

A proposed National Indigenous Arts and Cultural Authority (NIACA)

Public discussion paper

8 October 2018

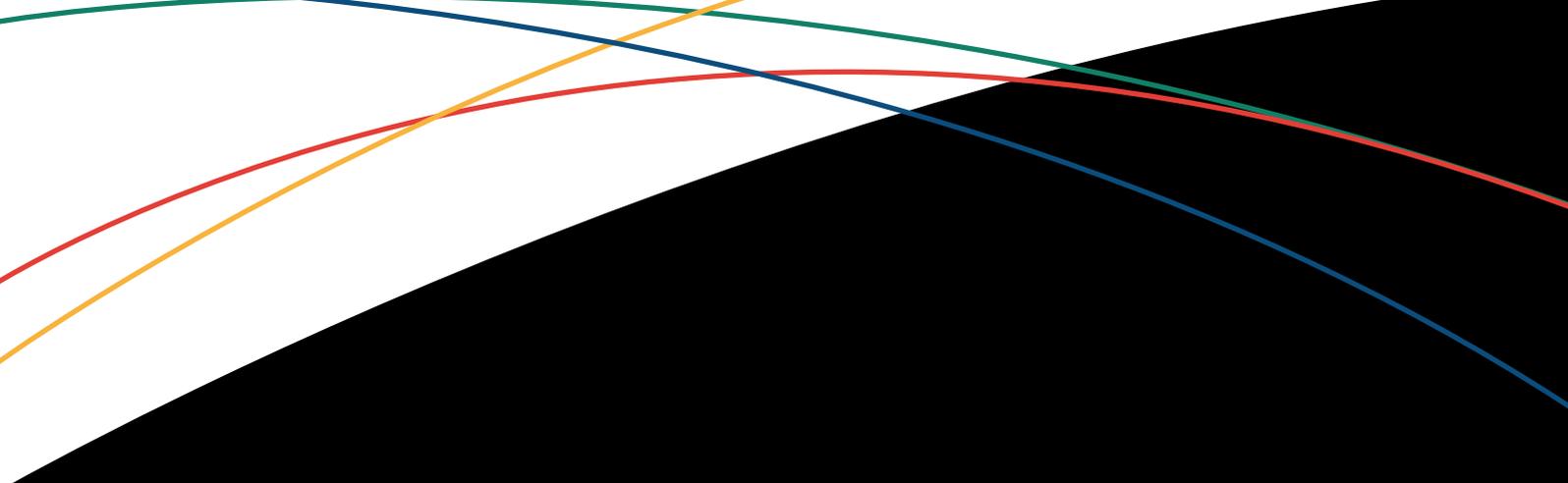


Australian Government



The Australia Council for the Arts is acting as an interim secretariat to support the consultation process for a NIACA.

The term NIACA is a working title and may be subject to change at the 2019 National Summit.



Imagine.

A recognised collective voice for Aboriginal and Torres Strait Islander peoples on arts and cultures.

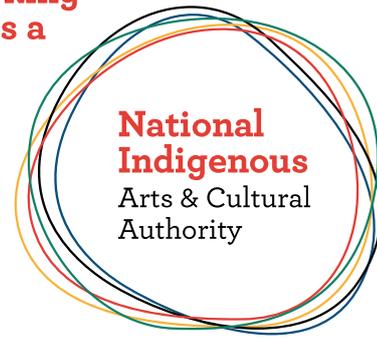
A national arts and culture body that empowers First Nations artists, communities and regions, and the authority of cultural custodians.

An organisation to protect, maintain, strengthen and amplify the arts and cultures of Australia's First Nations peoples – through rights, economies, resilience, sovereignty.

A national peak body working across art forms to grow, maintain, protect and empower the First Nations arts sector in its diversity and entirety.

An authority to focus on First Nations arts and cultures as a priority area of national significance – for cultural and economic sustainability, community wellbeing, and the uniqueness of Australian identity.

Working
towards a



Discussion
Paper

Contents

Introduction	2
Why create a NIACA?	3
What should the priorities of a NIACA be?	5
1. Networks and services to strengthen the First Nations arts and cultural sector	6
2. Policy development, advocacy and representation on First Nations arts and culture	6
3. Supporting and defending Indigenous cultural intellectual property rights	7
Who should be represented in the NIACA decision-making model?	8
How should a National Indigenous Arts and Cultural Authority be legally structured?	9

Introduction

For decades, the idea of a National Indigenous Arts and Cultural Authority (NIACA) has emerged and re-emerged in recognition of the unique place of Aboriginal and Torres Strait Islander arts as the world's premier continuous cultural tradition and the ongoing responsibilities and the obligations for Aboriginal and Torres Strait Islander people to maintain, control, protect and nurture this inheritance and its myriad contemporary expressions.

