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10 December 2021

Commissioners Romlie Mokak and Jonathan Coppel
Aboriginal and Torres Strait Islander Visual Arts and Crafts
Productivity Commission
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Dear Commissioners Mokak and Coppel

ACCC submission to the Productivity Commission's study into Aboriginal and Torres Strait Islander Visual Arts and Crafts

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Productivity Commission's (PC) study into Aboriginal and Torres Strait Islander Visual Arts and Crafts.

We agree with the position articulated in the PC's issues paper about the important cultural and economic significance of Aboriginal and Torres Strait Islander visual arts and crafts.

We have set out some of the ACCC's compliance and enforcement activities which are relevant to the PC's study. The ACCC's activities cover a broad range of issues and encompasses some of those relating to visual arts and crafts. Our experience in these activities informs our view that standalone tailored protections, rather than amendments to the Australian Consumer Law (the ACL), are required to protect and value Aboriginal and Torres Strait Islander peoples' traditional knowledge and cultural expressions.

Our submission focuses mainly on sections 5 and 6 of the PC's issues paper, that relate to possible policy options to address inauthentic arts and crafts in the style of Aboriginal and Torres Strait Islander peoples, and issues involved in interactions between Aboriginal and Torres Strait Islander artists and dealers.

Addressing inauthentic arts and crafts in the style of Aboriginal and Torres Strait Islander peoples

The ACCC recognises that the supply of inauthentic art and craft products leads to significant economic, social, and cultural harm to Aboriginal and Torres Strait Islander peoples, and detriment to consumers who purchase inauthentic products. The relevant harms to Aboriginal and Torres Strait Islander peoples and culture have been articulated in previous inquiries considering the problem of inauthentic arts and crafts in the style of Aboriginal and Torres Strait Islander peoples, and whether the ACL can or should deal with this problem.

As the PC is aware, the ACCC has previously made submissions to such inquiries. Please find attached copies of the ACCC's submissions to:

- the 2017/2018 House of Representatives Standing Committee on Indigenous Affairs inquiry into growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise (the 2017/2018 HoR Committee inquiry), and

- the 2019/2020 Senate Environment and Communications Legislation Committee's inquiry into the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (the 2019/2020 Senate Committee inquiry).

In the Government's response to the 2017/2018 HoR Committee inquiry, it agreed to progress a scoping study into standalone legislation to protect Aboriginal and Torres Strait Islander traditional knowledge and cultural expressions. As the PC's issues paper notes, IP Australia chairs a cross-departmental working group established to undertake the scoping study for a potential framework for new standalone legislation that could assist Aboriginal and Torres Strait Islander peoples in protecting and commercialising their traditional knowledge and cultural expressions. The ACCC participates in this working group. Next steps planned include targeted consultation with Aboriginal and Torres Strait Islander peoples to seek initial feedback on potential models to support finalising the scoping study.

Specific tailored protections are required to protect and value Aboriginal and Torres Strait Islander peoples' traditional knowledge and cultural expressions

The ACL can address misleading conduct in the sale of products that purport to be, or give the impression of being, produced by Aboriginal and Torres Strait Islander artists when this is not the case. However, the unique social and cultural harms associated with the loss of identity and lore goes well beyond the economic harms caused by anti-competitive conduct and unfair trading that the *Competition and Consumer Act 2010*, including the ACL, is intended to and can address.

We consider that ensuring the integrity of the Aboriginal and Torres Strait Islander arts and crafts industry, and safeguarding the culture of, and opportunities for, Aboriginal and Torres Strait Islander communities requires a comprehensive and holistic framework that is appropriately able to:

- deal with the complex nature of the rules and law relating to the use of Aboriginal and Torres Strait Islander knowledge, cultural expressions, and artefacts in order to protect them, and
- support Aboriginal and Torres Strait Islander artists in managing and commercialising their works if and as they wish.

We consider that the focus should be on the work being led by IP Australia for a potential framework for new standalone legislation, rather than relying on a less effective policy process, such as amending the ACL to include specific prohibitions relating to the supply of inauthentic arts and crafts.

The work being led by IP Australia offers a significant opportunity to develop a fit for purpose framework that not only adequately addresses the issues around inauthentic art and craft products, but also appropriately recognises and values Aboriginal and Torres Strait Islander traditional knowledge and cultural expressions. We consider that a fit for purpose standalone framework should also include enforcement mechanisms, through both a specifically designed Indigenous regulatory body, and which Aboriginal and Torres Strait Islander artists can also use themselves.

