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House of Representatives Standing Committee on Indigenous Affairs
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<https://www.aph.gov.au/inauthenticart>

**Submission to the House of Representatives Standing Committee on
Indigenous Affairs**

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

The National Association for the Visual Arts (NAVA) welcomes the opportunity to respond to the House of Representatives Standing Committee on Indigenous Affairs inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia.

1. About NAVA

The National Association for the Visual Arts (NAVA) is the peak body representing the professional interests of the Australian visual and media arts, craft and design sector, comprising of 20,000 practitioners, galleries and other art organisations. Since its establishment in 1983, NAVA has been influential in bringing about policy and legislative change to encourage the growth and development of the visual arts sector and to increase professionalism within the industry.

NAVA provides professional services to its constituents through offering expert advice and referrals, grants, career development opportunities and training, online and hard copy resources and the benchmark Code of Practice for the Professional Visual Art, Craft and Design Sector.

NAVA provides advocacy and representation for the sector and sets industry standards. It has had a long commitment to ensuring Aboriginal and Torres Strait Islander peoples rights are protected. This has included the commissioning and publication of *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector* written by Doreen Mellor and Terri Janke. This protocols document provides background information and a historical and cultural context for contemporary Indigenous visual arts practice in Australia and identifying the appropriate ways of working within the Indigenous sector.

NAVA has also been a vigorous advocate for the introduction of both moral rights and resale royalty rights legislation in Australia and a key contributor to the development of the Indigenous Art Code.

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NAVA gratefully acknowledges the assistance of the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments, as well as the NSW Government through Create NSW and the NSW VACS agreements, and the Queensland Government through Arts Queensland. Patrons: Pat Corrigan AM, Mrs Janet Holmes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

2. NAVA's Position on Fake Art

*"The art of Indigenous Australia has become an important element of the Australian arts environment. Visual art forms continue to play a leading role, providing a visible Indigenous presence in many and diverse contexts. As Indigenous involvement in the visual arts sector expands, addressing cultural exchange and diversity of approach becomes more challenging."*¹ Doreen Mellor and Terri Janke

As set out in NAVA's Code of Practice, the use of Indigenous designs or their close equivalent without permission is simply not acceptable. Yet, inauthentic items continue to be available for sale. NAVA firmly believes this is exploiting culture, undermining communities and blocking income generation for Aboriginal and Torres Strait Islander artists.

Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector recognises that technology has made it simpler to reproduce images, designs and visual symbols. This means it has become easier to replicate, create and sell often imported inauthentic art. This has a significant financial impact on artists, communities, buyers and ethical dealers.

Artists are often reliant on the sale of their work as a sole income stream. Fake art dismantles this stream and simultaneously disadvantages ethical businesses, who are unable to compete in an unregulated market place.

NAVA urgently calls on the Government to address these issues and the current inadequacies of Australian Consumer Law and Copyright Law in protecting Aboriginal and Torres Strait Islander practitioners' rights.

NAVA asserts that legislating to ban the supply of products purporting to be Australian Indigenous artefacts, artworks and souvenirs and ban the use of misleading terms like 'Aboriginal style' used to describe inauthentic local or imported artefacts, artworks or souvenirs being passed off as Indigenous, would protect artists' rights and culture.

Simultaneously, there also needs to be assistance for the Indigenous art industry and the Australian tourism industry to work together to create better informed international tourists and buyers of Australian Indigenous cultural products by developing and distributing appropriate protocols and mutually beneficial codes of conduct. These measures and the work of the Indigenous Art Code should be appropriately resourced and implemented nationally.

NAVA strongly recommends a review of Copyright Law to recognise cultural and intangible heritage. This would significantly support Aboriginal and Torres Strait Islander artists and culture and protect against cultural appropriation.

