

**Attachment 1 dated November 2017**

**Submission to the House of Representatives Standing Committee on Indigenous Affairs  
Inquiry into 'The growing presence of inauthentic Aboriginal and Torres Strait Islander  
'style' art and craft products and merchandise for sale across Australia'**

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This Committee looks to inquire into and report on the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia. It is the perception of 'a growing presence' that appears to have caught the attention of the Minister for Indigenous affairs when referring this issue for attention. If it is indeed the case that inauthentic (or fake) Indigenous art sales are growing then there is a distinct possibility that the economic wellbeing of those Indigenous Australians that are dependent on this sector for cash income will be undermined; and that the cultural integrity of Indigenous arts generally will be jeopardised.

On equity grounds alone it is unchallengeable, in my view, that Indigenous Australians should benefit from their intangible property rights in cultural assets; and have the right to see these presented in the market with integrity. It is also unchallengeable that producers or retailers who behave unscrupulously or illegally and who might extract excessive economic rent (profit) from the sale of inauthentic Indigenous arts and crafts products and merchandise should be stopped and potentially prosecuted and penalised.

This hardly needs to be stated.

But the question of what is authentic Indigenous art is a deeply complex issue that has troubled stakeholders in the Indigenous arts sector, and especially the manufactured tourist art sector on which this Inquiry focuses, since its emergence alongside Australian tourism 50 years ago. However, it is extremely difficult to accurately assess the prevalence of this problem and so to develop regulations that can realistically address it.

This is an issue addressed deploying a combination of cultural policy and Indigenous policy every decade or so. It was last considered by the Senate Standing Committee on Environment, Communications, Information Technology and the Arts in its prolonged inquiry and report *Indigenous Art – Securing the Future* released in June 2007.

The current Inquiry appears initiated by the 'Fake Art Harms Culture' campaign launched in August 2016 at the Darwin Aboriginal Art Fair. This campaign is mounted by a consortium of arts advocacy organisations including the Arts Law Centre, Indigenous Art Code and Copyright Agency Limited/Viscopy. This is a little paradoxical because the Darwin Aboriginal Art Fair is an exemplary annual showcase of Indigenous tourist art (alongside much fine art) marketed by Indigenous arts organisations with integrity and with the direct economic and cultural interests of Indigenous artists and producers paramount.

This campaign has attracted the well-intentioned interest of independent Federal MP Bob Katter who has held a long-standing interest in the issues being examined that I recall from interactions with him in earlier inquiries of this committee when he was a member.

In February 2017 Mr Katter tabled the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 as a private member's bill. That bill that expired in September 2017 was a response to the 'Fake Art Harms Culture' campaign. In his second reading speech on 13 February 2017 Mr Katter acknowledged renowned Yolngu artist Banduk Marika and Christina Davidson the CEO of the Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA) as well as other Fake Art Harms Culture campaign stakeholders for initiating the bill. As he noted in his second reading speech: 'I must emphasise to the House that my colleague the member for Mayo and myself are only acting today as agents for these people in bringing this bill forward, and we do so with very great pride in moving for a betterment of a situation for First Australians'.

In a recent newsletter published on 19 September 2017 the Arts Law Centre traces the origins of this inquiry noting its establishment in August 2017. On 11 September 2017, perhaps disappointed that the terms of reference for this Inquiry do not refer to his earlier bill, Mr Katter reintroduced his expired bill.

I have examined the issue of 'authenticity' on many occasions in the last three decades as an academic researcher advising government and its agencies, most significantly as chair of the federal review of the Aboriginal Arts and Crafts Industry in 1989<sup>1</sup> and as a consultant appointed to develop an Indigenous Arts Strategy for the NT in 2003<sup>2</sup>. I have also provided submission and expert evidence to this Committee's inquiry into Indigenous Arts and Culture in 1995 (that was not completed owing to a change in government in 1996); expert advice as a consultant in 1999 to the Aboriginal and Torres Strait Islander Commission (ATSIC) on the proposed development on a National Label of Authenticity by the National Indigenous Arts Advocacy Agency (that did not proceed); academic research for the Australian Competition and Consumer Commission (ACCC) in 2001 on trade practices issue of relevance to the Indigenous visual arts sector<sup>3</sup>; and a submission in 2006 to the above-mentioned Senate Inquiry into Australia's Indigenous visual arts and craft sector.<sup>4</sup>

My recent research in this area has focused on the escalating challenges of doing Indigenous arts business in remote Australia after the Global Financial Crisis and changes to superannuation laws. I remain engaged in seeking to understand how the free market, the regulatory state and artist control can be productively mixed to ensure sound outcomes for artists.

