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Dear Secretary

**ACCC submission to the Senate Environment and Communications Legislation Committee's inquiry into the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019***

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Senate Environment and Communications Legislation Committee inquiry into the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (the Bill).

The ACCC considers that the supply of inauthentic Indigenous Australian art and craft products can lead to significant economic, social and cultural harm to Indigenous Australian culture and artists and detriment to consumers who purchase these products.

For a number of reasons the ACCC considers that amending the ACL to introduce specific prohibitions is unlikely to achieve the objectives behind the Bill.

- **The *Competition and Consumer Act 2010 (Cth)* (the CCA), and more specifically the Australian Consumer Law (ACL), is not designed for sectorial or subject matter specific regulation.** The CCA (containing the ACL) is an economy-wide law of general application that is designed and intended to address the economic harms of anti-competitive and unfair trading. The ACL focuses on fair trading and consumer protection and is intended to provide a baseline standard for all traders across all products.<sup>1</sup> As a result, it is not designed or suited to adequately and holistically safeguard Indigenous Australian culture.
- **The ACL cannot address the broad economic, social, and cultural harms caused by inauthentic Indigenous Australian art and craft products.** The issues within the Indigenous Australian art and craft sector go beyond the fair trading and consumer protection objectives of the ACL. Given this, attempting to deal with such issues through the ACL may be perceived as a superficial way of addressing them.
- **The Bill will likely lead to an unrealistic expectation that the ACCC is able to safeguard Indigenous Australian culture through the ACL.** The aims the Bill seeks to

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<sup>1</sup> As recognised in the *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, House of Representatives Standing Committee on Indigenous Affairs, December 2018, at 4.70.

achieve would require a significant policing function, and this function would require in-depth knowledge of the complex issues around, and nature of, the rules and law relating to the use of Indigenous cultural expressions and artefacts. In any sector, the ACCC cannot take enforcement action for all matters that come to our attention. There would be a clear expectation gap between the Bill's objectives and what could be achieved in implementation.

The ACCC considers that our views on the inappropriateness of the ACL in this context are consistent with the conclusions reached by the House of Representatives Standing Committee on Indigenous Affairs (Indigenous Affairs Committee) in its December 2018 Report on the impact of inauthentic art and craft in the style of First Nations people. In its Report, the Indigenous Affairs Committee noted:

*Neither the ACL nor copyright law were designed to protect First Nations cultural expressions, and therefore each is inadequate to do so. The ACL prevents inauthentic products from being passed off as genuine under provisions that prevent businesses from misleading their customers. Current copyright law provides any artist, whether Indigenous or not, with legal protection against reproduction without permission.*

*The situation regarding inauthentic art is, however, far more complex and nuanced than this. In the first instance, the ACL cannot deal with issues of inauthentic Indigenous products, while the Copyright Act is not designed to recognise the eternal and communal nature of Indigenous cultural expressions, making it inadequate to deal with the misappropriation of culture. Stand-alone legislation may be the best long-term option to resolve this complex issue.*

One of the Report's eight recommendations is that the Government begin a consultation process to develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions. While the Government is yet to respond to the report, the ACCC considers that any consultation on developing stand-alone legislation would be a complex and long-term project, requiring significant engagement and consultation with stakeholders.

We note that the Australia Council is currently facilitating a national consultation process to assist with the development of a National Indigenous Arts and Culture Authority (NIACA). The consultation process will feed into a national forum on First Nations arts and culture which the Australia Council is planning for November 2019. Using this process to engage on how best to address inauthentic Indigenous Australian art and craft products, including through developing stand-alone legislation, would avoid duplication and the ACCC considers that this would be a preferred approach to deliver the public policy objectives of supporting and safeguarding Indigenous Australian culture.

The remainder of this submission also provides further information about:

- the current application of the ACL to circumstances involving the supply of inauthentic Indigenous Australian art and craft products,
- recent ACCC enforcement, education, and engagement actions relating to the Indigenous Australian art and craft sector, including enforcement actions in matters involving inauthentic Indigenous Australian art and craft products, and
- the ACCC's view of the harms caused by inauthentic Indigenous Australian art and craft products.

