CENTRAL LAND COUNCIL

Friday 19 September 2020

To the Senate Select Committee on the Aboriginal Flag

The Central Land Council (CLC) welcomes this opportunity to present our views to the Select Committee on the matters concerning the Aboriginal flag. This flag has particular importance in our region. One of the reasons for this is the fact that Mr Harold Thomas is a Luritja man, whose design for the flag was in part, inspired by his country. Our submission outlines some of the tensions between the rights and interests of Mr Thomas in the flag he created, and the flag as a very important collective symbol for Aboriginal peoples' identity and history, and for our activism in rights, justice and reconciliation.

In this submission, we focus on addressing the Committee's Terms of Reference (b) and (c) in particular. We propose a possible resolution by recommending a negotiated arrangement between Mr Harold Thomas and the Commonwealth Government, and that a new National Aboriginal Flag Commission, or Council be established to enable Indigenous controlled governance of the flag. We suggest Mr Thomas be invited to take a key role in that body.

We will be pleased to provide any additional information to the Committee if requested.

Yours sincerely

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Submission to the Senate Select Committee on the Aboriginal Flag

September 19 2020

Introduction to this Submission

Flags are highly potent symbols. As signifiers of identity, nationhood, culture and heritage, they evoke powerful emotions. The current concerns regarding the uses of the Aboriginal flag bring these emotions sharply into focus. It is the view of this submission that the recent matters relating to the uses of the flag do not only bear upon copyright and licensing arrangements, although we acknowledge that these warrant considerable attention. The recent series of alleged breaches of copyright of the Aboriginal flag point to deeper, ongoing concerns about the relationships between intellectual property rights laws, the individual artist or creator, and Indigenous culture, heritage, and identity. They also invoke moral and ethical issues, and raise many challenging questions. One of these is how Australian Indigenous identity is represented, both to Indigenous peoples themselves, and to the wider society? Another, crucial question that the Aboriginal flag copyright issues raise is about rights and ownership. This latter question is at the heart of the current matters surrounding the flag's status, and forms the basis upon which we make our main recommendation in this submission.

This CLC submission situates the current concerns about the Aboriginal flag into the long history of misuse and misappropriation of Aboriginal art and design, and the implications for copyright law. We also explore some of the many facets of the Aboriginal flag in the nation, culture and society, including its critical role in Aboriginal history and identity, in sports, and as art.

Our submission points to one of the central paradoxes in this matter: the tensions between ownership of the Aboriginal flag as vested in an individual (i.e. Mr Harold Thomas), and the very significant role the flag has for Aboriginal peoples collectively, in activism and in their struggles and representations for identity, rights and justice. We draw attention to these multiple roles that the flag has; to its importance for Harold Thomas personally and professionally as an Aboriginal artist, and for Aboriginal Nations as a whole. Our submission discusses the racialized representations that persist, in the ways in which the flag's powerful political symbolism has raised difficult questions around its display in sporting events, and the flying of the flag in public sites around Alice Springs.

One arena in which the Aboriginal flag has entered the public consciousness in various, sometimes strident and contentious ways, is in its use in sporting events. A prominent example of this is the use of the flag by Cathy Freeman, which highlighted the potential for such a powerful symbol of identity and Indigeneity to stir up divisions within the broader Australian society around nationhood, citizenship, and what constitutes being Australian.[1]

The Aboriginal Flag in History, Culture and Identity

The Aboriginal flag occupies a significant place in the history of Aboriginal peoples' struggle for land, identity, and culture and heritage. It was designed in 1971, during a decade that was particularly important in terms of the flag's critical association with the movement for Aboriginal land rights and recognition. As such, the flag has acquired a significant, iconic role; and the recognition of this has given it the status of a widely accepted, unifying flag for Aboriginal peoples.

The Aboriginal flag has multiple roles and functions as art, as activism, and as a key symbol for Aboriginal peoples' struggles for rights and recognition. As such, the display of the flag is central to many important events and occasions for Indigenous peoples, such as Sorry Day, NAIDOC Week, and at rallies and marches for land rights and reconciliation. Its prominence, and its use in displays and insignia by Aboriginal organisations and media, all speak to the importance of this flag as a symbol embodying Aboriginal peoples as a whole, and encompassing history, rights, heritage, and identity. It is for these reasons that we suggest the establishment of an Indigenous controlled and managed body to govern the Aboriginal flag.

