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Commissioners Romlie Mokak, Joanne Chong and Lisa Gropp
Aboriginal and Torres Strait Islander Visual Arts and Crafts
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Dear Commissioners Mokak, Chong and Gropp

ACCC submission to the Productivity Commission's draft report of its study into Aboriginal and Torres Strait Islander Visual Arts and Crafts

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the Productivity Commission's (PC) draft report and recommendations from its study into Aboriginal and Torres Strait Islander Visual Arts and Crafts.

The ACCC commends the PC's success in this report bringing together the nature and breadth of issues and the articulation of harms, both economic and cultural, impacting Aboriginal and Torres Strait Islander peoples in the visual arts and crafts sector. The report constitutes a culmination of years of advocacy by many and provides an opportunity not to be missed to bring action to a head, despite the continued complexity of issues, which we explore further in this submission.

Any possible options for action need to be considered through the fundamental question of what is sought to be achieved. Is the question one of facilitating informed choice, or one of restricting commercial use of Aboriginal and Torres Strait Islander culture by those without authority to do so? We are hearing from many stakeholders that the latter is the priority. We agree with this view and consider that options to address the issues should rightly be tested against this objective. Any measures to help address misappropriation of Aboriginal and Torres Strait Islander culture will require effective deterrence and enforcement mechanisms.

While the ACCC has insights into these issues from our outreach, engagement, compliance and enforcement work, our contribution should be put in the context of the experiences and interest of Aboriginal and Torres Strait Islander stakeholders who should have central roles in influencing the objectives and nature of outcomes that might ultimately be considered.

As noted in our submission in response to the issues paper for this study, the ACCC considers that standalone cultural rights legislation remains the most important solution in helping to address the problem of misappropriation of Aboriginal and Torres Strait Islander cultural rights. We note that since the PC released its draft report, the Government has also [expressed its commitment](#) to work with Aboriginal and Torres Strait Islander peoples to establish standalone cultural rights protection legislation, taking into account the findings of the PC's study.

The ACCC strongly supports the PC's draft recommendation that new cultural rights legislation should be introduced to recognise and protect Indigenous cultural and intellectual property. The ACCC notes and agrees with the PC's statement in its report that this should encompass all dimensions of Indigenous heritage and culture, from languages, expressions, and performances to traditional scientific and ecologic knowledge. However, we suggest reconsideration be given to the PC's proposed framing of the potential cultural rights legislation, and this is discussed further below.

With the benefit of the draft report, the ACCC can also see merit in possible changes to the Australian Consumer Law (ACL) that might support the transition to any new cultural rights protection legislation, and may also supplement any such law once introduced. We have identified three high level options for consideration as alternatives to the PC's draft recommendation that a mandatory inauthentic product labelling scheme be implemented. As discussed in more detail below, while we understand the PC's rationale for this draft recommendation, we consider there are a number of unintended adverse consequences that would arise from such a scheme. In particular, we place weight on feedback received from stakeholders that raises concern over the potential for such a regime to be seen to legitimise inauthentic products.

The three alternative options we identify address the objectives of either facilitating informed choice through to restricting cultural exploitation, to varying degrees. Further details of our proposed alternative options, and our views on the PC's other recommendations, are discussed below.

The ACCC recognises that the problems the PC is seeking to address through its recommended initiatives cause immeasurable harm to Aboriginal and Torres Strait Islander peoples, and to Australian culture as a whole. We also note the difficulties in creating a perfect solution, or set of solutions, to these problems. Regardless of the options the government may progress, there will likely be issues with framing, implementation, resourcing and/or compliance and enforcement.

This challenge should not discourage everyone involved, namely government, regulators, not for profits, the private sector, and other stakeholders, from striving to implement the most workable options. Our suggestions in this submission are made with a focus on trying to address as many of the issues of concern as possible. However, consideration as to the feasibility and effectiveness of the ACCC's suggestions of course ultimately lies with Aboriginal and Torres Strait Islander peoples.

We remain committed to playing our part in helping to address these problems, and look forward to assisting government to progress any initiatives in response.

