Law Council
OF AUSTRALIA

ATTACHMENT

Law Council of Australia – submission to the Productivity Commission – Aboriginal & Torres Strait Islander Visual Arts & Crafts inquiry

Draft Recommendation 5.1: A mandatory labelling scheme for inauthentic products should be developed

1. Recommendation 5.1 of the Draft Report is that:

> *The Australian Government should develop a mandatory information standard to require the labelling of inauthentic Indigenous-style products to indicate to consumers that they are not created by or under licence from an Aboriginal and Torres Strait Islander person.*
>
> *In developing the standard, the Australian Government should engage effectively with Aboriginal and Torres Strait Islander people.*

2. The Law Council refers to the following questions, which form part of Information request 5.1:

   - *How might a mandatory labelling scheme for inauthentic products operate in practice and what should be considered further in its design?*
   - *Is the suggested approach to product coverage workable? Are there ways to provide greater certainty about coverage without unduly narrowing its scope?*

3. The Commission's working definition of authentic and inauthentic Aboriginal and Torres Strait Islander visual art or craft is (the **authenticity definition**):

> *A product or artwork is considered **authentic** Aboriginal and Torres Strait Islander visual art or craft if it is:*
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> - *an original piece authored (or co-authored) by an Aboriginal and Torres Strait Islander person; or*
> - *produced under a licensing agreement with the Aboriginal and Torres Strait Islander artist(s).*
>
> *Aboriginal and Torres Strait Islander visual arts and crafts that do not meet these criteria, including those that infringe the copyright of an Aboriginal and Torres Strait Islander artist's work, or are Indigenous-style arts and crafts made by non-Indigenous people without licensing agreements, are considered **inauthentic**.*

4. The scheme will cover 'products offered for sale in Australia that include an expression or design (whether that is an object, such as a boomerang, or a dot or cross hatching

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design or pattern applied to another product) that a reasonable person could consider to be a cultural expression, design or style of Aboriginal and Torres Strait Islander origin'.[1] This could cover 'arts, crafts and artefacts; souvenirs, clothing, homewares and other merchandising containing Indigenous designs and expressions, and digital artworks and designs'.[2]

5. The Law Council considers that the authenticity definition has an ambiguous scope in a number of respects.

6. First, the treatment of co-authored works is unclear. The Draft Report states:[3]

> *To support Aboriginal and Torres Strait Islander artists working in collaboration with others, authorship need not be sole authorship — the authenticity definition is satisfied provided that one of the co-authors of a work is an Aboriginal and Torres Strait Islander person.*

7. The following questions arise:

   (a) Will the majority of joint authors need to be Aboriginal and Torres Strait Islander people?
   (b) What is the materiality of the contribution required to qualify an individual or entity to be a joint author?
   (c) Will digital artworks and designs developed in part by, or with the assistance of, artificial intelligence be considered as the works of joint authors?

8. Secondly, the treatment of implied licences is not addressed.

9. Thirdly, the prima facie objective standard invoked by the 'reasonable person' test for determining whether a product is of 'an Indigenous Cultural Expression, or of Aboriginal and Torres Strait Islander origin or style' and thus subject to the obligation of authenticity may in practice engender ambiguity. It may also change over time as the buying public's awareness, knowledge and expectations evolve.

10. There is a threshold question as to whether 'Aboriginal and Torres Strait Islander origin or style' is a matter which a 'reasonable person' may consistently and accurately determine. It is not clear upon what frame of reference a 'reasonable person' may form a view that an artwork is an 'Indigenous style'. The concept of Indigenous style, in practice, may require a subjective assessment of the origin, quantity and quality of design or decoration used on a product, artwork or souvenir, and accordingly will necessitate the development of factors and approaches to guide that subjective assessment. To address the questions raised in the Draft Report, even if a specific list of artefacts and designs could be developed, there will remain ambiguities about whether certain products are subject to the standard.

11. The Law Council suggests further work be undertaken to comprehensively determine, in the scheme itself, which products are subject to the authenticity requirement, rather than leave this to be a matter of judgement.

12. The range of works potentially caught by the definition is broad in scope and so requires careful consideration. For example, it is not clear whether it is intended that the proposal

[1] Draft Report 15, 185.
[2] Ibid.
[3] Ibid 127.

would apply to works of fine art by non-Indigenous artists (such as Brett Whiteley)[4] which deploy Aboriginal motifs, or by contemporary Indigenous artists (such as Blak Douglas), or to articles of cultural heritage held in institutions.

