

Chapter 9

Enhancing the market for Indigenous art – I

9.1 The Indigenous arts and craft industry is not immune from the problems that have befallen other industries, and concerns about fraud and unscrupulous conduct within the Indigenous arts and craft industry have been raised in many submissions to the inquiry.

9.2 This chapter briefly examines what legislation may currently exist to protect people within the industry from exploitation and other unethical practices, how these enforcement mechanisms appear to be working in reality, and what witnesses feel could be done to afford better ongoing protection of the industry and its artists.

Trade Practices Act 1974

9.3 It is the role of the Australian Competition and Consumer Commission (ACCC) to enforce the consumer protection and fair trading provisions of the *Trade Practices Act 1974* (TPA). Relevant aspects include prohibiting business conduct which is, or is likely to be, misleading or deceptive, and prohibiting unconscionable conduct by businesses in their dealings with consumers.¹

9.4 There are two main areas under the TPA that are relevant to the examination of unscrupulous trader activity occurring within the Indigenous visual arts and craft sector. Sections 51AA and 51AC of the TPA deal with the issue of unconscionable conduct. Section 52 of the TPA deals with misleading and deceptive conduct. An explanation of these sections and their relevance to the Indigenous arts and craft sector is provided below.

Unconscionable conduct

9.5 Unconscionable conduct is defined as being taken advantage of in a transaction in a way that offends the conscience. The TPA recognises that there may be circumstances or a situation in which the manner in which a contract was executed was unconscionable, such as a disparity in bargaining power.

9.6 While three sections in part IVA of the TPA address unconscionable conduct, only two relevant sections will be discussed for the purposes of this inquiry. In determining which provision will apply to a given set of circumstances it is first necessary to determine whether the conduct falls within ss. 51AA or 51AC.²

1 ACCC, *Submission 60*, p. 1.

2 ACCC, *Guide to Unconscionable Conduct*, Commonwealth of Australia, October 2004, p. 1.

9.7 Section 51AA of the TPA is a statutory prohibition on conduct which is unconscionable according to established legal principles. The courts have described unconscionable conduct as:

- serious misconduct or something clearly unfair or unreasonable;
- conduct which shows no regard for conscience;
- conduct which is irreconcilable with what is right or reasonable.

9.8 The court has indicated that it may be willing to grant relief under s. 51AA when:

- the stronger party unfairly exploits the weaker party's disadvantage;
- the stronger party relies on their legal rights to take advantage of the weaker party in a way that is harsh or oppressive;
- the stronger party allows the weaker party to rely on an incorrect assumption, or fails to disclose an important fact;
- one party benefits unfairly from the deal at the expense of the other party;
- the weaker party relies on a misrepresentation by the stronger party;
- the weaker party is unable to understand the deal, due to lack of experience or professional advice.

9.9 Section 51AC sets out several factors the court can consider in deciding whether or not conduct was unconscionable. They include, but are not limited to:

- the relative bargaining strength of the parties;
- whether the stronger party imposed conditions that were not necessary to protect their legitimate business interest;
- the use of undue influence, pressure or unfair tactics;
- whether the weaker party could obtain supply on better terms elsewhere;
- whether the stronger party made adequate disclosure to the weaker party;
- the willingness of the stronger party to negotiate;
- the extent to which each party acted in good faith;
- the requirements of any relevant industry code.

9.10 Section 51AC builds on the traditional concepts of unconscionable conduct under s. 51AA that apply to all commercial situations, not just the buyer-seller relationship. The ACCC explains that unconscionable conduct provisions do not apply to situations where one party may have simply made a poor deal.³

3 ACCC web site, *Unconscionable conduct 51AA & 51AC*, <http://www.accc.gov.au/content/index.phtml/itemId/303748/fromItemId/3669>, accessed 13 February 2007.

9.11 The ACCC recognises that Indigenous communities, particularly those in remote areas, often experience multiple forms of disadvantage or vulnerability and a general lack of awareness of competition and fair trading laws and as such may be more exposed to market exploitation relative to other consumer groups.⁴ This is particularly relevant to the Indigenous arts and craft sector, where this type of exploitation is purported to occur.

