

# chapter 4 The Indigenous visual arts industry

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This chapter focuses on how competition and consumer protection issues might be relevant and apply to a key Indigenous industry. In discussions between the ACCC, ATSIIC and CAEPR it was agreed that a focus on the Indigenous visual arts and crafts industry was desirable for a variety of reasons:

- it is more distinctly Indigenous than any other ‘industry’
- it has a high public profile
- it is of social and cultural significance both to Indigenous and other Australians
- it is of economic significance.<sup>1</sup>

However, it should be noted at the outset that, for a variety of reasons, many of the arts organisations that assist in the marketing of Indigenous art, especially art from remote communities, also undertake a variety of non-market activities on behalf of Indigenous producers. These organisations have social as well as economic functions—in many cases they have been established because of market failure.

This chapter begins with a general description of the Indigenous visual arts industry and the nature of competition within it. It then outlines the sections of the TPA that would appear, a priori, to apply to this industry. A discussion follows, based on the available empirical evidence of the likely points of articulation between the TPA and the industry. Both anecdotal and published case material are considered. The chapter ends by considering areas where the ACCC might play a role in ameliorating some of the competition and consumer problems that might arise for this industry. It should be noted that the discussion and analysis presented here is preliminary. It will become apparent that there is very limited statistical information about the industry.

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<sup>1</sup> Throughout this chapter reference to ‘Indigenous visual art’ will refer to Aboriginal and Torres Strait Islander art.

Many of the issues raised are not new and many have been previously documented. There is a substantial body of literature that deals with authenticity, cultural integrity, copyright, pricing, the market and the structure of the industry. Of particular significance is the ATSIAC-sponsored *The Art and Craft Centre Story* (ACCS) (see Wright 1999, 2000a; Wright & Morphy 2000), and the earlier review of the industry, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (Altman 1989) (see also Altman & Taylor 1990; Janke 1998; Loveday & Cooke 1983; Mercer 1997; Pascoe 1981).

It became clear early in the research that the lack of general information about Indigenous arts necessitated a focus on some particular aspect of this broad-ranging industry. Consequently, the focus throughout has been on the visual arts, sometimes termed 'arts and crafts' or handicrafts. Boundaries in the arts are difficult to demarcate clearly and one of the issues canvassed was manufactured product that has Indigenous design but may involve non-Indigenous collaboration.

## The policy context

The Indigenous visual arts industry has a relatively short history dating back to the early 1970s. The establishment and growth of the industry has been discussed in some detail elsewhere (Altman 1988; Altman 1989; Altman 2000c; Peterson 1983). One salient issue for this research has been to provide some explanation of the somewhat ambiguous and still unresolved role of government in the establishment and maintenance of the industry.

In the late 1960s and early 1970s there was a recognition in the formulation of policy that Indigenous (then Aboriginal) arts and crafts might provide a means to combine cultural maintenance with economic activity for both Indigenous and national benefit. This was linked to an increase in art and craft production by Indigenous people, and in part to a growth in domestic and inbound tourism and a demand for 'authentic' Indigenous cultural product. Since much of this was produced in extremely remote communities inaccessible to tourists, there was a recognition and acceptance that collecting and marketing entailed such high transportation (transactions) costs that the industry required government assistance. Most remote communities lacked institutional mechanisms for collecting and distributing such a product, so new institutions—community-controlled art centres—were established. At the same time, government sponsored a wholesaling and retailing enterprise, Aboriginal Arts and Crafts Pty Ltd. At its peak, this company had a warehouse in Sydney and retail outlets in Sydney, Perth, Melbourne, Alice Springs and Darwin (see Altman 1989; Peterson 1983).

Initially, much of this industry support was provided by the newly established Australia Council and its Aboriginal Arts Board under the cultural policy umbrella, but increasingly in the 1980s the federal Aboriginal affairs bureaucracy also

subsidised the industry through an unspecified amalgam of cultural and economic policy. In the early 1990s, ATSIC established a special program, the National Arts and Crafts Industry Support Strategy (NACISS) to support the industry, with the Australia Council now taking a secondary role. The government-supported wholesaling and retailing operation was wound down, but NACISS saw a more substantial and consistent support of about 40 community-based art centres (Altman 2000a; Mercer 1997; Wright 1999).

The policy rationale underlying the provision of industry support changed somewhat in the context of a major review of the industry undertaken in 1989 (Altman 1989). This review argued that there were sound economic and cultural reasons for government to support this industry since it had demonstrated rapid growth between the early 1970s and 1988. This view was reinforced by other policy reviews and initiatives around that time, including the Aboriginal Employment Development Policy (Commonwealth of Australia 1987), a review of the Aboriginal Homelands movement (Blanchard 1987) and the Royal Commission into Aboriginal Deaths in Custody (Johnston 1991). The important link between cultural maintenance and economic opportunity was recognised by all these inquiries.

These policy framework issues are important. While the industry has grown very rapidly over the past three decades according to available statistics, very few community-controlled art centres have become financially independent. This is partly because transaction costs remain high despite improvements in communications, and partly because few art centres are of sufficient size to sponsor the costs of collecting and marketing from operating surpluses. Those few art centres that have become financially independent are located adjacent to robust tourist destinations (and markets) such as Alice Springs or Uluru (Ayers Rock). Uncertainty over whether government industry support is cultural or economic (or both) still persists. To the extent that the support is economic in nature, it is unclear whether it is based on the rationale of 'infant industry' or 'market failure' (or both).

The continuing subvention of community-controlled art centres raises important issues that will be discussed further below. These include the relationships between producers and 'their' art centres, and the potential for or desirability of competition within communities where market failure arguments have resulted in government subsidisation of arts collection and marketing.

## The value of the industry

There are no comprehensive data on the Indigenous arts industry as a whole, and the limited statistical data that do exist are too incompatible to provide the basis for an accurate understanding of the market. This is partly because there is no instrument that is appropriately structured to collect such information, but it also reflects the contested definition of Indigenous art. There are debates about whether the ethnicity of the producer or the cultural form of the product is more important to its definition, and about where the boundaries of the category lie within a broad spectrum that has 'fine art' at one extreme and 'tourist art' at the other.

ATSIC's Cultural Industry Strategy (ATSIC 1997) estimated an annual total value of about \$200 million for the industry, but this figure is unsubstantiated. More recently, the Australian Bureau of Statistics (ABS) has estimated commercial sales of Indigenous art at \$36 million (ABS 2001: 3), but this has been challenged on a number of grounds as a probable underestimate (Altman 2001a). The figure is probably somewhere between \$100 million and \$300 million. The more conservative estimate is based on the commercial galleries survey (ABS 2001) and the less conservative estimate on adding to and updating surveys of international visitors and domestic consumers undertaken in 1997 (Hoegh-Guldberg 2002: 5). These figures can be compared with the past estimated scale of the industry (based mainly on the activities of community-controlled art centres). Pascoe (1981) estimated an industry of \$2.5 million in 1979–80 and Altman (1989) made an estimate of \$18.5 million in 1987–88.

The Indigenous visual art industry is much more complex than the statistical data suggest (Altman 1989). Licensing arrangements and collaborative efforts with non-Indigenous artists, factors such as the array of outlets involved, and distinctions between 'fine art' and 'souvenirs', and 'hand-made' and 'manufactured' art, all add to the complexity (Hoegh-Guldberg 2002: 5). It is also clear in statistical data from surveys that individual respondents' subjective notions about categories and definitions can influence the results. This is of particular concern in the international visitor survey data.

## Functional levels

There is a high degree of variability in the number of functional levels in different parts of the industry. Indigenous arts may be retailed in one or more of the following ways: directly from community art centres, directly from advocacy groups (an extremely rare practice), and through retail galleries (both specialist and non-specialist), souvenir shops, gift shops, markets and email sales (Hoegh-Guldberg 2002: 26–7).

There are three main components of the commercial sector (Altman 1989). There are specialist outlets that sell only, or mostly, Indigenous art. There are generalist outlets (including souvenir and gift shops) selling a small amount of Indigenous art amongst other product (Altman 1989: 74). The third component of the industry is focused around the reproduction and licensing of original artworks for value-added products such as cards and clothing (Rockchild & Wright 1997: 2).

Besides community-based art centres there are other wholesalers of hand-made product including commercial galleries and private dealers. An Indigenous arts advocacy organisation, Desert in Alice Springs, operated as a regional wholesaler but is currently insolvent. A private sector operator in Sydney, Rainbow Serpent, operates a wholesale warehouse, but mainly for its wholly owned Sydney airport outlets.

There are several different ways in which commercial galleries interact with their artists. Many just deal in art, either buying it through art centres or wholesalers, or putting on shows of works owned by other galleries or dealers. Others also deal directly with a stable of one or more artists, and may effectively operate as their exclusive agents (with or without contracts). Many of the artists in this situation are from remote areas that are not serviced by art centres, and it is therefore not an issue of 'private dealing' (discussed below). In some ways, such galleries emulate the role of a community-based art centre, not only dealing in the artists' work but also providing or organising ancillary services such as accommodation, meals, transport and health care. This is a function of the way in which Indigenous people perceive the production of art—as holistic. Some galleries have their artists on a retainer, others pay on performance and/or negotiate goods (e.g. cars or food). Such relationships are not always harmonious, but many are functional. The artists in such situations can produce huge quantities of work (far more than in an art centre context) and are heavily promoted by the dealer, who often commands resources unavailable to a community-controlled art centre.

There are few Indigenously owned commercial galleries and specialist outlets, although a number are attached to Indigenously owned cultural centres in key tourist destinations such as Uluru and Kakadu National Parks; and there are Indigenously owned commercial galleries in Darwin and Alice Springs. These galleries do not appear to have market advantage because of Indigenous ownership. At times they appear disadvantaged because of lack of commercial expertise and the absence of a working capital base.

It would be a mistake to suggest that the industry is only comprised of community-controlled art centres, commercial galleries and outlets that market Indigenous art and craft. There are also myriad other players in the industry. These include Indigenous people who operate as self-represented artists, many of whom have art school qualifications; Indigenous artists who are directly represented by agents or commercial galleries; Indigenous artists who are contracted as designers or who are sole traders or joint venturers in arts manufacturing enterprises; Indigenous artists who are shareholders in an arts marketing company (e.g. Papunya Tula

Artists); and itinerant Indigenous people who produce art for sale, often informally and on an occasional basis. At times, a particular Indigenous artist might also sell their art in a number of ways, for example, via a community-controlled art centre as well as to a private dealer or even directly at a market stall. Unfortunately, the overall significance of individual and informal modes of selling art are extremely difficult either to monitor or to quantify. Hence the focus here is on formal institutional arrangements.