While we consider that the ACL can play a complementary role to any such standalone framework, the ACL itself is not the solution. The application of the ACL to inauthentic arts and crafts, and relevant ACCC enforcement activity, is explained in the attached earlier ACCC submissions.

One of the ACCC's [enduring priorities](#) is addressing conduct in breach of the ACL that has the potential to specifically impact on the welfare of Indigenous Australians. The ACL is administered and enforced jointly by the ACCC and state and territory fair trading agencies, and the state and territory ACL regulators also prioritise such work.

However, the ACCC remains of the view that the ACL is not designed to, nor suited to adequately and holistically safeguard and support Aboriginal and Torres Strait Islander culture. We consider the scoping study for a potential framework for new standalone legislation is the only approach that can deliver on these important public policy objectives.

ACCC compliance and enforcement activities relating to Aboriginal and Torres Strait Islander arts and crafts

The attached submission to the 2019/2020 Senate Committee inquiry provides some detail about our relevant court action in *ACCC v Birubi Art Pty Ltd (in liq) (No 3) [2019] FCA 996*¹. However, as well as enforcement activity, the ACCC also looks to consumer education and business compliance initiatives to help drive better compliance with the ACL.

In relation to the sale of Aboriginal and Torres Strait Islander art products, we have [guidance](#) for consumers looking to buy Aboriginal and Torres Strait Islander art and craft, with tips about what to consider in assessing whether products are authentic. We recently ran a campaign on our [Your Rights Mob Facebook page](#) in October 2021 drawing on this guidance.

Another of the 2017/2018 HoR Committee inquiry recommendations related to consumer guidance on authentic Aboriginal and Torres Strait Islander art. As noted in the Government's response, the ACCC is assisting the Office for the Arts within the Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) in developing such guidance.

We are also continuing to monitor producers and retailers of Aboriginal and Torres Strait Islander art style products more broadly, including through issues identified in reports received from consumers, artists, art centres and collectives, and other stakeholders, and by actively looking at products in the market. We have sought to leverage off the outcome in the *Birubi* case to get businesses to understand what they need to do to comply with the ACL.

A multifaceted approach is required to address misconduct in interactions between artists and dealers

Stakeholders have often raised concerns with the ACCC and the state and territory ACL regulators about poor behaviour by art dealers in their interactions with Aboriginal and Torres Strait Islander artists. Concerns raised include allegations that:

- artists are signed to contracts that they do not understand, which are not adequately explained to them, and include terms they would not have agreed to, particularly with respect to how the dealer may be able to reproduce or license their artwork. This can include terms that allow a dealer to amend the artworks without proper consent, and in ways that have the potential to cause cultural offence.
- artists' agreements with dealers include unfair remuneration (particularly considering the extent of the ongoing rights some dealers have under such agreements to reproduce and license the artist's works), and
- some dealers are exploiting their dominant bargaining position and the circumstances of artists, including by having artists work under duress, or otherwise creating situations where it is difficult for artists to refuse to supply their artwork to a dealer. For example, when a dealer pays for an artist's accommodation on the basis that they supply artworks.

We are also aware that the majority of such conduct does not get reported to ACL regulators.

¹ [Australian Competition and Consumer Commission v Birubi Art Pty Ltd \(in liq\) \(No 3\) \[2019\] FCA 996](#)

Relevant provisions of the ACL

The ACL has provisions that deal with unconscionable conduct and unfair contract terms.

The unfair contract terms provisions operate to protect small businesses (which also include sole traders) from the imposition of unfair terms in standard form contracts, where:

- one of the parties to the contract is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis), and
- the upfront price payable under the contract is no more than \$300 000 or \$1 million if the contract is for more than 12 months.

An assessment of whether a term is unfair focuses on whether it causes detriment, whether it causes a significant imbalance in the parties' rights and obligations arising under the contract and whether it is reasonably necessary to protect the legitimate interests of the party benefiting from the term. Where a court determines that a term is unfair, it is rendered void.

In reports that the ACCC has considered, the unfair contract terms provisions have been unlikely to apply to conduct involving potential issues with the terms in an agreement between a dealer and an artist. Agreements tend to be tailored between individual artists and as such, would be unlikely to fall within the definition of 'standard form contract'.

