



**Submission to the Inquiry into
the Proliferation of
Inauthentic Aboriginal and Torres Strait
Islander 'Style' Art and Craft Products**

Executive summary

Aboriginal and Torres Strait Islander art is a dynamic and growing sector that brings significant economic and cultural benefits to artists and their communities. Despite the popularity of Aboriginal and Torres Strait Islander 'style' products with both visitors and Australian buyers, Aboriginal and Torres Strait Islander artists continue to be some of the most vulnerable to unlicensed reproduction in the form of cheap, imported goods. The *Fake Art Harms Culture* campaign, launched last year, estimates that up to 80% of Aboriginal and Torres Strait Islander 'style' products available in shops are inauthentic. Many are made and imported from countries such as Indonesia and China.

There are strong cultural and economic arguments for strengthening the current legal, policy and regulatory environments to address the proliferation of unlicensed and unethical imports. Government regulation and support is critical to ensure benefits flow to Aboriginal and Torres Strait Islander artists and their communities.

The NSW Government recognises that the proliferation of inauthentic Aboriginal and Torres Strait Islander 'style' art can have significant negative impacts on the culture and economic advancement of artists and communities. Incorrect use of Aboriginal and Torres Strait Islander designs, artworks and styles is a misappropriation of cultural knowledge and violates the intellectual property rights of artists and creators.

This misuse and misappropriation causes significant distress and harm to Aboriginal and Torres Strait Islander people and their cultures. It is critical to look at legal and advocacy strategies to provide protection and remedies.

NSW has the largest Aboriginal and Torres Strait Islander population in Australia and a unique contemporary Aboriginal and Torres Strait Islander arts, screen and cultural sector. Supporting Aboriginal and Torres Strait Islander arts and culture is a priority under the NSW Government's Arts and Cultural Policy Framework: *Create in NSW* and the *NSW Aboriginal Arts and Cultural Strategy*, managed by Create NSW. This priority is addressed through funding delivered via the Arts and Cultural Development Program (ACDP), screen investment program and programs run by the State Cultural Institutions.

The NSW Government's vision is for a strong, contemporary multi-disciplinary Aboriginal and Torres Strait Islander arts, screen and cultural sector in NSW and increased opportunities for Aboriginal and Torres Strait Islander people at all stages of their creative practice. Central to this is empowering artists and arts workers through employment capability, access to markets and professional development opportunities.

To address the growing prevalence of inauthentic Aboriginal and Torres Strait Islander 'style' art, Create NSW recommends a multi-pronged approach across the arts, screen, culture, consumer affairs and tourism sectors with strategies that:

- Directly engage and consult with Aboriginal and Torres Strait Islander artists and arts communities in the monitoring of issues and formulation of solutions
- Build the capacity of Aboriginal and Torres Strait Islander artists to increase supply of authentic products to meet market demand
- Support platforms, initiatives and organisations that promote protection of Aboriginal and Torres Strait Islander cultural and intellectual property
- Educate consumers, tourists, distributors and retailers about authentic products and the impact of inauthentic goods
- Impose restrictions on inauthentic products in the market
- Increase monitoring and actions against false claims or misleading descriptions of goods in the marketplace.

We recommend that the Australian Government closely monitor the effectiveness of developments in other countries, such as New Zealand and the USA, around regulation,

education and capacity building and consider whether similar approaches could be applied in Australia. It is also important to ensure solutions are flexible enough to accommodate a broad suite of works and formats that may be available to a global market.

Legitimate and ethical large-scale production of Aboriginal and Torres Strait Islander art and designs has the potential to return significant income to Aboriginal and Torres Strait Islander artists and communities. The proliferation of products in the tourist market demonstrates how large this market is. The challenge is to build the capacity of Aboriginal and Torres Strait Islander artists to meet this growing demand.

1. Introduction

For Aboriginal and Torres Strait Islander people, the arts are central to identity, place and belonging. They are an expression of a unique and continuing tradition and have an important place in the survival of culture.¹ Traditional cultural expression created by Aboriginal and Torres Strait Islander people is a visual interpretation of the stories that belong to an individual, family, tribe or community. These stories can be sacred and have been passed down from generation to generation. These visual interpretations relate to the relationship of an individual's and community's totems, landscape and waterways. When an artwork is altered, or appropriated by those who lack understanding of certain cultural expressions, or do not have permission to share such expressions, artists and traditional owners are disrespected.

