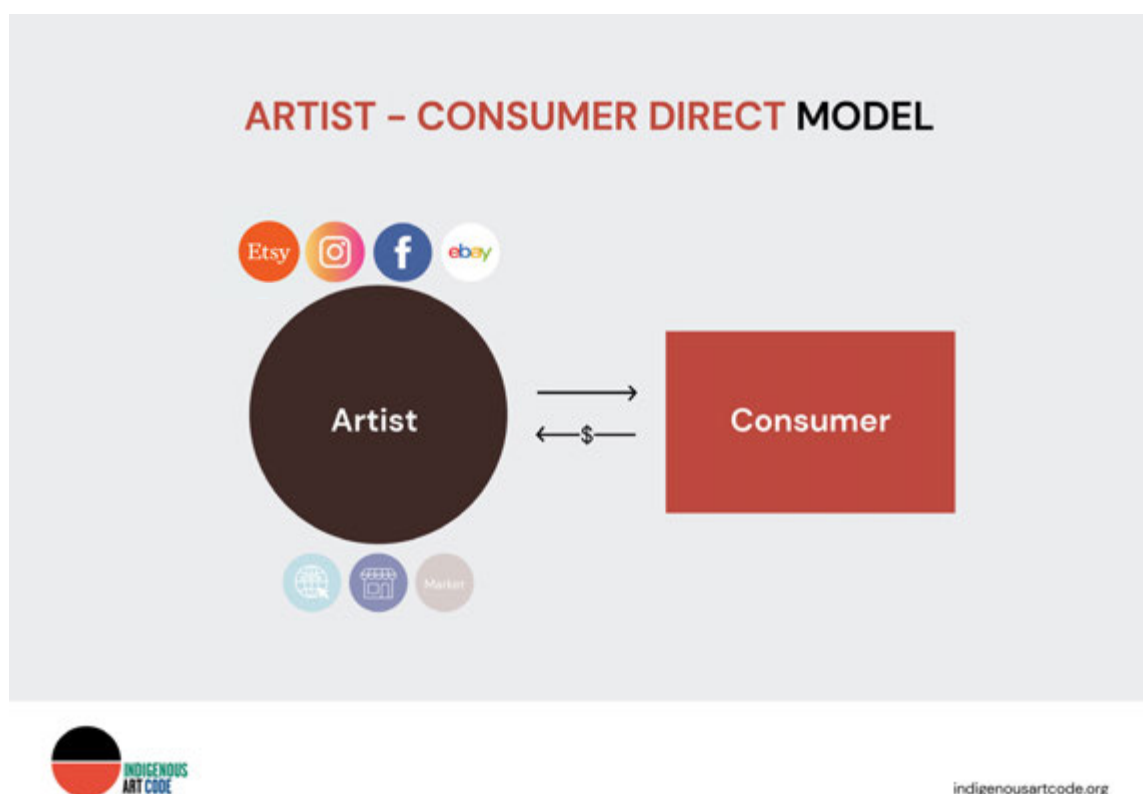


indigenouartcode.org

- 2.9 Aboriginal and Torres Strait Islander artists sell their work with an art centre through the artist- art centre model.
- 2.10 Aboriginal and Torres Strait Islander art centres around the country act as an agent in selling and promoting an artists' artwork. The art centre is owned and governed by artists, often linked by community, Country, language, or kinship. The art centre board comprises artists who lead the organisation and provide direction to the manager responsible for operations. Most arts centres nationally are located in remote and regional communities of the Northern Territory, Queensland, Torres Strait, Western Australia, and South Australia. Not every artist or community has access to an art centre.
- 2.11 Under the art centre model, artists are often supplied with materials and or provided with a place to create their artwork. Art centres also offer opportunities for professional skills development for artists, which is not dependent on the saleability of artists artwork. There are opportunities for training and employment of local Aboriginal and Torres Strait Islander staff.
- 2.12 When the art centre sells the artist's artwork, the artist receives payment. Artists usually receive 60–50% of the sale price in most art centres. The art centre keeps a 40–50% commission to pay for art materials, documentation of the artwork, artist travel, culture trips, other art centre operational expenses, including paying staff and rent. All art centre profits are reinvested into the art centre, which the artists own.
- 2.13 The art centre manager and arts workers (Aboriginal and Torres Strait Islander staff employed at the art centres) photograph, catalogue, and document the artwork in the art centre database. Most art centres use a database called Stories Art Money (SAM). Artists have full access to their accounts, consignment history, sales history, and the ability to look back on past work and keep track of their artistic development. The database is secure, and the artist and their art centre own all Copyright and Intellectual Property in the information housed in the database. Indigenous Art Code Dealer Member art centres will issue certificates of authenticity with the Indigenous Art Code logo.

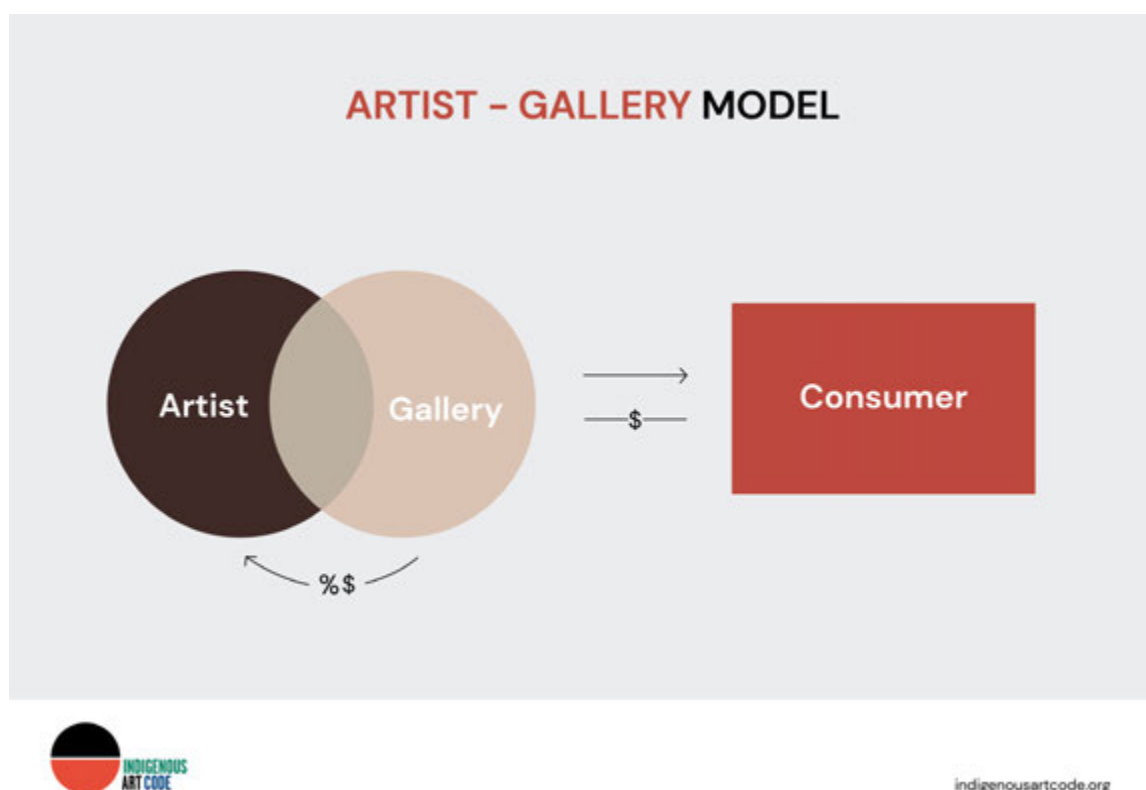
- 2.14 The artists' ICIP is paramount, valued, and respected within art centres.
- 2.15 Most art centres around Australia are Indigenous Corporations, incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006. They typically receive government funding. They are not-for-profit businesses and are independently audited each year. Information about art centres can be accessed from the peak bodies who work for and with art centres and their member artists (ANKA, Desart, Ku Arts, IACA, AACHWA).
- 2.16 Artists' artwork is sold through art centres via two major pathways.
- (a) Sold directly from the art centre to the customer (**Pathway 1**) or
 - (b) Through consigning to a gallery (**Pathway 2**)
- 2.17 Pathway 1 – When artwork is sold directly from the art centre to the customer, the sale may happen from the art centre's website, physically from the art centre, if visitors are possible, or at a market stall or art fair, in which the art centre participates in. Art centres will sometimes sell work directly to galleries; the gallery then sells the work to the customer. After this sale is made, the art centre will pay the artist minus the art centre commission. This is usually 40% or 50% of the sale price. The art centre's commission is used to cover the cost of operational expenses of the art centre. All art centre profits are reinvested into the art centre, which the artists own.
- 2.18 Pathway 2 – When artwork is sold through a gallery, the art centre will consign the artwork to the gallery, and the gallery will sell the work to buyers and collectors on the art centre's behalf. This sale often happens as part of an exhibition, sometimes online or at major contemporary art fairs.
- 2.19 The gallery takes a commission from the sale price of the artwork. Usually, this is 40%. When the work is sold, the gallery pays the art centre the sale price minus the gallery's commission. The art centre then takes their commission (usually 40%), and the artist is paid the remainder. The gallery usually covers the cost of promoting and marketing the exhibition, installing the works, and holding the exhibition. Some art centres choose to only exhibit with galleries committed to either exhibiting and selling work from art centres or independent artists under a consignment agreement that clearly articulates the terms of the agreement with the artist. Some galleries choose to only work with art centres as they value the transparency provided by the art centre model. They can also be sure of the source of the work. Art centres, commercial galleries, public institutions (State and Territory galleries and museums), and collectors value these relationships as artworks with art centre provenance are also often highly regarded in the secondary market.
- 2.20 There are apparent benefits to artists and clarity for consumers under the art centre model. While the above mentioned description of how an art centre works with artists is widely accepted, there are some variations.

2.21 ARTIST – CONSUMER DIRECT MODEL



- 2.22 Aboriginal and Torres Strait Islander artists sell their work directly to the consumer through the artist–consumer direct model. This model is becoming increasingly popular with the rise of social media and online purchasing. Under this model, the artist directly performs a monetary transaction with the consumer for their artwork at a price determined by the artist.
- 2.23 This model benefits those who have access to technology such as internet access and a computer and, are able to conduct business administration, provide some level of customer service, and can navigate the market and critically assess the market value of their work. Sometimes the artist–direct consumer model also requires start–up costs like website development.
- 2.24 Even if artists have this access, skills, and capabilities, some prefer to focus solely on their artmaking and operate under one of the other supply chain models.
- 2.25 Under this model, the artist creates work in their own home or studio, funds and sources all materials, professional development opportunities, and the documentation, marketing, and promotion of their work. The artist is often a sole trader or a private business entity.

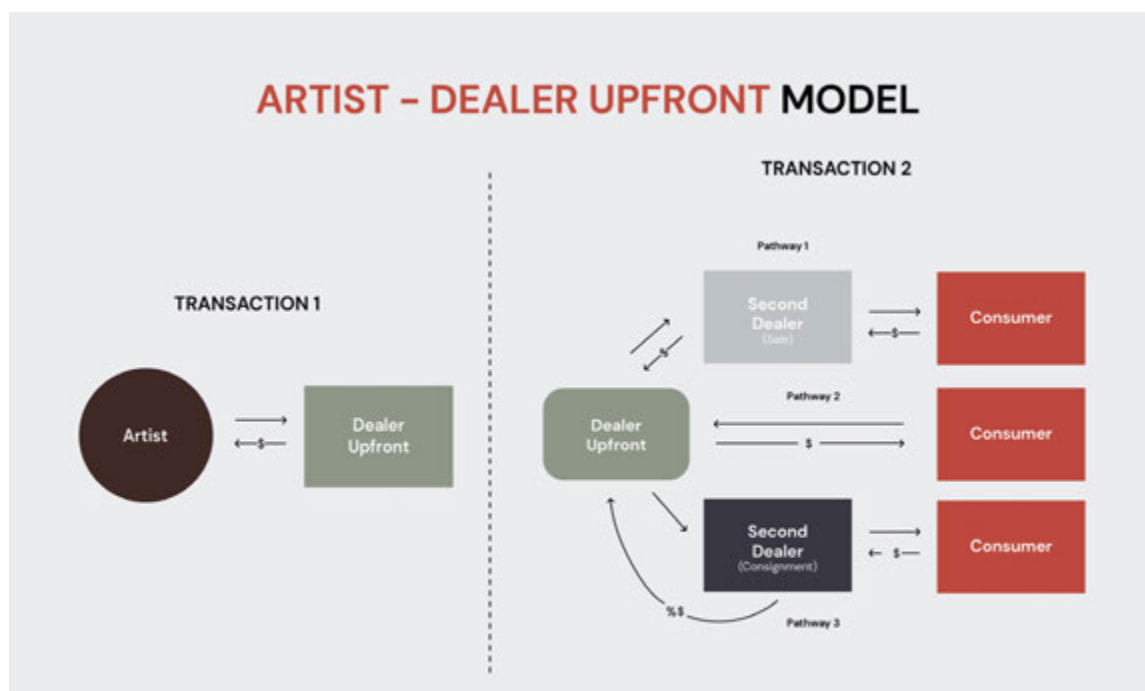
2.26 ARTIST – GALLERY MODEL



- 2.27 Through the artist–gallery model, Aboriginal and Torres Strait Islander artists, mainly established artists, have direct representation by commercial galleries. In this case, the art gallery acts as the agent for the artist. There are variations on the services, and support galleries provide to artists working with them. It should not be assumed that all galleries offer the same professional art services to the artists whose work they sell.
- 2.28 This is similar to the way many non-Indigenous artists work with galleries. These galleries often represent both Indigenous and non-Indigenous artists.
- 2.29 As with the art centre model, the artist is usually paid when the artwork is sold to the customer.
- 2.30 The artist usually creates the work in their studio using materials they have sourced themselves. Artists pursue professional development opportunities such as residencies and mentorships, although sometimes the gallery supports or encourages these options. Artists communicate directly with the gallery and usually cover their production costs, including studio rent, materials, and freight of the artwork to the gallery.
- 2.31 The gallery will usually complete artwork documentation to sell the work. Many established artists will also document their work. The artist retains all Copyright and Intellectual Property, but not necessarily in the documentation of their artwork. The gallery will have different reporting requirements depending on the business entity. Usually, these galleries are for-profit businesses.
- 2.32 Under this model, the artist will often consign artwork directly to the gallery. The gallery will sell the work to buyers and collectors. This sale may happen as part of an exhibition, sometimes online or at major contemporary art fairs or other events.

2.33 When the artwork sells, the gallery will pay the artist minus the gallery commission, and this commission varies depending on the relationship. The gallery covers the cost of promoting and marketing the artist’s work, installing and exhibiting the work, and all customer service and sales-related costs. Terms of the agreement should be negotiated with the gallery before consigning any artwork to the gallery.

2.34 **ARTIST – DEALER UPFRONT MODEL**



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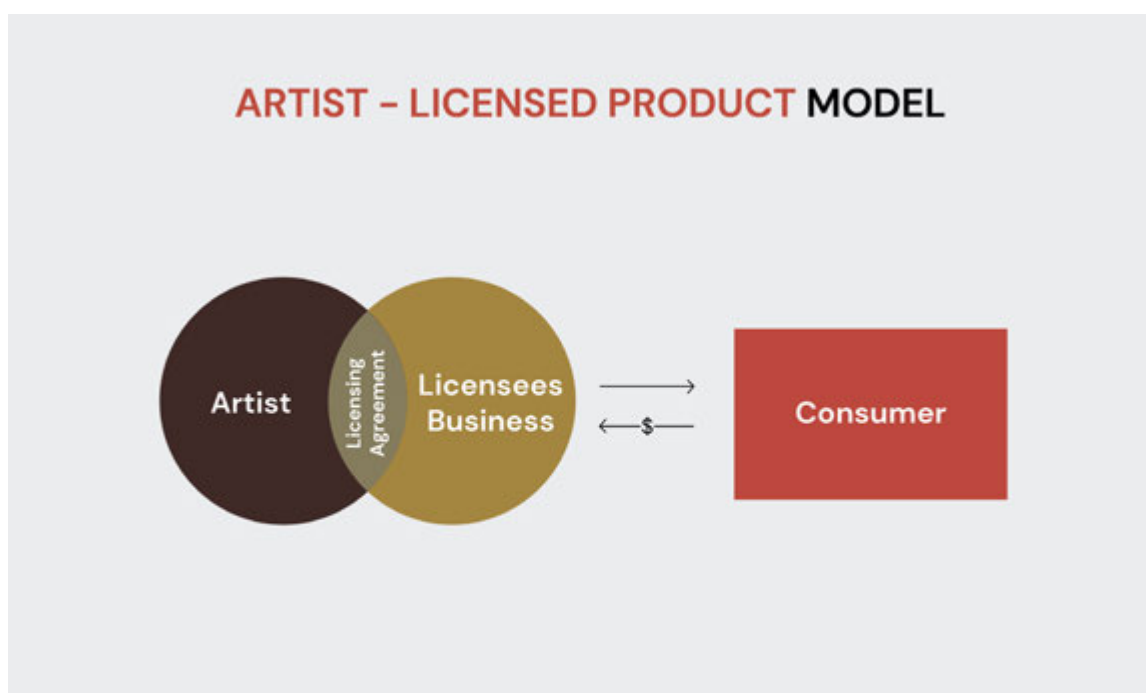
2.35 Aboriginal and Torres Strait Islander artists sell independently to a dealer through the artist-dealer upfront model. Under this model, the relationship between the dealer is sometimes transactional rather than a traditional artist-agent relationship. The artist expects to hand over the artwork for a sum of money, and then the dealer owns the artwork outright.

2.36 This model benefits artists with good negotiating skills, those who understand the market value of their work, and where the economic bargaining power of the artist is strong.

2.37 The artist will create the artwork sometimes using their materials or sometimes using materials provided by the dealer and then deducted off the purchase price.

2.38 Once purchased from the artist, the dealer can sell the artwork for any price they decide. The sale price is not dependent on the price paid to the artist. As the artwork has been purchased upfront from the artist, the next sale is considered secondary. Therefore, the dealer must report all eligible sales under the Australian Government’s Resale Royalty Scheme. Some dealers (referred to as Art Market Professional’s (AMP’s) under the Resale Royalty Scheme are not compliant with reporting resale). Further research could look at correlations between business/dealer types and resale reporting compliance.

- 2.39 The dealer will create their documentation to sell the artwork. The artist often does not keep or have access to photographs or documentation for future reference. The artist retains all Copyright and Intellectual Property in their artwork but not necessarily in the documentation of their artwork.
- 2.40 The dealer will have different reporting requirements depending on the business entity. They are for-profit businesses of various structures. The dealer will not have the exact reporting requirements as an incorporated entity (like an art centre).
- 2.41 Once the dealer has purchased the artwork from the artist, the artwork can reach the market in three ways:
- 2.42 Pathway 1: The dealer might sell (wholesale) the artwork to other dealers. This secondary dealer will then sell the work to the customer through exhibitions or sometimes through online auctions or other channels. If sold for over \$1000, the first dealer must report the resale to the Resale Royalty Scheme and pay a royalty (currently calculated at 5% of the sale price), which is returned to the artist via the Copyright Agency the second dealer will also be required to report the resale (if sold for over \$1000).
- 2.43 Pathway 2: The dealer might sell the work directly via online platforms or their physical gallery. If sold for over \$1000, the sale must be reported under the resale royalty scheme.
- 2.44 Pathway 3: The dealer might consign the artwork to other dealers. This secondary dealer will sell the work to the customer through exhibitions or sometimes through online auctions or other channels. The secondary dealer will pay the first dealer when the artwork sells. If sold for over \$1000, one of the dealers must report the resale to the Resale Royalty Scheme and pay a royalty returned to the artist via the Copyright Agency. How the resale is reported via this pathway is an area for confusion for some dealers.
- 2.45 **ARTIST – LICENSED PRODUCT MODEL**



- 2.46 There are numerous ways licensed product and merchandise reaches the consumer.
- 2.47 Aboriginal and Torres Strait Islander artists license their original artwork to be reproduced on manufactured products through the artist-licensed product model.
- 2.48 The artist may create an original artwork expressly to be reproduced on products or license an existing artwork. This artwork can be reproduced on a range of items including for example bags, scarves and mugs.
- 2.49 Aboriginal and Torres Strait Islander artists who work independently or through art centres may enter licensing agreements with a business or the art centre they work with.
- 2.50 Under the licensed product model the artist is the licensor and the business is the licensee.
- 2.51 Artists that work independently sometimes negotiate licensing agreements themselves. Their gallery might act as the agent in these negotiations and others engage the Copyright Agency (or other businesses), who will broker the license for the artist.
- 2.52 Best practice agreements generally see the artist paid a royalty (a percentage of the sale price) for each item sold. Sales of the items are reported at regular intervals, and artists are paid the royalties owing to them. Accurate reporting of all sales relies on the honesty of the licensee.
- 2.53 The products reach the market via the licensee either selling the products directly through their website or retail outlets or by wholesaling these products to their stockists, who then sell the products to the consumer.
- 2.54 Copyright licensing will be explored in further depth in our responses to issues 6 and 7 below.

In addition to the sources listed above, what other data sources are there on the size and value of the overall market or parts of the market?

- 2.55 The IartC has been collating data on dealers (its members and non-members) operating in the Aboriginal and Torres Strait Islander art market to understand better the makeup of who its members are and who its members are not. This active research informs how the IartC engages with, and better understands the sector. The University of Technology Sydney (UTS) has been engaged by IartC to analyse these research findings in an internal report referenced above and below, which is included as schedule to this document. IartC's work on collating data about the market is ongoing and could be expanded on resources permitting. Please see Schedule 2.
- 2.56 We also suggest looking at:
- [Aboriginal and Torres Strait Islander Art Economies \(Ninti-One and CRC for Remote Economic Participation, 2011–2016\)](#)
 - [A Financial Snapshot of Aboriginal and Torres Strait Islander Art Centres FYE 2020 \(Desart\)](#)
 - [Australian and New Zealand Art Sales Digest: Australian art auction sales by artist nationality \(ongoing, Furphy\)](#)
 - [Living Culture: First Nations arts participation and wellbeing \(Australia Council, 2017\)](#)
 - [Resale royalties \(ongoing, Copyright Agency\)](#) and Resale Data
 - [Domestic Arts Tourism: Connecting the country \(Australia Council, 2020\)](#)

Challenges in securing reliable data from dealers trading in Aboriginal and Torres Strait Islander Art

In 2016 the Australia Council for the Arts (Australia Council) and Deloitte Access Economics surveyed to better understand the Indigenous visual arts commercial sector.

The IartC encouraged Dealer Members to participate. Our understanding is that the project was not realised. The uptake by dealers was low and there was not enough data collected. Feedback the IartC received from dealers who did participate was:

- If you are a business that has its books in order and nothing to hide, the survey is straightforward to complete. If this data can be collated, it would assist all participants in the market.

2.58 Others who did not participate said it was:

- Because they didn't have time.
- Commercial in confidence and concerns that the information would not remain confidential.
- Not convinced that participating in a survey would result in any meaningful outcomes for themselves or artists.

2.59 It should be noted that the majority of Aboriginal and Torres Strait Islander owned and governed art centres, the majority of which are Dealer Members of the IartC participated in the Niniti One Remote Art Economies Project, providing de-identified financial information which has been invaluable to the sector. Aboriginal and Torres Strait Islander art centres and their peak bodies report to the Australian government on an ongoing basis. They are doing much of the heavy lifting when participating in research to inform the sector more broadly. Art Centres detailed records, artwork databases and reporting requirements under government funding agreements and incorporation mean this information is available.

What shares of income flow to artists, art centres, galleries, dealers, manufacturers, wholesalers and retailers?

2.60 This has been considered to some extent in the above supply chains. Further investigation of these and other supply chains would provide more detail.

What information sources can we draw on to examine how many independent Aboriginal and Torres Strait Islander artists operate in the markets, including those in urban and regional areas? & What information is there on how independent artists make their works, bring them to market and make a living?

2.61 The IartC supply chain project has mapped some of the different avenues independent artists operate in the market (at 2.20–2.23).

2.62 The Indigenous Art Code has some information on its artist members and could explore ways to gain further insight into independent artists' relationships with the market. This would require surveying artists along with further desktop research. The IartC is mindful of imposing or seeking additional information and time from artists who are already 'over consulted,' frequently underpaid for such requests for information, and time-poor. Any such research would need to demonstrate meaningful outcomes for the artists involved.

2.63 Many independent artists are successfully forging careers outside of any commercial gallery or dealer representation and confidently take their work to market. As detailed in response 7,

many artists operating without the support of an art centre are further susceptible to unfair and unethical conduct. Based on the requests made by independent artists for advice and support, some of which fall outside the remit of the IartC, Arts Law, and the Copyright Agency, we recommend that support services similar to those facilitated by art centres be accessible to independent artists. To ensure the success of any service targeting independent artists, the artists themselves, peak bodies, and organisations working with independent artists must be consulted and codesign the service. We would be happy to discuss this further with the Commission.

What data is available on production and sales of souvenirs and other merchandise (licensed or otherwise)?

