

darwin aboriginal art fair

3rd November 2017

Committee Secretary
House of Representatives Standing Committee on Indigenous Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Attention: Melanie Brocklehurst, Committee Secretary

RE: Invitation to make a submission: Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product

Dear Melanie,

The Darwin Aboriginal Art Fair Foundation would like to thank you for inviting us to lodge a submission into the “Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product” inquiry.

The Darwin Aboriginal Art Fair Foundation (DAAFF) exists to provide platforms to promote the work of emerging and established artists from more than 60 Indigenous Art Centres from across Australia. These Art Centres collectively represent more than 2,000 artists at our annual event. DAAFF recognises that Art Centres play a vital role in the economic, social and cultural landscape of Aboriginal and Torres Strait Islander communities. They are a keeping place of language and traditional practice, provide employment and training to hundreds of Indigenous Arts Workers and collectively, foster the careers of thousands of artists.

DAAFF has a sound understanding of the Indigenous art market, as well as an acute understanding of the challenges that face art centres and their artists. As a foundation, we provide different platforms to promote Indigenous art including an annual art fair, a fashion show, film gala, and panel discussion. DAAFF’s repertoire of activities grows each year, and the foundation is proud to boast that more than \$13 million has been generated in sales for art centres over the past 11 years – 100% of these funds return to the art centres and their communities.

DAAFF hopes that the insights, observations and recommendations made in this submission are useful to this inquiry.

Yours Sincerely,

Claire Summers
Executive Director

Darwin Aboriginal Art Fair Foundation's Submission to the Parliamentary Inquiry – Proliferation of Inauthentic Aboriginal and Torres Strait Islander Art Product.

This submission seeks to address each of the Inquiry's Terms of Reference in turn.

1. The definition of authentic art and craft products and merchandise

The Darwin Aboriginal Art Fair Foundation (DAAFF) would like to support the definition of “authentic art and craft products and merchandise” that the Indigenous Art Code (IAC) has also expressed in their submission to this Parliamentary Inquiry in that:

Artwork (being a creative expression in a material form including art, craft, products and merchandise) that includes an 'Indigenous Cultural Expression' that is either:

- (i) Hand crafted by an Aboriginal or Torres Strait Islander person; or
- (ii) A licensed reproduction of an artwork created by an Aboriginal or Torres Strait Islander person. In which case the original artwork or licenced reproduction must attribute the artist or artists who created the original artworks.

DAAFF supports the IAC's proposal that an 'Indigenous Cultural Expression' be defined to mean an expression of Indigenous culture (whether through images, form or any other medium) that: has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an Indigenous community; has its origins in an Indigenous community; is made by an Indigenous artist; or is derived from, or has a likeness or resemblance to, one or more Indigenous Cultural Expressions mentioned previously.

DAAFF also acknowledges that the term 'authentic' must also encompass any products made by, or under licence from, Indigenous artists. It considers it important that to be classified 'authentic' any merchandise being made by non-Indigenous people, including overseas, must be made with the full authority of Aboriginal and Torres Strait Islander artists / people and with an income being returned to the artists. For example, stationary, homewares, textiles etc. which have artwork reproduced on them should meet the following conditions:

- The integrity (moral rights) of the artist has been respected;
- The artist has received a fair licensing fee /payment under a transparent licensing agreement; and
- The artist has had the opportunity to access legal advice on the terms of the contract or agreement.

2. Current laws and licensing arrangements for the production, distribution, selling and reselling of authentic Aboriginal and Torres Strait Islander art and craft products and merchandise

Art centres play an important role in maintaining and strengthening cultural practices by operating as meeting places and offering opportunities for training, education, career pathways and enterprise for Indigenous people. They also play a vital economic role in remote Aboriginal and Torres Strait Islander (ATSI) communities. This economic aspect is crucial not only to the Indigenous art and craft industry but also to the health of the communities generally. In most communities, art centre sales are often the only externally generated source of income.

The strengthening and positioning of art centres will ensure that Australia's Indigenous art sector continues to flourish and excel. The economic sustainability of communities will help ensure that

ATSI peoples can continue to live on their homelands, resulting in the preservation of traditional practices, ceremonies, language, art and spirituality.

Art centres also provide many social benefits which are not directly related to the arts. These services include assistance with health and medical needs, family, education, legal, transport and financial management. Art centres also provide a safe and supportive environment for artists and their families. Providing services such as these contributes to the social and physical health of community members.

For art centres to continue growing and expanding their businesses, current laws and licensing arrangements for the production, distribution, selling and reselling of authentic ATSI art and craft products and merchandise must be strengthened. Otherwise, Indigenous artists and art centres' rights, and future opportunities, will be both undermined and stifled. There are approximately 15,000 ATSI artists who are represented by art centres. Many of these artists come from remote communities and are some of the most disadvantaged people in Australia. The process of creating and selling art is one of the key mechanisms for economic growth in Indigenous communities. In 2017, the Federal Government's announcement regarding the failure of "Closing the Gap" policies only highlighted the crisis that Indigenous affairs is in. Why then would the Australian government not do everything possible to ensure that ATSI people can build sustainable economic capacity for their futures?

