

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

Table of Contents

<i>Introduction</i>	7
<i>Part A: Challenges For Indigenous Knowledge Protection</i>	7
1 What other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK?	7
<i>Part B: Models For Sui generis Legislation</i>	8
2 Should each of these four elements should be part of a stand-alone legislation model for the protection of IK? Why or why not?	8
3 Is there anything missing from any of these elements?	13
<i>Part C: Proposed Cost Benefit Analysis Methodology</i>	13
4 Which element (1 to 4) and combination of elements would deliver most benefit to you?	13
5 What broader benefits, costs or risks would stand-alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?	14
<i>Questionnaire</i>	14
6 Have you experienced (or witnessed) misuse or misappropriation of IK?	14
7 Have you used an element of IK in a product, service or in business before?	15
8 If yes to Question 7, did you take any steps to check it was ok to use the IK?	15
9 Have you ever accessed government support for business, including anything specific to Indigenous businesses or Indigenous Knowledge?	15
10 In your experience, how have Aboriginal and Torres Strait Islander communities provided access to IK, or managed requests for use of IK?	15
11 How should a person or business from outside approach a community if they wish to use the community's IK?	16
12 If there was a new legal right to protect IK, should there be a way for a community to register their ownership or custodianship?	16
13 New laws could prevent the sale or importation of inauthentic Indigenous style products - what kind of products should they aim to stop?	16
14 Which of these could be considered authentic Indigenous products? Select all that apply	17
15 Would you be more likely to purchase something if it was labelled as an authentic Indigenous product? ..	18
16 Would it be helpful to have a separate IK organisation or authority that could help a community enforce protection of their IK rights?	18
17 How could a separate IK organisation or authority help at a national level? Select all that apply.	18
18 Following from Question 17, what roles or functions could be useful to have managed at a state / territory or community level? Select all that apply.	19
19 Overall, do you think stand-alone legislation for IK would be beneficial for Aboriginal and Torres Strait Islander people and communities?	20
20 What do you think are the potential benefits, costs and risks of stand-alone legislation for IK?	20

9 November 2022

IK Project Team
IP Australia
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RE: Stand-alone Legislation for Indigenous Knowledge: Interim Scoping Study Consultations

Dear IK Project Team

The Arts Law Centre of Australia (**Arts Law**), the Copyright Agency and the Indigenous Art Code Limited (**IartC**) are pleased to make the below joint submission to IP Australia's Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge (**IK**). In response to the October 2022 Interim Report released by IP Australia (**Interim Report**) and IP Australia's accompanying [survey](#), the below submission aims to address the questions raised (relevant to our three organisations' knowledge and experience) and makes references to our previous joint submissions to the Productivity Commission (accessible on the Productivity Commission's website [here](#)).

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

Please note that for the purposes of this submission, we respectfully use the terms 'Aboriginal and Torres Strait Islander', 'First Nations' and 'Indigenous' interchangeably to reference the Aboriginal and Torres Strait Islander people belonging to this country. Aboriginal and Torres Strait Islander readers are advised that this document may contain names of deceased persons.

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

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

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

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

IartC is the organisation that administers the Code, through:

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

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

The Copyright Agency Ltd is a not-for-profit company limited by guarantee who collect fees and distributes royalties to creator members for the copyright and sharing of their text and images. With currently over 38,000 members who include authors, artists, journalists, photographers, and more, many of the 13,500 visual artist members are Aboriginal or Torres Strait Islander. Copyright Agency is appointed by the Australian Government to manage the statutory licence schemes for the education and government sectors, and the Resale Royalty scheme for artists. Our visual arts team specialise in licensing artworks for a wide range of uses including publishing, merchandise, fashion, architectural uses and more. Copyright Agency also provides philanthropic support to Australia's cultural community through our grants program, the Cultural Fund.

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

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

In the below submission, we respond to the consultation questions of the Interim Report and questions from IP Australia's online survey. We do not pretend for an instant to be the final arbiter of what is good or fair or just and approach this study with humility and note that our combined fields of expertise are primarily limited to the Australian arts ecosystem. With respect to questions of cultural authority, we submit that IP Australia defers to the experiences and perspectives of the relevant Aboriginal and Torres Strait Islander artists, communities and organisations across the country from which that authority originates. We respectfully acknowledge the work that many Aboriginal and Torres Strait Islander peoples, communities and individuals have done over many decades and continue to do in the ongoing pursuit of recognition of rights.

We would also like to acknowledge the assistance of Allens Linklaters and thank Andrew Wiseman and Olivia Henderson for their contributions. Arts Law, the Copyright Agency and lartC welcome further questions about our submission and are available to discuss any of the issues raised with IP Australia.

Contributors

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

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Introduction

In our joint submissions to the Productivity Commission's study of Aboriginal and Torres Strait Islander Visual Arts and Crafts (both submissions available on the Productivity Commission's website for the inquiry [here](#)), we focused on three key reform areas which we believe would improve the security, stability, productivity, and integrity of the Aboriginal and Torres Strait Islander visual arts market. These areas are:

- a) amendments to the Australian Consumer Law (**ACL**) to be implemented to combat the fake art market;
- b) a stronger regulatory framework to govern the market; and
- c) a *sui generis* system to provide legal protection of Indigenous Cultural and Intellectual Property (**ICIP**).

The Interim Report addresses the third of these reform areas. However, in our view, meaningful and effective protection ICIP, including IK and traditional cultural expressions (**TCEs**), requires all three of the above reforms.

