



Submission to the Review of the Indigenous Art Code

Productivity Commission submission

The Productivity Commission acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their Cultures, Country and Elders past and present.

The Productivity Commission

The Productivity Commission (PC) is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long-term interest of the Australian community.

The PC's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the PC can be obtained from its website (www.pc.gov.au).

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Introduction

In 2021 the Australian Government asked the Productivity Commission (PC) to conduct a study into the nature and structure of the markets for Aboriginal and Torres Strait Islander visual arts and crafts and policies to address deficiencies in these markets. [Read the full terms of reference](#) on the PC's website.

The [study's final report](#) was released in December 2022. The report highlights the cultural significance that visual arts and crafts have had – and continue to have – for Aboriginal and Torres Strait Islander people and communities, and for all Australians. This cultural practice has grown into a significant industry, generating income for artists and arts workers, creating economic opportunities for communities and helping to maintain, strengthen and share Aboriginal and Torres Strait Islander cultures.

The PC found that inauthentic Aboriginal and Torres Strait Islander arts and crafts – which include Indigenous-style products created by non-Indigenous people, products that use Indigenous Cultural and Intellectual Property (ICIP) without the authorisation of traditional custodians and products that infringe copyright – are a pervasive and longstanding problem. It recommended the development of dedicated legislation to protect ICIP and the introduction of a mandatory disclosure requirement for Indigenous-style products not created or licensed by an Aboriginal and Torres Strait Islander person. The PC notes the progress made by the Australian Government in developing stand-alone legislation to protect ICIP, as part of the National Cultural Policy.

In undertaking the study, the PC also heard concerns about unethical market interactions. While many Aboriginal and Torres Strait Islander artists navigate the complexity of the market successfully and create sustainable sources of income, there were localised instances of market operators exploiting the vulnerability of some artists by underpaying them or reproducing their works without permission.

Art centres, regional peak bodies and support services – including the Indigenous Art Code – play an important role in the sector. The PC found that while these support services helped artists involved in unfair market transactions, their reach was limited and legal assistance was complex and costly to access.

The PC made recommendations on ways to improve supports for artists, including:

- bolstering the Indigenous Art Code Limited (IartC), which administers the Indigenous Art Code, by improving complaint and dispute resolution processes
- modestly increasing government funding to IartC
- ensuring legal and other support services are accessible to Aboriginal and Torres Strait Islander artists
- evaluating the effectiveness of expenditure directed to the Aboriginal and Torres Strait Islander visual arts and crafts sector, in partnership with Aboriginal and Torres Strait Islander people.

This submission presents a summary of the PC's findings and recommendations that pertain to the Indigenous Art Code.

Factors that help or hinder the implementation of the Indigenous Art Code

The Indigenous Art Code was established by the arts industry to promote ethical conduct in the market for Aboriginal and Torres Strait Islander visual arts and crafts. The Code defines and prohibits certain practices that, although not illegal, are likely to fall short of broader community standards of fair dealings.

The PC found that the Code is one of the key mechanisms used to mediate interactions between artists and the market. It establishes a standard of conduct for interactions between market participants with different

levels of market power. It also functions as a code of ethics, providing guidance on what 'fair and ethical trade' is. It provides artists with information and advice, hears and responds to reports of unethical conduct, and empowers artists to pursue their rights and maximise the economic benefits they derive from their artworks.

Many study participants agreed that the Code is a valuable mechanism for ensuring an ethical marketplace. However, they also had concerns about the operation, enforcement and effectiveness of the Code, including that:

- the Code is not mandatory, which means that unscrupulous operators are not obliged to participate
- IartC is not Aboriginal and Torres Strait Islander-led, and does not provide assurances over the authenticity of works, nor does it signal that the supply chain is Aboriginal and Torres Strait Islander-controlled
- IartC has limited powers over its members. In cases of misconduct, the main option available is to expel dealer-members, but some argue that IartC appears unwilling to use those powers
- IartC is under-resourced and overstretched. In the submission it provided to the study (together with Arts Law and the Copyright Agency), IartC agreed that 'the organisation is not equipped to handle all matters raised, namely those issues raised about non-IartC dealers and conduct research and other strategic work' (submission 31, p. 21).

Regulation of the Code

Some study participants suggested that the Australian Government should prescribe the Code in regulation, as either a voluntary or mandatory industry code under Part IVB of the *Competition and Consumer Act 2010* (Cth). This would enable the Australian Competition and Consumer Commission (ACCC) to enforce higher industry standards.

