

Protecting First Nations art

Introduction

- 4.1 Stronger protections for First Nations cultural expressions should reduce the prevalence of inauthentic Indigenous style art and craft items. This chapter discusses some ways First Nations arts and craft items could be protected, including:
- education – better informing consumers and the supply chain on the importance of authenticity in First Nations cultural expressions;
 - labelling systems – providing information to customers at the point of sale;
 - consumer law and copyright – the adequacy of current legislative frameworks in protecting cultural expressions;
 - the Indigenous Art Code – a retailer-level approach, encouraging authentic items and ethical processes; and
 - a Cultural Authority – an identifiable body whose role is focused on protecting traditional heritage and cultural expressions.

Education

- 4.2 There is a widespread lack of knowledge about First Nations cultures among non-Indigenous Australians. Most have difficulty in distinguishing between authentic and inauthentic First Nations art and crafts. This is equally an issue for tourists.

- 4.3 As discussed, the prevalence of inauthentic First Nations ‘style’ art and craft in the souvenir trade is indicative of a healthy tourist demand for these products, but also of a distinct lack of knowledge about what is authentic and what is not.
- 4.4 A private survey by Ms Myvanwy Moar was instructive in this regard. She found that when people at a popular Melbourne market were asked to distinguish between authentic and inauthentic artworks, the majority answered incorrectly.¹ Ms Moar commented that:
- We surveyed 63 people and showed them four photos... Two people correctly identified all four... Sixteen people either couldn’t identify any or were incorrect in all four instances. Overall, photo by photo, they were correct 36 per cent of the time.²
- 4.5 Although this was a small survey, it is consistent with other evidence that the wider public is largely uninformed about authentic Indigenous cultural expression and do not know of its significance.
- 4.6 An education campaign for buyers of Indigenous art is advocated by many of the contributors to this inquiry. The Indigenous Art Code Ltd (IartC) fully supports this also but acknowledges that it would be costly, including a marketing campaign which would need to ‘ensure that it was promoting what Aboriginal and Torres Strait Islander people want to communicate about their culture and artistic expression’.³
- 4.7 The IartC’s suggestions include technology aids for consumer decision-making, presenting information publicly about the various supply chains, and linking the various stakeholders and peak bodies.⁴
- 4.8 The IartC commented that an effective education framework for retailers and suppliers will need to be quite prescriptive about what is authentic, what is not, and why imitation products should not be supplied.
- 4.9 The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) commented that education in this context would involve capacity building for First Nations communities to enable them to engage with the wider community, and would also involve including Indigenous culture in the school curriculum.⁵

1 Ms Myvanwy Moar, *Supplementary Submission 71:1*, Answer to Question on Notice, p. [9].

2 Ms Myvanwy Moar, Private Capacity, *Committee Hansard*, Melbourne, 8 March 2018, p. 8.

3 Indigenous Art Code Ltd (IartC), *Submission 138*, p. 15

4 Ms Gabrielle Sullivan, Chief Executive Officer, IartC, *Committee Hansard*, Sydney, 6 March 2018, p. 43.

5 Mr Craig Ritchie, Chief Executive Officer, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Committee Hansard*, Canberra, 2 March 2018, p. 17.

- 4.10 BlakDance commented that local Indigenous knowledge from First Nations communities should also be part of any teaching of culture.⁶
- 4.11 Mr Tim Acker believes that the emphasis needs to be on consumer education as well as robust labelling. He states:
- Restricting supply of inauthentic works would involve detailed knowledge of the supply chain involved in each product – this is unlikely to be realistic. The focus on any changes in this sector should be on giving consumers as many reasons as possible to seek out and buy art, craft and merchandise of integrity and quality.⁷
- 4.12 The Aboriginal Art Association of Australia (AAAA) believes that the supply chain is also viable target for effective education about authenticity. AAAA stated that:
- ...we need to educate every segment of this supply chain but put a lot of that focus on the intermediaries – your manufacturers, your distributors and most of all your retailers.⁸
- 4.13 The Copyright Agency stressed that whilst there is no one thing that can fix the education problem:
- One of the things you do is support the creation of ethically sourced, commercially viable products. We need to give more education to distributors, manufacturers, artists, art centres – everybody in the supply chain. We also need to promote good products. That’s a whole piece around education to the consumer.⁹
- 4.14 The Martumili Artists commented that additional support for artists and art centres to promote ethical practices, and better resourcing of organisations such as the Arts Law Centre of Australia (Arts Law) and the Copyright Agency, will foster the education of artists, consumers and others.¹⁰
- 4.15 Araluen Arts Centre stated that art centres are a gateway for the wider public to learn about First Nations art and cultural expressions.¹¹

6 BlakDance, *Submission 119*, p. [8].

7 Mr Tim Acker, *Submission 22*, p. [4].

8 Ms Sylvie Tsatsaronis, Director, Aboriginal Art Association of Australia (AAAA), *Committee Hansard*, Sydney, 6 March 2018, pp. 8–9.

9 Ms Judy Grady, Manager, Visual Arts, Copyright Agency, *Committee Hansard*, Sydney, 6 March 2018, p. 20.

10 Ms Carly Day, Manager, Martumili Artists, *Committee Hansard*, Newman, 10 April 2018, p. 2.

11 Mr Stephen Williamson, Curator, Araluen Arts Centre, *Committee Hansard*, Alice Springs, 2 May 2018, p. 23.

- 4.16 Girringun Aboriginal Art Centre from North Queensland remarked that while it constantly seeks to raise knowledge and cultural awareness, it cannot on its own spread this education as widely as it needs to go.¹²
- 4.17 The scale of the education shortfall from the business perspective was stressed by the City of Sydney:
- Would we be able to resource that education campaign? That would be incredibly difficult. And I think that's the same with the Indigenous Art Code. Do they have the knowledge? Absolutely. Are there too many people for them to share it with to make a significant difference? I suspect so. Understanding the extent of the problem is going to help inform the investment in the response, and I'm not sure that we've really nailed the extent of the problem yet.¹³
- 4.18 The Australian Competition and Consumer Commission (ACCC) noted that it publishes its own guidelines on the production and sale of Indigenous art but they only focused on the Australian Consumer Law (ACL) and the government may wish to consider a broader education campaign.¹⁴
- 4.19 The IartC and Arts Law argue however that although education is a necessary part of the response to this issue, only legislative change will ultimately deter suppliers of inauthentic product.¹⁵ IartC further states:
- Fundamentally, in the absence of legislative change, education relies on the good intentions of suppliers and retailers. There will not be a strong deterrent to supplying inauthentic Indigenous art.¹⁶
- 4.20 Copyright Agency states that education and promotion activities will be less potent without a legislative component to addressing this problem.¹⁷

