

# FAKE ART HARMS CULTURE

## Discussion Paper

Consideration of a proposed Private Members Bill by the Member for Kennedy, the Hon Bob Katter MP, concerning ways to prevent the unfair exploitation and misuse of indigenous cultural heritage, traditional knowledge and expression through legislative amendment to the Competition and Consumer Act.

### Background

In 2016, following representations by Indigenous community members and artists, key peak bodies, the Arts Law Centre of Australia, Indigenous Art Code and Copyright Agency | Viscopy began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal style' art and craft products and merchandise for sale across Australia.

In response to the concerns, the 'Fake Art Harms Culture' campaign was created to address the widespread sale of works that have the 'look and feel' of being Indigenous but actually have no connection to Aboriginal and Torres Strait Islander communities. These are commercially produced goods, generally aimed at the tourist market; often made from non-traditional materials; and featuring inauthentic and culturally inappropriate designs. They range from bamboo didgeridoos, to decorative plates and key rings.

A mystery shopping exercise in tourist locations in various capital cities found very large numbers of such items and estimates suggest this is a multi-million dollar market.

The campaign to prevent this proliferation of fake art products and merchandise has received widespread support. It has included presentations at numerous Indigenous Arts events, campaign letters to MPs signed by Indigenous artists and individuals, national media coverage and the backing of many dealers. In addition, a *change.org* petition was initiated by an individual and has drawn over 13,000 signatures.

The introduction of a Private Members Bill by Mr Katter, which brings this issue formally to the attention of the Australian Parliament is therefore welcomed and offers an opportunity for further consultation with artists and stakeholders who are directly affected by these practices.



## **Significance of the issue**

Successive governments have actively supported the production of Indigenous art to the benefit of Indigenous communities, individuals and the nation as a whole. Long term funding of Aboriginal and Torres Strait Islander owned and governed art centres, for example, has created learning and income-earning opportunities while helping to foster the preservation and dissemination of Aboriginal and Torres Strait Islander culture.

Major touring exhibitions of Indigenous art have taken that culture to the world, promoting a greater understanding of its significance, encouraging tourism, helping create an international market for the visual arts, playing a role in soft diplomacy and generally benefiting Australia's cultural standing.

With this increased awareness, reputation and market value a market in fake art products and merchandise has also emerged. The production of these inauthentic products has a direct negative impact in at least four ways. It:

- misappropriates Aboriginal and Torres Strait Islander culture and undermines the role of Aboriginal and Torres Strait Islander communities;
- denies Aboriginal and Torres Strait Islander artists of economic and other opportunities;
- deceives consumers; and
- disadvantages Australian businesses who take an ethical and culturally empathetic approach to their work.

Examples of these effects are outlined below.

*Indigenous communities and individuals* are custodians of culture and have rights and obligations to protect and maintain cultural knowledge and expression so that it can be passed on to future generations. This includes groups with a connection to a specific region, those who are linked through their production of art or other shared goals, and the population of Aboriginal and Torres Strait Islander people as a whole.

This custodianship role is diverse, but visual arts are a central part of this responsibility. They are closely linked to identity, belonging and place. For an Indigenous community it includes such roles as protecting the integrity of work associated with a particular location. For example, the crosshatch (rarkk) style of ceremonial painting is associated with Arnhem Land and it is considered offensive and potentially in breach of customary laws if it is reproduced by others, including Aboriginal people from other locations. In some cases responsibility extends to objects that are secret and link to Indigenous cultural practices and which cannot be reproduced in any circumstances. In other cases certain objects and designs should only be produced by men or women.

Only with the authority or permission of the relevant Indigenous community can a reproduction, adaption, or style of work be considered authentic. Producing an art product or merchandise without that consent breaches the community's custodial rights. These are recognised both locally and internationally through the *2006 United Nations Declaration of the Rights of Indigenous Peoples*.

In this very real sense, misappropriated and ‘fake art’ tangibly harms culture’. It also potentially deprives a community of economic benefits through official licensing or distribution agreements.

*Indigenous artists* – The works of individual artists are protected by copyright laws, giving them control over the reproduction. However, work produced in an ‘Aboriginal style’, or that appropriates but does not replicate a work, does not fall into that category.

At both the community and local level, Aboriginal and Torres Strait Islander people should be able to benefit from the commercialisation of their work and cultural expression. Works that appear to be Indigenous but have actually been produced by others diminishes this opportunity for artists and their families.

*Consumers* – The growing recognition of Indigenous art and the increasing number of visitors to Australia have combined to create a unique market opportunity.

Consumers in Australia are protected from misleading and deceptive conduct by legislation. It is entirely reasonable therefore for them to assume that a piece, whether a high end original work or a small souvenir, that resembles an Aboriginal or Torres Strait Islander work was, in fact, created by an Aboriginal or Torres Strait Islander artist and that it is an authentic representation of Aboriginal or Torres Strait Islander culture. Currently the consumer protection laws do not extend to this situation.