¹ Doreen Mellor, Terri Janke *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector* The National Association for the Visual Arts https://visualarts.net.au/media/uploads/files/Valuing_Art_Respecting_Culture_2.pdf

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3. Response to Terms of Reference

a. The definition of authentic art and craft products and merchandise

*"This is about cultural preservation and respect for where that artist is from."*²
Executive Director of the Darwin Aboriginal Art Fair, Claire Summers

*'Art is our story, it is our identity, it is who we are, it's a living culture.'*³
Artist Laurie Nona

There are many instances when artworks have been created by non-Indigenous individuals and companies and marketed through retail outlets and/or commercial galleries as work by Indigenous practitioners. For this reason, it is important for users, including buyers of Indigenous cultural material to establish the authenticity of the work.

Authentic Indigenous arts and craft is made by or licenced by Indigenous artists or crafts people. An Indigenous artist or craftsperson identifies as Aboriginal or Torres Strait Islander and is recognised by the community in which they identify.

Authenticity may be determined by checking for an authentication label or other labelling system generated either by the practitioner and/or endorsed by appropriate and reliable entities. Authenticity may also be established by working through reputable agents or dealers (information can be obtained from the Australian Indigenous Art Code) or by working directly with Aboriginal art and craft centres. There should be legal redress if an art work is sold with an incorrect claim of authenticity.

The definition of authentic art and craft products and merchandise needs to ensure Aboriginal and Torres Strait Islander artists are attributed to their work. Currently works for sale can include images and biographies of the artists as well as a description of the work itself. This provides an important distinction as it shows who made the work, where the work comes from and what the work is. However, attribution to the artists should not be misused or artists misrepresented.

The definition of authentic art, craft and merchandise should go beyond just 'made in Australia' labelling. It should seek to incorporate the identification of specific Indigenous communities, with the artists making decisions on how and what part of their culture is shared with the buyers. Knowledge is not held with the sellers or the buyers, it is held with the creators and their rights should uphold this principle.

There needs to be legal clarity under Consumer Law of the use of terms relating to authentic and fake art. This should be enforced by the ACCC as many of the current terms can be misleading. For example:

² <http://www.abc.net.au/news/2017-08-09/indigenous-artists-battle-fakes-urge-consumers-to-buy-ethically/8788116>

³ *ibid.*

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- 'Indigenous style' or 'Aboriginal style' – this does not mean it is made by an Indigenous artist or that the maker has the cultural rights to use the design or imagery.
- 'Handmade' - handmade does not have to mean handmade in Australia or by an Indigenous artist.
- 'Made in Australia' - this also does not mean the work is made by an Indigenous artist.

Whilst NAVA recognises the urgent need for stopping the practice of fake art, we recommend that it should be the artists' and communities' decision on how authentic art and craft products and merchandise are represented, as they are the custodians and creators. This should be an integral inclusion in any proposed definition or changes to existing laws and practices. It must ensure that all products made and sold have the permission of Aboriginal and Torres Strait Islander artists and that the artists are earning an income from this.

NAVA also believes that whilst the definition and representation of authenticity should be the artists and communities decision, it should not be their role to prove authenticity. It can be difficult for artists, art centres and communities to comply with extensive costs and administrative requirements. Instead, NAVA recommends that the onus should be on the retailers to prove a work is authentic.

Authenticity could also ensure that an artist has had the opportunity to access advice on any contracts that they may be entering into. This is because a significant number of artists are not aware of their rights regarding reproduction licensing, sales of work and commissioning. Often contracts can be unfair to artists and they can be open to exploitation. NAVA will refer artists to the Arts Law Centre, who can provide legal advice on the terms of a contract or agreement.

b. Current law and licensing arrangements for the production, distribution, selling and reselling of authentic Aboriginal and Torres Strait Islander art and craft products and merchandise.

Australia has a responsibility to protect the rights of Aboriginal and Torres Strait Islander peoples in accordance with the United Nations Declaration of the Rights of Indigenous Peoples.

The United Nations Declaration of the Rights of Indigenous Peoples, Article 31 states:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

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2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.⁴

Indigenous cultural material can include objects and art/craft/design works, images, language and stories, particular words and representations of special places. Under Indigenous systems of law, ownership of cultural material is not limited to tangible items or recognisable styles such as rarrk crosshatching or x-ray images. As well as designs, styles and images, Indigenous language, words and stories are also 'owned'.