12 Dr Valerie Keenan, Manager, Girringun Aboriginal Art Centre, *Committee Hansard*, Cairns, 15 July 2018, p. 8.

13 Ms Yvette Andrews, Manager, Community Engagement, City of Sydney, *Committee Hansard*, Sydney, 7 March 2018, p. 5.

14 Australian Competition and Consumer Commission (ACCC), *Submission 54*, p. 4.

15 Arts Law Centre of Australia (Arts Law) and IartC, *Submission 149*, p. 1.

16 IartC, *Submission 138*, Appendix A: 'A Proposed Way Forward—Amending the Australian Consumer Law', p. 10.

17 Copyright Agency, *Submission 56*, p. [2].

4.21 The Queensland Office of Fair Trading (OFT) informed the committee that it developed state-wide compliance operations in 2017–18 in light of the concerns raised about inauthentic art. It stated:

The program consisted of four main phases: research and consultation, an education and engagement component, and two dedicated compliance operations which focused on potential contraventions of the ACL...Based on the information obtained, OFT was able to develop the scope of its education and compliance phases in accordance with ACL requirements. OFT incorporated an educational phase because it was important for traders to be aware of and understand their legal obligations under the ACL. The critical output of this phase was the development of a fact sheet for industry which OFT produced in consultation with the Australian Competition and Consumer Commission and key stakeholders.¹⁸

4.22 The Queensland OFT further noted that following inspections of 110 retailers of Indigenous craft, nine investigations were conducted due to possible ACL breaches and all instances were willingly rectified by the trader.¹⁹

4.23 FORM suggested that an approach combining education and preventative measures is needed. For example, prohibiting imitation art under the Australian Tourism Accreditation Program and stamping out inauthentic product sales by local governments.²⁰

Committee comment

4.24 A well-resourced, targeted education campaign aimed at tourists, domestic consumers, retailers, wholesalers and distributors would assist in reducing the prevalence of inauthentic First Nations art and craft products. Such a campaign would support the other methods suggested in this report for bolstering the sale of authentic products.

4.25 The principal goal of such a campaign is to enable the consumer to make an informed choice between authentic and inauthentic First Nations art and craft. The committee believes that many properly informed consumers would prefer to buy genuine products. An increased demand for authentic First Nations products will create opportunities to meet that demand.

18 Mr David Ford, Deputy Director-General, Department of Justice and Attorney-General, Queensland Office of Fair Trading (Qld OFT), *Committee Hansard*, 16 July 2018, Brisbane, p. 48.

19 Mr Ford, Qld OFT, *Committee Hansard*, 16 July 2018, Brisbane, p. 49.

20 FORM, *Submission 61*, p. 6.

- 4.26 The Queensland OFT approach to ensuring that traders of First Nations art and crafts are compliant with the ACL appears to be a very effective model. The committee would like to see this positive and direct approach adopted in other States and Territories. It is clear to the committee that State Governments need to tighten up their compliance and inspections and fines should become part of their strategy for retailers and suppliers of Indigenous style products who knowingly mislead their customers regarding its authenticity.

Labelling

- 4.27 Much of the current labelling of First Nations art and craft objects, such as souvenir items, is confusing and provides inadequate, or in some cases misleading, information about authenticity. However, a well-administered scheme, by providing clear information to customers, may help to reduce the prevalence of inauthentic Indigenous style goods in Australian stores.
- 4.28 Ms Janke suggested that trademarks ‘strengthen and identify authentic Indigenous-made or Indigenous-licensed arts and crafts products’.²¹
- 4.29 A previous but ultimately unsuccessful label of authenticity scheme (known as the National Certification Scheme) was introduced and administered by the now defunct National Indigenous Arts Advocacy Association (NIAAA) from the late 1990s until 2003.
- 4.30 The scheme was designed to protect artists by ensuring adequate payment, encouraging buyers to purchase Indigenous art, and differentiating authentic artwork from copied artwork. To register for use of the trademark, artists had to show they identified as Aboriginal or Torres Strait Islander, and had permission from their relevant community to make the artwork.²²
- 4.31 Under the scheme the NIAAA registered two trademarks – an authenticity mark and a collaboration mark. The authenticity mark certified that an artwork was created by an Indigenous artist. The collaboration mark certified that an Indigenous artist had made a significant contribution to an artwork’s creation.²³

21 Terri Janke and Company Pty Ltd, *Submission 73*, p. 3.

22 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* tabled 20 June 2007, p. 122.

23 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* tabled 20 June 2007, p. 122.

- 4.32 Criticisms of the scheme were that it was not well promoted or administered, and that many artists who applied for the mark were rejected as tests for Aboriginality were too complex, with over 75% of applications failing the requirements.²⁴
- 4.33 The symbol representing the mark was also criticised because ‘it was thought to be overly exclusive [and] that Indigenous artists not using the mark would be perceived as being inauthentic’.²⁵
- 4.34 The Department of Communications, Information Technology and the Arts advised the 2007 Senate inquiry into Indigenous Art that the scheme also failed because it did not make a distinction between fine art and souvenir products and merchandise.²⁶ Arts Law and AAAA made this same point in each of their submissions to the current inquiry.²⁷
- 4.35 Mr Tim Acker also submitted that the scheme was problematic and expensive, warning against a similar system being repeated.²⁸
- 4.36 It must be noted also, as highlighted by Arts Law and others, that some First Nations artists can be resistant to the notion that they have to somehow prove to others that what they are doing is genuine, and then go through a potentially burdensome administrative process to do so.²⁹
- 4.37 Prior to its closure, a review of the NIAAA had been commissioned by the Aboriginal and Torres Strait Islander Arts Board of the Australia Council for the Arts (Australia Council). This review noted that the take-up of the certification scheme was only of fraction of what had been hoped for.³⁰ The review also stated that there was considerable anger and disillusionment amongst stakeholders about the inadequate implementation and administration of this labelling scheme, which was seen at the time as a vital activity to address authenticity concerns.³¹

24 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* tabled 20 June 2007, pp. 122–23; Arts Law, *Submission 64.1*, p. 14.

25 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* tabled 20 June 2007, p. 123.

26 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* tabled 20 June 2007, p. 123.

27 Arts Law, *Submission 64.1*, p. 14, AAAA, *Submission 52*, p. 7.

28 Mr Tim Acker, *Submission 22*, p. 1.

29 Ms Robyn Ayres, Chief Executive Officer, Arts Law, *Committee Hansard*, Sydney, 6 March 2018, p. 30; Professor Jon Altman, Private Capacity, *Committee Hansard*, Melbourne, 8 March 2018, p. 19.

30 Dr Matthew Rimmer, *Exhibit 26b*, ‘Final Report of the Review of the National Indigenous Arts Advocacy Association’, p. iv.

