



**Australian Government**

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**The Treasury**

## **The House of Representatives Standing Committee on Indigenous Affairs**

**The growing presence of inauthentic Aboriginal and  
Torres Strait Islander 'style' art and craft products and  
merchandise for sale across Australia**

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## CONTENTS

INTRODUCTION .....	1
THE OBJECTIVES OF THE ACL AND HOW IT ASSISTS CONSUMERS AND TRADERS .....	1
OPTIONS TO PROMOTE AUTHENTIC PRODUCTS FOR THE BENEFIT OF ARTISTS AND CONSUMERS.....	2
Legislative reform .....	4
THE PROCESS FOR AMENDING THE ACL.....	5
1. Proposals noted by Ministers .....	6
2. Proposals <u>agreed</u> by Ministers.....	6
3. Proposals <u>supported</u> for further analysis .....	8
4. Proposals <u>directed</u> to the CAF strategic agenda.....	9

## INTRODUCTION

The Department of the Treasury (Treasury) welcomes the opportunity to make this submission to the Committee as it considers and reports on options to promote authentic products for the benefit of artists and consumers.

Treasury has general policy responsibility for the Australian Consumer Law (ACL) within the Australian Government, with changes to the ACL requiring the agreement of the majority of States, Territories and the Australian Government. Treasury makes this submission expressing its view on how the ACL may assist to promote informed purchasing decisions by consumers of authentic indigenous art, craft and merchandise.

## THE OBJECTIVES OF THE ACL AND HOW IT ASSISTS CONSUMERS AND TRADERS

The ACL sets out a nationally consistent law for fair trading and consumer protection. The ACL commenced on 1 January 2011 and is contained in Schedule 2 of the *Competition and Consumer Act 2010*, which replaced the *Trade Practices Act 1974* (TPA).

It followed the agreements of the Council of Australian Governments (COAG) to create a single national consumer law for Australia with the objective of improving consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

The ACL provides a mechanism to protect consumers and to stimulate competition by:

- Prohibiting misleading or deceptive conduct in trade or commerce and false or misleading representations (in relation to the characteristics, nature, grade, quality or affiliation of goods or services).
  - These obligations and protections apply equally to art, food, motor vehicles and practically any type of product sold in trade or commerce other than financial products which is dealt with under separate legislation.
- Preventing unfair sales pressure being applied. It is illegal to engage in unconscionable conduct (that is to engage in conduct against conscience as judged against the norms of society) when offering to supply a good or service in trade or commerce.
- Providing a national system to regulate the safety of consumer goods and the ability to ban the sale of consumer goods if there is a risk that the product may cause serious injury, illness or death.

Further, it allows these obligations to be enforced:

- Providing ACL regulators (in the form of the Australian Competition and Consumer Commission and State and Territory offices of fair trading) with enhanced capacities to investigate potential breaches of the ACL and to seek penalties from a court for breaches of the ACL.

- Providing ‘any’ person with a right to seek an injunction from a court to stop a breach of the ACL and allowing persons who have suffered loss or damage from a breach of the ACL to recover the amount of that loss or damage from the person who breached the ACL.

When a trader falsely represents their good is something it is not, they hurt:

- consumers who have paid the “market value” for a good with the quality / attributes / performance characteristics promised which are in fact not present such that they have paid more for less, and
- businesses who compete fairly, and the economy, by diverting sales from traders who are producing the goods of the kind that the consumer was seeking. This includes indigenous businesses selling authentic goods.

The ACL can assist to ensure authentic indigenous art, craft and merchandise are sold at a price that reflects its value by ensuring the consumer is not misled into purchasing a good that is represented as being authentic when it is not.

It is illegal under the ACL for a business to represent goods as authentic indigenous art, craft and merchandise, when they are not. Such conduct would expose the trader to action by an ACL regulator and pecuniary penalties of up to \$1.1 million for each contravention.

The ACL prohibits a business from making representations that are incorrect or likely to create a false impression. This includes false or misleading representations about the origin of goods, or their quality, value, price or age. Representations can be made using words as well as pictures. It is not illegal under the ACL for a trader to simply offer indigenous “style” art, craft or merchandise for sale when the good was not made by an indigenous artist.

Whether the ACL will be engaged will depend upon whether consumers are likely to be misled into believing the good is something which it is not.

The ACL does not define what is misleading or deceptive conduct. When assessing whether conduct is likely to mislead, courts have given consideration to whether the overall impression created by the conduct is false or inaccurate. If the overall impression left by a business’s advertisement, promotion, quotation, statement or other representation creates a misleading impression—such as to the price, value or the quality of any goods and services—then the behaviour may breach the law.