- 2.64 Definitions of a souvenir will vary depending on who you ask. Boomerangs, didgeridoos, and jewellery will be classed as souvenirs by some and artifacts and artwork by others.
- 2.65 There is limited data available. This question was asked on numerous occasions throughout the House of Representatives Inquiry.⁷ Submissions from this Inquiry should be referenced in response to this question.
- 2.66 Please see IartC and UTS research Schedule 2. IartC can provide further details on products its Dealer Members are selling. Concerning non-members, it is difficult to determine as businesses such as airport gift shops and tourist shops are not IartC Dealer Members. Many businesses in this market sector also manufacture and sell other merchandise not created by or licensed by Aboriginal and Torres Strait Islander people. These businesses have not been captured in our research.
- 2.67 From our experiences during the Fake Art Harms Culture shopping exercise, businesses manufacturing and selling souvenir products are unlikely to be forthcoming with information about production or sale. The IartC presented data to the ACCC as part of the Fake Art Harms Culture campaign. We can discuss this further with the PC.

We know that some Indigenous-style arts and crafts are produced and sold without the authority of Aboriginal and Torres Strait Islander artists and communities. How can we estimate the extent of this type of market activity?

- 2.68 This question was asked on numerous occasions throughout the 2018 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.⁸ Submissions from this Inquiry should be referenced in response to this question.⁹
- 2.69 The magnitude of the issue is articulated by the many artists who made submissions. Please watch the video submissions.

7 See: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft.

8 See: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft.

9 See: Submissions 138 and 149.

3. The role of governments

How effective are government investments in independent artists and artists working with art centres, such as grant funding programs administered by the Australia Council and State Governments?

How effective are programs administered by the Office for the Arts and State Governments to support art centres?

How can government programs be improved?

- 3.1 Government plays an indispensable role in designing strategies to develop and invest in market opportunities for artists. As legislators and as the dispensers of funding, government sets rules of the game by which artists, dealers and consumers must play. Any amendment of these rules must consider the gamut of consequences on all aspects of the sector and for all participants in the visual arts market. This, of course, includes anticipating unintended consequences and ensuring that there is adequate consultation prior to any reforms to ensure that they are, in fact, fit for purpose.
- 3.2 The same applies for government funding – the levers of which, when pulled, can have earth-shattering consequences for funding recipients. The breadth and depth of arts funding is a perennial subject of each federal budget with arts funding often being the first notch of government ‘belt tightening’. But these government grants support the lives and livelihoods of artists and arts workers, as well as the communities that are built around art centres and arts organisations across the country.
- 3.3 Organisations that support Aboriginal and Torres Strait Islander artists and art businesses have insufficient funding to perform core services. Arts Law is the recipient of small annual investments from the Office of the Arts and each State and Territory and receive project-specific funding from other bodies such as IVAIS, but this is insufficient to provide our core services to all potential artist clients and expand our capacity to provide access to justice to artists who need the advice and go without it. Each year, Justice Connect estimates that 8.5 million Australians – or roughly 1 in 3 people – have a legal problem; and that half of these people do not or cannot access legal assistance. Even assuming that a modest proportion of those people are artists, that leaves potentially tens of thousands of Australians with arts-related legal problems that go unsolved and unadvised every single year.
- 3.4 Similarly, the IartC receives small amounts of funding, covering minimal operating costs. The IartC has a national reach, employs 2.1 FTE staff, this staffing increase commenced in 2020 after a funding increase was provided through the Meeting of Cultural Ministers (MCM) funding provided via the IVAIS program. While this funding has gone some way to address the demand for IartC support and services and delivery of core operational activities, the organisation is not equipped to handle all matters raised, namely those issues raised about non-IartC dealers and conduct research and other strategic work that could further inform the sector.
- 3.5 The IartC cannot and does not provide legal advice; however a large number of artists contact the IartC regularly for this advice. All artists seeking legal advice are referred to Arts Law. While Arts Law provides legal advice to artists, the IartC spend considerable time liaising with artists assisting them with referrals for these services. Both IartC and Arts Law require further resourcing to facilitate referrals and for artists to be supported through the legal advice process by Arts Law.

- 3.6 The Copyright Agency funds its operations by deducting its costs from the licence fees and royalties it generates each year. As a not-for-profit organisation, its operating costs are kept low and inclusive of the 1.5% for the Cultural Fund, operate at ≈15% each year.¹⁰
- 3.7 The value of investment aside, the question of effectiveness is an entirely different matter. A key issue in this space is what seems to be a disconnect between the expertise of certain government bodies and the visual arts sector which these bodies are supposed to serve. Many government-funded initiatives, services, and entities serve either the public at large or are specifically for Aboriginal and Torres Strait Islander individuals or communities. Yet, holistic services that incidentally impact the visual arts market often cause harm to that market by providing incomplete advice or assistance due to a lack of bespoke or industry-specific expertise.
- 3.8 As to the effectiveness of government funding to support art centres, we defer to the submissions made by individual art centres and visual arts peak bodies on the subject. We wish to stress the value and benefits that government support provides the sector as a whole, and welcome constructive talks to ensure that government funding is sufficient to meet cultural, social, community and economic needs across the country. Art centres in particular are indispensable organisations for communities and all three of our organisations acknowledge the work of art centres and their staff who act as trusted contacts and supporters for artists and their families in the management of their affairs.
- 3.9 Governments – especially the federal government – also set the rules for the visual art market more broadly. The Copyright Act 1968 (Cth) enables artists to prevent the copying and reproduction of their works without consent for their life and for a period of 70 years after their death and protects artists’ moral rights. The Resale Royalty Right for Visual Artists Act 2009 (Cth) – managed by the Copyright Agency – provides a royalty of 5% on eligible sales when an artists’ work over \$1,000 is resold. The Copyright Agency reports that two-thirds of royalty recipients are Aboriginal or Torres Strait Islander artists.
- 3.10 In the absence of mandatory rules governing best practice in the visual art market, the Terms of Reference note the presence over the years of a number of voluntary codes of practice that have appeared from time to time and in various jurisdictions and for various purposes. We note, however, that it is not a true reflection of the art market to say that there is an abundance of Codes of Practice that are widely subscribed to, regularly updated and broadly endorsed by artists, galleries, dealers or consumers. Many Codes are published but are not monitored or complied with over time and lack transparency around how the provisions in such Codes were compiled and how or if they will be amended to address changing circumstances. We therefore take the view that it is not accurate to describe an arts landscape with an abundance of voluntary codes that influence behaviour in the sector and more certainly needs to be done to ensure best practice for Aboriginal and Torres Strait Islander artists. Industry-wide collaboration and cooperation are important to ensure that efforts to combat fake art and to improve professional best practices in the visual arts sector are assented to and implemented across Australia. The fact that voluntary Codes and Guidelines exist or have existed across the country is a strong reflection of a nationwide desire to do better by Aboriginal and Torres Strait Islander artists.
- 3.11 Our organisations support and recommend businesses adhere to the IartC Code (of conduct) and the NAVA Code of Practice.
- 3.12 We will return to our discussion of the voluntary Indigenous Art Code, and what a mandatory code might look like were one introduced by the government, later in this submission in our response to Issue 6.

4. What is (in)authenticity and how is it determined?

What constitutes authenticity? When does it matter?

What criteria should be used to determine authenticity?

Who should have the authority to make judgments regarding the authenticity of Aboriginal and Torres Strait Islander arts and crafts?

What processes should there be for artists to obtain permission from the relevant cultural authorities when needed?

-
- 4.1 Much of our present submission – and the work of the Fake Art Harms Culture campaign more broadly – is aimed to end the market in Australia for inauthentic art and cultural products. Accordingly, it is very important to stress what we mean by the terms “authentic” and “inauthentic” for the purposes of this submission. As noted in the Issues Paper, defining “authenticity” can raise complex cultural and social issues and we certainly do not claim any cultural authority on such matters. This is not our place, nor is it our intention when we set out the below definitions and law reform suggestions.
- 4.2 Our purpose is to define authenticity in a very specific and limited context: legislative amendments concerning fake art in the Australian Consumer Law. In defining an art or cultural product as inauthentic for this purpose, we take as a baseline the indisputable position that art and cultural products are clearly fake if they are “Aboriginal-style” works with no connection to an Aboriginal or Torres Strait Islander artist or community.
- 4.3 The Issues Paper attributes a “simple definition of authenticity” to IartC as follows: “an artwork is authentic if it was handcrafted by an Aboriginal and/or Torres Strait Islander person or is an ethically licensed reproduction”. This is an abridged and altered version of the definition that IartC used in its submission to the 2017 Inquiry which aimed to positively define an *authentic* work as an artwork with an Indigenous Cultural Expression that was, in the alternative, “hand crafted by an Aboriginal or Torres Strait Islander person or a licensed reproduction of an artwork created by an Aboriginal or Torres Strait Islander person (and where the original or licensed reproduction attributed the artist who created the original work)”.¹¹ 32 submissions to the 2017 Inquiry supported IartC’s definition in these terms.
- 4.4 But it is important to note that even the language of *authentic* and *inauthentic* art is part of a legalistic, Western discourse that bears little resemblance to the way Aboriginal and Torres Strait Islander artists view or discuss art and cultural products. As IartC noted in their submission to the 2017 Inquiry: “The term authentic is not one used by most Aboriginal and Torres Strait Islander artists in relation to the work they create. The work they create belongs to them, the ICIP [Indigenous Cultural and Intellectual Property] imbedded in those works belongs to them. It should be noted that the words authentic and inauthentic are predominately used by a non-Indigenous audience to understand this issue.”¹²
- 4.5 We defer to Aboriginal and Torres Strait Islander perspectives on “authenticity”. Stephanie Parkin (Copyright Agency; Chair, IartC), in her 2020 thesis, compiled many of the submissions made to

¹¹ Parkin, 2020, p. 104.

¹² See: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Submissions

the 2017 Inquiry on this topic by Aboriginal and Torres Strait Islander artists and art centres. Parkin’s conclusion rightly draws attention to the inherent difficulty – observed in the 2017 Inquiry Report, that “establishing a universally accepted definition of authenticity for artworks is not straightforward and may not be feasible”.¹³ For this reason, we want to make it absolutely clear that the below analysis of authenticity is tied specifically to its proposed statutory meaning, and that the discussion of what is authentic more broadly must be defined, as Parkin notes, using Aboriginal Terms of Reference.¹⁴

- 4.6 Lastly, it is important to distinguish two related but distinct issues that are broached in this submission: the difference between fake and unethical art. Even if an artwork is authentic in the sense that it was created by an Aboriginal or Torres Strait Islander person or is a licensed reproduction of such a work, there are of further issues that arise as to whether a work was made or sold under ethical circumstances. The latter is a distinct area of concern with some understandably taking the view that such work is tantamount to inauthentic art. That perspective aside, we wish to clearly delineate between these two categories of work for the purposes of this submission and our proposed amendments to the ACL.
- 4.7 As we will discuss further below, any legal definition of authenticity would be complex and might require dispute resolution in order for such questions to be effectively enforced by bodies like the ACCC. This raises the question of who would be able to resolve these disputes and who and where this “authority” would come from. Our suggestion is that it would not be the ACCC itself that make any final decisions about authenticity, but that it would be Aboriginal and Torres Strait Islander communities who make this final decision as a representative body or group within or advising the ACCC.
- 4.8 As to who might exercise cultural authority going forward, we are unclear about the status of the proposed National Indigenous Arts and Cultural Authority (NIACA) and cannot comment on what role this body might have in the context of authenticity disputes at time of writing.

13 *Ibid.*

14 *Ibid.*

5. What are the effects of inauthentic arts and crafts?

What are the negative effects of inauthentic art?

Do they vary between different types of misuse or inauthentic product?

What does respectful, meaningful and mutually beneficial collaboration across different cultures look like?

- 5.1 Over the last decade or so there has been a dramatic increase in local and international awareness of the significance of Indigenous art and crafts. At the same time there has been significant growth in the Aboriginal and Torres Strait Islander art industry in Australia. Initiatives such as long-term funding of Aboriginal and Torres Strait Islander owned and governed art centres, have created learning and income-earning opportunities while helping to foster the preservation and dissemination of Aboriginal and Torres Strait Islander culture.
- 5.2 The growing recognition and popularity of Indigenous art amongst consumers has led to significant demand from locals and visitors to Australia for Indigenous art and crafts, including in souvenir markets. Unfortunately, this rise in demand has also led to a rise in inauthentic products containing unauthorised appropriations of Aboriginal and Torres Strait Islander culture.
- 5.3 The proliferation of inauthentic Indigenous arts and crafts and the negative impacts it causes are discussed below.

Growing interest in the proliferation of inauthentic Indigenous art

- 5.4 In 2016, following representations by Aboriginal and Torres Strait Islander community members and artists, the Arts Law Centre of Australia, Indigenous Art Code and the Copyright Agency, began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal and Torres Strait Islander style' art and craft products and merchandise for sale across Australia.
- 5.5 Throughout 2016, Arts Law and the Indigenous Art Code conducted a joint investigation into the sale of Aboriginal and Torres Strait Islander art and products bearing Aboriginal and Torres Strait Islander cultural expressions in Australia. From that study, we estimated that up to 80% of items being sold as legitimate Aboriginal and Torres Strait Islander artworks and souvenirs in tourist shops and some galleries around Australia are inauthentic.¹⁵ This approximation was repeated by the House of Representatives Standing Committee on Indigenous Affairs' in its report on the impact of inauthentic art and craft in the style of First Nations peoples (the *HRSCIA Report*) and also noted in the Senate Environment and Communications Legislation Committee's (*SECLC*) later report on the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (the *SECLC Report*).¹⁶ The ACCC's findings also support

¹⁵ This estimate is based on best judgment observations made by informed purchasers during a mystery shopping exercise conducted in tourist locations in various capital cities in June 2016. The estimate applies to the souvenir / tourist market and does not include the fine art market. The media and other commentators have made similar estimates.

¹⁶ House of Representatives Standing Committee on Indigenous Affairs, *Report on the impact of inauthentic art and craft in the style of First Nations peoples (HRSCIA Report)*, December 2018, 5 at [2.5]: 'It was suggested during the inquiry that 80% or more of the First Nations souvenir products on sale in gift shops are inauthentic, including artefacts such as boomerangs and didgeridus displaying First Nations imagery and art. The committee's own private investigations and observations concur with this view'.

this estimate, its own investigations revealing that ‘quite a large proportion of that segment of the [souvenir] market falls into that inauthentic category’.¹⁷

- 5.6 Inauthentic products are produced commercially, are often made from non-traditional materials and often feature inauthentic and culturally inappropriate designs. Such goods come in a wide range of products, from bamboo didgeridoos to decorative plates and key rings. While these products are not restricted to tourist goods, a significant proportion of the tourism market engages in the sale and purchase of Indigenous arts, crafts or souvenirs.¹⁸ Although the domestic trade in inauthentic products has likely waned in the last two years as a result of COVID-19 associated travel restrictions,¹⁹ it is expected that trade of inauthentic products will return to pre-pandemic levels with the return of international tourists.

Negative impacts of the sale of inauthentic Aboriginal and Torres Strait Islander art

- 5.7 The trade in inauthentic Aboriginal and Torres Strait Islander art has a direct negative impact in at least four ways, addressed in turn below.

A. Misappropriation and exploitation of Aboriginal and Torres Strait Islander culture

- 5.8 Aboriginal and Torres Strait Islander communities and individuals are custodians of culture and have rights and obligations to protect and maintain cultural knowledge and expression so that it can be passed on to future generations.²⁰ This includes groups with a connection to a specific region, those who are linked through their production of art or other shared goals, and the population of Aboriginal and Torres Strait Islander peoples as a whole.
- 5.9 While this custodianship role is diverse, visual arts are a central part of this responsibility. They are closely linked to identity, belonging and place. For Aboriginal and Torres Strait Islander communities it includes such roles as protecting the integrity of work associated with a particular location.
- 5.10 Only with the authority or permission of the relevant Aboriginal and Torres Strait Islander community can a reproduction, adaption, or style of work be considered authentic. Producing an art product or merchandise without that consent breaches the community’s custodial rights. These are recognised both locally and internationally through the *2006 United Nations Declaration of the Rights of Indigenous Peoples*.
- 5.11 In this very real sense, misappropriated and ‘fake art’ tangibly harms culture’. It also potentially deprives a community of economic benefits through official licensing or distribution agreements.

17 Mr Rami Greiss, Executive Manager, Enforcement Division, ACCC, Committee Hansard (6 November 2019) 26 (referenced in the Senate Environment and Communications Legislation Committee, *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (April 2020) (**SECLC Report**), 11, [2.4]).

18 HRSCIA Report, 23 (referenced in the SECLC Report, 3, [1.10]).

19 The HRSCIA Report acknowledged the role of international tourists in the purchasing of Indigenous art, crafts and souvenir: HRSCIA Report, 23.

20 *Terri Janke, Our Culture: Our Future – Report on Australian Cultural and Intellectual Property Rights*, 1998, 7-9 [1.3]

- 5.12 So much is acknowledged in the HRSCIA Report, which stressed that:²¹
- Aboriginal and Torres Strait Islander art, craft and cultural expressions belong to Aboriginal and Torres Strait Islander peoples. Non- Aboriginal and Torres Strait Islander artists should not appropriate or copy this expression in any way, even with good intentions;
 - whilst producing and selling imitation Aboriginal and Torres Strait Islander art and craft is not currently unlawful, it has a profound and harmful impact on Aboriginal and Torres Strait Islander peoples and cultures;
 - any inauthentic piece of Aboriginal and Torres Strait Islander art, craft or artefact such as a boomerang or didgeridoo not made by an Aboriginal artist is by its very nature and existence purporting to be culturally authentic when it is not; and
 - Aboriginal and Torres Strait Islander cultures are an intrinsic part of Australian culture and allowing it to be compromised damages the identity of our nation as a whole.
- 5.13 The SECLC Report similarly acknowledged that the prevalence of inauthentic Indigenous cultural products being sold in Australia compromises cultural ownership and economic benefits of Indigenous communities with profoundly negative consequences:²²
- 5.14 [The prevalence of inauthentic art] has profoundly negative consequences not only for artists, but also for the Indigenous community, industry, and consumers. Inauthentic Indigenous art misappropriates Indigenous culture, undermines the role of traditional communities, and denies Indigenous artists financial reward, recognition for their skills and abilities, and other opportunities.

B. Denying Aboriginal and Torres Strait Islander artists economic and other opportunities

- 5.15 Individual Aboriginal and Torres Strait Islander artists have control over the reproduction of their works through the protection of copyright laws. However, work produced in a 'Aboriginal and Torres Strait Islander style', or that appropriates but does not replicate a work, does not fall into that category.
- 5.16 At both the community and local level, Aboriginal and Torres Strait Islander people have an inherent right to and should be able to benefit from the commercialisation of their work and cultural expression. Works that appear to be made by Aboriginal and Torres Strait Islander artists but have actually been made by others deliberately diminishes this opportunity for artists and their families.

C. Misleading and deceiving consumers regarding the authenticity of Aboriginal and Torres Strait Islander art products they purchase

- 5.17 Current laws against misleading and deceptive conduct only protect consumers from inauthentic Aboriginal and Torres Strait Islander art if the product includes an express or implied representation as to its authenticity, which is misleading. Such a representation:

²¹ HRSCIA Report, xii.

²² This view is supported in the SECLC Report at 3, [1.12] and 24, [2.59].

- can be made through text or images on the product or its packaging, such as through use of a label stating 'Aboriginal art'; and
 - may not necessarily be made simply through an artwork or souvenir having the 'look and feel' of Aboriginal and Torres Strait Islander art without further indications the item was produced by a Aboriginal and Torres Strait Islander artist. This could be the case if the packaging of an item states that it is reproduced or mass-produced somewhere overseas.
- 5.18 The inadequacies of relying on the existing prohibition on misleading conduct are highlighted in the *Birubi* judgement.²³ While the ACCC was successful with respect to most of the alleged representations, Perry J held that two of the five items fell short of making an implied representation that they were 'made by an Aboriginal person'. The line between these products and those that were held to make this representation was fine at best:
- 5.19 Perry J held it was a combination of features that gave rise to the representations in *Birubi*. The items featured various words and statements including 'Australia', 'hand crafted', 'handmade', 'hand painted', 'supports and promotes ethical dealings with all Aboriginal people' and 'authentic Aboriginal art'. If the products had not featured these labels or statements and instead explicitly stated that they were made in Indonesia, they would not be considered 'misleading'.
- 5.20 Furthermore, even if the products did not state that they were made in Indonesia, if they had not featured the words and statements implying they were made in Australia, made by an Aboriginal Australian or 'authentic', it is not clear that it would have amounted to misleading.
- 5.21 In essence, under the current laws governing misleading conduct, the more obviously fake an item of Aboriginal and Torres Strait Islander style' art, the more legal it is to sell that item. The existing law is not concerned with whether Indigenous culture is unfairly misappropriated for commercial gain, provided consumers are not misled. Furthermore, because the line between what is and is not misleading is blurred, it is possible for fake art to be sold in a way that is not misleading under the current law but where a consumer nonetheless mistakenly believes they are buying authentic artwork and that their purchase will financially benefit a Aboriginal and Torres Strait Islander artist.
- 5.22 There is a very large grey area between the two extremes of an obvious fake and a fake product that is specifically described as 'authentic Aboriginal art'. The joint 2016 study by the Indigenous Art Code and the Arts Law Centre revealed that many inauthentic products are not marketed so overtly. Products commonly appear to be 'authentic Indigenous art' but do not feature any labelling or packaging or other express representations claiming to be 'authentic Indigenous art'. In addition, many businesses comingle authentic and inauthentic product. It is unclear in these circumstances whether simply selling art that appears to be authentic, but which in fact is not, amounts to misleading or deceptive conduct or the making of a false representation in breach of the Australian Consumer Law (ACL). It is possible of course that many consumers, including visitors to Australia, think they are buying 'authentic Indigenous art' when in fact they are buying fakes. It is also possible, however, that consumers may simply not turn their mind to whether the product they are buying is or is not authentic.
- 5.23 Regardless of whether fake art is sold in a way that is misleading at law, it misappropriates and exploits Aboriginal and Torres Strait Islander culture and denies Aboriginal and Torres Strait Islander artists economic and other opportunities. We consider that consumers in Australia should be able to safely assume that any item sold commercially which resembles Aboriginal and Torres Strait Islander art – whether a high-end original work or a small souvenir – was in fact created by Aboriginal and Torres Strait Islander artists and is an authentic representation of Aboriginal and Torres Strait Islander culture.

²³ *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595.

D. Disadvantaging Australian businesses who take an ethical and culturally empathetic approach to their work

The existence of a strong and fair Aboriginal and Torres Strait Islander visual arts sector is as reliant on distribution and sale as it is on production. There are a large number of Australian businesses both Indigenous and non-Indigenous owned of all sizes who play a role in the licensing, reproduction, distribution and sale of Aboriginal and Torres Strait Islander art products and merchandise. Many companies work closely with Aboriginal and Torres Strait Islander artists and communities, meeting the industry best practice standards and ethical standards set out in the Indigenous Art Code. However, this good practice – which includes fair remuneration and recognition – comes at a higher cost, relative to those businesses importing and selling cheap, inauthentic goods. Current arrangements, therefore, have the potential to financially disadvantage those businesses that are ‘doing the right thing’ and risk their sustainability as well as that of the sector more broadly. Notwithstanding these concerns, there is broad consensus across all participants in the market that the problem ought to be addressed.

Aboriginal and Torres Strait Islander people have communicated the harm which is caused for decades. Please hear what they have already communicated.

“A painting is the visual expression of the story of our ancestors and spirit-beings, and the right to depict a particular story has been handed down through the ages from the original Dreamtime people. Some time ago, I happened to see a tea-towel with one of my paintings represented on it; this was one of the stories that my father had given me, and no-one else amongst my people would have painted it without my permission. I was deeply upset and for some years I have been unable to paint. It was then that I realised that I and my fellow Aboriginal artists needed some sort of protection.

It is not that we object to people reproducing our work, but it is essential that we be consulted first, for only we know if a particular painting is of special sacred significance, to be seen only by certain members of a tribe, and only we can give permission for our own work of art to be reproduced. It is hard to imagine the work of great Australian artists such as Sidney Nolan or Pro Hart being reproduced without their permission, we are only asking that we be granted the same recognition, that our works be respected and that we be acknowledged as the rightful owners of our own works of art.

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. To retain a jealous hold on our cultural heritage is not our desire, but we must realise our responsibility to safeguard this heritage and to ensure that Aboriginals at last achieve the recognition that is universally attributed to all artists.”

Wandjuk Marika, 1975

This is an excerpt from the statement which Wandjuk Marika published under the title ‘Copyright on Aboriginal Art’ in Aboriginal News Vol. 3 1 Feb. 1975 pp 7-8.

6. What policy options are there to address inauthentic arts and crafts?

How effective have previous initiatives been at reducing the incidence and negative effects of inauthentic art? What gaps and problems have they encountered?

When are approaches to verify or demonstrate authenticity inappropriate?

What else could be done to increase consumer awareness and demand for ethically produced art? Would further education campaigns be effective?

