

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd [2009] FCA 1545

TRADE PRACTICES – misleading or deceptive conduct – Aboriginal art – implied and express representations that artworks were painted by a person of Aboriginal descent – artworks not painted by a person of Aboriginal descent – whether false and misleading – representations that country of origin of artworks imported from Indonesia and painted in Australia is Australia – whether representations made – whether substantial transformation of artwork occurred in Australia – whether false and misleading

Trade Practices Act 1974 (Cth) ss 52, 53(eb), 65AB, 65AE, 65AN

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 cited
Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177 cited
Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82 cited
Campomar Sociedad Limitada v Nike International Ltd (2000) 202 CLR 45 cited
Trade Practices Commission v Optus Communications Pty Ltd & Optus Mobile Pty Ltd (1996) 64 FCR 326 cited
Australian Competition and Consumer Commission v Thorn Australia Pty Ltd [2004] FCA 157 cited
Australian Competition and Consumer Commission v Signature Security Group Pty Ltd [2003] FCA 3 cited
QDSV Holdings Pty Ltd (t/as bush Friends Australia) v Trade Practices Commission (1995) 131 ALR 493 discussed
Australian Competition and Consumer Commission v Lovelock Luke Pty Ltd (1997) 79 FCR 63 cited
Siddons Pty Ltd v Stanley Works Pty Ltd (1990) ATPR 41-044 cited
Trade Practices Commission v QDSV Holdings Pty Ltd (1997) 59 FCR 301 discussed
Netcomm (Australia) Pty Ltd v Dataplex Pty Ltd (1988) 81 ALR 101 cited
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1) (1988) 39 FCR 546 cited
Thorp v C.A. Imports Pty Ltd (1990) ATPR 40-996 cited

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v AUSTRALIAN
DREAMTIME CREATIONS PTY LTD ACN 062 097 590 and TONY ANTONIOU**

SAD 89 of 2009

**MANSFIELD J
21 DECEMBER 2009
ADELAIDE**

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 89 of 2009

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION
Applicant**

AND: **AUSTRALIAN DREAMTIME CREATIONS PTY LTD ACN
062 097 590
First Respondent**

**TONY ANTONIOU
Second Respondent**

JUDGE: **MANSFIELD J**

DATE OF ORDER: **21 DECEMBER 2009**

WHERE MADE: **ADELAIDE**

THE COURT DECLARES THAT:

1. The first respondent, from at least 19 June 2007 to January 2009, represented in trade or commerce on its internet website that certain artworks promoted for sale by it, including paintings, prints, boomerangs, bull-roarers, carved wooden animals, carved wooden statues, table platters, didgeridoos, emu eggs and ceramic objects including table platters, vases, wall plates, lidded boxes and bowls were painted by:

1.1 a person of Aboriginal descent; and

1.2 Ubanoo Brown,

when those artworks were not, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the TP Act).

2. The first respondent, from at least 2005, represented in trade or commerce by the supply of documents entitled “certificates of authenticity” that paintings sold or supplied on consignment by it were painted by:

2.1 a person of Aboriginal descent; and

2.2 Ubanoo Brown,

when the paintings were not, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the TP Act.

3. The first respondent, from at least 1996, represented in trade or commerce by the promotion, sale and supply on consignment of paintings which had "Ubanoo Brown" written on the back of the paintings, that the paintings were painted by Ubanoo Brown when the paintings were not, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the TP Act.
4. The first respondent, from at least January 2007, represented in trade or commerce by affixing a stamp onto artworks sold or supplied on consignment to consumers and retailers that the artworks were painted by a person of Aboriginal descent, when the artworks were painted by a person not of Aboriginal descent, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the TP Act.
5. The first respondent, in September 2008, represented in trade or commerce, on the eBay auction website that a carved wooden bird promoted and sold by it on eBay was carved and painted by a person or persons of Aboriginal descent, when it was not, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the TP Act.
6. The second respondent, being the director of the first respondent and the person responsible for its operations and having caused or directed the first respondent to make each of the representations referred to in paragraphs 1 to 5 hereof, was directly knowingly concerned in, or party to, each of the contraventions of the TP Act by the first respondent referred to in paragraphs 1 to 5 hereof.

THE COURT ORDERS THAT:

7. The first respondent be restrained, whether by itself or by its employees or servants or agents or otherwise howsoever for a period of three years from representing by any means whatsoever, including by any stamp or certificate of authenticity, that any artwork promoted, sold or supplied by it to any person has been made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent

unless the artwork was, to the best of its knowledge, made, painted, created, crafted, carved, or otherwise produced, as the case may be, by a person of Aboriginal descent and from using the words "Aboriginal Art" or words describing an artwork as "Aboriginal" unless it has made such enquiries as it considers appropriate to be satisfied that the artist or artists of each such work is a person of Aboriginal descent, and it is directed to retain for a period of five years from the time of such enquiries a record of the basis upon which it attained that satisfaction.

8. The second respondent be restrained, whether by himself or by his servants or agents or otherwise howsoever, from being directly or indirectly knowingly concerned in or party to ADC or any other trading corporation, representing that any artwork to be promoted, sold or supplied to any person has been made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent unless the artwork was, to the best of his knowledge, made, painted, crafted, carved, or otherwise produced as the case may be by a person of Aboriginal descent and from using the words "Aboriginal art" or words describing an artwork as "Aboriginal" unless he has made such enquiries as he considers appropriate to be satisfied that the artist or artists of each such work is a person of Aboriginal descent, and he is directed to retain for a period of five years from the time of such enquiries a record of the basis upon which he attained that satisfaction.
9. The first respondent, within 14 days of the making of this order, provide to the applicant a list of the names and addresses of retailers to which it has sold or supplied artwork on consignment since 1 January 2007.
10. The first respondent, within 21 days of the making of this order, send a letter in terms of Annexure "A" to these orders, on its letterhead to each retailer identified in Order 9 hereof.
11. The first respondent and the second respondent pay to the applicant its costs of the proceeding.

ANNEXURE A

[TO BE ON ADC LETTERHEAD]

Dear Client,

On **[insert date]** the Federal Court of Australia made orders against Australian Dreamtime Creations Pty Ltd ACN 062 097 590 and its Director, Tony Antoniou, following legal action by the Australian Competition and Consumer Commission.

The Court found that the company and Mr Antoniou engaged in misleading and deceptive conduct, contrary to section 52 of the *Trade Practices Act 1974* (the TP Act), by:

- (a) representing that artworks including paintings, boomerangs, bull-roarers, carved wooden animals, carved wooden statues, didgeridoos, emu eggs, and ceramic objects including table platters, vases, wall plates, lidded boxes and bowls were painted by a person of Aboriginal descent when this was untrue; and
- (b) representing that certain of the artworks referred to above were painted by an Aboriginal artist named Ubanoo Brown when this was untrue.

If you have in stock any painting purchased from ADC or taken on consignment from ADC since 1994 which is represented (including on the reverse of the item) to be the work of Ubanoo Brown, it is not his work. You should not sell the painting as the purported work of Ubanoo Brown.

If you have purchased or taken on consignment from ADC any of the objects referred to in paragraph (a) above from ADC since 1994 which feature an Aboriginal cross-hatch design, there is a very real risk that those objects were not painted by a person of Aboriginal descent. We invite you to contact us to discuss the authenticity of any such objects that have been supplied to you by ADC.