The NSW Government recognises that Aboriginal and Torres Strait Islander art and craft products and merchandise can represent a substantial income source to Aboriginal and Torres Strait Islander artists and can make an important economic contribution to Aboriginal and Torres Strait Islander communities across NSW and nationally. Aboriginal and Torres Strait Islander artists earn from selling, reselling and reproducing their works through sale, copyright and resale royalties.

Governments, including the NSW Government, actively support the production of Aboriginal and Torres Strait Islander art. Support of these artists and organisations has created learning and income-earning opportunities and has helped to foster the continuation and distribution of Aboriginal and Torres Strait Islander culture.

Building the prosperity of Aboriginal people is a key objective of *OCHRE*, the NSW Government Plan for Aboriginal affairs. *OCHRE* supports Aboriginal communities to actively influence and fully participate in social, economic and cultural life.

Arts and cultural expression, including sharing Aboriginal languages, provide economic and employment opportunities for Aboriginal people. During recent state-wide community consultations on the Aboriginal Languages Bill 2017, the threat posed by infringements of intellectual and cultural property rights in cultural materials, and the need for legal protections from such infringements, was frequently raised.

Inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products deny artists cultural and economic opportunities and mislead consumers. It disrespects these artists and disadvantages Australian businesses that take an ethical and culturally responsible approach. Advocacy by Aboriginal and Torres Strait Islander communities, artists and the *Fake Art Harms Culture* campaign has drawn attention to the need for action.

The NSW Government takes these concerns seriously, and welcomes the opportunity to work closely with other governments and key stakeholders to investigate the feasibility of a coordinated national approach.

Ownership, responsibility and control by Aboriginal and Torres Strait Islander people of their cultural and intellectual property is critical. Aboriginal and Torres Strait Islander artists and communities must be central in the formulation of effective solutions to the misuse of their art. To this end, this submission has been guided by advice from the Create NSW Aboriginal Advisory Committee and Create NSW has encouraged NSW Aboriginal and Torres Strait Islander artists, and other interested parties, to make submissions to the inquiry and/or complete a questionnaire.

¹ Australia Council, *Protocols for producing Indigenous Australian visual arts*, 2007

2. Support for Aboriginal and Torres Strait Islander arts, screen and culture

Create NSW

Supporting Aboriginal and Torres Strait Islander arts and culture is a priority under the NSW Government's Arts and Cultural Policy Framework: *Create in NSW* and the *NSW Aboriginal Arts and Cultural Strategy*, managed by Create NSW. This priority is addressed through funding delivered via the Arts and Cultural Development Program (ACDP), screen investment program and programs run by the State Cultural Institutions.

The NSW Government's vision is for a strong, contemporary multi-disciplinary Aboriginal and Torres Strait Islander arts, screen and cultural sector in NSW and increased opportunities for Aboriginal and Torres Strait Islander people at all stages of their creative practice. Central to this is building economic empowerment for NSW Aboriginal and Torres Strait Islander artists and arts workers through employment capability, access to markets and professional development opportunities.

Funding supports projects that celebrate and promote Aboriginal and Torres Strait Islander cultural identities and which make these rich and diverse cultures more visible and accessible. These funding programs aim to build the capacity and sustainability of Aboriginal and Torres Strait Islander arts and culture.

The NSW Government supports Aboriginal and Torres Strait Islander cultural practice, artistic creation, training, career pathways and market development opportunities for Aboriginal and Torres Strait Islander artists, arts workers and organisations across NSW with a focus on regional NSW and Western Sydney. This includes investment to develop platforms for the sale of authentic Aboriginal and Torres Strait Islander products through the growing number of Aboriginal-managed arts markets offering Aboriginal and Torres Strait Islander produced art to the public.

Create NSW supports the Arts Law Centre of Australia, a principal partner of the *Fake Art Harms Culture* campaign and the *Artists in the Black* program. The Arts Law Centre provides legal services for Indigenous artists, communities and arts organisations; including advice on cultural and intellectual property. This support comprises multi-year program funding and subsidised accommodation. In addition, in 2016/17, the total screen production investment in projects with an Aboriginal and Torres Strait Islander key creative or significant Aboriginal and Torres Strait Islander content was \$1.7 million.