The ACL also prohibits businesses from engaging in conduct that is, in all the circumstances, unconscionable. Unconscionable conduct is not defined in the ACL, but is considered by the courts to be conduct against conscience by reference to the norms of society. Courts have considered that unconscionable conduct requires a certain level of severity, and have distinguished between conduct that is 'unfair' and 'unconscionable'.

It is often difficult to prove that conduct between a dealer and an artist is severe enough to amount to unconscionable conduct. This can be exacerbated by evidentiary difficulties in demonstrating what occurred in the interactions between artists and dealers.

It is also important that in assessing agreements between Aboriginal and Torres Strait Islander artists and dealers, regulators and other government institutions respect the sovereignty of Aboriginal and Torres Strait Islander artists to make free and informed decisions about the agreements they make in respect of their art, even if people other than the artist may hold a different view about the arrangements made. Any assessments of such dealings need to be made on a case by case basis, assessing all the relevant circumstances.

Additionally, where any artists are being made to work against their will, the issue is more appropriately investigated by the police as a potential criminal matter, rather than through the ACL.

Nevertheless, the ACCC is concerned that gaps remain in the ACL which mean that the law does not adequately deal with the significant detriment to consumers and small businesses caused by a growing number of unfair commercial practices. We have been advocating for some time for the ACL to be amended to include an appropriately framed prohibition on unfair trading practices in order to better address such concerning conduct.

Relevant ACL policy process – unfair trading practices

At a 6 November 2020 meeting, Consumer Affairs Ministers across each Australian jurisdiction [directed](#) their senior consumer officials to commence work on a regulatory impact assessment process exploring the extent to which there are some unfair business practices that are unlikely to be covered by the existing protections in the ACL, and potential options to address these. This work is underway and the ACCC is participating in the project's working group. A consultation regulation impact statement will be released for public consultation in

due course, which, amongst other options, will include consideration of whether the ACL should be amended to introduce an unfair trading practices prohibition.

We consider that an unfair trading practices prohibition would provide a means for the ACL to better address some of the misconduct engaged in by dealers when dealing with Aboriginal and Torres Strait Islander artists. However, this would not be a complete solution as, for example, evidentiary challenges would likely make it difficult to address many allegations. Further, the ACCC's economy-wide focus means we cannot always actively monitor the sector, and would be limited in the number of actions we were able to take.

Other means of addressing the issues

To address misconduct by dealers and other intermediaries towards Aboriginal and Torres Strait Islander artists, a multi-faceted approach is required. The solution needs to include consumer, artist and dealer education, Aboriginal and Torres Strait Islander-led avenues for artists to promote and sell their work, such as Indigenous owned art centres, and specific legislation to provide protection and enforcement.

The ACCC's consumer [guidance](#) on purchasing Indigenous arts and crafts referred to above also includes tips that can assist consumers to choose to purchase from dealers more likely to engage appropriately with artists.

However, consumer education can only do so much. It is more likely to be useful for consumers seeking to purchase art and craft at the higher end of the market who place value on authenticity.

We consider a greater focus needs to be on appropriately supporting artists and changing the behaviour of dealers. Building relationships, supporting and empowering artists through partnering with them, their communities and advocacy bodies is critical to achieving long term change in the industry.

The ACCC has an established and expanding outreach and engagement program focusing on issues impacting Aboriginal, Torres Strait and Tiwi communities, including established relationships with a number of art centres. We also partner with other regulators and bodies such as ASIC and the state and territory ACL regulators, as well as various non-government organisations such as Indigenous Art Code Limited and ICAN.

We have developed a [film](#) which provides advice to Aboriginal and Torres Strait Islander artists on their rights when negotiating with dealers, and is distributed on our *Your Rights Mob* Facebook page and our YouTube page. This provides information to help artists understand their rights when negotiating, understand the terms of payment and timeframes for finishing art, and how to ensure their designs are not reproduced without permission or payment. We recently ran a campaign in October 2021 on *Your Rights Mob* to promote better understanding of these issues, including re-posting guidance material from other organisations, such as Arts Law.

