

# NOT FAIR?

INDIGENOUS ART CODE LTD - ABN 67139788711  
RESPONSE TO THE PRODUCTIVITY COMMISSION INTERIM REPORT  
– HARNESSING DATA AND DIGITAL TECHNOLOGY  
4 SEPTEMBER 2025



[WWW.INDIGENOUSARTCODE.ORG](http://WWW.INDIGENOUSARTCODE.ORG)

## **Indigenous Art Code Ltd – Our work**

Indigenous Art Code Ltd (IartC) is the national organisation responsible for administering a voluntary industry code of conduct for art dealers and other entities who trade in or deal with Aboriginal and Torres Strait Islander artists and their art.

IartC supports artists who contact us directly with issues or concerns about commercial dealings they have entered into or are considering entering into. We facilitate transparent communication between artists and member businesses, providing advice and, when required, referrals to other support organisations.

Through our Code Signatory membership process, IartC promotes best practice standards and behaviour change, strengthening the Aboriginal and Torres Strait Islander visual arts sector and helping to create a fairer market for artists to engage with.

IartC plays an advocacy role for our members, addressing the issues and challenges that impact them and the broader Aboriginal and Torres Strait Islander visual arts sector. Key campaigns IartC has helped develop and champion include the Fake Art Harms Culture Campaign and Our Art is Our Lifeline, which responded to market fluctuations caused by the COVID-19 pandemic.

IartC is a limited liability public company led by a Board of Directors drawn from the Aboriginal and Torres Strait Islander visual arts industry and the wider community. IartC is also a registered Charity through the Australian Charities and Not-For Profits Commission.

The IartC Board is independent from government and is administered under the Australian Corporations Act 2001.

### **1. Executive Summary**

The Indigenous Art Code (IartC) welcomes the opportunity to respond to the Productivity Commission's interim report on *Harnessing Data and Digital Technology* from August 2025.

Our submission is not about the technical aspects of Artificial Intelligence (AI), but about fairness—particularly fairness for Aboriginal and Torres Strait Islander artists whose rights are uniquely at risk.

As a summary of our response, we submit that:

- Copyright protections must not be eroded. Weakening copyright to facilitate AI scraping would disproportionately harm Aboriginal and Torres Strait Islander artists, who already face barriers in asserting their rights.
- Indigenous Cultural and Intellectual Property (ICIP) is not protected by copyright. While the Australian Government has committed to standalone ICIP legislation, no draft has been released, leaving a critical gap in protections.
- AI scraping poses specific risks, including but not limited to: loss of control over ICIP; misrepresentation of traditional cultural expressions and traditional knowledge; and

derogatory treatment of intellectual property and ICIP; and market distortion through AI-generated “Aboriginal-style” outputs.

- AI already reproduces racial bias and derogatory stereotypes. UN Special Rapporteurs, the UN Permanent Forum on Indigenous Issues, and UNESCO have all raised concerns that AI exacerbates discrimination and undermines Indigenous rights.
- International obligations apply. Australia has commitments under the *International Covenant on Economic, Social and Cultural Rights* (Article 15) and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP, Article 31) to protect Indigenous peoples’ cultural rights.

## Recommendations

In summary, we strongly urge that the following recommendations be applied to provide appropriate protection for Aboriginal and Torres Strait Islander people in the face of these new technologies and challenges:

1. Maintain existing copyright protections in full – with no erosion or special exceptions of any kind for AI.
2. Urgently progress standalone ICIP legislation.
3. Restrict AI scraping of cultural content immediately.
4. Ensure Aboriginal and Torres Strait Islander peoples are at the centre of AI policy development.
5. Embed fairness for artists as a guiding principle across AI and digital reforms.

AI may have extraordinary potential to positively impact productivity at a societal scale, but unless Aboriginal and Torres Strait Islander rights are protected, AI will risk becoming another mechanism for cultural exploitation and the market for inauthentic art and craft products.

IartC always advocates for fairness for artists as the bare minimum for respectful engagement. In the context of AI, this requires strong copyright protection, urgent ICIP legislative reform; and regulation of AI to ensure that racial bias and misrepresentation are tightly controlled in AI systems.

## 2. Copyright and Current Legal Frameworks

### 2.1. Australian Law

Australia’s copyright laws are strong – and for good reason. They reflect decades of legal and policy development that recognises the moral, material and economic rights of authors of original works, and subject matter other than works, as defined variously under the *Copyright Act*.<sup>1</sup> Historically, the invention of new technologies has prompted legislative reform either to recognise copyright in new media (such as photography, moving image and

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<sup>1</sup> *Copyright Act 1968* (Cth).

digital works), and to protect copyright owners from new technology that heightens the risk of infringement (such as online infringements).

The economic and technological disruption posed by AI is new, but it is no different in substance from the perspective of copyright protection than previous challenges posed by the Internet or even physical facsimiles. Just like the response to these other technologies in the past, copyright protections should not be eroded in the name of technological progress.