Draft recommendation 5.1 – mandatory labelling scheme for inauthentic arts and crafts be introduced as an information standard under the ACL

The ACCC considers the mandatory inauthentic labelling scheme would give rise to some significant implementation issues. We note the PC prefers the option of a scheme that applies to only inauthentic products, over a scheme that applies to all products, largely because of the concern that requiring labelling of authentic products or an inauthentic product ban would impose compliance burdens on Aboriginal and Torres Strait Islander artists, and could prevent such artists who cannot, or choose not to, 'prove' their Indigeneity from selling their works.

However, we are aware that a number of stakeholders consider that a mandatory labelling scheme for inauthentic products would have the unintended consequence of implying that inauthentic products have a place in the market, rather than being a misappropriation of Aboriginal and Torres Strait Islander culture. These stakeholders reject the view that the

problem, or a significant part of the problem, to be solved is ensuring consumers can make an informed choice about the products they purchase.

Further, as the PC's report acknowledges, under an inauthentic product labelling scheme, Aboriginal and Torres Strait Islander artists will still face a compliance burden if queries are raised about the authenticity of their works.

The ACCC is also concerned that with an inauthentic labelling scheme, the overall impression given by inauthentic products that do not apply the required labelling would be that they are actually authentic products.

Additionally, we consider that there would be very limited incentives for suppliers to comply with an inauthentic product labelling scheme, as it would add to their compliance costs, for no benefit to their business, and likely detriment to their business where the labelling turns potential purchasers away. This means there would likely be widespread non-compliance with the scheme, requiring substantial and continuing regulator action as a result.

The ACCC has given further consideration to whether there are other options that could be implemented under the ACL to assist in addressing the proliferation of inauthentic arts and crafts, particularly as such an option could likely be implemented sooner than the vital standalone cultural rights legislation.

In considering these potential alternative options, we have attempted to balance:

- ways to avoid or minimise the issues with an inauthentic labelling scheme noted above
- the desire to avoid onerous compliance burdens on Aboriginal and Torres Strait Islander artists, and
- feasibility of implementation and enforcement.

The three possible alternative options discussed further below are a sector specific labelling scheme, a certification scheme and a deeming provision. While each option could be explored further through consultation and further development of ideas, the ACCC favours the deeming provision option. We consider that the deeming provision option could continue to operate alongside, and neatly complement, a standalone cultural rights protection framework. Although further thought would need to be given to the intersection of the ACL and any standalone cultural rights protection framework.

Should the deeming provision option (or another option) be favoured through the PC's study, the ACCC alongside other stakeholders can give more detailed consideration to a potential framework that would be the most effective, including effective enforcement mechanisms.

Mandatory labelling under an ACL information standard applying to all products within key problematic sectors

Further consideration could be given to a mandatory labelling scheme applying to all products, authentic and inauthentic, within the key sectors where the bulk of the supply of inauthentic product occurs. If sought to be targeted, the ACCC considers this could apply to the supply of:

- imported and/or mass-produced souvenir products
- stock images, and
- print-on-demand merchandise.

While this will not cover all sectors in which inauthentic products may appear, as the PC's report notes, these are the sectors where the supply of inauthentic art is most prevalent. As such, the bulk of the compliance burden for a mandatory labelling scheme that applies to these sectors will fall on suppliers of inauthentic products. The extent of any potential burden

on Aboriginal or Torres Strait Islander artists selling or licensing their authentic works for production and supply in these sectors should be considered in further consultation about the possible labelling scheme.

The ACCC considers this sector specific mandatory labelling scheme should require suppliers to specify the connection to, and involvement of, Aboriginal or Torres Strait Islander peoples in the creation of a product, with some detail about what that connection or involvement is. This would include specifying that there has been no such connection or involvement where this is the case.

The ACCC considers it would be useful for the labelling scheme to specify the phrasing to be used for the disclosure of the connection to, and involvement of, Aboriginal or Torres Strait Islander peoples in the creation of a product. This could make compliance for suppliers easier (as what they need to do is set out for them), and would mitigate the possibility of labelling that purports to comply with the scheme actually causing confusion or misleading consumers. Determining the mandated phrasing would obviously require further consultation.