In August 2017, the Darwin Aboriginal Art Fair (DAAF) hosted 67 Aboriginal and Torres Strait Islander art centres from across Australia. Collectively, they represented more than 2000 artists at the 4-day event and more than \$2 million was generated. The art work on display at the fair ranged from high end works valued above \$20,000 right down to a \$20 tea towel. What DAAF demonstrates is that art centres have the capacity to produce artwork to a whole range of markets. Licensing agreements are not new to many artists and art centres. For example, artists from Babbarra Designs in Arnhem Land, Northern Territory licenced textile designs to Spotlight; Warlukurlangu Artists of the Central Desert have a very successful range of crockery (including mugs, plates and cutlery); Waringarri Aboriginal Arts in the Kimberley, WA had paintings on canvas digitally replicated onto fabric for a fashion label. This can only be achieved if there is a clear agreement negotiated for the artist. Sadly, there are still too many designs that are being replicated without permissions. Much ATSI knowledge and cultural expressions are not protected under Australian copyright laws which only protect individual artistic creations. They are not provided protection from being exploited.

DAAFF supports the *United Nations Declaration on the Rights of Indigenous People* and hopes that the Australian Government begins the process to recognise and protect the exercise of these rights. Article 31 is particularly relevant.

Rights of Indigenous People Article 31

1. 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.

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

In order to create a market place that respects and upholds the rights of Indigenous People, and prevents the production of unauthentic art, Australian Consumer Law (ACL) must change. The rights of consumers must also be protected. Australians and international guests are also the targets of inauthentic art. Whilst the ACL does protect consumers with legislation pertaining to misleading and deceptive conduct, it does not adequately address 'inauthentic' objects.

One of DAAFF's key missions is to "encourage and assist with the promotion of Aboriginal and Torres Strait Islander art in an ethical environment". Customers are assured that when they buy a piece of art at the fair, it is an ethical and 'authentic' purchase. DAAFF is committed to creating online resources and programs to help reach out to audiences regarding the ethical buying of art and avoiding unauthentic products. DAAFF is prepared to be a leader in educating audience about the importance of purchasing authentic art.

The "Fake Art Harms Culture" campaign was launched at DAAF in 2016, and was led by the IAC. Their research exposed how much fake art is available to the unknowing consumer. The sector will always do everything it can to promote ethical buying. However, the most proactive and finite solution to this issue is to ban inauthentic ATSI art and craft products and merchandise.

DAAFF also supports the resale royalty right for second sales of visual arts and crafts for \$1000 or more. It is an important right for Australian artists and needs to be maintained.

A proposed way forward

DAAFF supports the Indigenous Art Code's proposed way forward to address this issue. The Indigenous Art Code advises that:

In combination, the impact of current practices and gaps in existing laws outlined above are facilitating the widespread production of inauthentic objects and their distribution to unknowing consumers. As a first step towards reform it is proposed a set of clear objectives be established that cover all those parties presently disadvantaged by the current system. These are to:

- Protect Indigenous cultural expression and stop its misappropriation;
- Support economic and related social development opportunities for Indigenous artists and communities;
- Better protect consumers from deceptive and misleading conduct;
- Support Australian companies that take an ethical and culturally appropriate approach to their business.

It is recognised that the protection of culture and advancing the empowerment of Indigenous people is multifaceted, but a prohibition on unfair practices in supplying and trading in Indigenous art and merchandise would be a significant step forward. The need for comprehensive protection of Indigenous Cultural and Intellectual Property (ICIP) will not be addressed by this measure alone but it will be a meaningful step towards stopping a very public and damaging form of exploitation.

In this context, based on consultation to date, it is considered that a legislative solution which makes it an offence to supply or offer commercial goods to a consumer that include Indigenous cultural expression unless it is supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community, could prove effective. A set of draft objectives was created by the Indigenous Art Code and Arts Law, against which to assess legislative and regulatory options. These were that any solution should aim to:

- Focus on achieving all goals through a single, simplified mechanism;
- Build on existing frameworks and resources wherever possible;

- Be cost effective to implement and monitor;
- Be administratively straightforward;
- Utilise established terminology and definitions wherever possible;
- Have a capacity for transitional arrangements, education and awareness raising;
- Place the compliance onus on businesses and suppliers rather than Indigenous producers or consumers;
- Enable Indigenous artists and communities to exercise creative and cultural control and to negotiate their preferred options for the production and distribution of Indigenous work not captured by the existing copyright laws;
- Offer a practical enforcement regime with sufficient deterrents to change behaviour.

See Appendix 1: Proposed way forward - Existing Consumer Laws are inadequate

3. The prevalence of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products and merchandise in the market

In clan groups across Arnhem Land, Northern Territory, there are strict cultural protocols within family groups that stipulate who can paint certain designs, the colour pallet that can be used, and the designs that can be depicted. These stringent rules are determined by moieties, the kinship system, and personal totems. Aboriginal *lore* dictates who can replicate these ‘styles’ and colour ways even within their own family structure. Understanding cultural protocols is essential to understanding how destructive the proliferation of inauthentic art is.

It is therefore imperative that copyright laws address and acknowledge cultural expressionism. Is it not, nor has it ever, been acceptable to Australia’s First Nations Peoples, to replicate Aboriginal and Torres Strait Islander culture without the explicit permission of its traditional custodians.

