

14 September 2022



Law Council
OF AUSTRALIA

Office of the President

Aboriginal and Torres Strait Islander Visual Arts and Crafts
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By online form at:

<https://www.pc.gov.au/inquiries/current/indigenous-arts/make-submission#lodge>

Cc by email: indigenous.arts@pc.gov.au

Dear Commissioners

Law Council of Australia submission – Aboriginal and Torres Strait Islander Visual Arts and Crafts

The Law Council of Australia (**Law Council**) is grateful for the opportunity to respond to the Draft Report published by the Productivity Commission (**Commission**) in relation to its study of Aboriginal and Torres Strait Islander visual arts and crafts (the **Draft Report**).

An executive summary of the Law Council's views is set out in this letter and expanded on in the **attachment**.

I acknowledge the significant contributions of the Intellectual Property Committee (**IPC**) of the Business Law Section of the Law Council of Australia and the Law Council's Indigenous Legal Issues Committee to the Law Council's response. I also thank the Chair of the Consumer Law Committee of the Law Council's Legal Practice Section for reviewing parts of the paper. I refer also to the Business Law Section's [submission](#) to the Commission in relation to an earlier Issues Paper.

The IPC wishes to note that, while one of its contributors to the submission is Aboriginal the other authors do not identify as First Nations persons, their views should be considered on that basis. The IPC has made its contribution on the basis of its expertise in the practice and research of intellectual property law.

The Law Council's view is that reform in this area should be led by First Nations peoples, and it urges the Australian Government to focus on community engagement, capacity building, and developing strong and adequately funded institutions to further First Nations self-determination in this sphere.

Executive summary

The Law Council welcomes the acknowledgement in the Commission's Draft Report of the nature and extent of the problem of inauthentic Aboriginal and Torres Strait Islander arts and crafts, as well as the significant economic, cultural, and personal harms that they cause.

It is therefore conceptually supportive of a mandatory labelling scheme for inauthentic products which indicates to consumers that they are not created by or under licence from an Aboriginal and Torres Strait Islander person.

A mandatory labelling scheme offers the potential to help customers distinguish between authentic and inauthentic products, while avoiding placing the burden of administering the scheme onto Aboriginal and Torres Strait Islander artists and businesses – a key shortcoming of earlier, unsuccessful, initiatives such as the National Institute on Alcohol Abuse and Alcoholism (**NIAAA**) certification trademark.

However, the Law Council has strong reservations about several aspects of the model proposed by the Commission, and recommends that a number of matters be addressed before the final report is produced.

In summary, its key concern is that the definition of authenticity (and inauthenticity) is ambiguous in scope in a number of respects – including, most notably, the use of a ‘reasonable person’ test to determine the ‘Indigenous style arts and crafts’ which would be subject to the scheme.

The extent of these ambiguities is such that there is considerable doubt as to the level of certainty of protection which would be provided, and the scheme may in fact lead to greater disputation. This would compound the access to justice issues which First Nations artists already face, and would face, under the proposed scheme, as discussed below.

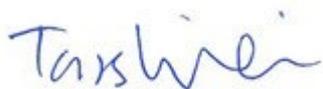
More broadly, the Law Council notes that the proposed scheme draws heavily upon copyright law, but that an encompassing cultural rights legislative scheme would need to engage with a much wider range of issues than those that fall within the purview of the Commission (and this inquiry’s focus on ‘arts and crafts’), and that an inquiry with a broader remit undertaken by an entity such as the Australian Law Reform Commission, may be preferable. Importantly, it must be an inquiry that is Indigenous-led, and which engages with community from the outset so First Nations’ needs, interests, and perspectives shape the law.

The Law Council would be pleased to engage further on these issues.

Contact

If you would like to discuss this matter further, please contact Mr Matthew Wood, Principal Policy Lawyer, on 02 6246 3755 or at matthew.wood@lawcouncil.asn.au.

Yours sincerely



Mr Tass Liveris
President