In this submission, I make comments for the Committee's consideration on its five terms of reference that I have reordered slightly, but also look to engage with relevant parts of the

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<sup>1</sup> See Altman, JC (Chair) 1989. *The Aboriginal Arts and Crafts Industry: Report of the Review Committee*, AGPS, Canberra.

<sup>2</sup> Developing an Indigenous Arts Strategy for the Northern Territory. See <http://caep.r.anu.edu.au/sites/default/files/Publications/WP/CAEPRWP22.pdf>.

<sup>3</sup> Competition and Consumer Issues for Indigenous Australians. See <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.459.8077&rep=rep1&type=pdf> and [http://caep.r.anu.edu.au/sites/default/files/Publications/DP/2002\\_DP235.pdf](http://caep.r.anu.edu.au/sites/default/files/Publications/DP/2002_DP235.pdf).

<sup>4</sup> Submission to the Inquiry into Australia's Indigenous visual arts and craft sector [http://caep.r.anu.edu.au/sites/default/files/Publications/topical/Altman\\_Arts\\_0.pdf](http://caep.r.anu.edu.au/sites/default/files/Publications/topical/Altman_Arts_0.pdf).

Katter Bill and important issues raised by it and its Explanatory Memorandum. I will also look to make some recommendations but begin with two over-arching observations.

First, in June 2007 *Indigenous Art – Securing the Future* made 29 recommendations divided between ten ‘key’ recommendations and 19 ‘other’ recommendations. A number of these recommendations particularly in relation to the now implemented Indigenous Art Commercial Code of Conduct, and enhanced activities by the ACCC and Australian Customs, are of direct relevance to this Inquiry. Of special relevance was recommendation 25 that the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights; and that Australian Customs be given an appropriate role in assisting the protection of these rights in relation to imports and exports. I am surprised that terms of reference for this Inquiry do not seek to address to what extent these recommendations have assisted to ‘secure the future’. Arguably the Katter Bill is a partial response to recommendation 25 of that earlier Senate Inquiry.

Second, it is generally recognised that the Indigenous visual arts sector is extraordinarily diverse and complex reflecting in large part Australia’s colonial past that extinguished much arts practice and then the postcolonial development and growth of this sector in the last four to five decades. Simplifying distinctions that are couched as dichotomies are frequently made between: art that is produced by Indigenous and non-Indigenous people; tourist art and fine art; urban art and remote art; hand-crafted and mass-produced art; art that is copied and art that is derivative; art that is produced domestically and internationally; and art that is produced (domestically or internationally) with legitimate licencing agreements or without. The final dichotomy of paramount importance here is between ‘authentic’ and ‘inauthentic’, or ‘fake’, arts and crafts product or merchandise.

The range of Indigenous and Indigenous-style art that is available for purchase is often made up of complicated combinations of these elements with the clear-cut boundaries suggested by over-simplifying dichotomies difficult to demarcate, let alone regulate. My sense from this Inquiry’s terms of reference and print and video media statements by its chair is that this Inquiry is focusing primarily on the perceived problem of manufactured merchandise sold, as if produced by Aboriginal and Torres Strait Islander people.

### ***The definition of authentic [Indigenous] art and craft products and merchandise***

I assume that the words Aboriginal and Torres Strait Islander or Indigenous have been unintentionally excluded from this term of reference given the focus of the Inquiry.

The two concepts of authenticity and indigeneity are complex and open to subjective assessments, contestation and disputable judgments. Debates around the issue of authenticity of Indigenous visual arts have received comprehensive coverage in at least five books from diverse western disciplinary perspectives that provide useful background reading for this Inquiry.<sup>5</sup> However, these books focus primarily on the authenticity issue on relation to high end Indigenous fine art rather than manufactured tourist product.