9.12 The ACCC gave no indication that any enforcement actions had been taken under ss. 51AA or 51AC for unconscionable conduct in the Indigenous art industry. However many submitters to the inquiry have indicated sincere concerns about regular unscrupulous activities between dealers and artists. As Professor Howard Morphy pointed out:

One of the things is the fact that some artists may not speak English and may have very little familiarity with the real value of money, and in particular not know the difference between \$150 and \$2,500 or something like that. Unscrupulous people will exploit that in their own interests. That is one of the things where arts centres and reputable dealers will protect the artist. In a sense they are protecting them against their lack of familiarity with usual Australian trade practices.⁵

9.13 Similarly, Ms Brenda Croft, Senior Curator of Aboriginal and Torres Strait Islander Art at the National Gallery, stated:

If you are a taste maker you want to promote someone's art and then you see all of these really unscrupulous people coming in and selecting those artists and then preying on them. It is not about free choice. People do not have those choices out in those communities where there is not access to understanding where your work goes or what happens with it. There are too few of us in the industry who are able to assist in that sense and we are fighting the undermining that is happening all the time.⁶

Misleading and deceptive conduct

9.14 Section 52 of the TPA deals with the issue of misleading or deceptive conduct and applies mainly to the relationship between businesses and intended consumers of their goods and services.

9.15 Under the TPA businesses must not do things that are misleading or deceptive, or would be likely to mislead or deceive customers (or anyone else including other businesses) with whom they have any form of commercial contact. This includes discussions and contracts, advertising in any form as well as labelling and packaging of products.

4 ACCC, *Submission 60*, p. 2–3.

5 Professor Howard Morphy, *Committee Hansard*, 9 February 2007, p. 75.

6 Ms Brenda Croft, National Gallery of Australia, *Committee Hansard*, 9 February 2007, p. 54.

9.16 Misleading someone includes:

- lying to them;
- leading them to a wrong conclusion;
- creating a false impression;
- leaving out (or hiding) important information in certain circumstances; and
- making false or inaccurate claims about products or services.

9.17 It is not necessary to prove that the conduct actually misled or deceived anyone, nor does it matter whether the misrepresentation is intentional, deliberate or accidental. What matters is the overall impression that is left in the customer's mind.⁷

9.18 The ACCC can take action in court against corporations and related individuals involved in misleading conduct, and may apply to the court for an injunction and other orders.

9.19 In enforcing consumer protection laws, the ACCC focuses on industry-wide conduct and conduct that affects many consumers, to achieve outcomes that make the most effective use of its resources. The ACCC cannot take action in all circumstances of misleading conduct.

9.20 Aside from enforcement by the ACCC, any person or business that has suffered a loss as a result of a business's misleading or deceptive conduct or misrepresentation may have a private right of action under legislation. Courts can order damages, injunctions and other orders against businesses found to have engaged in misleading or deceptive conduct.

9.21 Additionally, there are Offices of Fair Trading in each state and territory that can help with local issues of misleading conduct – if the business involved is a local trader, or the matter is within a certain locality. In some circumstances the Offices of Fair Trading can help consumers to resolve issues with businesses, or provide information about lodging claims in the Small Claims Tribunal.⁸ The committee wrote to state and territory departments of consumer affairs inviting submissions, however none were received.

9.22 In the ACCC's submission to the inquiry, only one example was given of court action against a business for misleading conduct when dealing in Aboriginal art products. Australian Icon Products was one of Australia's largest manufacturers of Aboriginal style souvenirs. The ACCC took action against Australian Icon under

7 ACCC web site, *Misleading Conduct*, <http://www.accc.gov.au/content/index.phtml/itemId/352599/fromItemId/3871>, accessed 14 February 2007.