The Fake Art Harms Culture Campaign

- 6.1 In response to existing and ongoing concerns from Aboriginal and Torres Strait Islander people about the growing presence of inauthentic 'Aboriginal style' products and merchandise being sold across Australia, the 'Fake Art Harms Culture' campaign was created by Arts Law, IartC and the Copyright Agency to address the proliferation of goods that have the 'look and feel' of being Indigenous but actually have no connection to Aboriginal and Torres Strait Islander communities. The campaign built upon decades of work undertaken by artists and those in the industry who have continually lobbied and advocated for reform in this area.
- 6.2 With the ongoing engagement of many Aboriginal and Torres Strait Islander people and communities across the country, the campaign has been successful in promoting awareness of this problem and has received widespread support. It has included presentations at numerous Aboriginal and Torres Strait Islander Arts events, campaign letters to MPs signed by Aboriginal and Torres Strait Islander artists and individuals, national media coverage and the backing of many art market professionals.
- 6.3 The success of this campaign has demonstrated that the issue of inauthentic Aboriginal and Torres Strait Islander art is widespread and pervasive, impacting the copyright, cultural rights and livelihoods of thousands of Indigenous people and their communities. The campaign has also highlighted that the need for action on this problem is almost universally recognised amongst both the Indigenous art community and the consumers of such art.

Developments since the Fake Art Harms Culture campaign

- 6.4 In prior and recent years, there has been a broad ongoing consensus that the proliferation of inauthentic Indigenous art and craft is a problem needing to be addressed.

2017 Bill and HRSCIA Report

- 6.5 In 2017 Senator Bob Katter introduced a Private Members Bill to Parliament which sought to prevent non-Aboriginal and Torres Strait Islander persons benefitting from the sale of fake Aboriginal and Torres Strait Islander art and souvenirs (2017 Bill).²⁴ The 2017 Bill sought to amend the ACL.

24 See: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5810

6.6 In July 2017, then Minister for Indigenous Affairs, Senator Nigel Scullion, referred an inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander style' art and craft products and merchandise for sale across Australia. The House of Representatives Standing Committee on Indigenous Affairs (HRSCIA) conducted the inquiry over 2017–18, resulting in the final HRSCIA Report tabled in December 2018.²⁵ The HRSCIA Report noted the growth in the availability of inauthentic First Nations art and craft products across Australia and the denigrating effect this has on Indigenous history and culture.²⁶ Clear themes acknowledged as having consistently emerged throughout the inquiry included:

- most Indigenous-style souvenirs sold in Australia have no connection to First Nations peoples and most buyers of these products are probably unaware of their inauthenticity; and
- most non-Indigenous Australians and foreign tourists could not determine the authenticity of a First Nations art or craft product.

6.7 The HRSCIA explored several possible solutions, noting that current laws are insufficient to address the problem and concluding that standalone legislation may be the best long-term option to resolve this complex issue. Specifically, the HRSCIA Report noted that '[n]either the ACL nor copyright law were designed to protect First Nations cultural expressions, and therefore each is inadequate to do so...the ACL cannot deal with issues of inauthentic Indigenous products, while the Copyright Act is not designed to recognise the eternal and communal nature of Indigenous cultural expressions, making it inadequate to deal with the misappropriation of culture.'²⁷ The HRSCIA recommended that 'the Australian Government begins a consultation process to develop standalone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.'²⁸

2019 Bill and SECLC Report

6.8 On 12 February 2019, the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (**2019 Bill**) was introduced to Parliament by Senator Sarah Hanson-Young. The 2019 Bill sought 'to prevent the proliferation of fake Aboriginal and Torres Strait Islander art and art products' by amending the Competition and Consumer Act 2010 (the **CCA**) to make it 'an offence to supply or offer commercial goods to a consumer that include Indigenous cultural expression unless it is supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community.'²⁹

6.9 On 4 July 2019, the Senate referred the 2019 Bill to the SECLC for inquiry.³⁰ In April 2020, the SECLC Report was published. The SECLC Report acknowledged 'the large and growing presence of inauthentic Indigenous cultural products being sold in Australia'³¹ and the 'profoundly negative

25 See: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft

26 HRSCIA Report, 5–6.

27 HRSCIA Report, 58 [4.83]–[4.84].

28 HRSCIA Report, xxi, Recommendation 8.

29 Explanatory Memorandum to the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019, 1.

30 See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/IndigCulturalExpression

31 SECLC Report, 23 [2.57].

consequences not only for artists, but also the Indigenous community, industry, and consumers.³² While supporting the prompt introduction of federal legislative measures to address the issue of fake souvenirs,³³

6.10 The Committee reached the following conclusion:

2.63 Overall, the committee supports the broader direction of these recommendations which, following extensive consultation with Indigenous and other stakeholders, should ultimately result in a comprehensive, standalone legislative framework to protect the various complex forms of Indigenous cultural expression. The committee's view is that this broader objective is beyond the scope of the current bill.

2.64 Nevertheless, the committee agrees that the concerning prevalence of inauthentic Indigenous souvenir products being sold in Australia is worthy of prompt attention by the Commonwealth, as supported by many of the submitters to this inquiry.

2.65 Accordingly, the committee supports in-principle the Commonwealth addressing the issue of inauthentic Indigenous products in the souvenir market quickly, as proposed in this bill, or through another legislative mechanism. Ultimately, the Committee recommended that the Senate not pass the Bill. Instead the Committee recommended:

2.66 ... that the Commonwealth consult Indigenous artists, organisations and communities to develop legislation to prohibit the sale of inauthentic Indigenous products sold as souvenirs, either through amendment of the Competition and Consumer Act 2010 or through another mechanism.

Despite both the HRSCIA and SECLC reports acknowledging the harms of inauthentic Aboriginal and Torres Strait Islander style art and craft products and the emerging consensus regarding the need the need for legislation to prohibit the sale of inauthentic Indigenous products sold as souvenirs, no legislative action has since been taken.

What about labelling schemes or requirements?

6.11 In 2000, the National Indigenous Arts Advocacy Association (NIAAA) developed the Label of Authenticity. The Label of Authenticity was a national trade mark that encouraged people to buy authentic Australian Indigenous artwork. The Label aimed to:

- protect Australian Indigenous artists to make sure that they were adequately paid for the sale of their work;
- protect buyers who wanted to purchase authentic Australian Indigenous artwork;
- allow people to see the different styles of Australian Indigenous artwork; and
- create a system which highlighted the differences between real and copied artworks.

6.12 Artists were registered with NIAAA if they could show that they identified as an Aboriginal or Torres Strait Islander and had permission from the relevant community to make the artwork. Registration meant that the artist had permission to attach the Label of Authenticity to their artwork. The Label of Authenticity is no longer in use after NIAAA stopped operating – a key reason for which being high administration costs. In addition, there were concerns raised by art centres about the way in which NIAAA processes ignored art centre processes.

6.13 Since then, new technologies have emerged or become more popular that may reduce administrative costs. Desart, the peak arts body for over 30 Central Australian Aboriginal art centres, has trialled and implemented a system of digital labelling in three art centres. This uses

32 SECLC Report, 24 [2.59].

33 SECLC Report, 13, [2.12] and 24 [2.64]-[2.65].

QR codes that grant access to information on authenticity. The QR code, which links to the Stories Art Money (SAM) database (also administered by Desart), provides the consumer with immediate access to detailed information about the artist and the artwork/ product, including their story and background, as well as multiple images of the item (often taken with the artist or in the community where it was produced).

- 6.14 However, even assuming that administration costs can be lowered to a point where an authenticity label or symbol is economically viable, there are serious questions as to whether it is appropriate. In particular, there is a clear tension between a measure such as a labelling scheme which heightens consumer awareness on the one hand, while ensuring on the other hand that there is not an undue burden placed on Aboriginal and Torres Strait Islander artists to prove anything.
- 6.15 IP Australia are currently examining labelling and certification trademarks, which we understand were due to be presented to the Australian Government by the end of 2021.

What are the limits of the existing intellectual property protections? How can existing intellectual property laws be amended to improve protections for Indigenous Cultural and Intellectual Property or do we need standalone legislation?

Australian intellectual property law

Current position under intellectual property law

- 6.16 Australia's intellectual property laws only offer limited protection against the production, distribution and sale of inauthentic Indigenous art.

Copyright

- 6.17 Copyright protects material expression, but not the underlying ideas, knowledge, stories, themes or genres of a work. For example, copyright will protect a painting in its material form, but will not protect the story it conveys, its style or the techniques used to create it (e.g. dot painting or cross-hatching).
- 6.18 Copyright is generally owned by the author/s of a work (e.g. an artist), but does not recognise communal rights in the work or underlying traditional knowledge. Copyright protection only lasts for a finite period after a copyright work is created (70 years after the death of the author or in some cases after first publication), so will not cover ancient or communally-owned works.
- 6.19 Copyright grants the owner exclusive rights over their work, including the right to reproduce or copy it. An unauthorised reproduction of a 'substantial part' of a work will infringe copyright, however the appropriation or replication of a particular style of work (e.g. dot painting) will not fall within that category.

Confidential information

- 6.20 Obligations of confidence govern the use and disclosure of certain categories of knowledge and other information that are not in the public domain (e.g. trade secrets and know how). Whereas copyright only protects the expression of ideas, obligations of confidence may protect the ideas themselves. For an obligation of confidence to arise (whether in equity or contract), the information:

- must be confidential (i.e., not in the public domain);
- must not be trivial or useless; and
- must be imparted in circumstances importing an obligation of confidence.

6.21 Third parties that obtain confidential information which they know to be confidential may also be restrained by obligations of confidence.

6.22 There is some scope to protect artistic techniques and other valuable traditional knowledge based on the law surrounding confidential information. However, if the information does not have the necessary 'quality of confidence', obligations of confidence will offer little assistance. Depending on the circumstances, the act of offering an artwork comprising or referring to traditional knowledge may be enough to undermine any ongoing claim to confidentiality in that traditional knowledge. Further, the overarching purpose of obligations of confidence (i.e. to keep the information confidential) is generally incompatible with the practice of sharing traditional knowledge between generations through storytelling, ceremony and otherwise.

Trade marks

6.23 Trade marks are 'badges of origin' used to distinguish the goods and services of one trader from those of another. It is possible to have an unregistered trade mark (where a trader has established goodwill and reputation in a particular mark). Trade marks can also be registered under the Trade Marks Act 1995 (Cth). In the context of tackling inauthentic art, trade marks are often considered for use as a marker of authenticity. For example, a particular trade mark applied to an art product could be used to indicate that the product was genuinely created by an Aboriginal or Torres Strait Islander artist. It is possible to register a 'certification trade mark' (CTM) – these are a specific kind of trade mark. Rather than being a badge of origin, CTMs signify goods or services that meet certain criteria or standards. In addition to the usual trade mark application process, to apply for a CTM the applicant must provide a set of 'rules' for using the CTM, which are subject to approval by the ACCC. The Woolmark logo is a well-known example of a CTM. While not registered as a CTM, the Fairtrade logo is only licensed to licensees whose products meet specific standards and in this way operates similarly to a CTM.

Licensing arrangements

6.24 Licensing arrangements can allow First Nations artists and communities to license the use of their intellectual property (usually copyright, including artworks) and confidential information (including traditional knowledge) to third parties, which offers a degree of control over those assets and a source of income.

Why intellectual property laws are inadequate

6.25 As the HRSCIA Report acknowledged, copyright laws are 'not designed to recognise the eternal and communal nature of First Nations cultural expressions, making it inadequate to deal with the misappropriation of culture.'³⁴ Copyright is designed to protect an individual's rights in their works for a finite period but is incompatible with the communal recognition and ownership of traditional knowledge and cultural expressions by Indigenous artists and their communities. As identified in section 6.17, copyright protection is limited to the artworks themselves, and although copies of particular artworks may infringe copyright, inauthentic works that replicate the style of a particular artist or cultural group may not.

³⁴ HRSCIA Report, 58 [4.83]–[4.84].

- 6.26 In addition, copyright and intellectual property laws more generally rely on private enforcement, meaning their utility is limited by the capacity (and appetite) of individuals to take legal action. The enforcement process is costly and time consuming.
- 6.27 Traditional knowledge may be protected as confidential information so long as it remains confidential. However, as noted in section 6.20, information that becomes available in the public domain cannot generally be protected as confidential information. In any event, unauthorised third parties could still appropriate or replicate Indigenous art without accessing or misusing confidential information.
- 6.28 Some submissions to the HRSCIA Inquiry suggested that labelling initiatives, such as a CTM, may be an appropriate solution to the problem of inauthentic art and craft. While labelling or a CTM may be useful components of a broader system to address the prevalence of inauthentic art, significant limitations include:
- the investment and time required to set up a CTM (including in the preparation of rules for use of the CTM and assessment by the Trade Marks Registrar and the ACCC);
 - shifting the burden to artists to comply with the CTM system;
 - relying on private enforcement;
 - the investment in developing consumer awareness and reliance on consumers knowing what the CTM is meant to represent; and
 - the possibility of forged certification by distributors of inauthentic art.
- 6.29 Labelling systems in Australia and around the world have had varying levels of success. In Australia, the National Indigenous Arts Advocacy Association (NIAAA) established a Label of Authenticity, but the scheme failed. The available evidence suggests that the main issues included that:
- Indigenous artists are mostly unsupportive of having to prove, and have a body certify, that their work is authentic;
 - the registration fee was prohibitive for many Indigenous artists;
 - the scheme was difficult to access for many Indigenous artists;
 - there was a lack of funding and NIAAA was poorly administered.
- 6.30 Overseas experiences with CTM equivalents are explored in more detail in the schedule.
- 6.31 While licensing arrangements can be beneficial to Indigenous artists, these are negotiated on a case-by-case basis. Like non-Indigenous artists, some Indigenous artists can experience unequal bargaining power, unfair contract terms and unethical treatment from art dealers and other third parties, which may be compounded by access to services and geographical location.

Why amendments to intellectual property law will not assist

Amending existing IP laws

- 6.32 Amending existing intellectual property laws, such as the Copyright Act 1968 (Cth), is not the most appropriate solution to address the prevalence of inauthentic art. As discussed in earlier sections, a more effective immediate solution is to amend the ACL to include a prohibition on the sale of inauthentic art. This may later be accompanied by standalone legislation dealing with the protection of First Nations traditional knowledge and cultural expressions.

- 6.33 Protection against the production, distribution and sale of inauthentic First Nations art is not limited to a single area of IP law, so amending such laws would be inefficient and piecemeal. We have already touched on copyright, confidential information and trademarks. Design law may come into play in relation to products incorporating First Nations artwork and designs, and patent law may be relevant to the protection of certain applications of traditional knowledge.

New standalone IP legislation

- 6.34 As already mentioned above, the *Olympic Insignia Protection Act 1987* (Cth) (**OIPA**) is an example of standalone legislation introduced to address a very specific issue – namely to preserve the AOC’s ability to fundraise through the licensing of Olympic insignia. Importantly, the protection afforded by that Act is also closely related to and in many cases overlaps with existing intellectual property legislation. OIPA expressly refers to the *Designs Act 2003* (Cth), *Trade Marks Act 1995* (Cth) and *Copyright Act 1968* (Cth). The Second Reading Speech and Explanatory Memorandum for the Olympic Insignia Protection Bill 1986 explain that the standalone legislation is designed to afford ‘greater protection’ than what is provided under existing laws and provide clarity as to the ownership of the copyright and design rights in the Olympic insignia.³⁵
- 6.35 The issue of inauthentic art similarly calls for bespoke standalone legislation in the long term in circumstances where current intellectual property law is inadequate. However, prohibiting the sale of inauthentic artwork through an amendment to the ACL is preferable at first instance for the reasons already discussed.

What are the merits of, and concerns about, amending the Australian Consumer Law to prohibit the sale of inauthentic arts and crafts? Are there more effective ways to restrict the supply of inauthentic arts and crafts?

ACL amendment prohibiting the sale of inauthentic Aboriginal and Torres Strait Islander art is the appropriate response

There should be a prohibition on the sale of inauthentic art and crafts

- 6.36 We are firmly of the view that current legal arrangements are inadequate and a specific prohibition on selling fake Indigenous art is needed in order to recognise that it is inappropriate for Indigenous culture to be unfairly misappropriated for commercial gain. This change would acknowledge that the concern is broader than just misleading consumers while also ensuring that consumers, including foreign visitors, are not misled into thinking they are buying authentic Indigenous art when they are not.
- 6.37 We support the HRSCIA’s recommendation of standalone legislation as a long-term solution,³⁶ and indeed, we have advocated for standalone legislation for some time. However, given the damage caused by inauthentic Aboriginal and Torres Strait Islander art and craft product is both current and widespread, we consider it imperative to expedite a legislative prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art within an existing legislative framework, while standalone legislation is developed as a long-term solution.

³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 October 1986, 2666 (John Brown, Minister for Sport, Recreation and Tourism); Explanatory Memorandum, Olympic Insignia Protection Bill 1986 (Cth) 2–3.

³⁶ The Environment and Communications Legislation Committee also showed support for this idea at [2.63] of SECLC Report.

- 6.38 There are a number of benefits arising from an outright prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art:
- it gives rise to a clear statement of the law regarding the boundaries of acceptable and unacceptable conduct;
 - it clearly addresses the costs associated with the misappropriation of Aboriginal and Torres Strait Islander culture and ensures that Aboriginal and Torres Strait Islander artists and communities can properly commercialise their artwork; and
 - it addresses the issue of consumers being misled into purchasing inauthentic Aboriginal and Torres Strait Islander products.
- 6.39 As discussed above, the SECLC Report recommended that the Commonwealth consult Indigenous artists, organisations and communities to develop legislation to prohibit the sale of inauthentic Indigenous products. The Committee left open, however, whether that should be achieved through amendment to the CCA (ie the ACL) or through another mechanism.

An amendment to the ACL is the appropriate mechanism

- 6.40 For the reasons set out below, a legislative prohibition on the sale of Inauthentic Aboriginal and Torres Strait Islander art and crafts could be achieved in the most timely and effective way through amendments to the ACL. In regards to prohibiting unfair treatment of artists, we are of the view that the adoption of a mandatory code could be one mechanism for dealing with this conduct and is addressed in Part 7 of this submission, rather than through an amendment to the ACL.

The growing prevalence of inauthentic Aboriginal and Torres Strait Islander art should be addressed at a federal level

- 6.41 Misappropriation of culture fundamentally affects all Aboriginal and Torres Strait Islander peoples, regardless of which state or region they reside in. The proliferation of inauthentic Aboriginal and Torres Strait Islander art and associated misappropriation of culture is an issue of national importance that should be addressed at a national level. It cannot be adequately addressed at a state or local government level.
- 6.42 Addressing the issue at a state or regional level would be impractical for businesses and confusing for consumers. It would give rise to a patchwork approach where it could be legitimate for businesses to sell inauthentic product in one area but not in an adjacent area. As for local controls, even assuming the regulation of fake Indigenous art and craft is properly within the purview of local government, local government law-making is ultimately subject to State parliamentary oversight and may be disallowed for political or policy reasons. Practically, the power of local governments to impose penalties under local government legislation is very limited and in any event, local governments are unlikely to be sufficiently resourced to actively monitor and enforce such regulations in their local government area. For these reasons the problem should be addressed at a federal level.

Such a prohibition would promote fair trading, in line with the object of the CCA

- 6.43 Selling inauthentic Indigenous art and craft misappropriates Indigenous culture and is fundamentally unfair for Indigenous communities. It is also unfair to consumers, given the proliferation of inauthentic product within the 'grey area' of misleading and deceptive conduct (that is, a product which appears to be made by an Indigenous person, although there is no express written representation that it is Indigenous art). A key purpose of the prohibition would be to promote fair trading by:

- preventing consumers being misled as to the authenticity of First Nations art; and
- preventing the commercial misappropriation and exploitation of First Nations culture, which is fundamentally unfair for First Nations communities and artists.

6.44 This purpose goal aligns with and furthers the object of the CCA, which contains the ACL, which is: 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (emphasis added).³⁷

- preventing consumers being misled as to the authenticity of First Nations art; and
- preventing the commercial misappropriation and exploitation of First Nations culture, which is fundamentally unfair for First Nations communities and artists.

Amending the ACL would provide an effective legal framework for addressing the problem in a timely manner

6.45 Amending the ACL would provide an effective legal framework for prohibiting the sale of inauthentic First Nations art and craft in a timely manner. The advantages of amending the ACL for this purpose include that:

- it eliminates the need to devise a new enforcement body. The responsibility for enforcing the prohibition would fall to the ACCC, a well-respected and effective regulator with effective enforcement powers;
- such a prohibition would also be subject to existing remedies under the ACL, including damages, non-punitive order, adverse publicity orders and pecuniary penalties;
- the ACCC already has a role in protecting consumers against fake First Nations art as the national regulator enforcing the existing prohibitions against misleading and deceptive conduct. In addition:
- the ACCC also contributes to the National Indigenous Consumer Strategy, in collaboration with ASIC, state consumer affairs agencies and the Indigenous Consumer Assistance Network;³⁸ and
- conduct impacting Indigenous consumers is an enduring compliance and enforcement priority of the ACCC.³⁹ This has led to successful enforcement actions, such as the ACCC's action against Telstra for unconscionable sales to Indigenous customers.⁴⁰
- the ACCC is accustomed to enforcing laws that target:
- particular industries – including through industry-specific mandatory codes, infrastructure access and price surveillance regimes;

³⁷ *Competition and Consumer Act 2010* (Cth), section 2.

³⁸ See: <https://www.accc.gov.au/media-release/action-plan-to-help-indigenous-australians-with-consumer-issues>.

³⁹ See: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>.

⁴⁰ See: <https://www.accc.gov.au/media-release/telstra-to-pay-50m-penalty-for-unconscionable-sales-to-indigenous-consumers>; *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2021] FCA 502.

- particular sales and marketing techniques, such as ‘country of origin’ representations, bait advertising, pyramid schemes, door-to-door sales and lay-by sales;
- particular products – including through the ACCC’s product safety role, in which the ACCC is responsible for monitoring compliance with certain product recalls notified by Government; and
- amending existing legislation is a much quicker and simpler process than drafting and introducing new legislation, and would not preclude the introduction of standalone ICIP legislation to address the problem in the long-term.

Experience of international markets and regulators responding to similar problems

- 6.46 The Issues Paper indicated that it is considering the experience of international markets, and the regulatory response to similar problems in those markets. We consider that the sale of inauthentic Indigenous arts and products is also widespread and pervasive in comparable international jurisdictions. There is also a growing recognition of the gaps in existing legislative and regulatory regimes internationally in respect of protecting both consumers and Indigenous artists, communities and culture from the harms flowing from the sale of inauthentic Indigenous art and products. A description of the approaches taken to similar problems in the US, Canada and New Zealand can be found in response to the question below on *“What can we learn from other countries’ efforts to protect First Nations people’s legal rights over their arts and cultures?”*.
- 6.47 While we encourage the Productivity Commission to consider this international experience, we consider many of the regulatory regimes to face the same shortcomings as discussed above. In particular, current international laws against misleading representations, and alternative regulatory solutions such as such as trade mark authentication schemes, are largely unsuccessful in preventing the sale of inauthentic Indigenous art to the detriment of Indigenous artists, communities and culture.
- 6.48 For that reason, we firmly believe that Australia should act promptly and decisively on amending the ACL to prohibit the sale of inauthentic Aboriginal and Torres Strait Islander art and products. Australia has the opportunity to lead the world in addressing the clear harms to Indigenous artists, communities and culture arising from these practices.

What have been the barriers to implementing any of these initiatives to date?

Responses to potential concerns about a prohibition in the ACL

- 6.49 A number of concerns have been raised with the proposal to amend the ACL. It was these concerns that seemingly led the SECLC to recommend that the 2019 Bill not be passed. For the reasons discussed below, those concerns, are either misplaced or can be satisfactorily addressed.

Concerns that a specific prohibition in the ACL would not be in line with the objective of the CCA and ACL are misplaced

- 6.50 It has been suggested that the CCA and ACL are intended to be broad, economy-wide laws, and that a specific prohibition, such as the proposed ACL amendment, may not be consistent with this objective.⁴¹
- 6.51 However, the CCA and ACL already contain a number of industry-specific regimes; that is, regimes which are intended to address issues or market failures in particular industries. By way of example:
- the CCA contains rules relating to the regulation of anti-competitive conduct, which is specific to the telecommunications industry; and
 - the CCA also contains rules relating to the regulation of the shipping liner industry.
- 6.52 In addition, the CCA regulates the use of specific promotional, marketing or sales techniques. For example, the CCA regulates the use of 'country of origin' representations by setting out prescriptive rules relating to when claims such as 'Made in Australia' can be made. It also sets out prescriptive rules relating to door to door sales and lay-by sales. Where the CCA does this, it is typically because the general, economy-wide prohibitions are considered to be insufficient to address concerns with the conduct.
- 6.53 It is submitted that, in the light of these existing regimes, the proposed amendment would not be unusual or uncommon.
- 6.54 We accept that standalone legislation could be passed to address the sale of inauthentic art and craft. Indeed, there are numerous examples where such standalone legislation has been passed to address particular industries or conduct. For example, the Olympic Insignia Protection Act 1987 regulates ownership and use of the Olympic symbol. It essentially deems the Australian Olympic Committee to be the owner of the symbol and prohibits the use of that symbol and images without a licence from the Australian Olympic Committee.
- 6.55 In line with this, it would not be unusual to introduce a new piece of legislation that prohibits the sale of inauthentic artwork. However, we submit that prohibiting the sale of inauthentic art and craft through an amendment to the ACL is preferable for the following reasons:
- it eliminates the need to devise a new enforcement body. The prohibition would be enforced by the ACCC, as the rest of the ACL is;
 - it enables the legislature to avail itself of the existing framework in the ACL dealing with the investigation and enforcement of the ACL by the ACCC and third parties. Businesses are familiar with the ACCC's powers and the manner in which it operates. The ACCC is also familiar with the issues which arise in relation to the sale of inauthentic art and craft, having already brought a number of prosecutions under the ACL;
 - by amending the ACL, this would enable State Fair Trading Departments to also enforce the new provisions (in addition to the ACCC) without any further legislation.⁴² By contrast, introducing a new piece of legislation, would not of itself enable State Fair Trading

41 The ACCC, Submission to the Committee's inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia (3 November 2017) 4. https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Submissions.