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<sup>5</sup> See Myers, F 2002. *Painting Culture: The Making of an Aboriginal Fine Art*, Duke University Press, Durham; Coleman, EA 2005. *Aboriginal Art, Identity and Appropriation*, Aldershot, Ashgate; Morphy, H 2008. *Becoming Art: Exploring Cross-Cultural Categories*, UNSW Press, Sydney; Gibson, L. 2013. *We Don’t Do Dots: Aboriginal Art and Culture in Wilcannia, New South Wales*, Sean Kingston Publishing, Canon Pyon; and Fisher, L 2016. *Aboriginal Art and Australian Society: Hope and Disenchantment*, Anthem, London.

In this submission which is informed by these broader debates, I focus primarily on the useful distinction between **nominal** authenticity and **expressive** authenticity made by the late philosopher Denis Dutton an expert on the question of 'authenticity in art'.<sup>6</sup>

Nominal authenticity refers to the correct authorship or provenance of an object. In the context of this Inquiry nominal authenticity might require that the author or creator of a product is not just properly attributed but also that they be Indigenous. Nominal authenticity would require an art and craft product or merchandise to be produced and/or designed and legitimately licenced by an Indigenous person or community or arts organisation.

Expressive authenticity connotes something different, whether an object's character is a true expression of an individual's or a community's or society's values and beliefs. In the context of this inquiry I would add here some form of recognised link to an individual or community's customs and traditions, sometimes depicted as the style of a distinct regional or linguistic group, or family group art style.

Authentic Indigenous arts and craft products and merchandise face the double threshold of requiring both nominal and expressive authenticity.

In the Katter Bill the challenges of definition become apparent. In the Explanatory Memorandum, an Indigenous artist is defined as someone who self identifies as Indigenous and is recognised as such by the community with which the artist identifies. This proposed definition is problematic on three counts.

First, the 2016 Census has identified an unusual demographic transition associated with rapid Indigenous population growth since 2011 to an estimated 786,689 Indigenous Australians at 30 June 2016. Analysis by Francis Markham and Nicholas Biddle from the ANU shows that rapid growth can be partly explained by natural population growth but also by changing patterns of identification that is sometimes referred to as 'unexplained growth'. I do not want to labour the point here except to note that most this growth occurred in NSW and Queensland where many self-identifying Indigenous people are not linked to a community and so would fail to meet the definition of Indigenous in the Katter Bill.

Second, unlike the standard Commonwealth definition, the Katter definition makes no mention of indigenous ancestry. Arguably, this can result in the definition of Indigenous being too inclusive, something that was demonstrated by Bob Katter himself in July 2017 when he referred to himself as a 'blackfella' on the ABC's Q&A show. Later he explained that this reflected a community acceptance of him as Indigenous when he was a young man, a classificatory or fictive inclusiveness that is not unusual but would not confer nominal authenticity.

Third, there is the possibility that someone might identify as Indigenous and even be able to demonstrate ancestry but fail to gain community recognition; or alternatively, may not identify as Indigenous but be recognised as Indigenous by a community. This opens the possibility of debate and disputation on who is and is not Indigenous that in the Inquiry context might have implications in terms of not just producers, designers and licensors, but also sellers of Indigenous arts and crafts products and merchandise.

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<sup>6</sup> See 'Authenticity in art' in *The Oxford Handbook of Aesthetics* (J. Levinson, ed.) New York: Oxford University Press, 2003.

In terms of expressive authenticity, the Katter Bill looks to grapple with this issue by being inclusive, hence for example, an Indigenous cultural expression can be an expression of Indigenous culture that is made by an Indigenous artist which is arguably tautological and not very helpful. Indeed, there is also a suggestion that derivation, likeness and resemblance to something made by an Indigenous artist might constitute Indigenous cultural expression. In fact, the expressive authenticity of Indigenous cultural expression can be tightly held and jealously guarded by various groupings scaling up from particular clan designs owned by small kin-based groups to distinct styles from regions like the East Kimberley or Western Desert or different geographic zones in Arnhem Land.

There are important issues about the precise definition and demarcation of an art or craft style with expressive authenticity; and the associated prospect that the onus of proof might shift onto an Indigenous producer, designer, licensor or seller to demonstrate that they have rights in a style. This would be an unfortunate consequence of any legislative attempt to define and regulate authentic Indigenous products and merchandise.