## The role of community-controlled art centres

The ATSIAC-sponsored ACCS research project surveyed 39 community art centres in remote Australia. Just over half of the art centres surveyed in ACCS are independently incorporated and the remainder operate under the auspices of another community organisation such as a community council or outstation resource agency (Altman et al. 1998; Wright 2000c: 19). As institutions, these art centres have no analogue in the mainstream arts industry; they have been structured in such a way as to meet the particular needs of Indigenous artists. The remote location of most centres in communities that lack opportunities for education, employment and training, means that they operate in difficult conditions and play an important sociocultural and economic role.

Membership is made up of community artists. Art centres are Indigenously owned and controlled, though perceptions about what this actually means varies between centres. Some see the hiring of Indigenous staff as important, while others attach more importance to Indigenous control of decisionmaking and governance (Wright 2000b: 67). The role of the art centre manager, whether Indigenous or not, is crucially important. Some commercial galleries go so far as to state that the quality of the art work can depend on the quality of the coordinator (Rockchild & Wright 1997: 29).

Art centres are found in a wide variety of social, geographical and cultural settings, and the roles that they play at local and regional levels and in the broader market also vary. Art centres deal in a variety of products, from 'fine art' to 'tourist art'. They undertake a wide variety of tasks. While Mercer (1997: 77) refers to art centres as 'production houses', they are in fact collecting agencies; most also function as wholesalers and retailers. Others operate as regional art advocacy agencies and artists' agents and, at times, in the absence of robust community infrastructure, might also assist with other roles such as being suppliers of transport services for 'return to country' trips and suppliers of food and other goods. Many art centres pursue mixed objectives: 'they are neither entirely cultural nor entirely commercial enterprises; each is a unique and highly variable amalgam of the commercial and cultural' (Wright & Altman 2000: 6). The nature of the services that art centres provide (e.g. as intercultural mediators) means that they are creating value for consumer benefit.

In general terms, 'the primary obstacles to operating art centres as efficient businesses are structural, geographical and cultural: the impact of the demands placed on art centres by producers who, to a greater or lesser extent, own and control them [are significant]' (Rockchild & Wright 1997: 23). As Wright notes:

an artist is not serviced by an art centre solely in terms of their productivity, but as a whole person. An artist also has health, education, nutrition and support needs, which they often bring to the art centre. There is a strong argument for art centres being key contributors to the wellness of a community (2002: 9).

The diverse services provided by art centres (often owing to cost shifting by other agencies), compounded by their remote locations adds to the cost of marketing arts and this in turn lends support to the 'market failure' arguments for subsidisation by ATSIC under NACISS.

## Auction houses

In the mid-1990s leading auction houses began to specialise in Indigenous fine art auctions, usually on an annual basis and initially in conjunction with sales of 'tribal' art. The growth of the secondary Indigenous art market has hastened the recognition of contemporary Indigenous fine art as investment art (Altman & Taylor 2000). There has been some controversy in recent years concerning auction sales of Indigenous art. Prices are increasing, often dramatically, but because there are no *droite de suite* (resale royalty) statutes in Australia the artists receive no proportion of these returns. In secondary sales 'the sale of paintings for tens of thousands of dollars (or more) for which an artist originally was paid perhaps \$100 (or less), are common' (Altman & Hinkson 1999: 17). The entry of auction houses into the Indigenous art market has raised some interesting issues in relation to pricing and consumers. Since auction houses deal in secondary markets, art centres, as dealers in primary markets, would not expect to present work for sale at auctions—although at times they do.

In 1999 and 2000, in the run-up to the Olympics, Deutscher-Menzies held annual specialist Indigenous art auctions. They ceased this practice in 2001. Recently Sotheby's, currently the only auction house to hold specialist auctions in Indigenous art, has emerged as the dominant player in the prestigious auctioning end of the Indigenous art market. The dominance of Sotheby's often gets significant media attention, especially when a new record auction price is attained. This may partially reflect their high profile. At times, however, this issue is conflated with the debate about the absence of *droite de suite* legislation in Australia and the frustration experienced by living artists who have seen their works escalate hugely in price in the secondary market in a relatively short period of time.

## Numbers of artists and geographical regions

Historical information on numbers of Indigenous producers and their geographic distribution suggests that they number in the region of 5000–6000 (Altman 1989), although a much higher estimate of 20 000 has been made in the context of lobbying for a national authenticity label (see below). The recent commercial galleries survey (ABS 2001) enumerated 5681 Indigenous artists represented by galleries, although this figure is qualified by the fact that a small number of artists are represented by more than one gallery (ABS 2001: 7). The figure also reflects only the ‘fine art’ sector of the industry. In general terms, art and craft production ‘is a market activity that Indigenous Australians appear willing to embrace: the nature of production, indirect social engagement, (and) expertise all combine to give them a distinct competitive advantage’ (Wilson 2001: 6).

Since most community-based art centres are in regional and remote Australia, the majority of artists are also located in these regions. This distribution accords with market perceptions that more ‘traditional’ Indigenous people live in the more remote regions and that ‘authentic’ Indigenous art is produced in these places. There is in fact a growing urban Indigenous arts sector producing both fine and tourist art. Information on distribution is limited, with little or no disaggregation of data by (or within) states and territories. Certain regions are known to be more prolific than others; and several of the more remote regions are known for the particular style of art produced. For example, the Western Desert region in central Australia is known for its dot style of painting in acrylic, while cross-hatching styles using natural ochres and pigments are produced primarily by Arnhem Land artists.

The high mobility of many Indigenous artists adds to the difficulty of ascertaining precise numbers of participant artists. It is also difficult to quantify precisely the number of outlets. The 39 art centres in the ACCS survey represented some 4500 member artists (Wright 2000c: 18). The figure of 31 art centres mentioned in the ABS commercial galleries survey is incorrect (Altman 2001a; Hoegh-Guldberg 2002: 13). At present there appear to be about 70 Indigenous art centres in central Australia and the Top End of Northern Territory, South Australia and Western Australia, representing between \$10 million and \$10.5 million-worth of art-work sales. Of this revenue, some 60 per cent goes to the artists (Hoegh-Guldberg 2002: 11). Art centres represent a much larger number of artists than do artists’ agents.

On average each art centre in the 1997–98 period serviced 175 producers, returning each one an estimated \$1049 (Altman 2000a: 84). The ACCS survey emphasises, however, that there is no ‘typical’ art centre. Some may deal with ten or so artists, while others service over 200; and while most centres operate locally, some are regional in their scope (Wright & Altman 2000: 18).

There is no estimate of the number of outlets that actually market Indigenous art and derivatives or imitations (often side-by-side), but it is likely to be in the hundreds or more Australia-wide. Altman found at least 160 retail outlets and



mainstream galleries selling Indigenous art (Altman 1989: 69), and more recently Hoegh-Guldberg (2002: 11) enumerated 270 retail outlets based on a *Yellow Pages* search (several of which were also listed as art centres). An unpublished report (Rockchild & Wright 1997) within the ACCS project surveyed 87 outlets operating in the commercial sector of the industry. The Indigenous Art Trade Association (discussed below), which was formed in the late 1990s, has a membership of about 50 specialist commercial outlets as well as a number of art centres. There are no firm data on numbers of tourist shops, non-Indigenous galleries or unlicensed individuals selling Indigenous art and craft.

## Product differentiation

Indigenous visual art and crafts are produced in numerous forms. Information from just one region identifies bark painting, carving and sculpture, pottery, fibre objects such as woven bags, instruments, tools, regalia such as armbands and necklaces, painting on paper and prints (Altman 1999a; Hoegh-Guldberg 2002: 26). A general but imprecise distinction is made in the industry between 'fine art' and 'tourist art', analogous in some ways to the distinction made between 'art' and 'craft' in the mainstream industry. 'Tourist' art generally encompasses boomerangs, didgeridoos, small to medium-sized paintings and trinkets, souvenirs, and clothing. However, from the point of view of the producer, the category can also embrace larger and more expensive works. For example, in Cairns, local artists are well aware of the popularity of central desert 'dot style' paintings among tourists and exploit this to their advantage. From the perspective of these artists a relatively large and expensive art work will still be considered 'bread and butter art' for the tourist market if the dotting technique is used (Anderson 2001: 179).

Manufactured and collaboratively produced products form a proportion of the market that is difficult to quantify. Products include T-shirts, fabrics and clothing which can be produced in a variety of ways. 'Blanks' of some sort (e.g. fabric, garments, or didgeridoo tubes) are generally produced by non-Indigenous manufacturers (and often imported from overseas) and subsequently painted, carved or printed upon by Indigenous artists and sold as Indigenous products (Altman 2000b; Hoegh-Guldberg 2002: 25). Such practices raise concerns about product labelling, consumer education and authenticity which are discussed below.

## The degree of vertical integration

There is limited vertical integration in the Indigenous arts industry, although there is some growth in concentration of industry activity. As a general rule community art centres are both wholesalers and retailers. They sell wholesale to commercial galleries and other outlets. Retailing occurs on site, and also via the Internet and other direct selling to consumers.

There is an increase in collaboration between artists and print makers. Two important but very different participants are Northern Editions in Darwin, based at the Northern Territory University, and the Australian Art Print Network in Sydney. In the former there is active collaboration between print makers and artists, either at the artists' communities or else in Northern Editions' Darwin studios. Ownership and sale of prints is negotiated, and print runs are usually split in some proportion between print makers and art centres, with artists being remunerated when sales occur. The Print Network in Sydney markets prints, dealing variably with a number of established print makers or with community art centres.

Some art centres engage in local screen printing: local designers may be employed as print makers and may also earn income from sales of printed T-shirts or fabric. A good example of such an enterprise is Tiwi Designs at Nguui on Bathurst Island. As a general rule, printed T-shirts are wholesaled to commercial outlets.