*“Protecting the cultural rights of Aboriginal and Torres Strait Islander peoples is essential to building an inclusive digital economy. Innovation must be grounded in respect, equity, and self-determination — Closing the Gap requires strengthening rights, not weakening them.”*

— Indigenous Art Code Ltd

The Productivity Commission’s report notes that productivity growth from AI will be “built on existing legal foundations”<sup>2</sup> and that regulatory reviews must be completed to identify gaps. We strongly support this recommendation and principle.

However, even under existing copyright law without the intervention of AI, Aboriginal and Torres Strait Islander artists face disproportionate barriers to enforcing their rights in a number of key respects:

- Artists often lack resources to pursue copyright and moral rights infringements, and the costs and delays associated especially with “small” infringements is particularly prohibitive;
- Enforcement is complicated by unequal bargaining power between artists and commercial intermediaries; and
- Remedies are often slow and inaccessible.

Crucially, copyright law does not extend to ICIP – the collective knowledge, designs, stories, languages, and cultural expressions that underpin and inform much Aboriginal and Torres Strait Islander artwork. While the Australian Government has committed to standalone ICIP legislation under the 2023 National Cultural Policy,<sup>3</sup> no draft has been released, and there is limited public clarity on the scope of the legislation or timelines.

In the absence of standalone ICIP legislation, even existing copyright protections are inadequate to protect Aboriginal and Torres Strait Islander culture from AI scraping. Further diminishing the effectiveness of these limited protections for traditional cultural expressions in Australia would leave Aboriginal and Torres Strait Islander artists and communities with even fewer means to achieve meaningful protection of their cultures and to limit the creation and sale of inauthentic art and craft products.

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<sup>2</sup> Productivity Commission, ‘Harnessing data and digital technology,’ Interim Report, August 2025, Draft Recommendation 1.1, p. 19.

<sup>3</sup> Australian Government, *Revive: A place for every story, a story for every place*, 2023, pp. 30-31.

It also furthers the presence of misinformation and disinformation about Aboriginal and Torres Strait Islander culture that is already rampant online, including from people who peddle fake art and make up stories with no cultural authority or meaning.

## *2.2. International Law*

Australia also has international obligations under key instruments such as article 15 of the *International Covenant on Economic Social and Cultural Rights*<sup>4</sup> and, crucially, Article 31(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*, which reads in full:

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.<sup>5</sup>

The weakening of intellectual property protections directly affecting Aboriginal and Torres Strait Islander artists and communities is inconsistent with these international law rules and norms.

## **3. Risks that the training and outputs of AI pose for Aboriginal and Torres Strait Islander Artists**

### *3.1. Loss of self-determination and control*

When ICIP is ingested into AI datasets, artists and communities lose agency over how their culture is used. Once rendered by an AI model in an image output, designs and stories can be endlessly replicated, remixed, and redistributed – often stripped of cultural meaning or context.

If exceptions around AI use are included in the *Copyright Act* or elsewhere, there are significant risks that any output generated through AI services and tools will then be replicated freely and lawfully, with confusion and uncertainty about the provenance of the source material upon which the generative AI models were trained.

Already, we have seen in the proliferation of AI-generated images that fake Aboriginal and Torres Strait Islander art is easily created and disseminated. The law should aim to restrict this practice, not validate it.

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<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15.

<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 31(1).

Recent reporting from the Australian Broadcasting Corporation described this accurately as an act of “cultural theft”, with those interviewed lamenting the ease with which these images can be created – and the significant distortion and disrespect that results.<sup>6</sup>

### *3.2. Misappropriation and misrepresentation*

AI models trained by scraping ICIP from online sources will inevitably create outputs that distort or trivialise traditional cultural expressions.

Under the *Copyright Act*, acts that alter or change a copyright-protected work may infringe an author’s moral rights if these changes amount to “derogatory treatment” that is prejudicial to the author’s honour or reputation.<sup>7</sup> In the context of Aboriginal and Torres Strait Islander art, significant changes to the underlying story of a given work can occur with what appear to be “minor” changes. In many cases, there is no such thing as a “minor” or “superficial” change, with any change to a work being derogatory in the minds of an artist or community.

IartC has long campaigned to outlaw the creation and sale of inauthentic Aboriginal and Torres Strait Islander art and craft products. We refer to our comprehensive joint submission with the Copyright Agency and Arts Law in relation to the previous Productivity Commission study into this topic.<sup>8</sup> Many of the concerns we raise in a general context about the harm of fake products apply directly to the world of generative AI, but the risks are at a far greater scale given the ease of replicability offered by generative AI tools.

### *3.3. Market distortion and loss of confidence*

Fake product undermines confidence in markets. Without meaningful action to combat inauthentic art and craft products, AI-generated works risk flooding the market with cheap, manufactured goods without any connection whatsoever to Aboriginal or Torres Strait Islander peoples.