The Create NSW *Aboriginal Arts and Cultural Protocols* present guiding principles that encompass a contemporary approach to working with the Aboriginal and Torres Strait Islander arts and cultural sector and with cultural material. These principles were developed in partnership with Aboriginal and Torres Strait Islander leaders in arts and culture and are: Voice; Investment; Leadership; Respect; and Ownership.

Create NSW is focussed on advocacy and engagement to support arts, screen and cultural development. For Aboriginal and Torres Strait Islander arts, screen and culture, this includes:

- Establishing the Create NSW Aboriginal Advisory Committee to advise on Aboriginal and Torres Strait Islander arts, screen and culture development
- Strengthening communications and engagement with NSW Aboriginal and Torres Strait Islander artists and the arts community through the Create NSW Regional Roadshows
- Targeting programs to Aboriginal and Torres Strait Islander artists and organisations to increase access and capacity
- Reviewing the *Aboriginal Arts and Cultural Protocols* in line with best practice

- Supporting Aboriginal and Torres Strait Islander artist participation in marketplaces: e.g. Cairns Indigenous Art Fair, Australian Performing Arts Market.

NSW Cultural Institutions

The NSW State Cultural Institutions manage significant cultural heritage collections and provide services and programs throughout the State. The Cultural Institutions actively support Aboriginal and Torres Strait Islander interests and cultural property through their protocols, programs, collections, exhibitions and merchandising.

The Art Gallery of NSW's *Aboriginal and Torres Strait Islander Engagement Policy* and related procedures, ensure that the Gallery follows best practice models with specific reference to exhibitions, acquisitions, loans, reproductions, programs and access. The Gallery's retail shop sources Indigenous product ethically and promotes awareness of the protection of the cultural and intellectual property of Indigenous artists through merchandise signage and labelling.

The Sydney Opera House is committed to the protection and awareness of Aboriginal and Torres Strait Islander arts and culture across all forms of creative expression, including the performing arts. Its *Aboriginal and Torres Strait Islander Cultural Protocols* outlines key principles for working with Aboriginal and Torres Strait Islander peoples and their artworks.

Programming initiatives such as Homeground, the annual celebration of First Nations culture, presents music, art, and performance in a free family-friendly outdoor festival that attracts around 10,000 people annually. The Homeground Arts Market showcases authentic Aboriginal and Torres Strait Islander arts and crafts from across the nation, including the Indigenous Arts Code to promote awareness in audiences of inauthentic artworks. The Opera House is currently developing a process for working with its retail operator to ensure that only appropriate and authentic works are available in its stores.

The Aboriginal concept of country is central to Sydney Living Museums' *Aboriginal Action Plan*. The plan provides a framework for Aboriginal products in retail outlets across all museums and online operations to 'explore opportunities to support local Aboriginal businesses and enterprises'. This is achieved by building partnerships with local Indigenous businesses, identifying retail opportunities and specific Aboriginal suppliers and enterprises. Sydney Living Museums' suite of public events focusing on local Aboriginal culture provide opportunities for local Aboriginal arts, crafts, cultural food providers and performance organisations to engage with the public. These events have a strong ethos in being economically advantageous for the Aboriginal providers.

At the State Library of New South Wales, the leadership of the Indigenous Services Branch guides the Library's projects that strengthen Aboriginal and Torres Strait Islander culture and language. The Library works in partnership with Aboriginal and Torres Strait Islander people, communities and stakeholders to grow new collections reflecting Aboriginal and Torres Strait Islander experience and to make collections accessible. The Library is guided by high level protocols and position statements including the *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, developed by the Aboriginal and Torres Strait Islander Library and Information Resource Network. The Library is currently developing an overarching Indigenous Cultural and Intellectual Property Protocol.

Merchandise on sale through the Library shop is ethically sourced from recognised distributors, that support the rights and interests of Aboriginal and Torres Strait Islander artists. Royalties from these products directly benefit the artist and their communities.