### **The application of the ACL to inauthentic Indigenous 'style' art and craft products**

As noted earlier, the ACL is an economy-wide law of general application and is not designed for sectorial or subject matter specific regulation that goes beyond the ACL's objectives of

ensuring fair trading and consumer protection. It already includes prohibitions on misleading or deceptive conduct and false representations. These prohibitions already cover conduct in connection with the sale and marketing of Indigenous art and craft products and merchandise.

The ACL can address:

- *express* representations that an artwork or product is made by an Indigenous Australian person, including by a particular Indigenous Australian artist, has approval from an Indigenous community, or was made in a particular way (for example hand-crafted or hand-painted) when this is not the case, and
- *implied* representations that give an overall misleading impression. Implied representations may be given by a combination of words, images or the way the art is sold, and can be more difficult to establish than express representations.

The ACL can be effective in addressing individual instances of misleading conduct in the sale of products that purport to or give the impression of being produced by Indigenous artists.

### **ACCC enforcement activity**

The ACCC has taken enforcement action under the ACL in matters involving the supply of inauthentic Indigenous Australian art and craft products, in our role as the general competition and consumer regulator responsible for administering and enforcing the CCA, and more specifically the ACL. The provisions of the ACL under which we have taken these enforcement actions are provisions dealing with consumer protection.

The ACL is administered and enforced jointly by the ACCC and state and territory fair trading agencies.

The ACCC receives around 300,000 contacts a year and as such, we cannot take enforcement action for all matters that come to our attention. We prioritise our enforcement activities with reference to our Compliance and Enforcement Policy that among other things identifies our current priorities.

One of the ACCC's enduring priorities is conduct in breach of the CCA that has the potential to specifically impact on the welfare of Indigenous Australians. However we cannot address all matters that fall within this priority area that come to our attention. Instead we seek to take targeted action to maximise impact and leverage any outcomes across an industry sector, through industry education and deterrence, and through consumer education.

The ACCC's most recent enforcement action in this area is our court proceedings against Birubi Art Pty Ltd (in liquidation) (Birubi). In June 2019, the Federal Court ordered Birubi to pay penalties of \$2.3 million for making false or misleading representations that products it supplied were made in Australia and hand painted by Australian Aboriginal persons, when they were made in Indonesia.

From July 2015 to November 2017, Birubi sold approximately 50,000 contravening products to retail outlets across Australia, including those situated in key tourist areas such as Sydney Airport, Bondi Beach, Kings Canyon, Mount Lofty and Cairns.

The products were loose boomerangs, boxed boomerangs, didgeridoos, message stones and bullroarers, which are all objects of significance to Indigenous Australians, with the exception of the message stones.

Birubi had applied symbols, visual imagery and/or iconography associated with Indigenous Australian art, as well as statements such as 'Australia', 'hand painted', 'genuine' and 'Aboriginal art' to the products. The Federal Court determined that the overwhelming

impression conveyed by some of the products, and the images and representations made on those products, is that they were made in Australia and were hand painted by Indigenous Australians.

The ACCC is continuing to monitor producers and retailers of Indigenous Australian art style products more broadly, including through issues identified in complaints received from consumers, Australian Indigenous groups and other stakeholders, and by actively looking at products in the market.

### **ACCC education and engagement activity**

As well as enforcement activity, the ACCC believes education and awareness are key tools to ensure markets are fair for consumers and businesses.

In relation to the sale of Indigenous art products, we have produced guidance for consumers looking to buy Indigenous art and craft, with tips about what to consider in assessing whether products are authentic. This guidance material can be downloaded at <https://www.accc.gov.au/publications/your-consumer-rights-indigenous-art-and-craft>.

