

# AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V AUSTRALIAN DREAMTIME CREATIONS PTY LTD

Federal Court of Australia (Mansfield J)

21 December 2009

[2009] FCA 1545

**Trade practices – Aboriginal art – *Trade Practices Act 1974* (Cth), s 52 – misleading or deceptive conduct – representations that artworks created by a person of Aboriginal descent – artworks not created by a person of Aboriginal descent – *Trade Practices Act 1974* (Cth), s 53(eb) – false or misleading representations concerning goods’ place of origin – artworks painted in Australia but initially imported from Indonesia**

## Facts:

Australian Dreamtime Creations Pty Ltd (‘ADC’) is a company which wholesales and retails in Aboriginal artworks. The company is directed and substantially owned by Mr Tony Antoniou, who is ADC’s ‘driving mind’. Around 1992–93, Mr Antoniou engaged Mr Bruce Harris, an artist of Aboriginal descent who identified himself as ‘Ubanoo’ or ‘Ubanoo Brown’, to paint certain items (such as didgeridoos, boomerangs and ceramics) in a style and manner that is commonly recognised as Aboriginal art. Mr Harris painted these items for Mr Antoniou for approximately three months only and has not done any more painting for Mr Antoniou since. ADC sold these items, identifying ‘Ubanoo’ or ‘Ubanoo Brown’ as the painter.

Around October 1993, Mr Antoniou engaged the artistic services of Mr Greg Goodridge, who is not of Aboriginal descent. From October 1993 to December 2008, Mr Goodridge painted certain artworks for ADC in the style of Aboriginal art, including in the same style used by Mr Harris. In 2003, ADC imported two shipping containers of various carved wooden items from Indonesia, the majority of which were painted by Mr Goodridge in the style of Aboriginal art.

Artworks painted by Mr Goodridge were promoted and sold by ADC in various ways – through ADC’s South Australian premises, on consignment through other retailers in Australia and overseas, and online through eBay and the ADC’s website.

The Australian Competition and Consumer Commission (‘ACCC’) alleged that a number of representations made by

ADC in the promotion and sale of artworks painted by Mr Goodridge constituted misleading and deceptive conduct or false and misleading statements, contrary to ss 52 and 53(eb) of the *Trade Practices Act 1974* (Cth) (‘TPA’). These alleged representations related to the following:

- since at least 1996, artworks painted by Mr Goodridge had the words ‘Ubanoo Brown’ written on them;
- since at least 2005, ADC supplied to consumers and retailers ‘Certificates of Authenticity’, which claimed the artworks were ‘Authentic Aboriginal’, in relation to artworks painted by Mr Goodridge that had the words ‘Ubanoo’ or ‘Ubanoo Brown’ written on them;
- since at least 2007, ADC had affixed stamps to items, including those painted by Mr Goodridge, which read ‘Traditional hand painted Aboriginal Art Australia’ or ‘Authentic Original Aboriginal Art Australia’;
- from at least 19 June 2007 to January 2009, ADC represented that certain artworks promoted for sale on its website were painted by a person of Aboriginal descent and/or Ubanoo Brown, when they were not painted by Mr Harris but in fact by Mr Goodridge;
- from at least 19 June 2007 to January 2009, ADC represented on its website that the carved wooden items imported from Indonesia were from Australia; and
- in September 2008, ADC represented on eBay that a particular wooden item was painted by a person of Aboriginal descent and was from Australia, when it was in fact painted by Mr Goodridge and imported from Indonesia.

The Federal Court had to determine, in light of these claims made by the ACCC, whether ADC had engaged in conduct in contravention of the *TPA*, ss 52 (misleading or deceptive conduct) and 53(eb) (false or misleading representations concerning goods' place of origin).

**Held, finding contravention of s 52 and granting declaratory and injunctive relief:**

1. Whether a representation is likely to mislead or deceive is an objective question of fact, to be determined in light of all the circumstances. It is sufficient if there is a real chance that the conduct or representation will mislead or deceive. The test is whether an ordinary or reasonable person from the class of persons to whom the representation is made is likely to be misled or deceived: [15]–[16]; *Taco Company of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 136 cited; *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12 cited; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44 cited.

2. The emphasis placed by Mr Antoniou on the distinction between the 'souvenir' market and the 'Aboriginal fine art' market is misplaced, for it assumes that, at the lower ('souvenir') end of the market, there can be no misleading or deceptive conduct. The focus must be on the conduct of ADC and whether that conduct was misleading or deceptive. There is no need to determine whether there are two, or more, ranges or categories of artwork: [36]–[37].

3. Even if 'Ubanoo Brown' was a pseudonym name, as suggested by Mr Antoniou, that name was used by Mr Harris and not Mr Goodridge. Moreover, it does not change the character of any representations made by ADC, as they may still be misleading: [38].

