

Schedule 1—Amendments

Competition and Consumer Act 2010

1 Subsection 2(1) of Schedule 2

Insert:

Indigenous artist means an artist who:

- (a) is a member of the Aboriginal race of Australia or a descendant of the Indigenous inhabitants of the Torres Strait Islands; and
- (b) identifies as Aboriginal or Torres Strait Islander; and
- (c) is recognised as Aboriginal or Torres Strait Islander by the community with which the artist identifies.

~~***Indigenous ceremonial or sacred artefact*** means an item, being or containing an Indigenous cultural expression, which is used or held in safe keeping by an Indigenous community for ceremonial or sacred purposes.~~

Indigenous community: see section 14A.

Indigenous cultural artefact means a good which is of archaeological, anthropological, historical, scientific, social or spiritual significance to an Indigenous community and includes:

- (a) paintings on bark;
- (b) Yidaki or didgeridoo;
- (c) boomerang;
- (d) clapsticks;
- (e) traditional weavings;
- (f) dillybags;
- (g) grass mats;
- (h) carvings.

Indigenous cultural expression means an expression of Indigenous culture (whether through images, form or any other medium) that:

- (a) has archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to an Indigenous community; or

(b) has its origins in an Indigenous community; or

~~(c) — is made by an Indigenous artist; or~~

~~(d)~~(c) is derived from, or has a likeness or resemblance to, one or more Indigenous cultural expressions mentioned in paragraphs (a), ~~(b) or (c or (b))~~.

~~*Indigenous cultural expression contract*: see subsection 23(6).~~

~~2 Subsection 2(1) of Schedule 2 (definition of *rely on*)~~

~~Omit “or small business contract”, substitute “, small business contract or Indigenous cultural expression contract”.~~

~~3 Subsection 2(1) of Schedule 2 (paragraph (b) of the definition of *transparent*)~~

~~Omit “or small business contract”, substitute “, small business contract or Indigenous cultural expression contract”.~~

~~4 Subsection 2(1) of Schedule 2 (definition of *unfair*)~~

~~Omit “or small business contract”, substitute “, small business contract or Indigenous cultural expression contract”.~~

~~5-2~~ After section 14 of Schedule 2

Insert:

14A Meaning of Indigenous community

(1) An *Indigenous community* is a community of people that identifies itself as Aboriginal or Torres Strait Islander.

(2) To avoid doubt, an *Indigenous community* includes:

(a) a community that identifies itself as Aboriginal or Torres Strait Islander through a connection with a particular region of Australia; or

(b) a group of people within a wider community of the kind mentioned in paragraph (a), that identify themselves as a group through shared goals or activities, such as shared involvement in the arts; or

(c) the community of Aboriginal and Torres Strait Islanders of Australia, taken as a whole.

~~6 Section 23 of Schedule 2 (heading)~~

~~Repeal the heading, substitute:~~

~~23 Unfair terms of consumer contracts, small business contracts and Indigenous cultural expression contracts~~

~~7 After subsection 23(1)~~

1 Insert:

2 ~~————— (1A) A term of an Indigenous cultural expression contract is void if~~
3 ~~the term is unfair.~~

4 **~~8 After subsection 23(5)~~**

5 Insert:

6 ~~————— (6) A contract is an Indigenous cultural expression contract if the~~
7 ~~contract provides for the grant of consent by an Indigenous artist or~~
8 ~~Indigenous community to a person to supply, or offer to supply, a~~
9 ~~good to a consumer that includes an Indigenous cultural~~
10 ~~expression, with whom the Indigenous artist or Indigenous~~
11 ~~community is connected.~~

12 **~~9 Subsection 24(1) of Schedule 2~~**

13 ~~Omit “or small business contract”, substitute “, small business contract~~
14 ~~or Indigenous cultural expression contract”.~~

15 **~~10 Subsection 25 of Schedule 2~~**

16 ~~Omit “or small business contract”, substitute “, small business contract~~
17 ~~or Indigenous cultural expression contract”.~~

18 **~~11 Section 26 of Schedule 2 (heading)~~**

19 ~~Repeal the heading, substitute:~~

20 **~~26 Terms that define main subject matter of consumer contracts,~~**
21 **~~small business contracts or Indigenous cultural expression~~**
22 **~~contracts etc. are unaffected~~**