We acknowledge and support the valuable initiatives to support and empower Aboriginal and Torres Strait Islander artists driven by other bodies, such as the Indigenous Art Code Limited, Arts Law, and the Office for the Arts (including those set out in the [National Indigenous Visual Arts Action Plan 2021–2025](#)).

On the issue of whether the Indigenous Art Code should be made mandatory, we defer to the views and experiences of Aboriginal and Torres Strait Islander artists and relevant stakeholders. However, we note that codes of practice are generally only effective where there are consequences for non-compliance, and there is a dedicated body able to actively monitor and take effective action for non-compliance.

Conclusion

The ACL and ACCC have a role to play in helping to address inauthentic arts and crafts in the style of Aboriginal and Torres Strait Islander peoples, and issues involved in interactions between Aboriginal and Torres Strait Islander artists and dealers, as part of our economy-wide role.

However, amending the ACL to include specific prohibitions relating to the supply of inauthentic arts and crafts is not the solution to adequately protect and value Aboriginal and Torres Strait Islander Visual traditional knowledge and cultural expressions. Rather a framework for new standalone legislation will be necessary to achieve this outcome.

If you wish to discuss any aspect of this submission, please feel free to contact Rami Greiss, Executive General Manager Consumer and Fair Trading, on _____ or _____

Yours sincerely

Rod Sims
Chair



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28 August 2019

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Committee Secretary
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Dear Secretary

ACCC submission to the Senate Environment and Communications Legislation Committee's inquiry into the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019*

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Senate Environment and Communications Legislation Committee inquiry into the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (the Bill).

The ACCC considers that the supply of inauthentic Indigenous Australian art and craft products can lead to significant economic, social and cultural harm to Indigenous Australian culture and artists and detriment to consumers who purchase these products.

For a number of reasons the ACCC considers that amending the ACL to introduce specific prohibitions is unlikely to achieve the objectives behind the Bill.

- **The *Competition and Consumer Act 2010 (Cth)* (the CCA), and more specifically the Australian Consumer Law (ACL), is not designed for sectorial or subject matter specific regulation.** The CCA (containing the ACL) is an economy-wide law of general application that is designed and intended to address the economic harms of anti-competitive and unfair trading. The ACL focuses on fair trading and consumer protection and is intended to provide a baseline standard for all traders across all products.¹ As a result, it is not designed or suited to adequately and holistically safeguard Indigenous Australian culture.
- **The ACL cannot address the broad economic, social, and cultural harms caused by inauthentic Indigenous Australian art and craft products.** The issues within the Indigenous Australian art and craft sector go beyond the fair trading and consumer protection objectives of the ACL. Given this, attempting to deal with such issues through the ACL may be perceived as a superficial way of addressing them.
- **The Bill will likely lead to an unrealistic expectation that the ACCC is able to safeguard Indigenous Australian culture through the ACL.** The aims the Bill seeks to

¹ As recognised in the *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, House of Representatives Standing Committee on Indigenous Affairs, December 2018, at 4.70.

achieve would require a significant policing function, and this function would require in-depth knowledge of the complex issues around, and nature of, the rules and law relating to the use of Indigenous cultural expressions and artefacts. In any sector, the ACCC cannot take enforcement action for all matters that come to our attention. There would be a clear expectation gap between the Bill's objectives and what could be achieved in implementation.

The ACCC considers that our views on the inappropriateness of the ACL in this context are consistent with the conclusions reached by the House of Representatives Standing Committee on Indigenous Affairs (Indigenous Affairs Committee) in its December 2018 Report on the impact of inauthentic art and craft in the style of First Nations people. In its Report, the Indigenous Affairs Committee noted:

Neither the ACL nor copyright law were designed to protect First Nations cultural expressions, and therefore each is inadequate to do so. The ACL prevents inauthentic products from being passed off as genuine under provisions that prevent businesses from misleading their customers. Current copyright law provides any artist, whether Indigenous or not, with legal protection against reproduction without permission.

The situation regarding inauthentic art is, however, far more complex and nuanced than this. In the first instance, the ACL cannot deal with issues of inauthentic Indigenous products, while the Copyright Act is not designed to recognise the eternal and communal nature of Indigenous cultural expressions, making it inadequate to deal with the misappropriation of culture. Stand-alone legislation may be the best long-term option to resolve this complex issue.