31 Dr Rimmer, *Exhibit 26b*, ‘Final Report of the Review of the National Indigenous Arts Advocacy Association’, p. 19.

- 4.38 Many submitters have nevertheless called for the reconsideration of an authenticity labelling scheme in consultation with Indigenous communities.³²
- 4.39 Some art centres have tried developing their own labels.³³ However, where art centres produce labels, these can be copied by inauthentic producers:
- The issue is that the inauthentic producers pretty much mimic them. They'll put a photo of someone on there; they'll use a name; they'll tell a little story. With old-fashioned style labelling, as with any sort of rip-off product, they do their best to make it look and feel exactly like the authentic product.³⁴
- 4.40 Contributors to the inquiry also pointed to the use of trademark labels in New Zealand and Canada.³⁵
- 4.41 New Zealand's *Toi Iho* trademark identifies and distinguishes Māori-made products and certifies quality and authenticity. It was established in 2002 by Creative Arts New Zealand and Te Waka Toi (Māori Arts Board). 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. The administration of the trademark transferred to the Toi Iho Charitable Trust in 2013,³⁶ who maintain a register of artists and supports the advancement of Māori art.³⁷
- 4.42 In Canada, the government developed the *Igloo tag* 1958, to protect and distinguish Inuit art and craft products from mass-produced imitations, and certifies that products are handmade by Inuit artists.³⁸ A 2016 survey of the Inuit Arts Economy found that consumers highly valued the tag,

32 Ms Debbie Taylor, *Submission 12*, p. 2; Ms Libby Harward, *Submission 21*, p. 2; Dr Bianca Beetson, *Submission 23*, p. 2; Ms Trisha Newton, *Submission 43*, p. 1; Arts Law, *Submission 64:1*, p. 14; Arts Law, *Submission 64*, p. [6].

33 Ms Banduk Marika, Director, IartC, *Committee Hansard*, Sydney, 6 March 2018, p. 44.

34 Ms Jane Barney, Director, Visual Arts and Design Section, Department of Communications and the Arts (DCA), *Committee Hansard*, Canberra, 2 March 2018, p. 3.

35 The Treasury, *Submission 60*, p.5; Arts Law, *Submission 64:1*, p. 14; Queensland Tourism Industry Council, *Submission 82*, p. 7.

36 Toi Iho Charitable Trust, 'About Toi Iho', <<http://www.toiho.co.nz/about-toi-iho/>> viewed 22 January 2018; The Big Idea, 'Creative NZ scraps Maori art trademark toi iho', October 2009, <<https://www.thebigidea.nz/news/industry-news/2009/oct/62121-creative-nz-scraps-maori-art-trademark-toi-iho>> viewed 22 January 2018; Taranaki Daily News, 'Artists mourn trademark loss', *Stuff NZ*, October 2009, <<http://www.stuff.co.nz/taranaki-daily-news/news/2996676/Artists-mourn-trademark-loss>> viewed 22 January 2018.

37 Toi Iho Charitable Trust, 'About Toi Iho', <<http://www.toiho.co.nz/about-toi-iho/>> viewed 22 January 2018.

38 Inuit Art Foundation, 'The Igloo Tag Trademark', <<http://iglootag.inuitartfoundation.org/>>, viewed 25 January 2018.

- while retailers and wholesalers saw little value in it.³⁹ However, the Inuit Art Foundation has noted that a Canadian government study estimates the tag contributes CAD\$3.5 million annually to the Inuit arts economy.⁴⁰
- 4.43 While these labelling schemes appear to have had some success, the AAAA stress that for a new labelling scheme to be effective in Australia, it should be directed at souvenir style products and merchandise; and crucially have a strong education, monitoring and compliance program.⁴¹
- 4.44 Ananguku Arts and Culture Aboriginal Corporation commented that while better product labelling has merit, the onus should be on the suppliers to sell authentic product with penalties imposed if they do not.⁴²
- 4.45 Professor Jon Altman also cautions that any regulation not be overly complex to administer and recommended that 'Indigenous stakeholders [b]e empowered to determine what is or is not authentic rather than [it being] determined by [a] centralised committee or mandatory authenticity labelling requirement'.⁴³
- 4.46 Other contributors to the inquiry also stressed that any new system of labelling for First Nations art products must have an adequate public education campaign behind it.⁴⁴
- 4.47 The committee notes the emerging success of the SAM (Stories Art Money) arts management database developed by Desart with Indigenous Visual Arts Industry Support (IVAIS) funding. SAM is designed to collate income data and measure financial performance and has now been adopted by more than 80 art centres.⁴⁵
- 4.48 Notably, the Government has recently announced \$150 000 in funding for a digital labelling trial in 2018–19 for up to three art centres, to be conducted by Desart utilising its SAM platform.⁴⁶

39 Big River Analytics, *Impact of the Inuit Arts economy*, Indigenous and Northern Affairs, Canada, 2017, <<https://www.aadnc-aandc.gc.ca/eng/1499360279403/1499360407727>>, viewed 25 January 2018.

40 Inuit Art Foundation, 'The IAF Announces Igloo Tag Transfer', 7 July 2017, <<https://www.inuitartfoundation.org/igloo-tag-announcement/>> viewed 25 January 2018.

41 AAAA, *Submission 52*, pp. 9, 19.

42 Ananguku Arts and Culture Aboriginal Corporation, *Submission 86*, p. 3.

43 Professor Jon Altman, *Submission 118*, p. 11.

44 Ms Helene George, Founder and Managing Director, Creative Economy, *Committee Hansard*, Melbourne, 8 March 2018, p. 3; Professor Altman, Private Capacity, *Committee Hansard*, Melbourne, 8 March 2018, p. 20.

45 Mr Philip Watkins, Chief Executive Director, Desart Inc., *Committee Hansard*, Alice Springs, 1 May 2018, p. 14.

46 DCA, *Supplementary Submission 131:1*, Answer to Question on Notice, p. 2.

Committee comment

- 4.49 There is no current labelling standard for the many souvenir products that contain First Nations imagery and this makes it virtually impossible for any consumer to distinguish authentic and inauthentic products. The committee visited souvenir and gift shops during the inquiry and noted that many of the labels on Indigenous style products provided little or no information on the item's origin. It was also not clear from the labels on the numerous souvenir products made overseas if the artwork was genuinely and fairly licenced.
- 4.50 A properly resourced and well managed labelling system for the Indigenous souvenir market has merit. Care must be taken however to avoid the mistakes of the previous failed National Certification Scheme.
- 4.51 Any new labelling scheme should be well targeted and relatively simple to administer. It must be developed in conjunction with First Nations artists, art centres, and peak bodies, and in consultation with wider Indigenous communities. It should take advantage of new technologies whenever possible.
- 4.52 Whilst any such mark would not be compulsory, there must be a) an incentive for the artist, eg promotion of this label through various channels such as an international arrivals video, and b) an incentive for the retailer and supplier to recognise their ethical approach to such items.
- 4.53 The committee welcomes the decision of the government to fund a digital label trial using Desart's already established SAM platform and looks forward to seeing the results. If such a labelling system were to prove successful among art centres in the first instance, this would likely go a long way to establishing such a system more widely.
- 4.54 It may not prove feasible however to develop a single, universally accepted label that will be used by the majority of First Nations artists. Care must be taken to ensure that genuine Indigenous art and craft is not disadvantaged if a particular mark were to be developed but not adopted in every case.
- 4.55 It should be noted also that labelling, even if successfully implemented and promoted, will not address the prevalence of inauthentic products on its own and must be used in conjunction with ethical codes of conduct and the effective education of suppliers, vendors and consumers about authenticity and respect for First Nations cultures.