There is a high demand for cheap, portable art for the tourist market, but there are few artists willing to undertake repetitive work for relatively little return. There are two options open to art centres wanting a slice of this market: they can either produce their own licensed or value-added product or they can enter into licensing agreements with manufacturers. There is a strong argument for art centres to engage in licensing since, if they do not, manufacturers will appropriate or devise 'Indigenous' themes and motifs with no financial returns to centres or artists (Wright 1999: 127). It is also preferable that licensed designs are reproduced on culturally appropriate products and that the artists themselves fully understand the way in which their designs will be used (Wright 1999: 128). About one-third of art centres in the ACCS survey had one or more current licensing agreements.

Desart took an active role in brokering and promoting relationships between manufacturers of licensed product and art centres between 1998 and 2001. The result is a range of licensed souvenir products such as T-shirts, postcards, playing cards, watches and key rings that all carry or are accompanied by information about the artist and Desart documentation of their authenticity. At the time there was a strong push for Desart to be developed as a 'notable' brand. However, with the demise of Desart's commercial activities this may not be pursued.

At Walkatjara Art Centre at Mutitjulu (near Uluru), a market evaluation exercise led to a reclamation of the souvenir market by local artists. As a result of the repositioning of the art centre through market research, local artists began to produce items in new media such as ceramics that they are proud to see in tourist shops. Designs were selected as 'market favourites' and sold under licence to appear on T-shirts, key rings, prints and magnets. In this way, local artists are increasing the potential audience for their work, protecting their intellectual property and ensuring the cultural integrity of souvenirs sold both locally and nationally (Wright 2000a: 181–85).

## How art is sold and distributed

The path from the artist to the consumer can be direct, or it can be complex and indirect. At one end of the spectrum is direct dealing between an artist and the final consumer, as occurs in informal trading in the Todd Street Mall in Alice Springs. In these dealings there is often considerable producer agency (e.g. desire for a quick cash sale) and consumer compliance (e.g. desire for a bargain). At the other end of the spectrum are the government-subsidised art centres that are often both wholesalers and retailers. It is possible for a work of art to be purchased by an art centre, then wholesaled to a commercial gallery that may in turn wholesale the work to an overseas gallery or public art institution.

Art centres were originally established to facilitate the collection and sale of art from remote localities, especially outstations. Art centre staff are invariably intercultural mediators between the artists and the market; however the circumstances of this mediation vary widely. Some artists live at outstations that are extremely remote and seasonally inaccessible; others live in urban centres such as Alice Springs, Darwin or Sydney. Consumers visiting art centres include 'local people, visitors who have come specifically to the art centre, tourists, wholesalers, retailers, collectors, [representatives of collecting] institutions, and academics' (Wright 1999: 99).

## Payment and pricing structures

Art centres use a wide variety of payment methods including up-front payment (the most used method), advance payment, and payment on consignment, as well as several arrangements involving the Community Development Employment Projects scheme (CDEP). The price of a work is usually negotiated between artists and staff though there are many factors involved in deciding what price will appear on an art work. These include the artist's reputation, aesthetic judgments, the cost of production, the financial position of the centre, and the market in which the item will be sold (Wright 2000c: 32).

Tensions over prices paid are not uncommon and there are several factors contributing to artists' (mis)understanding of pricing, such as culturally informed expectations that differ from market valuations and a poor understanding of cumulative mark-up processes. Some art centres, for example Warmun Arts in the east Kimberley, only deal with artists on a consignment (pay-on-sale) basis, which personalises the exchange and is culturally appropriate in this context. Commercial galleries are similarly varied in terms of their purchasing structures, with just over half those surveyed stating that they liked to have the option of purchasing either on consignment or outright as it allowed for greater flexibility (Rockchild & Wright 1997: 10).

Just over half of the art centres in the ACCS survey offer discounts. These may be offered to people making large purchases, to first-time buyers, to local people from the community, to good customers (particularly as a reward for prompt payment) and on sales made in the off season (Wright 1999: 102). The offering of discounts makes the occurrence of collusion unlikely (this point is discussed further below). The majority of art centres do not have a tiered system for pricing that reflects retail and wholesale market prices (Wright 2000c: 32).

There is huge variability in the pricing structures implemented by art centres and a wide range of factors that influences pricing policy. For fine art, the influences include market forces and demand, prices being charged by competitors, scarcity or glut of work by a particular artist, quality, whether the artist is elderly, healthy or deceased, value built into artist's work from previous marketing, and proximity to good markets (Altman 1989; Wright 1999).

There is also a high level of variability in perceptions of what is deemed a fair return to artists. The ACCS survey found that, as a percentage of sale price, payments to artists ranged from 25 per cent to 80 per cent and mark-ups ranged from 20 per cent to 200 per cent depending on the centre and the product (Wright 1999: 97). Centres that give a higher return to artists are generally financially constrained in their ability to conduct marketing and other essential activities (Wright 2000c: 32). Issues of mark-up are less prevalent with tourist art which is generally sold outright and marked up by between 100 and 130 per cent (sometimes inclusive of freight, sometimes not). Mark-up practices in the arts industry receive considerable media attention from time to time. The situation has been further complicated by the introduction of the GST, which leads to a conflation of taxation issues with returns to artists.

A distinction needs to be made between goods that are sold by producers outright and those that are sold on consignment. The number of stages in a distribution chain and a lack of vertical integration can result in the final retail price of a work being several times the return to artist. Artists become aware of this when, for example, they participate in exhibition openings in southern capital cities.

As a general rule, there is a 40 to 50 per cent sales fee for art provided on consignment; that is, if a painting sells for \$100 the return to the artist (or art centre) will be \$50–\$60, paid after the item is sold. However, if an art centre has been an intermediary and has itself marked up by 50 per cent (which is common practice) to cover some of its costs, the artist may only receive \$40 instead of \$60. Outright sales can be problematic, especially in cases where a commercial gallery has held onto a work for several years (or has been unable to sell it) and an artist becomes more popular in the meantime. In such cases, the value of the art held by the gallery increases markedly. This is similar to the process that occurs when an auction house sells a work for many times the original payment to the artist. This is, of course, not unusual in the arts industry generally. However, the value of Indigenous fine art has increased rapidly in a relatively short time.

## The market

Art centres may apply different levels of mark-up to different art forms; for example, bark paintings may attract a higher mark-up than baskets because they require a higher standard of conservation while they are in stock (Maningrida Arts and Culture (MAC) 2002). In some centres there is also cross-subsidisation between popular and less popular artists, introducing distortions that financially penalise the very best artists and benefit the apprentice or mediocre artists (Morphy 1983: 42). If art centre staff are not legitimately empowered by the membership (the artists) to implement such variable mark-up policies; if not, they may be vulnerable to complaints of exploitation or possibly even unconscionable conduct. Even if such a policy is enshrined in the constitution of the centre, it may not accord with artists' perceptions of the fairness of individual transactions. As a general rule, variable mark-up policies are a response to factors of supply and demand. Given that works purchased outright will not necessarily be sold, there is a risk premium for art centres, which needs to be recognised when evaluating mark-up policies.

Art centres face unique risks in that they tend to have a responsibility to market the work of all artists in the community, not just those who are better established (Wilson 2001: 8). Thus the industry is 'production pushed rather than market driven' (Collins Anderson Management 2001: 7). The following comment, made by an art centre staff member, reflects what may be a general problem for the marketing and promotion of Indigenous arts:

We have an excess of generic (but good quality) art by young/unknown artists, or old stock sitting which is desperately hard to move especially given isolation. Supply outstrips demand, and on the other hand we have incredible demand for a handful of artists' top rate work—we can only meet about 20% of the demand for this top level work. We need more staff to market and to spend time with the artists to increase quality (Hoegh-Guldberg 2002: 11).

There is a need to acknowledge the enormous significance of financial pressure as a force driving the production of much Indigenous art, both in the souvenir and fine art realms. Financial pressures stem from poverty and the demands of extended family, higher costs of living in remote communities and, at times, alcohol dependence and substance abuse. For some artists producing art is a means to an end: generating income to sustain addictions—either their own or those of close family members. Artists with substance abuse problems may be at greater risk of unconscionable conduct (see below) on the part of unscrupulous dealers.

Many commercial dealers believe that the commercial sector, especially when operating in southern capital cities, is best positioned to market and locate buyers (Rockchild & Wright 1997: 3, 41). Some in the commercial sector have voiced concern about the general lack of market direction and communication in the

industry, noting in particular that art centres and commercial galleries needed to improve their relationship so as to operate more strategically and collaboratively in the fine arts market. The commercial sector of the industry perceives a need for art centres to further develop their marketing skills. In particular some art centres are thought to be passive and lacking a general understanding of the need for aggressive marketing. However, the marketing abilities of art centres are becoming more sophisticated over time and the direct marketing efforts and enhanced professionalism of art centres may lead, in the long run to an increase in their share of the market, to the detriment of the commercial galleries.

## Protecting Indigenous property rights

Indigenous cultural and intellectual property rights refer to Indigenous peoples' rights to protect their heritage, defined by Janke as 'the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people' (1998: xvii). Two Commonwealth laws which may help protect Indigenous intellectual property rights are the *Copyright Act 1968* and the *Designs Act 1906*.

### Design and copyright

Design legislation protects both two and three-dimensional designs. Under the Designs Act individuals may apply to register a design which, if the criteria are met, then becomes protected from obvious or fraudulent imitations (Janke 1998: 64). Copyright is a set of particular rights granted to the creator of art (and other) works based on three main criteria: that the work is original, can be reduced to a material form and has an identifiable author. There is a range of possible copyright infringements, from overt illegal unlicensed reproductions to the rather grey area of 'Aboriginal-inspired' designs (Anderson 2002: 8). The appropriation of designs conceived as generically Indigenous, such as dots or cross-hatching, is a particular concern in the tourist market, where such designs are commonly reproduced on manufactured goods such as coffee cups or tea towels (Altman 1989: 288).

In relation to Indigenous art, copyright law has been relatively effective in that several prosecutions have been made involving a breach of the TPA. In the 'carpets case' of 1996 (discussed in 'TPA issues of relevance to the Indigenous arts industry') the traditional imagery of several Indigenous artists (some of whom are now deceased) was reproduced on carpets made in Vietnam and imported into Australia without the artists' permission. Not only did the court find that copyright had been infringed, but part of the award was given in consideration of the damage done due to the culturally inappropriate way in which the reproduction was made (Janke 1998: 63).