One of the Report's eight recommendations is that the Government begin a consultation process to develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions. While the Government is yet to respond to the report, the ACCC considers that any consultation on developing stand-alone legislation would be a complex and long-term project, requiring significant engagement and consultation with stakeholders.

We note that the Australia Council is currently facilitating a national consultation process to assist with the development of a National Indigenous Arts and Culture Authority (NIACA). The consultation process will feed into a national forum on First Nations arts and culture which the Australia Council is planning for November 2019. Using this process to engage on how best to address inauthentic Indigenous Australian art and craft products, including through developing stand-alone legislation, would avoid duplication and the ACCC considers that this would be a preferred approach to deliver the public policy objectives of supporting and safeguarding Indigenous Australian culture.

The remainder of this submission also provides further information about:

- the current application of the ACL to circumstances involving the supply of inauthentic Indigenous Australian art and craft products,
- recent ACCC enforcement, education, and engagement actions relating to the Indigenous Australian art and craft sector, including enforcement actions in matters involving inauthentic Indigenous Australian art and craft products, and
- the ACCC's view of the harms caused by inauthentic Indigenous Australian art and craft products.

The application of the ACL to inauthentic Indigenous 'style' art and craft products

As noted earlier, the ACL is an economy-wide law of general application and is not designed for sectorial or subject matter specific regulation that goes beyond the ACL's objectives of

ensuring fair trading and consumer protection. It already includes prohibitions on misleading or deceptive conduct and false representations. These prohibitions already cover conduct in connection with the sale and marketing of Indigenous art and craft products and merchandise.

The ACL can address:

- *express* representations that an artwork or product is made by an Indigenous Australian person, including by a particular Indigenous Australian artist, has approval from an Indigenous community, or was made in a particular way (for example hand-crafted or hand-painted) when this is not the case, and
- *implied* representations that give an overall misleading impression. Implied representations may be given by a combination of words, images or the way the art is sold, and can be more difficult to establish than express representations.

The ACL can be effective in addressing individual instances of misleading conduct in the sale of products that purport to or give the impression of being produced by Indigenous artists.

ACCC enforcement activity

The ACCC has taken enforcement action under the ACL in matters involving the supply of inauthentic Indigenous Australian art and craft products, in our role as the general competition and consumer regulator responsible for administering and enforcing the CCA, and more specifically the ACL. The provisions of the ACL under which we have taken these enforcement actions are provisions dealing with consumer protection.

The ACL is administered and enforced jointly by the ACCC and state and territory fair trading agencies.

The ACCC receives around 300,000 contacts a year and as such, we cannot take enforcement action for all matters that come to our attention. We prioritise our enforcement activities with reference to our Compliance and Enforcement Policy that among other things identifies our current priorities.

One of the ACCC's enduring priorities is conduct in breach of the CCA that has the potential to specifically impact on the welfare of Indigenous Australians. However we cannot address all matters that fall within this priority area that come to our attention. Instead we seek to take targeted action to maximise impact and leverage any outcomes across an industry sector, through industry education and deterrence, and through consumer education.

The ACCC's most recent enforcement action in this area is our court proceedings against Birubi Art Pty Ltd (in liquidation) (Birubi). In June 2019, the Federal Court ordered Birubi to pay penalties of \$2.3 million for making false or misleading representations that products it supplied were made in Australia and hand painted by Australian Aboriginal persons, when they were made in Indonesia.

From July 2015 to November 2017, Birubi sold approximately 50,000 contravening products to retail outlets across Australia, including those situated in key tourist areas such as Sydney Airport, Bondi Beach, Kings Canyon, Mount Lofty and Cairns.

The products were loose boomerangs, boxed boomerangs, didgeridoos, message stones and bullroarers, which are all objects of significance to Indigenous Australians, with the exception of the message stones.

Birubi had applied symbols, visual imagery and/or iconography associated with Indigenous Australian art, as well as statements such as 'Australia', 'hand painted', 'genuine' and 'Aboriginal art' to the products. The Federal Court determined that the overwhelming

impression conveyed by some of the products, and the images and representations made on those products, is that they were made in Australia and were hand painted by Indigenous Australians.

The ACCC is continuing to monitor producers and retailers of Indigenous Australian art style products more broadly, including through issues identified in complaints received from consumers, Australian Indigenous groups and other stakeholders, and by actively looking at products in the market.