Consumer and copyright law

- 4.56 Australian consumer law (ACL) is an ‘economy-wide law of general application’, prohibiting misleading or deceptive conduct and false representations in the marketing and sale of products, including First Nations art and craft products and merchandise.⁴⁷ However, it does not preclude the sale of inauthentic art and craft products, unless they are falsely labelled.⁴⁸
- 4.57 Australian intellectual property (IP) laws, including copyright, do not have specific provisions to protect Indigenous cultural expressions.⁴⁹ Rather, the *Copyright Act 1968* (Cth) ‘protects the form or way an idea or information is expressed, not the idea or information itself’. Protection is granted automatically at the time of creation and generally lasts 70 years after an artist’s death.⁵⁰ Under the Copyright Act individuals, including artists, have the right to reproduce or copy, publish, perform and amend their own work. For other individuals or organisations to do the same, permission must be sought from the owner of the copyright.⁵¹
- 4.58 Notwithstanding these provision, the IartC notes that many artists are unaware of, or have a limited understanding of, their rights. Some artists believe that once their original work is sold to a buyer, that buyer now has the rights over the work to reproduce it without permission or fee.⁵²
- 4.59 Others point to the protections prescribed by the *United Nations Declaration on the Rights of Indigenous Peoples* ‘to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions’, noting that current legislation does not recognise these rights.⁵³

47 ACCC, *Submission 54*, p. 1.

48 ACCC, *Submission 54*, p. 3; Terri Janke and Company Pty Ltd, *Submission 73*, p. 2; Ms Stephanie Parkin, *Committee Hansard*, 16 July 2018, p. 44.

49 World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Secretariat (WIPO IGC), ‘Survey on existing forms of intellectual property protection for traditional knowledge’, Doc. WIPO/GRTK/IC/2/5, WIPO, p. 8, <<http://www.wipo.int/export/sites/www/tk/en/igc/pdf/replies.pdf>> viewed 11 September 2018.

50 *Copyright Act 1968* (Cth); DCA, ‘Short Guide to Copyright’, pp. 3, 6, 11, <<https://www.communications.gov.au/documents/short-guide-copyright>> viewed 12 September 2018.

51 Arts Law, ‘What is copyright?’, <<https://www.artslaw.com.au/legal/raw-law/what-is-copyright>> viewed 12 September 2018.

52 IartC, *Submission 138*, p. 3.

53 Ms Delwyn Everard, *Submission 83*, p. 1.

- 4.60 The City of Melbourne *Code of Practice for galleries and retailers of Indigenous Art* (CoP) tackles this issue through its copyright provision, which requires that subscribed galleries and retailers respect and acknowledge Indigenous artists' copyright ownership. The CoP establishes a number of key directives to gallerists and retailers in consideration of safeguarding artists' copyright, including:
- advising customers that copyright remains with the artist, even after the physical work is purchased;
 - not pressuring artists to license or assign copyright of their works;
 - obtaining prior written consent from artists to use works for advertising and promotional purposes; and
 - taking measures to protect artists' works, where images are reproduced on online.⁵⁴
- 4.61 Arts Law and the IartC, supported by other industry organisations and experts⁵⁵ believe modifying the ACL will effectively address the sale of inauthentic products in the short term.⁵⁶ They propose changing the *Unfair Practices* section of the ACL to make it an offence to supply or offer to supply:
- an artwork that (being a creative expression in a material form) includes *Indigenous Cultural Expression* that is not either
 - ⇒ 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...
 - certain traditional [artefacts] that are not handcrafted in Australia by Aboriginal or Torres Strait Islander person.⁵⁷

54 T Janke, *Code of Practice for galleries and retailers of Indigenous Art*, City of Melbourne, 2017, p. 11, <<https://www.melbourne.vic.gov.au/SiteCollectionDocuments/code-of-practice-indigenous-arts.pdf>> viewed 2 August 2018.

55 Terri Janke and Company Ltd, *Submission 73*, p. 2; Darwin Aboriginal Art Fair (DAAF), *Submission 64*, p. 5; Arnhem, Northern and Kimberley Artists Aboriginal Corporation (ANKA), *Submission 132*, p. 6; Mr Kon Stellios, Partner, Allens Linklaters, *Committee Hansard*, 6 March 2018, Sydney, pp. 27–28; Ms Lydia Miller, Australia Council for the Arts (Australia Council), *Committee Hansard*, 6 March 2018, Sydney, p. 50; Ms Stephanie Rajalingam, Art Centre Manager, Warmun Art Centre, *Committee Hansard*, 11 April 2018, Warmun, p. 2.

56 Arts Law and IartC, *Submission 149*, p. 1.

57 IartC, *Submission 138*, p. [25]

- 4.62 Mr Kon Stellos, of Allens Linklaters, highlighted a number of advantages to amending the ACL to prohibit the sale of works that include Indigenous cultural express, unless created by an Indigenous person or reproduced under license:
- ...it automatically brings with it the power of the [ACCC] to enforce the prohibition[;]
 - ...the [ACL] already contains within it a broad set of penalties and remedies which the court can order when there's a breach of the prohibitions...the penalties and remedies which appear in the [ACL] are appropriate because they seek to deter the continued sale of inauthentic products[; and]
 - ...it's probably the most cost-effective option when compared with the paradigm of alternative regimes: sui generis legislation, a certification labelling regime or even relying on the existing misleading or deceptive conduct provisions in the ACL.⁵⁸
- 4.63 Arts Law and the IartC also stressed that amending the ACL eliminates the need to establish a new administrative and enforcement agency, as this would continue under the ACCC, with the assistance of state and territory fair trading agencies.⁵⁹ Further, consumers and businesses are familiar with the powers and operation of the ACCC.⁶⁰
- 4.64 However, the ACCC, although recognising the significant harm the sale of inauthentic products causes First Nations peoples and consumers, is of the view that because the ACL is an 'economy-wide law', it is not best placed to safeguard Indigenous culture.⁶¹

58 Mr Stellos, Allens Linklaters, *Committee Hansard*, 6 March 2018, Sydney, pp. 27–28.

59 Arts Law and IartC, *Submission 149*, pp. 1–2.

60 Arts Law and IartC, *Submission 149*, pp. 1–2.

61 ACCC, *Submission 54*, pp. 1, 4.

- 4.65 The ACCC has enforced the ACL in a number of cases relating to the sale of inauthentic Indigenous art and craft products,⁶² and some artists have successfully used copyright to protect their works.⁶³ However, many artists, art centres, legal experts and industry organisations believe that existing consumer and copyright laws are inadequate as a protector of First Nation cultural expressions because they do not prohibit the selling of inauthentic products,⁶⁴ noting that:
- ...the law should recognise that it is inappropriate for Indigenous culture to be unfairly misappropriated for commercial gain; the concern is not just about misleading consumers.⁶⁵
- 4.66 One such example of enforcement by the ACCC occurred in October 2018. The Federal Court concluded that Birubi Art Pty Ltd, a wholesaler of souvenirs based in Queensland, had misleadingly given the impression that 18 000 of its boomerangs, bullroarers and other artefacts were genuine First Nations products, when in fact they had been made in Indonesia.⁶⁶
- 4.67 Unfortunately, the ACCC is not able to pursue every case, only taking a certain number to the Federal Court each year. There are sometimes challenges in distinguishing ‘overt representations’ that a product is Indigenous in origin or simply Indigenous in style. Other challenges may relate to obtaining evidence, whether that is dealing with vulnerable consumers or uncovering the artists and origin of artworks.⁶⁷
- 4.68 In recognising their inability to pursue all cases that are brought to their attention individually, the ACCC tries to pursue alternative outcomes. This includes engaging with partners such as the IartC and fair-trading agencies, as well as with traders and consumers through education.⁶⁸

62 ACCC, *Submission 54*, p. 2–3.

63 Terri Janke and Company Pty Ltd, *Submission 73*, p. 1; Janke, T 1995, ‘The carpets case’, *Alternative Law Journal / Aboriginal Law Bulletin*, vol. 20, no. 3 / vol. 3, no. 72, February 1995, pp. 36–39, <<http://www.austlii.edu.au/au/journals/AltLawJl/1995/15.pdf>> viewed 12 September 2018.