- *Are the authenticity criteria for the scheme appropriate? Do they pose any unintended consequences? If so, how could these be addressed?*

13. The proposed authenticity definition turns on whether a work was authored by an 'Aboriginal and Torres Strait Islander person'. The 'Indigeneity' criteria are proposed to be the tripartite (descent, self-identification and acceptance) already in use.[5]

14. As discussed above, the Law Council considers that the appropriateness of the authenticity criteria ought to be determined by First Nations peoples. The entity attaching the label will need to be identified.

15. From a legal perspective, the Law Council observes that the crafting of clear definitions will be key to the workability of the scheme.

16. It further notes that the Draft Report cites as one of the key factors in the failure of the NIAAA scheme the difficulty of proving Aboriginal and Torres Strait Islander status and that 75 per cent of applicants failed to meet the complex requirements.[6] The Law Council is concerned that an unintended consequence of the mandatory nature and structure of the proposed inauthenticity scheme may be to impose a default assumption of failure to satisfy Indigeneity criteria. Disproving that assumption in order to avoid the imposition of the inauthenticity label on their artworks and products (and avoid action under the Australian Consumer Law (**ACL**) and/or other penalties introduced by the scheme) may be complex and costly and impose an additional burden and indirect disadvantage on First Nations people legitimately wishing to sell authentic Indigenous products and artworks.

- *Are there any other considerations about the design and implementation of the standard?*

17. Another concern about the proposed scheme relates to compliance and the low likelihood that makers and sellers of inauthentic arts and crafts would make use of the scheme. Related to this is the importance and cost of education and enforcement mechanisms. In the Law Council's view, the successful implementation of such a scheme would require significant investment.

18. The Law Council anticipates that non-compliance will be widespread and difficult to police and enforce. For example, many of the types of products identified in the Draft Report as problematic, such as souvenirs, are on sale in gift shops, market stalls and the like throughout Australia.

19. While described as 'mandatory', it is not clear to the Law Council that the consequences of breach of the labelling scheme are sufficient to ensure compliance. The Draft Report proposes that the mandatory inauthenticity label 'could be implemented through an

[4] See S Meacham, 'Saga of nude Brett Whiteley's cave painting', *Sydney Morning Herald* 12 March 2009, https://www.smh.com.au/entertainment/art-and-design/saga-of-nude-brett-whiteleys-cave-painting-20090312-gdteuo.html

[5] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70 (per Brennan J) and *Love v Commonwealth* (2020) 270 CLR 152.

[6] Draft Report 14.

information standard under the ACL',[7] and that 'failure to include a label where one should have been present would enable regulators to take action under the ACL'[8] – actions which are described at page 177 and, it is noted, which do not include infringement notices.

20. It may be observed that prima facie any artwork, product or souvenir offered for sale in Australia that a 'reasonable person could consider to be a cultural expression, design or style of Aboriginal and Torres Strait Islander origin' may already be in breach of section 18, paragraph 29(1)(a), paragraph 29(1)(k) and section 33 (among other provisions) of the ACL (Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**)), and yet to date the experience of practitioners is that the Australian Competition and Consumer Commission rarely takes such action under the ACL to obtain injunctions, civil penalties, or declaratory relief, with some exceptions: *ACCC v Birubi Art Pty Ltd* [2018] FCA 1595.

21. It is not clear to the Law Council that a breach of the mandatory inauthenticity label will make it more straightforward for the ACCC to bring more cases to penalise or restrain the sale of inauthentic products or provide additional motivation for it to do so, without a significantly increased enforcement budget.

22. For such a scheme to work, therefore, the scheme will require very substantial funding over a sustained period, in particular in relation to the organisation tasked with enforcement.

23. It is suggested that the Commission should also consider, as part of any 'mandatory inauthentic scheme', the introduction of powers for the Comptroller-General of Customs to seize imported inauthentic products, such as those set out in Part 13 of the *Trade Marks Act 1995* (Cth).

Draft Recommendation 7.2 New cultural rights legislation should be introduced to recognise and protect cultural assets in relation to visual arts and crafts

24. The Law Council supports the introduction of legislation that would recognise and protect the cultural expressions[9] of First Nations peoples. The Draft Report identifies compelling reasons why new legislation is an appropriate response to many of the issues that the Draft Report and stakeholders have identified, and why existing laws do not, and cannot, address them in isolation. However, the Draft Report also recognises that the issues in relation to Aboriginal and Torres Strait Islander arts and crafts extend well beyond their economic value and the marketplace relations of First Nations artists, craftspersons, and businesses. The questions surrounding the use of First Nations' cultural expressions are also integral to questions of self-determination and well-being. They are about connection to culture, country, and community.[10] For many First Nations people they are not separate from cultural practice, language, traditional knowledge, cultural heritage, spiritual beliefs, and land.[11]

[7] Ibid 14, 177.

