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Melanie Brocklehurst
Committee Secretary
House of Representatives Standing Committee on Indigenous Affairs
PO Box 6021, Parliament House
CANBERRA ACT 2600

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