In every major city and tourism destination in Australia, there are merchants who take advantage of the tourists who want to buy a keepsake of their holiday. These retail outlets are positioned in places that achieve maximum visibility. Darwin, Northern Territory provides poignant examples of this. Being the capital of the Northern Territory, and a major gateway to Asia, Darwin plays host to a huge number of guests. This small city has no less than four souvenir shops in the CBD, and all of them sell inauthentic art. Tourists and visitors to Darwin can buy genuine art if they know where to look, and many of these galleries are not on the tourist circuit. The imagery in figure 1 shows authentic



Figure 1: DAAF 2017

Images from top to bottom:

Keringke Arts booth, Babbarra Designs booth, Warlukurlangu Artists booth, Mimi Arts booth, Photos by Dylan Buckee



Figure 2: "Fake Art". Image sourced from: <http://www.abc.net.au/news/2017-01-17/calls-to-make-fake-aboriginal-style-souvenirs-illegal/8187042>

art displayed at the 2017 DAAF. Customers at DAAF are reassured that the artwork has been made by ATSI artists, because they are buying it from art centres and the artists themselves, items are labelled with information about the product and where it was made, and provenance can be provided.

Figure 2 shows a selection of inauthentic art that was discovered in souvenir shops by the Indigenous Art Code. These products are in the 'style' of ATSI art, craft and merchandise, but they are indeed fake. Consumers are presented with items like the ones in figure 2 constantly. They appear in gift shops, souvenir shops, and airport terminals across Australia. How is it possible for customers to differentiate between the art on display at the fair, and the products identified in Figure 1?

Current ACL laws are allowing customers to be deceived by retail outlets, ambiguous labelling systems and product developers. This hurts the customer. It hurts the artists. It completely disrespects ATSI culture and traditional practices. And it is taking away a multi-million-dollar industry from the ATSI businesses.

4. Options to promote the authentic products for the benefit of artists and consumers

One of DAAFF's key roles in the industry is to deliver opportunities to create two-way learning opportunities between ATSI artists and arts workers, and audiences who visit its events. This is to ensure that there is a genuine interaction between art buyers and artists/art centres. The DAAF 2017 visitor survey results show that 21% of the audience have never purchased Indigenous art before coming to the event. This figure (which has been consistent over the past three years) indicates that

many Australians are still experiencing (or yet to experience) Indigenous art and culture for the first time. Art fairs are an exceptional platform to promote the ethical buying of ATSI art. The Darwin Aboriginal Art Fair in particular provides the only platform in the world where all ATSI Art Centres are invited to showcase and sell their art and meet visitors under the one roof (see appendix 2 for a map of the participating Art Centres in 2017).

However, not only is the fair based in a regional area of Australia (Darwin), but it is only open to the public for four days of the year! DAAFF receives a constant stream of email enquiry from customers asking about how to buy authentic and ethically produced art. DAAFF is in the process of designing online educational programs to educate audiences and promote authentic products. DAAFF also encourages Federal and State Governments to ensure that this issue is embedded in school curriculums.

A long-term advertising campaign needs to be devised to help educate audiences in Australia and overseas about the risk of purchasing fake art. This needs to include platforms such as radio, television, and all social media platforms. The campaign should also be promoted in all Australian airports, inflight magazines and on the inflight entertainment stations before entering Australia.

Financial resources need to be made available to assist ATSI people to develop product and distribution channels for tourism and souvenir markets. ATSI art centres are already leading the charge in this area. Many art centres diversified their businesses to incorporate licencing and merchandise agreements in response to the Global Financial Crisis. This ensured that they had products available at affordable price points. DAAFF would suggest however, that a study is conducted into the current economic value of the “inauthentic” Indigenous art market, and provide insights for the industry regarding what the supply requirements will be, should fake art become illegal.

A marketing campaign targeting retailers could be developed to ensure that they are aware of the authentic products that are available from artists and art centres. One of the key barriers for retailers and commercial galleries is that art centres can often be difficult to communicate with. A brokering service could be developed so that retailers can access authentic products efficiently.

Art centres are based in some of the most remote regions of Australia, let alone the world. Tourist visitation is minimal in many of the art centre’s locations. Sales strategies tend to rely on high end commercial galleries, museum and art gallery shops at public institutions, and gift shops. Art and design fairs have also become key in the marketing and sales strategies of art centres. A resource needs to be developed for ATSI artists, art centres and peak bodies that outlines how to effectively work in other mainstream retail spaces including airports and major retailers.

The best option for the promotion of authentic art is to make inauthentic art illegal. Consumers should not have to feel nervous or at risk of purchasing fake art. The only way to guarantee consumer confidence is to ensure that inauthentic products are removed from the market. It is likely that this would also be the most cost-effective method of addressing the issue for the tax payer.

5. Options to restrict the prevalence of inauthentic Aboriginal ‘style’ art.

The ATSI art industry has enjoyed exponential growth over the past century. It is not a new market. Yet ATSI artists continue to be exploited. Whether it be carpetbaggers or fake art product manufacturers, ATSI artists’ artwork, and their ICIP rights, are continually under threat.

DAAFF acknowledges that there have been efforts in the past to create labelling and certification schemes. The regulation of these schemes is near impossible, and they have failed as a result.

DAAFF believes that it the easiest and most effective way of restricting the prevalence of inauthentic Aboriginal 'style' art would be to ban inauthentic products from being distributed and sold in Australia.

