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25 November 2021

Committee Secretary
House of Representatives Standing Committee on Indigenous Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Secretariat

Re: ACCC submission to the Committee's Inquiry into corporate engagement with Indigenous consumers

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the House of Representatives Standing Committee on Indigenous Affairs Inquiry into corporate engagement with Indigenous consumers.

The ACCC understands that many Indigenous Australians face a variety of unique challenges when dealing with the corporate sector and for Indigenous Australians living in remote parts of the country these challenges are often increased.

The purpose of the ACCC's submission is to:

1. outline the role of the ACCC
2. summarise the ACCC's engagement on consumer issues impacting Indigenous Australians and
3. summarise the key issues and ways to strengthen corporate sector cultural understanding.

1. The role of the ACCC

The ACCC is an independent Commonwealth statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (Cth) (CCA). This includes the Australian Consumer Law contained at Schedule 2 to the CCA (ACL), as well as a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians.

Competitive, informed, and (when necessary) well-regulated markets lead to lower prices, better quality products and services, and more choice. This increases the prosperity and welfare of all Australians.

We focus on taking action that most promotes the proper functioning of Australian markets, protects competition, improves consumer welfare and stops conduct that is anti-competitive or harmful to consumers.

The ACCC's approach to achieving compliance with the CCA, as well as to the exercise of the ACCC's enforcement powers and functions are outlined in the [ACCC's 2021 Compliance and Enforcement Policy and Priorities \(the Policy\)](#).

The ACCC reviews its enforcement and compliance priorities annually, following consultation with industry, consumer and other stakeholder groups. The Policy sets out the principles the ACCC adopts to achieve compliance with the CCA, including the ACL, and outlines its compliance and enforcement functions, strategies, and tools.

Conduct impacting Indigenous Australians is an enduring priority for the ACCC. Under this priority, the ACCC recognises that, amongst other things, Indigenous consumers living in remote areas face particular challenges in relation to asserting their consumer rights. This includes dealing with unscrupulous businesses who target and exploit them. These businesses often don't consider the enhanced risk of consumer harm nor do they have in place appropriate safeguards to mitigate against it. Therefore, work in this area will always be prioritised by the ACCC while these challenges remain.

The ACCC receives contacts in respect of this priority area through several means, including the ACCC's Indigenous Infoline, during outreach visits to remote communities, and referrals from stakeholders.

The ACCC prioritises its compliance and enforcement response to alleged contraventions of the CCA that adversely affect Indigenous Australians. This includes pursuing Court based outcomes for misleading and deceptive conduct, misrepresentations or unconscionable conduct, such as that which has impacted remote Indigenous communities.

2. The ACCC's engagement on consumer issues impacting Indigenous Australians

Proactive engagement

The ACCC works closely with several Indigenous communities to better understand the consumer challenges facing them and to partner with those communities in developing and delivering outcomes that address those challenges.

Do Not Knock informed communities

Some of the most problematic consumer protection issues involve door to door selling in remote communities. This behaviour can involve salespeople making false or misleading representations or engaging in unconscionable conduct. Not having adequate processes in place to assess whether consumers can pay can also lead to accrual of debts, debt collection and subsequent interactions with the legal system.

In April 2016 the ACCC, in partnership with the Wujal Wujal Aboriginal Shire Council, the Queensland Office of Fair Trading and the Indigenous Consumer Assistance Network (ICAN) launched the 'Do Not Knock informed' project. The project was informed by the consumer needs of the Wujal Wujal community and involves prominent roadside signage reminding door to door traders of their obligations under the ACL in addition to empowering the people of Wujal Wujal in enforcing their consumer law rights. The Do Not Knock informed project has since expanded to include the Aboriginal communities of Yarrabah, Hope Vale (in collaboration with Cape York Partnership), Palm Island, Cherbourg and Woorabinda. Six months after the Wujal Wujal 'Do Not Knock informed' launch the ACCC was advised by the Wujal Wujal community that they had experienced a significant reduction in the number of itinerant businesses visiting the community. Further, community members

were more confident in asserting their consumer rights including by challenging businesses who ignored do not knock signs on residences.