Sincerely

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 89 of 2009

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

AND: **AUSTRALIAN DREAMTIME CREATIONS PTY LTD ACN
062 097 590**
First Respondent

TONY ANTONIOU
Second Respondent

JUDGE: **MANSFIELD J**

DATE: **21 DECEMBER 2009**

PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

1 The ACCC alleges that Australian Dreamtime Creations Pty Ltd (ADC) engaged in misleading or deceptive conduct, and the making of allegedly false or misleading representations, in contravention of ss 52 and 53(eb) of the *Trade Practices Act 1974* (Cth) (the TP Act). It seeks declarations, injunctions and an order for the purposes of s 83 of the TP Act, and other orders under s 86C of the TP Act in respect of that conduct and those representations. It alleges that Tony Antoniou, as the director and secretary of ADC since 18 October 1993, and at all material times as an employee, servant or agent of ADC, was knowingly involved in the contraventions of the TP Act.

THE FACTS

2 There is little dispute about the primary facts. It is really the conclusions from or the consequences of the acknowledged conduct on behalf of ADC that was in issue. Moreover, Mr Antoniou clearly acknowledged that he was the driving mind behind ADC and was fully aware of its conduct. He did not seek to say that, if ADC were found to have contravened ss 52 or 53(eb) of the TP Act, he was not knowingly involved in its contravention.

The parties

3 At all material times, ADC carried on business as a wholesaler and retailer of
Aboriginal artwork, including paintings, prints, boomerangs, bull-roarers, carved wooden
animals, carved wooden statues, didgeridoos, emu eggs, and ceramic objects including table
platters, vases, wall plates, lidded boxes and bowls (together, artworks).

4 Mr Antoniou, as well as being the sole director and manager, is one of two
shareholders of ADC, the other being his wife. Mr Antoniou was given leave to appear in
person at the hearing of this proceeding on behalf of ADC, and he also represented himself.

The artworks and painting of the artworks

5 In or about 1992 or 1993, Mr Antoniou met with an artist, Bruce Harris, who also
identified himself as “Ubanoo” or “Ubanoo Brown”. Mr Harris was of Aboriginal descent.
Mr Antoniou engaged Mr Harris to paint certain items, including didgeridoos, boomerangs
and ceramics. Mr Harris painted such items for Mr Antoniou for a period of approximately
three months, only. Mr Harris painted the artworks in a style and manner that is commonly
recognised as Aboriginal art. Mr Harris has not since about 1993 been engaged by
Mr Antoniou, or ADC, to paint any artworks and has not painted any artworks for them since
that time.

6 Mr Antoniou and/or ADC sold the items painted by Mr Harris. Mr Antoniou and/or
ADC used the name “Ubanoo” or “Ubanoo Brown” to denote the artist of the painting on the
artworks. Mr Antoniou says he used “Ubanoo Brown” to identify a subset of artworks, being
the “cross-hatch collection”, as he says the distinguishing feature of that subset is the use of a
criss-cross method to create a cross-hatch effect on various parts of the artwork, such as the
wings of a bird.

7 In or about October 1993, Mr Antoniou, on behalf of ADC, engaged Greg Goodridge
to paint certain artworks. Mr Goodridge is not of Aboriginal descent. During the period from
October 1993 to December 2008, Mr Goodridge painted artworks for ADC in the Australian
Aboriginal style, including some artwork with the cross-hatch effect. The items painted by
Mr Goodridge were advertised and sold by Mr Antoniou and/or ADC through various means.

8 In 2003, ADC imported two shipping containers from Indonesia containing various carved wooden items including birds and other animals, statues, didgeridoos, boomerangs, shields and clapsticks. Those items were made in Indonesia. They fell into three categories. They were either already painted and did not require further painting prior to sale or supply on consignment by ADC, or they were unpainted and did not require painting prior to sale or supply on consignment by ADC, or they were unpainted and required painting prior to sale or supply on consignment by ADC. The majority of the items were unpainted and required painting.

9 Mr Goodridge painted the majority of the items that were unpainted and required painting. Mr Goodridge painted those artworks for ADC in the Australian Aboriginal style. Since 2003, ADC has promoted, sold and supplied on consignment, the wooden items that were painted by Mr Goodridge.

Selling and promoting the artworks

10 From at least October 1993, ADC promoted and sold artworks from its business premises in South Australia, and on consignment to retailers throughout Australia including in South Australia, Western Australia, New South Wales and the Northern Territory and to retailers overseas. From at least 2001, ADC has promoted and sold artworks online through an auction website www.ebay.com.au (eBay). From at least 19 August 2004 to January 2009, ADC has promoted and sold artworks both throughout Australia and internationally through an internet website www.aboriginalartpaintings.com (the Website).

THE REPRESENTATIONS

11 It is convenient to briefly describe the representations that the ACCC alleges constitute misleading and deceptive conduct or false and misleading statements, contrary to ss 52 and 53(eb) of the TP Act. There are six separate representations alleged, all of which are said to be false and misleading:

- that since at least 1996, ADC has promoted, sold and supplied on consignment, artworks which have the words “Ubanoo Brown” written on the back or part of the artwork, which were in fact painted by Mr Goodridge (the artist representations). The

words “Ubanoo Brown” were written on the artworks either by Mr Antoniou or at his direction.

The ACCC says that the artist representations give rise to the express representation that Ubanoo Brown was the artist who painted the artworks, and that such representation is untrue, because the artworks were painted by Mr Goodridge or a person or persons unknown who were not known as, nor identified as, “Ubanoo Brown”.

Mr Antoniou and ADC say that Ubanoo Brown is a “pseudonym name”. The ACCC says that even if it is accepted that Ubanoo Brown is a “pseudonym name”, that it was a name used by Mr Harris and not Mr Goodridge, and that it does not change the character of the representations made by ADC as the representations are still misleading in the same way, and that it does not alter the fact that the artworks sold by ADC were not painted by a person of Aboriginal descent.

- that since at least 2005, ADC has supplied documents to consumers and retailers entitled “Certificates of Authenticity” in relation to artworks that had the words “Ubanoo Brown” or “Ubanoo” written on them, and which were painted by Mr Goodridge (the certificate of authenticity representations).

The certificates of authenticity read “AUTHENTIC ABORIGINAL PAINTING” and “I GUARANTEE THE AUTHENTICITY OF THIS ORIGINAL CANVAS PAINTING” and “ABORIGINAL FINE ART CANVAS”.

The ACCC says that the certificate of authenticity representations gave rise to the express representation that the artworks and paintings were painted by Ubanoo Brown by the use of the text “Artist: Ubanoo Brown”, and the certificate of authenticity representations impliedly or expressly give rise to the representation that the artworks and paintings were painted by a person of Aboriginal descent, by virtue of the natural inference to be drawn from statements such as “Aboriginal fine art canvas” or “authentic aboriginal painting” included in the wording of the certificates of authenticity.

The ACCC says that the certificate of authenticity representations are untrue because the artworks and paintings were not painted by a person of Aboriginal descent and were not painted by Ubanoo Brown. The ACCC pleads that those artworks were painted by Mr Goodridge or by a person or persons unknown who were not known as nor identified themselves as “Ubanoo Brown”.

- that since at least January 2007, ADC has affixed stamps to items, including items painted by Mr Goodridge (the stamp representations), which read:

TRADITIONAL HAND PAINTED ABORIGINAL ART AUSTRALIA
AUSTRALIAN DREAMTIME CREATIONS STH AUSTRALIA.

