



**Culture First**  
Supporting Aboriginal Art Centres  
of Central Australia

Desart Submission  
to the  
House of Representatives

Inquiry into the growing presence of inauthentic Aboriginal and  
Torres Strait Islander “style” art and craft products and  
merchandise for sale across Australia.

November 2017

## INTRODUCTION

Desart is the peak industry body for forty-two Aboriginal community art centres representing approximately 8000 artists from sixteen distinct language groups spread across the vast Central Desert region of Australia. Desart is a non-profit association incorporated under the laws of the Northern Territory and overseen by a committed ten-member board consisting entirely of Aboriginal elders and community leaders.

Desart's member art centres are community based arts businesses owned and managed by their local Aboriginal communities for whom they are a vital source of economic, social and cultural benefits. For over 20 years, Desart has delivered programs to support the strong governance, sustainable business development and local capacity building of its member art centres grounded in best practice and respecting and protecting the unique cultural integrity of the Australian Aboriginal artistic aesthetic.

Desart is uniquely qualified to speak on behalf of the Aboriginal communities, artists and arts businesses of this region. It has unique and essential insight into both the cultural and spiritual bedrock which has made the art of the Australia's Aboriginal and Torres Strait Island peoples an internationally recognized phenomenon as well as the exigencies of doing business in the 21<sup>st</sup> century in the circumstances the subject of the current enquiry: namely a market facing unprecedented pressure from inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise.

## THE DEFINITION OF AUTHENTIC ART AND CRAFT PRODUCTS AND MERCHANDISE

Authentic Aboriginal and Torres Strait Island art and craft products can be defined as artworks, craft items and artefacts which are the legitimate expression of Aboriginal and Torres Strait Island culture. This means that the 'author' or 'creator' must be an Aboriginal or Torres Strait Island artist or group of artists.

As the Ninti One submission states, 'fake art', which is art not made by Aboriginal or Torres Strait Island artists, is essentially theft of culture. Jane Young, artist at Tangentyere Artists, Mparntwe - Alice Springs and current Chairperson of Desart board from explains:

*Our art is who we are ... it helps us carry our culture from the past, to now and into the future for our children and grandchildren. The stories we paint are from our grandmothers and grandfathers and theirs before them. We must pass this on to our grandchildren, so they can know who they are and be strong and proud Aboriginal people - the first people from this land. Our art is about where we come from, our apmere [land] and our atweye [family] - it belongs to us and our atweye - no one can take this away from us - it doesn't belong to anyone else but us.*



*It hurts us when people make fake Aboriginal art because that breaks our Law, our rights to our apmere and our atweye. When Aboriginal Law and our Ancestors are disrespected we feel terrible pain and fear for ourselves and our families. We don't know how to make it right, to heal the pain and protect the Law again, unless we get support from the wider community in solving this problem.*

*In the old days we painted on our bodies, on the ground and in caves - we still do this today, but we also paint on canvas and make all kinds of art in our art centres. In this way we are able to earn money that supports our atweye but also its another way we can share our culture with our young ones and other people from across Australia and the world.*

*Our art is altyerre [creation of] our culture, painting, dancing and singing, it is all part of our altyerre and this makes us strong. We must keep our culture strong because that is what makes our art strong and makes us strong.*

Authentic art and craft products can range from small handmade baskets and wooden carvings to a significant collaborative canvases and multimedia installations. They comprise:

- artwork, craft products and artefacts which have been created by Aboriginal or Torres Strait island artists or craftspeople, either individually or collaboratively
- products which are decorated by Aboriginal or Torres Strait island artists or craftspeople, either individually or collaboratively
- merchandise and other reproductions of such artworks, craft products and artefacts for which ethical licensing arrangements are in place with the Aboriginal artists and craftspeople who created the original versions.

In Desart's view, there is no need to complicate the definition of Aboriginal art and craft by reference to a certain visual style or technique or source of creative expression. If the work is the original creative expression of an Aboriginal or Torres Strait Island person then it is authentic Aboriginal or Torres Strait Island art. To argue otherwise prevents the dynamic evolution that is the hallmark of the development of contemporary Aboriginal art.

It is simple: authentic products are those made by Aboriginal and Torres Strait Island people. This includes reproductions of such products made with the permission of the original creators.



## CURRENT LAWS AND LICENSING ARRANGEMENTS FOR THE PRODUCTION, DISTRIBUTION, SELLING AND RESELLING OF AUTHENTIC ABORIGINAL AND TORRES STRAIT ISLANDER ART AND CRAFT PRODUCTS AND MERCHANDISE

The current legal framework relied on by Desart and its members to protect the supply of authentic art product is based primarily on contract, copyright, moral rights and the Australian Consumer Law.