Historically, since the 1970s, some artists have been represented by the Aboriginal Artists Agency (Altman 1989). Today, an increasing number of Indigenous artists are represented by Viscopy, (the Visual Arts Copyright Collecting Agency), a non-profit organisation established by the federal government in 1995. Viscopy's role is to protect artists' intellectual property and related contractual rights by enforcing copyright law. It can arrange (on a fee-for-service basis) to seek permission from artists or their agents to reproduce images (Mellor 2001a: 47). Viscopy currently represents about 1,000 Australian artists (Viscopy 2002) a number of whom are Indigenous, including artists from Yirrkala, Balgo and Ramingining (Janke 2001: 82).

There are several mechanisms in place, aside from Viscopy, that are intended to help police cases of copyright infringement. For example, in the 1990s Vivien Johnson and her sociology students at Macquarie University created the 'House of Aboriginality' project. The project includes a website that contains a virtual 'house' filled with unlicensed, Aboriginality 'inspired' product. The site is designed to support Indigenous artists in attempting to curb the activities of the so-called 'imitations industry'. Individuals are encouraged to become 'copyright detectives' to help expose 'fakes' and those who deal in them (Johnson 2002).

The Australian Indigenous Art Trade Association Ltd (AIATA; otherwise referred to as Art Trade) is a national voluntary association for individuals and organisations experienced in the business of Indigenous art. It promotes the ethical trade of Indigenous art and attempts to foster consumer confidence in those dealing in Indigenous art (AIATA 2000). In 2000, Art Trade arrived at a determination about the use of exclusive contracts. It does not encourage the use of such contracts because it sees them as a restraint on trade. Moreover, they do not take into account the artists' day-to-day circumstances, and they are prejudicial because language and cultural barriers disadvantage the artists. However, Art Trade will honour contracts if they are for a maximum of two years. After that they are renegotiated if a local language speaker and/or artist's advocate is present during negotiations, and if there is no legal duress brought to bear on the artist if they breach the contract.

## Authenticity labels

Authenticity labelling and statements of provenance are specific to the Indigenous arts industry and their existence illustrates one of the fundamental differences between buying art or craft produced by mainstream artists and purchasing an item produced by an Indigenous artist. The issue is one of cross-cultural communication. Consumers can approach a non-Indigenous artist (or their heirs) directly if they have any concerns about provenance and their conversation or correspondence will (almost invariably) be in English. Indigenous artists from 'the bush' rarely have access to mainstream media such as newspapers and magazines that may draw their attention to provenance issues, many are illiterate and would have difficulty understanding comments made in English about their art practice and subject matter.

Many consumers are now aware of the need for some form of documentation to verify provenance. Consumers frequently express the view to art centres and galleries that they want to buy genuine product made by Indigenous artists, and want to know that the artist was paid fairly for their work.

After tentative industry support the National Indigenous Arts Advocacy Association (NIAAA) launched the national authenticity label in November 1999. The label is a certified trade mark intended to deter the sales of 'rip off' products and to inform consumers of the ethnicity of producers. The introduction of the label is intended to benefit Indigenous artists and their communities, the broader art community and the tourism industry. Artists and businesses apply to the Label of Authenticity Registry for permission to use the tags and stickers on their products. Once applicants have been approved (the definition of an Aboriginal and Torres Strait Islander person is in line with the Commonwealth Government's three-pronged definition—ancestry, self-definition and community acceptance) they pay an annual fee to register (NIAAA 2001). To date a limited number of artists are participating in the scheme and art centres and regional organisations operate competing authenticity labels.

Few community-based art centres (or their member artists) have registered for NIAAA's label. The reasons include the cost and administrative complexity, the existence of alternative documentation produced by the art centres themselves, and a degree of antipathy on the part of many artists, especially those from remote regions, to the requirement to provide proof of Aboriginality.

Regional authenticity certification, such as the Gooren Mulla label in Cairns has also been developed. Desart launched the Central Australian Indigenous Art certification, which represents a shift in the industry away from the notion of policing the market and a move towards an emphasis on the education of consumers and the promotion of best practice (Congreve 2000). With regard to certification, the objectives of Desart and NIAAA are different. While the NIAAA label focuses on the identity of the producer, Desart aims to ensure that 'the provenance of a work, the materials used and the returns to artists are correctly documented, and that the use of standard and equitable contracts between artists and retailers is encouraged' (Congreve 2000: 87). The national label is intended to be used alongside, rather than in competition with, regional or art centre labels. There has, however, been little, if any market research on the question of how consumers will react to being faced with products bearing two or three different swing tags (Altman 1999b: 6). In Cairns, the majority of artists and business owners believed that regional labelling is more proactive, more effective and easier to monitor than a national label (Anderson 2002: 4).

It is NIAAA's hope that 'as a marketing tool, the Label of Authenticity will greatly increase the participation of Indigenous artists within the Indigenous arts and cultural economy and increase the financial benefits to both artists and communities' (NIAAA 2001). However, the evident lack of support from most rural



and remote artists for the label raises the question of its viability. The argument has been made that financial resources expended on the label might be better spent on establishing and underwriting additional art centres and further developing regional authentication systems (Wilson 2001: 15).

The ACCS survey identified that, for commercial operators, a major advantage in dealing with art centres was certainty about the authenticity or integrity of the product (Rockchild & Wright 1997: 16). Many art centres dealing in fine art have created their own mechanisms for documenting provenance. When art works are sold, documentation is provided to the consumer, with an archival copy being kept by the art centre for future reference. Documentation may include the artist's language group, the cultural 'story' of the artwork, a catalogue number, the media used, a copyright statement and a photograph of the art work. Such documentation confirms and promotes authenticity, as well as providing a means of maintaining cultural records. Warlukurlangu Artists in Yuendumu and Maningrida Arts and Culture provide best practice examples (see Wright 2000a: 101–10).

While NIAAA states that 'the Label of Authenticity should not be confused with defining what is 'modern', 'traditional' or 'real' Aboriginal and Torres Strait Islander culture' (NIAAA 2001), this has been a real concern for artists and perhaps one reason why so few have registered. The NIAAA label has been criticised because it provides no safeguard against the appropriation of region-specific art styles, a question of particular concern to artists from central and northern Australia (Wilson 2001: 8). The concern is that the label conflates the issue of Indigenous authorship with that of authenticity (Altman 2000b: 92). The Indigenous arts industry 'need(s) to ... recognise that the Pan-Aboriginal identity does not extend to a homogenised Indigenous culture' (Wilson 2001: 8). The national label cannot, as it is presently constituted, limit copyright infringement or, in itself, directly stop imitations. All the label can do is provide consumers with information about the ethnicity of the artist (Altman 1999b: 3).

Anecdotal evidence suggests that commercial gallery operators may remove NIAAA's label from art works before exhibiting them. Galleries do not want to display a range of items carrying several pieces of documentation. Nor do they wish to have a mixture of labelled and unlabelled items on display, because it might be confusing to the consumer and might imply that unlabelled products were not authentic. One of the strongest concerns emerging from discussions about the label is the question of whether artists who choose not to register are placed at a disadvantage in the market and potentially treated as suspect by consumers. At the time of the 2000 Olympics, the Customs Department issued information to people entering Australia stating that unless an artwork had the NIAAA label on it, the product was not genuine. At the time, the NIAAA labels had not yet been printed. A new leaflet was subsequently published stating that NIAAA's label was only one of a number of ways of determining authenticity.

The distinction between fine art and mass-produced items is again important in relation to labels of authenticity. Generally speaking, those operating in the fine art arena have been reluctant to register for the national label, believing that their own signature, label or document of authenticity should be enough to verify the authenticity of their work in the national or international arts arena. It is at the cheaper end of the art market that NIAAA's label could be most effective, assuring consumers that items they purchase have been properly licensed (this applies particularly to manufactured product like T-shirts, see Altman 1999b). However, this too is a potentially problematic area because a number of artists directly sign agreements with manufacturers and at times themselves produce highly derivative designs. NIAAA states that 'tourists do not want to fly all the way to Australia ... to purchase art or cultural product that looks of Aboriginal and Torres Strait Islander origin but is not' (NIAAA 2001). However, most 'rip-offs' occur in the cheap tourist art sector, which is particularly price-sensitive (Altman 1999b: 3). It is debatable whether tourists would be willing to pay more for 'authentic' tourist art and feedback from retailers strongly indicates that price is often more important than provenance to souvenir hunters.

## Approaches to consumer and producer education

National and regional advocacy bodies attempt to ensure the cultural integrity of Indigenous art through consumer education strategies. Many art centres produce promotional material such as brochures to inform potential consumers about the role of the centre, profiles of artist members, and the cultural background and types and styles of art they produce. NIAAA, the Association of Northern Kimberley and Arnhem Aboriginal Artists (ANKAAA) and Desert all use the Internet to promote their organisations and artists. Maintaining the integrity of product and style is best achieved closest to the source of the works and individual art centres are active in this realm (Wilson 2001: 7). The Cairns-based Gooren Mulla authenticity label is an attempt on the part of artists and businesses to both educate the public and pressure local outlets not to sell 'fake' art (Anderson 2002: 14).

Maningrida Arts and Culture (MAC) has been encouraged by the success of their website in educating consumers. In 1998 the website was averaging between 7000 and 10 000 hits a week from around the world (Wright 2000a: 223). People interested in purchasing art can access the site to gain a more in-depth understanding of styles of work available, and when requests are made MAC is able to sell works after sending digital images to consumers (Maningrida Arts and Culture 2002: 11–12). Recently, MAC was successful in securing a grant under the Commonwealth Government's OzeCulture: Making IT Work Program to further develop the web as a core element of MAC's marketing operations.

## The nature of competition within the industry

There seems to be a healthy level of competition at all functional levels of the industry, notwithstanding that a few art centres have exclusive access to some geographically defined art styles. There may be an element of 'monopsony' (supply monopoly) in the relationship between a sole agent and a particular artist or set of artists, but the generic art style will have many competitors. Similarly, some outlets have monopolistic commercial concessions.