We want to hear from you on this important issue.

This discussion paper is designed to inform the national consultation process about the value, role, scope and form of a NIACA.

We invite submissions from all people and organisations with an interest in the Indigenous arts and cultural sector.

Submissions to the proposed National Indigenous Arts and Cultural Authority (NIACA) discussion paper will close at **5:00pm (AEST) Friday 7 December 2018.**

If you would like to make a written submission please upload it to the online submission form or send via email to submissions@niaca.com.au. If you would like to mail us your submission please send it to:

NIACA Consultation
c/o Australia Council for the Arts
PO Box 788
Strawberry Hills NSW 2012
Australia

Submissions which address the Discussion Paper will be accepted and made public online at niaca.com.au. You can ask to keep your submission private.

The words 'Aboriginal and Torres Strait Islander', 'First Nations' and 'Indigenous' are used interchangeably in this report to refer to the Aboriginal and Torres Strait Islander peoples of Australia, and their arts and cultures. We understand that some Aboriginal and Torres Strait Islander people are not comfortable with some of these words. Only respect is meant when these words are used.

Why create a NIACA?

‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ... [including] oral traditions, literatures, designs ... 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.

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

Article 31

United Nations Declaration on the Rights of Indigenous Peoples 2007

- **Australian culture is unique and shaped by the longest continuous art and culture makers on earth. Aboriginal and Torres Strait Islander arts and cultures are precious, and critical to the cultural understanding of our nation.**
- **There is no national peak body working across art forms to promote the rights of First Nations artists and cultural custodians; to champion First Nations arts and cultures; or to support, strengthen and grow the First Nations arts and culture sector.**
- **There is increasing recognition of the critical role of First Nations culture in policy settings, but there is no collective voice in relation to arts and cultural matters.**

Aboriginal and Torres Strait Islander peoples are the custodians of a living artistic and cultural tradition embedded in thousands of years of heritage and continuing practice. First Nations arts are an integral part of our evolving national identity – almost all Australians agree that First Nations arts are an important part of Australia’s culture.¹ For this contribution to continue, it is imperative that Aboriginal and Torres Strait Islander artists and their communities are enabled to control and protect their cultural expressions and to realise the economic, social and cultural benefits of participation in the arts.

First Nations artists have been calling for recognition of their cultural and creative rights for half a century. There are gaps in intellectual property law when it comes to Indigenous cultural intellectual property. These include a lack of protection for: styles, performances, oral stories, secret or sacred works, the traditional knowledge embodied in traditional cultural expressions, the intergenerational passing of knowledge, and communal ownership.

For decades, numerous reports, inquiries, campaigns, advocates and initiatives have highlighted issues of misuse and misappropriation of Aboriginal and Torres Strait Islander arts and cultures and the idea of a national peak body to help address them.ⁱⁱ

A NIACA could protect and promote the rights of Aboriginal and Torres Strait Islander people’s arts and cultures in a range of potential ways.

It provides an opportunity to develop mechanisms for government, industry and the broader community to better understand how to consult, seek permission, attribute, acknowledge and provide returns to First Nations artists and cultural custodians.

There are a number of existing First Nations arts and cultural peak bodies with strong mandates and governance structures that work across particular regions or art forms. However, there is no national peak body providing a collective voice across art forms; promoting the rights of First Nations artists and cultural custodians across Australia; or building networks and capacity to support a flourishing First Nations arts sector in its diversity and entirety.

A NIACA could focus First Nations arts and cultures as a priority area of national significance. It could provide a strategic and integrated response on culturally based solutions to arts and cultural matters, grounded in First Nations self-determination and the authority of cultural custodians.

 **Question 1:**

Do you think a NIACA should exist?
Why or why not?

What should the priorities of a NIACA be?