As an example, the ACL would not prevent a trader selling goods that do not purport to be authentic indigenous products and are unlikely to be seen as such. This would include large numbers of small, cheap, mass produced plastic boomerangs at an airport gift shop.

However, an art gallery advertising a collection of “indigenous art” is likely to be creating an impression that the art is authentic and potential purchasers may be misled if the art was not made by an indigenous artist.

## OPTIONS TO PROMOTE AUTHENTIC PRODUCTS FOR THE BENEFIT OF ARTISTS AND CONSUMERS

The Treasury understands the Australian Competition and Consumer Commission will make a submission which includes discussion of the potential for compliance and enforcement under the

ACL in relation to the sale of authentic products and the prevalence of misleading conduct in relation to indigenous art, craft and merchandise.

The current provisions in the ACL provide significant scope to address harm arising to consumers and indigenous artists from inauthentic products being purchased under the belief they are authentic. As noted previously, this is possible by provisions addressing representations as to the characteristics, nature, grade, quality or affiliation of goods or services as well as the generic prohibition on misleading conduct.

Compliance and enforcement of the ACL in relation to goods that falsely claim to be authentic indigenous art, craft or merchandise is likely to assist consumers to make informed purchasing choices and in turn, work for the benefit of indigenous artists.

Case example: *ACCC v Dreamtime Creations Pty Ltd* [2009] FCA 1545

The ACCC successfully took action under the consumer law against traders who falsely represented their goods were painted by a person of Aboriginal descent.

The Federal Court found Australian Dreamtime Creations Pty Ltd and Mr Tony Antoniou had engaged in misleading and deceptive conduct in breach of the TPA including by:

- providing certificates of authenticity that paintings were painted by a person of Aboriginal descent, and more broadly,
- representing on its website that certain artworks promoted for sale by it, including paintings, prints, boomerangs, bull-roarers, carved wooden animals, carved wooden statues, table platters, didgeridoos, emu eggs and ceramic objects including table platters, vases, wall plates, lidded boxes and bowls were painted by:
  - a person of Aboriginal descent;
  - and Ubanoo Brown,when they were not.

The Federal Court ordered Australian Dreamtime Creations and Mr Antoniou not to represent any artwork promoted, sold or supplied by it had been made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent unless the artwork was, to the best of their knowledge, made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent.

Further, both were prohibited from using the words 'Aboriginal Art' or words describing an artwork as 'Aboriginal' unless they had made such enquiries to be satisfied that the artist or artists of each such work was a person of Aboriginal descent.

To ensure the efficacy of the order, Australian Dreamtime Creations and Mr Antoniou were required to retain a record of the basis upon which it was satisfied the art was produced by a person of Aboriginal descent for a five year period for each piece of art which was so described.

Self-certification of authentic indigenous art may also assist to promote authentic products for the benefit of artists and consumers. That is, sellers of authentic indigenous art can make their product stand out, and in all likelihood, command a higher price for their work by certifying the authenticity of their product. This is not an option available to sellers of inauthentic indigenous style art as seen from the application of the consumer law by the Federal Court.<sup>1</sup>

One option to improve self-certification is through the development of a Certification Trade Mark (CTM). The rules of a CTM are approved by the ACCC, are enforceable by the CTM rights holder and a business which uses the relevant mark / logo without authorisation is likely to be engaging in misleading conduct in breach of the ACL.

CTMs can provide a mechanism for businesses to develop a commonly understood, safe and trusted mark. A well understood mark can ensure that consumers are able to easily identify goods with particular characteristics, such as a product being of indigenous origin. CTMs show that a trader's goods or services are certified as meeting particular standards. Standards commonly certified are: quality; content; method of manufacture; and geographic origin.

A CTM could indicate that a product is of a particular quality; has been manufactured in a particular location; is made from particular ingredients; or suited to a particular task. A CTM is usually presented as a visual graphic or logo and can confer a marketing advantage.

There have been past efforts to develop a CTM for indigenous cultural expressions that could be widely used and accepted in the market place. While past attempts have not been successful there is scope to examine the limitations of these past attempts to develop a new CTM that is able to meet the expectations of indigenous producers, businesses selling authentic products as well as consumers.

### *Legislative reform*

Consumer Affairs Australia New Zealand (CAANZ) recently concluded a review of the ACL, publishing the ACL Review Final Report in April 2017. The ACL Review formally commenced with the publication of an issues paper in March 2016. During the course of the Review, CAANZ published an interim report, received over 250 submissions and held over 130 face to face consultations.

Concerns about the capacity of the ACL to address sales of inauthentic indigenous art were not raised by stakeholders during the Review.

Treasury is aware that various stakeholders have called for specific protections to be included in the ACL to protect indigenous cultural expression, including by prohibiting the commercial sale of goods that include an indigenous cultural expression unless the good was produced by an indigenous artist or in accordance with a transparent agreement with an indigenous artist or indigenous community.

