



28 August 2019

Mr Stephen Palethorpe  
Committee Secretary  
Senate Standing Committees on Environment and Communications  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Mr Palethorpe

**Re: Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019**

Thank you for your email of 15 July 2019 inviting the Aboriginal Art Association of Australia (AAAA) to lodge a submission on the above Bill. The Association also appreciates your granting an extension for lodgement until today.

As advised in my email of 12 August, the AAAA relies upon its Indigenous Members, Artist and Dealer, for direction on matters of Indigenous culture. Specifically, matters such as this Bill are referred to our Aboriginal Cultural Council (ACC), an independent group within the Association comprised solely of Indigenous people, for feedback and formal response.

#### **About the AAAA**

The Aboriginal Art Association of Australia serves and represents artists, individuals and organisations that produce, promote, protect or support Indigenous art and the cultures that create and nurture that art. We operate as an advocate for all industry participants, whether artist, gallery or dealer, independent or art centre affiliated.

Membership is comprised of 46 Trade Members, 7 Associate Members, over 160 Indigenous Artist Members and approximately 200 Supporter Members.

#### **General Feedback on the Bill**

- Both the ACC and the full Board of the AAAA are wholly supportive of the efforts to enshrine in legislation a solution to the matter of inauthentic art and souvenirs.
- We are of the opinion that a legislative solution is not only needed but can easily be enacted and is practically enforceable if it focuses on the core issue of inauthentic and unlicensed forms of expression of Indigenous culture.
- Our view is that the Bill should not be distracted by broader Indigenous cultural questions more appropriately dealt with under other legislation.

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- Both the ACC and the Board contends that appropriate and effective legislation will ensure that the Indigenous creators and the consumers of artefacts, art and souvenirs are both given the right to make *informed choices*. The first group, the artists, by bringing their talent and a window into their culture to market in the manner they see fit. The second group, the consumer, by being provided with documentation that allows them to make informed choices on their purchases.

### **Detailed Comments and Recommendations**

#### **Ceremonial and Sacred Objects**

The ACC commented in its first review of the Bill that the matter of sacred and ceremonial artefacts is a completely different issue to that of inauthentic art.

Their opinion is that issues concerning the handling of Indigenous peoples' sacred objects has no place in consumer law and therefore no place in the draft Bill. Their advice is that:

- Concerns about the matter must be dealt with under cultural heritage legislation;
- The above concerns should be considered together with broader discussions regarding inconsistent state and federal approaches in the patchwork legislative environment that blights the cultural heritage space; and
- Discussions on the matter must involve broad community consultation as the issues are incredibly complex and multi-layered

In addition to the concerns about inappropriate law being used to regulate sensitive matters of Indigenous culture, the ACC and the Board question what is to happen to existing collections of these objects if the Bill in its current form is passed. The ACC recognises and is appreciative of the fact that without the work of private collectors, many or most of these sacred items would have been lost for all time. The Committee should be aware that some of private collections of these objects have been carefully curated over decades and have immense value, both culturally and in monetary terms. At the stroke of a pen, the collections would be valueless (in monetary terms) and may be put at risk because there is no incentive for the collector to maintain them.

Recommendations:

- Excise ceremonial and sacred objects from the draft Bill and refer to a group set up to consider changes to cultural heritage legislation
- If these objects are not excised from the Bill, then the collectors of these objects who under the Bill would no longer be able to trade in them must be fully compensated

#### **Indigenous Cultural Artefacts**

The legislation categorises objects such as bark paintings, yidaki and boomerangs as cultural artefacts and seeks to apply different rules to trading in them than for other items such as paintings on canvas or linen. Specifically, under the Bill, the goods must be made on shore by an Indigenous artist or Community with whom the artefact is connected.

The ACC considered this matter carefully and discussed it in depth. It was clearly the part of the draft Bill that challenged the group the most to arrive at a balanced, considered, sensitive and sensible conclusion.

Matters worth mentioning include:

- As regards association of particular forms of cultural expression with particular communities:
  - This is something that Indigenous people cannot agree amongst themselves
  - Previous attempts to do this, such as at the time of the Olympics, failed. The imbroglio that transpired is best illustrated by the suggestion at the time to restrict the use of dots to the people of the western desert
  - The matter is complex and critical issues of culture and law are involved. It includes the highly sensitive issues of copy of designs by other Australian Indigenous people, something that traditionally would have resulted in the death of the transgressor
  - Attempts to regulate this cultural issue via consumer law is, in the opinion of the ACC, misguided and utterly inappropriate
  