Some community councils have a (formal or informal) policy of discouraging or preventing other individuals or organisations based in the community from trading in Indigenous art, unless they are also Indigenously owned and controlled community organisations (Wright 1999: 123). In Yuendumu, there were two art centres but their products were aimed at very different markets so as to avoid direct competition (Wright 1999: 124). This issue is addressed in 'Barriers to entry and other competition issues'.

While artists are, in theory, free to sell to whomever they choose, most trading in remote areas is done through art centres (Altman 1990: 7; Wright 1999: 123). Art centre operations may therefore appear to be fertile ground for exclusive dealing. However, there are provisions in the legislation for authorisation of certain conduct in cases where it is of public benefit (discussed later). Regional advocacy organisations such as ANKAAA can apply for collective authorisation.

Wright found that 46 per cent of the art centres surveyed in the ACCS project had to contend with private dealers accessing the artists in their region. A 'private dealer' is understood here as a person who regularly approaches artists with an offer to buy product directly from them. Private dealers rarely, if ever, purchase any work through the art centre. They may be a visitor, or resident in the community; they may be operating a shopfront gallery or may wholesale to other galleries.

A recent issue of *Australian Indigenous Art News* (the Art Trade journal) carried a letter to the editor from Craig Herbert, manager of Marrawuddi Gallery in Jabiru (Northern Territory). He raises concerns about 'poachers' at both Marrawuddi and Injalak Arts (50 kilometers away):

these two art centres ... are suffering ... the problem we both face is that some independent art dealers are using highly unethical behaviour to obtain paintings from artists ... also it is art centres that foster the young upcoming artists that many of you have little interest in, until such time as they start to get a 'name'. It is then that these ... operators move in to claim the benefits and dismiss art centres ... (Herbert 2001: 2).

The higher the value of the art produced, the more likely it is that art centres will have to compete with private dealers. Whereas art centres are responsible to

members, their constitutions and the broader community, private dealers are only responsible to themselves. Private dealers acquiring art from a certain region may be supplying the same market as the region's art centres and thus operating in direct competition to them. For art centres, this may result in difficulties at a number of levels and it may ultimately undermine their commercial viability. Private dealers can take advantage of the promotional activities of art centres (as free-riders); and may purchase works made with materials paid for by art centres (Wright 1999: 125). At times, however, art centres may benefit from the provision of material to 'their' artists by private dealers.

There may be several reasons why artists deal with private dealers including the form of payment, pressure from family for money, substance addiction or a desire to hedge bets. Desire for a quick cash sale is one key reason why artists may sell to private dealers rather than to an art centre, and this can result in the market being flooded by hastily produced, sub-standard work that is then overpriced. About half of the commercial galleries surveyed in the ACCS survey had dealt with private dealers (Rockchild & Wright 1997: 37). Advantages cited (contradicting the statement above) included quality, range of selection and price as well as general convenience (the remoteness of art centres is a barrier for some).

It is vital for art centres to maintain good relations with commercial galleries. Because of their isolated locations, few centres can survive solely on direct retail sales to the public: 'good relationships with commercial outlets provide financial stability to the centres, the potential for growth, and valuable market feedback' (Wright 1999: 120). Some people operating commercial galleries take advantage of the remote location of art centres, to the financial detriment of the centres. Areas of particular concern include slow payment or non-payment of debts, unreasonably high mark-ups on art centre stock, the giving of false or misleading information about product origin or authorship (later discussed in more detail), and delays or refusals to provide information about sales or stock held (Wright 1999: 120–21).

Some commercial galleries actively avoid dealing with art centres that have artists who work for other galleries in the same city. There is a belief that: 'there is not enough room for the multiple dealing of one artist, so not wanting to cause problems for other galleries, some dealers claimed to stay clear of each other's turf' (Rockchild & Wright 1997: 42). This is particularly the case with more popular artists. Rockchild and Wright also found that some commercial outlets believed that art centres that operate to make a profit cause problems because they are competing directly with commercial outlets.

Art centres are increasingly recognising that they operate in a competitive commercial environment (Altman 2000b: 91). There is no evidence that art centres collude in price fixing; the market appears very effective. There are some cases of exclusive dealing with particular commercial galleries, but such decisions are usually based on commercial or moral grounds—for example, experience with

other galleries of slow payment or non-payment or excessive mark-ups or culturally inappropriate display.

## Competition from imports and non-Indigenous sources

Cheap imitations are often available in the tourist market, although the significance of their impact on sales of genuine items is difficult to assess. In some cases the product may never enter Australia, for example when items are manufactured in Asia and then exported to Europe where they may be sold as genuine Indigenous Australian product (Hoegh-Guldberg 2002: 23). At times, Indigenous community art centres like Tobwabba in northern NSW arrange offshore manufacture on a licensed basis to take advantage of cheaper labour costs. The status of the resulting products is ambiguous: they are licensed by an Indigenous organisation, and so are no more classifiable as 'imitations' than any other licensed product, but they are manufactured in similar manner to outright imitations. The extent to which imitations are being passed off as Indigenous product is unclear (personal communication, Susan Congreve, ANKAAA), although Hoegh-Guldberg speculates this to be a 'very significant trade' (Hoegh-Guldberg 2002: 23). In 1994, imported plastic replicas of wooden coolamons made by Mutitjulu people were being sold alongside the authentic product, but at a cheaper price. While the imported goods had stickers on them stating the country of origin, these were easily removed or lost (Janke 1998: 38). The 'carpets case' previously referred to involved carpets with unlicensed Indigenous designs imported from Vietnam (Janke 1998: 39). There have been numerous complaints from Darwin about bamboo didgeridoos made in Indonesia, the identity of the importers remains a mystery. The instruments have no labels stating that they are made by Aboriginal people, but they are painted in derivative Arnhem Land and Central Desert designs (personal communication, Susan Congreve, ANKAAA). This may be a case of misrepresentation by silence; consumers may assume that the 'fakes' are authentic given their design and the lack of labelling stating otherwise.

## TPA issues of relevance to the Indigenous arts industry

The primary task of this project is to identify potential TPA issues in the Indigenous arts industry. In this section we introduce the relevant sections of the TPA and pose some questions that attempt to illuminate some trade practices issues. The most relevant parts of the TPA for the Indigenous arts industry are Part IV (anti-competitive practices), Part IVA (unconscionable conduct) and Part V (fair trading and consumer protection). Note that TPA authorisation of otherwise prohibited conduct (Part VII) can be sought for many breaches of Part IV of the TPA—except those involving a misuse of market power (Part IV, s. 46). Since conduct may be

authorised if it otherwise enhances the welfare of the community, it is entirely possible that many potential transgressions might be allowed in an industry that is firmly embedded in Indigenous culture and hence Indigenous welfare. However, the process of authorisation can be complex, and the cost of \$7500 may dissuade individuals or groups from applying.

Several breaches of the TPA (including exclusive dealing, misleading or deceptive conduct, and false representations) are confined to circumstances where the conduct complained of has been engaged in 'in trade or commerce' (see Miller 2001: 66). An employee works under the direction of an employer (who may be engaged 'in trade or commerce') and may be distanced from the conduct in question. Thus one issue concerns the number of artists who could be considered sole traders (i.e. independent operators or contractors) rather than employees.

The academic debate on the status of CDEP scheme workers may shed some light on the status of Indigenous artists. The operational definition of an employee (as opposed to an independent contractor) for tax purposes turns on who controls either the tools used or general working arrangements. This distinction is important in the Indigenous context because the employment status of CDEP scheme participants is ambiguous in many respects.<sup>2</sup> Many artists in the CDEP scheme have no superannuation coverage, they control the tools used in their work and they receive little direction from management.<sup>3</sup> However, the main debate over the status of CDEP scheme workers focuses on whether they are welfare recipients or employees, not whether they are sole traders or employees (Morphy & Sanders 2001).

Another issue to be considered in determining the nature of the relationship between CDEP scheme and artists, is whether a worker is producing for the tourist market or creating fine art. Arts and craft in the tourist market is more likely to be produced in a manufacturing paradigm with limited opportunities for creative input from workers. Artists producing fine art may work in the CDEP scheme but their unique skills may mean that they have some 'market power' in the relationship with their employers and therefore may have some special arrangements, informal or otherwise, whereby they have some control over their artistic output. In these circumstances, it is arguable whether these artists are employees. It should also be noted that the growing numbers of individual Australian workplace agreements means that the nature of the employee-employer relationship is changing, with the distinction between employees and contractors becoming increasingly blurred.

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<sup>2</sup> For example, the ABS treats CDEP scheme workers as employed for statistical purposes, but other important aspects of an employee/employer relationship are often missing.

<sup>3</sup> Ironically, the Tax Act currently treats CDEP scheme workers as welfare recipients as they are eligible for the beneficiary rebate.

If one was forced to classify CDEP scheme workers, the majority would be considered employees because they are covered by worker's compensation and are subject to potential direction to do specific jobs by management. However even in such circumstances, the TPA may be relevant since it applies to organisations (including CDEP organisations) that trade in art work. Consequently, conduct by employees may bind the organisation if it is done within the employee's actual or apparent scope of authority (s. 84). More generally, a person may be considered to be a secondary offender if they are involved in some way in a contravention of the TPA (e.g. by aiding and abetting, inducing others to contravene, being in any way knowingly concerned, conspiring with others) (s. 75B). For example, if an artist and an organisation were to arrange to create and then sell a forgery of another prominent artist's work, then the TPA may cover the misrepresentations that arise. Obviously, there is a considerable grey area in the relationship between CDEP organisations and artists on CDEP, and the TPA may apply to some artists employed in the scheme.

The TPA may also be relevant for Indigenous artists not associated with the CDEP scheme. Indeed, if the CDEP artists only supply a small part of the market, the TPA may affect many of the remaining Indigenous artists. The following discussion focuses on the TPA issues for such artists, the rest of the Indigenous arts industry and consumers.

## Anti-competitive practices

Part IV of the TPA prohibits practices such as anti-competitive agreements, misuse of market power, exclusive dealing and mergers. Anti-competitive agreements include those that result in, or are intended to result in, a substantial lessening of competition within the market. Note that price fixing agreements are prohibited outright.