Much of our present submission – and the work of the Fake Art Harms Culture campaign more broadly – is aimed to end the misuse of ICIP in the market for Australian art and cultural products. Accordingly, it is very important to stress what we mean by the terms “authentic” and “inauthentic” goods for the purposes of this submission. The meaning of “authenticity” can raise complex cultural and social issues and we certainly do not claim any cultural authority on such matters. Our purpose is to define authenticity in a very specific and limited context: legislative amendments concerning fake art in the context of a legislative prohibition. In defining an art or cultural product as inauthentic for this purpose, we take as a baseline the indisputable position that art and cultural products are clearly fake if they are “Aboriginal-style” or “Torres Strait Islander-style” works with no connection to an Aboriginal or Torres Strait Islander artist or community.

Part A: Challenges For Indigenous Knowledge Protection

1 What other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK?

In addition to the issues identified in the Interim Report, the ability of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK can be hindered by unethical and exploitative conduct. For example, there are a great many instances each year of artists being subject to problematic behaviour such as entering into unfair licensing arrangements or being remunerated poorly by those in a more advantageous position, which limits their ability to benefit from their IK. This problem is exacerbated by some Aboriginal and Torres Strait Islander people experiencing difficulties in obtaining information about their rights as well as accessing justice.

In addition, there are issues around appropriate documentation and maintaining the integrity of Indigenous art and craft products. Many artists (especially those working outside the support structures of art centres)¹ do not maintain documentation of their artwork. Our experiences are that, generally, the dealers selling an artwork photograph the artwork and maintain the copyright of that image along with the text/copy describing the artist's work. Artists do not necessarily have access to this documentation or oversight of how and what is written about them and their artwork.

¹ In art centres and other Aboriginal and Torres Strait Islander-owned organisations (such as language centres), the copyright of this content is owned by the artists and the Aboriginal-owned organisation. Via software like the SAM database, a rich database of cultural information is maintained and, importantly owned by the community and the artists. The motivation for maintaining this is not primarily a commercial one.

There is also a lack of understanding amongst many businesses about the limits of the rights obtained when licensing ICIP, intellectual property rights (such as copyright) and moral rights. For many businesses there is a sense that if they pay a price, they should be able to access ICIP and use it as they wish just like any other commodity.

Part B: Models For *Sui generis* Legislation

2 Should each of these four elements be part of a stand-alone legislation model for the protection of IK? Why or why not?

Element 1: Create A New IK Right

Consistent with our submissions to the Productivity Commission,² our organisations strongly support the introduction of *sui generis* ICIP legislation protecting ICIP rights in the form of TCEs and IK more broadly. Comprehensive and meaningful community consultation will be necessary to ensure that the interests of Aboriginal and Torres Strait people and communities will be met by any proposed legislation.

The conversation around a cultural authority and greater ICIP protection has a long history. As recently noted by Marcia Langton in her keynote speech at *Purrumpa*, calls for better legal protection and recognition of Aboriginal cultural and intellectual property formed part of the resolutions made at the National Seminar on Aboriginal Arts in May 1973, and yet the problem still has not been adequately dealt with. In 2018, the House of Representatives Standing Committee on Indigenous Affairs recognised that:

Neither the ACL nor copyright law were designed to protect First Nations cultural expressions, and therefore each is inadequate to do so...the ACL cannot deal with issues of inauthentic Indigenous products, while the Copyright Act is not designed to recognise the eternal and communal nature of Indigenous cultural expressions, making it inadequate to deal with the misappropriation of culture.³

This finding is consistent with the experiences of our organisations, exemplified by the frustrations experienced by Arts Law and the Worrora, Wunumbal and Ngarinyin Aboriginal peoples of the Kimberley when exploring the limited protections available to protect Wandjina cultural knowledge.⁴

We are supportive of new IK rights being accompanied by 'moral rights', however we are cautious of supporting the introduction of 'copyright-style exceptions', which were not designed to protect ICIP rights. We agree with IP Australia that exceptions need to be designed carefully and in consultation with Aboriginal and Torres Strait Islander people.

As a first step, we consider that amending the ACL to prohibit the sale of inauthentic goods containing an unauthorised or appropriated TCE is the quickest and simplest way to prevent the proliferation of inauthentic goods. This does not preclude *sui generis* ICIP legislation subsequently being enacted to provide a more comprehensive system of ICIP protection. Taking action to prevent the sale of inauthentic goods in an expeditious manner is imperative. With each sale of an inauthentic good, economic benefit is siphoned away from Aboriginal and Torres Strait Islander peoples, and significant cultural and social harm is created. Stand-alone legislation will take time to develop and require significant community consultation. While we strongly support *sui generis* ICIP legislation, amending the already operational ACL could reduce the current and continuing harms caused to Aboriginal and Torres Strait Islander people and communities in the most efficient manner.

² See eg, https://www.pc.gov.au/data/assets/pdf_file/0008/336653/sub031-indigenous-arts.pdf

³ House of Representatives Standing Committee on Indigenous Affairs, Report on the impact of inauthentic art and craft in the style of First Nations peoples (HRSCIA Report), December 2018, 58 at [4.83]-[4.84].

⁴ See: <https://www.artslaw.com.au/article/protecting-the-wandjina/>; https://www.wipo.int/wipo_magazine/en/2011/06/article_0003.html; submission of KALACC to HoR inquiry: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Submissions.