Please do not hesitate to contact me should you wish to discuss any of the comments made in this submission further.

Yours Sincerely,



Claire Summers
Executive Director



Appendix 1: Proposed way forward - Existing Consumer Laws are inadequate

See attached

Appendix 2: Participating Art Centres at the 2017 Darwin Aboriginal Art Fair



Appendix (A) A Proposed Way Forward – Amending the Australian Consumer Law.

This document was drafted with the pro bono legal advice of Allens Linklaters Lawyers for and in consultation with the Indigenous Art Code and Arts Law

1 Existing consumer laws are inadequate

1.1 What are the current consumer laws?

The Australian Consumer Law (**ACL**) at Schedule 2 of the *Competition and Consumer Act 2010* (**CCA**) contains several provisions of relevance relating to 'misleading or deceptive' or 'false or misleading' conduct:

- s 18 is a general prohibition on conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. However, no fines or pecuniary penalties are available upon breach of this prohibition (although other non-pecuniary remedies, such as an injunction, damages, publication orders or remedial orders are available).
- s 29(1): this section prohibits (among other things):
 - the making of a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or mode, or have a particular history or particular previous use;
 - the making of a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; and
 - the making of a false or misleading representation concerning the place of origin of goods,

in trade or commerce, in connection with the supply of goods or services, or in connection with the promotion of the supply or use of goods.

Unlike s 18, this section attracts the application of pecuniary penalties, as well as the other remedies available for breach of s 18. Specifically, the maximum pecuniary penalties are \$1.1 million per offence for a body corporate or \$220,000 per offence for persons that are not bodies corporate.

- s 33 prohibits conduct in trade or commerce that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

It attracts the same remedies (including pecuniary penalties) as s 29 of the ACL.

1.2 Why the current consumer laws are inadequate

Most fundamentally, in our submission there should be a legal prohibition on selling inauthentic Indigenous art. The focus of the existing ACL provisions described above is on ensuring that consumers are not misled. The sale of inauthentic Indigenous art can breach the existing provisions, but only if the art is sold in a way that misleads consumers. If consumers are not misled about the authenticity of the Indigenous art, then there is no breach of the existing laws.

To date the ACCC has not brought many cases in relation to the sale of inauthentic Indigenous art misleading consumers. One case *ACCC v Australian Dreamtime Creations Pty Ltd (ADC)*¹ illustrates the limited circumstances where the ACCC can bring legal proceedings for misleading

¹ 2009 (26 ALR 487).

and deceptive conduct in relation to fake Indigenous art. This case is summarised in the box below.

In the ADC case works of art were produced in an 'Aboriginal Australian style' by a non-Indigenous artist, many of which featured the following written representations:

- the words 'Ubanoo Brown' (the name of an artist of Aboriginal descent);
- a document entitled 'Certificate of Authenticity' which read 'Authentic Aboriginal Painting' and identified 'Ubanoo Brown' as the artist which accompanied the supply of the artworks;
- the words 'Traditional Hand Painted Aboriginal Art Australia' or 'Authentic Aboriginal Art Australia' stamped on the items; and
- phrases such as 'Australia's original and best Aboriginal art'.

The ACCC brought proceedings against ADC (the wholesaler and retailer of the relevant art) alleging that ADC had engaged in misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) (the predecessor to s 18 of the ACL) on the basis that there was a false and misleading representation that the artworks were made by persons of Aboriginal descent, when they were in fact not. The ACCC also alleged that the representations on the ADC website gave rise to the implied representation that the artworks were made in Australia. The ACCC alleged that this was a misrepresentation under s 53(eb) (the predecessor to s 29(1)(k)), as several artworks and carved wooden birds were imported from Indonesia and then painted in Australia.

In relation to the allegations of misleading and deceptive conduct, Mansfield J held:

In general, in my view, to a reasonable group of persons who buy or may buy Aboriginal art, to describe a painting as "Aboriginal art" is to convey that it is painted by an Aboriginal person or a person of Aboriginal descent. If that is not explicit, as I think it is, it is clearly implied.²

Mansfield J also found that each of the representations described above were misleading and deceptive within the meaning of s 52.

However, Mansfield J did not find in favour of the ACCC in relation to its implied 'country of origin' misrepresentation allegation, holding:

In my view, it is unlikely that a reasonable group of persons seeing those communications would think about the place of origin of those artworks. There is no express representation about their place of origin.³

The ADC case involved circumstances where there were clear written representations that the artworks in question were 'Aboriginal Art', 'traditional', 'authentic' or made by an Aboriginal person, when they were in fact not.

In circumstances where a product is an obvious fake, which is not sold with any documentation or representation claiming it is authentic, there would clearly not be any misleading or deceptive conduct or false representation that would breach the ACL. The existing law is concerned only with whether consumers are misled or deceived. The existing law is not concerned with whether Indigenous culture is unfairly misappropriated for commercial gain, provided consumers are not misled.

There is a very large grey area between the two extremes of an obvious fake and a case like ADC, where a fake product is specifically described as 'authentic Aboriginal art'. A joint 2016 study by the Indigenous Art Code and the Arts Law Centre revealed that many inauthentic

² ADC case at [40].