This not only damages the livelihoods and cultural connections held by artists, but it erodes public trust and confidence in the market for Aboriginal and Torres Strait Islander art.

## **4. Racial bias, misrepresentation and harm in AI**

AI systems are not neutral. They often reproduce—and even amplify—historic biases embedded in data, leading to harmful outcomes for certain demographics.

The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance warned in 2024 that generative AI “continue[s] to raise serious human rights issues, including concerns about racial discrimination”<sup>9</sup> and calls for urgent regulation – including due diligence to assess racial and ethnic bias in AI

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<sup>6</sup> James Vyver and Tahnee Jash, ‘Calls to protect Indigenous intellectual property from AI “cultural theft”’, *Australian Broadcasting Corporation*, 23 August 2025 <<https://www.abc.net.au/news/2025-08-23/calls-to-protect-indigenous-intellectual-property-from-ai-cultur/105680182>>.

<sup>7</sup> See *Copyright Act 1968* (Cth) Part IX.

<sup>8</sup> Indigenous Art Code Ltd, Copyright Agency and Arts Law Centre of Australia, ‘Responding to the Productivity Commission Issues Paper – Aboriginal and Torres Strait Islander Visual Arts and Crafts,’ <[https://www.pc.gov.au/data/assets/pdf\\_file/0008/336653/sub031-indigenous-arts.pdf](https://www.pc.gov.au/data/assets/pdf_file/0008/336653/sub031-indigenous-arts.pdf)>.

<sup>9</sup> Dr Ashwini K.P., ‘Contemporary forms of racism, racial discrimination, xenophobia and related intolerance’, Report, 3 June 2024, p. 2 <<https://docs.un.org/en/A/HRC/56/68>>.

technologies.<sup>10</sup> This was earlier reflected in United Nations General Assembly Resolution A/RES/78/265, in which all Member States were encouraged (among other things) to

“help protect individuals from all forms of discrimination, bias, misuse or other harm, and avoid reinforcing or perpetuating discriminatory or biased applications and outcomes throughout the life cycle of artificial intelligence systems, including, for example, by analysing and mitigating bias encoded in datasets and otherwise combating algorithmic discrimination and bias, while not inadvertently or disproportionately impacting the positive development, access and uses of other users and beneficiaries”.<sup>11</sup>

In 2025, for the International Day of the World’s Indigenous Peoples, the United Nations turned its focus on “Indigenous Peoples and AI”, highlighting the outsize impacts of generative-AI systems on the worlds First Peoples who are invariably not consulted in the construction of AI models “risking the misuse of their data, knowledge, and identities.”<sup>12</sup>

We call for strong and urgent protection of Aboriginal and Torres Strait Islander peoples in this space by way of regulation, in line with international norms as recognised at the United Nations, that limit discrimination, bias, misuse and harm in the creation of AI models.

This is firmly in line with Australia’s obligations under the UNDRIP to ensure that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”<sup>13</sup> It is also consistent with the prohibition on racial discrimination enshrined under the *Racial Discrimination Act*.<sup>14</sup>

## 5. Conclusion

The launch of the National Cultural Policy in 2023 saw its first pillar enshrined as “First Nations First.” Commenting on the scourge of fake Aboriginal and Torres Strait Islander art following the release of the Productivity Commission’s previous study on that topic, Minister for the Arts, Tony Burke, said: “I’m sick to death of First Nations artists getting ripped off. Fake art isn’t just dishonest - it is cultural theft.”<sup>15</sup>

In that same media release, then Minister for Indigenous Australians, Linda Burney, further commented: “Inauthentic art products and merchandise have no connection to First Nations communities and do not provide them with any economic benefits, which is why we’re committed to supporting an ethical marketplace that provides fair returns to Aboriginal and Torres Strait Islander artists and businesses.”<sup>16</sup>

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<sup>10</sup> Ibid, p. 18 [68].

<sup>11</sup> United Nations General Assembly Resolution A/RES/78/265, art 6(h)  
<<https://docs.un.org/en/A/RES/78/265>>.

<sup>12</sup> United Nations, ‘Indigenous Peoples and AI: Defending Rights, Shaping Futures,’  
<<https://www.un.org/en/observances/indigenous-day>>.

<sup>13</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, art 2.

<sup>14</sup> *Racial Discrimination Act 1975* (Cth) s 9.

<sup>15</sup> Tony Burke MP and Linda Burney MP, ‘Protecting First Nations visual arts and craft,’ Media Release, 19 July 2022 <<https://ministers.pmc.gov.au/former-ministers/burney/2022/protecting-first-nations-visual-arts-and-crafts>>.

<sup>16</sup> Ibid.

lartC agrees wholeheartedly with these sentiments. Consistent with these statements from Minister Burke and Minister Burney, we hope that the Productivity Commission will agree that exemptions for AI as are being discussed will encourage cultural theft and the market for inauthentic art products.