This would alter the focus of the ACL to protect cultural expression irrespective of whether consumers were misled or coerced into making a purchase.

It would also not be keeping with international practice for the management of protection of cultural expression.

For comparison, other jurisdictions have moved to protect indigenous cultural expression through specific legislation or trade marks. In the United States, the *Indian Arts and Crafts Act of 1990*

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<sup>1</sup> *ACCC v Dreamtime Creations Pty Ltd* [2009] FCA 1545, *ACCC v Nooravi* [2008] FCA 2021.

prohibit misrepresentations in marketing of Indian arts and crafts products and is enforced by the Indian Arts and Crafts Board of America. New Zealand and Canada both have trade marks for indigenous cultural expressions to assist consumers to make informed purchases.

The Legislative and Governance Forum on Consumer Affairs, comprising Ministers for Consumer Affairs, voted in August 2017 to support 15 amendments to the ACL to improve its operation, and expressed their desire that the relevant legislation be put in place as soon as possible.

- Ministers identified as a priority a proposal to increase the maximum penalties available under the ACL.
- The Australian Government has agreed to amend the ACL to increase the penalties available for breaching the ACL to the greater of \$10 million, three times the value of the benefit from the conduct, or 10% of annual turnover of the entity in the preceding 12 months.
  - These higher penalties should more than recoup any profit from firms engaging in breaches of the ACL so it is not worthwhile for traders to falsely represent their goods are authentic indigenous art.

Details of the proposals considered by Ministers are set out in Attachment A to this submission. Treasury is currently leading the work on a majority of these proposals. In addition, Ministers for Consumer Affairs have agreed to the Treasury undertaking work on retirement villages, ticket on-selling and payment for paper bills. This is a significant work agenda that together with the proposals outlined at Attachment A, extends to 2021.

## THE PROCESS FOR AMENDING THE ACL

The Commonwealth, a State or a Territory may submit a proposal to amend the ACL and provide this to all other jurisdictions.

As a general proposition, any change to the ACL requires consultation on whether there should be a change to the law, via a consultation regulation impact assessment, seeking the view of all stakeholders, including state and territory regulators. This process assists to determine the final options to be considered by Ministers for Consumer Affairs in a COAG Regulation Impact Statement.

The Regulation Impact Statement will canvass whether there is a problem requiring regulatory amendment, a range of feasible options to address that problem, the relative costs and benefits of those options to address the problem and to assess the effects on competition of the proposals.

If Ministers conclude legislative reform is appropriate in light of the Regulation Impact Statement, the Commonwealth Government will put the proposed amendment to a vote.

In such circumstances, the Inter-Governmental Agreement for the ACL requires the Commonwealth not to introduce a Bill into the Commonwealth Parliament to amend the ACL unless the proposed amendment is supported by the Commonwealth and four other States or Territories (including a minimum of at least three States).

# ATTACHMENT A

## Review of the Australian Consumer Law, 2017 – Proposals considered by Ministers, 31 August 2017

### 1. *Proposals noted by Ministers*

*Regulators will issue guidance or explore further options for these items*

#### **A1**

Guidance on ‘unsafe’ and ‘reasonable durability’ Regulators will work with stakeholders (including tribunals) to provide more specific guidance on both ‘unsafe’ goods and ‘reasonable durability’.

#### **A2**

Mandatory reporting Regulators will issue guidance clarifying traders’ mandatory reporting obligations.

#### **A3**

Product bans and recalls Regulators will explore options to streamline processes for implementing product bans and mandatory recalls, taking into account findings of the Productivity Commission’s study of Consumer Law Enforcement and Administration.

#### **A4**

Charities, not-for-profit organisations and fundraisers Regulators will issue guidance clarifying the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers.

### 2. *Proposals agreed by Ministers*

*Ministers agreed to make amendments to the Australian Consumer Law to give effect to these 15 proposals with minor regulatory impacts*

#### **Proposal 4**

Warranties against defects Clarify the mandatory text requirements for warranties against defects by developing text specific to services and services bundled with goods.

#### **Proposal 5**

Goods damaged or lost in transit Clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods where those goods are damaged or lost in transit.

Clarify and strengthen voluntary recall requirements by:

#### **Proposal 7**

Voluntary recalls

- introducing a statutory definition of ‘voluntary recall’
- increasing penalties for failure or refusal to notify a voluntary recall, proportionate with other ACL penalties.

#### **Proposal 8**

Strengthen ACCC powers to obtain information about product safety,



Powers to obtain information by broadening the power to apply to any person (including a consumer) likely to have relevant information, rather than just the supplier.

### **Proposal 9**

Publicly-listed companies

Extend the ACL (and ASIC Act) unconscionable conduct protections to publicly-listed companies.