Our organisations are committed to providing ongoing input, guided by our experiences and those of our stakeholders, to the process of developing stand-alone ICIP legislation. One of the questions that will need to be considered long-term is whether a product ban remains in the ACL, or is instead incorporated into *sui generis* ICIP legislation. Either way, our organisations support a ban on the sale of inauthentic art, enforceable by an independent regulator, as a permanent feature of legislation.

Alongside the development of *sui generis* ICIP legislation, consideration should be had for how individuals and communities access remedies under such laws. The Interim Report states that under Element 1, Indigenous communities could take action for breach of their IK rights. Commencing legal proceedings is a costly exercise. This expense is likely to dissuade many individuals and communities from seeking to enforce their rights. Arts Law is the only community legal centre specialising in legal services for artists, including Aboriginal and Torres Strait Islander artists. Demand for Arts Law's and other pro bono legal services will likely increase as artists and others seek to enforce their ICIP rights under new legislation.

We agree that the enactment of *sui generis* legislation could (and in our view, should) be accompanied by a resourcing package to make the system accessible to Aboriginal and Torres Strait Islander peoples and businesses. The package could include the below features:

- education and communication strategies;
- funding for dedicated legal advice for Traditional Owners to enforce their rights and existing organisations operating in this space (such as Arts Law);
- education for the broader public to build understanding that IK rights exist and best practice approaches to avoid infringing on IK; and
- multilingual education and resources made available so that Aboriginal and Torres Strait Islander people and communities understand how any new law would operate and how they can use it to seek justice.

Providing an avenue for a government regulator to have standing and making the claims process sufficiently comprehensive to allow for beneficiaries to be self-represented may also reduce the burden placed on traditional owners and community organisations.

Element 2: Measures Aimed At Inauthentic Product

We do not agree with the additional legislative measures proposed under Element 2 of the Interim Report:

New legislation could make it an offence to sell goods featuring or incorporating TCE unless they are made by Aboriginal or Torres Strait Islander people or are made by non-Indigenous businesses which have entered licences with the relevant owners of the TCE, unless the goods are clearly labelled as inauthentic.

...

In addition, a scheme to identify genuine Indigenous products through product labelling or packaging could be introduced. This would provide consumers, retailers and authorities, particularly border officials, with a simpler way to identify at the point of purchase or importation whether a product has been made by, or under licence from, an authentic source. Such a system might involve a single identification mechanism for all Indigenous products or could provide for different identification markers for different communities, regions and Traditional Owners. There are also a range of technological solutions to explore, including unique digital labels which could be used to trace provenance through supply chains.

The legislation proposed under Element 2 permits the sale of inauthentic goods, provided that a label is fixed to the goods being sold. While we agree that an offence should be created that prohibits the sale of inauthentic goods, we do not think that labelling goods as 'inauthentic' should be a permissible defence.

A labelling scheme is not an effective or appropriate solution to counter the proliferation of inauthentic goods. We acknowledge that a mandatory labelling scheme, if complied with, could ensure that

consumers are not misled into thinking they are purchasing authentic products when they are in fact buying fakes. It would do nothing, however, to address the cultural harms experienced by both Indigenous individuals and communities, and the misappropriation and economic detriment experienced by Aboriginal and Torres Strait Islander artists and communities.⁵ Many tourists will not understand the harms caused by inauthentic products and will base their purchasing decisions on other factors such as the cost and aesthetic value of a good. Where an inauthentic product offers a cheaper alternative to an authentic one, many tourists will purchase the fake. A mandatory labelling scheme may in fact exacerbate the already significant harms for Aboriginal and Torres Strait Islander peoples and cultures and risks legitimising fake products, sending a clear, harmful and stark message to First Nations people that, consumers' interests take priority and need to be protected, and Aboriginal and Torres Strait Islander cultures do not.

“There are eighty plus Aboriginal and Torres Strait Islander owned and governed art centres across Australia. There are also thousands of independent Aboriginal and Torres Strait Islander artists working across Australia. These artists are creating works of art which share their culture and provide economic opportunities to those artists, their businesses and their communities. Australia as a nation relies on Indigenous art and culture to promote and position itself internationally, being central to brand “Australia”. Is the promotion and sale of ‘fake’ product how Australia wants to promote its relationship with its Aboriginal and Torres Strait Islander peoples?”

- Glenn Iseger-Pilkington, Yamatji-Nyoongar curator and writer, published in Indigenous Art Code Submission 138 The growing presence of inauthentic Aboriginal and Torres Strait Islander style art and craft products and merchandise for sale across Australia, 2018

