

Appendix 4

Australian Competition and Consumer Commission – correspondence, 8 June 2007

ACCC review of submissions and verbal evidence for indicators of potential breaches of the *Trade Practices Act 1974 (Cth)* and a discussion of possible outcomes

Executive Summary

This response to the Inquiry into Australia's Indigenous Visual Arts and Craft Sector (**the Inquiry**) details the request to the Australian Competition and Consumer Commission (**the ACCC**) to review the submissions and verbal evidence provided to the Inquiry for indicators of possible breaches of the Trade Practices Act 1974 (Cth) (**the TPA**). The response provides background information on the relevant provisions of the TPA before summarising the ACCC's review of the evidence and what the ACCC is doing having regard to what information and evidence was identified in its review of the submissions and transcripts.

The review identified some possible indicators of unconscionable conduct. Although none of the evidence related to ongoing conduct ACCC staff have identified lines of inquiry for identifying any current or ongoing conduct that may breach the TPA. The ACCC has already begun to pursue those lines of inquiry, contacting submission authors and meeting with Art Centre representatives in Central Australia and the Top End. The ACCC has a further visit to Alice Springs scheduled during which it anticipates meeting with artists who may be able to provide first hand evidence of unconscionable conduct. The ACCC also continues to monitor the development of the National Indigenous Art Commercial Code of Conduct and associated Ethical Trading Strategies while maintaining its regular educative and outreach role as relevant to Indigenous communities generally and the Indigenous Visual Arts and Craft Sector.

Having regard to the submissions and transcript and subsequent discussions with industry participants, the ACCC considers enforcement activity under the TPA will not completely resolve ongoing concerns about unscrupulous and unethical conduct in the Australia's Indigenous Visual Arts and Craft Sector. The ACCC recommends other strategies be supported and implemented with a view to long-term solutions, including empowerment and reduction in vulnerability.

Background

The Senate Standing Committee on the Environment, Communications, Information Technology and the Arts (**the Committee**) is currently conducting an Inquiry into Australia's Indigenous Visual Arts and Craft Sector. The Inquiry was convened in

August 2006. The Committee which is due to report its findings on June 12 2007 received a total of 89 written submissions and conducted public hearings across the nation generating a further 408 pages of transcript.

The ACCC has provided assistance to the Committee by making submissions, responding to enquiries and participating in the public hearing process. After appearing before the Committee the ACCC provided supplementary information on indigenous employment in the ACCC, and book-up practices.

One of the terms of reference for the Inquiry was “*opportunities for strategies and mechanisms that the sector could adopt to improve its practices, capacity and sustainability, including to deal with unscrupulous or unethical conduct*”. Having regard to particular submissions in respect of this term of reference specifically, as well as some of the more general submissions, the Committee asked the ACCC whether concerns had been raised with the ACCC and further, whether the ACCC would be prepared to review the submissions and verbal evidence to the Inquiry. The ACCC subsequently responded by letter on 3 April 2007 outlining previous concerns regarding conduct in the Indigenous Visual Arts and Craft Sector that had been raised with the ACCC. The ACCC now reports on its review of the submissions and transcript of the Inquiry.

Relevant sections of the Trade Practices Act

The ACCC has reviewed those submissions and transcript with a view to identifying any indicators of potential breaches of the TPA. The ACCC has reviewed the submissions and transcript for evidence of both misleading and deceptive conduct and possible indicators unconscionable conduct in breach of Part IVA of the TPA. The ACCC has previously provided the Committee with a copy of its *Guide to unconscionable conduct* however the following points are provided to focus attention on the sections most relevant to the alleged conduct, in particular sections 51AA (general conduct) or 51AC (conduct between businesses).

Section 51AA provides:

- (1) *A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.*
- (2) *This section does not apply to conduct that is prohibited by section 51AB or 51AC.*

Section 51AA is a broad prohibition against unconscionable conduct as determined through the decisions of the courts over time. Unconscionable conduct is not a static concept but generally defined it is conduct which is so unreasonable that it goes against good conscience. The unreasonableness is determined having regard to the specific circumstances of each case that comes before the court. Over time judges have given some broad definitions in attempts to quantify exactly what unconscionable conduct encompasses. Without seeking to demonstrate the entire

breadth of the law, the following judicial comments provide some guidelines for demonstrating unconscionable conduct:

- Serious misconduct or something clearly unfair or unreasonable
- An overwhelming case of unreasonable, unfair, bullying and thuggish behaviour
- Actions showing no regard for conscience, or are irreconcilable with what is right or reasonable
- Unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary
- Advantage is taken of an innocent party who...is unable to make a worthwhile judgement as to what is in his best interest

Section 51AC provides:

(1) A corporation must not, in trade or commerce, in connection with:

...
(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

Section 51AC also provides a number of factors the court may have regard to in determining whether a business has engaged in unconscionable conduct under section 51AC. In the context of Indigenous artists and commercial acquirers of their art (**dealers**) those factors may be stated as follows:

- the relative bargaining strengths of the artist and the dealer
- whether the artist was required to comply with conditions not ‘reasonably necessary’ to protect the legitimate interests of the dealer
- whether the artist was able to understand any documentation used
- whether the dealer used undue influence or pressure, or unfair tactics
- the price and terms on which the artist could have sold the same or equivalent artwork elsewhere
- the extent to which the dealer’s conduct was consistent with dealings with other artists
- whether the dealer met the requirements of any applicable industry code
- whether the dealer met the requirements of any other industry code (such as a voluntary code), if the artist had the reasonable belief the dealer would abide by that code
- the extent to which the dealer failed to disclose any intended conduct (and any risks arising from this conduct) that might affect the artist
- the extent to which both the artist and the dealer acted in good faith.

Importantly, these factors are not intended to be exhaustive, and the Court may have regard to any other factors it considers relevant. The Court will determine whether the

conduct is unconscionable by having regard to **all** the circumstances, meaning, therefore, that each of these factors in isolation may not amount to unconscionable conduct.

Section 6 of the TPA extends prohibitions against corporations to individuals in certain circumstances including where conduct has occurred in a territory, for example, the Northern Territory.

ACCC Activity

In response to the Committee's request the ACCC has allocated experienced staff in the Darwin, Melbourne and Canberra offices to consider the issues raised before the Committee in submissions and public hearings. ACCC staff have reviewed all the public evidence provided to the Inquiry. Following that review ACCC staff have travelled to Alice Springs to assess the evidence available from Indigenous Art Centre representatives and have contacted several other organisations who provided submissions to the Inquiry to obtain further information. The ACCC has also engaged in dialogue with art centre managers at a meeting organised by the Association of Northern, Kimberley and Arnhem Aboriginal Artists.

A further trip to Alice Springs has been organised with the objective of interviewing artists who may have suffered from unconscionable conduct. The ACCC is also monitoring the development of the National Indigenous Art Commercial Code of Conduct and associated Ethical Trading Strategies.

More details on the specific activities undertaken by the ACCC is set out below.

Review of the evidence provided in submissions and at hearings

Many of the submissions provided general comments on unethical conduct through references to "carpetbaggers". DesArt's submission (Submission 49) defined carpetbagger as "*...a pejorative term describing dealers involved in exploitation of Indigenous artists. The term Carpetbagger can be applied to certain dealers, backyard dealers, commercial gallery owners, private agents, or persons operating other legitimate businesses such as card yards or motels. Carpetbaggers in this sector are essentially non-Indigenous law breakers dealing in unconscionable conduct, duress and misrepresentation as defined by the Trade Practices Act.*" This definition highlights the broad range of individuals and businesses allegedly engaging in unconscionable conduct towards Indigenous artists. Other submissions alleged ex-police officers, nurses, doctors, teachers and other individuals with legitimate grounds for entering Indigenous communities were also engaging in unconscionable conduct in their dealings with Indigenous artists.

The types of allegations surrounding the conduct of "carpetbaggers" related to:

- Pressure to produce artwork within limited time frames, using poor quality materials, often working in sweatshop environments and without having regard

to the resultant quality of work or the impact that quality (or lack thereof) may have on the artist's reputation.

- Low remuneration (in the form of cash or other incentives including alcohol, drugs and second-hand cars).
- Targeting artists who are vulnerable due to age, language skills, substance dependency and/or cash flow problems and taking advantage of family and/or community obligations and/or the high profile of particular artists.
- Entrapping artists in cycles of debt away from their own communities and support networks.
- Unauthorised entry into permit areas to deal directly with artists.

Some of these allegations on their own may not amount to unconscionable conduct, however a combination of these factors, or one of these factors in combination with other circumstances not addressed expressly in submissions **may** amount to unconscionable conduct.

Most of the allegations in submissions were general in nature; understandably they did not specify conduct by particular individuals or businesses and were not sufficiently detailed in respect of specific events or conduct to enable the ACCC to identify particular cases which could be progressed towards enforcement before the Federal Court. Furthermore, there were very few details as to when the conduct occurred. Investigation of the more specific allegations did not identify evidence of ongoing conduct. In some cases the businesses allegedly involved have ceased to trade.

The evidence provided at the public hearings was also mostly generalised and lacked specific examples, although in some cases it amplified the allegations made in submissions. Essentially the same conduct as that mentioned above as stated in submissions was similarly raised in the hearings. The Committee may have heard more detailed and substantiated claims during in-camera sessions of the hearings. The ACCC is aware at least some of those who provided evidence in-camera are (understandably) still reluctant to provide detailed information to the ACCC, as they come from small communities and are concerned about ramifications for themselves and for the artists involved.