Guided by its *Indigenous Cultural and Intellectual Protocol*, the Museum of Applied Arts and Sciences is reviewing policies relating to the management of tangible and intangible Indigenous cultural material. The Museum is committed to ensuring all goods and services relating to Aboriginal and Torres Strait Islander culture are provided by endorsed and

authentic suppliers, and continues to develop commercial relationships with Aboriginal and Torres Strait Islander owned businesses to source products designed by contemporary Aboriginal and Torres Strait Islander designers for its retail outlets.

3. Response to Terms of Reference

The definition of authentic art and craft products and merchandise

Create NSW delivers its funding and other support to NSW Aboriginal and Torres Strait Islander organisations and arts/cultural practitioners through the NSW Aboriginal Arts and Cultural Strategy and the annual ACDP competitive grants program. Both the Strategy and the ACDP are underpinned by Create NSW's Aboriginal Arts and Cultural Protocols which give guidance for people working with the NSW Aboriginal and Torres Strait Islander arts and cultural sector who are developing arts programs and projects involving Aboriginal and Torres Strait Islander people, organisations and cultural material.

These instruments emphasise the importance of arts and cultural expression in Aboriginal and Torres Strait Islander society, and that arts and cultural expression continue to be a crucial element of the social, cultural and economic fabric of Aboriginal and Torres Strait Islander people and communities throughout Australia.

Within NSW, there are up to seventy different language groups and a diversity of Aboriginal culture and practice. Aboriginal and Torres Strait Islander people practice many traditions of the past in a modern context. It is fundamental to Aboriginal and Torres Strait Islander artists who engage with cultural materials and practices to show consideration for the traditions of the past. Non-Aboriginal artists and arts practitioners should also engage with Aboriginal and Torres Strait Islander culture and heritage in a respectful way.

To uphold respect for Aboriginal and Torres Strait Islander culture and practice, Create NSW employs a strict definition of 'Aboriginal' and 'Torres Strait Islander': *"a person of Aboriginal or Torres Strait Islander descent, who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which they live, or have lived"*. Create NSW requires letters of support and confirmation of involvement from the relevant Aboriginal and Torres Strait Islander communities and/or organisations to ensure that the project/work is authentic and the maker has permission from his or her community to make the artwork.

The principles described above underpin the following recommendations in response to the Inquiry's question regarding the definition of authentic art and craft products and merchandise. The recommendations below have been prepared on the advice of the Arts Law Centre of Australia. The definition of authentic art and craft products and merchandise should:

1. Indicate that the product has been designed, made, produced or licensed with the full authority of people who identify as Aboriginal/Torres Strait Islander; are accepted as such by the community in which they live, and have cultural ownership of, or rights to use, the product itself or the designs and imagery reproduced on the product
2. Acknowledge that there are cultural objects that should not be made or produced by anyone other than Aboriginal and Torres Strait Islander people e.g. boomerangs, didgeridoos, yidakis, woomeras.
3. Acknowledge that some merchandise may be made under a licensing agreement with the full authority of the relevant Aboriginal and Torres Strait Islander people and there is an income being returned to the artists

Create NSW recognises that business arrangements in the production and supply of products make it difficult for consumers to determine authenticity. A product labelled 'made in China' is authentic if made under an appropriate licensing agreement with an Aboriginal or Torres Strait Islander artist or designer who has the cultural authority through traditional custodians and community members to use the stories or imagery depicted on the product. An item 'made in Australia' could be inauthentic if it did not involve an Aboriginal or Torres Strait Islander artist or designer, such as a design that imitates an Aboriginal and Torres Strait Islander style without any consultation or regard for culture or intellectual property.

Notwithstanding the above, a key requirement is direct engagement and consultation with Aboriginal artists and the arts community in determining authenticity, monitoring issues and formulating solutions.

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

Currently, the works of individual artists are protected by copyright laws, giving them control over the reproduction. However, work produced in an Aboriginal and Torres Strait Islander 'style', or that appropriates but does not replicate a work, does not fall into that category and is not covered by the *Copyright Act 1968* (Cth).² At both the community and local level, Aboriginal and Torres Strait Islander people should be able to benefit from the commercialisation of their work and cultural expression. Works that appear to be Indigenous but have been produced by others diminish this opportunity for artists and their families.³

Under Australian Consumer Law, it is unlawful to make false claims or misleading descriptions about consumer goods or services, or when promoting the supply or use of goods or services. A business must not make false or misleading representations about:

- the standard, quality, value or grade of goods or services
- the composition style, model or history of goods
- the place of origin of a product, for example, where it was made or assembled

There are high penalties for making false and misleading representations.