³ ADC case Ibid at [76].

products are not marketed so overtly. Products commonly appear to be 'authentic Indigenous art' but do not feature any labelling or packaging or other express representations claiming to be 'authentic Indigenous art'. It is unclear in these circumstances whether simply selling art that appears to be authentic, but which in fact is not, amounts to misleading or deceptive conduct or the making of a false representation in breach of the ACL. It is possible of course that many consumers, including visitors to Australia, think they are buying 'authentic Indigenous art' when in fact they are buying fakes. It is also possible, however, that consumers may simply not turn their mind to whether the product they are buying is or is not authentic.

It may be that the ACCC or others could bring further legal proceedings as test cases to establish whether simply selling an item that appears to be indigenous art, but is not, amounts to misleading and deceptive conduct.

There are no cases in relation to the application of the consumer provisions to fake Indigenous art where no express representations have been made. There are numerous examples of cases in other contexts (ie, not involving Indigenous art) where legal proceedings for misleading and deceptive conduct have failed despite similarities in appearance between products. One such case is summarised in the box below.

In *Telstra Corp Ltd v Phone Directories Co Pty Ltd*⁴ (**Telstra case**), Telstra failed to establish that PDC had engaged in misleading or deceptive conduct when it published telephone directories using the colour yellow. Telstra claimed that the colour yellow was associated with its 'Yellow Pages' directories and that by using the colour yellow with their directories, PDC represented to consumers that their print directories were connected with Telstra.

While Murphy J agreed that yellow is associated with Telstra's 'Yellow Pages', he did not consider the association was particularly strong as:

- the evidence showed that the colour yellow is internationally recognised as a standard colour for classified directories;
- the colour yellow was widely used on products and services;
- Telstra never used the colour yellow independently of its Yellow Pages Trade Marks; and
- Telstra's use of the colour yellow had declined over time.

In light of this, Murphy J found that PDC's use of the colour yellow on its colour directories was not misleading or deceptive.

The outcome of any test cases brought by the ACCC is likely to depend on the precise facts (eg, what was sold, what packaging there was, what was said to the consumer and the nature of the store from which the item was sold). In order to establish a clear dividing line, it is likely that a number of cases would need to be brought and decided by the courts. Even if a dividing line between when selling inauthentic Indigenous art was, or was not, misleading was established by the courts, that may just have the perverse result of pushing suppliers, distributors and retailers towards acquiring and selling low-quality, mass-produced, overtly inauthentic products, where consumers are not misled into thinking that the art was in fact authentic.

A specific prohibition on selling fake indigenous art is needed. First, and foremost, the law should recognise that it is inappropriate for indigenous culture to be unfairly misappropriated for commercial gain; the concern is not just about misleading consumers. Such a change would, however, also ensure that consumers, including foreign visitors, are not misled into thinking they are buying authentic Indigenous art when they are not.

⁴ (2014) 316 ALR 590.

2 A prohibition on the sale of inauthentic goods is necessary

2.1 The Proposal

In our submission, a prohibition on the sale of inauthentic products at all levels of the supply chain is the easiest and most efficient approach to address the problem.

In our submission, this could best be achieved by way of a new prohibition in the ACL in the Part of the ACL that relates to Unfair Practices. The reasons for including the prohibition in the ACL are explained in further detail in section 3 below.

In our submission the prohibition should include the following elements:

- (a) it would be an offence to supply or to offer to supply (at both a wholesale and retail level) an artwork (being a creative expression in a material form) that includes an 'Indigenous Cultural Expression' that is not either⁵:
 - (i) hand crafted by an Aboriginal or Torres Strait Islander person; or
 - (ii) a licensed reproduction of an artwork created by an Aboriginal or Torres Strait Islander person.

In which case the original artwork or licenced reproduction must attribute the artist or artists who created the original artworks;

- (b) it would also be an offence to supply or to offer to supply (at both wholesale and retail level) certain traditional Aboriginal and Torres Strait Islander artefacts (identified in the regulations) that are not handcrafted in Australia by an Aboriginal or Torres Strait Islander person. Again, the original artwork must attribute the artist or artists who created it;
- (c) it would be an offence to supply or offer to supply (at both wholesale and retail level) certain artefacts (including ceremonial objects and other objects identified in the regulations). This is because commercialisation of these artefacts is inappropriate and offensive.

The categorisation of the above offences and associated definitions have been developed based on discussions to date with a number of Indigenous artists. Further consultations would be required and a steering committee of Indigenous artists / community be established to provide instruction with definitions and the proposed regulations;

- (d) a defence should be available to offences (a) and (b) where a retailer or supplier can produce reasonable evidence of a product's authenticity (that is, that the product was handcrafted by an Aboriginal or Torres Strait Islander person or was a licensed reproduction of an artwork created by such a person). The law should allow regulations to be made specifying what would amount to 'reasonable evidence' for these purposes.