42 The Australian Consumer Law, a Framework Overview <http://consumerlaw.gov.au/files/2015/06/ACL_framework_overview.pdf>.

Departments to assist the ACCC by bringing their own enforcement action;

- the objectives of the ACL are entirely consistent with the objective which the proposed prohibition seeks to achieve, namely, protecting consumers and owners of Indigenous art from unfair practices.

Defining authenticity

- 6.56 The Productivity Commission's Issues Paper (the Issues Paper) identifies that, in some circumstances, the definition of 'authenticity' can raise complex issues. We submit that the complexity of the issue is dependent upon the lens through which 'authenticity' is viewed. In the context of the work that our organisations carry out, 'authenticity' and the actual use of the word becomes important primarily in the context of the financial value or collectability of an artwork. In that regard, anthropologist Professor Richard Handler suggests that 'authenticity' is a cultural construct of the modern Western world, closely tied to Western concepts of individualism and is, therefore, representative of Western enquiry rather than based on any notion of non-Western cultures, and in this case, Aboriginal or Torres Strait Islander cultures.⁴³ Our organisations' experience is that the term authentic is not one used by most Aboriginal and Torres Strait Islander artists in relation to the work they create. The work these artists create belongs to them and the ICIP imbedded in those works belongs to them. It should be noted that the words authentic and inauthentic are predominantly used by a non-Indigenous audience to understand this issue.
- 6.57 The Issues Paper gives the example of Aboriginal and Torres Strait Islander artists depicting stories or images in their work without the custodians' permission and the potential for such work to be considered inauthentic by some people. While we understand and acknowledge this particular example of conduct identified in the Issues Paper is of concern within Aboriginal and Torres Strait Islander communities, it is not the problem that the ACL prohibition is aimed at addressing. With respect, we submit this particular example of conduct is one which is to be discussed and addressed within Aboriginal and Torres Strait Islander communities. The potential unintended consequence is that non-Indigenous business owners will find ways to manipulate the ACL by actively seeking artists to create works or put their name to artwork which misappropriates the ICIP of other Indigenous people.
- 6.58 The core problem that the Fake Art Harms Culture campaign and the ACL amendment is aimed at is the creation and sale of Indigenous 'style' art and craft that is created and sold without the knowledge or involvement of an Aboriginal or Torres Strait Islander person. That is, the problem to be addressed by amending the ACL is the creation and sale of fake Indigenous art without any connection at all with any Indigenous community artist. Given that this is the core problem that needs to be solved, a simple definition of 'inauthenticity' is all that is required.⁴⁴
- 6.59 While we acknowledge the issues involved with defining 'authenticity' some of which are briefly referred to above, for the purposes of the draft bill in Schedule 1 (the draft Bill) only, there is a provision to the effect that to be considered 'authentic' products should either be made by, or under licence from, an Aboriginal or Torres Strait Islander artist. This definition provided for the purposes of the ACL amendment only, provides the ACCC with a clear standard to guide it in taking enforcement action.

43 Parkin, 2020, p. 75.

44 The draft Bill does include an additional requirement in relation to Indigenous cultural artefacts namely that the cultural artefact be made in Australia by an artist or community with whom the Indigenous cultural expression is connected. The issue of connection could raise more complex issues.

6.60 Addressing the core problem that needs to be solved, namely the sale of fake art with no connection with any Indigenous community, particularly in the souvenir goods market, does not require complex definitional issues to be grappled with to know, for example, that a plastic dot painted boomerang imported and manufactured outside Australia with no licence from an Indigenous community is inauthentic.

6.61 The SECLC Report noted the argument of one submission to the SECLC that:⁴⁵

Governments trying to regulate the authenticity of Indigenous art could lead to a 'repressive' form of authenticity, which could place 'an onus of proof' on Indigenous artists that would have negative effects.

6.62 In our view, these concerns are addressed by a combination of:

- the fact that the draft Bill proposes a definition of 'authenticity', which is all that is required to address the significant harms the legislation is intended to overcome, as discussed above; and
- the draft Bill adopts a well understood definition of 'Indigenous artist' which aligns with other state and federal requirements of demonstrating Indigeneity and contemplates that regulations may be made providing a documentary safe harbour for the sale of Indigenous art, with a committee that is representative of Indigenous communities to consult with the Minister on the content of such regulations.

Concerns regarding the expanded role of the ACCC and administrative burden are misplaced

6.63 The Issues Paper identifies concerns that have been raised around the ACCC's administration and enforcement capacity to administer a prohibition on inauthentic products. These concerns were echoed in the SECLC Report, which acknowledged comments of the ACCC that it 'does not currently have the 'capacity or remit' to determine the level of inauthentic Indigenous cultural products in the marketplace'.⁴⁶

6.64 We are of the view that there is no other Commonwealth regulator better suited for the enforcement of a new prohibition against the trade of inauthentic Indigenous-style products. The ACCC is a well-equipped, highly effective, well-respected and experienced regulator and is already active enforcing the existing ACL prohibitions where the sale of fake Indigenous art is misleading and deceptive. Its role extends to targeting specific issues affecting Indigenous products and consumers. For example, both *ACCC v Dreamtime Creations Pty Ltd*⁴⁷ and *Birubi* provide examples of successful ACCC enforcement action against the misleading sale of inauthentic products, while the ACCC's action against Telstra demonstrates enforcement against unconscionable sales to Indigenous customers.

6.65 The ACCC's role would not need to be greatly expanded to enforce any new prohibition on the sale of inauthentic products. It already enforces multiple laws aimed at preventing unscrupulous conduct such as the prohibition on unconscionable conduct, various Industry Codes, price exploitation laws and the price surveillance regime. The ACCC could use its existing powers to enforce a new prohibition, such as issuing notices or commencing proceedings seeking pecuniary penalties.

45 SECLC Report, 20, [2.43].

46 At 21-22, [2.45]-[2.48].

47 (2009) 26 ALR 487.

- 6.66 It should be remembered that the ACCC is an organisation with a budget of \$304.96 million with 1,261 employees.⁴⁸
- 6.67 In considering the extent of the burden that would be imposed on the ACCC and the question of whether it has the necessary skill sets, the points made above about the core problem and the definition of 'authenticity' should be borne in mind. In some ways, the new prohibition would make the ACCC's current enforcement task simpler. Rather than having to prove that a particular sale was misleading or deceptive, with the complexities that arose in the *Birubi* case, the ACCC would simply need to prove that the art was inauthentic in the sense discussed above.

Amending the ACL to prohibit the sale of inauthentic arts and crafts is the most effective ways to restrict the supply of inauthentic arts and crafts

- 6.68 The Issues Paper queried whether there are more effective ways to restrict the supply of inauthentic arts and crafts than by amending the ACL. For the reasons set out above in Part 3, we consider that amending the ACL is the most expedient, cost effective and appropriate solution to address the sale of inauthentic art and products. In addition to an ACL amendment, this submission considers proposals to amend Intellectual Property laws and the introduction of a mandatory code. These additional protections would not be precluded by amending the ACL but alone would not provide the most expeditious or appropriate solutions.

Experience of international markets and regulators responding to similar problems

- 6.69 The Issues Paper indicated that it is considering the experience of international markets, and the regulatory response to similar problems in those markets. We consider that the sale of inauthentic Indigenous arts and products is also widespread and pervasive in comparable international jurisdictions. There is also a growing recognition of the gaps in existing legislative and regulatory regimes internationally in respect of protecting both consumers and Indigenous artists, communities and culture from the harms flowing from the sale of inauthentic Indigenous art and products. A description of the approaches taken to similar problems in the US, Canada and New Zealand can be found below.
- 6.70 While we encourage the Productivity Commission to consider this international experience, we consider many of the regulatory regimes to face the same shortcomings as discussed above. In particular, current international laws against misleading representations, and alternative regulatory solutions such as such as trade mark authentication schemes, are largely unsuccessful in preventing the sale of inauthentic Indigenous art to the detriment of Indigenous artists, communities and culture.
- 6.71 For that reason, we firmly believe that Australia should act promptly and decisively on amending the ACL to prohibit the sale of inauthentic Aboriginal and Torres Strait Islander art and products. Australia has the opportunity to lead the world in address the clear harms to Indigenous artists, communities and culture arising from these practices.

What can we learn from other countries' efforts to protect First Nations people's legal

⁴⁸ ACCC and AER Annual Report 2020/2021, 3.

rights over their arts and cultures?

United States

- 6.72 The US *Indian Arts and Crafts Act 1990 (IACA)* is a truth-in-advertising law which prohibits the misrepresentation in marketing of American Indian or Alaskan Native arts and crafts products within the US. The IACA imposes a false representation test, whereby the sale of an arts and crafts product is illegal where it is 'falsely suggested' that the product is Indian-produced; an Indian product; or a product of a particular Indian, Indian tribe, or Indian arts and crafts organisation.⁴⁹ Regulations under the IACA (**Regulations**) prescribe when an item will be considered an Indian product, or Indian-produced. This includes specific examples of what is and is not an Indian product.
- 6.73 Regulations suggest that best practice is to include a label or other form of identification on the product that provides information about the artist, their Tribe, and their Tribe enrolment number.⁵⁰ Further, where products are genuine Indian arts and crafts products, Regulations provide that a supplier may attach a certificate declaring that the Indian Arts and Crafts Board recognises it as genuine, and that its trademark has the approval of the Board.⁵¹
- 6.74 Technically, where Native American-style merchandise is imported into the US, federal law requires a country-of-origin marking. However, this requirement is not in the IACA itself, but established through the complex interaction of various other parallel laws and Regulations. In particular, Regulations under the *Tarif Act 1930* specify that Native American-style jewellery and arts and crafts must be indelibly marked with their country of origin in some permanent way.⁵² Additionally, the US Criminal Code makes the importation of goods by means of any fraudulent or false statement, as well as the smuggling of goods, crimes.⁵³ Therefore, imported goods should be permanently marked with their country of origin, and making any false country of origin claim is a criminal offence. However, it appears that this requirement has been 'widely flouted' and is rarely, if ever, enforced. This mirrors the experience of enforcement of the IACA itself, which has rarely been enforced historically.⁵⁴
- 6.75 As a result of an ongoing federal investigation into Native American art fraud launched in 2012, more action has been taken under the IACA in recent years. For example, in 2018 two men were sentenced for violations of the IACA for importing and fraudulently selling Filipino-made jewellery as Native American-made.⁵⁵ More recently, in 2021 a man was charged for listing and selling fake pieces of Native American art and jewellery online which he claimed were signed by a famous Indian tribe artist.⁵⁶ Moreover, in 2017 a federal Senate Committee hearing on Indian affairs heard

49 See: <https://www.congress.gov/bill/101st-congress/house-bill/2006/text/pl?overview=closed>.

50 25 CFR 309.8.

51 25 CFR 308.2.

52 19 CFR 134.43.

53 18 US Code § 542; 545.

54 Maraya Cornell, 'Biggest Fake Native American Art Conspiracy Revealed' National Geographic (15 March 2018) <https://www.nationalgeographic.com/history/article/native-american-indian-art-fake-forgery-hopi-zuni/#close>

55 Department of Justice, 'Owner of Old Town Albuquerque Jewellery Stores Sentenced to Six Months for Fraudulently Selling Filipino-Made Jewellery as Native American-Made', 28 August 2018 <<https://www.justice.gov/usao-nm/pr/owner-old-town-albuquerque-jewelry-stores-sentenced-six-months-fraudulently-selling>>.

56 Department of Justice, 'Californian man pleads guilty to wire fraud and federal Indian Arts violations', 27 October 2021 <<https://www.justice.gov/usao-nm/pr/california-man-pleads-guilty-wire-fraud-and-federal-indian-arts-violations>>.

that up to 80% of all Indian art sold in the US today is estimated to be fake.⁵⁷ These difficulties have led to a number of proposed reforms to strengthen existing laws, including:

- considering importation and sale of inauthentic products separately;
- introducing a mandatory indelible country-of-origin marking in the IACA itself, rather than relying on the current piecemeal approach;
- requiring that sellers have a basis for representing merchandise is actually Native American produced;
- including a specific forfeiture section in the IACA;
- amending various related Acts to include misrepresentation of Indian produced goods and products as an offence; and
- the Department of Homeland Security actively flagging or seizing Native American style merchandise imported into the US that does not have an indelible country-of-origin marking.⁵⁸

6.76 While there has recently been a slight increase in the number of actions being taken under the IACA, to date none of the reforms proposed to strengthen existing laws in the US have been enacted.

Canada

6.77 Unlike the US, Canada does not have a specific piece of legislation regulating the sale of inauthentic Indigenous art and products. Similar to Australia, Canada currently regulates the sale of inauthentic through its consumer laws. The Canadian *Competition Act* contains prohibitions against the making of false or misleading representations, and engaging in misleading or deceptive conduct in the sale of goods or services to a consumer, and the Canadian *Consumer Packaging and Labelling Act* contains provisions requiring packaging and labelling to have accurate and meaningful information to help consumers make informed purchasing decisions. However, the Canadian Competition Bureau does not appear to have taken any action under these laws for misleading customers through the sale of inauthentic Indigenous art and products.

6.78 Canada has instead relied heavily on intellectual property laws in an attempt to respond to the sale of inauthentic Indigenous art and products. In 1958, the Department of Northern Affairs and Natural Resources registered an Igloo symbol under the National Trade Mark and True Labelling Act, with the ownership vested in the Canadian Government. The Igloo Trade Mark was created to distinguish arts and products that were handmade by Canadian artists of Inuit origin from mass-produced works by non-Inuit artists. In 2017, the Canadian Government transferred ownership of the Igloo symbol to the Inuit Art Foundation, an Inuit-led arts organisation. Since coming under the ownership of the Inuit Art Foundation, an Igloo Tag Program has been introduced as a way to license organisations to use, display and promote the Igloo Trade Mark in association with Inuit artwork.

6.79 Despite the Igloo Trade Mark's long history, it has been largely ineffective in preventing the widespread infringement of Indigenous art or sale of inauthentic Indigenous art in Canada. In

57 See: Damon Martinez, Testimony before the US Senate Committee on Indian Affairs <https://www.indian.senate.gov/sites/default/files/documents/7.7.17DamonMartinezTestimony.pdf>.

58 See: Damon Martinez, Testimony before the US Senate Committee on Indian Affairs <https://www.indian.senate.gov/sites/default/files/documents/7.7.17DamonMartinezTestimony.pdf>.

2010, a study commissioned by the Aboriginal Tourism Association of British Columbia found that 88% of Indigenous-themed souvenirs sold in Vancouver were manufactured and sold with no participation from Indigenous artists.⁵⁹ Nearly 10 years later, in 2019, two Parliamentary reports were provided to the Canadian government for consideration that both expressed a concern that many Indigenous artists were not receiving sufficient protection from existing copyright law and Indigenous work was being subject to widespread infringement.⁶⁰

- 6.80 In 2018, an Indigenous artist launched a national awareness campaign called 'Reclaim Indigenous Arts' which calls on the Canadian Government to implement policies to protect Indigenous cultures from the importation and sale of internationally made items purporting to be Indigenous, thereby devaluing authentic Indigenous art.⁶¹ The Reclaim Indigenous Arts campaign calls on people to write to local city officials demanding them to enact bylaws to ban the sale of inauthentic Indigenous arts and crafts in local municipalities.

New Zealand

- 6.81 New Zealand also does not have a specific piece of legislation regulating the sale of inauthentic Indigenous art and products. Similar to Australia and Canada, New Zealand currently regulates the sale of inauthentic through its consumer laws. The New Zealand *Fair Trading Act* contains prohibitions against the making of false or misleading representations, and engaging in misleading or deceptive conduct in the sale of goods or services to a consumer. The *Fair Trading Act* also contains Consumer Information Standards that sets certain requirements for the packaging and labelling to have accurate and meaningful information regarding the origin of goods to help consumers make informed purchasing decisions. However, the New Zealand Commerce Commission also does not appear to have taken any action under these laws in relation to misleading customers through the sale of inauthentic Indigenous art and products.
- 6.82 Similar to Canada, New Zealand appears to have relied on intellectual property laws in an attempt to respond to the sale of inauthentic Māori art and products. In 2002, Creative Arts New Zealand and Te Waka Toi (together the **Māori Arts Board**) registered the Toi Iho Trade Mark for the purpose of identifying and distinguishing Māori-made products. However, the government found that the trademark had failed to increase sales of Māori art by licensed artists and retailers, and withdrew funding in 2009.

59 Solen Roth, 'Preliminary Study of the Aboriginal-themed Giftware Market in Major Vancouver Tourism Site' (October 2021).

60 The Shifting Paradigms report of the Standing Committee on Canadian Heritage; INDU Committee Report of the Standing Committee on Industry, Science and Technology.

61 See: <https://www.reclaimindigenousarts.com/home>.

7. What issues arise in the interactions between artists and dealers?

- 7.1 Arts Law, IartC and the Copyright Agency all receive regular contact from artists, artists' families, and art centre managers reporting unfair and unethical dealings across the country, across all art forms, and across the market for works of all values. Our combined experiences are of a market in which many if not most dealers behave fairly and ethically most of the time, but where there is nonetheless a great many instances each year of artists who have been exploited, unpaid, or underpaid for their work, or otherwise mistreated or disrespected by dealers, clients, commissioners or employers. A broad range of issues arises in the interactions between artists and dealers. Issues raised frequently include but are not limited to:
- Unfair licensing arrangements;
 - Dealers failing to return outstanding consignments;
 - Dealers not paying for artworks they have sold;
 - Dealers failing to notify art centres of artwork sales;
 - Dealers paying artists upfront a small amount of money then selling the artwork for significantly higher prices;
 - Dealers failing to pay invoices on time;
 - Unauthorised use of images on social media platforms.
- 7.2 While artists working with art centres are not immune to the conduct of unscrupulous dealers, the artists most affected by poor behaviour are artists working independently without the support structure of an art centre and the advocacy and resources art centres access via their peak bodies.
- 7.3 When discussing the unfair and unethical issues that arise, it is not always about malicious intent by an individual to 'rip off' an artist, but rather a systemic power imbalance that permeates relationships between Aboriginal and Torres Strait Islander people and non-Indigenous people.
-

*'Colonial factors ... drive segregation and enable a forgetting that negates personal accountability and complicity in maintaining colonial power imbalances.'*⁶²

- 7.4 The issues that arise in these areas are due to the disadvantage many Aboriginal and Torres Strait Islander people face, which is overwhelmingly the result of centuries of colonial intervention. Artists, particularly those working independently, are often exploited by unethical practices due to an artist's age, poverty, medical conditions, social obligations, English literacy and numeracy, and displacement.⁶³ The often limited economic bargaining positions artists consequently find themselves in mean that even when an artist may be aware that the offer being made is unfair, they choose to take it in the absence of few other choices and knowing that if they don't say yes, the dealer will approach another artist.

62 Bronwyn Fredericks & Abraham Bradfield, 'I'm not afraid of the dark: white colonial fears, anxieties, and racism in Australia and beyond' (2021) 24(2) *MC Journal*.

63 Tim Acker & Lisa Stefanoff, *Artists outside art centres* (Report, 2016) p. 4.

'It is the Artists, who have been let down by a myriad of situations throughout their lives, that are the ones being ripped off. Until the lack of accessibility to housing, food, and basic human necessities are fixed, artists will continue to be exploited. The most vulnerable are the most preyed on. If you have to keep the lights on or your family fed and a bad deal is the only deal you have, you will do what you have to, to survive.'

– John Waight

- 7.5 Therefore, trying to address the issue of unfair and unethical dealings in isolation of the systemic problems faced by some artists will never be effective.
- 7.6 Ensuring people have access to an adequate standard of living would not eliminate all exploitation, but it would go a long way to elevating the issues some artists face. The IartC, like other organisations working in the Indigenous visual arts sector, receives requests for assistance relating to housing, debt, and other matters which fall outside the IartC's remit. We will direct artists to qualified agencies to assist; however, support is not always readily available, or within the timeframe the artists require.
- 7.7 **A transaction where the dealer knows the artist will say yes regardless of the terms is not fair.**

Attribution and authorship of artworks

- 7.8 While concerns about non-Indigenous art dealers and art studio support workers creating artworks and attributing those works circulate within the sector, reports of such conduct are rarely reported to the IartC directly by artists. This does not mean the behaviour doesn't occur, but it presents challenges for the IartC and other agencies investigating such allegations.
- 7.9 Like other unethical conduct in this sector, the weak economic bargaining position many artists find themselves in can result in artists not seeking support to address this conduct for fear of retribution by art dealers and being implicated in the behaviour. The issues raised with the IartC about attribution have been reported to the ACCC and Police. The Productivity Commission should liaise with these agencies about the challenges in pursuing these matters.

Artists being locked up

- 7.10 Similar to concerns raised about attribution and authorship of works, issues about artists being locked up in private art studios also circulate within the sector and are reported in the media and sometimes to the IartC. Like other unethical conduct in this sector, the limited economic bargaining position many artists find themselves in can result in artists not seeking support to address this conduct for fear of retribution by art dealers or because of other concerns the artist experiences dwarfing the unfair treatment by some art dealers. As previously highlighted just because the artist does not complain about the conduct doesn't mean it is ok however this does present difficulties for organisations including IartC responding to the conduct.
- 7.11 The IartC has reported such conduct to various authorities. Matters discussed in confidence with

the artC and other organisations will not be included in a public submission.

- 7.12 While upfront purchases of artwork or advance payments are not absent from the non-Indigenous art market, there is not the same reliance on paying artists upfront in cash as there is in the Indigenous art market. In our experience, there is a range of reasons why Aboriginal and Torres Strait Islander artists working independently and sometimes art centre member artists chose to work with private dealers (outside the art centre model). Working with private art dealers is a way for artists to access cash upfront in a way that their art centre may not be able to provide. This does not necessarily mean the artist has been exploited. It is common practice for some private art dealers, particularly those operating private art studios in towns like Alice Springs, to pay artists upfront and then sell that artwork for a price significantly higher than what the artist was paid for the work. It is not uncommon for these artists to be paid in:
- cash
 - groceries
 - motor vehicles
 - accommodation
 - payment to family members
 - transport
- 7.13 Many dealers allow book-up⁶⁴ resulting in artists being uncertain about the exact amounts paid for specific artworks. The amount 'owed' to a dealer for book-up does not necessarily reflect the value of an individual artwork. Artists can also find themselves in positions where they are 'painting off' debt for payments made to family members without their consent. Payments are also made in cash, via EFT, and goods and services. For some artists, receiving cash payments and goods like groceries and accommodation is needed. This is additional income on top of pensions or other assistance payments. Artists are understandably reluctant to jeopardise their pension payments when income derived from artwork sales is inconsistent.
- 7.14 From our experience, much of the bad conduct in the exhibition and sale of Aboriginal and Torres Strait Islander artwork is legal, but that doesn't mean it is fair. Because an artist will accept a small payment for their artwork because they are in need of the money doesn't mean it is fair for a dealer to pay the small amount. The discrepancy between what an artist is paid for their artwork and what the dealer sells it for is much contention for artists. This is particularly an issue when there is no transparency to the future sale price.
- 7.15 Much of what has been reported in the media about 'carpetbagging' has related to activity in Central Australia. Generally 'carpetbagging' is understood to mean an outsider who seeks power or success presumptuously. In the inquiry into Australia's Indigenous visual arts and craft sector in June, 2007 chapter 8.15 included the following reference to carpetbagging:
- 7.16 *The term **carpetbagger** can be applied to particular individuals, backyard dealers, commercial gallery owners, private agents, or persons operating other legitimate businesses such as car yards or motels. Such a person is usually not Indigenous and seeks to obtain art from an artist at a price well below what that person knows or ought to know is a reasonable market price, with the intention of selling it on at a substantial profit.*⁶⁵

64 'Book up' is informal credit offered by stores or other traders. It allows people to get goods or services and pay the store or trader later. Book up is also known by a number of other names, including 'book down', 'on the tick', 'on the slate', 'running a tab' or 'tiki'. Some stores charge the consumer a fee, or charge more for goods that are booked up, and some do not. < <https://files.moneysmart.gov.au/media/tz4npqee/dealing-with-book-up.pdf>>.

65 'Indigenous Art – Securing the Future,' 2007, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenousarts/report/index>.