Some of the stamps so affixed read:

AUTHENTIC ORIGINAL ABORIGINAL ART AUSTRALIA.

The ACCC says that the stamp representations were that the artworks on which they were made were painted by persons of Aboriginal descent.

- that from at least 19 June 2007 to January 2009, ADC represented that certain artworks promoted for sale on the Website were painted by a person of Aboriginal descent and/or Ubanoo Brown. The artworks so promoted were not painted by Mr Harris. A majority of the artworks so promoted were painted by Mr Goodridge (the website representations as to artist).

As at 19 June 2007, Ubanoo Brown was identified as the artist in respect of 332 artworks displayed on the website by the use of text placed in close proximity to images of the artworks. As at 1 September 2008, Ubanoo Brown was identified as the artist in respect of 322 artworks displayed on the website by the use of text placed in the close proximity to images of the artworks.

The text used to identify the artist included labels such as “ARTIST: Ubanoo Brown”; “ARTIST: Ubanoo Brown, a highly talented artist from Murchison River, Western Australia”; “A real showpiece painted by Ubanoo Brown, a talented artist from Murchison River, Western Australia”; “ARTIST: Ubanoo Brown, born circa 1960, a highly talented artist from Murchison River district of Western Australia” and “ARTIST: Ubanoo Brown, born 1960 from Murchison River, Western Australia, a

talented artist who has been painting since he was twelve” and various formulations of similar wording. Other text was also used, such as “Beautifully hand carved & painted Pelikan [sic] from Northern Australia by Ubanoo Brown”.

The ACCC says that the website representations as to artist are implied, and relies on the natural inference to be drawn from the statements on the website, made without qualification, including that ADC sells or supplies “Aboriginal Art”, “Australia’s original and best Aboriginal art”, “Authentic Traditional Aboriginal Fine Art”, and “Australian Aboriginal Art” as variously appearing on the website, and as also stated on the website that objects displayed on the website are created by “traditional Aboriginal artists”, and that certain objects displayed on the website are “from Northern Australia” or “made from Australian Native Timber”.

The representations are said to be untrue because as at 1 September 2008, at least 281 artworks represented on the website as painted by a person of Aboriginal descent and Ubanoo Brown were painted by Mr Goodridge, and that as at 1 September 2008, at least 41 artworks represented on the website as painted by a person of Aboriginal descent and Ubanoo Brown were painted by a person or persons unknown who were not known as or identified themselves as “Ubanoo Brown”.

- that since at least 19 June 2007 to January 2009, ADC represented that the country of origin of the carved wooden items that were imported from Indonesia (as referred to in paragraph [8] above) is Australia (the website representations as to country of origin).

The ACCC says that representation is implied from the words and statements on the Website, and in the case of the carved wooden bird referred to below by the words and statements made on eBay.

- that in September 2008, ADC represented on eBay, the auction website, that a particular carved wooden bird was painted by a person of Aboriginal descent (the carved wooden bird representation), and that the country of origin of the carved wooden bird was Australia (addressed as part of the website representations as to country of origin). The carved wooden bird was one of the artworks imported from Indonesia (as referred to in paragraph [8] above) and was painted by Mr Goodridge.

The ACCC says that representation was made expressly or by the words and manner of presentation of that artwork.

12 The ACCC says generally that there is a real prospect that a reasonable person upon seeing the aforementioned alleged representations, would be led to believe that the product or products that they were purchasing or considering purchasing were painted by a person of Aboriginal descent, or painted by an artist named Ubanoo Brown and are from Australia. The ACCC alleges that this prospect arises from the prominent words contained on the website, the certificates of authenticity, the paintings and artworks, the stamp and the eBay auction website in their ordinary sense.

13 The ACCC says that the impression created by the combination of the representations is made stronger by the fact that they are not qualified in any way. In addition, the ACCC says, ADC and Mr Antoniou have gone to considerable lengths to reinforce the impression that products offered for sale and sold by ADC are created by persons of Aboriginal descent, demonstrated by the following conduct:

- providing ADC's customers with Ubanoo Brown's dreamtime story when purchasing an item painted by Mr Goodridge;
- providing ADC's customers with the "bush tucker dreaming" story in relation to certain paintings attributed to Ubanoo Brown, but painted by Mr Goodridge;
- describing prints displayed on the Website (including those attributed to Ubanoo Brown) as "becoming increasingly popular worldwide as collectable fine art";
- stating on the Website that "Certificates of Authenticity issued with every print";
- including Ubanoo Brown's dreamtime story in certificates of authenticity issued in relation to paintings painted by Mr Goodridge; and
- mirroring the practice that Aboriginal artists have of writing their names on the back of paintings they have created.

THE APPLICABLE LAW

14 The relevant principles to applications under ss 52 and 53(e) of the TP Act are well established: see eg *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR

191 (*Parkdale*); *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (*Taco Bell*).

15 Whether a representation is likely to mislead or deceive is an objective question of fact, to be determined in all the circumstances: *Taco Bell*. It is sufficient if there is a real chance that the conduct or representation will mislead or deceive: *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87. Importantly, whether conduct is misleading or deceptive or is likely to mislead or deceive must be determined in context. In *Parkdale* it was said at 199:

It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion by (sic) regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will or (sic) course depend on all the circumstances.

16 The test is an objective one for the Court upon the whole of the evidence. 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: *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 (*Campomar*) at 85-7.

17 Where a representation has been made in advertising material, it must be assessed not by a particular statement taken in isolation, but by the statement in its context and, where appropriate, in the surrounding circumstances: *Trade Practices Commission v Optus Communications Pty Ltd & Optus Mobile Pty Ltd* (1996) 64 FCR 326 at 336-8; *Australian Competition and Consumer Commission v Thorn Australia Pty Ltd* [2004] FCA 157 at [13]-[14]; *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3 at [25]-[28].

18 In *QDSV Holdings Pty Ltd (t/as bush Friends Australia) v Trade Practices Commission* (1995) 131 ALR 493 (*QDSV Holdings*), the appellant was a wholesaler of soft toys. One of its products was a koala soft toy, which had a label attached to it with the words "Aussie Born" on one side, and the words "Made in Australia" on the other side, with smaller words "With Some Imported Components" beneath those words. The soft toys were designed

in Australia, the components were manufactured in China, except for about 30% of the filling, and all the components were then imported into Australia, for assembly within Australia. The primary judge declared the labels were in breach of ss 52 and 53(eb) of the TP Act and made an order under s 80 of the TP Act. The Full Court dismissed an appeal from those orders and held that the labels were misleading and deceptive, although that the toys could fairly be described as having been designed and finished in Australia. Sackville J observed at 500:

While it should not be assumed that purchasers are “extraordinarily stupid” ... neither should it be assumed that purchasers of products such as toy koalas will be scrupulous to analyse the nuances of the language the trader has chosen to use on labels attached to the merchandise ... The meaning conveyed by the labels will be assessed by construing the language employed, but will take account of such factors as the prominence given to particular slogans or phrases, the nature of the product itself and the expectations and likely understanding of consumers.

19 His Honour continued at 502:

The words “Made in Australia” are given prominence, no doubt in order to catch the eye of the consumer ... The force of the catchphrase is, if anything, increased by the fact that it is attached to an “Australiana” product. The product is not particularly expensive, the smaller koalas retailing for about \$20 to \$25. The consumer is therefore likely to devote less care to reading labels in a case of this nature than where he or she is buying, for example, expensive items of furniture ... The slogan or catchphrase, in these circumstances, is likely to play an important part in creating an impression in the consumer.