We had in mind that if a retailer received documents demonstrating authenticity that complied with the requirements of the regulations from a wholesale supplier, that documentation would be deemed to be 'reasonable evidence' and provide a defence for the retailer, if unbeknownst to the retailer, the artwork it was selling as authentic was in fact fake. Similarly, regulations could specify the evidence that a wholesaler would need to have received from the creators of products in order to amount to 'reasonable evidence' and so establish the defence. It should be an offence to provide a false

⁵ We propose that an 'Indigenous Cultural Expression' be defined to mean an expression of Indigenous culture (whether through images, form or any other medium) that: has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an Indigenous community; has its origins in an Indigenous community; is made by an Indigenous artist; or is derived from, or has a likeness or resemblance to, one or more Indigenous Cultural Expressions mentioned previously.

documents demonstrating authenticity. The objective of the regulations would establish a simple mechanism or 'safe harbour' whereby retailers, wholesalers and others in the supply chain could obtain comfort that they are selling authentic Indigenous art and protection from any legal action. This should ensure that the proposed prohibitions do not have any 'unintended consequences' and provide an administratively simple way for retailers and wholesalers who are trying to do the right thing to ensure they are in compliance with the law. The proposed regulations should be developed in consultation with Indigenous artists as well as retailers and the ACCC. We anticipate that many of the legitimate commercial arrangements in place today, by which Aboriginal or Torres Islander people licence the right to reproduce their artwork to third parties, would satisfy the requirements of the proposed regulations.

2.2 It is appropriate that the offences are strict liability offences

In our view there should be a breach of the proposed prohibitions even if the retailer or wholesaler in question did not intend to sell fake indigenous art. As noted above, however, we do think that a defence should be available if a person can show that they had reasonable evidence that the art they were selling was authentic, with regulations that allow retailers and wholesalers to obtain documents demonstrating authenticity from their suppliers that would be deemed to be reasonable evidence for this purpose. If the proposed prohibitions included a requirement that intent be established, that would not adequately protect Indigenous persons, Indigenous communities and consumers from exploitation. Proving intent would be almost impossible.

This strict liability approach is consistent with other provisions of the ACL, including those in respect of unfair practices (the part of the ACL we propose to be amended). As outlined in the Explanatory Memorandum to the ACL:

The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention.

The Indigenous Art Code and Arts Law Centre believe that the strict liability offence is appropriate because:

- the proposed defence and regulations relating to evidence of authenticity are intended to establish a simple procedure whereby retailers and wholesalers can obtain the evidence of authenticity that they need to ensure they do not breach the proposed new prohibition;
- the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;
- while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the ACL; and
- the offence is narrow and compliance will not be difficult.

2.3 Transitional Arrangements

We recognise that it may be appropriate that there be a transition period between when the proposed new prohibition is passed by Parliament and when it takes effect. The purpose of this transition period would be to allow time to educate those involved in the supply chain about the new prohibition and to allow retailers and wholesalers enough time to sell inauthentic stock on-hand at the time the legislation is passed.

It is of course not uncommon for there to be a transition period where major changes to laws are made. For example, recent changes that extended the unfair contract terms regime under the ACL to standard form contracts with small businesses were passed by Parliament in August 2015 but only came into effect over a year later, in November 2016. The change to the law was accompanied by a significant awareness raising campaign by the ACCC as the regulator in charge of enforcing the new laws, including the development and release of a guide to the unfair contract terms law to assist business, legal practitioners and others.

3 The ACL is the appropriate place for such a prohibition

3.1 The growing prevalence of inauthentic Indigenous art should be addressed at a federal level

Misappropriation of culture fundamentally affects all Indigenous Australians, regardless of which state or region they reside in. The proliferation of inauthentic Aboriginal and Torres Strait Islander art and associated misappropriation of culture is an issue of national importance that should be addressed at a national level. It cannot be adequately addressed at a state government or local government level.

Addressing the issue at a state or regional level would also be impractical for businesses and confusing for consumers as it would give rise to a patchwork approach where it could be perfectly legitimate for businesses to sell inauthentic product in one area but not in an adjacent area.

As for local controls, even assuming the regulation of fake Indigenous art is properly within the purview of local government, local government law-making is ultimately subject to State parliamentary oversight and may be disallowed for political or policy reasons. Practically, the power of local governments to impose penalties under local government legislation is very limited and in any event, local governments are unlikely to be sufficiently resourced to actively monitor and enforce such regulations in their local government area.

3.2 The prohibition is concerned with fair trading

The prohibition is inherently concerned with fair trading. The concept of fair trading is a broad one. Selling inauthentic Indigenous art misappropriates Indigenous culture and is fundamentally unfair for Indigenous communities. It is also unfair to consumers, given the proliferation of inauthentic product within the 'grey area' of misleading and deceptive conduct (that is, product which appears to be made by an Indigenous person, although there is no express written representation that it is Indigenous art).

This goal aligns with and furthers the object of the CCA: *'to enhance the welfare of Australians through the promotion of competition and **fair trading** and provision for consumer protection'* (emphasis added).⁶

3.3 The ACCC is the best regulator to enforce a prohibition

Housing the prohibition in the ACL will ensure that the ACCC is the regulator with responsibility for enforcing it. The ACCC is a well-respected, highly effective regulator. The ACCC already has a role in relation to enforcing sections 18, 29 and 33 of the ACL where the sale of fake Indigenous art is misleading and deceptive. There is no other Commonwealth regulator better equipped for the role. The ACL also confers on the ACCC a suite of powers that are suited to the task of enforcing a prohibition on the sale of inauthentic Indigenous art, including:

⁶ S 2, CCA.