Indeed, there is the real prospect that any attempt to regulate nominal and/or expressive authenticity will lead to a third form of authenticity that the late historian Patrick Wolfe labelled ‘repressive’.<sup>7</sup> Wolfe coined this term in his critique of the need for Indigenous native title claimants to prove the legitimacy of their claim according to the Native Title Act’s requirements that they demonstrate continuity of tradition and customs observed and connection to claimed lands. It would be an unfortunate consequence of this Inquiry if such onerous requirements were extended in any way into the domain of the arts including manufactured tourist art.

***An examination of the prevalence of inauthentic Aboriginal and Torres Strait Islander ‘style’ art and craft products and merchandise in the market***

This term of reference is a first order issue that requires primary data collection and analysis. It is only when definitions are agreed on what constitutes authentic and inauthentic Indigenous arts that any attempt can be made to examine and quantify the prevalence of the inauthentic as some proportion of the total sector. In my view, this is a fundamental issue that should have been addressed prior to the establishment of this Inquiry.

There are at least five questions embedded in this term of reference:

- 1 What is the size of the Indigenous visual arts sector?
- 2 What proportion is Indigenous art and crafts products and merchandise as distinct to fine art, bearing in mind that the boundary between the two categories is often blurred.
- 3 Of Indigenous arts and crafts products and merchandise what proportion might be deemed to be ‘authentic’ and what proportion ‘inauthentic’?
- 4 Of Indigenous arts and crafts products and merchandise, what proportions of authentic/inauthentic is imported/domestically manufactured?

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<sup>7</sup> See initially Wolfe, P. 1999. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*, Cassell, London; and most recently Wolfe, P. 2015. *Traces of History: Elementary Structures of Race*, Verso, London.

- 5 Of Indigenous arts and crafts products and merchandise, what proportion is manufactured under legitimate licencing arrangements with Indigenous art organisations or individuals and what proportion is not?

Answering these questions is a difficult task that the Australian government and numerous stakeholders have grappled with for decades. Currently there seems to be no accurate estimate of the size in financial (final sales) terms of the entire sector, let alone the component parts described above.<sup>8</sup> The last rather rubbery estimate made in 2007 and quoted by then Arts Minister Peter Garrett suggested that the entire sector might be worth \$500 million per annum. In 2012, the Office of the Registrar of Aboriginal Corporations estimated that turnover of incorporated Aboriginal arts organisations might have declined by 52 per cent in the aftermath of the Global Financial Crisis.<sup>9</sup> More recently, the Aboriginal and Torres Strait Islander Arts Economies project has indicated that the arts centres sector might have recovered back to where it was in 2007, but this project only focused on art centres and remote Australia.<sup>10</sup> The information that is currently available provides little guidance to answer the five questions above.

In the absence of industry statistics, it is difficult to understand how this Inquiry can refer to the ‘growing presence’ of inauthentic product. Not only do we lack information on the current prevalence of inauthentic product, but we additionally lack any trend data on whether this prevalence has grown.

In the absence of evidence, what we have is perception at best and mere anecdote at worst. And so, the main stakeholders seeking government intervention and action in relation to inauthentic or fake Aboriginal art and craft products available in shops have come up with generalised estimates with no methodology or source provided about how they have been made.

The Fake Art Harms Culture Campaign suggests that this proportion is around 80 per cent, while Mr Katter refers to 85 per cent in souvenir shops. Elsewhere in an SBS News article Mr Katter conflates this issue by noting that ‘based on empirical observation, approximately 85 to 95 per cent of what was sold in “tourist shops” in his northern Queensland seat was made overseas’.<sup>11</sup> The problem with this latter observation is that it does not identify if what is imported from overseas is manufactured under licencing agreements with Indigenous organisations and individuals. The problem with the former anecdotal observations, even if accurate, do not tell us if there is an upward trend in this proportion; and again no distinction is made between products manufactured under licencing agreements and those that are not.

In the absence of any industry statistics it is difficult to assess the prevalence of ‘inauthenticity’ or whether it is growing. What is important is that regulatory arrangements are in place so that if any holder of Indigenous intellectual or cultural property rights feel that

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<sup>8</sup> See Hoegh-Guldberg, H. 2002. The Indigenous Art and Craft Market: A Preliminary Assessment for the Cultural Ministers Council Statistics Working Group. Cultural Ministers Council Statistics Working Group. Canberra.