ACCC education and engagement activity

As well as enforcement activity, the ACCC believes education and awareness are key tools to ensure markets are fair for consumers and businesses.

In relation to the sale of Indigenous art products, we have produced guidance for consumers looking to buy Indigenous art and craft, with tips about what to consider in assessing whether products are authentic. This guidance material can be downloaded at <https://www.accc.gov.au/publications/your-consumer-rights-indigenous-art-and-craft>.

We have also developed a film which provides advice to Indigenous artists on their rights when negotiating with dealers to on-sell their art. This reflects our commitment to ensuring that Indigenous artists are aware of their rights when negotiating, understand the terms of payment and timeframes for finishing art, and ensure their designs are not reproduced without permission or payment. <https://www.accc.gov.au/media-release/accc-supporting-indigenous-artists-to-protect-themselves>

We have worked closely with the Indigenous Art Code Limited in relation to the promotion of, and matters arising in relation to, the Indigenous Art Code.

More broadly, the ACCC has an established and expanding outreach program focusing on issues impacting Indigenous consumers. Further, the ACCC is currently chairing the National Indigenous Consumer Strategy (NICS) involving the ACCC, ASIC and state and territory fair trading agencies. NICS roles and responsibilities include identification of strategic directions and actions and development of projects of national significance.

The ACCC considers that building relationships and raising awareness through partnering with artists and communities is the key to ensuring long term change in the industry. While we have taken some steps, the ACCC, as an economy wide enforcement agency, is not best placed to deliver the detailed focus required in the sector.

Harm to Indigenous Australians and consumer detriment caused by inauthentic Indigenous Australian art and craft products

Consumers, including tourists, can be misled into buying products they believed were produced by Indigenous artists, often paying a premium. Many purchasers of Indigenous 'style' art and craft products are tourists from non-English speaking backgrounds, so even where it may be accurately disclosed through fine print disclaimers where and how a product is made, this information is likely to be overlooked.

Most consumers have limited knowledge of authentic Indigenous art's connection to, and representation of, the cultural identity, stories and history of Indigenous Australians. Given this limited knowledge, consumers are highly susceptible to purchasing inauthentic Indigenous Australian art and craft products.

However, the ACCC considers that the supply of inauthentic Indigenous Australian art and craft products can lead to more significant economic, social, and cultural harm to Indigenous Australian culture and artists. The Indigenous art sector is vitally important to Indigenous Australians, especially those living remotely, and is one of the very few areas in which they

have a market and employment advantage. Indigenous Australian artists enjoy significant social and indirect economic benefits from participating in the sector. The supply of inauthentic Indigenous Australian art and craft products has the potential to undermine the integrity of the industry and reduce opportunities for Indigenous Australians.

Such conduct also gives rise to unique social and cultural harm associated with the loss of identity and lore. Traditional rules and lore exist to ensure that art and designs that are sacred to Indigenous Australians are not misused and that culture and songlines² are not distorted or diluted. Misuse of Indigenous Australian art and designs, including without permission of the traditional guardians, can cause serious offence and distress to Indigenous Australians.

The Federal Court in *ACCC v Birubi Art Pty Ltd*³ quoted the evidence of Dr Banduk Marika to explain this social and cultural harm.

If a design is used by someone who does not know or understand the lores, country or songlines relating to the design, they could risk misappropriating the art and conveying a meaning that is wrong or that is harmful to the meaning the design is meant to convey. Such use would mean that the design had been used without the permission of the design's guardians or the appropriate family or clan.

...

The impact of the misappropriation of art in a meaningless way that does not represent lore and culture is the dismantling of Indigenous cultural heritage. Indigenous Australians have, as described above, their own rules about their people and their country. Art identifies who you are and how you fit into Indigenous society. Misappropriation of art dismantles the cultural structure of Indigenous communities and causes damage to our identity.

The impact of this misconduct goes well beyond the economic harms of anti-competitive and unfair trading conduct that the CCA and the ACL are designed and intended to address.

The ACCC considers that the need to ensure the integrity of the Indigenous arts and crafts industry, and to safeguard the culture of, and opportunities for, Indigenous Australians warrants more comprehensive and holistic treatment than by adding some extra provisions into an economy-wide law of general application that focuses on fair trading and consumer protection.

If you wish to discuss any aspect of this submission, please feel free to contact Rami Greiss, Executive General Manager Enforcement, on _____ or _____.