Such a labelling scheme should also mandate that part of the information required to be disclosed with the supply of products includes some mandatory text that explains the cultural harms associated with inauthentic arts and crafts. This would build educative measures into the scheme itself, and may assist in the longer term with reducing the amount of inauthentic products in these sectors.

There are merits in such a labelling scheme also mandating the form of labelling required, at least to some extent. For example, controlling the colour and design to prevent the combination of Aboriginal flag colours being used. If a product's labelling specified that there has been no connection to, or involvement of, Aboriginal and Torres Strait Islander peoples, but used colours and imagery associated with Aboriginal and/or Torres Strait Islander peoples in the labelling, this would mislead or at the very least confuse consumers.

Subject to further consultation, the ACCC considers that the PC's idea of a specified list of products (for example, boomerangs and specific motifs or designs), as well as a broader category of any other items that a reasonable person would consider to incorporate an Aboriginal and Torres Strait Islander design or style, seems to be a logical foundation for product coverage of any labelling scheme.

Mandatory certification scheme under the ACL

A mandatory certification scheme under the ACL for authentic Aboriginal and Torres Strait Islander arts and crafts products could require suppliers to obtain certification of authenticity for their products, or for themselves as a supplier of authentic Aboriginal and Torres Strait Islander arts and crafts. An independent and fit-for-purpose body that has the expertise to consider issues such as authenticity and Indigeneity should be established to conduct this certification. Aboriginal and Torres Strait Islander peoples would run such a certification body.

Certification would be provided to:

- suppliers that are Aboriginal or Torres Strait Islander artists, to apply to the products they supply in general (for example, a community Aboriginal art co-operative would obtain certification for any products supplied by it), and/or
- specific products which are made by, or produced under license from, Aboriginal or Torres Strait Islander artists.

The certification process should be as simple as possible to minimise any burden on Aboriginal and Torres Strait Islander artists. Consideration could also be given to other ways to achieve this, such as by limiting certification requirements to apply to businesses of a certain size or nature, and/or by exempting Aboriginal and Torres Strait Islander artists selling their works directly to consumers.

The supply of products in the style of what a reasonable person would consider to be Aboriginal or Torres Strait Islander designs or expressions would be prohibited unless the supplier or product is certified through this process.

The independent, fit-for-purpose certification body would also adjudicate on any questions or disputes over Indigeneity or whether a particular Aboriginal or Torres Strait Islander person is culturally permitted to use, or licence, a particular design or expression.

ACL regulators would take any compliance or enforcement action on the basis that the products are being supplied without certification or the certification body has found that those supplying the products do not have the requisite authorisation. Although in the case of a product purported to be created under a licensing agreement, the ACL regulators may be able to take action without the need for any determination by the certification body (for example, where the supplier cannot prove there was such a licensing agreement in existence).

Actions taken in response to the supply of *authentic* products that do not have certification would focus on compliance and assisting artists to obtain certification. Whereas stronger enforcement actions would be taken in response to the supply of inauthentic products (including products supplied in the absence of a valid licensing agreement) that do not have certification.

Other measures could be introduced to assist with further reducing the potential for burden on Aboriginal and Torres Strait Islander artists, for example, bodies such as the National Indigenous Australians Agency and/or the Indigenous Art Code Limited could be funded to proactively work with individual artists, art centres and co-operatives to get them certified by the certification body.

Deeming provision in the ACL to work in conjunction with existing prohibitions against false or misleading representations

A deeming provision could be introduced into the ACL to provide that the supply of a product with features a reasonable consumer would understand to be an Aboriginal or Torres Strait Islander-style design or expression would be deemed to be making a representation that the product has been produced by, or under licence from, an Aboriginal or Torres Strait Islander person or persons.

Consideration would need to be given to how such a provision would align with current ACL provisions (ie. sections 18, 29(1)(a) and 33), noting consideration of further amendments may be necessary.

ACL regulators could then rely on the deeming provision to take compliance or enforcement action under the existing misleading conduct and representations provisions against suppliers of such products that were not produced by, or under licence from, an Aboriginal or Torres Strait Islander person or persons.

