



**Committee Inquiry – Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019**

Thank you for the opportunity to comment on the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (the **2019 Bill**).<sup>1</sup> This submission is made on behalf of the Arts Law Centre of Australia, Indigenous Art Code and Copyright Agency, the creators of the 'Fake Art Harms Culture' campaign.<sup>2</sup>

In summary:

- There is a significant and growing market in Australia for art and craft products which have the 'look and feel' of Aboriginal and Torres Strait Islander art but have no connection to Aboriginal and Torres Strait Islander communities. These goods are produced commercially and mostly aimed at the tourist market, often being made from non-traditional materials and featuring inauthentic and culturally inappropriate designs. We estimate that up to 80% of items being sold as legitimate Aboriginal and Torres Strait Islander artworks and souvenirs in tourist shops and some galleries around Australia are inauthentic.
- The trade in inauthentic Aboriginal and Torres Strait Islander art:
  - misappropriates and exploits Aboriginal and Torres Strait Islander culture;
  - denies Aboriginal and Torres Strait Islander artists economic and other opportunities;
  - misleads and deceives consumers regarding the authenticity of Aboriginal and Torres Strait Islander art products they purchase; and
  - disadvantages Australian businesses who take an ethical and culturally empathetic approach to their work.
- The issue of inauthentic Aboriginal and Torres Strait Islander art was considered by the Standing Committee on Indigenous Affairs in 2017-18, which concluded that such misappropriation of Aboriginal and Torres Strait Islander cultures is unacceptable. The Committee noted that current laws are insufficient to address the problem and explored several possible solutions, concluding that standalone legislation may be the best long-term option to resolve this complex issue. The Committee recommended that the Australian Government begin a consultation process to develop standalone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.

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<sup>1</sup> Accessed here: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bld=s1170](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1170)

<sup>2</sup> We thanks Allens law firm for its valuable contribution in the preparation of this submission.

- We support the Standing Committee on Indigenous Affairs' recommendation of standalone legislation as a long-term solution, and indeed, we have advocated for standalone legislation for some time. However, given the damage caused by inauthentic Aboriginal and Torres Strait Islander art and craft product is both current and widespread, we consider it imperative to expedite legislative action within an existing legislative framework, while standalone legislation is developed as a long-term solution. We consider this would be best achieved through amendments to the Australian Consumer Law (**ACL**) that prohibit the supply of inauthentic Aboriginal and Torres Strait Islander art and craft product.
- There are a number of benefits arising from an outright prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art, including that a prohibition would:
  - (a) give rise to a clear statement of the law regarding the boundaries of acceptable and unacceptable conduct;
  - (b) clearly address the costs associated with the misappropriation of Aboriginal and Torres Strait Islander culture and ensures that Aboriginal and Torres Strait Islander artists and communities can properly commercialise their artwork; and
  - (c) address the issue of consumers being misled into purchasing inauthentic Aboriginal and Torres Strait Islander products.
- The ACL would be an appropriate place for such a prohibition, as the prohibition is fundamentally concerned with fair trading and with preventing consumers being misled as to the authenticity of Aboriginal and Torres Strait Islander art. Further, amending the ACL would provide an effective legal framework for implementing the prohibition in a timely manner – since responsibility for enforcing the prohibition would fall to the ACCC and be subject to the existing remedies under the ACL.
- We therefore support the 2019 Bill introduced by Senator Hanson-Young.<sup>3</sup> However, we consider the 2019 Bill can be improved to better achieve its purpose. We describe those improvements further below and **attach** a proposed revised Bill and a mark-up to the 2019 Bill.

## **2 The rise of authentic and inauthentic Aboriginal and Torres Strait Islander Art**

Successive governments have actively supported the production of Aboriginal and Torres Strait Islander art to the benefit of Aboriginal and Torres Strait Islander communities, individuals and the nation as a whole. Long-term funding of Aboriginal and Torres Strait Islander owned and governed art centres, for example, has created learning and income-earning opportunities while helping to foster the preservation and dissemination of Aboriginal and Torres Strait Islander culture.

Major touring exhibitions of Aboriginal and Torres Strait Islander art have taken that culture to the world, promoting a greater understanding of its significance, encouraging tourism, helping create an international market for the visual arts, playing a role in soft diplomacy and generally benefiting Australia's cultural standing.