8 ACCC web site, *What to do if You Think You Have Been Misled*, <http://www.accc.gov.au/content/index.phtml/itemId/740212/fromItemId/3871>, accessed 15 February 2007.

s.52 of the TPA for misleading and deceptive conduct over the company's false claims about the authenticity of the souvenirs which purported to be authentic and certified Aboriginal art, when in fact, the souvenirs were painted by a pool of Indigenous and non-Indigenous artists and no certification process was in place.

9.23 The ACCC's submission also referred to a number of other investigations into complaints of traders of Indigenous artworks potentially breaching the TPA. These complaints apparently all achieved compliance/resolution without court action being taken.⁹

9.24 During the inquiry the question was raised as to the extent of exploitation of Indigenous people by unscrupulous dealers, and what the level of business and marketing knowledge was in some communities. In response to this issue, Dr John Moriarty of the National Indigenous Council told the committee:

From the traditional communities the knowledge of marketing and even the level of education of marketing systems, or even the practices that go on from where an object is sold and the process that object goes through, the knowledge would be pretty well down to zero. That is a group that can be very easily exploited, and I put my community in that category.¹⁰

9.25 The ACCC advised the committee that they were well aware of such concerns about potential breaches of the TPA, and that they received on average between 30 and 40 per annum 'Indigenous-specific calls' on the ACCC's Indigenous hotline. While these were not all related to TPA issues, the ACCC was examining ways to bring awareness of TPA issues to Indigenous communities.¹¹

9.26 One initiative the ACCC had implemented was the development of a trade practices training manual designed to assist Indigenous communities to become aware of various forms of wrong market behaviour and associated issues, and this was part of the ACCC's outreach program:

which is a process of individual officers travelling to communities and basically—rather than us trying to move and educate a number of individual consumers in the communities—recognising the issues of trust and confidence that members of the community have within their local councils, working with those councils so that those people who are in regular contact and engage with members of the community are alert to the issues and are able to relay those messages and to get any concerns back to us. So it is really actively engaging with that broader network of Indigenous consumer councils around the country, but we have commenced the process in Western Australia to identify any issues we need to think about before we go more broadly.¹²

9 ACCC, *Submission 60*, p. 7.

10 Dr John Moriarty, National Indigenous Council, *Committee Hansard*, 9 February 2007, p. 43.

11 Mr Nigel Ridgway, ACCC, *Committee Hansard*, 23 February 2007, pp 61–62.

12 Mr Nigel Ridgway, ACCC, *Committee Hansard*, 23 February 2007, pp 61–62.

9.27 As a result of evidence and submissions provided to the committee during the course of this inquiry, the ACCC conducted a review and in the process identified some possible indicators of unconscionable conduct. The ACCC advised the committee that 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.¹³

9.28 The ACCC, while having regard to the submissions and transcripts and subsequent discussions with industry participants, noted that enforcement activity under the TPA will not completely resolve ongoing concerns about unscrupulous and unethical conduct in the 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.¹⁴ Those strategies might include education, resources and infrastructure in Indigenous communities as well as additional support for artists visiting major centres.¹⁵

9.29 In regards to the difficulties of enforcing the TPA, the ACCC noted a comment from submission 11 to the inquiry by Professor Altman, Director of the Centre for Aboriginal Economic Policy Research, which stated 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'.¹⁶ A full copy of the ACCC's correspondence to the committee outlining their review of submissions and verbal evidence for indicators of potential breaches of the Trade Practices Act is attached at Appendix 4.

Imports of non-authentic Indigenous art and products

9.30 One issue of concern within the industry is the problem of imported non-authentic Indigenous arts, craft and souvenirs from other countries, which are then sold in this country as Australian Aboriginal art. While some of these products may not actually claim to be made in Australia and may be marked 'made in China' for

13 ACCC, Correspondence to the committee, 8 June 2007, p. 1.

14 ACCC, Correspondence to the committee, 8 June 2007, p. 1.

15 ACCC, Correspondence to the committee, 8 June 2007, p. 8.

16 ACCC, Correspondence to the committee, 8 June 2007, p. 6.

example, this type of product still serves to undermine the work of genuine Australian Indigenous artists.