- 7.17 This does not mean that the conduct associated with carpetbagging does not occur in other parts of Australia. However, there is undeniably a concentration of dealers conducting business in a way characteristic of carpetbagging located either in Alice Springs or working with artists based in Alice Springs or frequently travelling to Alice Springs from outlying communities. Many artists working with these dealers are not members of Aboriginal and Torres Strait Islander-owned art centres. Some are.
- 7.18 The IartC has completed detailed research with individual artists mapping available artworks they have for sale online and has compared the sale price of the artworks with the amount the artists were paid upfront. On occasion, at the artist's request, the IartC will contact galleries and dealers to obtain information about the transactions with the artists.
- 7.19 This information is usually difficult to secure with dealers and galleries using 'commercial in confidence' as the reason for not sharing the information. The IartC can discuss further de-identified details about this research with you. For example, when talking with dealers about issues relating to artists payments, the following have been genuine responses from dealers:
- "We wear all the risk."
 - "We don't receive any funding as art centres do."
 - "We are the ones providing all of that support to artists."
 - "We give the artists a space to work, we provide the art materials, we promote the artwork."
 - "We do this with no support from the government"
 - "The artists aren't interested in information about their artwork sales, so we don't tell them."
 - "No artist has ever asked me for that information."
 - "They [the artist] are being a pest or a humbugger. They have called me x amount of times, I'm not going to work with them anymore."
 - They are just going to spend the money at the casino or on alcohol."
- 7.20 **There is a level of contempt towards artists from some dealers whose business is dependent on those very artists to succeed. This begs the question: "Why are these dealers operating a business that relies on the creativity and knowledge of Aboriginal and Torres Strait Islander people?" The only answer can be that it is profitable.**
- 7.21 In the case of artists working independent of the art centre model, these artists are not beneficiaries of any Indigenous Visual Arts Industry Support (IVAIS) funding that supports most Aboriginal and Torres Strait Islander-owned art centres. Indirectly they might access the support of the IartC or Arts Law (both recipients of IVAIS funding). Still, it is challenging for them to access support and services equivalent to what art centre artists access from their art centres. The IartC does its best to work with independent artists. This work is resource-intensive and challenging especially when artists do not have access to computers and the internet. Correspondence is often via phone calls and text messages.
- 7.22 It should be noted that many artists working independently of art centres are confident in navigating the promotion and sale of their artwork with the many and varied private art dealers, galleries, and other businesses working across Australia and overseas. However, an artist's certainty and apparent satisfaction with their commercial arrangement does not necessarily equate to a fair and reasonable transaction between an art dealer and an artist.
- 7.23 The commercial arrangement between artists and dealers can vary depending on the artist a dealer is working with, i.e., an artist with good negotiating skills will negotiate a better deal for themselves. Negotiating skills could be influenced by any number of things including access to technology (computer, email, the internet, and mobile phone), and resources agencies and other support organisations.

- 7.24 The commercial arrangement between dealers and artists can vary depending on the dealer an artist is working with, i.e. dealer who is committed to fair and ethical trade with artists, who is a Dealer Member of the IartC, and who values and respects art and culture is more likely to negotiate a fair deal with all artists they work with irrespective of the artists negotiating skills and will be committed to fair and consistent dealings with all artists they work with.
- 7.25 The IartC has conducted desktop research for independent artists outside art centres. These artists all work with art dealers who provide upfront payment and sometimes payment in advance for the artist's work.
- 7.26 This research has included online searches for individual artists documenting:
- The galleries/businesses who are selling the artist's work
 - The name of the business owner and or director and staff
 - The ABN number of the business
 - Any other businesses connected to the entity
 - Where the galleries or businesses are located
 - Whether the gallery is online a physical gallery or both
 - How the dealer engages with the artist:
 - Artist travels to the art dealer to work at their home or studio, sometimes interstate
 - Artist works in dealer's studio in or close to the town where they reside
 - Dealers send art materials to the artist and either collect completed works or the artist sends completed works to the dealer or gallery.
 - Lists of the artworks for sale, including title size, medium, and sale price
 - Lists of works which are presented on gallery dealer sites as sold and the sold price if available
 - This information is presented for businesses located by each state and territory and overseas
 - The value of the artworks is calculated for each business where sale prices are listed
 - Where no sale prices are listed, the artwork's sale price is estimated based on the costs of similar works by that artist listed on other businesses' websites.
 - Once the data is collated, the IartC presents the information to the artist
- 7.27 The artists are generally shocked by the price the dealer is selling the artwork for relative to the amount the dealer paid them for the artwork. Artists have expressed anger, frustration, in some cases, shame at knowing they have been ripped off.
- 7.28 In some cases, artists have requested that the IartC make approaches to some dealers about the breakdown of the money story to understand the discrepancy between what they are paid and what the artwork sells for. However, more often than not the artist does not wish to pursue it further and the value of the research exercise for the artist has been someone taking the time to assist them in accessing information, to inform future negotiations, and understanding of the value of their work in the market. Similarly, artists have requested the Copyright Agency make approaches to some dealers to understand not only the money story, but how their work has ended up with that dealer/gallery.
- 7.29 The IartC cannot present information attributed to any individual artist or gallery or dealer cited in the above-mentioned research.

- 7.30 To further understand the relationship between artists and private art dealers we refer to the Remote Art Economies Project research Artists outside Art Centres – Acker and Steffanoff.⁶⁶ The research findings are consistent with observations of the IartC, Arts Law and Copyright Agency on the relationships artists have with the dealers they work with. While this research focuses on artists working outside of art centres in the Alice Springs / Central Desert region, the experience is shared by artists nationally to varying degrees, the main difference being there is a concentration of artists from the central desert region who work with art dealers via the Dealer Artist Upfront model that is not as prevalent in other parts of the country. IartC can discuss this further with the Commission.
- 7.31 *This report presents research results drawn from surveys conducted with 57 independent Aboriginal artists in the Northern Territory, with a concentration in central Australia/Alice Springs. It seeks to provide some details about the little-known art-making and trade practices of artists who choose to work outside of art centres.*⁶⁷
- 7.32 *Both established and unknown artists work outside of art centres. Some sell directly to a number of buyers. Others work regularly for one or another dealer. Some work for art centres as well as selling work to private customers, dealers and/or galleries. Numerous commercial galleries and auction businesses buy art from private dealers who work directly with artists, and some galleries work directly with artists themselves.*⁶⁸
- 7.33 *While there are some clear indications that independent artists generally have confidence in their professional practice, the responses to a question about where artists might seek help in the event of difficulties highlight that this confidence is not backed up by a depth of industry knowledge or a support network. Of the 54 (95%) artists who responded to a question asking if they knew where to seek assistance, 83% said 'no' and a further 15% said they 'weren't sure'.*⁶⁹
- 7.34 *Of the 54 (95%) artists who responded to a question asking if they knew where to seek assistance, 83% said 'no' and a further 15% said they 'weren't sure':*⁷⁰
- *Only 11% of artists knew something of peak agencies.*
 - *Three-quarters (76%) of artists had not heard about Resale Royalty.*
 - *Only 24% had heard about copyright and licensing; just over half of these said they wanted to know more about copyright.*
 - *Forty-three artists (77% of respondents) did not have a will.*
 - *Forty-seven artists (84% of respondents) had not heard of the Arts Law Centre of Australia or their Aboriginal and Torres Strait Islander program, Artists in the Black.*
- 7.35 Based on the recent contact the IartC, Arts Law and Copyright Agency have had with artists including Alice Springs based artists the responses to the questions about accessing advice and support from our organisations has increased but not to address the level of support required to ensure this cohort of artists are provided with the assistance they seek. There will still be numerous artists who do not know our organisations exist and do not understand our roles.

66 Tim Acker & Lisa Stefanoff, Artists outside art centres (Report, 2016) p. 4.

67 Ibid p. iii.

68 Ibid p. 4

69 Ibid p. 10

70 Ibid p. 10

Unfair licensing arrangements

- 7.36 As posited above, in our opinion, the issues arising between Aboriginal and Torres Strait Islander artists and dealers stem from and are reinforced by the systemic power imbalance. The most prevalent issue reported to our three organisations pertains to licensing arrangements. Artists can experience unequal bargaining power, unfair contract terms, and unethical treatment from art dealers and third parties.
- 7.37 The IartC has many Dealer Members who work exclusively in the licensing of Aboriginal and Torres Strait Islander artwork and Dealer Members who sometimes license artwork. The Copyright Agency exists to manage copyright with a section of their business dedicated solely to commercial licensing of artists' work. Arts Law does not manage licensing but does much work to support and educate artists about licensing arrangements and provide legal advice on the matter.
- 7.38 All three organisations are frequently contacted seeking support for issues they are experiencing with the licensing of their artwork, including but not limited to:
- Businesses reproducing artists work without permission
 - Businesses reproducing artists' work and the artists unaware that they have entered a licensing agreement with the licensee. This could be because:
 - The artist signed paperwork, thinking that they were signing a receipt confirming payment for original artwork, but they signed a licensing agreement and, in some cases, assigned their copyright to the business.
 - Artists are being pushed to sign agreements under duress without the opportunity to seek independent advice. The business will commonly tell the artist if they don't say yes, they will just go to another artist who will say yes and sign.
 - Artists signing agreements which are unfair and end up locked into a deal it is difficult to get out of
- 7.39 The unfair behaviours of some businesses licensing the work of Aboriginal and Torres Strait Islander artists are akin to the behaviours associated with carpetbagging. Unlike the dealer upfront model, businesses licensing artwork usually have some form of written agreement with the artist even if that agreement is unfair. In such cases, there are also records and some kind of inventory of goods as the items manufactured with the artist's work on them are generally sold or consigned wholesale to other retailers.
- 7.40 A project by Gandel Philanthropy and Ninti One, and supported by the Copyright Agency Cultural Fund, brought together industry experts – artists, art centre managers, IartC, licensing specialist, manufacturers, distributors and retailers – to discuss the successes and challenges in bringing products featuring Aboriginal and Torres Strait Islander artworks (predominately gifts and homewares) to market and what is needed for this to work well. The resulting documentation, designed to guide and encourage best practice can be found [here](#).
- 7.41 All three of our organisations have observed sellers utilising international online platforms and have assisted artists who have had their work stolen and misused. In some cases, we have been successful in having individual items being removed from sale. Sadly, however, our lack of resources to investigate and the lack of ability to trace online activities to find the source of the material means that artists face the prospect of playing whack-a-mole, with these sellers simply making a new site or reuploading the fake material. Arts Law elaborated further on these issues

that are prevalent in online marketplaces in a 2021 submission to the ACCC in response to their 'Digital Platform Services Inquiry'.⁷¹

- 7.42 To adequately present the issues with licensed products and merchandise in the market, we would need to provide supplementary information which is beyond the current capacity of our organisations at this time. This is an area the Commission should look at closely, and we would be happy to discuss this further with the Commission.
- 7.43 We also note that our organisations have invested significant time and resources into supporting artists who raise concerns with us. There has not been resolution for the artists even with access to expert legal advice in many cases. This is because a number of factors, including but not limited to the burden on artists involved in providing evidence to support their claim and the prohibitive costs involved in pursuing court action for contractual disputes, undue influence, unconscionable conduct, or copyright infringement matters.
- 7.44 Given that copyright laws do exist in Australia, and that there is too frequently no satisfactory outcome for artists in this space demonstrates that even with laws, it will not necessarily mean the desired outcome will be reached for the artist.
- 7.45 The above discussion on licensing arrangements is specific to artist dealer relations. However, clearly, artists engage in licensing agreements beyond this (engaging directly with businesses, government, and other artists).
- 7.46 On a positive note, the number of artists contacting IartC, Arts Law and Copyright Agency for advice and support about licensing is increasing, artists are becoming more aware of their rights and equipping themselves to safeguard against unfair deals along with reassessing existing agreements they have entered which they now know are unfair.
- 7.47 There is also increased accountability of businesses licensing Aboriginal and Torres Strait Islander artists' work. Many actively enter agreements with artists utilising the Arts Law best practice template agreements and ensuring artists seek independent advice before accepting the terms.

What do 'fair' and 'ethical' dealings between artists and dealers look like? How can best-practice ethical trade of Aboriginal and Torres Strait Islander arts and crafts be nurtured?

- 7.48 Defining what "fair" and "ethical" dealings between artists and dealers look like is complex as the nature of each artist-dealer relationship will vary based on individual, community, or business circumstances. As discussed below, the Indigenous Art Code operates as a voluntary code of conduct for dealers engaging in the sector. But the Code is not a policing body with regulatory powers.
- 7.49 Fair and ethical dealings in practice would adhere to the [Indigenous Code of Conduct](#) guidelines as a minimum.
- 7.50 Currently, the Code requires that there be an agreement between artists and dealers that covers the nature of their relationship. However, at present, there is no requirement of a written agreement. A number of the Code's Dealer Members do have written agreements and, if they do,

71 See: <https://www.artslaw.com.au/submission-digital-platforms-acc/>.

the Code will review these written agreements to ensure they adhere to the Code. For written agreements to be a requirement under the Code, the Code's Dealer Members would need to pass a vote to amend the Code. Details of best practice written agreements is something that requires further explanation and can be addressed in supplementary material at a further date.

- 7.51 In 2019 IartC conducted a survey surrounding consumers, artists and dealers' perspectives on fair and transparent dealings between artists and dealers. See survey results [here](#).
- 7.52 To nurture and continue to support the ethical trade of Aboriginal and Torres Strait Islander arts and crafts, there are existing programs that can be reviewed or introduced.

A review of the Cultural Gifts Program

- 7.53 There is currently no requirement under the Cultural Gifts Program (CGP) for information about how the artist was paid for the first sale of the artwork. Ascertaining the fairness of this transaction relies on the integrity and calibre of the valuer, namely their ability to discern provenance and authenticity by way of their knowledge of a particular artist's exhibiting and selling history, and knowledge about what constitutes good provenance for each artwork. However, the consideration of provenance and authenticity is separate from the question of fairness about an artwork's creation, as an otherwise authentic work made by the hand of the artist could nonetheless have been made in unfair or unethical circumstances, including where an artist was underpaid or otherwise exploited.
- 7.54 The CGP does not state that all Aboriginal and Torres Strait Islander artwork being considered must have Art Centre provenance – nor should it, as not all artists work with art centres. It does, however, require documentation confirming provenance (such as receipts or certificates of authenticity) and confirmation of the work's authenticity by the two qualified, independent valuers selected to perform the valuation of the gift. Despite these existing safeguards, there is a risk that dealers and collectors use gifts under the CGP to legitimise the provenance of the works in their collections. Once a work is accepted under the CGP and enters the collection of a public institution, works sharing that provenance may increase in commercial value relying on this precedent, even if that provenance was initially dubious.
- 7.55 It is also a matter of public interest that there is greater transparency about how the CGP works and that the purpose of the CGP does not inadvertently support a marketplace that benefits from the unfair treatment of artists. This is especially complex where donations may be of works acquired through the secondary market and donors simply do not have access to information about the original purchase of the work beyond an attribution to a private collection.
- 7.56 Any change to the CGP that increases the onus on donors and valuers to provide evidence and justification for the gifts and their values would also likely have to be prospective, and not retrospective, as it would be unreasonable to apply higher standards of evidence or documentation for past purchases where certain paperwork was not a requirement at the time of sale. More discussion needs to be had around these questions and should take place when the CGP is reviewed.

A review of the CDP activities and their impact on art centre operations

- 7.57 There is ongoing concern from art centres about the detrimental impact of some CDP providers offering competing art activities in communities where there are established art centres. These activities undermine the work of art centres and the sustainable and self-determined employment, training, and economic opportunities art centres provide to the community.
- 7.58 We ask that the Inquiry refers to the National Indigenous Australians Agency (NIAA) inquiry into CDP. The IartC consulted with Arts Law on their submission and support [the submission](#) made by Arts Law.

Copyright Agency Resale Royalty Inspection Rights

- 7.59 Many of the artists who approach the IartC for assistance raise concerns about their resale royalty payments (or lack of). In some instances, artists are not aware of the resale royalty scheme. Based on our observations many of the Dealers who the IartC would identify as being problematic in their dealings with artists are unlikely to be compliant with their resale royalty obligations.
- 7.60 At the time of the post-implementation review of the resale royalty scheme (3 years after the scheme commencement 2013), Copyright Agency in their submission requested inspection rights to assist them to drive compliance for the Resale Royalty Right. Copyright Agency has inspection rights to support its management of the statutory licenses. Similar inspection rights for the resale scheme would ensure Copyright Agency access to enough information to allow them to determine if a royalty is payable on a commercial resale under this act, how much that royalty should be and who is liable to pay the royalty. Documents that would assist in determining this include:
- Invoice/sales documentation between the art market professional (AMP) and the buyer
 - Payment documentation from the AMP to the seller (could be the artist or another owner)
 - Vendor documentation where the AMP is dealing with a seller who is not the artist
 - Where the AMP is dealing directly with the artist, a copy of the agreement between the artist and AMP (clarifying if it is a consignment or purchase arrangement)
 - Inventory/stock room records (again clarifying consignment stock versus owned stock)
- 7.61 Granting Copyright Agency inspection rights would not alleviate unfair payments for artworks, but it would drive greater compliance and transparency for artists. No amount of resale royalty payment will make up for the discrepancy between what some artists are paid up front by a dealer and what the dealer then sells the artwork for.
- 7.62 We are mindful of some private dealers also advocating for inspections rights to be granted to Copyright Agency. In considering inspection rights we ask you to keep in mind that because a dealer is resale compliant, it does not mean a fair amount of money was paid to the artist in the first place.
- 7.63 The collecting society has no legislative power to inspect the records of sellers, buyers, art market professionals or other agents to determine the amount of any resale payable on a commercial resale or the liability for that royalty. We can require this information from these parties and, if they do not comply, we can apply to the Federal Court for a penalty against

the relevant party. We note that the penalty provision does not empower the court to order compliance with a request for information.

- 7.64 In our view it would be useful to have the power to inspect records, rather than having to enforce compliance through the notice and penalty system provided. The power should extend to the right to inspect records related to information that is required to be given in a section 28 notice of commercial resale and not just the limited amount of information that can be requested under a section 29 request.
- 7.65 A possible model for our suggested amendment is the inspection provisions that form part of the educational statutory licence in the Copyright Act administered by Copyright Agency. We have found these provisions to be a useful tool in managing the statutory licence, though rarely used.

State Legislation

- 7.66 The following is provided to the Commission as an example of legislation governing the rights and obligations of participants in a particular industry.
- 7.67 There is legislation in New South Wales which governs the rights and obligations for performers and performer representatives in the entertainment industry; the *Entertainment Industry Act 2013 (the Entertainment Industry Act)*⁷² and the *Entertainment Regulation 2020 (the Entertainment Regulations)*.⁷³ In New South Wales, the Department of Fair Trading is the relevant department regulator that oversees enquiries and complaints. The Judicial Commission of New South Wales statutory scheme for fines. The Department of Fair Trading website provides a summary of how the Entertainment Industry Act and Entertainment Regulations operate which can be summarised as follows:
- (a) The rights and responsibilities of performers and performer representatives.
 - (b) Complaints about the performer not being paid within the specified timeframe.
 - (c) A breach of agreement terms.
 - (d) Fees exceeding the capped amounts set out in the Entertainment Industry Act.⁷⁴
- 7.68 The Entertainment Industry Act and Entertainment Regulations also prescribe that an agent of performers must provide certain information to performers including:
- (a) what fees will be charged
 - (b) what services are offered
 - (c) the cooling off period
 - (d) the effect of entering into the entertainment industry agreement or entertainment industry managerial agreement on the performer.⁷⁵

72 See the Act here: <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2013-073#sch1>.

73 See the Regulations here: <https://legislation.nsw.gov.au/view/html/inforce/current/sl-2020-0469#statusinformation>.

74 See: <https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/information-for-specific-industries/entertainment-industry>.

75 See: <https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/information-for-specific-industries/entertainment-industry>.

- 7.69 There is a Code of Conduct included in the Entertainment Industry Act with the objective of setting out principles that promote ethical practice, transparency and ensure honest, fair, and professional conduct.⁷⁶ In addition, The Entertainment Industry Act also prescribes the maximum fees an agent may charge a performer in different situations.
- 7.70 A major issue with the Entertainment Industry Act and Entertainment Regulations are that they are only enforceable for business carried out in New South Wales, and because the other states and territories do not have similar uniform requirements, their operation in Australia is limited, which is problematic for an industry that operates nationally. The Productivity Commission could consider the ability of states and territories to enact uniform legislation which applies to the Indigenous visual arts market (or potentially the visual arts market more broadly). This legislation (if drafted correctly and enforced by a regulatory body) could potentially provide protections against unethical practices in the Indigenous arts market.

How prevalent are unfair and unethical dealings between artists and dealers? What information sources can we draw on to estimate the scale of harmful practices?

- 7.71 This is incredibly difficult to determine as it would entirely depend on who was asked. We know that some artists will work with a particular dealer, and their experience is positive and seemingly fair. In contrast, another artist working with the same dealer is negative, and they feel ripped off and poorly treated.

'I work with various private art dealers in Alice Springs, and I don't get ripped off because I can read and write. I know what my artwork is worth and won't settle for less. This is not the same for all artists who work with the same dealers. Some of the artists are old, can't read and write, take what they are offered and don't question it. It isn't fair if they are famous artists who have been painting for a long time and their paintings sell for a lot more than mine to be getting paid less than me.'

– Artist Member of the Indigenous Art Code.

- 7.72 It is essential to be mindful when estimating scale and prevalence that the conduct sometimes reported in the media is of concern. Still, the day-to-day challenges faced by artists (not usually reported in any official capacity or by the media) are what cause ongoing harm, becoming the Modus Operandi for too many businesses.
- 7.73 In our opinion, unfair and unethical dealings have been reduced in many market areas but still exist in others. Our three organisations believe that quantifying the prevalence is both impossible and disrespectful. The existence of any at all calls for change.

76 See the legislation here: <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2013-073#sch.1>.

'The bottom line is everyone knows there is bad stuff going on; it is no secret. In different places, there might be more happening than in others. We will never know exactly how much, that is why it keeps happening. But isn't our knowledge of one unfair and unethical dealing too much? The idea of asking how many is offensive – one is one too many'.

– John Waight

7.74 Arts Law, IartC, Copyright Agency are open to having further discussions with the Productivity Commission regarding this. We, however, will not share confidential information in a public submission.

How well is the Indigenous Art Code working? How could it be improved? What are the pros and cons of moving to a mandatory code?

7.75 Arts Law, the Copyright Agency and IartC submit that:

- the Indigenous Art Code (referred to in this section as the **Voluntary Code**) exists to address problematic behaviour among Industry participants. The behaviour includes but is not limited to:
- artists being underpaid and misled as to the value of their art;
- Dealers paying artists upfront a small amount of money then selling the artwork for significantly higher prices;
- a lack of transparency around how artists are remunerated for their work;
- Unfair licensing arrangements;
- Dealers failing to return outstanding consignments;
- Dealers not paying for artworks they have sold;
- Dealers failing to notify art centres of artwork sales;
- Dealers failing to pay invoices on time;
- Unauthorised use of images on social media platforms.
- Dealers forcing artists to remain in the studio for long periods of time, in order to be remunerated; and
- Dealers exploiting family relationships.

7.76 The causes of this problematic behaviour are rooted in market failures – specifically caused by information asymmetry and imperfect competition leading to a chronic imbalance of bargaining power between artists and dealers – within the Aboriginal and Torres Strait Islander visual arts and crafts industry (the **Indigenous Art Industry**). Mandatory codes are often used to address problematic conduct stemming from information asymmetry and an imbalance of bargaining power.⁷⁷ The dairy industry is an example of where a mandatory code

⁷⁷ See the Treasury: <https://treasury.gov.au/sites/default/files/2019-03/p2017-t184652-5.pdf> at p. 4

has been successfully introduced to address an imbalance of bargaining power, where a voluntary code had failed to do so.

- 7.77 In this section of our submission, we present what the introduction of a mandatory code could look like, including some of its benefits and potential issues.
- 7.78 The introduction of a mandatory code, codifying minimum standards of conduct, could be an effective way of addressing the exploitation of artists, and the unconscionable behaviour of certain market participants. A mandatory code could be more effective than the existing voluntary model, because a mandatory code would apply to everyone (not just voluntary signatories), and there would be greater incentives for compliance with minimum standards.

Voluntary Code

- 7.79 The [Voluntary Code](#) sets out ethical practices for art dealers' interactions with artists, and for their behaviour in relation to selling Indigenous artwork. Individuals or businesses that deal in inauthentic Indigenous artwork are not permitted to join the Voluntary Code. However, the Code falls short of explicitly prohibiting the sale of inauthentic Indigenous art. The standards imposed by the Voluntary Code include:
- acting fairly, honestly, professionally and in good conscience when dealing with artists;
 - not making false or misleading representations in connection with artwork (for example with respect to the authenticity of artwork, or the place of origin of the artwork);
 - respecting artists' rights and adhering to cultural practices;
 - obtaining artists' informed consent before buying, reproducing or licensing their work; and
 - including prescribed terms in their agreements with artists (including cooling-off rights, details about any exhibition in which the artwork is to appear, and a term explaining whether the dealer is acting as an agent or in some other capacity).