However, with this increased awareness, reputation and market value, a market in fake and inauthentic Aboriginal and Torres Strait Islander art products has also emerged.

## **3 The Fake Art Harms Culture Campaign**

In 2016, following representations by Aboriginal and Torres Strait Islander community members and artists, three key peak bodies, being the Arts Law Centre of Australia, Indigenous Art Code and Copyright

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<sup>3</sup> See: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bld=s1170](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1170)

Agency, began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal and Torres Strait Islander style' art and craft products and merchandise for sale across Australia.

Throughout 2016, Arts Law and the Indigenous Art Code conducted a joint investigation into the sale of Aboriginal and Torres Strait Islander art and products bearing Aboriginal and Torres Strait Islander cultural expressions in Australia. From that study, we estimated that up to 80% of items being sold as legitimate Aboriginal and Torres Strait Islander artworks and souvenirs in tourist shops and some galleries around Australia are inauthentic.<sup>4</sup> These products are produced commercially, generally aimed at the tourist market, often made from non-traditional materials and often feature inauthentic and culturally inappropriate designs. Such goods come in a wide range of products, from bamboo didgeridoos to decorative plates and key rings.

In response to these concerns, the 'Fake Art Harms Culture' campaign was created by Arts Law, the Indigenous Arts Code and Copyright Agency to prevent this proliferation of fake Aboriginal and Torres Strait Islander art products and merchandise. The campaign has received widespread support. It has included presentations at numerous Aboriginal and Torres Strait Islander Arts events, campaign letters to MPs signed by Aboriginal and Torres Strait Islander artists and individuals, national media coverage and the backing of many art market professionals.

#### **4 Developments since the Fake Art Harms Culture campaign**

Since the Fake Art Harms Culture campaign began:

- Senator Bob Katter introduced a Private Members Bill to Parliament in 2017 which sought to prevent non- Aboriginal and Torres Strait Islander persons benefitting from the sale of Aboriginal and Torres Strait Islander art and souvenirs (**2017 Bill**).<sup>5</sup> The 2017 Bill sought to amend the ACL and was similar in some respects to the 2019 Bill introduced by Senator Hanson-Young;
- then Minister for Indigenous Affairs, Senator Nigel Scullion, referred an inquiry to the Senate Standing Committee on Indigenous Affairs, regarding the growing presence of inauthentic Aboriginal and Torres Strait Islander style' art and craft products and merchandise for sale across Australia. The Committee conducted the inquiry over 2017-18, resulting in a final report tabled in December 2018.<sup>6</sup> The Committee explored several possible solutions, noting that current laws are insufficient to address the problem and concluding that standalone legislation may be the best long-term option to resolve this complex issue. The Committee recommended that the Australian Government begin a consultation process to develop standalone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.
- the ACCC commenced misleading and deceptive conduct proceedings against Birubi Art Pty Ltd, an art product and souvenirs wholesaler. The Federal Court handed down its decision in June 2019, finding that Birubi had falsely claimed that products it sold were hand painted by Australian Aboriginal persons and made in Australia when that was not true, and ordered Birubi to pay a

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<sup>4</sup> This estimate is based on best judgment observations made by informed purchasers during a mystery shopping exercise conducted in tourist locations in various capital cities in June 2016. The estimate applies to the souvenir / tourist market and does not include the fine art market. The media and other commentators have made similar estimates.

<sup>5</sup> See: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5810](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5810)

<sup>6</sup> See:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Indigenous\\_Affairs/The\\_growing\\_presence\\_of\\_inauthentic\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_style\\_art\\_and\\_craft](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft)

penalty of \$2.3 million.<sup>7</sup> However, in its current form, the ACL is insufficient to protect consumers from being misled regarding the authenticity of Aboriginal and Torres Strait Islander art and craft (discussed further below).

- the Indigenous Art Code, Copyright Agency and Arts Law have had a dramatic increase in Aboriginal and Torres Strait Islander artists contacting our organisations about unfair licensing arrangements involving minimal payments for extensive use of their artwork on a wide range of souvenir products and merchandise. Whilst these artists consider the use of their work in this way to be 'fake' because they have not been attributed or properly paid, further investigations show that in many instances there is a 'paper trail' whereby permission has been obtained albeit without the informed consent of the artists. This issue is as prevalent and problematic in the souvenir market as the fake art issue.