23 **~~12 Subsection 26(1) of Schedule 2~~**

24 ~~Omit “or small business contract”, substitute “, small business contract~~
25 ~~or Indigenous cultural expression contract”.~~

26 **~~13 At the end of Part 3-1 of Chapter 3 of Schedule 2~~**

27 Add:

28 **Division 6—Unfair practices in relation to the supply of goods that**
29 **include an Indigenous cultural expression**

30 **50A Misuse of Indigenous cultural expression**

31 (1) A person must not, in trade or commerce, supply or offer to supply a
32 good to a person that includes an Indigenous cultural expression
33 unless:

34 (a) either of the following applies:

- 35 (i) the good is made by an Indigenous artist or members of
36 an Indigenous community; or
37 (ii) the good is a reproduction of a thing-good created by an
38 Indigenous artist or Indigenous community with whom

the Indigenous cultural expression is connected, where the reproduction is in accordance with a written licence granted by the Indigenous artist or Indigenous community and that license complies with any regulations made under section 50AC; and

(b) the good or the licensed reproduction attributes the Indigenous artist or Indigenous community who made the good or the original good in the case of a licensed reproduction; and

(c) if the good is an Indigenous cultural artefact, the good is made in Australia by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression contained on the Indigenous cultural artefact is connected.

~~(2) — A person must not, in trade or commerce, supply or offer to supply to a person an Indigenous ceremonial or sacred artefact.~~

~~(4)~~(2) For the purposes of subsection (1), it is a defence if the person supplying or offering to supply the good has in his or her possession a document that complies with the regulations made for the purposes of this subsection.

~~Note: — The regulations may specify requirements as to the contents of the document and the author of the document. The requirements as to the content of the document may deal with matters relating to who made the thing or the basis on which the thing is a licensed reproduction of an original thing.~~

(3) A person must not, in trade or commerce, create, provide or rely on a document for the purposes of section ~~(4)~~50A(2), that the person knows or believes is false in any material respect.

~~(5)~~(4) For the purposes of paragraph (1)(b), the attribution may be contained on the good or on packaging of the good which is provided at the time of supply to a person.

~~(6) — For the purposes of subsection (2), it is a defence if a person supplying or offering to supply the thing can prove that the Indigenous artist or a member of the Indigenous community to which the Indigenous cultural expression relates had instructed the person supplying or offering to supply the thing that it is not a ceremonial or sacred artefact.~~

~~(7)~~(5) The Minister must appoint a committee, or other appropriate body, which is representative of Indigenous communities to:

(a) monitor compliance with this Act as it applies in relation to Indigenous communities and Indigenous artists; ~~and~~

(b) report to the Minister on any changes that may be required to this Act to better protect the rights of Indigenous communities and Indigenous artists—;

(c) consult with the Minister on the content of regulations for the purposes of section 50AC; and

(d) consult with the Commission on the operation of this Division and the formulation of guidelines for the purposes of section 50AD.

50AB Offences

(1) A person commits an offence if the person, in trade or commerce:

(a) supplies or offers to supply a good to a person that includes an Indigenous cultural expression; or

(b) creates, provides or seeks to rely on a document for the purposes of subsection 50A(32), that the person knows or believes is false in any material respect.

Penalty

(2) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine of not more than the greater of the following:

(a) \$10,000,000;

(b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the commission of the offence—3 times the value of that benefit;

(c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the offence.

(3) An offence against subsection (1) committed by a person other than a body corporate is punishable on conviction by a fine of not more than \$500,000.

(4) Subsection (1) does not apply if:

(a) the good is:

(i) made by an Indigenous artist or members of an Indigenous community; or

(ii) a reproduction of a ~~thing~~ good created by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression is connected, where the

1 reproduction is in accordance with a written licence
2 granted by the Indigenous artist or Indigenous
3 community and that license complies with any
4 regulations made under section 50AC; and

5 (b) if the good is an Indigenous cultural artefact, the good is
6 made in Australia by an Indigenous artist or Indigenous
7 community with whom the Indigenous cultural expression
8 contained on the Indigenous cultural artefact is connected.