This would enable compliance or enforcement action to be taken for a wider range of conduct under the existing misleading conduct and representations provisions in the ACL than is currently the case.

For example, a boomerang in a souvenir shop with Indigenous-style designs, but labelled as made in Indonesia, could be deemed to be making a representation that the product has been produced by, or under licence from, an Aboriginal or Torres Strait Islander person. If that is not the case, the supplier would be in contravention of sections 18, 29 and 33 of the ACL.

Whilst suppliers would be able to avoid the application of the deeming provision, they could only do this by making clear and unambiguous disclosure to the contrary – for example by expressly stating that the product was not produced by, or under licence from, an Aboriginal

or Torres Strait Islander person. The framework for the deeming provision could also require that such disclosure would also need to be accompanied by mandatory text that explains the cultural harms associated with inauthentic arts and crafts.

While this proposal would not outright prevent the continued supply of inauthentic products where clearly labelled as such, it would not in itself be seen as a regulatory legitimising of such practice. Further, the need to disclose when accompanied by further education would strongly dissuade this continued practice. This option would also be strongly aligned with the role and function of consumer law in dealing with misrepresentations.

Other considerations applying to all three alternative options

The usual investigative tools and remedies that are available under the ACL currently should also apply to any new provisions introduced through either of these options.

The adoption of any of the above ACL options would need to be supported by effective compliance and enforcement activity by the ACL regulators, in particular the ACCC on significant, national and systemic issues. Any of the options would also need to be accompanied by education and compliance initiatives. Education measures would need to target industry (both artists and third-party suppliers) and consumers, including visiting international consumers.

We continue to prioritise work to address conduct that impacts Indigenous Australians, as do the state and territory ACL regulators. However, such specific new frameworks in the ACL will create an expectation and requirement for additional effort and capability for the ACCC and state and territory ACL regulators which will need to be resourced appropriately.

The absence of effective compliance and enforcement activity would undermine the objectives and could lead to additional harm. The breadth of products, businesses and locations that participate in the relevant sectors demonstrate the size of the task this would involve. The capacity to involve Aboriginal and Torres Strait Islander people in relevant workforces undertaking this work, and to enhance networks with external stakeholders, would also be vital to success. Consideration needs to be given to the investment that would be required to ensure these can be achieved.

Once the proposed standalone cultural rights legislation is closer to implementation, any of these ACL options (if implemented in the intervening period) could be reviewed for consideration as to scope and effectiveness, and also whether the regime should instead be incorporated into the standalone cultural rights legislation framework in some form.

Draft recommendation 7.1 – the Government should develop and publish an Indigenous Cultural and Intellectual Property (ICIP) strategy

Draft recommendation 7.2 – new cultural rights legislation should be introduced to recognise and protect cultural assets in relation to visual arts and crafts

The ACCC strongly supports draft recommendation 7.2. As articulated in our submission to the PC's issues paper, we consider that ultimately standalone tailored protections are required to not only more adequately address the issues around inauthentic art and craft products, but also to more adequately and holistically protect and value Aboriginal and Torres Strait Islander peoples' traditional knowledge and cultural expressions.

However, we consider that a standalone cultural rights protection framework needs to be crafted so it is fit for purpose based on:

- the ways Aboriginal and Torres Strait Islander peoples use their traditional knowledge and cultural expressions, and
- the need to elevate the protection of Aboriginal and Torres Strait Islander knowledge and expression to something beyond just the recognition of intellectual property rights.

Therefore the ACCC has reservations about considering a cultural rights protection framework that is constrained by any desire for alignment with existing Australian intellectual property frameworks, or existing international cultural rights frameworks that may not be fit for purpose.

As the PC is aware, IP Australia chairs a cross-departmental working group established to undertake a scoping study for a potential framework for new standalone legislation that could assist Aboriginal and Torres Strait Islander peoples in protecting and commercialising their traditional knowledge and cultural expressions. The ACCC participates in this working group. Next steps planned include targeted consultation with Aboriginal and Torres Strait Islander peoples to seek initial feedback on potential elements to support finalising the scoping study. We consider this work can help inform the scope of the PC's draft recommendation 7.2 and we are aware that the PC and IP Australia are seeking to coordinate on their respective consultation processes.