20 His Honour referred the fact that the proportion of purchasers of the soft toy were overseas tourists, and that many consumers would have only a limited facility in English, and to them, the phrase “Made in Australia” may be the only words on the label which they understand. His Honour continued at 503 to note that

even an English-speaking consumer who is prepared to read the label with a moderate degree of care, would believe that the koalas have been produced by a manufacturing process substantially taking place in Australia. The consumer is also likely to believe that most of the components used in the manufacturing process themselves have been manufactured in Australia. A consumer unable or unwilling to do more than glance at the label would be even more likely to form these beliefs.

THE EVIDENCE

21 As noted, ultimately, there was no real issue about the nature of the primary evidence. The issue was really whether what ADC had done in the past conveyed the representations

alleged by the ACCC. However, it is convenient to briefly advert to the evidence simply to explain why the case was so confined.

22 As is not uncommon in the case of a litigant in person, Mr Antoniou was anxious to get the proceeding over. He conducted it efficiently on behalf of ADC and himself. He only very briefly questioned the one witness called by the ACCC who he required for cross-examination, Susan Jacquier, the Assistant Director of the Adelaide regional office of the ACCC, although he did not consistently stay on the issues arising in the proceeding. I was impressed with Ms Jacquier as a witness and I accept her evidence. It was in every respect uncontradicted and Mr Antoniou did not submit that I should not accept any particular part of her evidence.

23 In his affidavit constituting part of his evidence, Mr Antoniou disputed certain of the numbers and descriptions of artworks described by Ms Jacquier from the Website. None of the disputes went to whether the alleged representations were made, or were otherwise significant to the findings recorded below. The Website is the website of ADC. It has as its opening screen image an evocative photograph of what appears to be part of central Australia, with an inset image of three Aboriginal men, and with the words "Aboriginal Art" above the printed words "Australian Dreamtime Creations". Ms Jacquier said in her affidavit, and counsel for the ACCC acknowledged, that the opening page of the Website recorded considerable detail about the Website in terms which were only visible when the Website was printed out. Nothing turns on that. I have placed no weight on that part of the exhibit. It is an exhibit of many pages. I find that, with that qualification, it accurately reproduces what is apparent on the Website.

24 Mr Antoniou also disputed, to a relatively minor degree but only in the most general terms, the accuracy of the transcript of the examination under s 155 of the TP Act conducted by Ms Jacquier of Mr Goodridge in April 2009. Mr Goodridge did not give evidence. Mr Antoniou was not present at that examination. I have no reason to reject the accuracy of that transcript, including where it records identified documents being shown to Mr Goodridge for his response. In any event, the ACCC in its final submissions did not rely upon what Mr Goodridge said in that examination even though, at the hearing, Mr Antoniou did not object to the reception of Ms Jacquier's affidavit and the all exhibits to it.

25 The other three witnesses called by the ACCC were not required for cross-examination.

26 Mr Antoniou did not object to the affidavits of Nicholas Parkyn, a senior lawyer employed by the Australian Government Solicitor, of Christopher Williams, a solicitor employed by Gilbert + Tobin, who coincidentally had procured a copy of the Website as at 19 June 2007, or of Mark McCarthy, a Senior Investigator in the Adelaide regional office of the ACCC, or to the exhibits to their affidavits. In his affidavit, Mr Antoniou suggested that the exhibit to Mr Williams' affidavit involved some duplication of items or images. He did not take that further in his evidence. Nothing turns on the points made by Mr Antoniou in his affidavit about that exhibit. I accept that evidence.

27 Mr Antoniou gave evidence himself, and called Ivy Taylor. Ms Taylor presented as an expert in carving and sculpting, who for some 40 years or so had specialised in acrylic paintings and sculptures, following her obtaining a Certificate in Bauhaus Graphic Design in Germany after two years full-time study.

28 Mr Antoniou's evidence largely reflected what appeared in the defence.

29 Mr Antoniou's evidence focused on what he said was a "world of distinction" between Aboriginal fine art on the one hand and Souvenirs on the other. Aboriginal fine arts are one-off works painted by an Aboriginal artist. He said he was in the Souvenirs market, and generally not in the Aboriginal fine art market, although he said advertising on eBay may involve Aboriginal fine art, but the particular carved wooden bird in issue (the subject of the carved wooden bird representations) did not fall into that category. He described anything that is hand painted as genuine and as Aboriginal art. He said that because Ubanoo Brown is a pseudonym, and (despite it originally being a pseudonym for the Aboriginal person Bruce Harris) that ADC could add that name to works painted by Mr Goodridge without then representing that Ubanoo Brown labelled works are painted by a person of Aboriginal descent, provided they were on works in the cross-hatch collection (referred to at [6] above).

30 So far as the certificates of authenticity representation is concerned, he said the certificates shown to the ACCC were templates. He acknowledged he had issued some 47 certificates to art galleries dealing with those works during 2008. He agreed they had either

“Original Aboriginal Painting” or “Authentic Aboriginal Painting”, and probably the name Ubanoo Brown. He said, however, that the certificates did not represent that the painter was of Aboriginal descent, and accurately represented that they were “Authentic” and “Original” and were “Aboriginal art”. He said a person does not have to be of Aboriginal descent to paint Aboriginal art. The distinction is a very artificial one. I do not accept it. I address that issue in more detail below.

31 Mr Antoniou adopted a similar position in relating to the stamp representations. He said that all they conveyed was that the stamped artworks were painted in Australia, and that they did not convey that a person of Aboriginal descent painted them.

32 He took a similar position about the artworks which were displayed on the Website and so were said to be the website representations as to artist and the artworks advertised on eBay and the subject of the carved wooden bird representations.

33 He did not address in his evidence the website representations as to country of origin, except to say that the representation was not made based upon the primary form of presentation of those artworks.

34 Finally I note, and reject, his claim that because ADC is the trustee for the Antoniou Family Trust, it cannot be sued for what it has done in its role as trustee. That is simply not correct.

35 The other witness called by Mr Antoniou was Ms Ivy Taylor. I have referred to her qualifications above. She has known Mr Antoniou for many years. Not all her evidence was on a topic of her expertise; for instance she commented on how people might understand the various material constituting the representations. She spoke of the common practice of writers and artists using a pseudonym. She gave evidence – not consistent with Mr Antoniou’s pleaded case – that the cross-hatching used by Aboriginal artists had its derivation elsewhere and was not indicative of an Aboriginal artwork. Mr Antoniou did not plead that. Nor did he maintain that. His case was the more refined one that Aboriginal artworks as he offered them to the public for sale did not convey the representations alleged. Ms Taylor’s written statement was not in the form required for an expert witness, in accordance with the Federal Court Rules. Nor did it demonstrate the degree of impartiality

the Court is entitled to expect of an expert witness: for instance, she described to the ACCC investigation as a “gross miscarriage of justice – to wrongfully use [its] powers and resources” to “facilitate the threats of a disgruntled person”, and then spent some time explaining that view. None of that was pleaded, nor was it part of Mr Antoniou’s case. For those reasons, I have placed little weight on her evidence.