9.31 IdenteArt Authentication Systems, a company working in the field of product protection and authentication technologies, submitted to the inquiry their concerns about:

The influx/export of Non-Indigenous/non-authentic cheap "Aboriginal-Styled" Art and Craft into Australia having a detrimental affect on local Indigenous art and craftsmen pricing, competitiveness and businesses infrastructure investment and development... The export into Australia of "Aboriginal styled" art and craft with made in China, Taiwan labels etc that is later is sold in major Australian capital cities now bearing written certificates of authentication. With advances in reproductive technologies and techniques it has increasingly difficult for consumers and indeed authorities to determine if fine art and craft pieces originated in Balgo or Bombay.¹⁷

9.32 The committee also heard a first hand example of how some of these fake imports come to exist in the first place:

Four weeks after the first paintings had been put onto the market, an Indian dealer turned up in a hire car at Yuendumu and started to try to buy up every piece of art that was currently being produced. After checking with Daphne Williams at Papunya Tula, we were informed that this man was going around buying authentic original pieces of Indigenous art, taking them back to India, mass producing them and selling them to tourists on the Gold Coast. That was four weeks after we started our program.¹⁸

9.33 This example highlights some of the difficulties in policing or regulating this type of activity, as there are two distinct issues here. One issue is whether and how the sale of art to purchasers who have unethical intentions might be regulated in the first place, preventing their use for the purpose of mass reproduction; the second is how can such mass-produced products be prevented from being imported into Australia.

9.34 One way of dealing with this is to stop such products entering the country via Customs. However, this is easier said than done, and the import of Indigenous art and craft products is not illegal unless the products purport to be genuine Indigenous art made by Indigenous Australians, or unless they are works purporting to be that of Indigenous artists who might have registered a copyright or have intellectual property rights to their name. A current list of prohibited and restricted imports on the Australian Customs Service web site does not include any reference to the importation of inauthentic Indigenous art products.¹⁹

17 IdenteArt Pty Ltd, *Submission 25*, p. 3.

18 Dr Peter Toyne, Identeart Pty Limited, *Committee Hansard*, 11 April 2007, p. 5.

19 Australians Customs Service, *Prohibited and Restricted Imports*, <http://www.customs.gov.au/site/page.cfm?u=4369>, accessed 15 February 2007.

9.35 The *Copyright Act 1968* may be used to enforce the control of the importation into Australia of 'inauthentic' artworks and souvenirs that purport to be genuine Indigenous arts and craft.²⁰ In relation to imported artworks, the copyright claim would be in the artistic works created by the Indigenous artist. To protect copyright works from importation of unauthorised works, the Australian Customs Service (ACS) stated that the copyright owner must have a Notice of Objection in place with Customs. This is a legal document that allows Customs to seize imported goods that infringe copyright owners' rights. The ACS suggested, however, that it would be 'quite difficult to protect these imports given the range of artists and types of work that may be imported'.²¹

9.36 Another possible avenue of redress is under the *Commerce (Trade Descriptions) Act 1905* (CTDA). Under this Act it is an offence to import goods bearing a false trade description. Customs can seize goods that bear a false trade description under warrant. However, it is a defence if the defendant proves that he or she did not intentionally import the goods in contravention of the Act. Customs noted that:

The combined requirements for Customs to obtain a warrant to seize goods bearing a false trade description and the defence provisions, mean that seizure of goods under the CTDA is resource intensive for Customs. It also places the costs involved onto the Commonwealth.²²

9.37 The Customs procedures may be of limited use for at least three reasons. First, Indigenous artists are probably particularly unlikely to be registering intellectual property rights, and to be difficult for Customs to contact. Second, Indigenous people generally are less likely to access the court system to exercise those rights, often through a lack of understanding about their legal rights and the court system generally. Third and most importantly, many of the problems with imports are about the undermining of Indigenous creators through general imitation of Indigenous artistic styles rather than specific infringements against an artist's rights.