Provided inauthentic 'style' products disclose their country of origin and do not claim to be or are not promoted as authentic, their sale is legal in Australia. This can make it difficult for consumers to distinguish between authentic and inauthentic products.

Create NSW notes the Indigenous Art Code, Copyright Agency and Arts Law Australia are advocating for the development of Australian legislation to prohibit the marketing and sale of Aboriginal and Torres Strait Islander arts and crafts products within Australia unless it is made by Aboriginal and Torres Strait Islander peoples, or licensed with their full authority, which is clearly documented. The law would cover all Aboriginal and Torres Strait Islander 'style' traditional and contemporary arts and craft. It should also cover all marketplaces including online, with effective notice and takedown procedures for inauthentic goods.

Create NSW supports the intent of this proposal and would welcome the opportunity to explore how existing arrangements could provide greater protection. However, if this will not result in reducing the proliferation of inauthentic products, new, strengthened arrangements should be considered.

² Fake Art Harms Culture Discussion Paper, https://www.artslaw.com.au/images/uploads/Fake_Art_discussion_paper_response_to_R_Katter_Private_Members_Bill_Final.pdf

³ *ibid*

An examination of the prevalence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise in the market

The *Fake Art Harms Culture* campaign estimates around 80% of products available in shops are inauthentic. Many are made and imported from countries such as Indonesia and China. This estimate was calculated when the Indigenous Art Code and the Arts Law Centre of Australia visited outlets in Circular Quay and the Rocks in Sydney, and Queen Victoria Markets and Swanston Street in Melbourne where they purchased a sample of 31 inauthentic products ranging in price from \$6 to \$140. Authentic and inauthentic products were displayed side-by-side and labelling of inauthentic products was variable and confusing. These two factors can mislead consumers.

Presentations by *Fake Art Harms Culture* have demonstrated the large amount of Aboriginal and Torres Strait Islander 'style' arts and crafts for sale primarily directed at the tourist market in the major Australian tourist precincts of Sydney, Melbourne, Adelaide, Alice Springs, Cairns, Darwin, Fremantle and Perth. The *Fake Art Harms Culture* campaign has significant support. This includes national media coverage and letters to MPs signed by Aboriginal and Torres Strait Islander artists, arts workers, consumers and industry representatives. These letters called for better legislation to protect Aboriginal and Torres Strait Islander culture, arts and knowledge and an education campaign to inform consumers about the action they can take.

Options to promote authentic products for the benefit of artists and consumers

Create NSW strongly supports strategies to increase supply and promotion of authentic products to meet market demand. This is key to economic empowerment for those artists who earn money from selling, reselling and reproducing their works through sale, copyright and resale royalties. Options for consideration include:

1. Build the capacity of Aboriginal and Torres Strait Island artists and arts communities to meet the growing demand for Aboriginal and Torres Strait Islander products and develop income streams from their art and design. This could include developing skills in licencing, merchandising, and negotiating fair payment, as well as access to ethical intermediaries and experts.
2. Increase the supply of authentic products. A reliable supply of quality authentic products to the marketplace is critical. This can include strategies which provide opportunities for Aboriginal and Torres Strait Islander artists and designers to connect with production and distribution channels under appropriate licensing arrangements.
3. Promote organisations that advise and build the capacity of Aboriginal and Torres Strait Islander artists in the protection of rights associated with their artworks, for example:
 - The Arts Law Centre of Australia could be supported to promote, disseminate and update instructional tools such as the *Licencing Toolkit*, *Manufacturing Agreement* and sample contracts
 - *Artists in the Black* that provides legal advice and support for Aboriginal and Torres Strait Island artists
4. Strengthen, resource and encourage adoption of the *Indigenous Art Code*. The *Indigenous Art Code* is a system to preserve and promote ethical trading in Indigenous art. The Code supports the rights of Indigenous artists to negotiate fair terms for their work and gives buyers greater certainty about an artwork's origin. Dealers who are Code signatories have agreed to comply with the Code's ethical standards in their dealings with Indigenous Artists and with art buyers.