CONSIDERATION

The “Souvenir market”

36 In my view, Mr Antoniou’s emphasis on the so-called “Souvenir market” is misplaced. That is not because there is not a range of artworks, in terms of artistic merit or size or cost or value. There clearly is. It is because that classification simply diverts attention from the real issues in the case. To label a particular artwork as a “Souvenir” or as “Aboriginal fine art” assumes that, at the lower end of the market or markets for the supply of the artworks where the descriptor “Souvenir” might be used, there can be no misleading or deceptive conduct of the nature alleged by the ACCC. That assumption is unfounded. The focus must be on the conduct of ADC, and whether that conduct – whether or not ADC and Mr Antoniou perceived it as functioning in a Souvenir market – was misleading and deceptive.

37 I do not need to determine whether there are two, or more, ranges or categories of the artworks. I note, however, that Mr Antoniou did not essay a clear and consistent identification of the line between his Souvenir market and his Aboriginal fine arts market, either in terms of cost or value or any other particular criteria.

The use of a pseudonym name

38 Similarly, I do not regard the position of ADC and Mr Antoniou that Ubanoo Brown is a “pseudonym name” as taking their position far. Even if it is accepted that Ubanoo Brown is a pseudonym name, that name was used by Mr Harris and not Mr Goodridge. It does not change the character of any representations made by ADC as those representations may still be misleading, even if the name is accepted as a pseudonym. The question still is whether the artworks promoted and sold by ADC conveyed the alleged representations or any of them.

The use of the description “Aboriginal art”

39 One of the themes running through the case of ADC and Mr Antoniou is that “Aboriginal art” does not convey to a reasonable person who might acquire an artwork so labelled that the artwork is painted or made by an Aboriginal person, but simply describes a style of the artwork.

40 I do not accept that general proposition. It is, of course, necessary to consider separately each of the particular types of transaction by which the alleged representations were made. I shall deal with their individual features below. But, subject to any particular factual context, I am of the opinion that to describe an artwork as “Aboriginal” is expressly to say that the artist is of Aboriginal descent. It is a common means of conveying that an artwork is painted by an artist of Aboriginal descent to describe it as “Aboriginal art”. On the other hand, it is not commonplace to describe an artwork painted by an artist who is not of Aboriginal descent as “Aboriginal art”. The style of Aboriginal art is not one-dimensional. It is multi-dimensional. It varies with region, with artist, and over time. Within wider regions, there are or may be local variations which identify particular local areas or artists as the source of the artwork. It is not possible to label one particular style of art as the Aboriginal style. In general, in my view, 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. If that is not explicit, as I think it is, it is clearly implied. Indeed, the pictorial presentation of the opening page of the Website, where the words “Aboriginal Art” appear, recognise that general meaning by the depiction of Aboriginal men in conjunction with those words. The name of ADC also appearing there also fortifies that meaning. To those who would place significance on the word “Dreamtime”, or “Dreaming”, they would be people who are aware that the Dreamtime or the Dreaming is, in Aboriginal mythology, the time of the spiritual creation when Aboriginal persons were given their values and symbols and stories, and their laws. Of course, there may be some people who would not have that level of awareness or understanding. Nevertheless, whether the consumer considering buying Aboriginal art from ADC is a resident in Australia, buying for personal enjoyment or satisfaction or for a gift, or an overseas tourist (or an overseas collector), I find that they or a significant class of them would reasonably understand that the presentation of an artwork as “Aboriginal art” would convey

the representation that the artwork was painted or made by an Aboriginal person, that is a person of Aboriginal descent.

The artist representations

41 Since about 1996, ADC has promoted and sold and supplied on consignment
paintings which had “Ubanoo Brown” written on the back of the paintings. There is no
contest about that.

42 In my view, that style of presentation of such paintings conveyed to a reasonable class
of persons who bought or might buy such paintings that the paintings were painted by a
person who used the name Ubanoo Brown. That was expressed on the painting itself. It is
not to the point that the name Ubanoo Brown may have been used as an artistic pseudonym.
That may be acknowledged. Mr Harris was a person of Aboriginal descent who used that
pseudonym. But it was Mr Harris who initially created the artworks using his pseudonym.
He did so only for about three months in 1993. Thereafter, he did not use that pseudonym

43 On that basis, in my judgment, it also follows that the artist representations were false
and misleading. Once it is accepted that the artist representations were made, it necessarily
follows from the circumstances in which the representations were made, that they were false
and misleading. As noted above, ADC and Mr Antoniou did not contend to the contrary.
Their contention was that the representations thus were made.

44 The evidence indicates that, on occasions, ADC through Mr Antoniou fortified the
representation by having the name “Ubanoo Brown” written on the back of the paintings by
providing ADC’s customers with Ubanoo Brown’s Dreamtime story when purchasing a
painting by Mr Goodridge, and sometimes by providing to its customers the “bush tucker
dreaming” story in relation to certain of those paintings. That did not occur in every instance,
but on occasion, it did occur. I infer that it 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”. That conduct, when it occurred, would have had the desired effect.

45 The ACCC has established contravention of s 52 of the TP Act by the artist
representations.

The certificates of authenticity representation

46 The uncontested evidence, including that of Mr Antoniou, confirms the supply of certificates of authenticity by ADC.

47 It is plain from the form of those certificates that they represented that the paintings supported by certificates of authenticity were painted by a person of Aboriginal descent, and that some were painted by a person who used the name Ubanoo Brown. It is unclear the extent to which certificates of authenticity included the description “Artist: Ubanoo Brown”, but I find that occurred in a not insignificant number of them.

48 I have said, in my view, that describing an artwork as “Aboriginal art” represents that the artwork is created by a person of Aboriginal descent. The certificates of authenticity conveyed that representation, not simply by that formulation, but by the words used. The certificates included the words “Authentic Aboriginal painting” and a guarantee as to the authenticity of the painting. In my judgment, the use of the words “authentic” and “authenticity” make it even clearer that the paintings with which the certificates of authenticity were supplied were painted by a person of Aboriginal descent. It is almost an oxymoron to contend, as ADC and Mr Antoniou did, that authenticity in conjunction with the word “Aboriginal” conveyed that the paintings may have been painted by a person of non-Aboriginal descent, in a style of Aboriginal art. I reject that submission.

49 I have also found that the paintings were painted either by Mr Goodridge or by other persons who were not of Aboriginal descent and by persons who did not identify themselves and were not known as Ubanoo Brown. Consequently, the certificate of authenticity representations, when made, were false and misleading.

50 I note that, in the defence, ADC and Mr Antoniou claim that the paintings the subject of the certificate of authenticity representations were souvenirs and not fine art or investment artworks. I have indicated above that, in my view, that distinction is not directly relevant to whether the representations were made, or were false and misleading. However, the evidence of Mr Antoniou does not indicate that in fact the paintings which were provided with the certificates of authenticity were at the very lower end in terms of value or quality, or were sold as one of apparently cheap mass produced replicas (which might be described as

souvenirs) in any event. He said that the paintings were provided to galleries to support the sale of paintings from ADC. They were obviously not of the character which might readily be described as souvenirs.

51 It necessarily follows, as I have found that the certificate of authenticity representations were made and were false and misleading, that the ACCC claim in this respect is made out.

The stamp representations

52 There is no dispute that from about January 2007 ADC had stamps affixed to various artworks painted by Mr Goodridge and then offered for sale or sold by ADC. The text of the stamps is set out above.

53 ADC and Mr Antoniou assert that the text of the stamps do not convey the representation that those artworks were painted by a person of Aboriginal descent, but simply that they were hand-painted in an Aboriginal design.