Exclusive dealing is an arrangement under which a retailer or wholesaler contracts to purchase from a supplier on the understanding that no other distributor will be appointed or receive supplies in a given area. One form of exclusive dealing prohibited per se is 'third line forcing'. It involves the supply of goods or services on condition that the purchaser acquire goods or services from a particular third party or a refusal to supply because the purchaser will not agree to that condition (s. 47(6)). Otherwise, exclusive dealing is only prohibited if it has the purpose or effect of substantially lessening competition (Part IV, s. 47).

Sellers sometimes engage in price fixing and market sharing to earn 'supra-normal' profits. The TPA is therefore 'suspicious' of resale price maintenance, tie-in contracts, territorial restraints in joint ventures and mergers, horizontal price agreements not linked with market power, and any vertical restraints (i.e. restrictions or conditions imposed on the seller or buyer of an item). The following discussion gives some examples of such practices to illustrate the main TPA issues that may arise in the context of the Indigenous arts industry.

Resale price maintenance occurs when suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale. Resale price maintenance is also known as 'vertical price fixing'. It is targeted by the TPA because it is thought to diminish intra-brand competition (Part IV, ss. 48, 96–100). Examples of resale price maintenance include: inducing resellers not to discount (e.g. by giving special deals to resellers who agree not to discount) and threatening resellers by refusing to continue to supply them.

A supplier may recommend a resale price provided that the document setting out the suggested price makes it clear that it is a recommended price only. Suppliers may specify a maximum price without infringing the resale price maintenance prohibition. Note that, in our assessment, putting an art work on consignment means that it is reasonable to place a reservation price on it. However, if a work is sold outright, then the resale price maintenance provisions would come into force.

Exclusive dealing can reduce intra-brand competition, but can enhance inter-brand competition by preventing free-riders who have not made any investments in the image and reputation of products (as in the case previously discussed, of some private dealers who take advantage of the promotional activities of art centres). To have a meaningful discussion on the effect of exclusive dealing it is necessary to have an operational definition of what constitutes a 'brand' (e.g. individual artists, art centres or 'regional styles'). In the fine art market, Indigenous artists are associated with a 'regional style'. A definition of 'brand' based on regions presupposes an adequate definition of a 'region', and this is not easily achieved. For example, Arnhem Land is often disaggregated into subregions such as Western, Central, and Eastern Arnhem Land (Ryan 1990; Sever 2001).

Arguably, the abstract concept of 'brand' may be defined in relation to the excellence of the individual artist. However, the situation is complicated by the fact that many artists do not individually own the designs they use. The ownership of a design may be vested in a clan or other social grouping

Even if it is possible to arrive at a functional definition of 'brand' for Indigenous fine art, it is important to recognise that the concept has less relevance in the tourist art market where there are few meaningful distinctions between artistic styles. Exclusive dealing and other vertical constraints are unlikely to affect the level of competition in the tourist market where the vast majority of firms are small relative to the overall size of the industry.

Some art centres make a point of recommending that artists get their supplies from particular establishments. Given that there is, to our knowledge, no instance of a refusal to supply retail or wholesale services when artists do not purchase their supplies from such sources, this cannot be considered as third line forcing. Such recommendations should be characterised as art centres informing artists about market conditions.



## Barriers to entry and other competition issues

What can be classified as a barrier to entry is highly contestable. Bain (1956) defines a barrier to entry as anything that allows incumbent firms to earn excessive (or 'supra-normal') profits without threat of entry. Stigler (1968) offers an alternative definition based on cost asymmetries between incumbents and entrants. A barrier to entry is a cost of producing that must be borne by a firm which seeks to enter an industry but is not borne by a firm already in the industry (and implies a distortion in the allocation of resources from the social point of view).

Factors that prevent competitors from entering a particular industry may be innocent, for example an absolute cost advantage on the part of the firm that dominates the market, or deliberate, such as high spending on advertising to make it very expensive for new firms to enter the market and establish themselves. Other entry barriers may result from a firm's technological advantage, often protected by patents, or from a firm's existing access to end users as a result of its control of the distribution network. Barriers to entry reduce the external threat of competition in a market, thereby enabling incumbents to charge higher-than-competitive prices. The concept of barriers to entry is complex and may involve a number of dimensions: existing firms may manufacture a product more cheaply because of economies of scale, may have built up a strong brand loyalty, control the supply of raw material, or own the patent rights to all or part of the production process (Bannock et al. 1998).

Miller (2001: 270) describes barriers to entry as the ultimate determinate of the existence or absence of market power. The case, *ACCC v Boral Ltd* (1999), is used to clarify what is meant by the term in the context of the TPA: barriers to entry exclude economic circumstances which make it unattractive, irrational or impossible for a new entrant to enter the market. The same case is used by Miller to list several matters to be considered in determining whether a barrier to entry existed in the relevant market.<sup>4</sup>

The TPA takes into account the 'height' of barrier to entry when evaluating whether a substantial lessening of competition has occurred (Part IV, ss. 50 and 50A). The process of assessing whether a substantial lessening of competition has occurred is described in detail in Miller (2001: 212–3).

Given the complexity and an element of imprecision, in the standard definition of barrier to entry, it is necessary to focus our discussion on specific issues in the

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<sup>4</sup> The appeal of the **Boral** case to the full Federal Court further 'clarified' the issue by indicating that dynamic market behaviour by incumbent firms to exclude rivals by a variety of uncompetitive practices was as much a barrier to entry as any structural condition in the market.

Indigenous arts industry. Under Bain's definition the authenticity label may provide a barrier to new entrants if it is costly to join the label and consumers have a strong loyalty to the label ('brand'). Clearly however, given their approval for NIAAA's registration of the trademark, the ACCC found that there was no problem of this kind.<sup>5</sup> The role of economies of scale will be introduced briefly in the section that provides an overview of the Indigenous arts industry. Control over the supply of raw materials will be explored in the context of the discussion of the potential for 'exclusive dealing'.

## Unconscionable conduct

Part IVA of the TPA deals with unconscionable conduct both in commercial dealings (ss. 51AA and 51AC) and consumer transactions (ss. 51AA and 51AB). The term unconscionable conduct has come to refer in common law to circumstances that have the following elements (Bruce 1999):

- an unequal relationship—in the sense that one of the parties is under a special disability, for example by virtue of age, infirmity, illiteracy or lack of education
- the stronger party is aware of the disability and then exploits it to their advantage.

The TPA provides a non-exhaustive list of specific considerations and situations which, arguably, may help to define unconscionable conduct without the need to demonstrate a 'special' disability (ss. 51AB and 51AC). This 'statutory unconscionability' goes beyond s. 51AA and appears to cover conduct that would not otherwise be found to be unconscionable within the meaning of the common law.

Obviously, there is a potential for such issues to arise in the context of both consumer transactions as well as between artists and commercial galleries or community-based art centres. The role of asymmetries of bargaining power and information sets (e.g. about the value of the art) are discussed at length below, and illustrated in several anecdotes provided in interviews of current industry participants.

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<sup>5</sup> While NIAAA's arrangements originally held some anti-competitive and consumer effect concerns for the ACCC (such that it considered that s. 45 and/or s. 52 of the Act may apply), the areas of concern were allayed through amendments to the rules governing use of the mark, and through further clarification of the manner in which the arrangements are to be administered (ACCC media release: MR 213/99, 4 November 1999, 'No objection to Indigenous certification trade mark').

## Misleading and deceptive conduct

Part V of the TPA deals with fair trading and contains provisions aimed at protecting consumers and ethical traders. Of particular relevance here are s. 52 (misleading or deceptive conduct), s. 53 (false or misleading representations), and ss. 55 and 55A (misleading the public as to the nature or characteristics of goods and services).

Section 52 of the TPA contains a general prohibition that ‘a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’.

Section 53 of the TPA specifically prohibits false claims about:

- the standard, quality, value, grade, composition, style, model or history of goods and services
- the price of goods and services (e.g. that it is less than a competitor’s price)
- the place of origin of the goods.

Other specific prohibitions potentially relevant to the Indigenous arts industry, include:

- misleading the public as to the nature or characteristics of goods and services
- bait advertising (of goods which cannot be supplied in reasonable quantities at that price for a reasonable period)
- accepting payment without intending to supply.

The NIAAA authenticity label may involve certain TPA issues surrounding the term ‘misleading and deceptive conduct’. There is potential for an authentically licensed product to misrepresent the extent to which it is the work of an Indigenous artist if, for example, the artwork was authenticated despite only being partly produced by Indigenous artists or if it was created by Indigenous artists without customary authority to produce the particular style (Fair Trading/Unfair Practices covered in TPA, Part V, ss. 51–65A, see ACCC 2001b).<sup>6</sup> Note that some TPA issues may overlap with offences under the Fraud and the Crimes Acts, and various state/territory fair trading acts.

While the authenticity label could be characterised as a direct attempt to curtail misleading and deceptive conduct on the part of non-Indigenous artists who pose as Indigenous artists, it may also involve other TPA issues (e.g. it may be a barrier to entry if it is expensive or difficult for new Indigenous artists to get authenticated—see the discussion of NIAAA in the previous section).

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<sup>6</sup> Note that the NIAAA documentation does not specify whether an art work was created by Indigenous artists with customary authority to produce the particular style.

## Harassment and coercion

Section 60 of the TPA prohibits the use of physical force, undue harassment by a corporation in relation to the supply of goods or services to a consumer, or in relation to payment by a consumer for goods and services. While this section is of potentially wide application, it has received little judicial scrutiny (Miller 2001: 467). When the TPA was introduced the section was limited to the use of force etc. at a place of residence, but this limitation was removed in 1986. Unlike the common law tort of intimidation, there is no requirement that harassment or coercion involve a threat of an illegal act, only that the conduct is undue.

Miller (2001) claims that the term 'undue' is likely to be given its ordinary dictionary definition of 'unwarranted; excessive; too great'. In the context of the Indigenous arts industry where intercultural transactions are the norm, the term 'undue' may be particularly difficult to define. This ambiguity, in combination with a possibly unequal relationship between the parties involved, may mean that some 'harassment and coercion' may resemble the unconscionable conduct described above. Also, given that s. 60 of the TPA focuses on consumers, artists may not be classified under this section unless they are interpreted by the courts to be consumers. An artist, in effect a producer, may be considered to be a consumer if the transaction with a supplier does not exceed \$40 000.<sup>7</sup>

## How the TPA might articulate with the Indigenous arts industry

In this section, we revisit those parts of the TPA outlined above and discuss, in more detail, how they may be relevant to the Indigenous arts industry.