In order for the ACCC to identify and pursue conduct warranting enforcement action, it requires specific evidence of particular events, including artists being prepared to tell the story of their experience(s). Obtaining such evidence has its own special challenges. The ACCC recognises and appreciates it is not always easy in small communities to come forward with information. It is necessary for the ACCC to develop trust within Indigenous communities and the Indigenous Visual Arts and Craft Sector generally. These and other relevant issues to the ACCC's investigation process are discussed below.

Allegations relating to potentially misleading and deceptive conduct primarily concerned misrepresenting who actually painted the work and passing off non-Indigenous works as Indigenous. No specific instances of this conduct were identified, however the ACCC would welcome specific evidence of such conduct in order to

consider what action might be appropriate. Should any of the authors of submissions have specific examples of works that have been sold with misleading information as to the artist or origin the ACCC would be happy to assess the merits of any available evidence. The ACCC considers there to be significant harm to consumers, industry participants and the industry generally where misleading and deceptive conduct becomes rife, accordingly it is in the interests of those aware of such conduct to draw it to the attention of the ACCC. The nature of many of the allegations are such that in the absence of specific complaints to the ACCC it is unlikely to be aware of the conduct - that is the ACCC is unlikely to be able to identify artwork being passed off without assistance from knowledgeable industry participants.

ACCC investigative processes

The ACCC is of the view there are significant indicators of unconscionable conduct within the submissions and transcripts of the Inquiry, despite insufficient evidence of specific conduct, and to that end it has contacted several authors of submissions. Additional authors will be contacted in due course, with a view to obtaining more detailed information.

The ACCC's investigation to date has identified some scenarios of conduct it is concerned about, comprising of a number of the factors/incidents raised in various submissions to the Inquiry and it is currently working on strategies to identify and pursue specific instances of such conduct currently occurring. In order to avoid prejudicing such investigations the ACCC is unable to disclose more detailed information concerning the investigation at this time.

The Committee will be aware from the ACCC's earlier response providing information as to the number of complaints received concerning the Indigenous Visual Arts and Crafts Sector that despite the numerous general allegations presented to the Committee both by way of submissions and orally during hearings for the Inquiry, the ACCC had not received a corresponding number of complaints. There are likely to be a number of understandable and appreciable reasons for this, including: lack of knowledge about the role of the ACCC; concerns about possible ramifications within communities for those prepared to come forward; and recognition by some that there are sometimes other appropriate avenues for redress.

In the context of any ongoing investigation into alleged breaches of the TPA in the Indigenous Visual Arts and Crafts Sector, there are a number of factors which may hamper the investigation, including: the nature of the parties involved; the remoteness of potential witnesses; and the responsibilities and obligations on artists to their communities and families. Some of the factors that may make artists vulnerable to unconscionable conduct are also factors that can inhibit the ACCC's investigative process and any enforcement activity. The ACCC also notes comments from the submission of Professor Altman, Director of the Centre for Aboriginal Economic Policy Research (Submission 11) that "*Unfortunately, Indigenous artists may be reluctant to participate in prosecutions under the TPA if they have been complicit in*

unconscionable conduct, sometimes for very basic reasons like lacking access to banking facilities and needing to trade informally to gain access to cash.”

Importantly, though, such challenges are not necessarily fatal to an investigation and the ACCC is employing specific strategies to manage these hurdles appropriately to ensure effective investigation where significant indicators of unconscionable conduct have been or are subsequently identified in the Indigenous Visual Arts and Crafts Sector.

It is also apparent from reviewing the evidence provided to the Committee and subsequent discussions the ACCC has had with some industry participants that there remains little appreciation by many as to what specific conduct might fall within the scope of the unconscionable conduct provisions of the TPA, or what other avenues of assistance of which artists and art centres may be able to avail themselves. In addition, some artists may not be concerned about particular conduct (i.e. cash payments which are significantly less than the potential value of the artwork) for a variety of reasons, including: seeing painting for cash as a viable alternative to commission work as it assists their cash flow; lack of awareness or appreciation of their rights; and lack of awareness of the effects of poor quality work (due to either time pressures or quality of materials) on their reputation within the industry. Conversely, some artists feel shame at having been taken advantage of and shame at having cash flow difficulties. These issues sometimes mean it is less likely the ACCC will receive first hand evidence of the conduct. The ACCC is working with industry participants in an educative role to address these issues.

To effectively investigate and obtain sufficient evidence ACCC staff need to establish trusted relationships with artists and their supporting network of art centres and communities. Such relationships take time to build. In remote Indigenous communities there may be different perceptions, priorities and preoccupations to that of mainstream Australia including time, family obligations and community pressures. These differences can impact on the ability to locate specific artists at specific times. The situation is further complicated when coupled with language barriers (where English is the second, third or fourth language of an artist). Thus obtaining statements, while not insurmountable, will almost certainly be a time consuming task, as it is in many complex investigations.