Achievements of the Voluntary Code

- 7.80 The IartC has maintained strong membership numbers, which are increasing steadily. IartC Membership currently stands at:
- Dealer Members = 195
 - Artist Members = 340
 - Supporter Members = 28
- 7.81 The 2016 introduction of the revised Dealer Membership application has required dealers to provide more information about their business practices. To gain membership, dealers must demonstrate how their business works with and treats artists fairly by adhering to the Code. In instances they do not already adhere to the Code they are required to improve their practices before being accepted. The introduction of further scrutiny has:
- Driven adherence to the Code
 - Given confidence to previously reluctant dealers to become members
 - Established a clear framework for prospective applicants and members to understand what is required to adhere to the Code

- Allowed the IartC to facilitate an educative role with businesses trying to work fairly and transparently with artists
- 7.82 The IartC has played a significant role in educating the entire market about fair and ethical trade. This has been particularly successful through:
- The Fake Art Harms Culture campaign and the
 - Our Art is Our Lifeline campaign
- 7.83 Both campaigns have received strong media coverage. This has brought increased awareness of the IartC to consumers, artists and dealers which has led to a greater demand for IartC support and services.
- 7.84 This has been particularly important for consumers as these campaigns have promoted the right questions being asked when purchasing art. The success of this education has been reported by Dealers who have conveyed that consumers are now asking more questions when purchasing art, particularly regarding the artist's involvement in the sale and how much for the sale price the artist receives.
- 7.85 A significant role played by the IartC is the support provided to artists. Artist Membership has grown significantly with more than 100 new Artist Members joining in the last six months. Artists feel supported, empowered, and informed by the support provided by the IartC. Whilst the services artists are often seeking fall outside the remit of the IartC, the IartC invest considerable time and resources in conversations referring artists to the most suitable support (often to Arts Law, Copyright Agency, NAVA and the peak bodies). While IartC is continually working to provide further accessible content for artists to access their required support, nothing replaces the integral function the meaningful conversations currently being facilitated by the IartC.

Limitations of the Voluntary Code

- 7.86 The Voluntary Code was never intended to be a cure-all for the scope of ethical issues that face the Aboriginal and Torres Strait Islander art market. While the Code stands as an important document to guide its members and supporters and serves beyond that to inform broader conversations among consumers and the public at large about best practice, some problems continue to exist.
- 7.87 Most industry participants uphold acceptable professional standards and operate in good faith. Some dealers, however, continue to engage in exploitative conduct discussed throughout this submission.
- 7.88 We believe that these problems continue to exist in the Indigenous Art Industry, despite the Voluntary Code, because:
- not all dealers specialising in Indigenous visual art are signatories to the Voluntary Code.
 - Some dealer members of the Voluntary Code use their membership to validate their business practices but might not actually adopt its principles.⁷⁸ The scope for IartC to monitor and ensure compliance of all Dealer Members is limited by funding constraints.

⁷⁸ This concern was noted in the Standing Committee on Indigenous Affairs' December 2018 ['Report on the impact of inauthentic art and craft in the style of First Nations peoples'](#) at [4.102] to [4.107].

- The IartC could further drive compliance but not under the current resourcing constraints. The existing process for processing, reviewing and accepting applications for Dealer Membership are onerous and could not be increased without increased resourcing of the IartC. See IartC Membership Policy and Process Map.
- When discussing the unfair and unethical issues that arise, it is not always about malicious intent by an individual to 'rip off' an artist, but rather at times a systemic power imbalance that permeates relationships between Aboriginal and Torres Strait Islander people and non-Indigenous people.
- If consideration of a mandatory code we refer to issues identified in section 7.1 – 7.49 and 7.63 – 7.70

The use of mandatory codes to address market failure

7.89 We wish to present the model that could be adopted were a mandatory code put in place to regulate the Aboriginal and Torres Strait Islander art market. We do not, in this submission, intend to recommend or advocate for a mandatory code at this time – rather, we hope to put forward as objectively as we can the arguments both for and against such a model.

Mandatory codes and market failure

7.90 Industry codes regulate the conduct of participants in an industry towards other participants and/or consumers in the industry.⁷⁹ If an industry code is prescribed in accordance with Part IVB of the Competition and Consumer Act 2010 (Cth) (CCA), it is regulated by the ACCC and its contravention is an offence.⁸⁰ Prescribed industry codes must be set out in regulations under the.⁸¹ Mandatory prescribed industry codes are automatically binding on all industry members.

7.91 According to Treasury's *Industry Codes of Conduct – Policy Framework*, the Government will only impose prescribed codes where market failure is occurring.⁸² Types of market failure that may lead to the establishment of prescribed industry codes include:

- **Information asymmetry**, which occurs where market participants do not have access to the same information. The consequence of this is that parties cannot make informed decisions, or bargain on a level playing field; and
- **imperfect competition**, which occurs when there are relatively few acquirers of goods (eg, dealers) compared with the number of suppliers (eg, artists). This can result in an imbalance of bargaining power. Where this occurs, parties may be unable to negotiate a fair contract.

7.92 Mandatory industry codes have been prescribed in the following industries as a means of addressing imbalances in bargaining power:

- the dairy industry, through the Dairy Code of Conduct (the **Dairy Code**). The Dairy Code replaced an earlier voluntary code. It was introduced in response to market failures that had arisen from the structure of the dairy industry and the terms of contracts offered by processors (acquirers of raw milk) to farmers, with the goal of improving the balance in

79 CCA s 51ACA.

80 CCA s 51ACB.

81 CCA s 51AE.

82 See the Treasury '[Industry Codes of Conduct Policy Framework](#)' at page 8.

bargaining power between dairy farmers and processors;

- franchising, through the Franchising Code of Conduct (the Franchising Code).⁸³ The Franchising Code was introduced to address the power asymmetry between franchisor and franchisee, which often arises through the franchise agreement contract; and
- horticultural produce, through the Horticulture Code of Conduct (the Horticulture Code).⁸⁴ The Horticulture Code was introduced because, prior to its existence, there was an under-supply of important information about prices obtained and prices paid by traders in central markets. This lack of clarity and transparency was to the detriment of growers (in particular, smaller scale growers).

The dairy industry

- 7.93 The Dairy Code demonstrates how the transition from a voluntary code to a mandatory code can be an effective way to address persistent market failure.

The voluntary code of conduct

- 7.94 A voluntary code of conduct for the Australian dairy industry was developed by the Australian Dairy Industry Council in 2017, in response to farm gate price reductions experienced in 2016. Signatories were not legally obliged to comply with this voluntary code.
- 7.95 After a review in 2018, the ACCC concluded that the non-enforceability of the voluntary code was an inherent weakness that could not be remedied.⁸⁵ It recommended the introduction of a mandatory code, finding that:
- 7.96 A mandatory code should therefore be designed to improve transparency and certainty in contracts, set minimum standards of conduct and provide for dispute resolution processes. In particular, a mandatory code should contain obligations on processors to improve the timing and manner of processors' communication of price and other key information and increase farmers' ability to switch in response to significant changes to their trading terms.

The Dairy Code

- 7.97 The (mandatory) Dairy Code was introduced in response to market failure that had arisen from the structure of the dairy industry and the terms of contracts offered by processors to farmers, including:⁸⁶
- an imbalance in bargaining power between dairy farmers and processors;
 - standard industry practices deterring farmers from responding to market signals; and
 - unfairness of standard industry practices and unreasonable transfer of risk to farmers.

83 See the Parliamentary Joint Committee on Corporations and Financial Services 'Fairness in Franchising' Report, 2019.

84 See the ACCC's [submission](#) to the 2015 review of the Horticulture Code.

85 See [Dairy Inquiry Final Report](#), April 2018 at xxvii.

86 See the [explanatory statement](#) to the Competition and Consumer (Industry Codes—Dairy) Regulations 2019.

- 7.98 To address this market failure, the Dairy Code sets out rules for business transactions between processors and farmers. The Dairy Code is designed to set out clear rules to prohibit egregious business practices in the dairy industry, while still allowing farmers and processors to negotiate contractual terms that suit their individual circumstances and business models.⁸⁷
- 7.99 Since the commencement of the Dairy Code on 1 January 2020, the ACCC has closely monitored farmers and processors' compliance with the Dairy Code and has actively engaged with farmers and processors regarding code compliance issues. The ACCC notes that 'some processors have voluntarily changed their approach after being contacted by the ACCC'.⁸⁸ In other cases, the ACCC has taken enforcement action against market participants for non-compliance:
- On 1 October 2021, the Dairy Farmers Milk Co-operative Limited paid a penalty of \$11,100 after the ACCC issued it with one infringement notice for allegedly failing to comply with its publishing obligations under the Dairy Code.
 - On 26 July 2021, the ACCC instituted proceedings against Lactalis Australia Pty Ltd (Lactalis) for alleged breaches of the Dairy Code of Conduct.
 - On 5 July 2021, Brownes Dairy paid penalties totalling \$22,200 after the ACCC issued it with two infringement notices for allegedly failing to comply with the Dairy Code of Conduct.
 - On 21 October 2020, The Union Dairy Company paid a penalty of \$10,500 after the ACCC issued it with an infringement notice for allegedly failing to comply with its publishing obligations under the Dairy Code.
- 7.100 On 22 November 2021, the ACCC released a report on Dairy Code compliance during the start of the 2021-22 season.⁸⁹ The report observes that there has been a 'substantial improvement' in compliance with the Dairy Code since its commencement on 1 January 2020. It observes that while there are still areas of non-compliance to be addressed, the Dairy Code has fostered positive changes in the industry by improving the transparency and certainty of agreements between farmers and processors.
- 7.101 The ACCC's enforcement of the Dairy Code demonstrates the efficacy of mandatory codes in industries in which there is an imbalance of bargaining power.

A mandatory code for the Indigenous Art Industry

- 7.102 Like the dairy industry, the Indigenous Art Industry is characterised by an imbalance of bargaining power and information asymmetry:
- **Imbalance of bargaining power / Imperfect competition.** There is imperfect competition in the Indigenous Arts Industry, given that there are a larger number of artists than dealers. This means that artists are limited in their choice of dealer, and are therefore in a limited bargaining position when negotiating contracts.

87 See the [explanatory statement](#) to the Competition and Consumer (Industry Codes—Dairy) Regulations 2019.

88 <https://www.accc.gov.au/media-release/dairy-code-compliance-under-accc-scrutiny>.

89 See ACCC, '[Dairy Code compliance – Observations from 2021-22 season opening](#)', November 2021.

- **Information asymmetry.** Information asymmetry exists between dealers and artists. This information asymmetry leaves some artists vulnerable to exploitation, particularly in the negotiation of commercial terms.
- 7.103 To address these market failures, and prevent the further exploitation of market participants, the benefit of introducing a mandatory industry code would be to provide a response that is proportionate to the problems faced by the Indigenous Art Industry. In our view, the standards imposed by any mandatory code should not be onerous, and any mandatory code should not unreasonably or unnecessarily impact on dealers who already engage with artists in a fair and reasonable manner. That is, the standards should be minimum standards, rather than ‘best practice’ standards. Broadly, the Code would establish minimum standards in three spheres – all of which are already represented under the existing Voluntary Code:
- the prohibition of misleading and deceptive conduct and unconscionable or unjust conduct by dealers in relation to an artist or Indigenous artwork;
 - the regulation of agreements between artists and dealers; and
 - the imposition of record-keeping obligations on Dealers.
- 7.104 A mandatory code in the Indigenous Art Industry could address the persistent market failure more effectively than the Voluntary Code because:
- 7.105 **a mandatory code would apply to everyone.** The clearest difference between the Voluntary Code and a mandatory model is that whereas the Voluntary Code is only binding on those market participants who choose to become signatories, a mandatory code would be binding on all participants in the Industry who acquire Indigenous visual art for re-supply by means of sale or other distribution; and
- 7.106 **there would be greater incentives for compliance with minimum standards.** The current Voluntary Code does not contain sufficient incentives for compliance. If a member is found to have breached the Voluntary Code, the consequences are limited (ie, the dealer’s membership may be suspended, revoked or a condition imposed). In contrast, a mandatory code would be enforceable by the ACCC under Part IVB of the CCA. As with other prescribed industry codes, the ACCC would have responsibility for promoting compliance with the code by providing education and information and, where necessary, taking enforcement action.
- 7.107 Relevant enforcement action could include:
- civil proceedings in the federal courts, with potential consequences including the imposition of pecuniary penalties, the issue of public warnings about the dealer’s conduct and orders against the dealer for return of artwork, or variation or cancellation of agreements with artists;
 - orders restraining conduct that is in breach of the code; or
 - requiring dealers to produce the records they will be required to keep under the code.
- 7.108 An artist could also take private action against a dealer for a breach of the code.
- 7.109 By codifying minimum standards, a mandatory code would assist in promoting fair and ethical treatment of artists and public confidence in the integrity, provenance and authenticity of Indigenous artwork, with a view to ensuring a vibrant, prosperous and well-functioning Indigenous art market.

Concerns about the effectiveness of a mandatory code:

7.110 Following are questions worth considering in relation to a mandatory code.

- (i) How effective would a mandatory code be if the minimum standards set out in a mandatory code were less than those in the existing voluntary code (the Code)?
- (ii) How would matters be reported to the ACCC?
- (iii) Would investigation of reports of alleged misconduct be dependent on the artist coming forward and speaking about the conduct which was impacting them?
- (iv) Who would the ACCC hear and respond to complaints from besides artists?
 - Consumers?
 - Dealers?
 - Concerned citizens?
 - The IartC?
 - Arts Law?
 - Copyright Agency?
 - Peak bodies?
 - Art centres?
 - Others?
- (v) What would follow up with the complainant look like? / Would there be an ongoing dialogue with the individuals who report the conduct?
- (vi) Would the ACCC investigate all matters raised with them or focus only on issues they believe would deter others in the sector?
- (vii) Would there be an expectation that the ACCC takes on all of the functions of the existing IartC?
- (viii) Would the mandatory code promote best practice beyond what is required by law?
- (ix) Would the ACCC work with dealers to educate them about working fairly and transparently with artists?
- (x) Would the ACCC assist artists with matters and referrals to other relevant organisations?
- (xi) Would the ACCC provide a platform for artists to present their business profile and contact details?
- (xii) The Fake Art Harms Culture campaign highlighted the limitations of the ACCC to investigate all the examples of fake art reported to them. How would reporting under a mandatory code differ?
- (xiii) What would the role of the IartC be if a mandatory code was implemented?

8. Points for further consideration

Statutory licence schemes for the education and government sectors

- 8.1 A statutory licence allows certain uses of material protected by copyright, without the permissions usually required, subject to fair compensation to copyright owners.
- 8.2 The education statutory licence allows copying and communication for educational purposes by educational institutions, including schools, universities, TAFEs and vocational educational bodies. For example, a teacher could make copies of an artistic work, on its own or as part of other material, to give students in their class. The government statutory licence allows uses government purposes, and applies to the Commonwealth, States and Territories.
- 8.3 The licence arrangements under each of these statutory licence schemes are what is known as blanket licensing arrangements: they cover all uses by the sector in reliance on the licence. For example, we have agreements with education departments, and with peak bodies for schools in non-government sectors, that cover copying and sharing of text or images for educational purposes that would otherwise require a copyright clearance.
- 8.4 The copyright fees we collect from these schemes provide important support to Australia's creative industries, including visual artists and the industries that support them. In 2020–21, the totalled more than \$63m.
- 8.5 The Government is currently considering potential changes to Australia's copyright legislation. In announcing the consultation process, Minister Fletcher said:
*"Australia's copyright system underpins our creative economy, and these reforms seek to provide clear and reasonable access to copyright materials, while maintaining the incentives and protections for content creators."*⁹⁰
- 8.6 It is very important that any changes do not reduce the support that the copyright system provides to Australia's creative industries. The copyright system is based on recognition of the value of creative endeavour for Australian society as a whole, and that those who create for the benefit of others have opportunities to be rewarded for that benefit, and to continue to create.
- 8.7 The Copyright Agency is drafting a detailed submission to The Department of Infrastructure, Transport, Regional Development and Communications.⁹¹

Competition in the market

- 8.8 The market for buying and selling Aboriginal and Torres Strait Islander artwork is competitive:
- Artists compete with other artists
 - Dealers compete with other dealers
 - Collectors are competing for the same works as other collectors
- 8.9 While we have not explored these notions of competition in this submission, it is helpful to keep this in mind when considering the mechanisms to improve the Aboriginal and Torres Strait Islander visual arts market's security, stability, productivity, cultural safety, and integrity.

90 Paul Fletcher MP, 'Have your say on draft copyright reform legislation' (21 December 2021) <<https://minister.infrastructure.gov.au/fletcher/media-release/have-your-say-draft-copyright-reform-legislation>>.

91 See: <https://www.infrastructure.gov.au/have-your-say/have-your-say-draft-copyright-reform-legislation>.

8.10 What drives the market, influences the monetary value of art and affirms an artist's reputation?

- Gallery representation
- Inclusion in the permanent collections of public institutions and exhibitions and associated catalogues
- Critical attention from curators
- Inclusion in journals and academic writing
- Do the supply chains through which artists work influence their reputation in the market?

8.11 It's not uncommon for buyers to be curious about an artist's market value, especially if they own works by that artist.

- What factors influence buyers purchases?
- What is the profile of the buyer?
- What is the role of the buyer in the Aboriginal and Torres Strait Islander art and craft market?

8.12 Buyer behaviour has been explored in the Ninti One Remote Art Economies research '*Understanding buyer behaviour in the primary market for Aboriginal and Torres Strait Islander art*'.⁹²

92 see: <https://www.nintione.com.au/resources/rao/understanding-buyer-behaviour-in-the-primary-market-for-aboriginal-and-torres-strait-islander-art-summary-of-key-findings-from-masters-by-research/?fbclid=IwAR2YqRoqsRDy55NBnG5Rb-pOv1efZZzzw-osrzUh6fhmPxAnWE6CwlPnLKbg>

Schedule 1 – Draft Bill proposing ACL amendments

Part A – Overview

Part B of this Schedule sets out possible drafting for a bill amending the ACL as proposed. It is provided for the purpose of allowing the Commission to understand one way in which the prohibition might be framed. The draft Bill prohibits:

- the supply of items featuring an Indigenous cultural expression unless the item is made by an Indigenous artist or members of an Indigenous community, or is a licensed reproduction of such good (and the license satisfies certain requirements set out in regulations): ss 50A(1)(a) and (b). These goods must attribute the artist or community (either on the good itself, or on the packaging): s50A(1)(b) and (4).
- the supply of Indigenous cultural artefacts unless the item is made in Australia by an Indigenous artists or Indigenous community (ie these cannot be subject to licensing agreements): s50A(1)(c).

It is a defence to the prohibitions in the draft Bill if the person supplying the good has a document that complies with the regulations: s50A(2) (the ‘safe harbour’ defence). The purpose of the document is to act as a certificate of authenticity for suppliers, which can be relied upon as evidence that the supplier believed the item was authentic. The regulations will set out requirements as to the document form, content and author or signatory: s50AC(b).

The prohibitions in the draft Bill attract two types of liability: civil liability (s50A) and criminal liability (s50AC). This is similar to existing provisions in the ACL, including provisions concerned with false or misleading representations under Part 3-1, which give rise to both civil and criminal liability. The difference between the civil and criminal versions of the prohibition is that whilst failure to attribute the artist or community on the good or the good’s packaging attracts civil liability (s50A(1)(b)), it is not an offence under s50AC.

The draft Bill is designed to ensure that it operates and is enforced in a way that is culturally appropriate and targets the problem. First and foremost, this is because a good must satisfy the definition of ‘Indigenous cultural expression’ and / or ‘Indigenous cultural artefact’ to be caught by the ambit of the draft Bill. The draft Bill also includes provisions that:

- allow for the Government to make regulations regarding the form, content and procedures relating to:
 - the written licences which may be granted by Indigenous artists or communities for the reproduction of Indigenous art made by those artists or communities (ie regulations for the purpose of sections 50A(1)(a)(ii) and 50AB(4)(a)(ii)); and
 - the documents of authenticity for the purposes of the defence in sections 50A(2) and 50AB(5).
- provide for the ACCC to formulate guidelines to inform its approach to enforcing the new prohibitions, including factors the ACCC must take into account when determining whether an item features an Indigenous cultural expression and / or is an Indigenous cultural artefact: section 50AD.
- creates an Indigenous representative committee to monitor compliance with the ACL and to consult with:
 - the Minister – on the content of the regulations referred to above; and
 - the ACCC – on the operation of the new provisions and the formulation of the ACCC’s enforcement guidelines referred to above.

Competition and Consumer Act 2010

1 Subsection 2(1) of Schedule 2

Insert:

Indigenous artist means an artist who:

- (a) is a member of the Aboriginal race of Australia or a descendant of the Indigenous inhabitants of the Torres Strait Islands; and
- (b) identifies as Aboriginal or Torres Strait Islander; and
- (c) is recognised as Aboriginal or Torres Strait Islander by the community with which the artist identifies.

Indigenous community: see section 14A.

Indigenous cultural artefact means a good which is of archaeological, anthropological, historical, scientific, social or spiritual significance to an Indigenous community and includes:

- (a) paintings on bark;
- (b) Yidaki or didgeridoo;
- (c) boomerang;
- (d) clapsticks;
- (e) traditional weavings;
- (f) dillybags;
- (g) grass mats;
- (h) carvings.

Indigenous cultural expression means an expression of Indigenous culture (whether through images, form or any other medium) that:

- (a) has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an Indigenous community; or
- (b) has its origins in an Indigenous community; or
- (c) is derived from, or has a likeness or resemblance to, one or more Indigenous cultural expressions mentioned in paragraphs (a) or (b).

2 After section 14 of Schedule 2

Insert:

- **14A Meaning of Indigenous community**

- (1) **An Indigenous community** is a community of people that identifies itself as Aboriginal or Torres Strait Islander.
- (2) To avoid doubt, an **Indigenous community** includes:enforcement guidelines referred to above.

- (a) a community that identifies itself as Aboriginal or Torres Strait Islander through a connection with a particular region of Australia; or
- (b) a group of people within a wider community of the kind mentioned in paragraph that identify themselves as a group through shared goals or activities, such as shared involvement in the arts; or
- (c) the community of Aboriginal and Torres Strait Islanders of Australia, taken as a whole.

3 At the end of Part 3-1 of Chapter 3 of Schedule 2

Add:

Division 6—Unfair practices in relation to the supply of goods that include an Indigenous cultural expression

50A Misuse of Indigenous cultural expression

(1) A person must not, in trade or commerce, supply or offer to supply a good to a person that includes an Indigenous cultural expression unless:

(a) either of the following applies:

(i) the good is made by an Indigenous artist or members of an Indigenous community; or

(ii) the good is a reproduction of a good created by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression is connected, where the reproduction is in accordance with a written licence granted by the Indigenous artist or Indigenous community and that license complies with any regulations made under section 50AC; and

(b) the good or the licensed reproduction attributes the Indigenous artist or Indigenous community who made the good or the original good in the case of a licensed reproduction; and

(c) if the good is an Indigenous cultural artefact, the good is made in Australia by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression contained on the Indigenous cultural artefact is connected.

(2) For the purposes of subsection (1), it is a defence if the person supplying or offering to supply the good has in his or her possession a document that complies with the regulations made for the purposes of this subsection.

(3) A person must not, in trade or commerce, create, provide or rely on a document for the purposes of section 50A(2), that the person knows or believes is false in any material respect.

(4) For the purposes of paragraph (1)(b), the attribution may be contained on the good or on packaging of the good which is provided at the time of supply to a person.

(5) The Minister must appoint a committee, or other appropriate body, which is representative of Indigenous communities to:

(a) monitor compliance with this Act as it applies in relation to Indigenous communities and Indigenous artists;

(b) report to the Minister on any changes that may be required to this Act to better protect the rights of Indigenous communities and Indigenous artists;

(c) consult with the Minister on the content of regulations for the purposes of section 50AC; and

(d) consult with the Commission on the operation of this Division and the formulation of guidelines for the purposes of section 5OAD.

5OAB Offences

(1) A person commits an offence if the person, in trade or commerce:

- (a) supplies or offers to supply a good to a person that includes an Indigenous cultural expression; or
- (b) creates, provides or seeks to rely on a document for the purposes of subsection 5OA(2), that the person knows or believes is false in any material respect.

Penalty

(2) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine of not more than the greater of the following:

- (a) \$10,000,000;
- (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the commission of the offence—3 times the value of that benefit;
- (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the offence.

(3) An offence against subsection (1) committed by a person other than a body corporate is punishable on conviction by a fine of not more than \$500,000.

(4) Subsection (1) does not apply if:

- (a) the good is:
 - (i) made by an Indigenous artist or members of an Indigenous community; or
 - (ii) a reproduction of a good created by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression is connected, where the reproduction is in accordance with a written licence granted by the Indigenous artist or Indigenous community and that license complies with any regulations made under section 5OAC;and

- (b) if the good is an Indigenous cultural artefact, the good is made in Australia by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression contained on the Indigenous cultural artefact is connected.

(5) For the purposes of subsection (1), it is a defence if the person supplying or offering to supply the good has in his or her possession a document that complies with the regulations made under section 5OAC.

(6) Subsection (1) is an offence of strict liability.

5OAC Regulations as to certain matters

The Minister may make regulations dealing with matters relating to:

- (a) written licenses for the purpose of sections 5OA(1)(a)(ii) and 5OAB(4)(a)(ii), including:

- (i) requirements relating to the form and content of such licenses; and
- (ii) whether there is a requirement for licensors to obtain legal or other advice in relation to the license; and

(b) documents for the purpose of section 50A(2) and 50AB(5), including requirements relating to:

- (i) the form of the document;
- (ii) the content of the document; and
- (iii) the author or signatory of the document.

Note: The following are examples of the kinds of things that requirements relating to the content of the document might deal with:

- (a) the identity of the Indigenous Artist or Indigenous Community that made the original good;
- (b) certification that the artist or community that made the good is Indigenous; and
- (c) whether the good is a licensed reproduction of an original good, and if so, whether that license complies with regulations.