4. Presenting the paintings with 'Ubanoo Brown' written on them conveyed to a reasonable class of persons who bought or might buy such paintings that they were painted by a person who used the name Ubanoo Brown. On that basis the artist representations were false and misleading, in contravention of the *TPA*, s 52. The representations were reinforced by the providing of customers buying Mr Goodridge's paintings with Ubanoo Brown's 'Dreamtime story', and sometimes with a 'bush tucker dreaming' story. This conduct occurred to encourage the purchase of the painting and to reinforce that the painting was by an Aboriginal person who used the name 'Ubanoo Brown': [41]–[45].

5. To describe an artwork as 'Aboriginal' is to expressly say that the artist is of Aboriginal descent, rather than to describe the artwork style. Describing an artwork as 'Aboriginal art' is a common means of conveying that an artwork is painted by an artist of Aboriginal descent. It is not commonplace to describe an artwork painted by an artist who is not of Aboriginal descent as 'Aboriginal art'. The multidimensional nature of the style of Aboriginal art makes it impossible to label one particular style of art as the Aboriginal style. To a reasonable group of persons who buy or may buy Aboriginal art, to describe a painting as 'Aboriginal art' is to convey that it is painted by an Aboriginal person or a person of Aboriginal descent: [40].

6. Concerning the 'Certificates of Authenticity': in using the phrases 'Aboriginal art' and 'Authentic Aboriginal painting', and in guaranteeing the authenticity of the paintings they accompanied, the certificates represented that the paintings they supported were painted by a person of Aboriginal descent. A not-insignificant number of the certificates also represented that they were painted by Ubanoo Brown. Accordingly, these representations in the certificates were false and misleading, contravening the *TPA*, s 52: [46]–[51].

7. The stamps affixed to the paintings that read 'traditional hand painted Aboriginal art' or 'authentic original Aboriginal art' conveyed to a reasonable group of persons who purchased or who may have considered purchasing those artworks that they were painted by a person of Aboriginal descent. The words 'traditional', 'authentic' and 'authentic original' confirm or assert the background of the artist. It follows that the stamp representations were false and misleading, in contravention of the *TPA*, s 52: [52]–[57].

8. The website of ADC identified Ubanoo Brown as the artist in respect of the artwork by the use of adjacent text to images of those artworks. The website reinforced that the artworks offered for sale were created by artists of Aboriginal descent by depicting an Aboriginal artist at work, by referring against other images to employing 'traditional Aboriginal artists to paint and refine new techniques', by referring to boomerangs 'individually hand made by Aboriginals' from a particular area, by describing the passage of paintings from one generation to the next, by referring to the significance of world art markets and museums of paintings by persons of Aboriginal descent in recent times, and in respect of other artists sometimes also describing their origins. It follows that, on the website, representations as to artist were made and

those representations were false, in contravention of the *TPA*, s 52, because the artworks were not painted by a person of Aboriginal descent, and not by a person identified as Ubanoo Brown: [58]–[67].

9. The representation in September 2008 on eBay, in the Aboriginal art category, of a carved wooden bird described as 'Aboriginal Art Brolga', depicted and presented the artwork as being carved and painted by a person of Aboriginal descent. The conclusion is supported by the category in which the artwork appeared. The bird shape was imported unpainted from Indonesia and it was then painted by a person not of Aboriginal descent. Accordingly, there is a contravention of the *TPA*, s 52: [93]–[96].

**Held, finding no contravention of s 53(eb) of the  
*TPA*:**

10. There is no express representation as to origin of any of the carved wooden items. The carved wooden items on the website were supported by descriptions such as 'Australia's original and best Aboriginal art'; 'Authentic Traditional Aboriginal Fine Art'; 'Australian Aboriginal Art', 'Aboriginal Art' and objects created by 'traditional Aboriginal artists'. The carved wooden bird was listed on eBay in the Aboriginal art category, was described by the text 'Aboriginal Art Brolga', and was accompanied by a description saying that ADC had been supplying 'Aboriginal fine art and craft work' since 1991. It is unlikely that a reasonable group of persons seeing those communications would think about the place or origin of those artworks. Therefore, on the evidence, no representation as to place of origin was made: [68]–[78]; *Australian Competition and Consumer Commission v Lovelock Luke Pty Ltd* (1997) 79 FCR 63, distinguished; *Siddons Pty Ltd v Stanley Works Pty Ltd* (1990) ATPR 41-044, distinguished; *QDSV Holdings; Netcomm (Australia) Pty Ltd v Dataplex Pty Ltd* (1988) 81 ALR 101, distinguished; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* [1988] FCA 40, cited; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44 cited; *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12 cited.