

**Submission to the Environment and Communications Legislation Committee Inquiry into
Competition and Consumer Amendment (Prevention of Exploitation
of Indigenous Cultural Expressions) Bill 2019**

Emeritus Professor Jon Altman
School of Regulation and Global Governance,
College of Asia and the Pacific, the Australian National University
14 August 2019

I would like to thank the Committee for alerting me to this inquiry and inviting a submission on 15 July 2019.

By way of brief background, I provided a detailed submission (that I append at Attachment 1) 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' in November 2017. Subsequently I gave additional evidence as a witness in a public hearing in Melbourne on 8 March 2018.

More recently, in early 2019 I was retained by the Australian Competition and Consumer Commission (ACCC) working with the Australian Government Solicitor as an expert witness in the Federal Court of Australia case *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3) [2019] FCA 996* before Justice Perry.

In my affidavit, that is available from the Federal Court and dated 6 June 2019, I documented in some detail the benefits for Aboriginal and Torres Strait Islander artists and their communities from producing and selling art and artefacts and from licencing agreements. I also provided expert opinion that the misleading and deceptive conduct as defined under Australian Consumer Law engaged in by Birubi Art Pty Ltd is likely to reduce financial benefits to Aboriginal and Torres Strait Islander artists and their communities and to damage emerging Indigenous 'brand equity' in the visual arts with unfair competition.

In its *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* published in December 2018, the House of Representatives Standing Committee on Indigenous Affairs (HRSCIA) made eight recommendations including at recommendation 8 that 'a consultation process be initiated to develop stand-alone legislation protecting Indigenous Cultural intellectual Property including traditional knowledge and cultural expressions' (p.xiv, p. xxi). The Committee noted in terms of Australian Consumer Law, the ACCC can take action against a company for intentionally misleading its customers about authenticity through information such as labels. It cannot take action, however, for imitation products that are not explicitly claiming to be authentic (p. xiii).

The ability for the ACCC to take action and for the legal system to impose a significant fine of \$2.3 million has been clearly demonstrated in *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3) [2019] FCA 996*. But the issue of imitations that do not claim to be authentic remains unresolved.

The Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 that is the subject of this Inquiry by the Environment and Communications Legislation Committee looks to address this issue by amending Australian Consumer Law to prevent such unfair practices in the supply of goods that exhibit indigenous cultural expression. This is a private member's bill tabled by Senator Sarah Hanson-Young in February 2019.

The Hanson-Young bill has many similarities to an earlier private member's bill (the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017) tabled by the Hon Bob Katter, Federal member for Kennedy two years earlier. The earlier bill that expired in September 2017 was, as I noted in my appended submission to the HRSCIA Inquiry, well intentioned. But determining what constitutes authentic Indigenous arts and craft products and merchandise is extremely difficult.

I looked to demonstrate this complexity with reference to the distinction that the late philosopher Dennis Dutton made between 'nominal' and 'expressive' authenticity (see pps 6–8 below). To simplify considerably, nominal authenticity requires that the author or creator of the art product is recognised as Indigenous. Expressive authenticity requires that an art object's character be recognised as a true expression of the artistic customs and traditions of an artist as a member of a community.

The earlier Katter Bill was especially problematic as it failed to comply with the standard Commonwealth definition of Indigeneity (or nominal authenticity) that requires a person (in this case an artist) identifying as Indigenous to not only self-identify as Indigenous and to be accepted as such by the community with which they identify, but also to have Indigenous ancestry. And it did not engage with the issue of expressive authenticity at all.

The current Hanson-Young bill deals more effectively with the issue of nominal authenticity by deploying a definition of an Indigenous artist that complies with the three-way Commonwealth definition. It does not directly address the issue of expressive authenticity directly but instead proposes that the Minister (I assume the Minister for Indigenous Australians) appoint a committee or other appropriate body to monitor compliance with the Act in relation to Indigenous communities and Indigenous artists. It is this committee that will need to make the hard decisions and once decision-making processes are put in place then appeal mechanisms including options for legal challenge will also be required.

My main concern, as in my earlier submission, is that any attempt to regulate authenticity of Indigenous art (be it nominal or expressive or both) will lead to a third form of authenticity that the late historian Patrick Wolfe termed 'repressive'. In other words, an onus of proof will be placed on Indigenous artists to demonstrate either their Indigeneity in accord with the current bill's three-way Commonwealth definition; or the 'expressive authenticity' of what they produce in the form of a regional or language group or some other art style criterion.

Putting in place a mandatory regulatory body in the form of a ministerially-appointed committee, or other appropriate body, will not lessen this burden of proof—indeed there is a danger that it might enhance onerous regulatory requirements for artists.

But there are also other compliance requirements in the Hanson-Young bill that could be administratively burdensome including the requirement that the good is made in Australia and that if it is manufactured by a non-Indigenous entity that it is in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community.

The reference to 'made in Australia' in the Hanson-Young bill (that was also included in the Katter bill) is a little unclear, but there is no doubt that much legally licenced manufactured product is made overseas. A requirement that products are made in Australia might limit the price competitiveness of indigenous merchandise.

And the issue of transparency might also be problematic in dealings are often commercial-in-confidence; and where nominal authenticity (the Indigeneity of the licensor) rather than expressive authenticity of the product might be the only requirement.

In my view the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 is well intentioned and looks to address an important issue. But the bill as proposed runs the risk of being administratively cumbersome and generating unintended consequences for Indigenous artists in the form of over-regulation.

Rather than propose new law just three months after the publication of the HRSCIA report on the impact of inauthentic art, it seems preferable to await the government's response to the eight recommendations in this report; and to await an analysis of how the wide range of stakeholders who constitute the Indigenous visual arts sector respond to the recent court orders (dated 28 June 2019) in *ACCC v Birubi Art Pty Ltd* (FCA 996).

Submission ends.