NOTE: The Chair of CAF will write to the Commonwealth Minister responsible for the ASIC Act to seek their agreement to the amendment.

### **Proposal 11**

Powers to obtain information

Enable regulators to use existing investigative powers to better assess whether or not a term may be unfair.

NOTE: The Chair of CAF will write to the Commonwealth Minister responsible for the ASIC Act to seek their agreement to the amendment.

### **Proposal 12**

Threshold requirements for unsolicited consumer agreements

Ensure that the unsolicited selling provisions operate as intended by clarifying that the provisions:

- can apply to public places
- capture suppliers in their negotiations with consumers where the suppliers obtain, from a third party (sometimes referred to as a 'lead generator'), a consumer's contact details or permission to be contacted.

### **Proposal 13**

Pre-selected options

Enhance price transparency in online shopping by requiring that any additional fees or charges associated with pre-selected options are included in the headline price.

### **Proposal 16**

Financial products

Amend the ASIC Act to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products.

NOTE: The Chair of CAF will write to the Commonwealth Minister responsible for the ASIC Act to seek their agreement to the amendment.

### **Proposal 17**

Private action

Ease evidentiary requirements for private litigants through an expanded 'follow-on' provision enabling them to rely on admitted facts from earlier proceedings.

Increase maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the *Competition and Consumer Act 2010*:

### **Proposal 18**

Maximum financial penalties

- for companies, the greater of:
  - the maximum penalty (of \$10 million), or
  - three times the value of the benefit the company received from the act or omission, or
  - if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.
- for individuals, \$500,000.

### **Proposal 19**

Allow third parties to give effect to a community service order under the

Community service orders	ACL.
Technical Amendment (a)	Amend the definition of ‘unsolicited services’ in section 2 of the ACL to allow the false billing provisions (sections 40 and 162) to apply to false bills for services not provided.
Technical Amendment (b)	Amend section 12DC of the ASIC Act to address terminology that is inconsistent with other consumer protection provisions in the ASIC Act and that may unintentionally narrow the scope of the provision. NOTE: The Chair of CAF will write to the Commonwealth Minister responsible for the ASIC Act to seek their agreement to the amendment.
Technical Amendment (c)	Amend section 76 of the ACL (or the regulations) to clarify that disclosure requirements for unsolicited consumer agreements do not apply to certain exempt agreements.

### 3. *Proposals supported for further analysis*

*Ministers asked officials to undertake regulatory impact assessment for these seven proposals to amend the consumer law, to inform future decision making*

**Proposal 1**  
Rights to refunds and replacements Specify that where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to the remedies of a refund or replacement without needing to prove a ‘major failure’.

**Proposal 2**  
Multiple non-major failures Clarify that multiple non-major failures can amount to a major failure.

**Proposal 3**  
Extended warranties Enhance disclosure in relation to extended warranties.

**Proposal 6**  
General safety provision Introduce a general safety provision into the ACL.

**Proposal 10**  
Insurance contracts Apply unfair contract term protections to contracts regulated by the *Insurance Contracts Act 1984* (Cth).

**Proposal 14**  
Online auctions Modernise the ‘sale by auction’ exemption with regard to consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

**Proposal 15**  
Definition of ‘consumer’ Increase the \$40,000 threshold in the definition of ‘consumer’ to \$100,000.

## 4. Proposals directed to the CAF strategic agenda

*Ministers directed CAANZ to place these seven research and policy projects on the forward work program and the 2018-21 Strategic Agenda, noting the importance of stakeholder engagement in ongoing policy development.*

<b>Looking to the Future 1</b> Commencing 2021	Commission a third Australian Consumer Survey in 2021 to assist with regular monitoring and review of the ACL.
<b>Looking to the Future 2</b> Commencing 2018-19	Examine whether the current consumer guarantees are fit-for-purpose for purely digital products, certain market practices and emerging technologies.
<b>Looking to the Future 3</b> Commencing 2017-18	Promote enhanced collection and dissemination of product safety data, taking into account findings of the Productivity Commission's study of Consumer Law Enforcement and Administration and initiatives undertaken by other regulatory regimes.
<b>Looking to the Future 4</b> Commencing 2018-19	Explore how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.
<b>Looking to the Future 5</b> Commencing 2017-18	Undertake an economy-wide study to examine the role, nature and impact of unsolicited selling in the Australian economy, to inform future policy development.
<b>Looking to the Future 6</b> Commencing 2018-19	Assess the effectiveness of the proposed guidance on not-for-profit fundraising, further regulator actions, and whether any amendment to the ACL is necessary.
<b>Looking to the Future 7</b> Ongoing as priorities arise	Review current exemptions, with a view to removing those that are no longer in the public interest.