The Code is run with very modest resources. Increased resources could strengthen its role as an indicator of ethical trading standards, enable regular review to reflect best practice and evolving protocols, improve its profile with the public and secure greater adoption by outlets and artists.

Funding agencies could consider the adoption of the Code or similar ethical protocols as an assessment criteria.

5. Support the *Fake Art Harms Culture* campaign to continue to raise awareness of the proliferation of inauthentic art.
6. Encourage consistent and improved labelling to ensure consumers have sufficient information to determine whether a product is authentic. Detailed labelling can include artist information, an explanation of the cultural story and information about the product or imagery. As well as differentiating the products, this labelling ensures artists are recognised and acknowledged, and demonstrates appropriate regard for culture.
7. Support, strengthen and increase the profile of organisations and events that offer a marketplace for Aboriginal and Torres Strait Islander artists creating authentic works, particularly those run by Aboriginal and Torres Strait Islander people. For example, in NSW, *Black Arts Market* was presented in collaboration with Carriageworks and *Blak Market* partners with the Barangaroo Delivery Authority to present quarterly events.
8. Education and marketing campaigns on buying authentic products aimed at consumers and tourists. Develop awareness in consumers and tourists about why it is important to buy an authentic product, where they can buy authentic products and how to differentiate an authentic product from an inauthentic product.
9. Educate the tourism industry, distributors, retailers and cultural organisations to trade only authentic products. Business education can be improved through information on where to source authentic products and the diversity of authentic products available.

Destination NSW has recently released the *NSW Aboriginal Tourism Toolkit*, which provides a guide for the tourism industry to connect tourists to authentic Aboriginal products and experiences. It gives information on why it is important for the wider tourism industry to ensure authenticity and consultation with Aboriginal tourism operators. It lists authentic NSW 'Aboriginal Export Ready Tour Products'; festivals and events; galleries and exhibitions; Aboriginal performance groups; and places to buy corporate gifts and eat bush tucker.

Destination NSW has also contributed to developing criteria and a means to ensure integrity and authenticity of Aboriginal tourism product on the NSW State Tourism Data Warehouse. The Data Warehouse provides information about products and destinations available across Australia and its target market is tourism business operators, wholesalers, retailers and distributors for use in their websites and booking systems.

10. Research the effectiveness and applicability of international models and developments that promote authenticity. Evaluations of international models should inform Australian developments, for example, *Toi Iho – the Māori Made Mark* and the USA's *Indian Arts and Crafts Act*, as well as the lessons learnt from the Australian National Indigenous Arts Advocacy Association's *Boomerang Tick*.

Options to restrict the prevalence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise in the market

Create NSW supports strategies that will target and reduce the level of inauthentic products in the marketplace. Options to restrict the prevalence of Aboriginal and Torres Strait Islander 'style' art include:

1. Increased monitoring and actions against false claims or misleading descriptions of goods in the marketplace.
2. Raising awareness in Aboriginal and Torres Strait Islander artists and communities about their rights to complain to regulators of Australian Consumer Law when inauthentic works are represented as authentic.
3. Influence the *demand* for inauthentic products. Educate distributors, retailers and consumers to trade only in authentic products. Provide consumers and retailers with the information they need to make the decision to buy and sell authentic art. A reduction in the demand for inauthentic goods can be achieved by education, greater enforcement of current laws, increasing the competitiveness and supply of authentic products, and labelling that identifies authentic art.
4. Influence the *supply* of inauthentic products. This would require making the distribution and selling of inauthentic products illegal. Inauthentic art should be treated in the same way as other products that Australia restricts or prohibits for importation and sale, such as merchandise with a representation of the coat of arms, a flag or a seal of a State or Territory of the Commonwealth, or unsafe or offensive goods.

As an overarching principle, the onus to prove authenticity should be placed on the producers and retailers, rather than on Aboriginal and Torres Strait Island artists and designers.

Create NSW believes that the Australian Competition and Consumer Commission and the State and Territory consumer protection agencies would be best positioned to enforce, monitor and establish any new legislation.