## 5 Significance of the problem

The trade in inauthentic Aboriginal and Torres Strait Islander art has a direct negative impact in at least four ways. It:

- misappropriates and exploits Aboriginal and Torres Strait Islander culture;
- denies Aboriginal and Torres Strait Islander artists economic and other opportunities;
- misleads and deceives consumers regarding the authenticity of Aboriginal and Torres Strait Islander art products they purchase; and
- disadvantages Australian businesses who take an ethical and culturally empathetic approach to their work.

We address these in turn below.

**Aboriginal and Torres Strait Islander communities and individuals** are custodians of culture and have rights and obligations to protect and maintain cultural knowledge and expression so that it can be passed on to future generations. This includes groups with a connection to a specific region, those who are linked through their production of art or other shared goals, and the population of Aboriginal and Torres Strait Islander peoples as a whole.

While this custodianship role is diverse, visual arts are a central part of this responsibility. They are closely linked to identity, belonging and place. For Aboriginal and Torres Strait Islander communities it includes such roles as protecting the integrity of work associated with a particular location. For example, the crosshatch (rarkk) style of ceremonial painting is associated with Arnhem Land and it is considered offensive and potentially in breach of customary laws if it is reproduced by others.

Only with the authority or permission of the relevant Aboriginal and Torres Strait Islander community can a reproduction, adaption, or style of work be considered authentic. Producing an art product or merchandise without that consent breaches the community's custodial rights. These are recognised both locally and internationally through the *2006 United Nations Declaration of the Rights of Indigenous Peoples*.

In this very real sense, misappropriated and 'fake art' tangibly harms culture'. It also potentially deprives a community of economic benefits through official licensing or distribution agreements.

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<sup>7</sup> See: <https://www.accc.gov.au/media-release/23m-penalty-for-fake-indigenous-australian-art>

So much is acknowledged in the Senate Committee's Final Report, which stressed that:

- Aboriginal and Torres Strait Islander art, craft and cultural expressions belong to Aboriginal and Torres Strait Islander peoples. Non- Aboriginal and Torres Strait Islander artists should not appropriate or copy this expression in any way, even with good intentions;
- whilst producing and selling imitation Aboriginal and Torres Strait Islander art and craft is not currently unlawful, it has a profound and harmful impact on Aboriginal and Torres Strait Islander peoples and cultures;
- any inauthentic piece of Aboriginal and Torres Strait Islander art, craft or artefact such as a boomerang or didgeridoo not made by an Aboriginal artist is by its very nature and existence purporting to be culturally authentic when it is not; and
- Aboriginal and Torres Strait Islander cultures are an intrinsic part of Australian culture and allowing it to be compromised damages the identity of our nation as a whole.

**Aboriginal and Torres Strait Islander artists** – individual artists have control over the reproduction of their works through the protection of copyright laws. However, work produced in a 'Aboriginal and Torres Strait Islander style', or that appropriates but does not replicate a work, does not fall into that category.

At both the community and local level, Aboriginal and Torres Strait Islander people should be able to benefit from the commercialisation of their work and cultural expression. Works that appear to be made by Aboriginal and Torres Strait Islander artists but have actually been made by others diminishes this opportunity for artists and their families.

**Consumers** – The Indigenous Art Code, which is supported by the Australian Government, has played an important role in helping to establish standards and benchmarks that can increase consumer confidence in acquiring Aboriginal and Torres Strait Islander art, but the Code is voluntary and its resources are limited.

Further, current laws against misleading and deceptive conduct only protect consumers from inauthentic Aboriginal and Torres Strait Islander art if the product includes an express or implied representation as to its authenticity, which is misleading. Such a representation:

- can be made through text or images on the product or its packaging, such as through use of a label stating 'Aboriginal art'; and
- may not necessarily be made simply through an artwork or souvenir having the 'look and feel' of Aboriginal and Torres Strait Islander art without further indications the item was produced by a Aboriginal and Torres Strait Islander artist. This could be the case if the packaging of an item states that it is reproduced or mass-produced somewhere overseas.