- (a) **substantiation notices:** the ACCC would have the power to issue a substantiation notice to a person who, in connection with the supply or possible supply of art, has promoted that the art exhibits Indigenous cultural expressions. A substantiation notice requires the person to either produce information or documents that substantiate or the support the claim they are making. For example, the ACCC could use this power to require a supplier to substantiate that art they are supplying is made by an Indigenous artist;
- (b) **public warning notices:** the ACCC may issue to the public a written notice containing a warning about particular conduct if the ACCC has reasonable grounds to suspect conduct that contravenes the new prohibition, the ACCC is satisfied that the conduct has caused detriment to one or more persons and the ACCC is satisfied that it is in the public interest to issue the notice. This section can also be used where the ACCC has issued a substantiation notice and the notice has not been complied with. This section would allow the ACCC to issue a public warning that it has grounds to believe that art being sold at a particular store has not been produced by or in accordance with an agreement with an Indigenous artist or community;
- (c) **pecuniary penalties:** the ACCC can commence proceedings against a person seeking pecuniary penalties. If the court is satisfied that the person has contravened the new prohibition, the court may order that the person pay a pecuniary penalty as the court determines appropriate. The maximum penalties are \$1.1 million per offence for a body corporate or \$220,000 for persons that are not bodies corporate;
- (d) **infringement notices:** the ACCC may issue an infringement notice where it has reasonable grounds to believe that a person has contravened the new prohibition 50A. In most cases, the infringement notice penalty is fixed at \$10,800 for a corporation (\$108,000 if the corporation is listed) and \$2160 for an individual.

There are also a range of other remedies that are available under the ACL that would effectively supplement the ACCC's powers and provide a strong deterrent to change behaviour:

- (a) **damages:** a person who suffers loss or damage because of a contravention of section 50A can commence an action seeking to recover the amount of the loss or damage;
- (b) **non-punitive orders:** a court can also make a number of non-punitive orders (such as orders designed to ensure that the person does not engage in a similar offence again);
- (c) **adverse publicity orders:** a court can order a person to publish corrective advertising;
- (d) **disqualification from managing corporations:** a court can make an order disqualifying a person from managing corporations for a period that the court considers appropriate.

The issues that would arise as a result of a prohibition are familiar to the ACCC, given its existing enforcement role as the national fair trading and consumer protection regulator. Indeed, this role extends to a specific focus on issues affecting Indigenous consumers:

- The ACCC contributes to the National Indigenous Consumer Strategy (NICS), in collaboration with ASIC, state consumer affairs agencies and the Indigenous Consumer Assistance Network.⁷ Some of the priorities areas of the NICS include: unscrupulous door-to-door and telemarketing sales tactics, and consumer rights regarding motor vehicles.
- Protecting the consumers rights of Indigenous consumers living in remote areas is also an 'enduring priority' for the ACCC in its enforcement policy for 2017.⁸

⁷ <https://www.accc.gov.au/media-release/action-plan-to-help-indigenous-australians-with-consumer-issues>.

⁸ <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>.

- Just recently, the ACCC issued a draft determination proposing to authorise several banks and ATM deployers to provide fee-free ATM services in remote Indigenous communities, recognising that *'high ATM usage and fees intensifies the financial and social disadvantage found in remote communities'*.⁹

Further, the ACCC is routinely asked to enforce laws which extend beyond misleading and deceptive conduct and cover other aspects of conduct in trade or commerce, including:

- the prohibition on unconscionable conduct¹⁰;
- various Industry Codes such as the Franchising Code of Conduct, the Horticulture Code of Conduct, the Food and Grocery Code of Conduct, the Wheat Port Code of Conduct and Oil Code of Conduct, which regulate dealings between businesses in particular specified industries;¹¹
- price exploitation laws following the introduction of the Good and Services Tax (to prevent affected traders from increasing prices by more than the amount required to comply with the new tax requirements);¹² and
- prices surveillance powers, including powers to conduct investigations in relation to specific industries.

4 Why is a prohibition the best policy option?

There are a number of policy options available to promote authentic products and restrict the prevalence of inauthentic Indigenous art, including:

- (a) a prohibition on the sale of inauthentic Indigenous products (as described in section 2 above);
- (b) bringing test cases under existing consumer laws to clarify the application of those laws in the 'grey area' referred to above (that is, to the sale of inauthentic products where no representations are explicitly made about the authenticity of the products);
- (c) educating consumers and suppliers / retailers regarding the differences between authentic and inauthentic products; and
- (d) introducing a labelling scheme to distinguish authentic and inauthentic products.

We deal with the net benefits of each option in turn.

4.1 A prohibition on the sale of inauthentic Indigenous art

There are a number of benefits arising from an outright prohibition on the sale of inauthentic Indigenous art:

- (a) it gives rise to a clear statement of the law regarding the boundaries of acceptable and unacceptable conduct;
- (b) it clearly addresses the costs associated with the misappropriation of Indigenous culture and ensures that Indigenous artists and communities can properly commercialise their artwork; and
- (c) it addresses the issue of consumers being misled into purchasing inauthentic Indigenous products.

⁹ <https://www.accc.gov.au/media-release/draft-decision-on-fee-free-atms-in-remote-indigenous-communities>.

¹⁰ S 21, ACL.

¹¹ See <https://www.accc.gov.au/business/industry-codes>.

¹² <https://www.accc.gov.au/media-release/gst-price-exploitation-law-enforcement>.