<sup>9</sup> Commonwealth of Australia 2012. At the Heart of Art: A snapshot of Aboriginal and Torres Strait Islander corporations in the visual arts sector, Office of the Registrar of Indigenous Corporations, Canberra.

<sup>10</sup> See <https://old.crc-rep.com/research/enterprise-development/aboriginal-and-torres-strait-islander-art-economies> and also Submission 1 to this Inquiry by Ninti One.

<sup>11</sup> <http://www.sbs.com.au/news/article/2017/05/18/bob-katter-renew-push-protection-indigenous-artists-following-chanel-faux-pas>.

if these rights have been unfairly transgressed then legal avenues are available to pursue and prosecute the transgressor.

***Current laws and licencing arrangements for the production, distribution, selling and reselling of authentic Aboriginal and Torres Strait Islander art and craft products and merchandise***

Current laws and licencing arrangements can operate to facilitate the production and selling of authentic Aboriginal art and craft products and merchandise in two ways.

Positively, legal mechanisms under commercial arts law can facilitate the entering of licencing agreements that see the manufacture of authentic Indigenous products in collaborations between Indigenous artists and Indigenous or non-Indigenous, domestic or international manufacturers. There are numerous examples of individual Indigenous artists and community based art centres using commercial contracts successfully with three examples from my direct research being Injalak Arts in Gunbalanya, Babbarra Women's Centre in Maningrida and Warlukurlangu Artists in Yuendumu. Arguably if artists and their representative organisations in these very remote circumstances can avail themselves of commercial instruments under current laws others should be able to do so.

Negatively, current laws might be required to prosecute manufacturers or sellers who operate unethically or illegally. When I undertook research (with colleagues) for the ACCC on competition and consumer issues in the Indigenous visual arts sector I found that there were a number of legal mechanisms available for the protection of Indigenous intellectual and cultural property in the arts. These included copyright law, design law and trade practices law. Of particular relevance to this Inquiry are issues of unconscionable conduct in relation to producers and misleading and deceptive conduct in relation to consumers. I also found that there had been a number of successful prosecutions of offenders going back to 1989 mainly for misleading and deceptive conduct, but also for breach of copyright. I will not revisit this research here provide it as a resource for the Committee.<sup>12</sup> Others have also undertaken in-depth research on this issue, including Dr Vivien Johnson and Ms Terri Janke.

The key issue that emerges here is whether the existing legal framework is adequate for the Indigenous art sector's requirements. If the estimates of inauthentic merchandise proliferation can be empirically verified then there clearly is a problem. Alternatively, if the estimates made by the Fake Art Harms Culture campaign and Bob Katter of 80 per cent to 95 per cent are exaggerated then the current legal framework may be operating effectively. This is why evidence to address the five empirical questions about prevalence outlined above is of fundamental importance to this Inquiry.

Certainly as a number of submissions to this Inquiry indicate there is a strong perception among a number of Indigenous and non-indigenous stakeholders that inauthenticity is a problem. This in turn raises the critically important question whether the legal framework as currently structured is inadequate in which case some reform of the law might be required? Or whether it is the application of the law, including by stakeholder organisations that are mounting the Fake Art Harms Culture campaign that is inadequate because these organisations are poorly resourced?

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<sup>12</sup> <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.459.8077&rep=rep1&type=pdf> and [http://caepn.anu.edu.au/sites/default/files/Publications/DP/2002\\_DP235.pdf](http://caepn.anu.edu.au/sites/default/files/Publications/DP/2002_DP235.pdf).

It seems that those mounting the Fake Art Harms Culture campaign and Bob Katter believe that the answer to this question is that the legal framework needs strengthening. This raises the further question, that I return to, of whether the Katter Bill provides the appropriate means to drive inauthentic art from the market.

But if the legal framework works effectively for some and allows punitive regulation of those who transgress, there is a distinct possibility that it is the application of legal regulations and sanctions that is inadequate bearing in mind that there are a number of organisations that have objectives to represent the interests of Indigenous artists and receive some public funding to do so. This in turn suggests that these organisations, that include about 100 community-based art centres, are likely to be inadequately resourced to avail themselves of regulatory and licencing options currently available or lack capacity in these areas. This in turn suggests that they might need additional assistance to buy in expertise in the difficult area of licencing and protecting the property rights in cultural assets of Indigenous people.