64 Arts Law & IartC, *Submission 149*, p. 6; DAAF, *Submission 62*, p. 5; AAAA, *Submission 52*, pp. 4, 10; Arts Law, *Submission 64*, pp. 5–10; Mr Ian Goss, Chair, World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC), *Committee Hansard*, pp. 4, 8.

65 Arts Law, *Submission 64*, p. 10.

66 ACCC media release <<https://www.accc.gov.au/media-release/court-finds-that-birubi-art-misled-consumers-over-fake-indigenous-australian-art>> viewed 5 December 2018.

67 Mr Scott Gregson, Executive General Manager, Enforcement Division, ACCC, *Committee Hansard*, 15 February 2018, Canberra, p. 1.

68 Mr Gregson, ACCC, *Committee Hansard*, 15 February 2018, Canberra, p. 1.

- 4.69 As such, the ACCC believes any amendments to the ACL should focus on misleading behaviour, instead of outright prohibition;⁶⁹ and that a certification scheme, such as a trademark, and an education campaign would ‘encourage consumers and businesses to support suppliers of genuine [products]’.⁷⁰
- 4.70 Other stakeholders agreed that the ACL is not appropriate to protect First Nations cultural expressions because it is aimed at ‘providing a baseline standard for all traders across all products’⁷¹ and that measures beyond the ACL are needed instead.⁷²
- 4.71 The Copyright Act, designed for individuals and limited duration, is fundamentally unsuited to recognising communal ownership,⁷³ and the enduring nature of Indigenous cultural expressions that ‘have been reproduced over tens of thousands of years’.⁷⁴
- 4.72 Beyond that, the application of existing copyright laws may be problematic because Indigenous works may not be original, in a material form or have an identifiable author.⁷⁵
- 4.73 Mr Ian Goss, of the World Intellectual Property Organization (WIPO), also points out that under the Copyright Act third parties are able to make works deriving from First Nations cultural expressions, with the copyright then belonging to the third party.⁷⁶ For example, a person who makes a recording of Indigenous people singing becomes recognised as the copyright owner, not the people who are singing.⁷⁷
- 4.74 A previous attempt was made to amend the Copyright Act to include provisions for communal moral rights in 2003.⁷⁸ However, Ms Janke noted that this ‘was not well received by Indigenous interest groups [due to its] complexity and limited utility’.⁷⁹ She further noted that moral rights will

69 Mr Gregson, ACCC, *Committee Hansard*, 15 February 2018, p. 2.

70 ACCC, *Submission 54*, p. 4.

71 Mr Ford, Qld OFT, *Committee Hansard*, 16 July 2018, Brisbane, p. 51.

72 Mr Ford, Qld OFT, *Committee Hansard*, 16 July 2018, Brisbane, p. 51; Dr Kylie Pappalardo, *Private Capacity*, *Committee Hansard*, 17 July 2018, Brisbane, p. 3.

73 Ms Stephanie Parkin, *Committee Hansard*, 16 July 2018, Brisbane, p. 44.

74 AIATSIS, *Submission 127*, p. 11.

75 T Janke, *Our Culture: Our Future*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Aboriginal and Torres Strait Islander Commission (ATSIC), 1998, p. xxii.

76 Mr Goss, WIPO IGC, *Committee Hansard*, 16 August 2018, Canberra, p. 8.

77 Mr Goss, WIPO IGC, *Committee Hansard*, 16 August 2018, Canberra, p. 8.

78 Dr Rimmer, *Private Capacity*, *Committee Hansard*, 17 July 2018, Brisbane, pp. 4–5.

79 T Janke, *Indigenous Knowledge: Issues for protection and management*, IP Australia and the Department of Industry, Innovation and Science (DIIS), 2018, p. 43.

not stop the misappropriation of works considered to be ‘in the public domain such as rock art images’.⁸⁰

4.75 Dr Kylie Pappalardo and Ms Stephanie Parkin, copyright lawyers and academics, cautions against changing the Copyright Act to deal with Indigenous works, because for non-Indigenous works current copyright protections are appropriate.⁸¹

4.76 Instead, both Dr Pappalardo and Ms Parkin, advocate for separate, special legislation,⁸² that is ‘deeper than copyright law can provide’.⁸³

Dr Pappalardo further explains:

What the Indigenous communities are asking for is really stringent protection of their culture: high levels of control over things like artistic styles and stories, and protection that's much more enduring than the length of copyright protection.⁸⁴

4.77 Arts Law, Ms Janke and Mr Goss also advocate for a unique legal approach to safeguarding Indigenous cultural heritage,⁸⁵ with Mr Goss pointing to mechanisms that have been developed internationally,⁸⁶ including:

- Secretariat of the Pacific Community’s (SPC) *Model Law for the Protection of Traditional Knowledge and Expressions of Culture* (Model Law);
- African Regional Intellectual Property Organisation’s (ARIPO) *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (Swakopund Protocol); and
- Melanesian Spearhead Group’s (MSG) *Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture* (Treaty).⁸⁷

80 T Janke, *Indigenous Knowledge: Issues for protection and management*, IP Australia and DIIS, 2018, p. 43.

81 Dr Pappalardo, Private Capacity, *Committee Hansard*, 17 July 2018, Brisbane, p. 3.

82 Dr Pappalardo, Private Capacity, *Committee Hansard*, 17 July 2018, Brisbane, p. 4; Ms Parkin, *Committee Hansard*, 16 July 2018, Brisbane, p. 44.

83 Dr Pappalardo, Private Capacity, *Committee Hansard*, 17 July 2018, Brisbane, p. 4.

84 Dr Pappalardo, Private Capacity, *Committee Hansard*, 17 July 2018, Brisbane, p. 4.

85 Arts Law, *Committee Hansard*, 6 March 2018, p. 29; Arts Law, *Submission 64.1*, p. [31]; T Janke, *Our Culture: Our Future*, AIATSIA and ATSIC, 1998, p. 194; Mr Goss, WIPO IGC, *Committee Hansard*, 16 August 2018, p. 2.