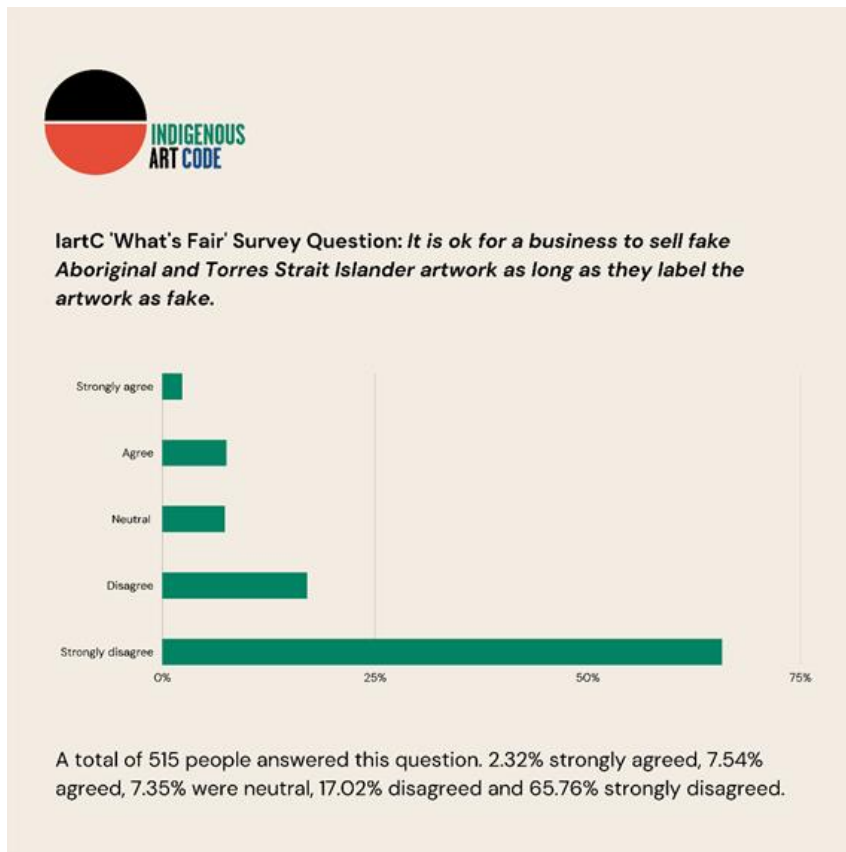
We agree with the concerns identified in the Interim Report that 'labelling products as authentic doesn't address the sale of inauthentic products and instead places a burden on Aboriginal and Torres Strait Islander creators.' Further, there is a significant risk of non-compliance with a mandatory labelling scheme given that labelling will be a cost and will reduce inauthentic product sales, creating a strong incentive not to comply.

While we are supportive of additional measures being implemented to raise awareness of the existence and harms of inauthentic products, a labelling scheme is not a long-term solution as it accepts the continued existence of inauthentic art in the market. In other words, informing buyers of the existence of stolen goods in a market does not alleviate the harms of cultural theft. In order to address the harms of inauthentic products, the long-term focus should not be on raising consumer awareness of these products, but on preventing retailers and producers from bringing these products into the market in the first place.

Our view is that Element 1 should be complemented by a legislative ban against trade in inauthentic product. A mandatory labelling scheme has no advantages over an outright ban. If a product can be identified as fake with sufficient certainty so as to be labelled as such, then it can be banned. A ban would not necessitate Aboriginal and Torres Strait Islander artists proving their Indigeneity and would be the most effective mechanism in ensuring fake products are not sold.

Indigenous Art Code recently conducted a survey titled '[What's Fair?](#)'. The survey was promoted at Darwin Aboriginal Art Fair, Desert Mob and through our social media channels. Survey respondents were asked if they agreed or disagree with the statement: It is ok for a business to sell fake Aboriginal and Torres Strait Islander artwork as long as they label the artwork as fake. Of the 515 responses, 65.76% of people strongly disagreed with this statement and a further 17.02% disagreed suggesting that 82.78% of respondents are against labelling as a strategy to combat inauthentic Aboriginal and Torres Strait Islander art and products.

⁵ We refer to pages 26 to 29 of our [submission](#) to the Productivity Commission's ongoing study for detailed consideration of the harms arising from inauthentic art and craft products.



We agree with the following proposal:

New legislation could be enacted empowering border officials to act proactively to prevent the entry into, or export from, Australia of products featuring or incorporating Indigenous designs and styles unless evidence is provided demonstrating that they have been manufactured under agreement with Traditional Owners.

We also support the enactment of legislation being accompanied by a government resourced education and marketing campaign promoting the value of TCEs and awareness of the prohibition on inauthentic goods.

Element 3: National Indigenous Knowledge Authority

Our organisations support the introduction of a First Nations led decision-making body to assist in the protection of IK if community consultation is in favour of this. As stated in the summing up of recent discussions at *Purrumpa*, a cultural plan without cultural bosses is not a cultural plan.

We agree with IP Australia that providing an avenue for a legislative body to work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK rights may reduce the burden placed on traditional owners and community organisations. As noted above, the enforcement process is costly and time consuming. Currently, copyright and intellectual property laws more generally rely on private enforcement, meaning their utility is limited by the capacity (and appetite) of individuals to take legal action. Additionally, the ACCC does not have the resources to take enforcement action against every breach of consumer law and prioritises larger scale breaches. It is unclear from the Interim Report whether the National Indigenous Knowledge Authority proposed under Element 3 would be First Nations led or made up of Indigenous representatives. The report states that the legislative body 'would work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK Rights' and that '[t]he function and governance of any such body would be designed in partnership with Aboriginal and Torres Strait Islander peoples.'

The concept of a First Nations national body for arts and culture is not new. The Australia Council for the Arts has facilitated discussions in 2018 and 2019 around a 'National Indigenous Arts and Cultural Authority (NIACA)' and recently published the *Bringing It Forward* report, which notes that 88% of the 95 First Nations survey respondents were in favour of a NIACA being established.⁶ The report notes (on p 28) that:

Consultation participants were in favour of a national body that would represent and advocate for First Nations arts and culture at a national level and grow and empower the sector. Many also called for greater protection of ICIP rights.