[8] Ibid 14.

[9] The Law Council prefers the term 'cultural expression' to 'cultural assets' as the latter may tend to focus attention on the economic and commercial aspects of arts and crafts.

[10] Draft Report 66-71.

[11] Ibid 62-66.

25. The issues regarding what will constitute cultural assets and who will be authorised to use them, or to authorise their use, are complex and need to be carefully thought through and clearly defined.

26. In that context, the Law Council notes that the World Intellectual Property Organization (**WIPO**) has established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**) which is undertaking text-based negotiations to finalise an agreement on an international legal instrument(s) for the protection of traditional knowledge, traditional cultural expressions (**TCEs**) and genetic resources.[12] The next meeting to further the work on the TCE instrument is scheduled for September 2023. The IPC understands that these negotiations are at a sufficiently advanced stage that a Diplomatic Conference may be convened by 2024 with a view to adopting a treaty.

27. The negotiations being undertaken at WIPO demonstrate the range of considerations that need to be considered and accommodated. The Law Council does not consider that development of an Australian solution should necessarily be constrained by the work being undertaken at WIPO, but ultimately it is desirable that any Australian solution is consistent with its requirements.

28. Cultural rights legislation would need to engage with a much wider range of issues than those which fall within the purview of the Commission, in light of its key focus on economic perspectives and the limited scope of the Draft Report on 'arts and crafts'. The Law Council is further concerned that considerably more time than is currently available to the Commission is required to address these matters in detail.

29. The Law Council therefore believes that the task of investigating, designing, and implementing the legislation proposed in Draft Recommendation 7.2 should be undertaken by an expert body with a much wider mandate, such as the Australian Law Reform Commission. 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. At all costs it is vital to avoid a situation where communities are only consulted after a draft model has been produced.

30. This reform task could be directed to consider all the important questions raised by Information requests 7.1–7.4. Additional matters which would need to be considered include:

    - how the proposed legislation would interact with the wide array of existing laws that directly or indirectly engage with related matters, including intellectual property laws, cultural heritage laws, consumer protection laws, biological resource laws, and native title law;

    - whether some of the desired objectives could be achieved by relatively minor amendments of the above laws;

    - how the proposed legislation would comply with Australia's international obligations (including intellectual property treaty obligations), as well as take account of ongoing international initiatives (such as those being undertaken by the IGC at WIPO);

[12] World Intellectual Property Organization, 'Intergovernmental Committee (IGC)', https://www.wipo.int/tk/en/igc/ (webpage, accessed on 7 September 2022).

- the constitutional head(s) of power upon which such legislation would be based;
- the role of Customs officials in relation to imported, potentially infringing or inauthentic merchandise;
- the role that could be played by alternative forms of dispute resolution, such as a small claims court or customary law, and how those mechanisms could be designed to improve access and enforceability of the rights of First Nations communities and artists; and
- the importance of complying with principles of Indigenous data sovereignty.

Access to justice

31. Access to justice for First Nations artists is a key concern of the Law Council.

32. Even a perfectly balanced scheme to protect cultural rights will be ineffective if the First Nations people who rely on it cannot access its remedies. This issue affects both existing and proposed legislation for Indigenous artists and other Indigenous stakeholders, including by reason of legal costs,[13] and the nature of financial funding that may be required from government (and the private sector) to alleviate any such impediments.

33. As the Intellectual Property Committee of the Law Council's Business Law Section noted in its submission to the Commission on its Issues Paper:

> *Many of the costs in enforcing consumer law are "hidden", particularly in relation to enforcement. Those artists who are able to identify problematic use of their culture often rely on pro bono legal support, assuming they are able to access it. Those who provide legal support to such artists must do so against the practical and structural barriers of geography, language, and culture.*[14]

34. Just one law firm, for example - King & Wood Mallesons - estimated that it had recently provided 530.7 hours (described as 'nominally $289,234.50') in pro bono legal assistance in disputes relevant to the scope of the Commission's study of Aboriginal and Torres Strait Islander visual arts and crafts.[15]