***Options to promote the authentic products for the benefit of artists and consumers***

There are options available to artists, manufacturers and sellers (retailers and wholesalers) that could see the promotion of authentic Indigenous arts products. Some might occur with continuation of best practice business as usual, some might require additional support. The three most pressing issues in my view are: to empower art centres and/or individual Indigenous artists to properly document their art and enter into transparent and binding licencing agreements to assuage any concerns that discerning consumers might have about a product's authenticity; to educate the public about the nature of contemporary Aboriginal art so that they can make informed choices, that can be price sensitive, about what they purchase; and to build the manufacturing capacity of Indigenous enterprises that wish to engage in the production and sale of manufactured tourist art.

The first of these options is perhaps most straightforward because there is so much exemplary practice that could be more widely disseminated by peak arts organisations. Specific campaigns might highlight the need for consumers to check labelling to make sure that a product is either produced by Indigenous artists or else is produced under legitimate licencing arrangements. An issue here that does not need to be over-emphasised is that there is potential for those with nominal authenticity to transgress protocols of expressive authenticity. This is a complex issue that might need to be resolved in the Indigenous domain. It would certainly not benefit market perceptions of authenticity if there was publicised debate and conflict about ownership and rights in particular art styles or content.<sup>13</sup>

The second option lies mainly with public art institutions and commercial dealers. As submissions to this Inquiry demonstrate there are retailers attached to major public arts institutions like museums and galleries, but also Australia's parliament house, that take care in sourcing merchandise and documenting its provenance. As the public, including inbound tourists who often visit these cultural institutions, get better educated about the nature of contemporary Indigenous art and its diversity, buyers are more likely to become more discerning and make informed choices that differentiates authentic from inauthentic product.

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<sup>13</sup> It is often assumed that art styles from remote Australia are the ones more likely to be appropriated or misrepresented. But Lorraine Gibson in *We Don't Do Dots: Aboriginal Art and Culture in Wilcannia, New South Wales* (Sean Kingston Publishing, Canon Pyon) documents how Indigenous artists in remote NSW look to inform consumers of their distinct home grown artistic traditions.



The third option is to better support what is already working, bearing in mind that Indigenous manufacturers often face major challenges of scale of production (especially with hand-crafted products) and marketing, hence the need for licencing arrangements and joint venturing of diverse forms. This might seem like an obvious observation, but over the last few years, and certainly since the mainstreaming of many Indigenous-specific programs, Indigenous success has at times been defunded rather than rewarded. Examples of this have occurred especially under the Indigenous Advancement Strategy that has been reviewed critically by the ANAO and the Senate Finance and Public Administration References Committee. I do not wish to labour this issue here except to note that if the economic benefit of artists is of paramount importance then institutional arrangements could be readily tailored in a cost-neutral manner to increase the availability of authentic Indigenous product for the tourism market.

***Options to restrict the prevalence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise in the market***

Options to restrict the prevalence of the inauthentic depend on its actual prevalence and whether the existing regulatory framework is adequate or needs reform.

Assuming that it is adequate then the question arises why the producers and sellers of inauthentic product that is falsely or misleadingly represented as authentic or legally licenced are not prosecuted? Part of the answer might be that organisations like the ACCC or members of the Fake Art Harms Culture campaign consortium or peak Indigenous arts organisations or community based arts organisations lack the financial resource to prosecute. Under such circumstances there may well be a case for renewed government funding of legal proceedings. I note here that while such enhanced support might be desirable and have positive spinoffs for both Indigenous interests and the national tourism sector, since 2014 the Australian government has been more concerned to reduce rather than expand financial support for Indigenous-specific legal services of any variety.

If existing protections are inadequate, and this is an assumption that needs to be scrutinised by legal experts in this area, then what sort of amendments to the regulatory framework might be needed?

In my view the current proposal in the Parliament in the form of the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (the Katter Bill) would be unhelpful and potentially harmful to Indigenous arts interests.