- As regards having different rules for what the draft Bill terms as cultural artefacts:
  - The ACC appreciates that there is heightened sensitivity around certain forms of cultural expression
  - However, the ACC does not agree that a distinction should be drawn between cultural artefacts and other forms of cultural expression
  - The arbitrary nature of the current categorisation is demonstrated by bark paintings being in one group and paintings on canvas in another. The ACC sees no difference in the cultural importance of a dreaming on canvas versus one on bark. Cultural significance is not reliant upon the medium upon which it is expressed, so why the distinction?
  - The ACC is of the opinion that the right of Indigenous people to make their own choices about their culture is paramount
  - The ACC points out that there is demonstrably no consensus in the Indigenous community which supports the proposed different set of rules
  - In the absence of consensus, the AAAA contends that it is not for a central bureaucratic body, no matter how well meaning, to tell Indigenous people what they can and can't do with their culture
  - The ACC and the full AAAA Board points out that the proper licensing of an artist's design brings much needed income into Indigenous households and that the challenge for the legislation should be to focus on ensuring what is marketed is properly licensed
  - Thus, the ACC does not support attempts to legislate to only allow these items to be made on shore

Recommendations:

- Consideration of the association of various forms of cultural expression with specific communities, groups or individuals should not be dealt with under consumer law. The draft Bill should be amended to exclude this.

- The matters are, however, important. They should be dealt with sensitively in a cultural context and be included in discussions and consideration of amendments to cultural heritage legislation.
- There should be no separate category for what the draft Bill terms cultural artefacts. Cultural artefacts should be dealt with in the same manner as is proposed in the general Indigenous cultural expression section.

### **Indigenous Cultural Expression**

The ACC and full Board are supportive of the framework proposed in the draft Bill for these items.

Points made by the ACC, matters to consider and recommendations are:

- The current wording requires attribution information to be on the item or on the packaging. The fine arts sector formally sets of this information in Certificates of Authenticity (COA), dealing with all provenance related data. This is enshrined in industry standards such as our Aboriginal Art Code and the Indigenous Art Code and has served the Indigenous fine arts market well for 50 years.

RECOMMENDATION: Amend the wording of the Bill to provide for COAs for fine art

- Reproduction is not defined in the draft Bill. Reproduction can potentially be machine based or human and thus, requires clear definition.

Different members of the ACC have different views as to what they would see as acceptable reproduction methods for their own art, however, they are unanimous that legislation should allow reproduction by any means that is acceptable to the artist.

RECOMMENDATION: Include the definition of reproduction in the final Bill. That definition should include hand and machine reproduction

- The vast majority of the authenticity problems come from the souvenir sector. As we saw in the recent Birubi Art case, much of this is brought about by misleading or ambiguous labelling on the items or their packaging. Critical in making any new regulation regime work is to ensure the packaging makes it clear exactly where a product came from and how it came to market.

RECOMMENDATION: Clear protocols must be developed for the labelling of licensed product. The AAAA has members that can assist by providing examples of industry best practice packaging.

### **Unfair Contracts**

The AAAA Board, which includes all ACC members, has seen egregious examples of unfair contracts involving licensing of Indigenous designs. The Association is fully supportive of the proposal to include the right to void unfair contracts, including contracts existing at time the Bill becomes law.

### **Grandfathering of Existing Contracts**

The Board sees an issue with allowing contracts in place at the date of the legislation to continue indefinitely. The ACC is particularly insistent that this must be changed. Failure to do so would see enshrined in legislation the possibility to supply utterly inappropriately sourced art and souvenirs

forever and a day. Grandfathering provisions are inappropriate to the issue at hand, especially as the proposed legislation has been circulated in public and there is a clear opportunity for unethical players to contract prior to enactment of the legislation.

RECOMMENDATION: Existing contracts that breach the Bill must be changed to be compliant within 12 months.

### **Penalties**

The AAAA in general supports significant penalties, however, given the size of even the largest of businesses in the industry, we question whether the possibility to fine a company up to \$10 million for a breach is not disproportionate to the "sin". We think \$10 million is not proportionate, particularly when the maximum for an individual is \$500,000. Three times benefit or 10% of total company turnover is rational and proportionate.

RECOMMENDATION: The Association recommends reducing the figure of \$10 million. If the Committee is of the opinion that \$10 million is appropriate, then the \$500,000 needs to be raised to achieve some sensible relationship between the two.

### **Committee referred to in 50A (7)**

The AAAA is concerned to ensure that the Committee or other body referred to in Section 50A (7) is representative of the entire industry and that it is not heavily weighted to a specific segment of the industry. The AAAA notes the growing trend towards an overemphasis on representation of community art centres and their associates in "solutions" to industry problems. This trend is somewhat perverse as when looking right across art, artefacts and souvenirs, the private sector is the dominant player in the industry.

RECOMMENDATION: Proper consultation within the industry takes place to ensure there is broad and balanced representation on the Committee and that those recruited have skill sets which individually and as a whole are capable of addressing and dealing with the challenges that lie before the industry.

### **Education Programme**

The legislation itself will achieve little if it is not accompanied by funding for an education programme. That programme should target both those trading and the consumer. The Board notes that firstly focussing on educating the retailer will likely significantly cut supply of problematic items to the market, reducing the scale and breadth of the consumer challenge.

RECOMMENDATION: Funding to be put in place for an education programme.

The Association would be happy to discuss our recommendations with the Committee in more detail and to assist in any other way the Committee sees as appropriate. Please do not hesitate to contact me in that regard.

Yours sincerely

Scott Henderson

President