Yours sincerely

Rod Sims
Chair

² Songlines are the narratives that are used to describe the stories and activities of Indigenous Australians' ancestors.

³ *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq)* (No 3) [2019] FCA 996 at 53



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3 November 2017

Melanie Brocklehurst
Committee Secretary
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By email: IndigenousAffairs.Reps@aph.gov.au

Dear Ms Brocklehurst

ACCC submission to the Committee's inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Indigenous Affairs inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia (the Inquiry).

The ACCC recognises that selling inauthentic Indigenous Australian art and craft products can lead to significant harm to consumers and Indigenous Australian artists. Consumers, including tourists, can be misled into buying products they believed were produced by Indigenous artists, often paying a premium. Indigenous artists may lose business to sellers of inauthentic art and craft, their reputation may be damaged as consumers may be sceptical about authenticity claims, and more broadly the practice of imitating and selling inauthentic art and products can be disrespectful to Indigenous Australians and their culture.

In this submission, the ACCC shares its experience of enforcing the Australian Consumer Law (ACL) to address this harm, as well as providing comments on possible policy options to address issues raised by stakeholders.

The application of the ACL to inauthentic Indigenous 'style' art and craft products and merchandise

The ACL is a national economy-wide law of general application. It prohibits misleading or deceptive conduct and false representations, including in connection with the sale and marketing of Indigenous art and craft products and merchandise.

The ACL can address *express* representations that an artwork or product is made by an Indigenous Australian, has approval from an Indigenous community, or was made in a particular way (for example hand-crafted or hand-painted) when this is not the case. The ACL can also address *implied* representations that give an overall misleading impression.

Implied representations may be given by a combination of words, images or the way the art is sold.

The ACL has a significant role in addressing instances of misleading conduct in the sale of products that purport to or give the impression of being produced by Indigenous artists.

However, while the ACL can deal with misleading conduct in relation to the origin or authenticity of art or other products, whether by express representation or given by an overall impression, it cannot address all conduct that may be of concern to stakeholders. For example, it is not a breach of the ACL to produce or sell inauthentic indigenous style art provided it is not marketed in a way that gives the impression it has been produced by an Indigenous artist.

ACL enforcement activity

The ACL is enforced jointly by the ACCC (which generally focuses on more national matters) and state and territory fair trading agencies (which generally have a more local focus).

The ACCC cannot pursue all matters that come to its attention but rather seeks to direct its activity to priority areas. It seeks to take action in matters which cause the greatest harm and are likely to deliver broader industry compliance through education and deterrence.

The ACCC prioritises its enforcement activities with reference to its Compliance and Enforcement Policy that among other things identifies its current priorities. The ACCC has prioritised Indigenous consumer protection matters over recent years and has identified consumer protection matters involving Indigenous consumers living in remote areas as an enduring priority.

We have a strong record of compliance and enforcement activity in relation to Indigenous consumer protection matters. We have and continue to investigate and take action in relation to matters including misleading door-to-door sales in Indigenous communities, representations made in the sale of mobile phones, and the supply of unsafe goods.

In relation to the sale of Indigenous art, the ACCC has investigated and taken past action. A selection of past matters where the ACCC has enforced the ACL (or the equivalent provisions under the former *Trade Practices Act 1974*) in relation to misleading conduct and false representations in the sale of Indigenous art and craft products and merchandise are set out below.

Date	Matter	Issue	Outcome
December 2012	Angela Delgiacco of Alice Sundown Aboriginal Art	Attempting to sell a painting title connected to a well-known Indigenous artist.	Court enforceable undertaking for making false or misleading representations in a certificate of authenticity. http://www.accc.gov.au/media-release/art-dealer-gives-acc-undertaking-for-misrepresentations-about-indigenous-art
March 2010	Mayvic Pty Ltd	Alleged false or misleading impression by Mayvic that Aboriginal rock art magnets were authentic Aboriginal artworks, when this was not the case.	Mayvic withdrew the "authentic" Aboriginal rock art magnets from sale. http://www.accc.gov.au/media-release/wholesaler-withdraws-authentic-aboriginal-rock-art-magnets-from-sale