Participants said that a national body must be First Nations owned, led and run – sovereignty and self-determination were key themes of the consultation.

The *Bringing It Forward* report also notes (on p 29) that '[a] recurring theme of the [Australia Council] consultation was the need to support local and regional decision making and champion the regional and art form-based bodies that already exist.' One main area of concern was whether a NIACA would duplicate the work of existing peak bodies and services, such as AITB. Our view is that, in addition to the proposal to develop a new cultural authority, consideration should be given to enhancing the resources of existing support and enforcement mechanisms, including non-governmental bodies providing legal advice and support services (noting that the Arts Law Centre is currently the only community legal centre in the country equipped to deal with issues around intellectual property and ICIP).

While the responses received by Australia Council largely point in favour of a representative cultural authority being developed, we encourage IP Australia to consult a wider range of First Nations individuals and communities on whether such a body is appropriate and, if so, what its structure and functions should be. Current discussions around and modelling for a Voice to Parliament may also be informative regarding how to form and structure a representative cultural authority.

Through its AITB program, Arts Law provides an 'outreach' service, travelling all over the country to provide Aboriginal and Torres Strait Islander artists, arts organisations and businesses with free legal advice, resources and professional development opportunities. The outreach program has been important in building trust and confidence with art centres and Aboriginal and Torres Strait Islander individuals and communities and useful in educating people of their rights; however, Arts Law is currently under-resourced in providing this service. If better-resourced, Arts Law would be able to have people in different regions and deliver this service more effectively.

In relation to the suggestion of a database or register of IK information, we agree with IP Australia regarding the dangers of allowing unrestricted access to any database or making inclusion in a database a precondition to protection. We acknowledge that there may be some benefits to a system of voluntary ICIP registration, however a mandatory process requiring communities to register for protection should not be adopted due to issues of access and the burden placed on Indigenous communities to obtain protection. Further, some ICIP may contain secret and sacred material and information which would be culturally inappropriate to record in a database. We suggest consulting with different communities as to whether a system of registration is appropriate and what access restrictions would need to be in place if such a database was created to sufficiently protect ICIP from unauthorised access or exploitation.

Element 4: Measures to Support Competitiveness of Indigenous Business

We agree that legislation alone may not be enough to assist Aboriginal and Torres Strait Islander people to derive commercial value from their IK. As stated in our consideration of Element 1 above, we think that the enactment of *sui generis* legislation should be accompanied by a resourcing package to assist in making the system accessible to Aboriginal and Torres Strait Islander peoples and promote compliance by individuals and businesses. The introduction of new rights under stand-alone legislation or an ACL amendment will have consequences for both Indigenous and non-Indigenous businesses

⁶ <https://australiacouncil.gov.au/wp-content/uploads/2022/10/NIACA-Report-FA-Accessible.pdf>.

and individuals. The application of a *sui generis* law to different communities will be varied and complex. Appropriate resourcing and educational tools are critical to ensure understanding of and compliance with any new system in place amongst Indigenous and non-Indigenous people and businesses. This could include additional resourcing and funding for existing advice and support services in addition to educational tools and initiatives to assist businesses and individuals understand and comply with the new rights and obligations.

While we support the idea for development and implementation (in consultation with Aboriginal and Torres Strait Islander peoples) of specialised government programs and capacity building strategies to complement the proposed reform measures, in our view the focus should first be on enhancing and coordinating existing systems, programs and services currently delivered by government and non-government organisations. In our experience, non-governmental organisations are more cost-effective at providing programs and resources to Indigenous artists and businesses in the arts and crafts sector than government programs. Additional government programs and capacity building strategies could fill any gaps these organisations cannot meet.

3 Is there anything missing from any of these elements?

As discussed above, a ban on the sale of inauthentic products is essential to combat the harms arising from the existence of these goods. We are firmly of the view that current legal arrangements are inadequate and a specific prohibition on selling fake Indigenous products is needed in order to recognise that it is inappropriate for Indigenous culture to be unfairly misappropriated for commercial gain and to prevent this conduct from occurring. An outright ban of the sale of inauthentic goods would acknowledge that the concern is broader than just misleading consumers, while also ensuring that consumers, including foreign visitors, are not misled into thinking they are buying authentic Indigenous goods when they are not.

In addition, any meaningful reform or discussion or consultation about reform requires a commitment to self-determination of Aboriginal and Torres Strait Islander people, both in its object and effect.

Part C: Proposed Cost Benefit Analysis Methodology

4 Which element (1 to 4) and combination of elements would deliver most benefit to you?

We agree with IP Australia that a key element to the reforms proposed is the new right recognising communal ownership in TCE and IK,⁷ however, as our organisations have consistently advocated for, a ban on the sale of inauthentic goods should be the first step in the legislative response. Given that the damage caused by inauthentic Aboriginal and Torres Strait Islander products is both current and widespread, we consider it imperative to expedite a legislative prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art within an existing legislative framework, while stand-alone legislation is developed as a long-term solution.

There are a number of benefits arising from an outright prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art, namely:

- it gives rise to a clear statement of the law regarding the boundaries of acceptable and unacceptable conduct;
- it clearly addresses the costs associated with the misappropriation of Aboriginal and Torres Strait Islander culture and ensures that Aboriginal and Torres Strait Islander artists and communities can properly commercialise their artwork; and

⁷ <https://www.ipaustralia.gov.au/files/interim-report-scoping-study-stand-alone-legislation-protect-and-commercialise-indigenous-0>.

