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**Australian
Competition &
Consumer
Commission**

6 July 2010

Mr Donny Woolagoodja
Chairman
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Cc Delwyn J Everard
Senior Solicitor
Arts Law Centre of Australia

Dear Mr Woolagoodja

Thank you for your letter dated 10 May 2010 to the Perth office of the Australian Competition and Consumer Commission (ACCC) concerning Ms Vesna Tenodi and her alleged unauthorised use and reproduction of Wandjina and Wanjina imagery, which bears similar resemblance to traditional Wandjina imagery.

In particular, I understand that you are concerned that Ms Tenodi has used and reproduced the Wandjina and Wanjina imagery (**the imagery**) at the Modrogorje Wellness and Art Centre, New South Wales, and by way of the website www.modrogorje.com, without the appropriate permission from the Worrorra, Wunumbal and Ngarinyin Aboriginal people. Consequently, you are concerned that consumers may be led to believe that Ms Tenodi has an association or licence to use the imagery that she does not in fact have.

You now seek advice from the ACCC as to how to best proceed towards a resolution with Ms Tenodi.

The ACCC and the *Trade Practice Act 1974*

As you may be aware, the ACCC is the national statutory authority responsible for enforcing the *Trade Practices Act 1974 (TPA)*. The main purpose of the TPA is to promote competition and efficiency in markets within Australia and to protect businesses and consumers from unlawful anti-competitive and unlawful market practices.

Although ACCC staff do not provide legal advice, nor are the views herein expressed intended to be interpreted as such, I provide the following comments in relation to your letter.

The concerns you expressed would appear to fall for consideration under section 52 and 53 of the TPA. Section 52 is a broad provision which prohibits a corporation, in trade or commerce, engaging in conduct which is misleading or deceptive, or which is likely to mislead or deceive. Whether particular conduct is misleading or deceptive is a question of fact to be determined in the context of the evidence as to the alleged conduct and to the relevant surrounding facts and circumstances. Further, in some cases, silence may constitute misleading conduct if the circumstances give rise to an obligation to disclose relevant facts.



Section 53 supports section 52 by detailing specific types of conduct which will give rise to a breach of the TPA. In particular, section 53(c) prohibits a corporation, in trade or commerce, from falsely representing that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have.

Further, section 6 of the TPA expands the application of parts of the TPA to apply to individuals in certain circumstances, including conduct engaged in by individuals over the internet.

Assessment of matter

Given that Ms Tenodi is carrying on her business as an individual, pursuant to section 6 of the TPA, the scope of the matter under assessment must be limited to conduct occurring over the internet at the website www.modrogorje.com (the **website**).

I note that it is represented on the website: "It's totally inappropriate for a non-indigenous person to be doing wanjinias, especially without permission," said Chris Tobin, a member of the local Darug people who works as a guide with the National Parks and Wildlife Service." ... "Aboriginal law is very specific on what you can and can't do with wanjinias." Asked if she had sought permission to use the image, Tenodi says she did not need to."

I also note media reports quoting your solicitor from the Arts Law Centre that "*Aboriginal law is clear on which groups could depict certain images, but it was difficult to enforce under Australian law . Copyright law did not protect ancient images.*"

I am unable to conclude that Ms Tenodi has represented that she has permission to use the imagery, in circumstances where she may not need that permission. Having considered the use and reproduction of the imagery on the website, in the context of the *overall* impression created by the website, I am unable to conclude that the alleged conduct is likely to give rise to conduct that contravenes sections 52 or 53(c) of the TPA.

Whether conduct contravenes the TPA is ultimately a matter for a Court to determine. The TPA confers the right of private action on those who believe they have suffered loss or damage as a result of the offending conduct and the decision of this office not to pursue this matter further does not preclude any right to private action by you.

Thank you for the time you have taken to bring this matter to my attention. Your complaint has been recorded on the ACCC database, however in the circumstances I do not propose to take any further action.

Should you have any queries or wish to discuss this outcome further, please do not hesitate to contact Ms Bianca Gartner or myself on (08) 9325 0618.

Yours sincerely



Anthony Hilton
Deputy Director
ACCC, Perth