- The vision of a NIACA is for a recognised collective voice for First Nations arts and culture promoting the rights of First Nations artists and cultural custodians and a strong, empowered and growing First Nations arts and cultural sector.
- A range of objectives and activities have been proposed over previous decades and in more recent discussions with the First Nations arts sector. Capacity to deliver on the objectives must be built over time, ensuring sustainability via a phased approach.
- We want to hear what you think are the most important needs and priorities a NIACA should address – for First Nations artists, cultural practitioners, cultural custodians, communities and regions; for the arts and cultural sector; and for a culturally ambitious nation.

The value of a NIACA will be defined by what it does for its membership in achieving its vision. Discussion to date suggests that the objectives should be long term, with a fifty year focus. At the initial stages of development focus needs to be on what is current and realistic for a NIACA to achieve, in building a sustainable organisation. By focusing on a smaller set of issues and objectives, a NIACA can build the foundations of an organisation focused on significant long term change.

Policy objectives and the range of potential activities to achieve them can be grouped under three main themes:

1. establishing networks, partnerships and services to strengthen and grow the First Nations arts and cultural sector
2. policy development, expert advice and advocacy through meaningful representation for Aboriginal and Torres Strait Islander peoples on arts and culture policy issues
3. supporting and defending Indigenous cultural intellectual property rights

1. Networks and services to strengthen the First Nations arts and cultural sector

A NIACA could establish strategic networks and partnerships, and provide a range of services to strengthen and grow the First Nations arts and cultural sector. It could bolster the existing First Nations arts and cultural landscape by supporting existing region and art form-based peak bodies, and by providing national oversight.

Potential activities include:

- networking and connecting the First Nations arts sector, and supporting partnerships among organisations and communities, states and territories and internationally
- enabling cultural exchange between First Nations artists
- identifying and developing opportunities for First Nations artists
- providing professional development for the First Nations arts and culture sector
- providing fee for service talent scouting or festival performers services
- providing business support to First Nations artists and arts and cultural organisations
- running a regular, national high profile event to engage with the sector and provide information, networking, skills development and showcasing opportunities.

2. Policy development, advocacy and representation on First Nations arts and culture

A NIACA could undertake a range of policy development, advisory services and advocacy activities to provide national leadership and meaningful representation for Aboriginal and Torres Strait Islander peoples on arts and culture issues. It could complement the work of National Congress and the Indigenous Advisory Council by focusing on First Nations arts and cultures as a priority area of national significance.

Potential activities include:

- supporting and coordinating genuine, efficient and effective engagement with First Nations communities on cultural policies and programs
- representing First Nations peoples, their interests and their rights in the wider arts sector, and providing advice to the wider arts sector about First Nations arts and culture
- championing Aboriginal and Torres Strait Islander arts and cultures nationally and internationally
- representing First Nations artists, cultural practitioners and cultural custodians on policy issues regarding arts and culture
- influencing the recognition of the central role of First Nations cultures in policy settings
- supporting the identification of clearly articulated priorities for investment aligned to diverse communities and their contexts
- identifying and developing pathways to improve First Nations programs across the arts and cultural sector to ensure they come from a position of cultural authority
- setting agendas for research to support First Nations arts and cultures, and harnessing research to support policy development and advocacy.

3. Supporting and defending Indigenous cultural intellectual property rights

A NIACA could undertake a range of activities to promote Aboriginal and Torres Strait Islander peoples' cultural and creative rights – to make sure culture is used appropriately, recompensed, valued and attributed; to prevent derogatory use; and to promote recognition of Aboriginal and Torres Strait Islander peoples as the primary guardians and interpreters of their cultures.

As a national coordinating body, a NIACA could provide an infrastructure to promote, assert, negotiate, protect or administer cultural and creative rights. It could administer rights directly, or establish a rights clearance framework for Indigenous cultural intellectual property – as it relates to the arts, cultural expression, or traditional knowledge more broadly.

Potential activities include:

- facilitating prior and informed consent for the use of cultural material
- benefit sharing by charging and distributing royalties for First Nations cultural expression and knowledge
- developing protocols in consultation with First Nations communities that set standards for consent processes, attribution and integrity
- developing and managing a database to track who owns rights and who has made use of them, to assist in managing rights clearances
- collecting information on the inappropriate and unauthorised use of First Nations cultural material and advocating for better outcomes for First Nations peoples
- running campaigns to promote ethical art trade or to prevent cultural appropriation
- providing fee for service advice on Indigenous cultural intellectual property and protocols
- developing a trademark or branding system to endorse projects, goods and services facilitated by NIACA processes of prior informed consent, and to assist consumers to identify authentic products
- developing standards of appropriate use to guard cultural integrity and enforce rights
- developing model contracts and standard terms for licence agreements for the use of cultural material
- providing mediation processes and dispute resolution to deal with competing interests and overlapping knowledge.