Your Rights Mob

In 2013 the ACCC launched a new Facebook page in partnership with the Tiwi community, 'Your Rights Mob Tiwi Islands'. The page acted as a conduit to provide timely and relevant consumer information to Tiwi people as well as an online platform through which Tiwi people could engage with the ACCC directly. In July 2014 'Your Rights Mob Tiwi Islands' was rebranded as 'Your Rights Mob', with national coverage to all Aboriginal, Torres Strait Islander and Tiwi consumers.

Indigenous outreach, engagement and networking

The ACCC has a dedicated Indigenous outreach and engagement team that consults with Indigenous communities through personal visits. These visits allow the ACCC to be better informed by Aboriginal, Torres Strait Islander and Tiwi people on consumer matters impacting them and subsequently deliver practical and meaningful consumer empowerment outcomes.

The ACCC's Indigenous outreach team works closely with other regulators such as Australian Securities and Investments Commission and state and territory fair trading agencies as well as various non-government organisations such as ICAN. ICAN and Financial Counselling Australia are two valued members of the ACCC's Consumer Consultative Committee who assist the ACCC in identifying issues facing Indigenous communities for potential ACCC action. Commonwealth, state and territory consumer agencies work together to improve outcomes for Indigenous consumers through the National Indigenous Consumer Strategy which the ACCC currently chairs.

The ACCC outreach and engagement team often liaises with Indigenous communities around specific, important consumer issues such as the recent Takata airbag recall. The ACCC used data submitted by vehicle manufacturers to identify postcodes most at risk and then visited these communities to talk about the recall and help people use the 'Is My Airbag Safe' website to check their vehicles. The ACCC found that the Indigenous consumers they worked with on the Takata recall valued the personal engagement. They were more likely to check their own vehicle and get the airbag replaced and speak to friends and family and encourage them to do likewise. This experience demonstrates the importance Indigenous consumers, particularly those from remote communities, place on personal engagement by regulators and the improved outcomes that are possible as a result.

The ACCC also operates a dedicated Indigenous Infoline where Indigenous Australians can make enquiries or lodge complaints.

The ACCC's outreach and engagement, Your Rights Mob and Scamwatch teams work closely together to inform Indigenous Australians of scams in a timely manner.

While focus and specific approach may need to be tailored, we consider businesses can adopt similar practices to the ACCC's experience in engagement with Indigenous consumers including how they can address issues and remedies when they arise.

Involvement in policy processes

The ACCC draws upon its experience in the above engagement activities with Indigenous communities and in its enforcement investigations and outcomes to contribute to relevant policy initiatives and legislative reform processes impacting Indigenous Australians. For example, following the Birubi Art case noted in **Attachment A**, we are part of a cross-departmental working group led by IP Australia which is conducting a scoping study to

assess possible new stand-alone legislation to help Aboriginal and Torres Strait Islander people protect and commercialise their Indigenous knowledge, art and culture.

Contributing to relevant Parliamentary inquiries

The ACCC seeks to share its understanding of the reasons behind the barriers Indigenous Australians face when engaging with the corporate sector by making submissions to relevant Parliamentary inquiries. In July 2020 the ACCC made a submission to the Committee's Inquiry into food pricing and food security in remote Indigenous communities.

3. Key issues and ways to strengthen corporate sector cultural understanding

The ACCC acknowledges that certain conduct in breach of the CCA has the potential to specifically impact on the welfare of Indigenous Australians. In accordance with our Compliance and Enforcement Priorities, the ACCC has taken enforcement action in numerous matters impacting Indigenous Australians living in remote areas. These are detailed at **Attachment A**. Through our engagement with Indigenous Australians and our enforcement activities, the ACCC has developed an understanding of the problematic business processes and practices that the corporate sector could focus on to improve how it interacts with Indigenous Australians.

Avoid sales incentives and commissions

Commission based remuneration models incentivise salespeople to engage in poor conduct at the consumer's expense. The extensive harm that sales incentives and commissions can have on consumers was highlighted in the Telstra unconscionable conduct case.¹ For example, sales incentives and targets saw salespeople working in licenced Telstra-branded stores manipulate credit assessments, add on services that a consumer didn't need and couldn't afford and misrepresent products as free in dealings with Indigenous Australians in remote communities.

Similarly, sales incentives and commissions saw unfair sales tactics used by salespeople in the Cornerstone Investments Australia case² where Indigenous Australians were signed up to online VET FEE-HELP courses where they did not have English as a first language and did not have the necessary literary or numeracy skills. In some cases, these consumers could not use a computer or didn't have internet access to undertake the course.