The inadequacies of relying on the existing prohibition on misleading conduct are highlighted in the recent *Birubi* judgement.<sup>8</sup> While the ACCC was successful with respect to most of the alleged representations, Perry J held that two of the five items fell short of making an implied representation that they were 'made by an Aboriginal person'. The line between these products and those that were held to make this representation was fine at best:

- Perry J held it was a combination of features that gave rise to the representations in *Birubi*. The items featured various words and statements including 'Australia', 'hand crafted', 'handmade', 'hand painted', 'supports and promotes ethical dealings with all Aboriginal people' and 'authentic

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<sup>8</sup> *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595.

Aboriginal art'. If the products had not featured these labels or statements and instead explicitly stated that they were made in Indonesia, they would not be considered 'misleading'.

- Furthermore, even if the products did not state that they were made in Indonesia, if they had not featured the words and statements implying they were made in Australia, made by an Aboriginal Australian or 'authentic', it is not clear that it would have amounted to misleading.

In essence, under the current laws governing misleading conduct, the more obviously fake an item of Aboriginal and Torres Strait Islander style' art, the more legal it is to sell that item. The sale of fake art in a way that is not misleading at law still misappropriates and exploits Aboriginal and Torres Strait Islander culture, and denies Aboriginal and Torres Strait Islander artists economic and other opportunities. Furthermore, because the line between what is and is not misleading is blurred, it is possible for fake art to be sold in a way that is not misleading under the current law but where a consumer nonetheless mistakenly believes they are buying authentic art work and that their purchase will financially benefit a Aboriginal and Torres Strait Islander artist.

In contrast, we consider that consumers in Australia should be able to safely assume that any item sold commercially which resembles Aboriginal and Torres Strait Islander art – whether a high-end original work or a small souvenir – was in fact created by Aboriginal and Torres Strait Islander artists and is an authentic representation of Aboriginal and Torres Strait Islander culture. We therefore support amending the ACL to prohibit the sale of inauthentic Aboriginal and Torres Strait Islander art – both to protect consumers and to protect Aboriginal and Torres Strait Islander artists, communities and culture.

**Businesses** – The existence of a strong and fair Aboriginal and Torres Strait Islander visual arts sector is as reliant on distribution and sale as it is on production. There are a large number of Australian businesses of all sizes who play a role in the licensing, reproduction, distribution and sale of Aboriginal and Torres Strait Islander art products and merchandise. Many companies work closely with Aboriginal and Torres Strait Islander artists and communities, meeting the industry best practice standards and ethical benchmarks set out in the Indigenous Art Code. However, this good practice – which includes fair remuneration and recognition – comes at a higher cost, relative to those businesses importing and selling cheap, inauthentic goods. Current arrangements therefore have the potential to financially disadvantage those businesses that are 'doing the right thing' and risk their sustainability as well as that of the sector more broadly.

## **6 A prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art is necessary**

We support the Standing Committee on Indigenous Affairs' recommendation of standalone legislation as a long-term solution, and indeed, we have advocated for standalone legislation for some time. However, given the damage caused by inauthentic Aboriginal and Torres Strait Islander art and craft product is both current and widespread, we consider it imperative to expedite a legislative prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art within an existing legislative framework, while standalone legislation is developed as a long-term solution.

There are a number of benefits arising from an outright prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander culture and ensures that Aboriginal and Torres Strait Islander artists and communities can properly commercialise their artwork; and
- (c) it addresses the issue of consumers being misled into purchasing inauthentic Aboriginal and Torres Strait Islander products.

## **7 The ACL is the appropriate place for such a prohibition**

For the reasons set out below, we consider that expediting a legislative prohibition on the sale of inauthentic Aboriginal and Torres Strait Islander art would be best achieved through amendments to the ACL (or the introduction of a mandatory industry code if it achieves the same outcome).

### **7.1 The growing prevalence of inauthentic Aboriginal and Torres Strait Islander art should be addressed at a federal level**

Misappropriation of culture fundamentally affects all Aboriginal and Torres Strait Islander peoples, 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.