The elements of a fit for purpose standalone framework will clearly need to be informed by consultation with Aboriginal and Torres Strait Islander stakeholders and peoples. Subject to that further consultation, the ACCC's initial views are that such a framework should:

- deal with the complex nature of the rules and lore relating to the use of Aboriginal and Torres Strait Islander knowledge, cultural expressions, and artefacts in order to protect them.
- recognise that Aboriginal and Torres Strait Islander knowledge and cultural expressions are not static, but rather can evolve over time.
- be framed in such a way to place the onus on parties wishing to use such knowledge and cultural expressions to obtain the free and informed consent of relevant Traditional Owners and enter into appropriate licensing agreements with them, before they can use the knowledge and cultural expressions.
- require adequate attribution where knowledge and cultural expressions are used under licensing agreements.
- include effective enforcement mechanisms and culturally appropriate and accessible dispute resolution mechanisms.
- create and support some form of cultural authority regulatory body with the necessary expertise to understand the relevant rules and lore and assess the use (and misuse) of Aboriginal and Torres Strait Islander knowledge and cultural expressions according to these.
- provide for the regulatory body to work with Aboriginal and Torres Strait Islander peoples (where Aboriginal and Torres Strait Islander peoples prefer to engage the regulatory body's assistance) to protect and enforce their rights under the framework, assist them with entering into licensing agreements and assist them in other ways of managing their works and knowledge.
- provide for the regulatory body to assist third parties to identify and engage with Traditional Owners to seek appropriate consents and arrangements to use knowledge and cultural expressions.
- allow for either the specifically designed regulatory body, or Aboriginal and Torres Strait Islander peoples, or them jointly, to take action against misuse of knowledge and cultural expressions.
- carefully limit any 'fair dealing' exceptions (for example, reproduction of knowledge or cultural expressions for the purposes of news reporting).

Potential restrictions on the supply of particular products (such as sacred artefacts) could also be considered further under this standalone framework. Further, as noted earlier, any

regime that may be implemented under the ACL to help address the supply of inauthentic products could be transferred across to this standalone framework, following further consultation on the merits of this at that stage.

As with the possible ACL options discussed above, sufficient resourcing investments would need to be made to ensure this fit for purpose standalone framework can be implemented and maintained successfully. This may also include further funding for community legal service bodies to be able to assist Aboriginal and Torres Strait Islander Traditional Owners in taking action to help protect their knowledge and cultural expressions.

The ACCC also strongly supports draft recommendation 7.1 for the reasons articulated in the PC's report. We agree that an overarching strategy, led by the Minister for Indigenous Australians, in partnership with state and territory governments and Aboriginal and Torres Strait Islander people, should be developed to bring together all policy and regulatory measures and other initiatives involved in protecting the broad spectrum of Aboriginal and Torres Strait Islander cultural rights.

Other recommendations

The ACCC agrees with draft recommendations 10.1 and 10.2 in relation to enhancing the Indigenous Art Code Ltd (the Code). An enhanced dispute resolution process and additional funding will assist the Code to continue to improve standards of conduct for members, promote ethical dealings and support artists. We also support empowering and adequately resourcing the Code (or another body) to provide legal support service referrals.

The ACCC also agrees with draft recommendations 10.3 and 10.4. Effective funding arrangements and shared decision-making are fundamental requirements that underpin the PC's other recommendations. They are also vital to any existing measures relating to Aboriginal and Torres Strait Islander cultural rights.

We reiterate our support for timely, material and effective measures that are supported by Aboriginal and Torres Strait Islander stakeholders. The significance of the PC report is an opportunity that should be seized to make a difference in an area long wanting action.

If you wish to discuss any aspect of this submission, please feel free to contact Rami Greiss, Executive General Manager Consumer and Fair Trading, on _____ or _____

Yours sincerely

Delia Rickard
Acting Chair