Copyright

NAVA's primary concern with copyright is to ensure that the visual arts creators of intellectual property are appropriately protected and remunerated when their art works are used by others. On behalf of Australian visual artists, NAVA has continued to assert that legislation must ensure artists can have sustainable careers, including through earning income from copyright payments. This means that artists should have decision making power about by whom and under what circumstances their work can be reproduced and for what return.

The *Copyright Act 1968* is concerned with the final expression of an idea, such as in a song, poem, or painting. It does not protect information or ideas that contribute to the final expression, which includes personal styles, methods and techniques. Whilst copyright of an artist's physical work is protected under current legislation, in the context of Indigenous art and cultural practice, collaborative practice, the protection of cultural knowledge and its representation is not protected.

Copyright law currently does not protect Indigenous Cultural Intellectual Property (ICIP). This is something that NAVA firmly asserts needs to be addressed. It does not cover all ownership situations in relation to Indigenous art, craft and design. For example, some forms of Indigenous rock art are very old, and although the images remain important and may belong culturally to certain groups, who are their custodians, current copyright law does not protect rock art works that are older than 70 years from the death of the artist. Permission for reproduction of rock art or other such cultural images should be sought from appropriate local Indigenous groups or custodians. However, there are no legal mechanisms in place to enforce this.

The *Copyright Act 1968* permits the assigning or licensing of an individual's copyright rights to another person. For example, an Indigenous artist may commission an individual living in Indonesia to make copies of their work. So long as there is permission, the artworks produced overseas under the guidance of the Indigenous artist will not breach the *Copyright Act*.

⁴ United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, United Nations Documents, Human Rights Council, A/HRC/1/1/3 29 June 2006.

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However, the issue of contention is that by not directly copying Indigenous artworks and producing works that resemble Indigenous works, producers are not seen as breaching the *Copyright Act*. If a person appropriates a design or style they are not infringing on Copyright Law. NAVA recommends that new sui generis legislation is required to deal with the complexities of the copyright principle as it should apply to Indigenous art. NAVA reasserts that any changes to Copyright law must ensure artistic creators' work is respected and adequately remunerated when their art works are used by others.

Licensing

NAVA believes that Australia's system of licences, should respect the fundamental principle of the right of a creator to benefit from their investment in their creation of thought, time, skill and resources. Artists should have a right to choose who they licence their work to, how it is used and where it is used. Licensing should not inhibit an artist's moral rights, as set out in the *Copyright Act 1968* 2000 amendment.

A key element of any copyright or IP change is to enable individual creators to gain access to justice. Usually the situation is one where an artist is trying to assert their rights against exploitation by major commercial interests with infinitely greater power and resources. We urge the Government to consider other measures, such as an effective notice and takedown (or stay down) regime and fines and remuneration for breach of copyright, moral rights or exploitation of cultural property.

NAVA also recommends amending Copyright Legislation so that the copyright in works produced by Indigenous artists under certain employment arrangements remains with the artist.

NAVA proposes that if changes are to be made to Australia's IP arrangements, the Government needs to provide resources for a community education campaign and the running of test cases to establish the boundaries of any new legal parameters.

Resale Royalty

The Resale Royalty scheme benefits established artists and their beneficiaries after their death, but also young and emerging and living artists, especially Indigenous artists living in remote areas.

In the first five years of the Resale Royalty scheme, over \$3 million was paid out to over 1000 artists, 65% of whom were Aboriginal or Torres Strait Islanders artists.

NAVA surveyed the opinions of its members about the Resale Royalty scheme and found that:

- 90.3% of those surveyed said they thought that the recognition of on-going rights was an important benefit of the scheme
- 70.1% of those surveyed said that earning income was a valued benefit, though at that stage only 8% had received payment

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- 93.8 % of those surveyed said they thought the scheme should be expanded so they would be eligible for resale royalty payments when their art sold overseas.

c. An examination of the prevalence of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products and merchandise in the market;

One of the significant challenges for Aboriginal and Torres Strait Islander artists is the prevalence and impact of inauthentic art. Currently the Arts Law Centre of Australia estimates that around 80% of the products available in shops are inauthentic⁵. This means that Aboriginal and Torres Strait Islander artists are being economically and culturally disadvantaged.