9 (5) For the purposes of subsection (1), it is a defence if the person
10 supplying or offering to supply the good has in his or her
11 possession a document that complies with the regulations made ~~for~~
12 the purposes of this subsection under section 50AC.

13
14 ~~Note: — The regulations may specify requirements as to the contents of the~~
15 ~~document and the author of the document. The requirements as to the~~
16 ~~content of the document may deal with matters relating to who made~~
17 ~~the thing or the basis on which the thing is a licensed reproduction of~~
18 ~~an original thing.~~

19 (6) Subsection (1) is an offence of strict liability.

20 21 **50AC Regulations as to certain matters**

22 The Minister may make regulations dealing with matters relating to:

23 (a) written licenses for the purpose of sections 50A(1)(a)(ii) and
24 50AB(4)(a)(ii), including:

25 (i) requirements relating to the form and content of such
26 licenses; and

27 (ii) whether there is a requirement for licensors to obtain
28 legal or other advice in relation to the license; and

29 (b) documents for the purpose of section 50A(2) and 50AB(5),
30 including requirements relating to:

31 (i) the form of the document;

32 (ii) the content of the document; and

33 (iii) the author or signatory of the document.

34 Note: — The following are examples of the kinds of things that requirements
35 relating to the content of the document might deal with:

36 (a) the identity of the Indigenous Artist or Indigenous Community
37 that made the original good;

38 (b) certification that the artist or community that made the good is
39 Indigenous; and

40 (b) whether the good is a licensed reproduction of an original good,
41 and if so, whether that license complies with regulations.
42

1 **50AD Guidelines**

2 (1) In deciding whether to initiate enforcement proceedings under this
3 Division, the Commission must have regard to:

4 (a) any guidelines in force under subsection (2); and

5 (b) such other matters as the Commission thinks is relevant.

6 (2) The Commission must, by written instrument, formulate guidelines
7 for the purposes of subsection (1).

8 Note: For consultation requirements, see section 17 (consultation) of
9 the Legislation Act 2003.

10 (3) In formulating guidelines for the purposes of subsection (2), the
11 Commission must consult with the committee or other appropriate
12 body as required under section 50A(5).

13 (4) Guidelines under subsection (2) must address the factors the
14 Commission must take into account when determining whether an
15 item features an Indigenous cultural expression and/or is an
16 Indigenous cultural artefact.

17
18 **~~14 After Part 1A of Chapter 6 of Schedule 2~~**

19 ~~Insert:~~

20 **~~Part 1B Application provision relating to the~~**
21 **~~Competition and Consumer Amendment~~**
22 **~~(Prevention of Exploitation of Indigenous~~**
23 **~~Cultural Expressions) Act 2019~~**
24

25 **~~290B Application~~**

26 ~~(1) The amendments made by Schedule 1 to *Competition and*~~
27 ~~*Consumer Amendment (Prevention of Exploitation of Indigenous*~~
28 ~~*Cultural Expressions) Act 2019* apply in relation to a contract~~
29 ~~entered into on or after the commencement of that Schedule.~~

30 ~~(2) The amendments do not apply to a contract entered into before the~~
31 ~~commencement of that Schedule. However:~~

32 ~~(a) if the contract is renewed on or after that commencement—the~~
33 ~~amendments apply to the contract as renewed, on and from the day~~
34 ~~(the **renewal day**) on which the renewal takes effect, in relation to~~
35 ~~conduct that occurs on or after the renewal day; or~~

36 ~~(b) if a term of the contract is varied on or after that commencement~~
37 ~~and paragraph (a) has not already applied in relation to the~~
38 ~~contract—the amendments apply to the term as varied, on and from~~

1 the day (the ~~*variation day*~~) on which the variation takes effect, in
2 relation to conduct that occurs on and after the variation day.

3 ~~(3) Despite subsection (2), the amendments do not apply to a contract, or a term~~
4 ~~of a contract, to the extent that the operation of the amendments would~~
5 ~~result in an acquisition of property (within the meaning of paragraph~~
6 ~~51(xxxi) of the *Constitution*) from a person otherwise than on just terms~~
7 ~~(within the meaning of that paragraph of the *Constitution*).~~