### **7.2 The prohibition is concerned with fair trading**

A key purpose of the prohibition would be to promote fair trading by:

- preventing consumers being misled as to the authenticity of Aboriginal and Torres Strait Islander art; and
- preventing the commercial misappropriation and exploitation of Aboriginal and Torres Strait Islander culture, which is fundamentally unfair for Aboriginal and Torres Strait Islander communities and artists.

This purpose goal aligns with and furthers the object of the Act containing the ACL, which is: *'to enhance the welfare of Australians through the promotion of competition and **fair trading** and provision for **consumer protection**'* (emphasis added).<sup>9</sup>

### **7.3 Amending the ACL would provide an effective legal framework for addressing the problem in a timely manner**

Amending the ACL would will provide an effective legal framework for prohibiting the sale of inauthentic Aboriginal and Torres Strait Islander art and craft in a timely manner. The advantages of amending the ACL for this purpose include that:

- responsibility for enforcing the prohibition would fall to the ACCC, a well-respected and effective regulator with effective enforcement powers;
- such a prohibition would also be subject to existing remedies under the ACL, including pecuniary penalties;
- the ACCC already has a role in protecting consumers against fake Aboriginal and Torres Strait Islander art as the national regulator enforcing the existing prohibitions against misleading and deceptive conduct. In addition:

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<sup>9</sup> *Competition and Consumer Act 2010* (Cth), section 2.

- the ACCC also contributes to the National Indigenous Consumer Strategy (NICS), in collaboration with ASIC, state consumer affairs agencies and the Indigenous Consumer Assistance Network;<sup>10</sup> and
- conduct impacting Indigenous consumers is an enduring compliance and enforcement priority of the ACCC;<sup>11</sup>
- the ACCC is accustomed to enforcing laws that target:
  - particular industries – including through industry-specific mandatory codes, infrastructure access and price surveillance regimes;
  - particular sales and marketing techniques, such as 'country of origin' representations, bait advertising, pyramid schemes, door-to-door sales and lay-by sales;
  - particular products – including through the ACCC's product safety role, in which the ACCC is responsible for monitoring compliance with certain product recalls notified by Government;
- amending existing legislation is a much quicker and simpler process than drafting and introducing new legislation and would not preclude the introduction of standalone Indigenous Cultural and Intellectual Property Rights legislation to address the problem in the long-term.

Further, the prohibition would not impose a material burden on retailers and suppliers, or the ACCC, given that:

- the 2019 Bill contains a 'safe harbour' defence to the proposed prohibition for suppliers and retailers where they have a document of the product's authenticity which meets the regulations set by Government. This acts as an administratively simple way for retailers and wholesalers to ensure they are complying with the law; and
- the ACCC would have the benefit of enforcing a prohibition where retailers and suppliers 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.

## 8 The 2019 Bill can be improved

In the context of the points made above, we support the 2019 Bill introduced by Senator Hanson-Young.<sup>12</sup> However, we consider the 2019 Bill can be improved to better achieve its purpose. To that end, we **attach** a proposed revised Bill and a mark-up to the 2019 Bill (**Revised Bill**). Section 8.1 below provides an overview of the Revised Bill (noting that most of the essential features of the Revised Bill are the same as the 2019 Bill). Section 8.2 then summarises the amendments that we propose be made to the 2019 Bill.

### 8.1 Overview of the Revised Bill

The Revised Bill prohibits:

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<sup>10</sup> <https://www.accc.gov.au/media-release/action-plan-to-help-indigenous-australians-with-consumer-issues>

<sup>11</sup> See: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

<sup>12</sup> We note that the 2019 Bill is similar to the 2017 Bill introduced by Senator Katter, although it appears to have been amended to address comments made by the Standing Committee for the Scrutiny of Bills regarding the breadth of the prohibition in the 2017 Bill – see Scrutiny Digest 12 of 2017, here: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Scrutiny\\_Digest/2017](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest/2017). Note that the 2017 Bill was also examined by the Parliamentary Joint Committee on Human Rights, which noted that the 2017 Bill contained a strict liability and reverse burden offence which, based on the information provided, was likely to be compatible with the right to be presumed innocent. See: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2017/Report\\_4\\_of\\_2017](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2017/Report_4_of_2017)



- the supply of items featuring an Indigenous cultural expression unless the item is made by an Indigenous artist or members of an Indigenous community, or is a licensed reproduction of such good (and the license satisfies certain requirements set out in regulations): ss 50A(1)(a) and (b). These goods must attribute the artist or community (either on the good itself, or on the packaging): s50A(1)(b) and (4).
- the supply of Indigenous cultural artefacts unless the item is made *in Australia* by an Indigenous artists or Indigenous community (ie, these cannot be subject to licensing agreements): s50A(1)(c).