50AD Guidelines

(1) In deciding whether to initiate enforcement proceedings under this Division, the Commission must have regard to:

- (a) any guidelines in force under subsection (2); and
- (b) such other matters as the Commission thinks is relevant.

(2) The Commission must, by written instrument, formulate guidelines for the purposes of subsection (1).

Note: For consultation requirements, see section 17 (consultation) of the Legislation Act 2003.

(3) In formulating guidelines for the purposes of subsection (2), the Commission must consult with the committee or other appropriate body as required under section 50A(5).

(4) Guidelines under subsection (2) must address the factors the Commission must take into account when determining whether an item features an Indigenous cultural expression and/or is an Indigenous cultural artefact.

Schedule 2 – IartC and UTS analysis of businesses selling Aboriginal and Torres Strait
Islander art

Analysis of businesses selling Aboriginal and Torres Strait Islander art

Prepared by
Institute for Public Policy and Governance
University of Technology Sydney

for the Indigenous Art Code Ltd

FINAL REPORT 2 February 2022

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1. Introduction

1.1 About the Report

This report, prepared by the Institute for Public Policy and Governance (IPPG) at the University of Technology Sydney (UTS), provides a snapshot of the profile of businesses selling Aboriginal and Torres Strait Islander art products and merchandise based on data collected by the Indigenous Art Code Ltd (IartC). It aims to provide some insights into the profile of the Indigenous art market in Australia, comparing information about both IartC Dealer Members and non-members.

The IartC is the organisation that administers the Indigenous Art Commercial Code of Conduct ('the Code'), a voluntary industry code of conduct introduced into the visual arts industry in 2009. The Code is a set of rules and guidelines that Dealer Members (both Indigenous and non-Indigenous businesses) commit to following to ensure ethical practices and fair treatment of artists.

The report analysis does not include data on IartC Artist Members or other non-member artists. These individuals and their businesses fall outside the definition of a dealer for the purposes of IartC Dealer Membership. The basis of the information presented is looking at dealers (businesses) defined in The Indigenous Art Code ([the Code](#)) as – an Agent, person or organisation who acquires Artwork, or who carries on a business involving the acquisition of Artwork, for re-supply by means of sale or other distribution.

The IPPG analysis carried out in this report follows an Exploratory Data Analysis (EDA) framework, which includes:

- Overview of the data distributions
- Overview of summary statistics
- Analysis of key features associated with each IartC Dealer Member and non-member
- Association (or Correlation) analysis.

The data analysed in this report was collected by IartC staff using a) non-confidential information about IartC Members, plus b) desktop research and thus only presents readily available information. non-member information was found through internet and social media searches, as well as referring to peak body membership lists and tourism pages (methods consumers might also use to find art for sale).

It is important to note that the insights in this report are based solely on the IartC collected and supplied data, noting their limited resourcing. No data has been independently verified or checked using other source content. As such, the findings should be considered an indicative snapshot of the market rather than a definitive profile.

In addition, given that the market is not static, and dealers in the market are changing, it is possible that dealers may have changed their status, some may have closed, and others may have opened. As such, all findings and conclusions should be the subject of further research, with the analysis conducted under formal research conditions including:

- Clear research terms of reference
- Oversight by an expert research reference group
- Use of a mixed methodology and data collection with data triangulated from more than one source, including sector survey data supplemented by a further desktop review

- Overseen by skilled and sufficiently resourced researchers

To this end, Section 3 of the report provides suggestions on how the data could be further developed and modelled to inform future policy and planning decisions related to businesses dealing in Aboriginal Torres Strait Islander artwork in Australia.

1.2 About the IPPG Data Analysis

The IartC dataset analysed consists of discrete and categorical values for IartC Dealer Member businesses (current Dealer Members of the IartC and signatories to the Code) and non-member businesses (not Dealer Members of the IartC).

There are 201 IartC Dealer Members and 173 non-members listed, totalling 374 businesses in the dataset, with all data collected between 12 August 2021 and 11 December 2021.

Each business was ascribed a unique identifier (to remove individual name recognition). They were then assessed against different 'features', as listed in Appendix 1.

The IPPG analysis was conducted in December 2021 and January 2022 using an EDA framework. This involved explicit assessment of different data features, including the relationship between database variables and how they affect each other. In addition, statistical correlation methods were used to explore the relationship between a select number of variables.

2. Exploratory Data Analysis

2.1 Art Dealer numbers

The IartC dataset comprised 201 (54%) IartC art Dealer Member businesses (Members) and 173 (46%) art dealer businesses who are not IartC members (non-members).

	Members	Non-Members	Total
Art Dealers	201	173	374

Source: Business selling Indigenous art data (2021), IPPG Analysis

2.2 Location

The data below shows where the business is registered (by state, territory or overseas), as well as the business's remoteness region classification. Created by the Australian Bureau of Statistics (ABS) using the ABS Census data, the Australian Statistical Geography Standard (ASGS) Remoteness Area (RA) is determined according to population and distance to services.

It is noted that this classification should be considered in context. For example, some businesses may have their address registered or located in a particular state or territory, though the majority of their work may occur in another state or territory, and most of the artwork they deal in is from a location other than where their business is located. Further research would clarify how to interpret the data presented below. (Anecdotally, it appears that the majority of businesses located in NSW and Victoria (VIC) are predominantly selling the work of artists who live and work in other states, specifically in Western Australia (WA), South Australia (SA) and the Northern Territory (NT).

LOCATION	Members	Non-Members	Total
NSW	16.9%	16.8%	16.8%
ACT	3.0%	1.2%	2.1%
VIC	11.4%	16.2%	13.6%
TAS	1.5%	0.0%	0.8%
SA	5.0%	5.2%	5.1%
WA	16.9%	13.3%	15.2%
NT	24.4%	23.1%	23.8%
QLD	13.4%	14.5%	13.9%
OVERSEAS	5.5%	8.7%	7.0%

Source: Business selling Indigenous art data (2021), IPPG Analysis

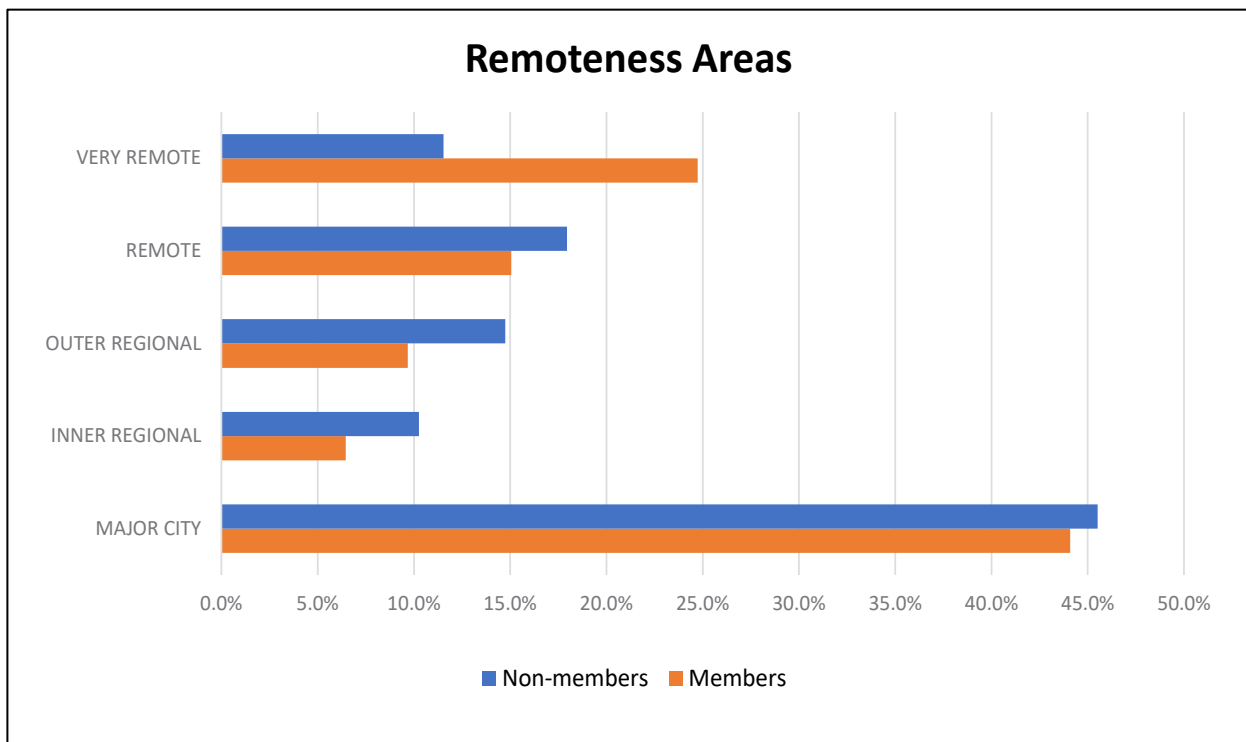
The sample of non-member businesses is well represented in the dataset, given that the distribution of Members compared to non-member businesses is similar across each state and territory.

Of the total number of businesses (374):

- almost a quarter are located in the NT (23.8%), followed by NSW (16.8%) and WA (15.2%).
- only 26 operate overseas (7%).

REMOTENESS AREAS	Members	Non-Members	Total
MAJOR CITY	44.1%	45.5%	44.7%
INNER REGIONAL	6.5%	10.3%	8.2%
OUTER REGIONAL	9.7%	14.7%	12.0%
REMOTE	15.1%	17.9%	16.4%
VERY REMOTE	24.7%	11.5%	18.7%

Source: Business selling Indigenous art data (2021), IPPG Analysis



Source: Business selling Indigenous art data (2021), IPPG Analysis

Data shows that:

- almost half of the businesses are located in Major cities (44.7%), and about 1 out of 3 (35.1%) are located in either Remote or Very Remote regions.
- A quarter of Member businesses (24.7%) are located in very remote regions compared to 1 out of 10 non-member businesses (11.5%).

2.3 Business characteristics

Businesses must register for GST if their gross income is greater than \$75,000 (the non-profit threshold is \$150,000). Although the distribution or revenue is unknown, GST data could suggest that a higher proportion of Member businesses could be earning more than non-member businesses. This would need to be verified in further analysis, including capturing a business’s revenue, profit and wages.

Data presented on businesses that received federal funding was based on desktop research and what information about the funding was readily available online.

	Members	Non-Members	Total
REGISTERED FOR GST	80.1%	63.6%	72.5%
FEDERAL FUNDING	31.3%	5.8%	19.5%

Source: Business selling Indigenous art data (2021), IPPG Analysis

Of the total number of businesses (374):

- 72.5% were registered for GST.
- Member businesses recorded a higher level (80.1%) compared to non-members (63.6%).
- A higher proportion of Member businesses received federal funding (19.5%) compared to non-member businesses (5.8%). This is based on desktop research and what information about the funding was readily available online. IartC has not completed a comprehensive analysis of any funding businesses receive.

2.4 Business structure

The IartC data below shows the legal entity or business structure across Dealer Member and non-member businesses. This can provide particular insights into the operation of the business. For example, sole traders may be more likely to sell original products and artwork.

To determine the operations of a business, financial data is generally required. Although private companies are not required to publicise their financial statements, one possible avenue to estimate revenue is through the Australian Tax Office. Companies can apply for tax breaks, concessions and government grants which would require them to provide the ATO with supporting information.

Some of this information may be publicly available and accessible. An alternative method could be to assess the business’s location, employee count, and types of products sold (Section 3.1).

BUSINESS STRUCTURE	Members	Non-Members	Total
AUSTRALIAN PRIVATE COMPANY	22.4%	30.6%	26.2%
INDIVIDUAL SOLE TRADER	9.0%	15.0%	11.8%
OTHER PARTNERSHIP	2.0%	1.7%	1.9%
FAMILY PARTNERSHIP	1.0%	5.8%	3.2%
LOCAL GOVERNMENT ENTITY	1.0%	0.6%	0.8%
OTHER INCORPORATED ENTITY	33.3%	11.6%	23.3%
FIXED UNIT TRUST	0.5%	1.7%	1.1%
DISCRETIONARY TRADING TRUST	7.5%	6.9%	7.2%
DISCRETIONARY TRUST	0.0%	0.0%	0.0%
COMMONWEALTH GOV ENTITY	1.0%	0.0%	0.5%
AUSTRALIAN PUBLIC COMPANY	3.5%	0.0%	1.9%
STATE GOVERNMENT ENTITY	5.0%	0.0%	2.7%
CO-OPERATIVE	0.5%	0.0%	0.3%
DISCRETIONARY INVESTMENT TRUST	0.5%	0.6%	0.5%

Source: Business selling Indigenous art data (2021), IPPG Analysis

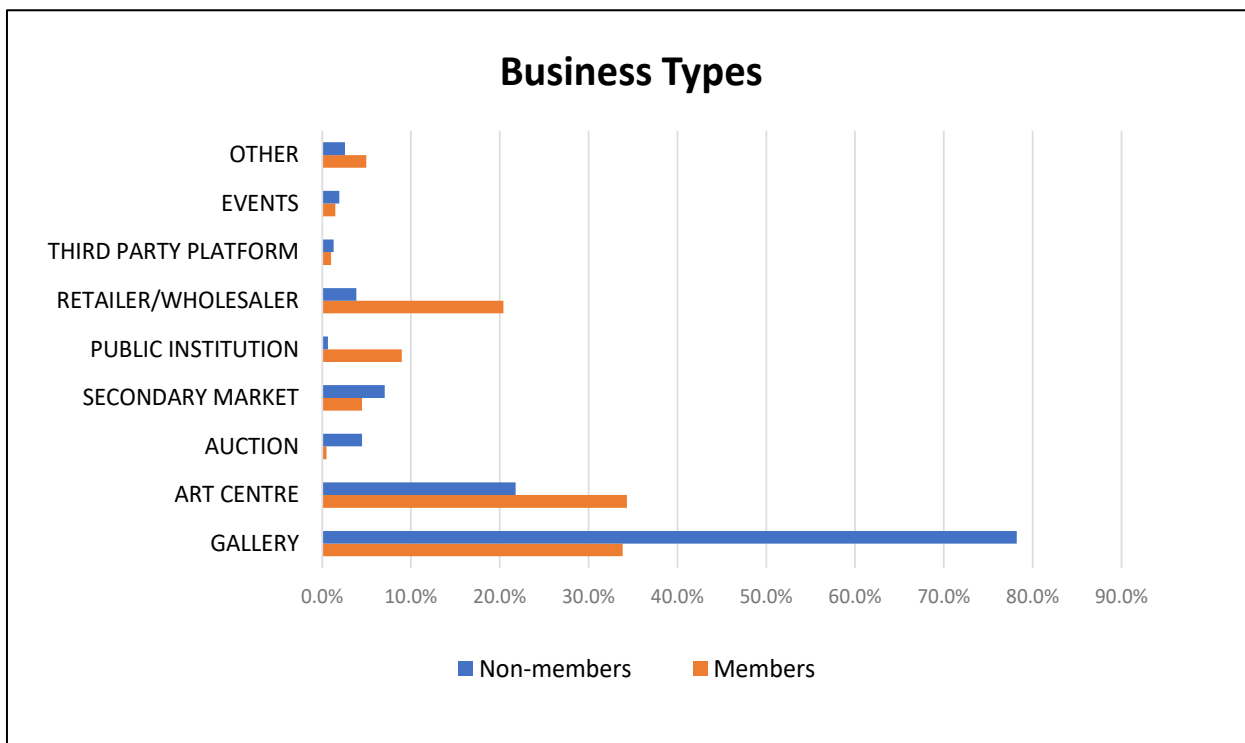
Of the total number of businesses (374):

- the majority are Australian private companies (26.2%), followed by other incorporated entities (23.3%) and Individual sole traders (11.8%).

2.5 Type of business

TYPE OF BUSINESS	Members	Non-Members	Total
GALLERY¹	33.8%	78.2%	50.8%
ART CENTRE²	34.3%	21.8%	27.5%
AUCTION³	0.5%	4.5%	2.1%
SECONDARY MARKET⁴	4.5%	7.1%	5.3%
PUBLIC INSTITUTION⁵	9.0%	0.6%	5.1%
RETAILER/WHOLESALE⁶	20.4%	3.8%	12.6%
THIRD-PARTY PLATFORM⁷	1.0%	1.3%	1.1%
EVENTS	1.5%	1.9%	1.6%
OTHER	5.0%	2.6%	3.7%

Source: Business selling Indigenous art data (2021), IPPG Analysis



Source: Business selling Indigenous art data (2021), IPPG Analysis

¹ A business that sells predominately original artworks (excluding art centres).

² An Aboriginal and Torres Strait Islander owned and governed corporative.

³ A business that sells using the auction method.

⁴ Sells work previously owned and is re-entering the market.

⁵ Generally, museum and retail gallery outlets.

⁶ Businesses selling only licensed work.

⁷ Online gallery where artists upload work for sale.

Of the total number of businesses (374):

- more than half are Galleries (50.8%).
- one third are Art Centres (27.5%).

Of the galleries:

- 64.2% are non-members.
- 35.8% are Members.

Similarly, from all the Art centres:

- 67.0% are Members.
- 33.0% are non-members.

Retailers/wholesalers account for about 1 in 10 of all the businesses, of which:

- 87.2% are Members.
- 12.8% are non-members.

Similarly, members account for the majority of the total public institution type (94.7%).

TYPE OF BUSINESS	Members	Non-Members	Total
ONLINE GALLERY	56.2%	52.0%	54.3%
PHYSICAL GALLERY	74.1%	70.5%	72.5%
PHYSICAL GALLERY BY APPT ONLY	6.0%	14.5%	9.9%
PRIVATE ART STUDIO (not including art centres)	2.5%	15.6%	8.6%

Source: Business selling Indigenous art data (2021), IPPG Analysis

The majority of all businesses have an online gallery (54.3%).

Almost 3 out of 4 businesses have a physical gallery (72.5%).

2.6 Aboriginal and Torres Strait Islander owned

The data below shows the representation of Aboriginal and Torres Strait Islander ownership across all Member and non-member businesses. Further analysis on the representation of Aboriginal and Torres Strait Islander ownership in Individual Sole Trader, Gallery or Private Art studio businesses is also provided.

ABORIGINAL AND TORRES STRAIT ISLANDER OWNERSHIP	Members	Non-Members	Total
ABORIGINAL AND TORRES STRAIT ISLANDER OWNED	47.3%	22.4%	37.4%
NON-ABORIGINAL AND TORRES STRAIT ISLANDER OWNED	52.7%	63.7%	62.6%
ABORIGINAL AND TORRES STRAIT ISLANDER BUSINESS NAME (NON-ABORIGINAL AND TORRES STRAIT ISLANDER OWNED)	3.8%	13.4%	8.3%

Source: Business selling Indigenous art data (2021), IPPG Analysis

Of the total number of businesses (374):

- almost 4 out of 10 businesses were Aboriginal and Torres Strait Islander owned (37.5%).
- the remaining 6 out of 10 being non- Aboriginal and Torres Strait Islander owned (62.6%).

From the Member, non-Aboriginal and Torres Strait Islander owned businesses, only a small fraction use Aboriginal and Torres Strait Islander language in their business name (3.8%).

From non-member, non-Aboriginal and Torres Strait Islander owned businesses, a more significant proportion use Aboriginal and Torres Strait Islander language in their business name (13.4%).

It should be noted that there is potential for consumers in the market to mistakenly associate an Aboriginal and Torres Strait Islander brand name on a product or on a business to mean that they are buying from an Aboriginal and Torres Strait Islander owned business.

Cross feature correlations for Aboriginal and Torres Strait Islander owned businesses shows that:

- 1.1% of Member Aboriginal and Torres Strait Islander owned businesses use the dealer upfront model.
 - This compares to 4.4% of non-member Aboriginal and Torres Strait Islander owned businesses that choose to use the dealer upfront model.
- 24.4% of non-member, Aboriginal and Torres Strait Islander owned businesses use the licensed product supply chain model.
 - The remaining 75.6% of non-member, Aboriginal and Torres Strait Islander owned businesses do not.

Additional analysis on Aboriginal and Torres Strait Islander owned businesses are shown below. It illustrates the proportion of businesses (Individual Sole Traders) that are Aboriginal, and Torres Strait Islander owned.



Source: Business selling Indigenous art data (2021), IPPG Analysis

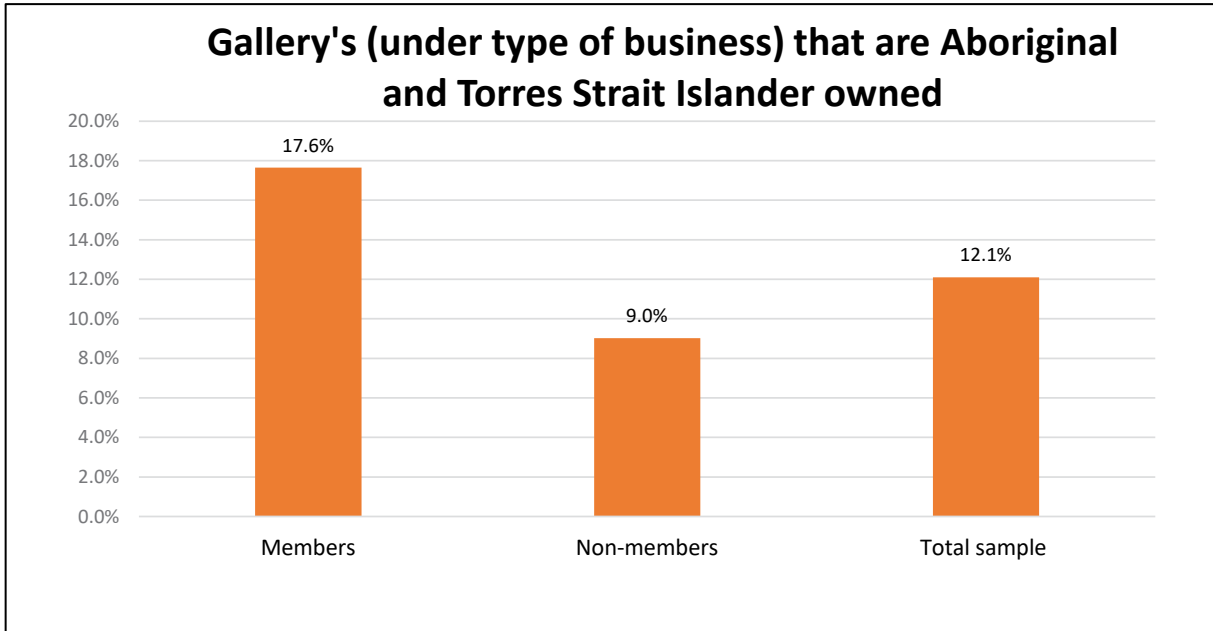
Approximately 22.2% of all Member and non-member Individual Sole Traders are Aboriginal, and Torres Strait Islander owned.

Of the 201 Member businesses, 18 are Sole Traders (9%), of which 3 are Aboriginal and Torres Strait Islander owned (16.7%).

Similarly, across all 173 non-member businesses, 27 are Sole Traders (15.6%), of which 7 are Aboriginal and Torres Strait Islander owned (25.9%).

A large percentage of IartC Artist Members are running their own business but are not included in this data set as the research only explores IartC Dealer Membership characteristics. For IartC membership, artists who only sell their own work are not considered dealers.

The chart below shows the proportion of gallery's (under the type of business) that are Aboriginal and Torres Strait Islander owned.



Source: Business selling Indigenous art data (2021), IPPG Analysis

Approximately 12.1% of all Member and non-member gallery's (type of business) are Aboriginal, and Torres Strait Islander owned.

Across the 201 Member businesses, 68 are considered a Gallery (under the type of business) (33.8%), of which 12 are Aboriginal and Torres Strait Islander owned (17.6%).

Likewise, across all 173 non-member businesses, 122 are considered a Gallery (under the type of business) (70.5%), of which 11 are Aboriginal and Torres Strait Islander owned (9.0%).

2.7 Source of artworks

Supply chain data shows the source of the product (e.g., art centres, independent artists, art centre member artists).

SOURCE OF ARTWORKS	Members	Non-Members	Total
ART CENTRES	52.7%	25.7%	43.7%
ART CENTRE MEMBER ARTIST	34.3%	31.7%	33.4%
INDEPENDENT ARTISTS	48.8%	54.5%	50.7%
WHOLESALEERS - INDEP ARTISTS	10.4%	5.0%	8.6%
WHOLESALEERS – OPERATING STUDIO	32.3%	4.0%	22.8%
MERCHANDISE MANUFACTURERS	28.9%	3.0%	20.2%
SECONDARY MARKET	1.5%	7.9%	3.6%
INFORMATION NOT READILY AVAILABLE	0%	41.6%	19.3%

Source: Business selling Indigenous art data (2021), IPPG Analysis

For all businesses, the main source of products comes from independent artists (50.7%), art centres (43.7%) and art centre members (33.4%).

The sourcing preferences can be highlighted from the data.