The seriousness of the conduct in these cases was recognised by the Courts in determining it was unconscionable conduct in breach of the ACL, resulting in record penalties.

Businesses should carefully consider the use of conflicting remuneration business models and explore best practice alternatives. For example, rewarding positive sales behaviour that demonstrates cultural intelligence and deploying other measures to assess the performance of salespeople and business success.

Ensure marketing materials, including sales scripts and written information, are fit for purpose taking into account the nature and characteristics of consumers they are engaging with

Marketing materials, sales scripts and written information should be adapted appropriately by businesses for a range of consumers, including Indigenous Australians. They are likely to

¹ [Australian Competition and Consumer Commission v Telstra Corporation Limited \[2021\] FCA 502](#)

² [Australian Competition and Consumer Commission v Cornerstone Investments Aust Pty Ltd \(in liq\) \(No 5\) \[2019\] FCA 1544](#)

be better understood when an accompanying verbal explanation is provided by salespeople to consumers in plain, simple English.

Businesses need to ensure that consumers fully understand contract terms including payment amounts and other obligations such as cancellation and late payment fees. Salespeople and other staff interacting with Indigenous consumers should also maintain high levels of cultural intelligence so that consumers are not taken advantage of.

In particular, businesses should encourage salespeople to immediately cease negotiating the unsolicited sales of goods and services with Indigenous consumers when it becomes clear that the consumer does not understand what is being said to them or is not interested in the goods or services involved. In the Titan case,³ the ACCC identified multiple instances where Aboriginal consumers were signed up to contracts while having little or no understanding of the contracts, yet Titan sought to enforce these contracts causing them to pay for goods they did not need or want.

Ensure businesses have effective complaints mechanisms to promptly identify, escalate and resolve consumer protection issues

The ACCC is aware of circumstances where businesses fail to escalate consumer complaints internally, resulting in those complaints not being acted on. Senior executives should be kept informed, remain aware of, and ensure consumer complaints are appropriately acted on. This will assist in ensuring that any conduct potentially in breach of the ACL is acted on in a timely and meaningful way under the direction of those senior executives. When this does not occur, poor business practices can continue and cause ongoing harm to consumers.

Businesses should further ensure that consumer support staff possess high levels of cultural intelligence and that consumers are provided with contact details for complaint resolution services during the sales process. Complaint services should be designed to assist a range of consumers, for example by offering translation services and employing customer representatives from diverse cultural backgrounds. Following the ACCC's involvement, Telstra has taken positive steps in implementing its First Nations Connect Indigenous hotline to better assist Indigenous Australians in a culturally appropriate way.

Ensure high levels of ACL risk management are included in unsolicited selling strategies and clearly communicate expectations around same to sales staff

The unsolicited sales of goods and services, particularly door to door sales in remote Indigenous communities, has led to extremely poor outcomes for Indigenous Australians.

Businesses must be aware of their legal obligations regarding unsolicited sales and display zero tolerance for non-compliance. Among other things, businesses must ensure sales staff do not approach a dwelling for the purpose of engaging in sales conduct when a do not knock sign is displayed and salespeople must immediately leave the premises if directed to do so by the occupier. Cooling off periods should also be observed, including not taking payment from, or supplying goods or services to, consumers during this time.

To manage the risk of non-compliance with these legal obligations, businesses are encouraged to engage with relevant Elders and/or the local Council in Indigenous communities prior to engaging in unsolicited sales in the community. This will enable better understanding of cultural dynamics and preferences in the community.

³ [Australian Competition and Consumer Commission v Titan Marketing Pty Ltd \[2014\] FCA 913](#)

Implement comprehensive ACL compliance programs and training for staff

In addition to understanding relevant legal obligations involving unsolicited sales, more generally businesses should implement comprehensive and current ACL compliance programs and training for all staff engaging with consumers to minimise the risk of non-compliance and consumer harm. Training should address prohibitions on false or misleading conduct and unconscionable conduct.

Businesses are expected to regularly review their promotional and advertising materials for compliance with the ACL and review any contracts for compliance with unfair contract terms laws to prevent occurrence and consumer harm, including to Indigenous Australians.

When designing and implementing ACL compliance programs (including training), businesses must give careful consideration to the measures needed to effectively assess the risk of compliance failures that may arise under their specific business model. Further, senior executives need to appropriately commit to, and invest in their compliance systems, and to regularly review and evaluate these systems, so that any necessary adjustments can be made.