54 In my view, the stamp representations were made. In this instance, apart from the use of the words "Aboriginal art" to which I have referred above, the stamps contained the words "traditional hand painted Aboriginal art" or "authentic original Aboriginal art". In each case, the additional words "traditional" and "authentic" and "authentic original" in my view added to what was conveyed to a reasonable group of persons who purchased or may have considered purchasing those artworks that they were painted by a person of Aboriginal descent. The use of those words confirms or asserts the background of the artist. Again, particularly by the use of the words "authentic original", it is almost an oxymoron to assert that it means not painted by a person of Aboriginal descent but by a non-Aboriginal person according to an Aboriginal style. The same may be said by the use of the word "traditional". That conveys the handing down from generation to generation, and in accordance with the beliefs (in context) of Aboriginal persons.

55 Accordingly, I find that the stamp representations were made.

56 It follows, and was not contested, that the stamp representations were false and misleading.

57 The ACCC has established contravention of s 52 of the TP Act by these representations.

The website representations as to artist

58 The Website promoted the sale of “Aboriginal art”.

59 Its entry was by the image referred to above, including a picture of Aboriginal men apparently performing a traditional dance, remote desert and hill country, and apparently an Aboriginal rock painting, together with the name “Australian Dreamtime Creations”.

60 There are many artworks depicted in the Website, no doubt changing from time to time. I find that as at June 2007 Ubanoo Brown was identified as the artist in respect of 332 artworks displayed on the Website by the use of text adjacent to images of those artworks, and as at 18 June 2009 he was identified as the artist in respect of 324 of those artworks, and as at 1 September 2008, in respect of 332 of those artworks. The text used to identify Ubanoo Brown during that period included describing him simply by name, and also by name and as “a highly talented artist from Murchison River, Western Australia” or similar words, or as describing him as having been born in about 1960 and coming from Murchison River in Western Australia.

61 The Website reinforces 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. The Website also offers certificates of authenticity upon purchase.

62 It uses phrases such as “Australia’s original and best Aboriginal art”, “Authentic
Traditional Aboriginal Fine Art”, “Australian Aboriginal art” and “Aboriginal art” and
“traditional Aboriginal artists”.

63 The ACCC alleges that, in respect of the works said to have been painted by Ubanoo
Brown on the Website, the representation was made that those paintings were painted by a
person of Aboriginal descent, identified as Ubanoo Brown.

64 In my judgment, the Website representations as to artist were made. I would make
that finding based upon the particular text adjacent to the artworks depicted on the Website
which identified Ubanoo Brown as the artist. That finding is reinforced by the entry image to
the Website, and by the other features of the Website to which I have referred. It is
overwhelmingly plain, in my view, that a reasonable group of persons considering acquiring,
or acquiring, artworks from ADC through the Website would reasonably have understood
that the artworks there displayed attributed to Ubanoo Brown as the artist were painted by a
person of Aboriginal descent, and by a person of Aboriginal descent who is identified by the
name Ubanoo Brown.

65 Again, ADC and Mr Antoniou do not dispute that, if the Website representations as to
artist were made, they were false and misleading. Their contest was that the website
representations as to artist were not made.

66 The website representations as to artist were false because those artworks were not
painted by a person of Aboriginal descent, and not by a person who identified as Ubanoo
Brown who was a person of Aboriginal descent.

67 The ACCC has established contravention of s 52 of the TP Act by these
representations.

The website representations as to country of origin

68 Section 53 of the TP Act supports s 52 of the TP Act by enumerating specific types of
conduct which, if engaged in by a corporation in trade or commerce in connection with the
promotion or supply of goods or services, will give rise to a breach of the TP Act. The ACCC

alleges that ADC and Mr Antoniou have breached s 53(eb) of the TP Act by making the website representations as to country of origin on the Website and on eBay when making the carved wooden bird representations.

69 Section 53(eb) of the TP Act provides:

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

...
(eb) make a false or misleading representation concerning the place of origin of goods.

70 Representations within the meaning of s 53 of the TP Act may be active or passive and may arise as a result of statements made or by implication from conduct: *Given v Pryor* (1979) 2 ATPR 40-029 at 441.

71 A representation that goods were made in a particular country or place will be false if the goods were not, in fact, made in the place represented.

72 The ACCC alleges that the website representations as to country of origin representations are made impliedly, so that the communications gave rise to the representation that the artworks advertised on the Website were made in Australia, and the carved wooden bird was made in Australia, whereas in fact, those artworks and the carved wooden bird were not made in Australia but largely in Indonesia.

73 There is no express representation that any of the carved wooden items were made in Australia. That has been the context in which a number of actions under s 53(eb) have been decided: see *Australian Competition and Consumer Commission v Lovelock Luke Pty Ltd* (1997) 79 FCR 63; *Siddons Pty Ltd v Stanley Works Pty Ltd* (1990) ATPR 41-044; *QDSV Holdings*; *Netcomm (Australia) Pty Ltd v Dataplex Pty Ltd* (1988) 81 ALR 101. The representation is said to arise by implication from the way in which the carved wooden items were promoted on the Website, and by the way in which the carved wooden bird was promoted on eBay.

74 As noted above, 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, and 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.

75 In my view, by those methods of presentation, in respect of the carved wooden items advertised on the Website and the carved wooden bird advertised on eBay, ADC represented that the particular artworks were made by persons of Aboriginal descent. It does not follow that a reasonable group of people seeing those communications would think about the further question of where the particular artwork was made. They might assume that it had been entirely made in Australia. That would not necessarily be assumed, however, if thought was given to the materials going to the artwork: canvas or wood and paints (no longer merely ochre), and in some instances other items such as feathers or glue. It would not be assumed that all of those elements necessarily came from resources within Australia. On a different level, if the artist were an Aboriginal person who for some reason painted the artwork overseas, rhetorically one might ask whether it would still be Aboriginal art.

76 In my view, it is unlikely that a reasonable group of persons seeing those communications would think about the place of origin of those artworks. There is no express representation about their place of origin. There is no real reason why, beyond the clear representation as to the Aboriginality of the artist, the reasonable consumer would advert to their place of origin. In other words, the particular conduct which is said to give rise by implication to the representation that the place of origin of the particular artworks is Australia does not, in my judgment, give rise to that representation. Indeed, as was pointed out in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 555, s 52 is not expressed in terms of, and is not confined to, representations. The question is one of fact, namely whether the conduct complained of is likely “to lead into error” (per Gibbs CJ in *Parkdale* 149 CLR 191 at 198). Relevantly here, the question is whether the conduct, tested against ordinary and reasonable members of a section of the public, may have led into error those persons as to the place of origin of those particular artworks (as distinct from the

Aboriginality of the artist). *Campomar* would indicate that the appropriate question is what would be the likely reaction of that section of the public to the particular conduct.

77 On balance, I am not satisfied that the website representation as to place of origin was made. In the circumstances, I do not consider that a reasonable section of the public would have taken from that conduct more than that the artist was of Aboriginal descent. If the conduct conveyed (as ADC and Mr Antoniou urged) no more than that those artworks were of an Aboriginal style but not necessarily painted by an Aboriginal person, then a reasonable section of the public understanding that fact may well have taken the step of considering the place of origin of those artworks. In that event, I would conclude that the conduct implied that they were made in Australia. However, for the reasons given, I do not consider that situation arises.

78 In my view, the ACCC has not made out contraventions of s 53(eb) by reason of the Website representations as to country of origin.