- it addresses the issue of consumers being misled into purchasing inauthentic Aboriginal and Torres Strait Islander products.

5 What broader benefits, costs or risks would stand-alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?

Our organisations strongly support the introduction of *sui generis* ICIP legislation protecting ICIP rights in the form of TCEs and traditional knowledge more broadly. The introduction of dedicated cultural rights legislation to protect tangible expressions of ICIP could provide stronger, more fit-for-purpose ICIP rights and provide greater clarity around cultural rights.

It is important for any legislative reform to be firm in prohibiting the sale of inauthentic goods (whether the ban remains in the ACL or is incorporated in stand-alone legislation), as continuing to allow these goods to proliferate in the market risks creating opacity around whether such practices are inappropriate and harmful. With each sale of an inauthentic product, economic benefit is syphoned away from Aboriginal and Torres Strait Islander artists, and a significant risk of cultural and social harm is created. In contrast to a mandatory labelling scheme, which risks legitimising fake art and sending a clear, harmful message to First Nations people, the introduction of a ban on inauthentic goods and stand-alone ICIP legislation would be a meaningful step towards self-determination of Aboriginal and Torres Strait Islander peoples

There is risk that if community consultation is not appropriately conducted, stand-alone legislation may not adequately protect the interests and meet the needs of Aboriginal and Torres Strait Islander people. In order to obtain comprehensive and meaningful direction as to what the *sui generis* legislative framework should look like, the Government should conduct ongoing, face-to-face consultations with different Indigenous communities in open and honest forums on country. This involves ensuring that all communities that want to contribute to these discussions are given the opportunity and appropriate forum to do so. What is appropriate consultation in each case is likely to be as diverse as the groups across Australia. Agency should be given to each community or individual participant to determine what process and forum is appropriate.

Questionnaire

6 Have you experienced (or witnessed) misuse or misappropriation of IK?

Yes. In 2016, following representations by Indigenous community members and artists, key peak bodies, Arts Law, the Copyright Agency | Viscopy (as they were then known) and IartC began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal-style' art and craft products and merchandise for sale across Australia that had no connection to Aboriginal and Torres Strait Islander artists and communities. We found that the sale of inauthentic art and craft is extensive and widespread, both in terms of the types of items sold and their easy availability, particularly in tourist locations. Products available include bamboo digeridoos, paintings, decorative plates and key rings, to name a few.

Based on a shopping exercise and anecdotal evidence, we also found examples of companies using the labour of a small number of Aboriginal artists to help legitimise inauthentic products for the souvenir/tourist market. For example, Aboriginal artists may be asked to paint handcrafted wooden items imported from Indonesia in an 'Aboriginal-style' that the artist does not choose. The artist may be paid a small amount on a per item basis and rarely has an employment contract or written agreement in place. The business may also import a large quantity of completed products which look almost identical to the products painted by Aboriginal artists, with imported goods comprising the majority of goods sold by the business (ie up to 80%).

The result was the creation of the Fake Art Harms Culture campaign, the core aim of which is to end the market of fake Aboriginal and Torres Strait Islander art in Australia by increasing consumer

awareness and by advocating for meaningful law reform in settings such as this present study. See further discussion of this campaign and the harms of inauthentic art in our submissions to the Productivity Commission and the [House of Representatives inquiry](#).

7 Have you used an element of IK in a product, service or in business before?

8 If yes to Question 7, did you take any steps to check it was ok to use the IK?

Ensuring that use of ICIP is appropriate requires an understanding of the will and values of the individuals and communities involved. In some instances, this may require a substantial amount of time and resources. Barriers to doing this work the right way include:

- poor relationships with, or a lack of confidence in the justice system from, the First Nations individuals and communities involved;
- attempting to apply a format or system that does not fully accommodate what is culturally right; and
- a lack of time and resources to conduct appropriate consultation or to adequately implement a culturally appropriate process.

Arts Law was involved in developing plans for the management of ICIP for the Canning Stock Route project, working with 110 Aboriginal artists and contributors from 10 art and culture centres across 17 remote communities that the Canning Stock Route passes through. The process was lengthy, with consultation occurring on a granular level with individual artists and elders around what could be shared.⁸ As stated by Monique La Fontaine when detailing the experience of developing appropriate frameworks for handling ICIP for this project, communication is key to ensuring different communities' ICIP is handled appropriately, including using translators and making sure communities are adequately consulted and involved in decision making.⁹

When working with their Aboriginal and Torres Strait Island artist members to licence their art works, the Copyright Agency consults with the artist to ensure the works are shared (reproduced and communicated) appropriately. While the extent of consultation is generally proportionate to the size and complexity of licence, sometimes even the smallest of licences will require close attention to ensure IK is protected, for example, the use of an artwork on a book cover where the artwork was cropped and overprinted with the book title: concept layouts and proofs were provided to ensure particular elements of the work with cultural significance were unaffected.

9 Have you ever accessed government support for business, including anything specific to Indigenous businesses or Indigenous Knowledge?