For further discussion of a national First Nations body to support and defend Indigenous cultural intellectual property rights, see Terri Janke's *Beyond Guarding Ground*.ⁱⁱⁱ

Question 2:

What do you think are the most important needs and priorities a NIACA should address – for the short, medium and long term?

Question 3:

What activities are the most relevant to you, your community, your region or your organisation?

Question 4:

What cultural material should be covered by the NIACA model? Arts? Cultural expression including languages?

Potential to cover traditional knowledge more broadly including biodiversity knowledge?

Who should be represented in a NIACA decision-making model?

- A NIACA would need to uphold the authority of cultural custodians, and represent Aboriginal and Torres Strait Islander people at a national level across First Nations arts and cultures.
- The first step would be to form a steering committee to build a strong governance and accountability framework and engage the membership.

The authority of cultural custodians, senior lawmen and women, cultural bosses and rights holders is fundamental in the exercising of cultural authority – the authority to be upheld through a NIACA model.

A NIACA has the potential to be a self-determining national body providing meaningful representation for the First Nations arts and cultural sector, and for Aboriginal and Torres Straits Islander peoples on arts and culture issues.

The First Nations arts and culture sector encompasses independent artists and cultural practitioners, peak bodies, organisations and regional representative bodies. Other representation considerations include art and cultural forms, gender, geography and age. A NIACA model needs to consider how each group can have effective participation through decision-making structures such as voting rights, annual meetings or representation on the board.

A robust governance framework and structure and good stakeholder engagement are the foundations of a sustainable organisation. The establishment of a steering committee will enable the First Nations arts and culture sector to determine the future direction of a NIACA, engage its membership and oversee the election of the governing board.

Question 5:

What groups should a NIACA represent – through its membership, steering committee, decision-making structure and board?

What art and cultural forms should be represented?

Question 6:

How should the NIACA model include local and regional decision-making structures?

Question 7:

What are the required skills, attributes and experiences of the NIACA steering committee and board?

Question 8:

How should the board members be selected and how long should they serve?

How should a National Indigenous Arts and Cultural Authority be legally structured?

- A NIACA would need to operate on sound business principles in parallel with cultural appropriateness and underpinned by First Nations self-determination and governance.
- It is envisioned that a NIACA would be a national not-for-profit organisation providing service to members through strong governance and administration, with the potential to become self-sufficient.

A NIACA could aspire to ultimately be non-reliant on government funding. Other potential sources of income include philanthropic and corporate income, donations, private foundations, crowdfunding, fees for services, and membership fees.

A company is an independent legal entity owned by its members and is guided by its directors. It can be publicly listed or private, limited by shares or unlimited and has a number of stringent obligations relating to reporting under the *Corporations Act 2001* (Cth). This includes directors' duties and annual reporting, as well as personal liability of directors.^{iv}

When establishing a not-for-profit organisation, there are a range of legal structures to choose from. The scope of activities and revenue sources will determine the most appropriate legal body. This will determine the relevant government bodies it will need to register with or report to. The models are as follows:

Statutory authority

- Forming a statutory authority would require an Act of Parliament to be introduced and enabled. A NIACA is intended to be a national body so this would be introduced at the federal government level.
- A statutory authority is enabled by legislation, once passed, with powers and functions and limitations of government placed upon it.
- A statutory authority would be reliant on an annual budget appropriation from the federal government.

Company limited by guarantee

- Companies limited by guarantee are administered to by the Australian Securities and Investments Commission (ASIC) under the *Corporations Act 2001* (Cth).
- They are formed on the principle that the liability of members is limited to the amount they agree to contribute if the company is wound up. This amount is typically nominal and set out in the company's constitution. Companies limited by guarantee cannot pay dividends and generally will not have deductible gift recipient status.^v Certain reporting obligations may attach to a company limited by guarantee, including the requirement to prepare an annual report and a directors' disclosure report in accordance with the *Corporations Act*. Other obligations under the *Corporations Act 2001* also apply.
- The strict legal and administrative obligations of this structure may provide potential donors, clients and business partners with confidence that the organisation is run according to stringent principles and acknowledged standards. Under this model the NIACA could receive income and government funding.