Possible TPA Outcomes

The ACCC is seriously concerned about the nature of the allegations arising during the Inquiry and considers it likely (should sufficient evidence be identified) that such a matter would warrant litigation as the appropriate enforcement action. In the event the ACCC pursues litigation and succeeds at trial, the remedies available to the ACCC include: declarations the conduct is in breach of the Act; injunctions prohibiting certain conduct; and other orders including community service orders and probation orders. In certain circumstances, the ACCC may also take representative action on behalf of people who have suffered loss or damage as a result of unconscionable conduct.

Such orders may result in specific deterrence against the business subjected to ACCC enforcement action; however there are concerns whether general deterrence in this industry will be achieved. Having regard to the ease with which individuals and businesses can enter this industry in the form of dealers (low set up costs, absences of registration/association membership requirements, ability to sell over the internet), the removal of one “carpetbagger” may simply make way for another. Furthermore, for those dealers who have been in the industry a long time and are engaging in questionable conduct, the financial incentives of the industry mean significant pecuniary penalties would likely be needed to achieve general deterrence of these long-established dealers.

Successful ACCC action is likely to achieve a clear message that certain conduct is not only generally considered unacceptable, but is also a breach of the law. The resultant educative avenues arising from such a court outcome would include consumer, industry and indigenous community awareness.

That being said, ACCC enforcement action will not remove the variety of factors likely to make Indigenous artists vulnerable to unconscionable conduct: where that vulnerability exists, and there are financial rewards for those who take advantage of it, unconscionable conduct is likely to continue to occur, albeit by a different individual or business.

The ACCC considers other strategies need to be considered in conjunction with the ACCC’s enforcement and education roles in the Indigenous Visual Arts and Craft Sector to improve the sector’s practices, capacity and sustainability..

Other Relevant Issues and Alternative Strategies

The ACCC is of the view there are a range of factors likely to contribute to Indigenous artists’ vulnerability to unconscionable conduct. Some of these are industry-specific, whilst others are Indigenous-specific and have previously been found to have contributed to vulnerability by the court. These factors include:

- cash flow difficulties
- immediate financial needs for various reasons including food, accommodation, medical care, family obligations, supporting substance dependency of themselves or family members
- family obligations, including the responsibility of the primary bread winner (sometimes elderly artists) of a family to provide for extended family members
- limited English speaking and literacy skills of some artists
- artists out of their community have lack of support and access to advice on dealing with external parties
- lack of appreciation of true value of work
- disinclination/inexperience in negotiating terms
- non-confrontational nature

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- failure to understand market effect, specifically the devaluation of reputable artists' names through "mass" production and poor quality materials or work
 - disparity in costs of goods and services, including high living costs in remote communities and disparity in charges for Indigenous and non-Indigenous guests of motels in major centres such as Alice Springs.

As noted above, enforcement activity by the ACCC alone will not address a significant number of these factors. Accordingly, the ACCC considers other strategies need to be considered to alleviate some of those factors which contribute to vulnerability. Those strategies might include education, resources and infrastructure in Indigenous communities as well as additional support for artists visiting major centres.

Some of the conduct highlighted to the Committee is also likely to fall within other agency jurisdictions such as the Northern Territory Police, State and Territory fair trading agencies and possibly the Australian Crime Commission. Further community and industry education on the roles of these and other government departments and agencies would help in empowering Indigenous communities and artists, enabling them to consider possible recourse or assistance options available to them in different circumstances.

The ACCC also welcomes the completion and subsequent implementation of the National Indigenous Art Commercial Code of Conduct and associated Ethical Trading Strategies (**the Code**). The Code is a joint initiative of the National Association for the Visual Arts (NAVA), DesArt and the Association of Northern, Kimberly and Arnhem Aboriginal Artists (ANKAAA).

The Code is an example of a range of initiatives currently being pursued by participants in the Indigenous Visual Arts and Craft Sector to enhance sustainability and improve market behaviour. The ACCC is generally supportive of industry based initiatives as they complement its compliance activities by providing a further mechanism to increase market integrity and thus reduce the instances of breaches of the law.

Conclusion

The ACCC remains concerned about possible indicators of unconscionable conduct in the Indigenous Visual Arts and Craft Sector and has investigations on foot to address these concerns. In addition, it remains vigilant and ready to pursue substantive allegations of any breaches of the TPA raised directly with it. However, having regard to its own review of the submissions and transcript and its subsequent discussions with industry participants, it considers any enforcement and compliance activities pursued by it will not completely resolve ongoing concerns about unscrupulous and unethical conduct in the industry. The ACCC recommends other strategies be supported and implemented with a view to long-term solutions, including empowerment and reduction in vulnerability.