86 Mr Goss, WIPO IGC, *Committee Hansard*, 16 August 2018, p. 2.

87 Mr Goss, WIPO IGC, *Committee Hansard*, 16 August 2018, p. 2.

- 4.78 The Model Law assists governments to legally protect TK and TCEs against exploitation and inappropriate commercialisation.⁸⁸ The SPC considers the Model Law to be a starting point, noting that individual countries are free to ‘adopt and/or adapt the provisions...in accordance with their own national needs [and] wishes of its traditional communities’.⁸⁹ The Model Law designates that a Cultural Authority should administer this law.⁹⁰
- 4.79 The Swakopmund Protocol also protects TK and TCEs against misappropriation and unlawful exploitation, and establishes an agency to implement and administer the protocol.⁹¹
- 4.80 As signatories to the MSG Treaty, Fiji, Papua New Guinea, the Solomon Islands, Vanuatu and New Caledonia agree to ‘strengthen their cooperation and collaboration’ to protect, preserve and promote the recognition of traditional knowledge and expressions of culture, including protection ‘against misappropriation, misuse and unlawful exploitation’.⁹²
- 4.81 However, Mr Goss does note ‘that there remains a level of immaturity in...these laws’, and therefore, sees adopting new legislation as a longer term solution, needing careful consideration.⁹³ Ms Janke also believes this is a long-term goal that will require significant Indigenous community involvement.⁹⁴
- 4.82 Ms Parkin pointed to the Victorian *Aboriginal Heritage Act 2006*. Amendments to the Act in 2016 recognise intangible cultural heritage rights such as ‘stories, traditional knowledge, song and dance’.⁹⁵ The amendments also introduce a mechanism to record Traditional Owner groups’ rights on a register, and ensure legal obligations on organisations

88 Secretariat of the Pacific Community (SPC), *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002, p. [iii].

89 SPC, *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002, p. [iii].

90 SPC, *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002, p. 15.

91 African Regional Intellectual Property Organisation (ARIPO), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, 2010, pp. 7-8.

92 Melanesian Spearhead Group (MSG), *Framework Treaty on Traditional Knowledge and Expressions of Culture*, 2011, p. 3.

93 Mr Goss, WIPO IGC, *Committee Hansard* 16 August 2018, p. 2.

94 Terri Janke and Company, *Indigenous Knowledge: Issues for protection and management*, IP Australia and DIIS, 2018, p. 119; Terri Janke and Company, *Submission 73*, p.4.

95 Ms Parkin, *Committee Hansard*, 16 July 2018, Brisbane, p. 44.

to engage with owners, safeguarding owners' rights to decide how traditional knowledge is used.⁹⁶

Committee comment

- 4.83 Neither the ACL nor copyright law were designed to protect First Nations cultural expressions, and therefore each is inadequate to do so. The ACL prevents inauthentic products from being passed off as genuine under provisions that prevent businesses from misleading their customers. Current copyright law provides any artist, whether Indigenous or not, with legal protection against reproduction without permission.
- 4.84 The situation regarding inauthentic art is, however, far more complex and nuanced than this. In the first instance, 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. Stand-alone legislation may be the best long-term option to resolve this complex issue.

Indigenous Art Code

- 4.85 The *Indigenous Art Code* (the Code) is a voluntary industry code of conduct administered by Indigenous Art Code Ltd (IartC). It is designed to promote the fair and ethical trade of First Nations artworks. Adherence to the code requires transparency in the promotion and sale of art and that disputes are dealt with efficiently and fairly.⁹⁷ It was launched in 2010 by the National Association for the Visual Arts (NAVA) and the Australian Council for the Arts following consultation with artists, art centres, galleries and peak bodies.⁹⁸
- 4.86 Membership costs \$150 annually for dealers and support members but is free for artists.⁹⁹ The Commonwealth Government also provides funding and administrative support through its IVAIS program.¹⁰⁰

96 Ms Parkin, *Committee Hansard*, 16 July 2018, Brisbane, p. 44; Victorian Department of Premier and Cabinet, *Aboriginal Heritage Amendment Act 2016*, <<https://www.dpc.vic.gov.au/index.php/communication/communication-planning-and-mams/7-about/897-aboriginal-heritage-amendment-act-2016>> viewed 30 October 2018.

97 IartC, 'FAQS', 2018, <<https://indigenousartcode.org/faqs/>> viewed 30 October 2018.

98 IartC, 'The Indigenous Art Code', 2018, <<https://indigenousartcode.org/the-indigenous-art-code/>> viewed 30 October 2018.

99 Ms Sullivan, IartC, *Committee Hansard*, 6 March 2018, p. 44; IartC, 'FAQS', 2018, <<https://indigenousartcode.org/faqs/>> viewed 30 October 2018.

- 4.87 The Code requires that its members not engage in misleading or deceptive conduct in relation to any of the following:
- the authenticity or provenance of an artwork;
 - any sponsorship, approval or affiliation of an artist (including an artist's affiliation with a dealer or an art centre);
 - the place of origin of an artwork;
 - that an artwork has been produced by an Indigenous artist or artists; and
 - the artwork's exhibition history, reference notes, authenticity statements or price.¹⁰¹
- 4.88 The Code also requires dealer members to provide a 'Code Certificate' for artworks valued over \$250. This certificate includes the artist's name; date and location of the work; a description of size and type of work; the contact details for a person who can identify the work and their signature; and the dealer member's details.¹⁰²
- 4.89 The IartC maintains a register of members, investigates complaints and breaches by members, and issues sanctions for non-compliance.¹⁰³
- 4.90 Evidence to the inquiry was largely supportive of the work of the IartC and there was a general belief that it should be better resourced to enable it to expand its membership and profile. Currently, the IartC, in addition to membership fees, receives \$200 000 in Australian Government funding and has only one full time staff member, CEO Gabrielle Sullivan.
- 4.91 NAVA argues that the IartC should be appropriately resourced and implemented nationally 'to create better informed international tourists and buyers of Australian Indigenous cultural products'.¹⁰⁴
- 4.92 Create NSW proposes increased resources for the IartC as a strategy to promote authentic products.¹⁰⁵
- 4.93 The SA Government recommended ongoing and expanded funding for the IartC as a support organisation in the First Nations art sector.¹⁰⁶

100 Ms Sullivan, IartC, *Committee Hansard*, 6 March 2018, p. 44; IartC, 'FAQS', 2018, <<https://indigenouartcode.org/faqs/>> viewed 30 October 2018.

101 IartC, *Indigenous Art Code*, 2010, <<https://indigenouartcode.org/wp-content/uploads/2017/03/Indigenous-Art-Code.pdf>> viewed 30 October 2018.

