

Productivity Commission
Aboriginal and Torres Strait Islander Visual Arts and Crafts
Submission by Dr May Fong Cheong*

Introduction

This submission addresses the issues on the policy options to address inauthentic arts and crafts (issue 6), and the issues affecting dealings between artists and dealers (issue 7),¹ in relation to the merits of, and concerns, about amending the Australian Consumer Law (the ACL).

This submission notes the overall view that ultimately ‘a comprehensive, standalone legislative framework’ will be needed ‘to protect the various complex forms of Indigenous cultural expression’.² Pending the enactment of this standalone legislation, and to address particularly the more immediate problem of the proliferation of inauthentic Indigenous crafts (as differentiated from Indigenous arts) including souvenirs, amending the ACL will provide a viable resolution on this matter.

The submission also notes that the Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (the Hanson-Young Bill) that seeks to introduce a statutory prohibition to supply commercial goods that ‘include Indigenous cultural expression unless it is supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community’ was not passed by Parliament.³ This submission, in-principle, supports introducing a new provision to address the sale of inauthentic Indigenous arts or craft that falls short of a misrepresentation, express or implied (fake products) that would fall outside the current prohibitions in the ACL on misleading or deceptive conduct, or prohibitions on false or misleading representations on goods. However, the boundaries of this new provision require careful deliberations and consultations with Indigenous artists and their communities. Important policy considerations include the matter of definitions, whether it will be a strict liability provision and the burden of proof. These matters are outside of the scope of this submission which focuses on the core question whether to amend the ACL, rather than through other mechanisms in addressing issues 6 and 7.

Merits, concerns and barriers in amending the ACL

This submission sets out the merits for amending the ACL to strengthen the current provisions and to introduce the new provision pending the enactment of a standalone legislation. The ACL’s *existing legislative framework of statutory prohibitions* and the *wide remedial regime* provide an important and crucial starting point which protects consumer interests (the buyers), provides a fair-trading environment and which will, albeit indirectly, protect Indigenous cultural expressions, the creators and artists, and the Indigenous community. Amending the ACL to include a provision to prevent the sale of inauthentic Indigenous arts and crafts to add to the existing framework of statutory prohibitions in the ACL against misleading or deceptive

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¹ Productivity Commission, *Issues Paper – Aboriginal and Torres Strait Islander visual arts and craft*, September 2021, pp 11 and 12.

² The Senate, Environment and Communications Legislation Committee: *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019*, 2020, para 2.63.

³ *Ibid*, see the commentaries and criticisms of the bill.

conduct (section 18), false or misleading representations about goods or service (section 29) and misleading conduct as to the nature of the goods (section 33) would address issue 6. The value of *available case precedents* from court decisions on the above provisions, generally, and specifically from cases involving art, is a significant factor meriting amending the ACL rather than through other mechanisms.

Issue 6: Addressing inauthentic arts and crafts

There are a small number but significant range of art cases that have been successfully litigated applying the ACL. Section 18 of the ACL was successfully applied in *McBride v Christie's Australia Pty Ltd*⁴ in an action by a purchaser against an auction house. In this case, the NSW Supreme Court awarded damages of \$118,788,71 to the purchaser. While this case did not involve Indigenous art, it demonstrates the utility of a statutory prohibition based on strict liability with a lower threshold test of leading a person to error; further it is sufficient that the conduct is 'likely' to mislead or deceive. The small number of art cases successfully litigated within this section should not be attributed to the adequacy or inadequacy of section 18. The art market is unique; varied factors contribute to why it is resistant to correction and why a purchaser may not bring an action even if the purchaser suspects or knows that an art piece is forged.⁵ Sections 29(1)(a) and 33 were applied in *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)*⁶ involving Indigenous crafts resulting in an order for payment of pecuniary penalties totalling \$2.3 million. Two other successful cases involving Indigenous artworks which applied the former section 52 of the *Trade Practices Act 1974* (now section 18 of the ACL) resulted in restraint orders against the contravening parties.⁷ In 2012, Angela Delgiacco of Alice Sundown Aboriginal Art provided an undertaking under section 87B of the *Competition and Consumer Act 2010* (Cth) (CCA) after making false and misleading representations in a certificate of authenticity for an Indigenous artwork sold on eBay, contravening sections 18 and 29(1)(a) of the ACL. The undertaking under section 87B of the CCA required that, for a period of three years, Ms Delgiacco refrain from producing certificates of authenticity for artwork which contains false or misleading information.⁸ More recently, sections 18 and 29 were applied in relation to misleading or deceptive conduct, and false or misleading representations in relation to the wrongful use of the Pikachu artistic work first published in Japan. These cases illustrate the utility of the provisions and the breadth of the remedies available in relation to cases on art infringement that could potentially be made available to a new provision preventing the sale of unauthentic Indigenous arts and crafts. One amendment to improve the current provisions is to have a new section 29(1)(o) to include making false or misleading representation with respect to 'forgery, fakes or inauthentic Indigenous arts and crafts.' This would provide an additional specific provision to address issue 6.