### Anti-competitive agreements

The possibility of collusion and cartel appears limited in the primary art and craft market. Historically, a number of art centres cooperated in 1987 to boycott a government-funded company, Aboriginal Arts Australia, an action that led to the formation of the peak body ANCAAA (then the Association of Northern and Central Australian Aboriginal Artists, see Altman 1989). This move was

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<sup>7</sup> Note that s.4B of the TPA defines a consumer as someone (including a corporation) who purchases goods (that are both not for resale or use in a production process) where the price of the goods did not exceed \$40 000; or, where that price exceeded the prescribed amount, the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle.

unchallenged by the Trade Practices Commission but if it were to occur today it might be challenged by the ACCC. It is, however, unlikely that such action would be possible today, particularly given the lack of unity among representative bodies within the industry and the absence of a government-sponsored company.

There have been anecdotal suggestions of collaboration between commercial galleries and staff of public institutions to promote individual Indigenous artists' careers and increase the value of art works owned or traded by dealers. The mainstream arts industry benchmarks for establishing that an artist has achieved significant career success is to be featured in non-selling exhibitions and included in the collections of public institutions. Some commercial galleries appear to have cultivated relationships with institutional staff in order to secure major exhibitions for artists they represent. Some of the paintings included in retrospective exhibitions are owned by dealers, and additional value is created through their being presented in a major exhibition.

There are situations in which competition may favour some parties to the detriment of others, or where an apparent short-term advantage to a party may contribute to their long-term disadvantage. A case in point is where the activities of private dealers compromise the viability of a community art centre, to the ultimate disadvantage, of the artists who depend on the centre.

An ATSIIC subsidised community-controlled art centre, Injalak Arts located at Oenpelli community, western Arnhem Land faces competition from a number of other agents operating in the same community. These competing agents are either non-Indigenous entrepreneurs or else have formed informal business associations with local Aboriginal people. As an incorporated community organisation Injalak is fully accountable for its activities and financial performance, whereas the activities of these other agents are far less transparent. While artists' agency is clearly a factor such competing arrangements, the viability of Injalak Arts is potentially jeopardised by such activities and there is also a risk of unconscionability in relations between artists and such private dealers.

## Exclusive dealing

This section of the TPA may be relevant to the industry in situations where the distribution of a collective body of regional artwork is restricted in some way by the actions of an art centre, commercial outlet or private dealer. There are almost no exclusive relationships between art centres and artists. However, there may be exclusive dealing scenarios with private dealers where artists are trapped into producing art for a certain individual (often away from their communities), though this is more likely a matter of unconscionable conduct (see 'Unconscionable conduct and the nature of Indigenous "disability"').

One of the few known cases in which an artist has entered into exclusive contracts with dealers concerns the Ngukurr artist Ginger Riley who made complaints to Darwin police in relation to art works being sold in his name. The claim relates to 40–50 paintings created in a workshop organised by Fred Torres. Mr Torres was aware that the artist was under an exclusive contract with Beverly Knight of Alcaston House Gallery. Knight alleged that the paintings were fakes and that Riley had been coerced into producing the works (McDonald 2000: 35).

## Resale price maintenance

As indicated, suppliers may specify a maximum price without infringing the resale price maintenance prohibitions. However, the issue in the Indigenous arts industry is rarely about preventing retailers from going below a certain price, and more often about encouraging them to desist from over-inflating the price. Most artists and art centres (and presumably galleries that wholesale and retail), who sell their paintings to dealers recognise that they cannot place restrictions on the retail price of the artworks. On balance, there is no evidence that resale price maintenance is a problem in the sector.

## Barriers to entry

Barriers to entry for commercial galleries and agents can result from restrictions on access to Aboriginal land, although in practice this is a law that can be breached. It is difficult to monitor and is in any case outside the jurisdiction of the ACCC. Community councils can put mechanisms in place which prevent or discourage unauthorised individuals or organisations from trading in art. Such policies, if effectively policed, could potentially be characterised as barriers to entry. However, fewer than half of the centres surveyed in the ACCS were able to operate as monopolies in the local community.

In dealing with ‘poachers’, artists are exercising their freedom to choose with whom they deal. An artist might desire a quick cash transaction, but may also be aware that they may receive lower returns than they would do when dealing with the government-funded community art centre. The activities of private dealers can considerably undermine art centres. ‘Poachers’ target big-name artists, including artists that art centres rely on to subsidise the support of emerging artists. The very existence of ‘poachers’ and independent dealers provides prima facie evidence that barriers to entry are not problematic in the overall industry.

A related point is that most of the wholesale and retail outlets are reasonably small relative to the overall size of the industry. While it is possible that there are unexploited economies of scale, especially among art centres, the political,

geographic, and cultural constraints of rationalising operations across several communities means that any such economies are unlikely to be realised in the near future. In any case, the cost savings of larger operations might be offset by the difficulties involved in managing artists from a range of communities, cultures and language groups.

A potential barrier to entry is associated with the label of authenticity although it is far from clear if this has proven an effective barrier. The low take-up rates of NIAAA's label means that it is extremely unlikely that non-participants will be disadvantaged by the label. The only possible exception was the debacle at the time of the Sydney Olympics (previously referred to, that probably lost sales across the whole industry. The failure of the label to garner support amongst artists, their agents, and consumers means that the label will not constitute a barrier to entry for the foreseeable future. In any case, the NIAAA and other authentication labels are all voluntary schemes.

## Unconscionable conduct and the nature of Indigenous 'disability'

In the case of the Indigenous arts industry in remote Australia, artists may be 'disabled' by poor literacy, numeracy, substance abuse, their general lack confidence in cross-cultural interactions, and poor understanding of unfamiliar and relatively abstract concepts such as the 'market'. If art dealers take advantage of these 'disabilities' they may be in breach of the TPA.

There are anecdotes in the industry about artists being invited to work for a dealer and being trapped physically, emotionally or through their lack of knowledge about how to extricate themselves from the situation. Artists appear especially vulnerable when they are in an unfamiliar place, for example in an urban centre.

An artist who was in Sydney working for a dealer rang his relative in central Australia telling the relative he was sick of being in Sydney, and that the dealer would not let him leave and was refusing to arrange for him to return to his community. Since the artist did not have the private means for a flight home, he was now ringing relatives in an attempt to arrange to pay for a flight. The plan was to surreptitiously catch a taxi to the airport to get home.

An artist was visiting Darwin as the guest of a privately organised festival of weaving. She had been promised an airfare and a fee, but had arrived in Darwin to find she was being hosted in the organiser's house and was not going to be paid a fee. She did not have any money and felt trapped, being unable to organise anything independently.

Certain art centres that are otherwise successful, face problems because their key producers have a dependency on alcohol that private dealers are more than willing to exploit by supplying alcohol and/or money to artists and their families as well as arranging transport into town. Such exploitation debases the artists (and often threatens the integrity of their art work), undermines the art centres, and demoralises the art centre staff and other artist members.

A prominent and successful artist, who was promoted internationally by an art centre for more than a decade, was encouraged to work on site for a dealer in an urban centre in 2000. He did this for a period of months before being 'poached' by another dealer. To the first dealer's irritation, the new arrangement was exclusive. It is rumoured that the second dealer provided a number of 'encouragements' to the artist who has multiple substance dependencies.

There are instances where artists have been provided with art materials by private dealers, and have then been coerced to deliver a finished product. The most difficult situations occur when the private dealers have been residing in the community and are employed either in community organisations or in running (non-arts related) businesses. The fact that the dealers are on site means they have easy access to artists and can visit them in their homes or places of work to monitor output or to pressure artists to complete works. The activities of such informal rent-seeking entrepreneurs raises ethical issues about people being granted permits to live in an Indigenous community to undertake a specific task, and then deciding that they will take advantage of their proximity to world-renowned artists to begin dealing in art.

There is anecdotal evidence that when a prominent artist was in physical decline associated with old age, her camp was visited by a range of dealers who had supplied art materials with a view to securing her completed works. The behaviour of some individuals was described as 'coercive'. This was despite all visitors being asked by her relatives and community staff to desist from visiting because of her age and ill health. Her fragility and lack of English language skills, plus her inherent cultural aversion to rudeness, would have made it exceedingly difficult for her to assert her rights to privacy.

## False or misleading representations

Sections 52 and 53 of the TPA may be particularly relevant to the Indigenous arts industry. For example, one of the key problems for art centres in dealing with the commercial sector is the promulgation by the latter of false and misleading information about artists and/or their products (Wright 1999: 21). There are many



unpublished examples of galleries presenting art works with deceptive or misleading information relating to materials, traditional use and the significance of the objects.

In a gallery in Alice Springs a sales assistant was overheard telling customers that an Arnhem Land painting on what appeared to be manufactured 'Arches' paper (imported from France) was created '100% by Aboriginal artists' and was painted on 'paperbark paper' made by the artists themselves. To our knowledge no artists in Arnhem Land make their own paper, although many paint on Eucalyptus bark—an entirely different material to paper. The customers were also informed that the product was painted entirely in ochres when the background was in fact gouache (watercolour). On another occasion the gallery director was heard to tell customers that a patchwork rug made from lambskin was a 'traditional piccaninny blanket'.

There is potential for the manufacturers of an authentically licensed product to misrepresent the extent to which it is the work of an Indigenous artist if, for example, the artwork was only partly produced by Indigenous artists or it was created by Indigenous artists who did not have the customary authority to produce the particular style (Fair Trading/Unfair Practices covered in TPA, Part V, ss. 51–65A, see ACCC 2001b).

One case relating to potential misleading representation (ss. 52 and 53) concerns the production of didgeridoos in South Australia. Indigenous people (supposedly) harvest raw woods in the Northern Territory which are then trucked to Adelaide, where non-Aborigines strip the 'blanks' and fit mouth pieces. The didgeridoos are then distributed to Indigenous painters (from all over Australia) living in Adelaide who are paid a flat fee per item. The instruments are then marketed as 'Aboriginal made', which to a limited degree they are (Janke 1998: 39).