102 IartC, 'FAQS', 2018, <<https://indigenouartcode.org/faqs/>> viewed 30 October 2018.

103 IartC, 'Board of Directors', 2018, <<https://indigenouartcode.org/board-of-directors/>> viewed 30 October 2018.

104 National Association for the Visual Arts (NAVA), *Submission 55*, p. [2].

105 Create NSW, *Submission 137*, pp. 8–9.

106 South Australian Government, *Submission 160*, p. [10].

4.94 FORM also supports the IartC in its recommendations to the inquiry:

Equip consumers with the knowledge to make informed purchasing decisions by continual support and promotion of the Indigenous Art Code principles (truth in labelling), and proactively educating tourists/wider society on the negative impacts of purchasing fake goods.¹⁰⁷

4.95 Martumili Artists comment on the value of the IartC in promoting ethical dealings in the art industry:

Through the work of the Indigenous Art Code, industry dealers and creators are held to a standard of ethical trade, transparency of promotion and representation of ATSI Indigenous Cultural and Intellectual property (ICIP). Through [IartC] certification, dealers and creators are acknowledging the importance of ATSI sovereignty and recognition within the Aboriginal Art industry. There is no reason why this standard of business could not be adopted more widely, throughout the national art, craft or souvenir/tourism market.¹⁰⁸

4.96 Spinifex Hill Artists from the Pilbara region of WA also regard the IartC as a valuable resource. Mr Greg Taylor, Studio Manager, commented:

I think the code is a very positive step and I'm very happy it exists. Even as an educational tool for people working in art centres it's so valuable, that here we have the best practice across the country...For myself, we've started an art centre and we knew the Indigenous Art Code was key, so we were able to start off on the right foot.¹⁰⁹

4.97 A great many contributors to the inquiry expressed the view that the IartC should in fact be mandatory.¹¹⁰

107 FORM, *Submission 61*, p. 7.

108 Martumili Artists, *Submission 63*, p. [2].

109 Mr Greg Taylor, Studio Manager, Spinifex Hill Artists, *Committee Hansard*, Darwin, 9 August 2018, p. 34.

110 See for example Ms Ayres, Arts Law, *Committee Hansard*, Sydney, 6 March 2018, p. 30; Australia Council, *Submission 96*, p. 18; Ms Rajalingam, Warmun Art Centre, *Committee Hansard*, Warmun, 11 April 2018, p. 2; Mr Darrell Harris, Manager, Yarrabah Arts and Cultural Precinct, *Committee Hansard*, Cairns, 15 July 2018, p. 16.

4.98 Gallery owner Mr Paul Johnstone argued that before any mandatory code was explored, the existing IartC should be properly resourced and expanded. He stated:

Build the code up for what it was to be in the first place – give it some policing power, give it some teeth and give it some resources – and then see what type of reaction you get and how well they can actually put themselves into these issues.¹¹¹

4.99 Regional Arts Australia informed the committee that the board of the IartC had at one time agreed that a mandatory code was the best outcome.¹¹² Executive Director Mr John Oster noted however:

There are very few mandatory codes in Australia. To convince the ACCC, the minister and the sector that a mandatory code was the best outcome was an impossible feat. I think we've come to a place where everyone's come to learn to live with the code as a guide and as an example of good practice, and then doing good work to educate people and to work through licences. I think the code does excellent work, but I don't think it's gotten to the point where it's encapsulated the whole industry because there's still a whole section of dealers and tourist shops that are operating outside of any understanding of the code.¹¹³

4.100 IartC and Arts Law have also pointed out that a mandatory code would need to be legislated for as part of the ACL and therefore be enforced by the ACCC.¹¹⁴

4.101 There was also a concern that the IartC could be utilised by unethical operators and that any mandatory system would group these entities together with ethical practitioners. Mr Matt Ward, Director of Outstation Gallery (and previous director of the IartC) remarked:

I think the problem with it being mandatory is that you group a whole lot of people in it and it's like grouping apples and oranges... There are people who are currently members of the Indigenous Art Code who I don't like being affiliated with. What they do and what I do are completely different. By making it mandatory, you're kind of grouping everyone in together... There are people on there who I don't like being associated with.¹¹⁵

111 Mr Paul Johnstone, Director, Paul Johnstone Gallery, *Committee Hansard*, Darwin, 9 August 2018, p. 8.

112 Mr John Oster, Executive Director, Regional Arts Australia, *Committee Hansard*, Alice Springs, 1 May 2018, p. 4.

113 Mr Oster, Regional Arts Australia, *Committee Hansard*, Alice Springs, 1 May 2018, p. 4.

114 Arts Law & IartC, *Submission 149*, pp. 6-9.

115 Mr Matt Ward, Director, Outstation Gallery, *Committee Hansard*, Darwin, 9 August 2018, p. 7.

Committee comment

- 4.102 The IartC is extremely well-regarded by most Indigenous artists, art centres, and by different art organisations across the country, but needs to be better funded to achieve its mandate. The IartC cannot promote the Code more widely and properly monitor compliance with the limited resources it currently has.
- 4.103 Compliance issues have been highlighted by concerns that some existing members of IartC are using the Code to validate their business practices, but are not actually adopting its principles. These could be addressed by enhancing the capacity of the organisation to detect and exclude such operators.
- 4.104 An expanded IartC will be an important component of any future policy settings aimed at reducing the prevalence of inauthentic art and thereby increasing the opportunities for First Nations artists to sell their work. The committee therefore welcomes the recent endorsement from the meeting of Federal and State Cultural Ministers in September 2018 to provide additional funding to the IartC.¹¹⁶ This funding must be sufficient to enable the Code to become the national standard over the long-term.
- 4.105 There were calls by some during the inquiry for the Code to become mandatory. This is understandable given the frustration of many First Nations artists and communities with the sale of inauthentic products and unethical practices by some in the industry. However, the committee notes the view of IartC that its Code is inherently a voluntary set of principles, and that any mandatory practices would actually need to be enshrined in law and enforced by a regulatory agency such as the ACCC.
- 4.106 The committee is of a mind to recommend a mandatory code given that self-regulation within this industry has proved to be largely ineffective. In the first instance, however, it would be useful to assess the impact of a properly resourced IartC. It is possible that a respected, properly funded and much more widely recognised IartC will eventually lead to behavioural change in the industry by putting non-members at a commercial disadvantage.
- 4.107 The committee would like to see an evaluation of industry practices within two years of adequate funding being made available to IartC. Steps should be taken to implement mandatory rules if there is little evidence of improvement in these behaviours.

¹¹⁶ DCA, *Supplementary Submission 131:1*, Answer to Question on Notice, p. 5.

National Indigenous Art & Cultural Authority

- 4.108 A further means of safeguarding traditional heritage and cultural expressions, and therefore addressing the prevalence of inauthentic art and craft in the market place, is to establish a National Indigenous Cultural Authority (NICA) or National Indigenous Art and Cultural Authority (NIACA).
- 4.109 Under the United Nations *Declaration on the rights of Indigenous peoples*, First Nations peoples and communities have the right to ‘maintain, control, protect and develop their [ICIP] over [their] cultural heritage, [TK] and [TCEs]’.¹¹⁷ If these rights are to be recognised, then a mechanism must be established to assert and enforce those rights.¹¹⁸
- 4.110 Ms Janke strongly advocates for an independent peak advisory body to safeguard ICIP.¹¹⁹ In her view, such a body should be comprised of various Indigenous organisations and be independent of government, but would need government assistance. Responsibilities would relate to the protection, advocacy and promotion of First Nations cultures, including TK, TCEs and ICIP. Her model is intended to establish a framework for:
- developing industry polices and protocols;
 - providing advice on ICIP rights;
 - monitoring exploitation of cultures, including ensuring benefit sharing and prior informed consent;
 - public education and awareness;
 - connecting users with custodians and rights holders to facilitate consultation processes and approvals;

117 United Nations 2007, *Declaration on the Rights of Indigenous Peoples*, p. 11.

118 T Janke, *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd, Sydney, 2009, p. 17; Ms Ayres, *Committee Hansard*, 6 March 2018, Sydney, p. 34.