Arts Law is the recipient of small annual investments from the Office of the Arts and each State and Territory and receives project-specific funding from other bodies such as IVAIS. Similarly, the IartC receives small amounts of funding, covering minimal operating costs. The Copyright Agency funds its operations by deducting its costs from the licence fees and royalties it generates each year. It received funding to support the introduction of the Resale Royalty Right for visual artists which commenced in 2010. While a Right for all artists - 65% of the artists receiving resale royalties are Aboriginal or Torres Strait Islander.

10 In your experience, how have Aboriginal and Torres Strait Islander communities provided access to IK, or managed requests for use of IK?

In our experience, there is no 'one means' by which Aboriginal and Torres Strait Islander communities provide access to IK or manage requests for use of IK. One common example through which

⁸ <https://www.artslaw.com.au/case-studies/yiwarra-kuju-the-canning-stock-route-2/>;
<https://www.artslaw.com.au/videos/yiwarra-kuju-the-canning-stock-route/>.

⁹ Ibid.

communities provide authorised access to IK is through licensing arrangements, though these are negotiated on a case-by-case basis.

Licensing arrangements can allow First Nations artists and communities to license the use of their intellectual property (usually copyright, including artistic works) and confidential information (including traditional knowledge) to third parties, which offers a degree of control over those assets and a source of income. The artist may create an original artwork expressly to be reproduced on products or license an existing artwork. This artwork can be reproduced on a range of items including for example bags, scarves and mugs.

Aboriginal and Torres Strait Islander artists who work independently or through art centres may enter licensing agreements with a business or the art centre they work with. Under the licensed product model, the artist is the licensor and the business is the licensee. Artists that work independently sometimes negotiate licensing agreements themselves. Their gallery might act as the agent in these negotiations and others engage the Copyright Agency (or other businesses), who will broker the license for the artist. Best practice agreements generally see the artist paid a royalty (a percentage of the sale price) for each item sold or for uses that are not product-based (for example used in an architectural feature), a licence fee commensurate to the use. Some product licences require the reporting of sales of the items at regular intervals, and artists are paid the royalties due to them. Accurate reporting of all sales relies on the honesty of the licensee. The products reach the market via the licensee either selling the products directly through their website or retail outlets or by wholesaling these products to their stockists, who then sell the products to the consumer.

While licensing arrangements can be beneficial to Indigenous artists, some Indigenous artists can experience unequal bargaining power, unfair contract terms and unethical treatment from art dealers and other third parties, which may be compounded by access to services and geographical location.

11 How should a person or business from outside approach a community if they wish to use the community's IK?

There are many Aboriginal and Torres Strait Islander communities and individuals within 'Australia' that possess varying languages, cultural protocols and obligations. The appropriate and necessary steps to follow when a person wishes to use a community's IK will vary from case to case, though we encourage obtaining free, prior and informed consent from the relevant person or community as a mandatory first step in every instance.

People and businesses can use pre-existing protocols (such as those developed by organisations such as Arts Law or the [Australia Council](https://australiacouncil.gov.au))¹⁰ as a framework or guidance for what steps to follow when dealing with ICIP, but the content of any protocol should be informed and consented to by the relevant First Nations individuals or communities.

12 If there was a new legal right to protect IK, should there be a way for a community to register their ownership or custodianship?

In our view, the ICIP rights should be automatic. While there may be some benefits to registration, it should not be a requirement for protection (see response to Section 2, Element 3 above).

13 New laws could prevent the sale or importation of inauthentic Indigenous style products - what kind of products should they aim to stop?

In line with what we proposed in Schedule 1 of our [submission](#) to the Productivity Commission, the ACL could be amended to prohibit:

¹⁰ <https://australiacouncil.gov.au/investment-and-development/protocols-and-resources/protocols-for-using-first-nations-cultural-and-intellectual-property-in-the-arts/>.

- the supply of items featuring an Indigenous cultural expression unless the item is made by an Indigenous artist or members of an Indigenous community, or is a licensed reproduction of such goods; or
- the supply of Indigenous cultural artefacts unless the item is made in Australia by an Indigenous artist or Indigenous community (ie these cannot be subject to licensing agreements).

14 Which of these could be considered authentic Indigenous products? Select all that apply.

As noted in our submission to the Productivity Commission, defining ‘authenticity’ can raise complex cultural and social issues and we do not claim any cultural authority on such matters. We refer to pages 23 to 24 of our [previous submission](#) for a discussion on the complexities of proposing any legal definition of authenticity.

Our responses regarding authenticity below are provided for the limited purposes of this study. Further community consultation is needed to define the parameters of authenticity in a broader context, such as stand-alone ICIP legislation.

Item	Authentic?
Products produced or sold by a company that is majority Aboriginal or Torres Strait Islander owned	<p>Products produced by an Aboriginal or Torres Strait Islander owned company may be 'authentic' in certain situations.</p> <p>if the product contains the ICIP of the Aboriginal or Torres Strait Islander owner or ICIP they are culturally authorised to use; the product was made under licence from the relevant Indigenous person or Indigenous community.</p> <p>The person or company who sells the product does not factor into the product's authenticity.</p> <p>For example, if an Aboriginal-owned design agency employs non-Indigenous designers and those designers create Aboriginal-style designs for documents, including RAPs and websites, these designs would not be considered 'authentic'.</p> <p>For example, if an Aboriginal-owned design agency employs Indigenous designers and those designers create Aboriginal-style designs that are a montage of various styles from many Aboriginal groups from across Australia for which the designers are not the owners of the ICIP and they are not culturally authorised to use, these designs would not be considered 'authentic'.</p>
Products hand made in Australia by an Aboriginal or Torres Strait Islander person	<p>Yes, if the product contains the ICIP of that Aboriginal or Torres Strait Islander person or ICIP they are culturally authorised to use or includes ICIP used under licence from the relevant Aboriginal or Torres Strait Islander person or community.</p>
Products partly made by an Aboriginal or Torres Strait Islander person	<p>Assuming the product contains ICIP of that Aboriginal or Torres Strait Islander person or ICIP they are culturally authorised to use, it may be an 'authentic Indigenous product'.</p> <p>Factors to consider include:</p>