35. The potential liability for an adverse costs order (including a pre-emptive order for security for costs) is a barrier to many seeking redress, including those fortunate enough to have pro bono assistance. In this context, the Law Council recommends that the protection given to claims in subsection 82(4) of the CCA be extended to applicants seeking declaratory or compensatory orders for breaches of the ACL insofar as it would apply to the mandatory labelling scheme. Subsection 82(4) provides that a court may

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[13] These may include litigation costs under proposed and existing legislation, costs of advice in relation to protection options under existing and proposed legislation, and/or costs of effective legal advice to enable entry into licensing agreements to commercialise authentic Indigenous Cultural and Intellectual Property in arts and crafts.

[14] Intellectual Property Committee, Business Law Section of the Law Council of Australia, *Response to Issues paper - Aboriginal and Torres Strait Islander visual arts and crafts* (Submission to Issues Paper), 16 December 2021, [24.2], https://www.lawcouncil.asn.au/publicassets/c396c1b6-5961-ec11-9446-005056be13b5/4147%20-%20Aboriginal%20and%20Torres%20Strait%20Islander%20visual%20arts%20and%20crafts.pdf.

[15] King & Wood Mallesons, *Data re pro bono support provided to Aboriginal and Torres Strait Islander visual arts and crafts* (Submission), 20 May 2022 2, https://www.pc.gov.au/__data/assets/pdf_file/0015/340170/sub034-indigenous-arts.pdf.

order that certain applicants are not liable for respondents' costs, '*regardless of the outcome*' or likely outcome, but only for certain remedies under that Act. The availability of this potential protection would assist applicants to take the first step to protect their cultural rights.

36. As well, those who are designing a scheme to protect such cultural rights must give careful thought to the particular difficulties faced by those seeking to enforce cultural property or to prevent cultural harm. For example, how the scheme will provide a timely remedy will, as with many legislative remedies, be very important. Existing court processes can be cumbersome and will not necessarily provide a prompt resolution. In addition,, the legislation could give guidance to assist the courts by including applicable principles for the assessment of damages.

37. The Law Council also considers that there is a need for additional legal assistance funding to support First Nations persons involved in civil matters. The Law Council has long called for a significant and ongoing funding increase to First Nations legal services. It notes that Aboriginal and Torres Strait Islander Legal Service, for example, does not provide legal aid for civil matters.

Broader policy agenda

38. The model proposed by the Draft Report, while still in a nascent stage, appears heavily reliant on the model of copyright law. However, the Law Council suggests it would be valuable to consider a wider range of options, noting in particular:

    - There is an existing body of First Nations law and custom in relation to arts, crafts, and other cultural expressions that has developed over tens of thousands of years. The existence of this law is identified in the Draft Report.[16] It is important that any reform in this area recognises that existing body of law and custom. The legal space of regulating access to and uses of cultural expressions is far from being *terra nullius.*

    - There is no particular reason to favour the copyright model for a new legislative scheme, particularly as the underlying justifications for the new rights would be different to those underlying copyright and the historical and international contexts are also different.[17] In particular, it would be worth considering whether a registration scheme may offer more promise in relation to cultural rights legislation.[18] Another option worth considering might be principles-based legislation supplemented with protocols embedding community practices.

39. Finally, there are already underway a number of other initiatives and processes, which relate directly or indirectly to First Nations arts and culture, Indigenous cultural and intellectual property, and self-determination. These include:

    - the Australia Council's National Indigenous Arts and Cultural Authority;

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[16] Draft Report 62-66.

[17] In this context, it is understood that the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* 2003 (Cth) did not proceed because of the limitations of the copyright system to provide for Indigenous cultural rights.

[18] In this context, it is noted that the choice of a registration scheme also has bearing on the issue of standing. See for example the High Court's discussion of standing in light of the public interest with the accuracy and purity of Register of Trade Marks in *Health World Pty Ltd v Shin Sun Australia Pty Ltd* [2010] HCA 13; 240 CLR 590.

- IP Australia's Indigenous Knowledge Project and Indigenous Knowledge Working Group;
- the National Cultural Policy Review; and
- the Uluru Statement from the Heart.

40. A broad inquiry could ensure that these projects and initiatives do not operate in silos but work together to achieve better cultural, social, and economic outcomes for Aboriginal and Torres Strait Islander peoples, as well as working towards First Nations' sovereignty and self-determination in relation to the best methods for protecting First Nations arts and culture.