Unethical conduct towards Aboriginal and Torres Strait Islander artists is a complex and often localised problem. While any cases of unethical market dealings are of concern, the PC was not presented with evidence of widespread unethical conduct to justify an ACCC-enforced voluntary or mandatory code of conduct for the Aboriginal and Torres Strait Islander visual arts and crafts industry.

A mandatory code would not address the systemic factors that give rise to unethical conduct towards Aboriginal and Torres Strait Islander artists and would impose administrative burdens on artists and other industry participants. Further, although a prescribed code would provide the ACCC with stronger investigation and enforcement powers, these are often last-resort powers under the enforcement of existing codes and the ACCC is only able to pursue a small subset of the issues presented to it.

Therefore, the PC concluded that although there remains unethical conduct in the industry, there was inadequate evidence to justify a mandatory code as the best solution. Many information imbalances, such as a lack of awareness on pricing, could be reduced through improved contracting practices (including model contracts and artists better understanding their rights) and information provision through art centres and other support services. Market power imbalances were mitigated by artists having an increasing number of channels to sell their art, including direct online sales.

Funding of Indigenous Art Code Limited

The PC found that some of the concerns raised by sector participants about the Code could be linked to IartC's limited resourcing. It concluded that there was a clear case for modestly increasing government funding to IartC, particularly if the organisation took on more comprehensive compliance, data collection and reporting obligations.

Government grants accounted for 78% of IartC's income in 2020-21. The PC notes that since the release of its study, Australian Government funding to IartC has increased by 47%, compared to its levels in 2021-22.

To support the effectiveness of the Code and avoid government funds being diverted from other sector priorities, the PC also recommended that additional government funding should be matched, at least partly, by larger contributions from dealer and member fees. The PC notes that since the publication of its study, dealer and member annual fees have increased from \$170 to \$220.

There is limited public reporting to enable the PC to assess whether current funding amounts are adequate.

Improving the effectiveness of the Code

Although the PC did not recommend a prescribed Code, it highlighted some actions that the IartC could consider to improve the effectiveness of the voluntary industry code. These included:

- improving enforcement of code compliance, including through stronger, independent complaints and dispute resolution processes and greater transparency around the outcome of disputes
- supporting take-up and improved consumer awareness of the Code
- embedding better monitoring, evaluation and review of the Code's effectiveness, including through more data collection and reporting.

Specific recommendations and findings from the PC's study

Finding 8.2 – Enforcement of the Indigenous Art Code is constrained by resourcing

The Indigenous Art Code is one of the key mechanisms used to mediate interactions between artists and the market. However, the corporation enforcing the code is under-resourced and overstretched.

Recommendation 8.1 – Strengthening Indigenous Art Code Limited

The Australian Government, in partnership with State and Territory Governments, should modestly increase funding to Indigenous Art Code Limited to support key processes, including:

- an enhanced complaints and dispute process, including a referral pathway to independent review of decisions and public reporting of compliance and educative actions and outcomes
- collecting and reporting on performance indicators to inform evaluation of the Code's effectiveness, including data on trends in reported unethical conduct.

Additional funding should be subject to ongoing monitoring and evaluation of the Code's effectiveness. Commensurately higher membership fees from dealer members should also be levied to co-fund these improvements.

Finding 8.4 – The case for an ACCC-enforced mandatory or voluntary Indigenous art code is not strong

There is inadequate evidence of widespread unethical conduct to justify an ACCC-enforced voluntary or mandatory code of conduct for the Aboriginal and Torres Strait Islander visual arts and crafts industry. A government-imposed code risks being a blunt and costly tool that would not necessarily address the systemic imbalances that create opportunities for unethical dealings.

Specific recommendations and findings from the PC's study

Finding 8.5 – Artists face difficulties accessing legal and other support services

Key legal protections, including copyright and the prohibition on unconscionable conduct, can be difficult for artists to access. There are also gaps in legal and other support services for independent artists, particularly those working outside of areas serviced by art centres and regional peak bodies.

Recommendation 8.2 – Ensuring support services are accessible and centre artists' needs

The Australian Government should identify gaps in and barriers to access to Aboriginal and Torres Strait Islander artist support services, and consider ways to ensure services are able to respond to the needs of all types of artists in all regions. The planned Australian Government evaluation of Indigenous Art Code Limited should consider what role the organisation should play in artist outreach and referral.

The artwork on the cover page is adapted from:

River of Knowledge

by Luke Penrith