The Indigenous Art Code, which is supported by the Australian Government, has played an important role in helping to establish standards and benchmarks that can increase consumer confidence but it is voluntary, its resources are limited and it is still evolving.

Presently, therefore, consumers are at a high risk of being misinformed, paying an unreasonable price, believing their purchase financially benefits an Indigenous artist or creator when that is not necessarily the case or they may be unaware they are collecting a culturally inauthentic or even inappropriate piece. Once again, this potentially damages communities culturally, financially and their reputation.

*Businesses* – There are a large number of Australian businesses of all sizes who play a role in the licensing, reproduction, distribution and sale of Indigenous art products and merchandise. Many companies work closely with Indigenous artists and communities, meeting the industry best practice standards and ethical benchmarks set out in the Indigenous Art Code. However, this good practice which includes fair remuneration and recognition comes at a higher cost than for the business that imports cheap, fake goods for sale.

The existence of a strong and fair Indigenous visual arts sector is as reliant on distribution and sale as it is on production. Current arrangements potentially financially disadvantage those businesses that are ‘doing the right thing’ and therefore risk their sustainability as well as the sector more broadly.

## **A potential way forward – amendment to the Competition and Consumer Act**

Given the impacts of the current practices outlined above, the proposed objectives for reform are as follows:

- to protect Indigenous cultural expression and stop its misappropriation;
- support economic and related social development opportunities for Indigenous artists and communities;
- better protect consumers from deceptive and misleading conduct; and
- support Australian companies who take an ethical and culturally appropriate approach to their business.

It is recognised that the protection of culture and advancing the empowerment of Indigenous people is complex, but a prohibition on unfair practices in supplying and trading in Indigenous art and merchandise would be a significant step forward. The need for comprehensive protection of Indigenous Cultural Intellectual Property will not be addressed by this measure alone but it will be a small step in stopping a very public and damaging form of exploitation.

In this context, based on consultation to date, it is considered that a legislative solution which makes it an offence to supply or offer commercial goods to a consumer that include Indigenous cultural expression unless it is supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community could prove effective.

A set of draft objectives was created against which to assess legislative and regulatory options. These were that any solution should aim to:

- focus on achieving all goals through a single, simplified mechanism
- build on existing frameworks and resources wherever possible
- be cost effective to implement and monitor
- be administratively straightforward
- utilise established terminology and definitions wherever possible
- have a capacity for transitional arrangements, education and awareness raising
- place the compliance onus on businesses and suppliers rather than Indigenous producers or consumers
- enable Indigenous artists and communities to exercise creative and cultural control and to negotiate their preferred options for the production and distribution of Indigenous work not captured by the existing copyright laws
- Offer a practical enforcement regime with sufficient deterrents to change behaviour.

A further criterion was also considered which required that the art be exclusively produced in Australia. While the concept of locally made has significant merit, given that the works in question are largely mass-produced for consumer markets rather than being single or limited editions it did not seem appropriate to restrict the methods by which authorised Indigenous art could be produced in a way that did not apply to the rest of the Australian arts community or which might have unintended adverse financial consequences for Indigenous artists and creators.

The campaign is committed to a consultative and inclusive approach to developing options but has brought forward its current thinking in response to the Private Members Bill. To date, a range of options have been tested against these agreed criteria, including a licensing regime and a standalone Act. While these each had some merit, their complexity and the need to create new administrative and regulatory structures weighed against them.

Of the options considered only one appeared to best meet the full range of criteria. On this basis, subject to further consultation, the group would support a new division in the Australian Consumer Law (section 50A) that relates to Unfair Practices as the mechanism that would most readily achieve the goal of prohibiting fake art products and merchandise, supporting good practice, empowering the Indigenous creators and protecting consumers.

This option draws on the expertise of the ACCC as the existing regulator and on its current enforcement powers without necessitating a new administrative regime. Further, the ACCC has already had some engagement with this issue and is well placed to deliver a comprehensive approach.

Underpinning this change would need to be an awareness raising campaign that:

- promoted the benefits of the legislation;
- was tailored in its messaging to all affected parties; and
- included promotion and advice around the Indigenous Art Code and support for businesses in moving towards best practice.

We would also seek to ensure an Indigenous advisory committee was established to help guide the implementation of any amendment to the Competition and Consumer Act.