The carpets case previously discussed involved a breach of the TPA as well as copyright law. Justice Von Doussa found that the label attached to the carpets incorrectly stated that the carpets were produced with permission of the artists and that royalties were being paid to the artists. He made the judgment that misleading consumers in this way was an infringement of ss. 52 and 53 of the TPA (Janke 1998: 94).

In relation to false claims about authorship it is important to note the complex nature of collaborations between Indigenous artists. The issue of authorship has been problematic for dealers, art centres and the market because Indigenous artists and their communities have a different concept of 'ownership' of designs to those

held by the encapsulating culture. Rights to paint certain images and 'dreamings' belong to a group rather than an individual. Indigenous artists, unlike most mainstream artists, work collaboratively on arts projects, and this practice has continued with the introduction of paintings created for the market. The participation in collaborations is determined by rights and responsibilities under Indigenous law and is rarely random. The role of each participant in a collaborative work varies depending upon rights and responsibilities of the participating individuals. It may involve significant input to the content of the painting or may be 'decorative'.

In the case of Kathleen Petyarre and her former husband Ray Beamish, and the painting that won the Telstra National Aboriginal and Torres Strait Islander Art Award in 1996, it was strongly argued by a number of people that it was not necessary to acknowledge the collaboration because the subject matter of the painting belonged to Petyarre. This was vindicated by a panel convened to investigate the affair. The Chairman of the Board of the Museums and Art Galleries of the Northern Territory 'went on to note that while it was not in dispute that Ray Beamish has assisted with some of the dotting, ultimately this was not material to the decision in terms of what constituted authorship of the painting' (Nicholls & North 2001: 27).

There is a motivation for art centres and galleries to promote the work of individual artists, rather than collaborations. The fine art consumer generally has the expectation that artworks will hold or increase their value as investments. The long-standing western practice has been for the works of individual artists to be deemed collectable and for their works to steadily appreciate in value. Dealers have articulated the view that the investment art market is not receptive to collaborative works, even if they are culturally appropriate in the Indigenous domain. The industry concern with multiple authorship has not been satisfactorily resolved and no industry-wide protocol has been developed to date. A Melbourne based art dealer and artist was taken to court by members of Injalak Art Centre in 1994. An Adelaide dealer had been approached by the first dealer who was selling paintings by specific Kunwinjku artists as well as works from Central Australia. The Adelaide dealer forwarded photographs of the paintings to the art centre for verification, whereupon the artists acknowledged authorship of some works, but rejected others. The disputed paintings were of poor quality, derivative of the Western Arnhem Land style, and the subject matter was not necessarily owned by the artists. The paintings that the artists acknowledged authorship for were created during a residency undertaken at the Melbourne dealer's home organised directly with the artists some months earlier. According to the artists, they all painted in the dealer's studio and produced a number of paintings on Arches paper during

the residency. At the same time they gave the dealer lessons in their traditional painting style as an expression of their respect and gratitude to him as host. They were paid both in cash and in-kind for the paintings they produced. The dealer did some painting under their supervision but did not indicate his intention to sell his artwork, neither did he indicate his intention to continue painting in the Kunwinjku style after their departure, nor his intention to attribute their authorship to his own derivative paintings.

An employee of a Cairns artefact shop has been caught on video claiming genuine Indigenous didgeridoos are inferior to fake Indonesian imports. The local Indigenous community is calling for government action over claims that cheap imported didgeridoos are flooding the million-dollar artefact market while Indigenous people are being edged out by dealers. They say that workers in Indonesia are paid at cheap rates to make the didgeridoos and Aboriginal artists are being ripped off, being paid \$50–\$60 for genuine didgeridoos which are then retailed for up to \$800. ATSIC Cairns and District chairman Terry O’Shane said that federal legislation was needed to protect Aboriginal artwork. ‘Aboriginal authenticity must be protected by law because our people are being hoodwinked and this reflects badly on the integrity of Australia in terms of culture,’ he said. A spokesman for Fair Trading Minister Merri Rose said an artefact’s country of origin must not be misrepresented. Fines of \$40 000 for individuals and \$202 000 for corporations could be implemented (Reid 2002).

## Conclusions and implications for practice

The research reported here has focused on the Indigenous arts industry as a case study of how competition and consumer protection issues might apply to an industry dominated by Indigenous Australians. We found that this industry is extraordinarily complex, especially given its relatively small overall size. This is partly because a large proportion of producers (artists) reside in remote localities and in circumstances that are culturally very different from the mainstream. Consequently, there is often a considerable physical and cultural distance between producers and consumers, with all the complications that such intercultural exchange entails. The sheer diversity of the industry, in both production and marketing, means that it would be extremely difficult to rigorously regulate, even in situations where such regulation might be warranted.

The main policy response to this situation by government over the last 30 years has been the gradual establishment of a network of community-controlled art centres as subsidised intercultural mediating institutions—as the collectors and initial marketers of Indigenous art. This policy instrument has most recently been used by

ATSIC since the early 1990s as the major plank of its NACISS (Mercer 1997). These established organisations operate most effectively as monopolies, primarily because of market failure associated with remoteness, small size and dispersed artist populations that are expensive to service. Paradoxically, it may be in the artists' best interests to be serviced by these monopolistic organisations. This is partly because of the poor track record and performance of many private dealers, with much of the anecdotal evidence indicating conduct that might border on the unconscionable. Counter-intuitively, perhaps, it could be argued that competition per se may not assist the industry, at least as it is currently structured.

It is entirely possible that the ACCC may receive complaints from consumers, producers or dealers within the Indigenous arts industry. It is our hope that this chapter will assist the ACCC in understanding the complex nature of the industry and particularly the nuances that need to be considered when looking at potential articulation points between the industry and the TPA.

The approach taken in this research has been diverse: it has used the existing literature, the research and experiences of the authors and an theoretical economics framework that meshes with the intent of the TPA. This approach has shortcomings. In particular, on the collection and marketing side—the supply side—there is too much emphasis on formal institutions primarily because these are most visible, both statistically and in the literature. To some extent, our findings replicate many already historically reported in the literature (see e.g. Altman 1989) and in some recently completed projects (see Janke 1998; Mellor 2001; Wright 1999; Wright & Morphy 2000). Where this research primarily differs from others is in its use of a trade practices legislation lens to focus on the Indigenous arts industry.

The trade practices issues that we have highlighted are, in order of their estimated significance to the Indigenous arts industry, unconscionable conduct and false or misleading representations.

Unconscionable conduct can occur in situations where private dealers are in a stronger bargaining position than the Indigenous producer of art. The very fact that such intrusion and conduct occurs, even in situations where there are established community-controlled art centres, suggests that it is an actual and potentially greater problem in more informal settings where arts collecting institutions are absent. This issue has been evident since the establishment of the modern Indigenous arts industry in the early 1970s. It should be noted though that because artists are engaged in an exchange relationship they are rarely passive parties in the transaction, although they may experience special disability especially in those situations where they might experience extreme financial deprivation or alcohol or drug dependence. In such situations they are especially vulnerable. There is clearly a need for unconscionable conduct to be reduced or eliminated, although it is problematic when individual artists make informed choices to use dealers over established channels.

False or misleading information can emanate from artists, art centres, retail outlets or commercial dealers. It is important that consumers are confident, when they make a purchase in either the fine or the tourist market, that they are getting product made by Indigenous artists and, in the case of fine art, by a prominent artist. The issues of authorship and authenticity can be distinguished. While there are many situations where collective authorship of an artwork is culturally appropriate, it is important that this is clearly documented to ensure that the consumer is accurately informed. It is especially important that the authorship is correctly recorded for works destined for the expanding fine art 'investment' market, where knowledgeable investors are prepared to pay a premium for the work of recognised artists. The issue of authenticity is also complex. It encompasses appropriation of certain geographically based styles, collaboration between Indigenous and non-Indigenous artists, and competition from imported and locally produced unlicensed 'fakes'. All these issues exacerbate the potential vulnerability of the Indigenous arts industry which, in many situations, represents the main private sector option for economic development for Indigenous communities.

We turn now to the question of what action the ACCC might contemplate in respect to the trade practices issues identified.

There are no ready solutions to the problem of unconscionable conduct except, perhaps, education of artists that encourages strong allegiance to accountable and well-governed arts organisations. This in turn suggests that a broadening of the network of community-controlled art centres might prove beneficial, but this is a policy response that is clearly outside the ACCC's ambit. It is also important to emphasise that the governance issue here extends well beyond community-controlled art centres—there may be systemic and deeply ingrained community governance problems that make artists vulnerable to private dealers, some of whom may be employed within communities. Nevertheless, the ACCC may wish to keep a watching brief for interactions that might be classified as unconscionable conduct, or as coercion or harassment under the TPA.

There are labelling statutes in force (e.g. through customs), particularly for imported goods which must state country of origin. In recent years, documentation strategies undertaken by many art centres and reputable commercial galleries have improved markedly, but there is still competition from non-Indigenous products, particularly in the tourist art sector. Fortunately, national and regional initiatives to document art thoroughly and appropriately are contributing to enhancing consumer confidence and have the potential to limit opportunities for unauthorised fine art or imitation tourist art. There is a potential role for the ACCC here in supporting art centre, regional and national initiatives especially in the problematic tourist sector of the industry.

In April 2002 the ACCC and ATSIC signed an MoU which provides a framework for cooperation between the agencies (ACCC 2002a). The ACCC, in consultation

with ATSIC could play a constructive and proactive competition and consumer role by assisting in the provision of producer, art centre, dealer, and consumer information in particular in relation to issues of authorship, authenticity, copyright, pricing policies and unconscionable conduct. A simplified guide or charter for producers and consumers of Indigenous art might prove very useful in generating producer and consumer benefit and industry growth. In April 2002 the ACCC released *Storecharter—a service charter for stores serving remote and Indigenous communities* (ACCC 2002b). A similar 'Arts charter—a service charter for the Indigenous arts industry' might prove appropriate, especially to facilitate **both** producer and consumer information, so as to reduce the risk of unconscionable conduct and false or misleading conduct. The arts charter could be appropriately developed with national arts advocacy or commercial galleries associations or, with an eye to devolution, with regional arts advocacy organisations like ANKAAA or Desart that more directly represent the community-controlled art centre constituency.