The Explanatory Memorandum indicates that the Bill seeks to prevent 'non-First Australians' and 'foreigners' (his terms) benefitting from the sale of Indigenous art, souvenir items and other 'cultural affirmations'. At once in this Bill there is the populist nationalistic (and anti-competitive) requirement that the 'thing' (product/merchandise) be made in Australia; and the exception clause to this prohibition if it is in accord with 'an arrangement'. While this Bill is apparently compatible with Human Rights requirements, it may not be compatible with the Trade Practices Act. The bottom line is that the Katter Bill misunderstands the nature of the Indigenous tourist arts sector and marketing that is highly dependent on non-First Australian sellers; and possibly underestimates the competitive edge that offshore manufacturing affords some Indigenous art centres or artists who enter into licencing agreements that benefit both Indigenous and foreign parties.

If nothing else the Katter Bill proposals would be impossible to rigorously regulate and ‘hospital-passing’ this role to a ministerially-appointed committee will not overcome the challenges posed by the diversity and complexity of production and marketing of Indigenous products and merchandise. The very language of this Bill could also have a negative impact if it drives or excludes non-Indigenous sellers some of whom are of fundamental importance to the robustness of the market.

At best, there might be legal requirement for appropriate labelling of Indigenous art and craft products and merchandise (e.g. ‘this product is Indigenous-made’, ‘this product is made under licence issued by ... ‘), although this may already be required under existing Australian law. I prepare this submission after a visit to eastern parts of the USA and Canada where native tourist art is very clearly labelled for the discerning buyer. What I am not sure of in these other settler state contexts is whether this has resulted in the driving of inauthentic product from the market?

### **Conclusion**

I want to end with some general observations and the briefest of recommendations.

First, this Inquiry looks to engage with the issue of how to protect the intellectual and cultural property rights of Indigenous Australians for their economic and cultural benefit. This is a form of property that is extraordinarily difficult to readily demarcate and to regulate for reasons outlined above. And yet at the same time other more tangible forms of property rights, for example in minerals or other commercially valuable resources that are far more amenable to clear demarcation, are ignored in policy debates. A form of what Karen Engle has referred to as ‘the elusive promise of Indigenous development’ is being promoted by this Inquiry.<sup>14</sup> This is reminiscent of the Senate Inquiry a decade ago that was to ‘secure the future’ of Indigenous visual arts. We must ask what can state intervention deliver beyond providing financial support?

Indeed, the Indigenous visual arts sector has been an outstanding success enjoying sustained support with some fluctuations over the past 26 years. At the heart of this success has been community-control, empowerment and capacity that still needs to be enhanced. The funding architecture for Indigenous visual arts is one of the few remaining vestiges of community-led development from the self-determination era; it is instructive of what can be achieved with devolution and relatively at arms-length support.

However, there is always a danger that an Inquiry such as this will unintentionally reduce rather than enhance consumer confidence in the authenticity of Indigenous art and craft products and merchandise. This is especially the case when the first-order issue of the extent of the prevalence of the inauthentic has not been rigorously established. There is also the danger that the Inquiry will divert scarce parliamentary attention from more pressing issues of Indigenous policy.

Finally, it is imperative that the trap of administratively complex regulation is avoided. Not only does this raise issues of administrative cost versus producer benefit, but it can also lead to unintended consequences such as the emergence of loose derivatives and generic copies that make no claim to be authentic. It is important that key Indigenous stakeholders are

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<sup>14</sup> Engle, K 2010 *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, Duke University Press, Durham.

empowered to determine what is or is not authentic rather than have this determined by some centralised committee or mandatory authenticity labelling requirement.

I end with four brief recommendations:

- 1 Research is urgently needed to estimate the size of the Indigenous visual arts sector and to determine if the issue of 'inauthentic' product is real or imagined. Evidence is needed to accurately document the perceived problem if it is to be effectively addressed.
- 2 Irrespective, there are strong developmental grounds to support Indigenous arts organisations to enhance their manufacturing capacity and/or the organisational capacity to enter commercially-sound licencing arrangements. Ensuring that there is sufficient authentic product and merchandise available is imperative. Some art centres have shown what can be done, but they often operate with limited short-term funding, some longer-term 'industry seeding' support might result in significant returns on investment in this area.
- 3 More effort should be directed to educating the public and inbound tourists about how to identify 'authentic' products and merchandise and where to purchase these.
- 4 If evidence indicates that legislative change is required, this should focus in the first instance on the requirement for the accurate labelling of all products, including imports.