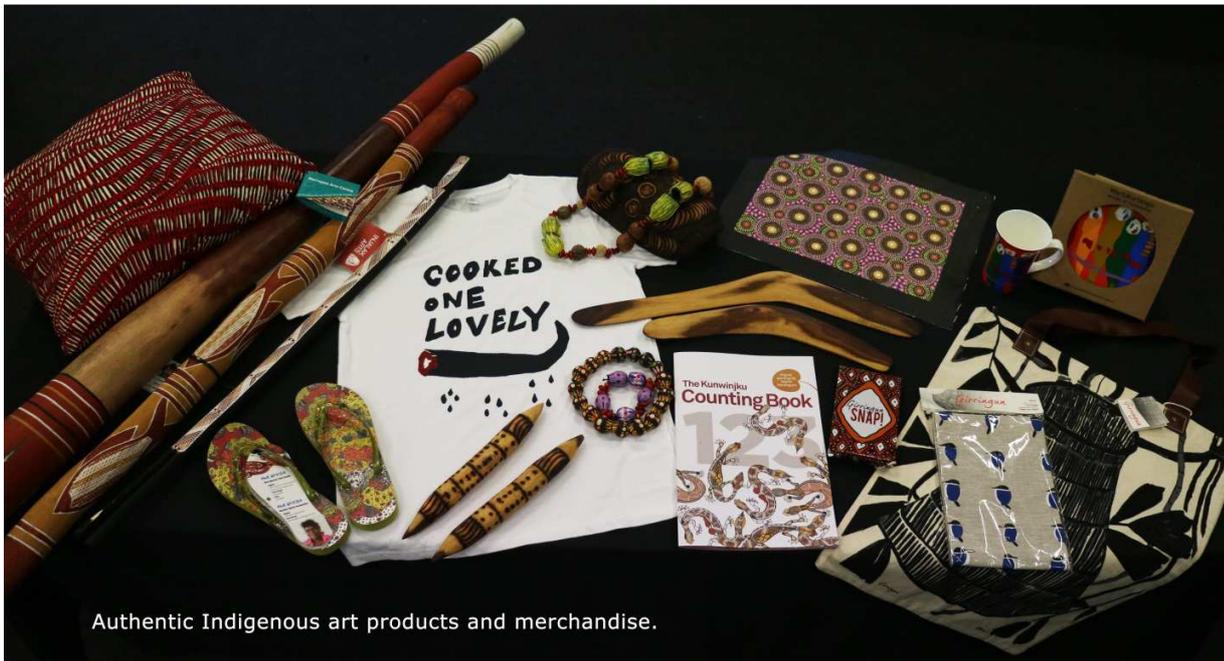
## **Next Steps**

As stated above, the widespread interest and support for the 'Fake Art Harms Culture' campaign has been gratifying.

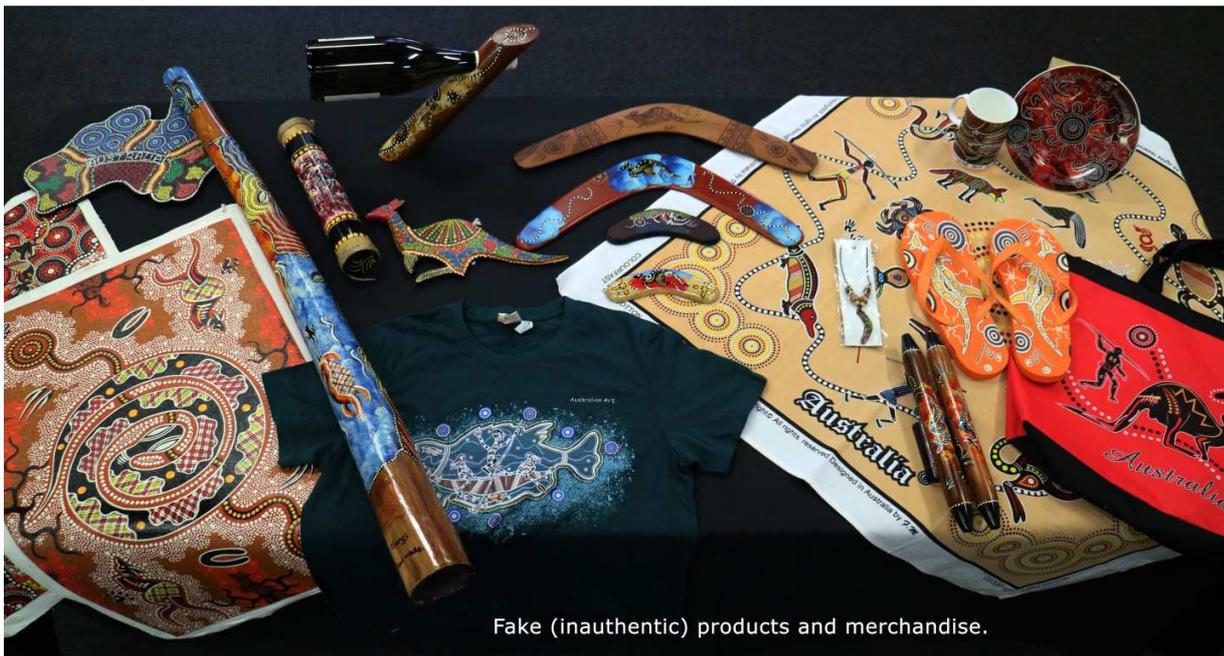
By bringing the matter before the Parliament, Mr Katter, is demonstrating its significance and providing an opportunity for even greater engagement with the Parliament and community on this important issue.

We welcome the chance to continue this dialogue and to hear from the full range of Indigenous voices on how best to support them.

Images:



Authentic Indigenous art products and merchandise.



Fake (inauthentic) products and merchandise.



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