December 2009	Australian Dreamtime Creations Pty Ltd	Company represented that certain art that it promoted and sold was by an artist of Aboriginal descent when this was not the case.	Court declaration that Australian Dreamtime Creations engaged in misleading and deceptive conduct, and its Director was found to be knowingly concerned in the conduct. http://www.accc.gov.au/media-release/court-declares-dealer-in-aboriginal-art-misled-consumers
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Currently, we have ongoing investigations into alleged misleading representations about products offered for sale which are presented as authentic Indigenous art, but which may have actually been designed and made overseas by non-Indigenous manufacturers. These investigations have been informed by information provided under the Indigenous Art Code (IAC) and we continue to update the Indigenous Art Code Limited on the progress of these matters. These investigations are well advanced and we would be happy to update the Committee if and when they are made public.

Like many investigations, we can face some difficulties when investigating allegations of false or misleading conduct and representations in the Indigenous art and craft industry. For example, in some investigations into alleged false or misleading representations we have been unable to establish unequivocally that an artwork is inauthentic. Similarly, although investigating and litigating alleged express misrepresentations of authenticity can be more straight forward, establishing implied misrepresentations, through a combination of factors such as use of Indigenous style, combination of words, or the way in which the product is sold, can provide challenges.

ACCC education and engagement activity

As well as enforcement activity, the ACCC believes education and awareness are key tools to ensure markets are fair for consumers and businesses.

In relation to the sale of Indigenous art products, we have produced guidance for consumers looking to buy Indigenous art and craft, with tips about how to help establish that products are authentic. This guidance material can be downloaded at <https://www.accc.gov.au/publications/your-consumer-rights-indigenous-art-and-craft>.

We have also developed a film which provides advice to Indigenous artists on their rights when negotiating with dealers to on-sell their art. This reflects our commitment to ensuring that Indigenous artists are aware of their rights when negotiating, understand the terms of payment and timeframes for finishing art, and ensure their designs are not reproduced without permission or payment. <https://www.accc.gov.au/media-release/accc-supporting-indigenous-artists-to-protect-themselves>

We have worked closely with the Indigenous Art Code Limited in relation to the promotion of and matters arising in relation to the IAC.

More broadly, the ACCC has an established and expanding outreach program currently focusing on scams impacting Indigenous consumers and, in conjunction with communities and other stakeholders, supporting the establishment of *Do Not Knock informed* towns to address the impacts of the direct selling practices of some businesses.

The ACCC is currently co-leading the National Indigenous Consumer Strategy (NICS) involving the ACCC, ASIC and state and territory fair trading agencies. NICS roles and responsibilities include identification of strategic directions and actions and development of projects of national significance.

Options to promote authentic products and restrict the prevalence of inauthentic art and craft products and merchandise

The ACL is an effective tool to promote authentic products and restrict the sale of inauthentic art, but only to the extent that it prohibits sellers representing (expressly or by implication) that art is authentic when it is not.

To the extent that government seeks to introduce broader prohibitions on the supply of Indigenous style art and craft products not produced by Indigenous Australians, we consider that the consumer protection framework is not the appropriate vehicle to achieve this public policy aim. The ACL is underpinned by broad economy-wide principles of fair trading and preventing misleading conduct. It is not able to deliver broad public policy aims of supporting and safeguarding Indigenous Australian culture.

Aside from the consumer protection framework, the Committee may wish to consider the following options to address conduct in this industry:

- **Certification schemes:** A certification scheme, such as a Certified Trade Mark, could provide consumers with greater certainty about the origin of Indigenous art. This would encourage consumers and businesses to support suppliers of genuine Indigenous art and craft work. To be fully effective, a scheme may require considerable support in its establishment and operation.
- **Education:** As noted above, we have published guidelines in this area and can consider the development of further guidelines in relation to the production and sale of Indigenous art which could focus on the obligations of suppliers, importers and retailers. Any ACCC guidelines would only focus on the ACL, and given the ACL may not capture all the concerning conduct in this industry, the Committee may wish to consider a broader education campaign.

As a general principle, when considering policy options to address harmful conduct in this industry, we strongly encourage extensive consultation with Indigenous Australians to avoid unintended negative effects on Indigenous artists and Indigenous communities.

If you wish to discuss any aspect of this submission, please feel free to contact Executive General Manager Enforcement Division, [REDACTED]

Yours sincerely

[REDACTED]
Rod Sims
Chairman