Desart's member art centres take care to respect the legal rights of the thousands of Aboriginal artists they represent by adopting best practice in all their dealings. They use legal contracts to make sure that the terms on which sales are made are clear and agreed, written copyright licences are put in place to deal with all reproductions for merchandise or other publications, and respect for moral rights (crediting the artist and respecting the integrity of the work) is embedded both in practice and in all contracts.

This legal framework operates in the context of a commitment to best practice – the bedrock of which is a deep respect and understanding of the cultural practices and traditions of the Aboriginal peoples and communities to which the artists belong. This cultural framework is consistent with the principles of cultural respect set out in the *Australia Council Protocol for Producing Indigenous Australian Visual Arts* [http://www.australiacouncil.gov.au/symphony/extension/richtext\\_redactor/getfile/?name=daaf1afd6d719315db5e5e174a1da961.pdf](http://www.australiacouncil.gov.au/symphony/extension/richtext_redactor/getfile/?name=daaf1afd6d719315db5e5e174a1da961.pdf) which has been available since 2002 and is now in its second edition, and the standards of the Indigenous Art Code which was launched in 2010 and grew out of the recommendations of the 2007 Senate Inquiry report: *Indigenous Art- Securing the Future*. All art centres also have access to best practice legal advice from the Arts Law Centre of Australia through its Artists in the Black program as does Desart.

Best practice in the legal and ethical conduct of the business of selling Aboriginal art and merchandise is the foundation of the support provided by Desart to its members. Desart is guided by its values of culture first, diversity, autonomy, consultation and ethical transparency.

The difficulty is that while these laws and protocols provide a practical working framework for businesses committed to ethical conduct, they are woefully inadequate to deal with the businesses who compete with our members by supplying inauthentic product and have no interest in best practice:

1. Copyright law treats artwork by an artist who died more than 70 years ago as in the public domain so does not protect the images of Australia's ancient and extraordinary rock art which is sacred to Australia's first peoples. It arguably prevents certain unauthorised reproductions of contemporary works but does not prevent the appropriation of Aboriginal iconography and symbols. It doesn't prevent fake artworks 'in the style of' certain artists which are not direct copies. As the onus is on the artist to pursue and prove infringements, this requires legal representation and court proceedings which are beyond the means of our



members – the support provided by the Arts Law Centre does not extend to pursuing legal proceedings.

2. Contract law is often used as a weapon against Aboriginal artists. Unscrupulous dealers hold up a piece of paper and flaunt a signature to justify their actions in purchasing or reproducing the work of vulnerable artists on terms that grossly undervalue the work and permit conduct which doesn't meet even minimum standards of ethical dealing. The artist often did not understand the document and had no access to legal advice before signing. Usually the artist has no copy of whatever they signed and is effectively deprived of any legal redress at the first hurdle due to lack of evidence. Alternatively, there is no written document just assertions that an artist 'agreed' and accepted 'payment' of some sort and so has entered a binding legal agreement. Aboriginal artists who are economically and socially vulnerable – true of many artists living in remote Australia – are not in a position to disprove the legal claims made by those exploiting them. Again, the onus is on the artist to seek a remedy with the practical result that such behaviour is unchecked.
3. The Australian Consumer Law prohibits misleading and deceptive conduct in trade and commerce. Our understanding is that dealing in Aboriginal looking artworks or products is not unlawful if the word "Aboriginal" is not used in the marketing. Certainly, the proliferation of souvenir businesses selling fake souvenirs sometimes adjacent to genuine (usually more expensive) Aboriginal products bears this out. The well-known example is the case, some years ago, when an art centre did complain to the ACCC that an exhibition of paintings by a non-Indigenous artist described as being paintings depicting sacred Aboriginal spirit figures or Wandjina, amounted to misleading and deceptive conduct. The art centre argued that the subject matter and style of the artworks meant that the public would believe the paintings were created by Aboriginal artists from one of the three language groups which have cultural authority to depict such images. The ACCC's response was along the lines that the paintings couldn't be misleading because it was made clear that the artist was not Indigenous. Further, even accepting the images were culturally sacred, the ACCC observed that as there was no law requiring a non-Aboriginal person to obtain the permission of the traditional cultural Aboriginal custodians to paint such images, it couldn't be the case that the exhibition was misleading or deceptive – presumably even if consumers were deceived into thinking that the artworks were authentic.  
[http://www.wipo.int/wipo\\_magazine/en/2011/06/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2011/06/article_0003.html) The underlying rationale seems to be that as the current law in Australia doesn't prevent non-Indigenous creators making artworks or objects that 'look like' Aboriginal art, it is not misleading to do so as long as it there is no overt claim that the creator was Indigenous. Essentially this creates an open invitation to businesses wanting to trade off the unique cultural traditions of Australia's Aboriginal and Torres Strait Island communities.
4. The Australian Consumer Law also prohibits unconscionable conduct in trade and commerce. As the 2007 Senate Inquiry report: *Indigenous Art- Securing the Future* shows, this has not prevented the gross exploitation of Aboriginal