It is a defence to the prohibitions in the Revised Bill if the person supplying the good has a document that complies with the regulations: s50A(2) (the 'safe harbour' defence). The purpose of the document is to act as a certificate of authenticity for suppliers, which can be relied upon as evidence that the supplier believed the item was authentic. The regulations will set out requirements as to the document form, content and author or signatory: s50AC(b).

The prohibitions in the Bill attract two types of liability: civil liability (s50A) and criminal liability (s50AC). This is similar to existing provisions in the ACL, including provisions concerned with false or misleading representations under Part 3-1, which give rise to both civil and criminal liability. The difference between the civil and criminal versions of the prohibition is that whilst failure to attribute the artist or community on the good or the good's packaging attracts civil liability (s50A(1)(b)), it is not an offence under s50AC.

The Proposed Bill is designed to ensure that it operates and is enforced in a way that is culturally appropriate and targets the problem. First and foremost, this is because a good must satisfy the definition of 'Indigenous cultural expression' and / or 'Indigenous cultural artefact' to be caught by the ambit of the Bill. Other provisions which ensure the Bill targets the problem are discussed below.

## 8.2 Differences to the 2019 Bill

The Revised Bill contains a number of differences from the 2019 Bill that we propose for consideration by the Committee. In particular, the Revised Bill:

- Simplifies the definition of 'Indigenous cultural expression' by removing the words 'made by an Indigenous artist', which we do not consider to be necessary given the other provisions of the Bill.
- Allows for the Government to make regulations regarding the form, content and procedures relating to:
  - the written licences which may be granted by Indigenous artists or communities for the reproduction of Indigenous art made by those artists or communities (ie. regulations for the purpose of sections 50A(1)(a)(ii) and 50AB(4)(a)(ii)); and
  - the documents of authenticity for the purposes of the defence in sections 50A(2) and 50AB(5).<sup>13</sup>
- Provides for the ACCC to formulate guidelines to inform its approach to enforcing the new prohibitions, including factors the ACCC must take into account when determining whether an item features an Indigenous cultural expression and / or is an Indigenous cultural artefact: section 50AD.

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<sup>13</sup> The notes in sections 50A and 50AB of the 2019 Bill indicate that regulations can be made for this purpose. The Revised Bill provides directly for the Government to make such regulations in new section 50AD.

- Gives additional roles to the Indigenous representative committee appointed by the Minister under 50A(5)) to monitor compliance with the Act as it applies to Indigenous communities and artists. Those additional roles are to consult with:
  - the Minister – on the content of the regulations referred to above; and
  - the ACCC – on the operation of the new provisions and the formulation of the ACCC's enforcement guidelines referred to above.
- Does not include a separate general prohibition on the supply of 'Indigenous ceremonial or sacred artefacts'. We consider that such a prohibition would be better considered as part of enacting standalone Indigenous Cultural Intellectual Property legislation as a long-term solution. Instead, in the Revised Bill, the supply of 'Indigenous cultural artefacts' is governed by the general prohibition on the misuse of Indigenous cultural expression in new section 50A.
- Removes the provisions which would extend the Unfair Contract Terms regime in the ACL to 'Indigenous cultural expression contracts'. Instead, we consider that the function of those provisions can be achieved through the regulations regarding written licences referred to above.

The overall purpose of these proposed changes is to simplify the Bill, narrow its focus just to the sale of inauthentic items featuring an Indigenous cultural expression and to provide certainty to businesses involved in the supply of Indigenous art through regulations and guidelines.

## 9 Conclusion

We welcome the 2019 Bill introduced by Senator Hanson-Young and the opportunity it brings for engagement with the Parliament and community on this important issue.<sup>14</sup> We consider the 2019 Bill can be improved to better achieve its purpose and would welcome the adoption of the amendments proposed in the Revised Bill attached.

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<sup>14</sup> See: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bld=s1170](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1170)