Concerns have been expressed of the suitability of using the ACL, a consumer and retail-oriented legislation to protect Indigenous cultural expressions, and of the increased administrative and capacity needs of the Australian Competition and Consumer Commission (ACCC) to enforce the proposed provision to address the proliferation of inauthentic

⁴ [2014] NSWSC 1729.

⁵ May Fong Cheong, 'Art fraud and market failure in the art market: A need for multiple approaches' (2021) 28 *Competition & Consumer Law Journal* 26, 40.

⁶ [2018] FCA 1595; [2019] FCA 996.

⁷ *ACCC v Nooravi* [2008] FCA 2021 (restraint order for a period of 5 years); *ACCC v Australian Dreamtime Creations Pty Ltd* (2009) 263 ALR 487; [2009] FCA 1545 (restraint order for a period of 3 years).

⁸ See <https://www.accc.gov.au/system/files/public-registers/undertaking/1093119-1-undertaking.pdf>.

Indigenous arts and craft, if legislated. These should not be considered as barriers towards this new initiative. On a similar rationale of ACL's existing framework to address issue 6, the extensive experience of ACCC in enforcing the ACL (which will need to be supplemented by additional resources and funding)⁹ would provide a viable machinery to move forward the amendment process.

Issue 7: Dealings between artists and dealers

Much of the general considerations stated above apply to a consideration of issue 7 on the unethical treatment of artists and the relations between art dealers, particularly the problem of 'carpetbagging'.¹⁰ Specifically, the unconscionable conduct provisions in sections 20, 21 and 22 of the ACL could be used to argue a case of unconscionable conduct of art dealers to protect the vulnerable position, particularly of independent artists who do not have the safety net of art centres.¹¹ The wide statutory interpretations given to 'special disability'¹² for the purposes of section 20 would capture the 'frail and elderly' artists facing financial needs to provide for their families and thus forced to accept unequal terms of payment offered by art dealers.¹³ Many of the factors in the non-exhaustive list of factors in section 22 would apply to raise an action on section 21 for the acquisition of the artists' services by art dealers. One barrier towards utilising these statutory prohibitions stems from the reluctance of artists to come forward and provide the needed evidence to substantiate and successfully litigate these claims.¹⁴ Professor Altman states that there are several reasons why artists prefer dealing with private dealers including the desire for a quick cash sale due to family needs and pressure.¹⁵

Another protection that artists could resort to is the unfair contract terms regime in sections 23-28 of the ACL to void unfair terms in their contracts with private dealers. The under payment for their artistic services would constitute a significant imbalance under section 24 of the ACL.

Remedial provisions

As noted, the ACL was intended to be consumer oriented. Based on current judicial interpretations, section 236 of ACL will unlikely afford the remedy of damages to Indigenous artists who suffer indirect financial harm from potential earnings, as well as non-financial harm from the misappropriation of Indigenous culture expressions. In *Blackman v Gant*,¹⁶ the plaintiffs, two artists successfully proved that the defendant misled the purchaser who bought counterfeits of drawings ascribed to the plaintiffs. Although they successfully obtained a declaration that the said works were fakes and orders for delivery up of the fake works, they were not able to obtain damages. In this case, there was no reliance established, which is usually

⁹ In view of comment on the capacity needs of the ACCC, see n 1, paras 2.45 – 2.36.

¹⁰ House of Representatives, Standing Committee on Indigenous Affairs, *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, 2018, paras 3.81-3.87.

¹¹ *Ibid.*

¹² *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447, and cases thereafter.

¹³ See anecdotal evidence of varied vulnerable situations that could amount to special disability, see Jon Altman et al, 'The Indigenous visual art industry' in Jon Altman J and Sally Ward (eds), *Competition and Consumer Issues for Indigenous Australian: a report to the Australian Competition and Consumer Commission* (Center for Aboriginal Economic Policy Research, the Australian National University, Canberra, 2002) 94-95.

¹⁴ The Senate, Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future*, June 2007, para 9.29

¹⁵ See n 13, p 83.

¹⁶ (2010) 29 VR 29; [2010] VSC 229.

a requisite element for damages in relation to cases dealing with misrepresentations. The Court held that the plaintiffs, as artists, could not establish that Gant's misleading conduct was the cause of their loss – the plaintiffs were not involved in the transactions that gave rise to the loss claimed. The relevant provision, section 159 of the *Fair Trading Act 1999* (Vic) provides for the relief of damages to a person 'who suffers loss, injury or damage *because of* a contravention of a provision of this Act' including misleading conduct in breach of section 9 of the Act. Section 236 of the ACL contains similar wordings.

In considering the remedial provisions to address issues 6 and 7, reforming section 236 of the ACL should be considered. The question also arises whether to extend the remedial aims in the ACL beyond compensatory aims to deter or punish contravening parties, and further whether to include restitutionary aims to require the contravening party to restore ill-gotten gains from their harmful actions.