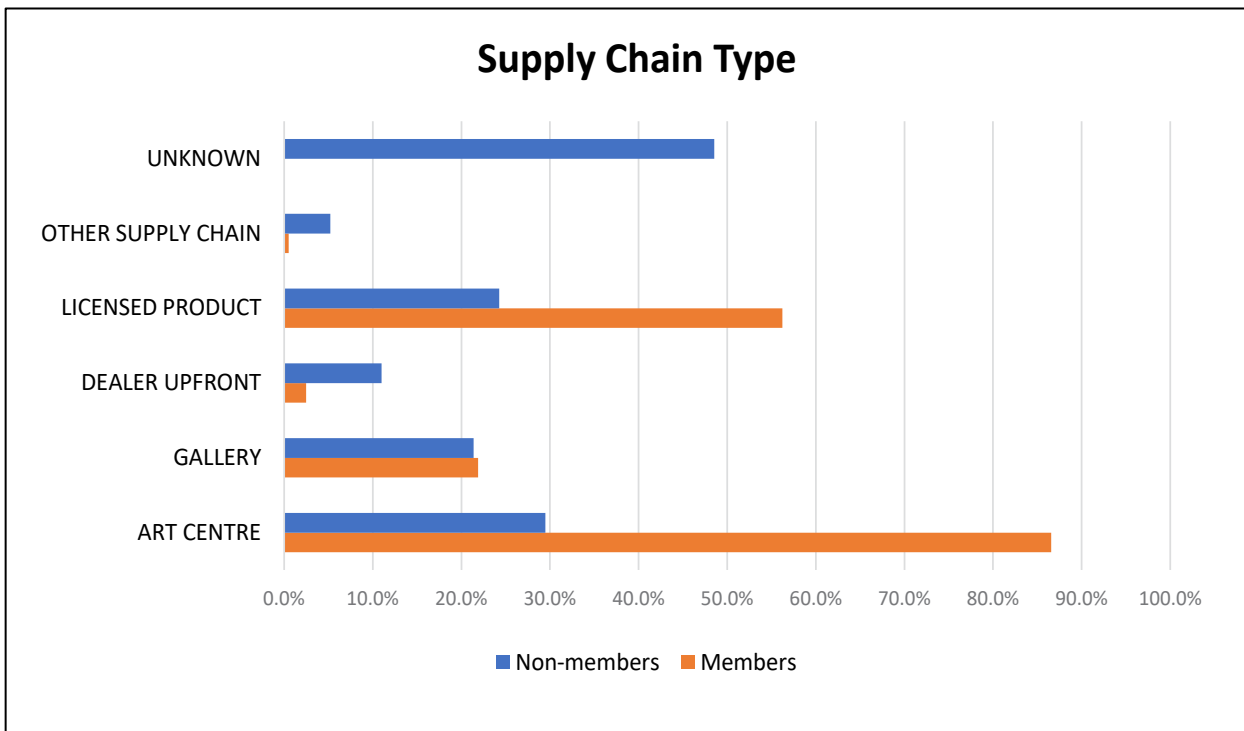
- From Member businesses, approximately half of the products were sourced from art centres (52.7%) and independent artists (48.8%).
- For non-member businesses, more than half the products were sourced from independent artists (54.5%).

It is noted that not all information related to non-member businesses was readily available. Out of 173 non-member businesses, 72 (41.6%) did not provide any information on their artwork sources.

For the Members, more detailed data was available on the production of licensed work. This was not readily available for non-members.

SUPPLY CHAIN ⁸	Members	Non-Members	Total
ART CENTRE	86.6%	29.5%	60.2%
GALLERY	21.9%	21.4%	21.7%
DEALER UPFRONT	2.5%	11.0%	6.4%
LICENSED PRODUCT	56.2%	24.3%	41.4%
OTHER SUPPLY CHAIN	0.5%	5.2%	2.7%
UNKNOWN	0.0%	48.6%	22.5%

Source: Business selling Indigenous art data (2021), IPPG Analysis



Source: Business selling Indigenous art data (2021), IPPG Analysis

The majority of all businesses adopted the Art Centre supply chain model (60.2%), followed by the Licensed Product (33.7%) and Gallery (21.7%) supply chain model.

Member businesses were seen to significantly use the Art Centre supply chain model (86.6%) to a greater degree than non-members (29.5%).

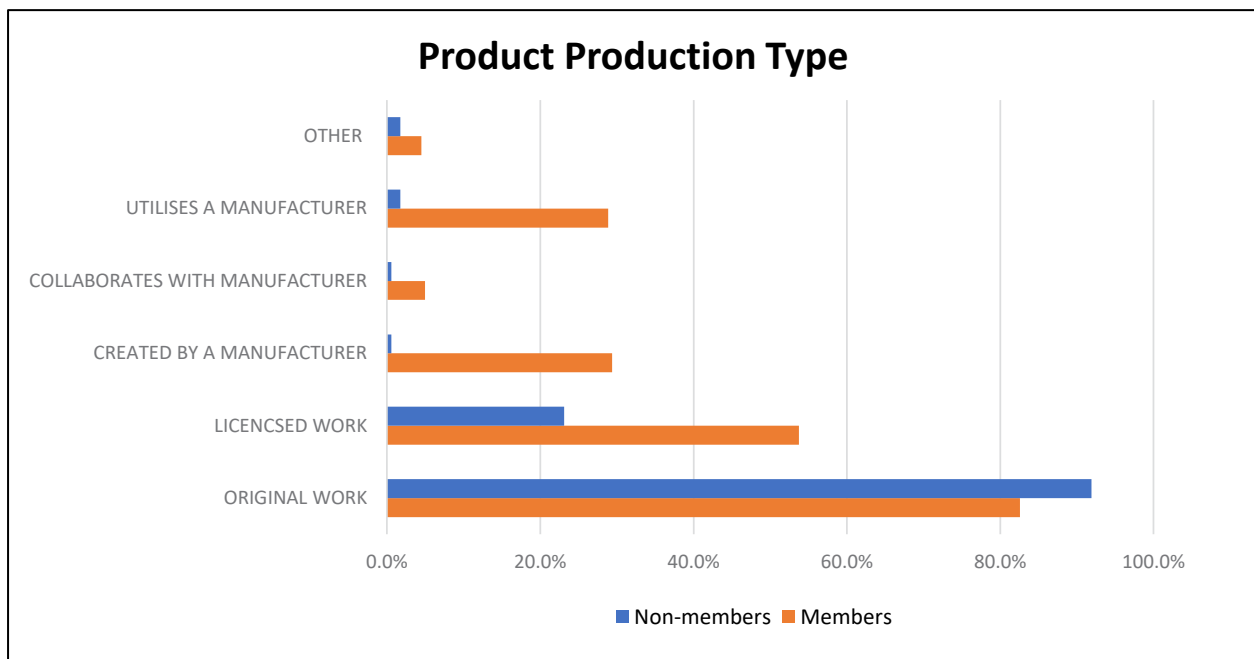
Conversely, non-member businesses were seen to significantly use the Dealer Up-Front supply chain model (11.0%) to a greater extent than Member businesses (2.5%).

2.8 Product information

Product information data shows the product production type (whether the work is considered original or licensed art) and the product method (e.g., created by manufacturer).

PRODUCTION INFORMATION	Members	Non-Members	Total
ORIGINAL WORK	82.6%	91.9%	86.9%
LICENSED WORK	56.2%	24.3%	41.4%
CREATED BY A MANUFACTURER	29.4%	0.6%	16.0%
COLLABORATES WITH MANUFACTURER	5.0%	0.6%	2.9%
UTILISES A MANUFACTURER	28.9%	1.7%	16.3%
OTHER	4.5%	1.7%	3.2%

Source: Business selling Indigenous art data (2021), IPPG Analysis



Source: Business selling Indigenous art data (2021), IPPG Analysis

Most artwork sold is original artwork (86.9%) and licensed work (41.4%).

From the total number of IartC Member businesses, approximately half sold licenced work (56.2%) compared to approximately a quarter (24.3%) for non-members.

The number of businesses selling licensed work would be far higher if the research looked broadly at retail and wholesale businesses.

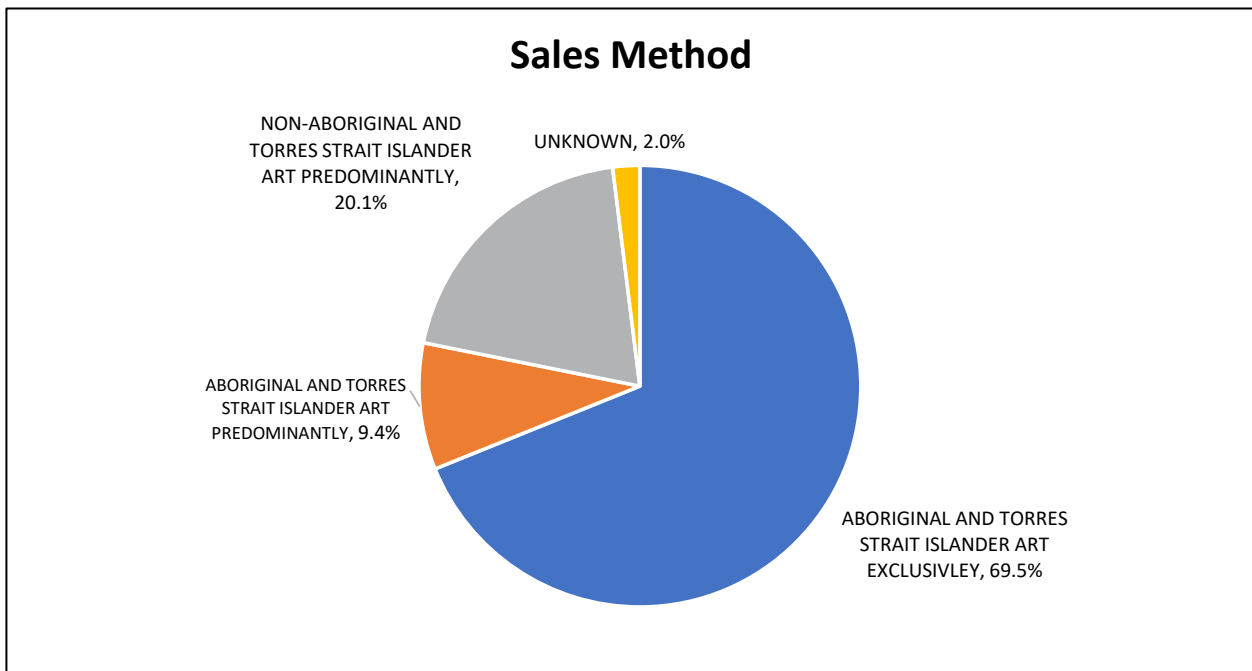
A high volume of Aboriginal and Torres Strait Islander licensed products sold in Australia is through airports and tourist shops that were not captured in this data.

2.9 Sales method

The sales method data shows whether the business sells Indigenous work exclusively, predominately Aboriginal and Torres Strait Islander or predominately non-Aboriginal and Torres Strait Islander.

	Members	Non-Members	Total
ABORIGINAL AND TORRES STRAIT ISLANDER EXCLUSIVELY	69.2%	69.9%	69.5%
ABORIGINAL AND TORRES STRAIT ISLANDER PREDOMINANTLY	6.5%	12.7%	9.4%
PREDOMINANTLY NON-ABORIGINAL AND TORRES STRAIT ISLANDER SALES	23.4%	16.2%	20.1%

Source: Business selling Indigenous art data (2021), IPPG Analysis



Source: Business selling Indigenous art data (2021), IPPG Analysis

The majority of all businesses sold Aboriginal and Torres Strait Islander work exclusively (69.5%).

For IartC Member businesses, almost a quarter (23.4%) sold non-Aboriginal and Torres Strait Islander goods predominately compared to 16.2% for non-members.

2.10 Industry involvement

Membership and industry involvement data shows the level of membership, registrations and participation levels within the industry.

INDUSTRY INVOLVEMENT	Members	Non-Members	Total
PAST IARTC DEALER MEMBER	0.0%	27.2%	12.6%
ABORIGINAL ART ASSOCIATION OF AUSTRALIA (AAAA) MEMBER	6.0%	15.0%	10.2%
SUPPLY NATION REGISTERED	7.5%	2.3%	5.1%
WESTERN AUSTRALIAN INDIGENOUS TOURISM OPERATORS COUNCIL (WAITOC)	3.5%	4.0%	3.7%
REPORTS TO THE OFFICE OF THE REGISTRAR OF INDIGENOUS CORPORATIONS (ORIC)	23.4%	5.8%	15.2%
AUSTRALIAN CHARITIES AND NON-FOR-PROFITS COMMISSION (ACNC)	26.9%	6.9%	17.6%
ARNHEM, NORTHERN AND KIMBERLEY ARTISTS (ANKA) MEMBER	10.0%	7.5%	8.8%
DESART MEMBER	12.4%	2.9%	8.0%
INDIGENOUS ART CENTRE ALLIANCE (IACA) MEMBER	5.0%	1.2%	3.2%
ABORIGINAL ART CENTRE HUB WESTERN AUSTRALIA (AACHWA) MEMBER	4.5%	4.0%	4.3%
KU ARTS MEMBER	1.5%	1.2%	1.3%
2021 DESERT MOB	10.9%	1.7%	6.7%
2021 REVEALED MARKETPLACE	8.0%	0.6%	4.5%
2021 TARANANTHI ART FAIR	21.9%	1.2%	12.3%
2021 CIAF	4.0%	1.7%	2.9%
2021 DAAF	22.9%	2.3%	13.4%

Source: Business selling Indigenous art data (2021), IPPG Analysis

From the total number of IartC Member businesses, approximately one quarter also report to ACNC (26.9%) and are incorporated under ORIC (23.4%).

From the total non-member businesses, 27.2% are past IartC dealer Members.

2.11 Social media

The proportion of social media usage shows the level of engagement across multiple social media platforms.

SOCIAL MEDIA	Members	Non-Members	Total
WEBSITE	96.5%	91.9%	94.4%
INSTAGRAM ACCOUNT	91.0%	78.0%	85.0%
FACEBOOK ACCOUNT	89.6%	84.4%	87.2%
TWITTER	43.8%	42.2%	43.0%
TRIP ADVISOR	40.3%	34.1%	37.4%
EBAY	0.0%	1.2%	0.5%
GUMTREE	0.0%	0.0%	0.0%
ETSY	0.0%	1.2%	0.5%
OTHER PLATFORM	0.0%	0.6%	0.3%

Source: Business selling Indigenous art data (2021), IPPG Analysis

The majority of businesses have a website (94.4%), a Facebook account (87.2%) and an Instagram page (85.0%).

Figures for eBay, Gumtree and Etsy platforms could be underreported, as businesses often do not operate under their familiar business name, making it difficult to determine. Despite this, IartC is aware that businesses make sales through these platforms under different usernames.

Further research would be required to demonstrate these figures accurately.

3. Data development and additional work

As noted in Section 1, the data used in this report has been derived by a single data source prepared by IartC. In order to verify the content, provide a fuller picture of the Indigenous art market in Australia, and generate a robust evidence base upon which future policy decisions can be made, IPPG recommends that additional research be undertaken, potentially aligned to the following three stage approach:

3.1 Stage 1: Confirm and capture additional data features

As a starting point, a detailed desktop review of publicly available data on the size and growth of Member and non-member businesses should be undertaken beyond the current categorical values captured by the IartC database.

This research should focus on obtaining data that includes discrete values (such as employment numbers and international trade levels) and continuous values (such as revenue and expenses). Potential data sources might consist of, though not be limited to:

- **Revenue:**
The total sales of the goods and services (exclusive of excise and sales tax), subsidies on production, all other operating income from outside the business (such as commission income and leasing income).
- **Employment or Full-Time Equivalent (FTE):**
The number of permanent, part-time, temporary and casual employees in the business.
- **Wages:**
The gross total wages and salaries of all employees in the business, including any benefits.
- **Average prices:**
The dollar figure for prominent products. Where earlier data is used, adjustments for inflation using the current year (i.e., year published) as the base year must be made.
- **Exports:**
The total value of goods and services sold to customers abroad.
- **International trade levels:**
The level of international trade is determined by ratio of exports to revenue and imports to domestic demand.

Incorporating this type of additional data will allow for a more complete assessment of the industry's current performance within a robust statistical framework (that uses confidence intervals and minimised error terms).

Forecasts can also be made using various forecasting models to provide a clearer industry outlook or forecast future impacts. For example, the supplementary data could also be used to support:

- Overall benefits of being an IartC Member, when compared to non-members.
- The education and training benefits of belonging to IartC as a Member.

Key data sources to allow this type of analysis would include the Australian Bureau of Statistics (particularly the labour force collection) and the Australian Taxation Office (particularly taxation statistics).

3.2 Stage 2: Conducting surveys to supplement existing data

Following from the Stage 1 desktop analysis, an online survey of IartC Member and non-member businesses should be designed, distributed and analysed. An anonymous or de-identified online survey is the most suitable method for compiling a large but concise amount of sectoral data in a short space of time, in a non-burdensome manner and producing consistent features for comparison.

With the IartC membership covering a large share of the Indigenous art industry, a survey with a strong response rate can provide a good representation of the industry-wide picture.

Such a survey should be designed to be completed by simply using information from each business's financial records. Topics that could be examined in the survey design should be consistent with the application of an industry 'value' study (described in section 3.3) and include, for example:

- Employment and payroll figures
- Revenue and expenses
- Money spent on training (both formally and informally)
- Money spent on training staff (both formally and informally)
- Contribution to a community organisation
- Payroll tax, stamp duty and the like
- Share of profits derived from the sale of artwork or other products.

3.3 Stage 3: Conducting an Economic Contribution Study

An economic contribution assessment should be prepared to determine the overall importance of the art dealer businesses in general (and Member businesses in particular) to the industry and the economy (at both a national level and each state and territory).

Economic contribution studies are intended to quantify measures such as value added, exports and employment associated with an industry or a sector of an industry in a historical reference year. In this case, the economic contribution is a measure of the total value of production supported by the industry, including by all Members.

Such a study would provide a valuable statistical snapshot leading to a better understanding of what an IartC Member contributes to the economy more broadly through its activity and the activity generated in its supply chain.

The economic contribution here would be based on the total employment and wages of the Member businesses and the gross operating surplus and production taxes paid by the businesses.

The data used would include the existing categorical data, additional financial data (continuous data), and data collated through the survey. The information will then be converted through the ABS Input-Output tables to determine the overall economic contribution to the industry and the economy.

Importantly, this approach would provide IartC with an estimate of the money spent by IartC Member businesses on local suppliers and other local businesses (through the difference between the direct contribution of the industry and the total contribution). A description of the framework is provided in Appendix 2

At face value, the headline economic value will summarise in dollar terms the contribution of IartC Members to the community, its surrounding regions, and to Australia as a whole.

4. Conclusion

The above snapshot data analysis of Indigenous art dealers in Australia, despite noted data validity and reliability limitations, provides a good first step towards a better understanding of the profile and features of dealers across Australia.

IPPG recommends that IartC uses this information to prepare a strong business case to extend and refine this research for the benefit of not only current and potential IartC Member businesses but also for the benefit of the Australian economy, Government policy makers and for the education and use of the wider community and most importantly Aboriginal and Torres Strait Islander artists. Without them, there would not be an Indigenous visual arts market.

For example, this could include understanding which parts of the market provide the most significant economic and social return to Aboriginal and Torres Strait Islander people.

Appendix 1- Data Feature List used on IartC dataset

- Business trading name
- Entity name
- ABN
- Registered for GST
- Business Structure
 - Australian Private Company
 - Individual Sole Trade
 - Other Partnership
 - Family Partnership
 - Local Government Entity
 - Other Incorporated Entity
 - Fixed Unit Trust
 - Discretionary Trading Trust
 - Discretionary Trust
 - Commonwealth Government Entity
 - Australian Public Company
 - State Government Entity
 - Co-operative
 - Discretionary Investment Trust
- State and Territory
 - Major City
 - Inner Regional
 - Outer Regional
 - Remote
 - Very Remote
 - Overseas
- Type of Business
 - Gallery
 - Art Centre
 - Use Auction as a sales method
 - Public Institution
 - Retailer/wholesaler
 - Third party platform
 - Events
 - Other (includes directories, curatorial services)
- Features of business
 - Online gallery
 - Physical gallery
 - Physical gallery by appointment only
 - Runs private art studio
- Aboriginal/Torres Strait
 - Aboriginal and Torres Strait Islander owned
 - If non- Aboriginal and Torres Strait Islander owned

- Using Aboriginal and Torres Strait Islander language for a business name
 - Using Aboriginal and Torres Strait Islander language for product branding
- Sources of works
 - Art Centres
 - Art Centre member artists
 - Independent artists
 - Wholesalers - sources original works from independent artists
 - Wholesalers – operating studio
 - Merchandises manufacturers
 - Secondary market
 - Undeterminable
- Product types
 - Buys and sells original work (includes limited additional prints)
 - Sells licensed work
 - Buys and sells products and merchandise created by a manufacturer
 - Buys and sells products and merchandise in collaboration with a manufacturer
 - Creates and sells licensed products and merchandise using a manufacturer
 - Other (includes events/publication licensing/sales platform)
 - Sells Indigenous work
 - Exclusively
 - Predominately
 - Predominately non-Aboriginal and Torres Strait Islander sales
- Supply Chain models
 - Art Centre
 - Gallery
 - Dealer upfront
 - Licensed product
 - Other supply chains
 - Unknown
- IartC membership
 - IartC Dealer Member
 - Non-IartC member
 - Past IartC Dealer Member
- Other industry membership and registration
 - Aboriginal Art Association of Australia (AAAA)
 - Supply Nation
 - Western Australian Indigenous Tourism Operators Council (WAITOC)
 - Office of the Registrar of Indigenous Corporations (ORIC)
 - Australian Charities and non for profits Commission (ACNC)
- Industry peak body memberships
 - Arnhem, Northern and Kimberley Artists (ANKA)
 - Desert
 - Indigenous Art Centre Alliance (IACA)
 - Aboriginal Art Centre Hub Western Australia (AACHWA)

- Ku Arts
- Other industry body membership
- Industry participation
 - 2021 Desert MOB
 - 2021 Revealed Marketplace
 - 2021 Tarnanthi Art Fair
 - 2021 Cairns Indigenous Art Fair (CIAF)
 - 2021 Darwin Aboriginal Art Fair (DAAF)
- Website
 - Uses Website
- Instagram
 - Instagram account
 - Instagram username
 - IartC follows Instagram account
 - Business follows IartC Instagram account
- Facebook
 - Facebook account
 - IartC likes Facebook
- Other social media
 - Twitter
 - Trip Advisor
 - eBay
 - Gumtree
 - Etsy
 - Other platforms
- Government funded
 - Federal operational funding

Appendix 2- Economic Contribution Framework

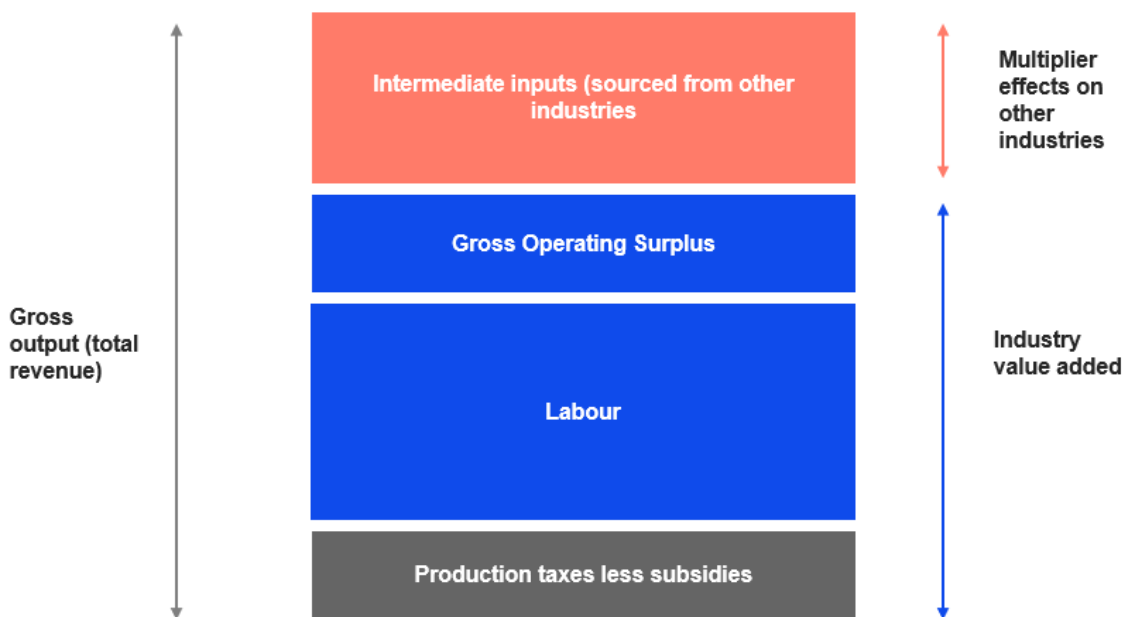
An economic contribution study measures direct and indirect (or flow-on) contribution to GDP.

Figure 1 provides the visual economic framework of the direct value IartC Members provide - represented by the blue section boxes. This is defined as the 'value-added' and is the net value of output generated by the business's factors of production (i.e., capturing the value of labour, capital and land). It is important to note that the sum of value-added across all entities in the economy is equal to GDP.

Figure 1 also shows the value of goods and services source from other industries, which produces flow-on economic value to other sectors of the economy. This is represented in the red box and, in this case, can represent the value of raw artwork material like paint, canvasses, wood, cotton etc.

The direct economic contribution to overall economic activity from IartC Members will include both 'value add' and 'multiplier effect' to other industries.

Figure 1 – Economic benefit framework (direct and flow on effects)



Source: IPPG 2021