Indigenous corporation

- The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* allows Aboriginal and Torres Strait Islander groups to form corporations for any social or economic purpose. It replaced the *Aboriginal Councils and Associations Act 1976* and is administered by the Department of Prime Minister and Cabinet. Aboriginal and Torres Strait Islander groups are able to incorporate, meaning an entity with separate legal personality is formed. The *Corporations Act 2001* applies to these incorporated entities. Incorporation is also regulated in different ways across various states and territories.
- Indigenous corporations are overseen by the Office of the Registrar of Indigenous Corporations (ORIC), an independent statutory officer holder appointed by the Minister for Indigenous Affairs under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. ORIC has the power to register Indigenous entities that wish to become incorporated and assist and support corporations to both run effectively and cater to their community. Like ASIC, ORIC also has the authority to intervene when an Indigenous corporation or its directors are found to be failing in its duties or requirements.^{viii}
- Under this model a NIACA could receive income and government funding.

Propriety (private) company

Proprietary companies may be ‘limited by shares’ or ‘unlimited with a share capital’. Limited by shares is the most common type of proprietary company. Limited by shares means the personal liability of each shareholder is limited to the amount they have agreed to pay for the shares. Unlimited with a share capital means there is no limit on the personal liability of the shareholders. That is, shareholders could be liable for the debts of the company even if they have paid for their shares in full.^{ix} Not-for-profit proprietary companies are not permitted to distribute profits or assets to its shareholders.

Registered charity

Companies limited by guarantee and Indigenous corporations can register for tax concessions with the Australian Charities and Not-for-profits Commission (ACNC) under the *Charities Act 2013* (Cth). Once registered with the ACNC, most of the ongoing obligations are to the ACNC rather than ASIC or ORIC.

Deductible Gift Recipients (DGR)

A NIACA may also be eligible to apply to the Australian Taxation Office (ATO) for deductible gift recipient (DGR) endorsement. DGRs may receive tax deductible donations and fundraising contributions. Some donor organisations and grant makers can only fund DGRs.^{xi}

? Question 9:

What do you think should be the funding and revenue sources for a NIACA?

? Question 10:

What do you think is the best legal model for a NIACA? Why?

References

- i Australia Council 2017, *Connecting Australians: Results of the National Arts Participation Survey*.
- ii For example, a National Indigenous Cultural Authority was a recommendation of the 1999 report by Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous cultural and intellectual property rights*, Michael Frankel and Company. A decade later, it was a recommendation of the *Australia 2020 Summit*, Terri Janke’s 2008 Wentworth Lecture, and discussed in T Janke 2009, *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, Terri Janke and Company. The current proposal for a National Indigenous Arts and Cultural Authority draws on these recommendations and ongoing discussion with the First Nations arts and cultural sector.
- iii T Janke 2009, *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, Terri Janke and Company.
- iv Business Victoria, *Company: Register the most suitable structure for your business*, viewed 18/9/18 at <http://www.business.vic.gov.au/setting-up-a-business/business-structure/company>
- v ASIC, *Companies Limited by Guarantee: Disputes About Members’ Rights*, viewed 18/9/18 at <http://www.asic.gov.au/about-asic/contact-us/how-to-complain/companies-limited-by-guarantee-disputes-about-members-rights/>
- vi betterboards 2013, *What is a Company Limited by Guarantee?* Viewed 18/9/18 at <http://betterboards.net/non-profit-fact-sheets/company-limited-by-guarantee/>
- vii Office of the Registrar of Indigenous Corporations, *About the CATSI Act*, viewed 18/9/18 at <http://www.oric.gov.au/catsi-act/about-catsi-act>
- viii betterboards 2013, *What is an Indigenous Corporation?* Viewed 18/9/18 at <http://betterboards.net/non-profit-fact-sheets/indigenous-corporation/>
- ix ASIC, *Checklist for Registering a Company*, viewed 18/9/18 at <https://asic.gov.au/for-business/registering-a-company/before-you-register-a-company/checklist-for-registering-a-company/>
- x Thomsen Reuters, Cleardocs, *Not-for-profit Pty Ltd Company*, viewed 18/9/18 at <https://www.cleardocs.com/resources-legal-faq-nfp-pty-company-registration.html#2>
- xi ACNC, *Factsheet: Deductable Gift Recipients (GDRs) and the ACNC*, viewed 18/9/18 at https://www.acnc.gov.au/ACNC/FTS/Fact_DGR.aspx