NAVA often receives requests for advice on how to purchase ethical Aboriginal and Torres Strait Islander Art. Currently we are able to advise what to look for, what questions to ask and how to identify works that have not disadvantaged artists. We also refer people to the Indigenous Art Code for ethical buying. However, this does not always mean that consumers are purchasing authentic products, due to the prevalence of inauthentic works.

Another significant issue that artists regularly contact NAVA for is the use of Aboriginal or Torres Strait Islander work or cultural imagery by non-indigenous artists. NAVA asserts that non-indigenous artists need to always gain permissions when working with Aboriginal and Torres Strait Islander artists or cultural material and that the existing protocols⁶ that protect Indigenous artists from cultural appropriation should be adopted industry wide.

d. options to promote the authentic products for the benefit of artists and consumers; and

Purchasing directly from Indigenous art and craft centres ensures authenticity and supports the community and the artists. In most cases, bypassing art and craft centres is an unacceptable practice. This however, is only applicable where art centres exist. In other key tourist hubs, especially in major cities, it is essential that consumers and sellers are educated on what is authentic work.

Much like other consumer campaigns the Government could further resource the Indigenous Art Code to educate both buyers and sellers of their rights, best practice standards and create an ethical buyer’s app from the list of reputable stockists or companies for people to shop at as identified by the Indigenous Art Code.

Visual fact sheets for sellers outlining ethical practices, what questions to ask

⁵ <https://www.artslaw.com.au/news/entry/fake-art-harms-culture-campaign/>

⁶ Doreen Mellor, Terri Janke *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector* The National Association for the Visual Arts https://visualarts.net.au/media/uploads/files/Valuing_Art_Respecting_Culture_2.pdf

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distributors and how to ensure authentic work could also be distributed at Tourist Information Centres across Australia.

These measures however, will not address the proliferation of the production of fake art and the exploitative practices that many Aboriginal or Torres Strait Islander artists have experienced in entering into agreements or payments for work.

To assist in addressing these a strengthening of Australian Consumer Law (ALC) and the ACCC's ability to enforce regulations around misleading and deceptive conduct beyond the current scope, new legislation that prohibits the production and distribution of inauthentic works and a continuing education campaign for consumers.

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

NAVA supports the recommendations made by the Arts Law Centre of Australia to strengthen existing Australian Consumer Law and calls for the Government to implement legal preventions on the sale of inauthentic Aboriginal and Torres Strait Islander art. We also recognize and support the Indigenous Art Code's submission in recommending the establishment of an Indigenous Advisory Committee to inform the implementation of any legislative changes.

As discussed in the Arts Law Centre of Australia's submission the ability to continue selling fake art means that the laws around misleading and deceptive conduct are not strong enough. Strengthening the ACL could make an immediate impact on stopping the sale of inauthentic works and misleading conduct.

However, as noted by Arts Law, the existing law is not concerned with whether Indigenous culture is unfairly misappropriated for commercial gain, provided consumers are not misled. The law would also need to change to protect the cultural rights of Aboriginal and Torres Strait Islander artists and communities as set out in the United Nations Declaration of the Rights of Indigenous Peoples. There would need to be a recognition of that Aboriginal or Torres Strait Islander culture is being misappropriated for commercial gain and that is inappropriate.

Any measures that are implemented must be discussed and tested with the artists who are affected by the prevalence of fake art. The Government must make sure there is no extra administrative or financial burden placed on artists in the process of ensuring authentic works for sale. Often artists are time and resource poor and any extra requirements for them could be a barrier to implementation.

NAVA maintains that it is the ethical and legal responsibility of all tiers of Government and businesses to ascertain the authenticity of artists or companies they may be commissioning to produce souvenirs for significant local, national and international events. This means consulting with key Aboriginal and Torres Strait islander communities, peak bodies, legal centres and service organisations to ensure reputable providers are engaged.

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