79 In case I am wrong, I will address the other issues arising in respect of those alleged representations.

80 I have made findings above about ADC having imported into Australia in 2003 a number of carved wooden animals and other three dimensional objects from Indonesia. Each of those items were items which were unpainted and required painting in Australia. On the evidence the painting carried out by Mr Goodridge. Those items, or many of them, were then advertised on the Website. In the case of the carved wooden bird, it was brought into Australia from Indonesia already in its final shape, and it was painted in Australia by Mr Goodridge before it was offered for sale on eBay.

81 The determination of whether a representation is misleading concerning the country of origin of manufacture is to be determined by reference to the provisions of Division 1AA of the TP Act. Division 1AA provides a regime for determining when goods will and will not be regarded as made in or produced in Australia, partly by reference to the extent to which production or transformation has occurred in Australia.

82 It is important to note s 65AA, which provides an overview of Division 1AA. It says that the Division provides that certain country of origin representations made about goods do not contravene (relevantly) ss 52 and 53(eb). I assume there is no relevant difference between “place of origin” used in s 53(eb) and “country of origin” used variously in Division 1AA. No submission was made by the ACCC on that topic.

83 Section 65AB sets out the general test for country of origin representations. It provides:

If:

- (a) a corporation makes a representation as to the country of origin of goods; and
- (b) the goods have been substantially transformed in that country; and
- (c) 50% or more of the cost of producing or manufacturing the goods (as the case may be) is attributable to production or manufacturing processes that occurred in that country; and
- (d) the representation is not a representation to which section 65AC (product of/produce of representations) or section 65AD (prescribed logo representations) applies;

the corporation does not contravene section 52, paragraph 53(a) or (eb) or paragraph 75AZC(1)(a) or (i) by reason only of making the representation.

84 Section 65AN provides, in relation to proceedings relating to false, misleading or deceptive conduct or misrepresentations:

(1) If

- (a) proceedings are brought against a person in respect of section 52, paragraph 53(a) or (eb) or paragraph 75AZC(1)(a) or (i); and
- (b) the person seeks to rely on a provision of this Division, or of a regulation made under this Division, in the proceedings;

the person bears an evidential burden in relation to the matters set out in the provision on which the person seeks to rely.

(2) In this section:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

85 Hence, the test for determining where goods have been manufactured for the purposes of ss 52 and 53 is determined in accordance with s 65AB, namely, that goods will be regarded as made in a particular country if 50% of the cost of producing the goods is attributable to production or manufacture in that country and the goods were substantially transformed in the relevant country. Special provisions apply for the purpose of determining the cost of producing the goods: see s 65AF TP Act. Whether or not goods have been “substantially transformed” is determined by reference to s 65AE, which provides:

- (1) For the purposes of this Division, goods are *substantially transformed* in a country if they undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.
- (2) Without limiting subsection (1), the regulations may prescribe changes (whether in relation to particular classes of goods or otherwise) that are not fundamental changes for the purposes of subsection (1), and may include examples (in relation to particular classes of goods or otherwise) of changes which are fundamental changes for the purposes of subsection (1).

86 The ACCC submits that in respect of items that were imported by ADC from Indonesia in 2003, that those that were either already painted and did not require further painting prior to sale or supply on consignment by ADC, or were unpainted and did not require painting prior to sale or supply on consignment by ADC, that those items were “totally transformed” in Indonesia. There is no real issue about that.

87 For the purposes of this matter, the significant items were those that were unpainted and required painting prior to sale or supply on consignment by ADC. The ACCC submits that those items were all created from Indonesian material in Indonesia, and that the painting of those items in Australia does not qualify as having “substantially transformed” those items as contemplated by s 65AB(b) of the TP Act. For example, and I think an appropriate one, the ACCC says that once a carved wooden item is painted, it is not a new or different item from what it was prior to painting, and that it remains a carved wooden item which was carved in Indonesia. The ACCC says that the carving of the item is the process which provides the item with its inherent character, and that this process did not occur in Australia in respect of those imported items. In support of its proposition, the ACCC referred to several cases where the Court has considered what constitutes “substantial transformation”, albeit before the introduction of s 65AB.

88 I do not consider those cases provide any real assistance in the circumstances. As Sheppard J said in *Thorp v C.A. Imports Pty Ltd* (1990) ATPR 40-996 at 50,966, the question is one of fact and degree depending upon a consideration of the entirety of the steps required to manufacture the object in question. Of course, in addition, it is now necessary to apply ss 65AB and 65AE.

89 The evidence shows that the cost to ADC of the carved wooden bird (and like objects) was under \$10. The amount paid to Mr Goodridge for painting it was in excess of \$30. The precise figures varied, according to the size of the objects. Even allowing for shipment costs, I find that s 65AB(c) of the TP Act would be satisfied, if there had been a representation that those artworks were Australian in origin.

90 The remaining issue is whether those items were substantially transformed by being painted in Australia: s 65AB(b). The alleged country of origin representations did not attract ss 65AC or 65AD, so s 65AB(d) was also satisfied. That is a question of fact, informed by s 65AE. In my judgment, those artworks including the carved wooden bird were substantially transformed by being painted in Australia. There was in evidence an example of the carved wooden bird, unpainted (it is then purely a flat white in colour). The difference is significant. As an unpainted object, it is quite unappealing. The shape itself seems to lack definition. The painting makes the object quite a different one: the shape emerges as clearly defined, and the colouring gives the object a real life and attractiveness. I think the description “new and different goods” is an appropriate one, even though fundamentally the shape itself does not change. It is, in a bland sense, and remains a carved wooden item but the qualities which make it an attractive object emerge only after it is painted. Analogy is always a little dangerous, but I essay one, albeit not a perfect one: a painter’s canvas may be imported, and although it does not change size, the canvas is substantially transformed by being painted. The carved wooden bird shape is, of course, not the equivalent of a canvas. It is already shaped. However, the dramatic change in appearance, including that the painting seems to add definition to the shape, has to my mind a not dissimilar transformation.

91 In my view, a similar conclusion should be reached in respect of the other imported carved wooden items that were painted in Australia. The ACCC did not suggest that there

should be a different conclusion in respect of the carved wooden bird compared to the other carved wooden items imported from Indonesia.

92 Accordingly, even if the website representations as to country of origin were made, I would not find that s 53(eb) of the TP Act had been contravened in the circumstances.

The carved wooden bird representation

93 In September 2008, ADC advertised on eBay in the Aboriginal art category a carved wooden bird as depicted and described as “Aboriginal Art Brolga”, and ADC described itself as having been supplying “Aboriginal fine art and craft work since 1991”.

94 In my view, as depicted and presented, for reasons which would by now be apparent, that represented that the carved wooden bird was carved and painted by a person of Aboriginal descent. That conclusion is supported by the category in which that artwork appeared, and by ADC’s description of its business. I have earlier rejected the claim of ADC that the wooden bird has an Aboriginal design painted on it, and it was therefore an Aboriginal artwork. The bird shape unpainted was imported from Indonesia, and it was then painted by a person who was not of Aboriginal descent.

95 It follows that this representation was false and misleading.

96 The ACCC has established a contravention of s 52 of the TP Act in that regard.

RELIEF

97 For those reasons, in my judgment, the ACCC has made out the contraventions of the TP Act which it has alleged against ADC, other than a contravention of s 53(eb), and that Mr Antoniou has been knowingly involved in each of them.