	<ul style="list-style-type: none"> to what extent the Aboriginal or Torres Strait Islander person was involved; and whether there is a fair licensing/joint venture/collaboration/employment/partnership agreement in place.
Products that use fairly licenced artwork or other IK by an Aboriginal or Torres Strait Islander artist or craftsman	Yes
Products that use IK with the consent of Traditional Owners	Only if consent is appropriately and fairly obtained
Other / unsure	

15 Would you be more likely to purchase something if it was labelled as an authentic Indigenous product?

Yes, though a ban would be more effective in increasing demand for authentic products and providing economic benefits to First Nations people than a labelling scheme.

16 Would it be helpful to have a separate IK organisation or authority that could help a community enforce protection of their IK rights?

See response to Section 2, Element 3 above.

17 How could a separate IK organisation or authority help at a national level? Select all that apply.

Possible benefit	Role of separate IK authority?
Education and advice to Traditional Owners on how to protect and enforce their IK;	Potentially, though the Government should also consider enhancing existing advice and education services for Aboriginal and Torres Strait Islander people. In the Indigenous art space, these include art centres and other peak bodies/support organisations including art centres but not limited to: IartC, Arts Law, the Copyright Agency, Desart, Arnhem, Northern and Kimberley Artists, Aboriginal Art Centre, Hub Western Australia, Indigenous Art Centre Alliance, Ku Arts, Umi Arts and the National Association for the Visual Artists and groups like The NSW Aboriginal Culture, Heritage & Arts Association (ACHAA).
Establish processes to help third parties to identify and secure the consent of Traditional Owners to the use of their IK;	Possibly, if after consultation this seems like an appropriate model. The process for obtaining appropriate consent (including whether it is appropriate to use a third party) should be self-determined by each Aboriginal and Torres Strait Islander community or individual.
Negotiate IK licences on behalf of Traditional Owners, with their permission;	Possibly, if after consultation this seems like an appropriate model.
Distribute any licence fees collected from the	Probably, if after consultation this seems like an appropriate model. There are several existing models that see revenue from licensed

third-party users to the Traditional Owners;	use of copyright returned to owners. These have evolved (and been amended and augmented) over the past 50 years. Some model involving a national cost effective, efficient and culturally appropriate collection organisation might be appropriate.
Managing and enforcing a system to identify authentic Indigenous products;	No, we do not support an authenticity labelling scheme to identify inauthentic products over a product ban.
Liaising with border officials to identify/verify suspected inauthentic imports;	Yes
Power to take enforcement action against unauthorised use, misappropriation and breaches of licencing or other IK agreements;	As discussed in our <u>submission</u> to the Productivity Commission, we envisage that, initially, the responsibility for enforcing the ACL prohibition on inauthentic products would fall to the ACCC, a well-respected and effective regulator with effective enforcement powers. As stated in that submission: <i>any legal definition of authenticity would be complex and might require dispute resolution in order for such questions to be effectively enforced by bodies like the ACCC. This raises the question of who would be able to resolve these disputes and who and where this “authority” would come from. Our suggestion is that it would not be the ACCC itself that make any final decisions about authenticity, but that it would be Aboriginal and Torres Strait Islander communities who make this final decision as a representative body or group within or advising the ACCC.</i> We are open to the possibility of a separate IK organisation or authority subsequently managing and enforcing a system to identify authentic Indigenous products if, following consultation, this seems like an appropriate model.
Other / none	

18 Following from Question 17, what roles or functions could be useful to have managed at a state / territory or community level? Select all that apply.

Role/function	Managed at what level?
Education and advice to Traditional Owners on how to protect and enforce their IK;	Yes
Establish processes to help third parties to identify and secure the consent of Traditional Owners to the use of their IK;	Possibly, if after consultation this seems like an appropriate model.
Negotiate IK licences on behalf of Traditional Owners, with their permission;	Possibly, if after consultation this seems like an appropriate model.

Distribute any licence fees collected from the third-party users to the Traditional Owners;	Possibly, if after consultation this seems like an appropriate model.
Managing and enforcing a system to identify authentic Indigenous products;	Possibly, if after consultation this seems like an appropriate model.
Liaising with border officials to identify/verify suspected inauthentic imports;	Possibly, if after consultation this seems like an appropriate model.
Power to take enforcement action against unauthorised use, misappropriation and breaches of licencing or other IK agreements;	Possibly, if after consultation this seems like an appropriate model.
Other / none	

19 Overall, do you think stand-alone legislation for IK would be beneficial for Aboriginal and Torres Strait Islander people and communities?

Yes, as addressed in our submissions to the Productivity Commission and above, our organisations strongly support the introduction of *sui generis* ICIP legislation protecting ICIP rights in the form of TCEs and IK more broadly.

20 What do you think are the potential benefits, costs and risks of stand-alone legislation for IK?

See response to Section 5, above.