Managing predatory commercial practices

Despite progress by some companies to improve their CCA compliance, there appears to persist a small number of 'rogue traders' that use predatory sales practices. Such conduct is deliberate and often involves small, mobile businesses targeting remote Indigenous communities. Past examples of such conduct include unsolicited sales conduct where people were misled and signed up to contracts containing direct debit payment terms.

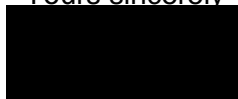
The nature of this conduct by such traders is particularly challenging to address, noting difficulties with both detection and in obtaining effective remedies. Experience has shown the ACCC that effective information sharing between regulatory agencies can improve detection, and assist to identify the most appropriate regulatory response. There are increased compliance risks associated with sales activities by smaller, less sophisticated traders. Therefore, larger businesses that engage smaller contractors to perform sales activities on their behalf, should proactively manage those risks.

Reconciliation Action Plans guiding business operations

The ACCC acknowledges the benefits of Reconciliation Action Plans (RAPs) and that corporate RAPs can help to drive positive business practices. Further integrating the intent of RAPs into business practices and processes with a focus on ACL compliance can help minimise the harm to Indigenous Australian consumers.

The ACCC is willing to further elaborate on the issues outlined in this submission if it would assist the Committee's Inquiry into corporate engagement with Indigenous consumers.

Yours sincerely



Rod Sims

Chair

Attachment A

Australian Competition and Consumer Commission v Telstra Corporation Limited [2021] FCA 502

The Federal Court ordered, by consent, Telstra pay \$50 million in penalties for engaging in unconscionable conduct when it sold mobile contracts to more than 100 Indigenous Australian consumers across three states and territories. Many of the consumers spoke English as a second or third language.

Telstra admitted that between January 2016 and August 2018, it breached the Australian Consumer Law and acted unconscionably when sales staff at five licensed Telstra-branded stores signed 108 Indigenous consumers to multiple post-paid mobile contracts which they did not understand and could not afford.

Telstra were also alerted to the sales practices but did not promptly act to stop them.

In some cases, sales staff at the licensed stores failed to properly explain the potential costs of the contract to the consumers and falsely represented that consumers were receiving products for 'free'.

In many instances, sales staff also manipulated credit assessments, so consumers who otherwise may have failed its credit assessment process could purchase post-paid mobile products. This included falsely indicating that a consumer was employed when they were not.

This case reinforces the need for the corporate sector to listen to and better understand the needs and wants of consumers. This includes ensuring staff, whose role includes interacting with Indigenous Australians, possess and demonstrate high levels of cultural intelligence. It also demonstrates the need to act quickly and decisively upon becoming aware of conduct likely to be in breach of the ACL.

Following the ACCC's involvement Telstra has, and continues to, implement meaningful change in the way it interacts with Indigenous Australians including the establishment of Telstra's First Nations Connect Indigenous support phone line and the provision of digital literacy training, including to remote Indigenous communities, amongst other things.

Australian Competition and Consumer Commission v Cornerstone Investments Australia Pty Ltd (in liq) (No 5) [2019] FCA 1544

The Federal Court found that Cornerstone Investments Australia Pty Ltd, trading as Empower Institute, engaged in unconscionable conduct, misleading or deceptive conduct and making false or misleading representations when enrolling consumers into diploma courses. The Federal Court subsequently ordered \$26.5 million in penalties against Cornerstone Investments Pty Ltd (in liquidation) in addition to an order to repay more than \$56 million to the Commonwealth for funding it received to provide the courses.

Empower Institute signed consumers, including Indigenous Australians in remote communities, to online courses under the VET FEE-HELP scheme in 2015, often approaching consumers on an unsolicited basis. Empower Institute failed to clearly advise consumers of the cost of the courses and had little or no regard to the consumer's ability to complete the course. Many of the affected consumers did not have English as a first language, did not have the necessary literacy or numeracy skills and in some cases could not use a computer or didn't have internet access. Empower used sales staff who were practically untrained and who offered inducements to consumers such as free laptops to sign up for the courses.

This case highlights the particularly egregious nature that unconscionable conduct can take and that the ACCC will not hesitate to intervene in such cases. The matter also highlights the heightened potential for consumer harm with unsolicited sales practices, including when combined with commissioned based remuneration models for sales staff.

Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3) [2019] FCA 996

Birubi Art Pty Ltd (Birubi) falsely claimed that products it sold were hand painted by Australian Aboriginal persons and made in Australia when that was not true. Birubi supplied almost 50,000 boomerangs, bullroarers, didgeridoos, and message stones to retail outlets across Australia between July 2015 and November 2017.

These products featured images, symbols and designs associated with Australian Aboriginal art and words such as 'Authentic Aboriginal Art', 'Hand Painted', and 'Australia', but were all made in Indonesia.

The Federal Court ordered Birubi (in liquidation) to pay a \$2.3 million penalty for making false or misleading representations about products it sold in breach of the Australian Consumer Law.

Birubi's conduct has the potential to undermine the integrity of the Indigenous art industry, reduce economic opportunities and cause cultural offence and distress for First Australians.

This case demonstrates the need to properly engage with relevant First Australians before implementing business models that have the potential to negatively impact them.

Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited [2015] FCA 1204

The ACCC became aware of concerns regarding Chrisco's lay-by agreements during a meeting with the Indigenous Consumer Assistance Network (ICAN) on Bwgcolman (Palm Island, North Queensland) as part of the ACCC's Indigenous outreach work.

Following ACCC action, the Federal Court ordered Chrisco to pay a \$200,000 penalty for contravening the ACL by making a false or misleading representation to consumers between January 2011 and December 2013 that consumers could not cancel their lay-by agreement after making their final payment. The ACL provides that consumers have a right to cancel a lay-by agreement at any time prior to delivery of the goods, including after paying their final lay-by instalment.

The Federal Court also found that Chrisco's 2014 lay-by agreement contained an unfair contract term. The term related to Chrisco's "HeadStart Plan" and allowed Chrisco to continue to take payments by direct debit after the consumer had fully paid for their lay-by order. Consumers were required to 'opt out' in order to avoid having further payments automatically deducted by Chrisco after their lay-by had been fully paid.

This case reinforces the need for businesses, even those who are well known with established processes, to actively consider the circumstances of the consumers to whom they are selling products, such as their location and financial circumstances to ensure the business is complying with their ACL obligations. Consultation with relevant First Australians such as community leaders and respected Elders as well as financial counsellors who work closely with them can assist businesses in this regard.

Australian Competition and Consumer Commission v Titan Marketing Pty Ltd [2014] FCA 913

Titan Marketing Pty Ltd (Titan) sold first aid kits and water filters using door to door sales methods, including to consumers in remote Aboriginal communities of Far North Queensland and the Northern Territory. From 2011 Titan entered into over 7,900 unsolicited consumer agreements.

This was a case that involved Titan's door to door representatives:

- making misrepresentations to consumers about the value of the first aid kits
- making misrepresentations to consumers that Titan's sales representatives were associated with a community group or charity
- not taking reasonable steps to ascertain whether the consumer was capable of understanding the agreement documents, including how much the goods would cost, and how the consumer was to pay for the goods and
- intentionally not informing the consumer about their cooling off rights.

In one instance Titan signed an elderly Aboriginal man, who was a resident of a community health care facility, up to a contract for a first aid kit and a water filter.

The Federal Court ordered Titan, by consent, to pay total penalties of \$750,000 for engaging in unconscionable conduct, making false and misleading representations, breaches of the unsolicited consumer agreement provisions of the Australian Consumer Law and failing to specify a single price for goods.

The Federal Court also declared by consent that Titan's director, Mr Paul Giovanni Okumu, was knowingly concerned in the systemic unconscionable conduct engaged in by Titan and ordered him to pay a penalty of \$50,000. An order was also made by consent disqualifying Mr Okumu from managing corporations for a period of five years.

The Federal Court further ordered Titan to give its remaining first aid kits to Aboriginal health centres in two remote communities and banned Titan and Mr Okumu from entering Indigenous communities where permission to enter is required by community Elders or Administrators for the purpose of selling goods.

This case reinforces the need for businesses to consult with relevant community Elders or administrators prior to engaging in trade with community members. This case also highlights the need to properly explain, orally, contract terms associated with unsolicited sales as well as ensuring products being sold are genuinely needed or wanted by consumers, which wasn't the case when Titan sold a first aid kit to an Aboriginal man in a community health care facility for example.