119 T Janke, *Our Culture: Our Future*, AIATSIS and ATSIC, Canberra, 1998; T Janke, *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd, Sydney, 2009; T Janke, *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, Terri Janke and Company Pty Ltd, Sydney, 2012; Terri Janke and Company, *Cultural Protocols and the Arts*, Terri Janke and Company, Sydney, 2016; Terri Janke and Company, *Indigenous Knowledge: Issues for protection and Management*, IP Australia and DIIS, 2018, <https://www.ipaustralia.gov.au/sites/g/files/net856/f/ipaust_ikdiscussionpaper_28march2018.pdf> viewed 18 October 2018.

- providing culturally-appropriate and inexpensive dispute resolution; and
 - advancing ICIP rights domestically and internationally.¹²⁰
- 4.111 In circumstances of ICIP being used ‘without prior informed consent and benefit sharing’, the authority could take a regulatory role by imposing fines for infringements or referring cases to the ACCC.¹²¹
- 4.112 Where products are produced in accordance with consent processes, a trademark or brand ‘could be applied to [those] products’,¹²² endorsing the producer’s compliance with NIAC processes and protocols. This would be unlike the former label of authenticity, which endorsed the product itself, this is about ‘endorsing the process...about saying that we're following a process’.¹²³ Ms Janke envisages this as being similar to the IartC logo, where registered galleries and retailers, by subscribing to the Code, have the right to use the logo.¹²⁴
- 4.113 A number of individuals and organisation support the establishment of a NIACA or NICA to ‘provide a co-ordinated response to the protection of [ICIP]’, [TK] and expressions of culture.¹²⁵
- 4.114 Submissions by Arts Law and the IartC endorse the adoption of Ms Janke’s cultural authority model to protect ICIP. Arts Law believes that a cultural authority could achieve this by administering licencing agreements and investigating complaints of non-compliance, as well as managing a label of authenticity.¹²⁶

120 T Janke, *Our Culture: Our Future*, AIATSIS and ATSIC, Canberra, 1998, p. xli; Terri Janke and Company, *Submission 73*, pp. 3-4; Ms Janke, *Committee Hansard*, 6 March 2018, Sydney, p. 56-57; Terri Janke and Company, *Indigenous Knowledge: Issues for protection and management*, IP Australia and DIIS, 2018, p.117, <https://www.ipaustralia.gov.au/sites/g/files/net856/f/ipaust_ikdiscussionpaper_28march2018.pdf> viewed 18 October 2018.

121 Terri Janke and Company, *Submission 73*, p. 4.

122 Ms Janke, *Committee Hansard*, 6 March 2018, Sydney, pp. 56-58.

123 Ms Janke, *Committee Hansard*, 6 March 2018, Sydney, pp. 56-58.

124 Ms Janke, *Committee Hansard*, 6 March 2018, Sydney, p. 58.

125 Ms Debbie Taylor, *Submission 12*, p. 2; Ms Libby Harward, *Submission 21*, p. 2; Dr Beetson, *Submission 23*, p. 3; Dr Rimmer, *Submission 95*, p. 16; Ms Clothilde Bullen, *Committee Hansard*, 6 March 2018, Sydney, p. 17; Dr Beetson, *Committee Hansard*, 14 July 2018, Cairns, p. 10; Mr Leo Akee, UMI Arts, *Committee Hansard*, 14 July 2018, Cairns, p. 18; Ms Nancy Bamaga, *Committee Hansard*, 16 July 2018, Brisbane, p. 5; Mr Bob Weatherall, *Committee Hansard*, 16 July 2018, Brisbane, p. 10; Ms Merindah Donnelly, *BlakDance*, *Committee Hansard*, 16 July 2018, Brisbane, p. 11; Mr Elliott Bledsoe, Arts Front, *Committee Hansard*, 16 July 2018, Brisbane, p. 37; Mr Goss, WIPO IGC, *Committee Hansard*, 16 August 2018, Canberra, p. 3.

126 Arts Law, *Submission 64.1*, pp. 14, 16; Indigenous Art Code, *Submission 138*, p. 3.

- 4.115 Ms Joella Warkill, of BlakDance, highlighted the importance of resourcing for this authority:

We have the skill in our sector; we do not have the financial resourcing. We call on the Australian government to resource the development of a national Indigenous arts and cultural authority to provide us with the infrastructure and administrative processes to tackle one of the biggest issues for Indigenous arts in the 21st century. Fake art harms culture.¹²⁷

- 4.116 The Australia Council in October 2018 published a discussion paper on the establishment of a NIACA, arguing that First Nations peoples should be ‘enabled to control and protect their [TCEs]’ through a ‘collective voice in relation to arts and cultural’ matters.¹²⁸

- 4.117 The Australia Council notes that while peak bodies exist, with ‘strong mandates and governance structures’, a national organisation to provide a co-ordinated approach to protection and promotion of rights, connectivity, capacity building and strategic direction across the entire Indigenous arts sector is needed.¹²⁹

- 4.118 In presenting options and asking questions about the scope, role, value and form of a NIACA, the Australia Council is asking interested stakeholders to make submissions and attend consultation forums, to respond to the suggested scope, priorities and formation of such a body.¹³⁰

Committee comment

- 4.119 The committee is supportive of a national peak body to advocate for and safeguard Indigenous Cultural Intellectual Property, including traditional knowledge and expressions of culture. The committee therefore looks forward to the outcome of the consultation process being conducted by the Australia Council on the possible establishment of a National Indigenous Art and Cultural Authority.

127 Ms Joella Warkill, BlakDance, *Committee Hansard*, 16 July 2018, Brisbane, p. 8.

128 Australia Council, *A proposed National Indigenous Arts and Cultural Authority (NIACA): Public discussion paper*, 2018, p. 3, <https://niaca.com.au/wp-content/uploads/2018/09/NIACA-Discussion-Paper_2018.pdf> viewed 16 October 2018.

129 Australia Council, *A proposed National Indigenous Arts and Cultural Authority (NIACA): Public discussion paper*, 2018, pp. 3–4, <https://niaca.com.au/wp-content/uploads/2018/09/NIACA-Discussion-Paper_2018.pdf> viewed 16 October 2018.

130 Australia Council, *A proposed National Indigenous Arts and Cultural Authority (NIACA): Public discussion paper*, 2018, <https://niaca.com.au/wp-content/uploads/2018/09/NIACA-Discussion-Paper_2018.pdf> viewed 16 October 2018; Australia Council, ‘Register to attend a First Nations consultation forum’, *National Indigenous Arts & Cultural Authority*, 2018 <<https://niaca.com.au/consultation-forums/>> viewed 16 October 2018.