98 I see no reason why appropriate declaratory relief should not be made in respect of the various representations which I have found to have been proved. I propose to make declarations in the following form:

(1) A declaration that ADC, from at least 19 June 2007 to January 2009, represented in trade or commerce on the Website that certain artworks promoted for sale by it, including paintings, prints, boomerangs, bull-roarers, carved wooden animals, carved wooden statues, table platters, didgeridoos, emu eggs and ceramic objects including table platters, vases, wall plates, lidded boxes and bowls were painted by:

1.1 a person of Aboriginal descent; and

1.2 Ubanoo Brown,

when those artworks were not, and thereby engaged in conduct that is misleading or deceptive in contravention of s 52 of the TP Act.

2. A declaration that ADC, from at least 2005, represented in trade or commerce by the supply of documents entitled “certificates of authenticity” that paintings sold or supplied on consignment by ADC were painted by:

2.1 a person of Aboriginal descent; and

2.2 Ubanoo Brown,

when the paintings were not, and thereby engaged in conduct that is misleading or deceptive in contravention of section 52 of the TP Act.

3. A declaration that ADC, from at least 1996, represented in trade or commerce by the promotion, sale and supply on consignment of paintings which had “Ubanoo Brown” written on the back of the paintings, that the paintings were painted by Ubanoo Brown when the paintings were not, and thereby engaged in conduct that is misleading or deceptive in contravention of section 52 of the TP Act.

4. A declaration that ADC, from at least January 2007, represented in trade or commerce by affixing a stamp onto artworks sold or supplied on consignment to consumers and retailers that the artworks were painted by a person of Aboriginal descent, when the artworks were painted by a person not of Aboriginal descent, and thereby engaged in conduct that is misleading or deceptive in contravention of section 52 of the TP Act.

5. A declaration that ADC, in September 2008, represented in trade or commerce, on the eBay online auction website that a carved wooden bird promoted and sold by ADC on eBay was carved and painted by a person of Aboriginal descent, when it as not, and thereby engaged in conduct that is misleading or deceptive in contravention of section 52 of the Act.
6. A declaration that Mr Antoniou, being the director of ADC and the person responsible for its operations and having caused or directed ADC to make each of the representations referred to in paragraphs 1 to 5 hereof was directly knowingly concerned in, or party to, each of the contraventions of the TP Act by ADC referred to in paragraphs 1 to 5 hereof.

99 The ACCC also seeks injunctive relief. Again, in my judgment, it is appropriate to grant such relief. Although I accept Mr Antoniou's evidence that ADC has now closed the Website and does not propose to re-use it, there should be some order restraining the sort of conduct which has been engaged in in the past from being engaged in in the future. The injunction which I propose to grant should run for three years.

100 The ACCC sought an injunction not simply restraining the conduct engaged in, but positively obliging ADC not to offer for sale any work as produced by a person of Aboriginal descent or to promote the sale of any work as produced by a person of Aboriginal descent unless it has previously sought and obtained from that person a written statement that the person is of Aboriginal descent, and that it retains that statement for at least seven years. I do not propose to include that in the injunctive relief. I think a more appropriate order is to extend the injunction to prohibit the promotion or offering for sale or the sale of any artwork described as Aboriginal art unless ADC and Mr Antoniou have made such enquiries as they consider appropriate to be satisfied that the artist or artists of each of those works is a person of Aboriginal descent, and to direct them to retain for a period of five years a record of the basis upon which they attained the satisfaction required. That is a formulation which is less onerous, as it enables them to require artworks from sources other than directly from the artist and, if satisfied that the artist is of Aboriginal descent by enquiries that they have duly recorded and retained, to then offer those artworks for sale as Aboriginal art. I will vary the proposed injunctive relief to that effect.

101 I note that Mr Antoniou asserted that he did not think he or ADC were doing anything
wrong at any material times. In my view, that evinced at least some ingenuousness on his
part. It is an ingenuousness which the findings of the Court, and the declaratory and
injunctive relief which I propose to make, will clearly have disabused him of.

102 I accordingly propose to make the injunctions in the following terms:

7. An order that ADC be restrained, whether by itself or by its employees or servants or agents or otherwise howsoever for a period of three years from representing by any means whatsoever, including by any stamp or certificate of authenticity, that any artwork promoted, sold or supplied by it to any person has been made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent unless the artwork was, to the best of its knowledge, made, painted, created, crafted, carved, or otherwise produced, as the case may be, by a person of Aboriginal descent and from using the words "Aboriginal art" or words describing an artwork as "Aboriginal" unless it has made such enquiries as it considers appropriate to be satisfied that the artist or artists of each such work is a person of Aboriginal descent, and it is directed to retain for a period of five years from the time of such enquiries a record of the basis upon which it attained that satisfaction.

8. An order that Mr Antoniou be restrained, whether by himself or by his servants or agents or otherwise howsoever, from being directly or indirectly knowingly concerned in or party to ADC or any other trading corporation representing that any artwork to be promoted, sold or supplied to any person has been made, painted, created, crafted, carved, or otherwise produced by a person of Aboriginal descent unless the artwork was, to the best of his knowledge, made, painted, crafted, carved, or otherwise produced as the case may be by a person of Aboriginal descent and from using the words "Aboriginal art" or words describing an artwork as "Aboriginal" unless he has made such enquiries as he considers appropriate to be satisfied that the artist or artists of each such work is a person of Aboriginal descent, and he is directed to retain for a period of five years from the time of such enquiries a record of the basis upon which he attained that satisfaction.

103 Mr Antoniou was at pains, in the course of his evidence, to point out that a significant volume of the artworks he had procured by importation from Indonesia, whether or not it was then enhanced by painting in Australia, had not been sold. Many would be on consignment. In those circumstances, it is appropriate to make some order to protect consumers who may be induced to acquire those artworks in the belief that they are works created by a person of Aboriginal descent from doing so. For that purpose, I propose to make further orders requiring him to disclose to the ACCC a list of the names and addresses of retailers to which ADC has sold or supplied artwork on consignment since 1 January 2007 and to direct him to send to those retailers a letter in a prescribed form.

104 I accordingly make the following orders:

9. An order that ADC, within 14 days of the making of this order, provide to the ACCC a list of the names and addresses of retailers to which ADC has sold or supplied artwork on consignment since 1 January 2007.
10. An order that ADC send a letter within 21 days of making this order, in the terms of Annexure "A" to the orders on the ADC letterhead, within 21 days of making this order, to each retailer identified in Order 9 hereof.

105 The ACCC also requested that Mr Antoniou be directed to attend at his own expense a seminar to better inform him about the obligations of a supplier under Pt V of the TP Act. In my view, that is not an appropriate order to make in the present circumstances. That is because the dispute in this matter arose not because Mr Antoniou was unaware of the relevant provisions of the TP Act but formed the view (ingenuously, as I noted) that the conduct which contravened it did not convey the representations which I have found it conveyed. It would require a refined seminar on what conduct may expressly or by implication convey to serve a useful purpose. The particular conduct in question has been enjoined for three years. I do not see a risk of other like conduct being undertaken by Mr Antoniou.

106 Finally, in my judgment, there is no reason why the ACCC should not recover its costs of this proceeding. I order that ADC and Mr Antoniou pay to the ACCC its costs of the proceeding.

I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate: *H. Doyle*

Dated: 21 December 2009

Counsel for the Applicant: T Duggan

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the First Respondent: T Antoniou

Counsel for the Second Respondent: The Second Respondent appeared in person

Date of Hearing: 25 September 2009

Date of Judgment: 21 December 2009