We do not believe the proposed prohibition gives rise to a material administrative burden (and therefore costs):

- From the perspective of suppliers and retailers, it would result in a low administrative burden. This is because the elements of the defence to the prohibition (that is, what comprises reasonable evidence of a product's authenticity) would be developed in consultation with retailers and suppliers. As noted previously, the objective of the defence is to provide an administratively simple way for retailers and wholesalers who are trying to do the right thing to ensure they are complying with the law. Further, the potential penalties and other remedies available for contravening the new prohibition will provide a strong deterrent to change behaviour amongst retailers and suppliers.
- The Indigenous Arts Code and ArtsLaw have designed the law in a manner which they expect would not impose a material burden on the ACCC. Retailers and suppliers will either fall within the safe harbour defence (by possessing the requisite evidence of authenticity) or outside it. This contrasts to the current ACL provisions, which are ambiguous and fact-specific in their application. Further, the proposal builds upon the ACCC's existing related enforcement experience and powers eg, the ACCC could use their substantiation powers or s155 notices to enforce the prohibition.

4.2 Bringing test cases under existing laws

Relying on the ACCC or others to bring test cases under existing consumer laws (particularly the misleading or deceptive conduct and the false misrepresentations prohibitions) is less cost effective than an outright prohibition on the sale of inauthentic Indigenous products. It places pressure on the resources and time of the Courts and the ACCC. The costs of running a court case are not insubstantial and it can take a number of years from investigating a case to obtaining judgment (not including the possibility of an appeal).

It will also likely take many years to build up a body of case law that clarifies the types of conduct that would be misleading and deceptive in the 'grey' area between obvious fake and cases where a fake product is specifically described as 'authentic Aboriginal art'.

Indeed, even after bringing several test cases, it is not clear that Courts would be willing to promulgate clear principles that address the policy issues arising from the sale of inauthentic Indigenous art. As noted previously, even if a dividing line between when selling inauthentic indigenous art was, or was not, misleading is established by the courts, that may just have the perverse result of pushing suppliers, distributors and retailers towards acquiring and selling low-quality, mass-produced, overtly inauthentic products, where consumers are not misled into thinking that the art was in fact authentic. Many of the cultural and financial harms of misappropriation will remain.

4.3 Educational campaigns directed towards educating consumers about inauthentic artwork

The targets of educational campaigns can be segmented into two key groups: consumers (comprising the Australian public and tourists) and retailers / suppliers.

Raising awareness of the harm of purchasing inauthentic Indigenous artworks among consumers is likely to require significant financial investment in an advertising campaign. In the case of tourists, such advertising may still not reach or resonate with them in the time that they spend in Australia. Given the large numbers of tourists who purchase Aboriginal art, craft and souvenirs,¹³ it is vital that any proposal effectively empower consumers to differentiate between authentic art

¹³ According to the Australia Council for the Arts 'Arts Nation' report (2015), 185,000 tourists purchased Aboriginal art, craft or souvenirs in 2013-2014 (page 33). It is unclear whether this statistic includes inauthentic Indigenous art.

and inauthentic art. In our submission, education alone is unlikely to achieve this, particularly as awareness of a product's authenticity is peculiarly within the knowledge of suppliers and retailers. By contrast, a prohibition would give consumers confidence that the artwork they are purchasing is authentic Indigenous art.

For suppliers and retailers, in order to be effective, the education campaign would need to be quite prescriptive (ie, this is what amounts to authentic Indigenous artwork, this is what does not and this is why you should not supply inauthentic Indigenous art). This would borrow heavily from the elements of a prohibition but without the 'sting' of penalties and other remedies.

Fundamentally, in the absence of legislative change, education relies on the good intentions of suppliers and retailers. There will not be a strong deterrent to supplying inauthentic Indigenous art.

4.4 Introducing a labelling scheme to distinguish authentic and inauthentic products

To be effective, a labelling scheme would need to be mandatory – that is, all products that bear Indigenous Cultural Expressions must be labelled in a way that prominently identifies whether they are authentic or inauthentic. This is because a voluntary labelling scheme would:

- create confusion among consumers (particularly uninformed consumers) as to the authenticity of products that are not labelled; and
- cause detriment to artists whose authentic products are not properly labelled by retailers or suppliers (as consumers may assume unlabelled products are not authentic).

However, mandatory labelling has the potential to become administratively complex, particularly for retailers and suppliers who supply both authentic and inauthentic Indigenous artworks.

Labelling also relies on:

- the goodwill of suppliers / retailers, who may find other ways to promote inauthentic products (eg, differential pricing or product placement in store); and
- consumer awareness of the harms of purchasing inauthentic Indigenous art.

Thus a labelling scheme would still be reliant on awareness raising. As described above, awareness raising may not be effective, particularly where tourists are concerned, and in the absence of a strong deterrent to retailers / suppliers supplying inauthentic products.

4.5 Conclusion

A prohibition against the sale of inauthentic Indigenous art is evidently the most simple and efficient way to address the problems caused by the growing prevalence of inauthentic Indigenous art.

Unlike the alternatives, a prohibition would:

- be administratively straightforward for all stakeholders;
- be cost-effective to implement and monitor;
- build on existing frameworks and resources;
- place the compliance onus on businesses rather than Indigenous artists;
- enable Indigenous artists and communities to exercise creative and cultural control; and
- offer a practical enforcement regime with sufficient deterrents to change behaviour.