artists by carpetbaggers. A recent example is the ABC's 2016 Story of Theft show last year <https://www.youtube.com/watch?v=xiNLsN6UAXU> where artist Brandon Porteous explains he "made the mistake of selling a couple of paintings to someone and they keep reproducing" them.

The Wandjina example above clearly highlights the fundamental problem of the current legal regime which does not provide any legal mechanism to protect the misappropriation of Aboriginal forms of traditional cultural expression except incidentally and tangentially. But this has been known since at least 2009 when Terri Janke's much quoted *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, was published. There is no law which requires non-Aboriginal businesses and artists to respect the Australia's unique cultural heritage and prevents them from making and selling fake or look-alike Aboriginal items as long as they don't label them as "Aboriginal".

Other laws intended to protect Australia's cultural traditions and unique flora and fauna in fact positively hinder the sale and supply of authentic product enabling a further competitive advantage to fake or inauthentic product. The *Protection of Moveable Cultural Heritage Act 1986* regulates the export of cultural objects, distinguishing between Aboriginal and Torres strait Island artworks and other artworks. The former require export approval for paintings older than 20 years and valued at over \$10,000. The latter only require export approval for art over 30 years and valued at more than \$250,000.<sup>1</sup>

Similarly, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regulates the use of native species and can prevent the export of genuine Aboriginal artworks.

Article 31 of the Declaration on the Rights of Indigenous People requires signatories to "take effective measures to recognise and protect the exercise of ... rights" 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.

Despite the Federal Government's expressed support for the Declaration, Australian law contains no general legal right of community cultural heritage which would support a right to prevent the manufacture and sale of inauthentic product. There is no legal obligation on businesses making or selling artwork or merchandise to respect traditional knowledge which could be the basis for regulating the supply of inauthentic product. Other than laws inapplicable in this context relating to native title and protected areas and objects, there is no legal right of ownership of Indigenous cultural heritage capable of enforcement by the Australian legal system in a way which can protect our members from the unfair competitive advantages exercised by makers and sellers of inauthentic product.

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<sup>1</sup> CRC-REP Research Report CR017 p 11



In summary, the current legal framework works only to the extent it is supported by a commitment to best practice and respect for culture. Unfortunately, best practice and respect for culture are, under Australian law, optional and voluntary practices studiously and legally able to be ignored by those who make and sell inauthentic product.

## AN EXAMINATION OF THE PREVALENCE OF INAUTHENTIC ABORIGINAL AND TORRES STRAIT ISLANDER 'STYLE' ART AND CRAFT PRODUCTS AND MERCHANDISE IN THE MARKET

In adopting this inquiry and calling for submissions, the Standing Committee accepts that inauthentic product is a pressing issue. Other organizations have compiled evidence of the widespread presence of inauthentic art and craft in the market (the work of the Indigenous Art Code in particular) all of which confirms Desart's own experience and observations. Rather than repeat those reports, Desart's submission focusses on the impact of inauthentic product on the Aboriginal artists and arts businesses of Central Australia. Desart's membership accounts for over half of the 14,000 ATSI artists identified as working in remote Australia in 2013 by Ninti One's The Art Economies Value Chain Reports<sup>2</sup>, and spans 5 of the 12 geographic regions surveyed.

Desart has now conducted a survey of its member art centres (accounting for approximately 40% of all remote Aboriginal and Torres Strait Island community art centres) which confirms Ninti One's assertion that "inauthentic, foreign-produced 'art' is having a detrimental impact on Aboriginal and Torres Strait Islander artists, both culturally and economically". The survey results reveal that:

- a. 80% of respondent art centres had not seen the work of their own member artists appropriated or copied suggesting that the best practice, culture first approach of the art centre model does provide strong protection for their individual artist members against exploitation. Desart believes that the Aboriginal artists living in remote Australia whose art is most often the direct target of unscrupulous operators are those without the protection of an art centre.
- b. However less than 10% of art centres felt no impact from the presence of inauthentic product. Even if not the target of direct copying, over 90% of art centres and the artists they represent have been adversely affected with the three most significant impacts of the widespread availability of inauthentic product being:
  - i. Over 60% finding it harder to compete in the market due to the prevalence of lower priced inauthentic product with one respondent explaining "the sale of fake art products makes it harder for traditional artefacts to compete as our scale of production cannot match mass produced items in price or volume".
  - ii. Over 50% finding it more difficult to get access to retail and wholesale outlets

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<sup>2</sup> CRC-REP Research Report CR004, A Woodhead and T Acker, Ninti One Limited, Alice Springs



- iii. Over 50% reporting that their artists were distressed and upset by what is seen as a gross lack of respect for their culture not only by those that sell such products but by the lack of any government response to protect them. As one respondent explained “artists are often unaware of how their culture is being abused and are livid when they find out. It creates disengagement. It is destructive to their career development, especially longer term.”
- c. Over 25% of art centres had made a deliberate choice not to engage in third party licensing of artwork for fear of competition with inauthentic work. Interestingly over 90% of art centres felt that many consumers were unable to distinguish between authentic and inauthentic product and over 80% believe that many consumers do not see the value in authentic product if a cheap alternative is available. In Desart’s view, these responses refer principally to consumers in the souvenir and merchandise markets rather than the fine art market; however, it is also true of paintings and fine art sold in retail outlets other than art centres and established commercial galleries – such as pop-up auctions, online and in souvenir shops.
- d. While over 80% of art centres were interested in undertaking third party licensing to produce merchandise and homewares (77% interested in producing textiles, 55% in homewares, over 40% interested in creating jewellery and stationery), they are hesitant to develop these new businesses out of concerns about the risks of engaging in third party licensing of artwork on merchandise and souvenirs in a market flooded with cheap fake product. 80% identified that knowing who to deal with was a threshold barrier – is the manufacturer ethical or not and will copyright be respected.

## OPTIONS TO PROMOTE THE AUTHENTIC PRODUCTS FOR THE BENEFIT OF ARTISTS AND CONSUMERS

Desart wholeheartedly endorses an approach which does not just target inauthentic product but which proactively promotes and supports the authentic supply of product by the Aboriginal and Torres Strait Island arts sector.

The promotion of genuine product requires a multifaceted approach and Desart proposes:

- strengthening the fragile businesses of remote and regional community art centres;
- implementing best practice procurement policies across all government departments and government operated or funded businesses;
- promoting the unique art of Australia’s Aboriginal and Torres Strait Island artists abroad; and
- a public education campaign both here and in offshore tourist markets celebrating Australia’s Indigenous culture and authenticity.

### Strengthening the Art Centre Ecosystem

Aboriginal and Torres Strait Island artists work both within and without the art centre model and many such artists live in Australia’s urban cities. However, it is undeniable that a large proportion of artists live in Australia’s remote and regional communities and that the art centre has been an effective tool of sustainable community



development, cultural protection and small business development nurturing many extraordinary artists who may not otherwise have had the opportunity to create art. The art centre model protects the most vulnerable and is the standard for best practice yet it is economically fragile and requires ongoing government support. Were it to fail, many communities would lose their only income producing business, their primary social hub and a vital means of engaging their youth to value and maintain cultural practices.

Government policy can support the community art sector economy by greater support and resourcing of art centres and the peak bodies that support them. In particular, targeted resourcing for business development of sustainable ethical licensing models of Aboriginal art for merchandise and souvenirs would directly boost the ability of art centres and the artists they represent to develop product to meet local and tourist demand for Aboriginal and Torres Strait Island craft, merchandise and souvenir product. It would assist art centres to diversify from the current predominant reliance on the fine art market into commercial homeware and merchandise, tapping into existing demand and enabling business growth less reliant on individually produced items.

The Desart survey shows a reluctance in art centres to enter this sector even though it has the capacity to generate long term growth and employment. They require support to develop marketing plans, identify ethical partners, secure initial investment and acquire appropriate skills.

#### Best Practice Procurement and Preferential Dealing

Desart read with pleasure the submissions of the Museum of Contemporary Art (submission 10) and the Department of Parliamentary Services (Submission 9) each exemplifying a thorough and best practice approach to sourcing Aboriginal and Torres Strait Island Product at all levels of their businesses. Desart proposes that the policies and protocols of these institutions provide the basis for a government mandated approach for all government departments and government operated or funded businesses, as well as all businesses operating on Commonwealth owned property (such as retail outlets in airports and national parks).

Ideally State and local governments would follow suit.