9.38 The TPA as a legal mechanism also offers some protection from fake imports. During the hearings the ACCC were asked at what point the sale of non-authentic imported products, such as didgeridoos from Bali, breached the TPA. The ACCC advised the committee that:

The section of the act we would be looking under is section 52, the misleading and deceptive conduct provisions. I suggest that if the description of the product that was imported from Indonesia implied that it was Indigenous or originated in Australia then it would be likely to be misleading or deceptive. If it was clearly labelled 'Made in Indonesia', then

20 For a discussion of the issue, see Mr Parnes, Director, The Rainbow Serpent Pty Ltd, *Committee Hansard*, 23 February 2007, pp 23–26.

21 ACS, *Submission 81*, p.1.

22 ACS, *Submission 81*, p. 2.

I think there would be less chance that it would be misleading and deceptive.²³

Copyright laws

9.39 There are two pieces of legislation which may help to protect Indigenous intellectual property rights and these are the Copyright Act and the *Designs Act 2003*. The Designs Act allows individuals to register a design under certain criteria that then affords protection from obvious or fraudulent imitations. The Copyright Act grants a set of particular rights to the creator of art based on three criteria; that the work is original, it can be reduced to a material form, and that the work has an identifiable author. A range of possible infringements are possible, from overt illegal unlicensed reproductions to the shady area of 'Aboriginal inspired' designs.²⁴ For a further discussion see chapter 11.

9.40 Copyright law in relation to Indigenous art has been somewhat effective, and prosecutions have been made which involved a breach of the TPA. In one case, action was brought against a company called Beechrow Pty Ltd, who imported carpets from Vietnam and sold them for up to \$4000 each. These carpets reproduced the work of prominent Aboriginal artists including George Milpurruru and a number of others, but permission to reproduce the artists' work was never sought from the artists or their representatives.

9.41 The courts found that the import of these carpets breached the Copyright Act and also infringed the TPA for false and misleading conduct. The court awarded damages plus ownership of the carpets to compensate for the cultural and personal hurt to the artists.²⁵

Fraud and illegal activity

9.42 The media reported late last year that attempts by the Australian Taxation Office and state police fraud squads to crack down on the financial irregularities and forgeries common in the Indigenous art trade were continuing, but with few visible results.²⁶

9.43 The policing of fraudulent art works in any area, not just within the Indigenous art sector, is generally not a routine or straightforward task. In general, police will only ever investigate matters when defrauded individuals approach the police with their complaint, and this is the same for art fraud matters. Law

23 Mr Michael Kiley, ACCC, *Committee Hansard*, 23 February 2007, p. 57.

24 J.C. Altman et al, 'Some competition and consumer issues in the Indigenous visual arts industry', *Discussion Paper No. 235*, Centre for Aboriginal and Economic Research, A.N.U., 2002, p. 13.

25 Terri Janke, 'Copyright – The Carpet Case', *Aboriginal Law Bulletin*, 13:3(72) 1995, p. 36.

26 Nicholas Rothwell, 'The desert's tainted brush', *The Australian*, 11/9/2006, p. 16.

enforcement agencies will not always be in a position to investigate matters where an individual suspects that a person is distributing fraudulent art works. The complainant in this regard will more than likely be referred to the relevant Department of Fair Trading.²⁷ Therefore, complaints about fraudulent art within the sector are more likely to be pursued through civil law channels rather than criminal ones.

9.44 Because Australia has nine criminal jurisdictions – with the six states, two territories and the Commonwealth, many investigations are restricted to their respective jurisdictions. In instances where more than one jurisdiction is involved, problems can occur over authority. Cross border trading is the norm in the Indigenous art sector and is thus problematic. Also, traditional investigative methods which involve interviewing witnesses, identifying suspects and obtaining statements, are of limited effectiveness in the investigation of art fraud. This is because the investigative trail tends to lack documentary evidence, which conventional fraud inquiries usually rely upon.