We have also developed a film which provides advice to Indigenous artists on their rights when negotiating with dealers to on-sell their art. This reflects our commitment to ensuring that Indigenous artists are aware of their rights when negotiating, understand the terms of payment and timeframes for finishing art, and ensure their designs are not reproduced without permission or payment. <https://www.accc.gov.au/media-release/accc-supporting-indigenous-artists-to-protect-themselves>

We have worked closely with the Indigenous Art Code Limited in relation to the promotion of, and matters arising in relation to, the Indigenous Art Code.

More broadly, the ACCC has an established and expanding outreach program focusing on issues impacting Indigenous consumers. Further, the ACCC is currently chairing the National Indigenous Consumer Strategy (NICS) involving the ACCC, ASIC and state and territory fair trading agencies. NICS roles and responsibilities include identification of strategic directions and actions and development of projects of national significance.

The ACCC considers that building relationships and raising awareness through partnering with artists and communities is the key to ensuring long term change in the industry. While we have taken some steps, the ACCC, as an economy wide enforcement agency, is not best placed to deliver the detailed focus required in the sector.

### **Harm to Indigenous Australians and consumer detriment caused by inauthentic Indigenous Australian art and craft products**

Consumers, including tourists, can be misled into buying products they believed were produced by Indigenous artists, often paying a premium. Many purchasers of Indigenous 'style' art and craft products are tourists from non-English speaking backgrounds, so even where it may be accurately disclosed through fine print disclaimers where and how a product is made, this information is likely to be overlooked.

Most consumers have limited knowledge of authentic Indigenous art's connection to, and representation of, the cultural identity, stories and history of Indigenous Australians. Given this limited knowledge, consumers are highly susceptible to purchasing inauthentic Indigenous Australian art and craft products.

However, the ACCC considers that the supply of inauthentic Indigenous Australian art and craft products can lead to more significant economic, social, and cultural harm to Indigenous Australian culture and artists. The Indigenous art sector is vitally important to Indigenous Australians, especially those living remotely, and is one of the very few areas in which they

have a market and employment advantage. Indigenous Australian artists enjoy significant social and indirect economic benefits from participating in the sector. The supply of inauthentic Indigenous Australian art and craft products has the potential to undermine the integrity of the industry and reduce opportunities for Indigenous Australians.

Such conduct also gives rise to unique social and cultural harm associated with the loss of identity and lore. Traditional rules and lore exist to ensure that art and designs that are sacred to Indigenous Australians are not misused and that culture and songlines<sup>2</sup> are not distorted or diluted. Misuse of Indigenous Australian art and designs, including without permission of the traditional guardians, can cause serious offence and distress to Indigenous Australians.

The Federal Court in *ACCC v Birubi Art Pty Ltd*<sup>3</sup> quoted the evidence of Dr Banduk Marika to explain this social and cultural harm.

*If a design is used by someone who does not know or understand the lores, country or songlines relating to the design, they could risk misappropriating the art and conveying a meaning that is wrong or that is harmful to the meaning the design is meant to convey. Such use would mean that the design had been used without the permission of the design's guardians or the appropriate family or clan.*

...

*The impact of the misappropriation of art in a meaningless way that does not represent lore and culture is the dismantling of Indigenous cultural heritage. Indigenous Australians have, as described above, their own rules about their people and their country. Art identifies who you are and how you fit into Indigenous society. Misappropriation of art dismantles the cultural structure of Indigenous communities and causes damage to our identity.*

The impact of this misconduct goes well beyond the economic harms of anti-competitive and unfair trading conduct that the CCA and the ACL are designed and intended to address.

The ACCC considers that the need to ensure the integrity of the Indigenous arts and crafts industry, and to safeguard the culture of, and opportunities for, Indigenous Australians warrants more comprehensive and holistic treatment than by adding some extra provisions into an economy-wide law of general application that focuses on fair trading and consumer protection.

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[REDACTED]

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<sup>2</sup> Songlines are the narratives that are used to describe the stories and activities of Indigenous Australians' ancestors.

<sup>3</sup> *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996 at 53