The features of such a protocol would vary depending on the nature of the relevant entity (whether collecting institution, government body, government lessee) but could include:

- where the public is provided with Aboriginal and Torres Strait Island art works and related merchandise, responsibility only to provide such product if it is ethically sourced and produced;
- all Indigenous art or products for sale or display to be sourced from Indigenous suppliers or companies with valid licence agreements in place;
- an Indigenous Advisory Committee to advise on the acquisition and licensing of artwork;
- commitment to ensure that licence fees are paid to all artists whose work is reproduced;
- membership of the Indigenous Art Code and adherence to its principles



- staff training to understand the importance of sourcing genuine product and to recognise product which is not genuine;
- educating visitors and purchasers about the significance of Australia's unique Indigenous cultural heritage and the importance of authentic cultural experiences and products.

Desart also proposes that all businesses contracted by or on behalf of government to produce Australian merchandise to promote tourism or sporting events (such as the Commonwealth Games) as well as any tourism activities funded or supported by Tourism Australia or its State equivalents be required to use Aboriginal or Torres Strait Island artwork for at least 50% of such promotional activities and that such product must be authentic and ethically sourced. Australia is proud of its unique Indigenous cultural heritage and the government can show leadership by ensuring its survival through ethical procurement policies supporting authenticity.

### Showcasing Australian Indigenous Art Abroad

Strengthening the appreciation of overseas markets and collectors for Australia's unique Aboriginal and Torres Strait Island art has flow on effects strengthening the sector domestically and also contributes to visitors to Australia developing enhanced appreciation and understanding of the significance of engaging with authentic cultural experience.

Desart recommends greater Government support for art centres and local galleries to participate in overseas exhibitions at prestigious public and commercial galleries to showcase Indigenous art. Desart would like to see greater representation of Aboriginal and Torres Strait Island art at international art fairs such as those in Basel, Hong Kong and Miami. This is only possible with financial support.

### Education and Public Awareness

A broad based public education campaign to raise awareness both in Australia and overseas of the significance of Australia's Indigenous cultural heritage and the unique value of the authentic cultural experience is vital. Desart agrees with the many other submissions on this point but emphasizes that a public education campaign on its own is unlikely to address the current problem adequately. It must be part of a total approach including measures to inhibit dealing in inauthentic product and measures to support those producing authentic product.

### OPTIONS TO RESTRICT THE PREVALENCE OF INAUTHENTIC ABORIGINAL AND TORRES STRAIT ISLANDER 'STYLE' ART AND CRAFT PRODUCTS AND MERCHANDISE IN THE MARKET

Supporting the sector will not be enough without strong government action to stamp out inauthentic product.

Desart agrees with Tim Acker's submission when he says there is simply "no place for Aboriginal Style products". This requires more than just 'truth in labelling' – if that would still allow inauthentic product if correctly labelled as such. Such a solution



would not be enough to ameliorate the cultural and economic harm the presence of such product causes. Giving consumers a choice whether to buy authentic or inauthentic (each clearly labelled) and hoping the market will sort it out is not enough when the availability of cheap foreign made rip-offs can still entice the tourist and keep ethical merchandise at bay – the responses of the Desart survey make that clear. Desart submits that the solution must include amendments to the Australian Consumer Law to prohibit the sale of inauthentic art and craft product altogether, making it an offence to supply or offer commercial goods that include Indigenous cultural expression unless supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community. The focus cannot be solely on whether consumers are misled – the policy needs to start from the foundation that inauthentic product is damaging – damaging to the Aboriginal and Torres Strait Island art sector, damaging to the businesses that support that sector, Aboriginal and Torres Strait Island artworks damaging to Aboriginal and Torres Strait Island people and their communities – both culturally and economically, damaging to Australia's international reputation and damaging to consumers.

Such a policy could be supported by the Indigenous Art Code's dealer registration system. Desart would like to see registration of dealers and retailers made mandatory and dependent upon an application process that required applicants to demonstrate ethical best practice. It would be an offence to sell or deal in Aboriginal and Torres Strait Island product unless registered.

Further, Desart would like to see a system of import restrictions on all Aboriginal and Torres Strait Island 'style' product preventing:

- the importation of certain categories of uniquely Indigenous artefacts altogether unless made in Australia (boomerangs, yidaki, woomera);
- the importation of other Aboriginal or Torres Strait Island 'style' product unless the importer can demonstrate ethical licensing from a genuine Aboriginal or Torres Strait Island artist or arts business located in Australia.

Thank you for the opportunity to contribute to this very important discussion.

Yours sincerely



Philip Watkins  
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Desart