9.45 Just because a victim is prepared to report art fraud to the police, it does not mean they are prepared to sign a statement or an affidavit. Individuals can be reluctant to state in an affidavit and then give evidence that they were duped by a counterfeiter. Because art dealers and collectors operate almost solely by their reputation, and knowledge of their chosen fields of art, many are simply not prepared to lower their guard and admit they have been defrauded by counterfeiters. They believe that their business may suffer because of this perceived lapse in their credibility.²⁸

9.46 In addition to the above issues, there can be specific difficulties relating to claims of fraud or forgery in the case of Indigenous art works. Most Indigenous art works are not signed by artists, and it has been suggested that some Indigenous designs are easily copied. Indigenous art may also be the result of collaborations between different family members, meaning several people contribute to a single work, making the establishment of authenticity and provenance more difficult. These issues are addressed in chapter 8.

Issues and solutions

9.47 The Arts Law Centre of Australia argued that the sustainability and development of the Indigenous arts and craft sector is only possible with the reduction of current exploitative practices, and states:

Greater use should be made of laws against misleading and deceptive conduct. An increase in the involvement of the ACCC and other law

27 Paul Baker, *Policing Fakes*, Paper presented at the Art Crime Protecting Art, Protecting Artists and Protecting Consumers Conference convened by the Australian Institute of Criminology and held in Sydney, 2-3 December 1999, p. 6.

28 Paul Baker, *Policing Fakes*, Paper presented at the Art Crime Protecting Art, Protecting Artists and Protecting Consumers Conference convened by the Australian Institute of Criminology and held in Sydney, 2-3 December 1999, pp 7–8.

enforcement agencies in policing this conduct would encourage ethical conduct in the Indigenous art sector.²⁹

9.48 Additionally, Arts Law claimed that the lack of recognisable authenticity protection mechanisms may also affect the financial viability of the sector. Buyers of Indigenous art need some guarantee that the work they purchase is authentic, and the lack of certainty about the authenticity of Indigenous art work can have an impact on the value of such work in the market.³⁰

9.49 Viscopy, a non-profit company representing the rights of artists, claimed that exploitation of Indigenous artists by unscrupulous people is a major concern. In their submission, Viscopy related fourteen different types of experience the organisation had had with unethical or exploitative activity, and stated that:

These are not isolated incidences... We have reported a number of these incidents to Government authorities. Often little or no action is taken due to: a) a lack of resources to take the matter to court; b) a lack of priority for the issue; c) a lack of Indigenous staff with understanding of the issue; d) a lack of interest or expertise regarding market abuse issues from the arts sector. There has been limited direct regulation of the sector, (in fact NSW state regulation of the art market was reduced) during the last ten years, a time of phenomenal growth for the Indigenous art market. This has resulted in an expansion of the problematic aspects of the market as well as the income, such as examples of exploitation.³¹

9.50 The committee was concerned about some of the practices brought to its attention, while recognising that there was often limited evidence available to support allegations about poor conduct in the industry. The committee welcomed the evidence and assistance of the ACCC, and hopes that the information that has been made available during this inquiry will assist the ACCC in targeting poor practices in the industry.

Recommendation 15

9.51 The committee recommends that, as a matter of priority, the ACCC be funded to increase its scrutiny of the Indigenous art industry, including conducting educational programs for consumers as well as investigation activities, with a goal of increasing successful prosecutions of illegal practices in the industry.

9.52 The committee believes that further work of the ACCC in this area, including any prosecutions undertaken, will also assist in identifying if any reforms of relevant trade practices law may be necessary to ensure that fair practices in the industry are fully supported.

29 Arts Law Centre of Australia, *Submission 36*, p. 3.

30 Arts Law Centre of Australia, *Submission 36*, pp 6–7.

31 Viscopy, *Submission 44A*, pp 11–12.

9.53 The preceding evidence highlights the need for better ongoing protection of the industry and its artists. To achieve such improvements generally may require a collaborative approach between industry, relevant organisations and governments. Some of the proposals for achieving better protection for the industry, such as codes of conduct, labels of authenticity, and other types of regulation and legislation are discussed in chapter ten.