The Aboriginal Flag as Art and Activism

The Aboriginal flag, in the context of other, comparative types of flags is somewhat unusual. This is because it serves not only as a symbol for the collective activism and struggles of a colonised, displaced peoples, but also as a work of art created and owned by an individual. [2] It is worth citing the work of Mathieu Gallois on these aspects of the Aboriginal flag:

> The *Aboriginal flag* is universally accepted as a powerful activist ensign and, as such, the flag, once accepted as art, also has to be accepted at activist art. Accepted as art, the issues of the flag's use, ownership, copyright status and revenues are thrown into a complex terrain that traverses the values of two cultures and two mediums: art and vexillology (the study of flags).[3]

These multiple facets of the flag have been well described by Gallois:

> Sitting at the intersection of two cultures and two mediums, the *Aboriginal flag* has a complicated and specific reading that sets it apart from other flags and works of art. In its symbolism, the flag describes the relationship of people to land, land to culture, and culture to identity: concepts of great profundity for Indigenous Australians. The *Aboriginal flag* affirms black pride, it claims and asserts Aboriginal land rights, it advocates Indigenous self-determination, it repudiates the insidious policies and

[1] Tony Bruce and Emma Wensing, "She's not one of us": Cathy Freeman and the Place of Aboriginal People in Australian National Culture, *Australian Aboriginal Studies*, Vol. 2, 2009, pp. 90-100.

[2] On the Aboriginal flag as art see for example Mathieu Gallois, The Aboriginal flag as art, *Australian Aboriginal Studies*, Vol 2, 2016, pp. 46-60.

[3] Mathieu Gallois, The Aboriginal flag as art, p. 46

culture of assimilation, and it has come to symbolise the complex notion and claim of Indigenous sovereignty.[4]

As a work of art, the Aboriginal flag, 'has come to be perhaps one of the most appropriated works of art in Australian culture'.[5] However, the flag as a work of art, according to Gallois, is often overlooked, or under-appreciated in the context of its very widely acknowledged, historically significant, and prominent role in Aboriginal activism.[6]

The CLC understands and respects the critical importance of the Aboriginal flag to Harold Thomas, its maker. He has spoken about the inspirations and influences on his design, from the landscape around Alice Springs where he was born. As a Stolen Generations man, Thomas has lived in the two worlds of Aboriginal and Western traditions, and his artwork of the Aboriginal flag reflects this. In 1969 Harold graduated with Honours from the South Australian School of Art. This background, and his embracing of two different art traditions – Indigenous and Western – contribute to understanding the nature of the design of the flag, and its place as art.[7] By looking to the flag as part of Harold Thomas' personal and professional biography, the importance of the flag to him becomes clearer. Hence the need, as we argue in our recommendations, to ensure that the outcome of any negotiated settlement, whether a shared ownership, purchase of the flag by the Commonwealth, or assignment by Mr Thomas to the Commonwealth, respects the agency of, and rights and interests of Harold Thomas in the flag.[8]

The breaches of copyright in the Aboriginal flag raise challenging questions about the status and role of the flag in Australian society and culture. They also raise wider questions about the role of intellectual property laws in protecting Indigenous cultural heritage, art and design; and in this context, what responsibility does the nation state have in regard to the Aboriginal flag as an object of culture, art and identity for all Aboriginal people? These questions invite inquiry into the tensions between multiple interests and views on what the flag represents. These tensions play out in regard to the flag's role and uses: between the flag as Aboriginal artwork, as a national iconic symbol for Aboriginal people and for the nation as a whole. They point to tensions between a desire, or need for some kind of community or collectively held responsibility for the flag, and the rights of one individual, the flag's owner, Mr Harold Thomas, to use it in any way he chooses, as a proud achievement in his professional life as an Aboriginal artist, and also for commercial gain.[9]

The Aboriginal Flag and Copyright Law

Since at least the 1970s, and still today, Aboriginal and Torres Strait Islander peoples' artistic and cultural expressions have been subject to exploitation, unlawful use, and distortion or misrepresentation. The many examples of this have consistently brought to light the inadequacies of copyright and other Western intellectual property laws to effectively protect Indigenous rights in these expressions of their heritage and culture.[10] One of the cases that

[4] Mathieu Gallois, pp. 46-47.
[5] Gallois, p. 48.
[6] Ibid.
[7] Mathieu Gallois, The Aboriginal flag as art, p. 49.
[8] See Claire G Coleman, The Flag is Art, Art is Copyright, *Meanjin*, August 23, 2020.
[9] Claire G Coleman, The Flag is Art, Art is Copyright, *Meanjin*, August 23, 2020.
[10] Michael Davis, *Indigenous Peoples and Intellectual Property Rights*, Canberra, Australian Parliamentary Library, Research Paper 20, 1997; Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property*, Michael Frankel Solicitors, Sydney, 1998.

gained attention in 1995, *Milpurrurru v Indofurn Pty Ltd* (1995), known as the 'Aboriginal carpets case', concerned the unlawful reproduction of Indigenous designs on carpets. The case was significant for its recognition of the 'cultural harm' suffered by the plaintiffs in the awarding of damages, and its implied recognition of the communal ownership of Indigenous designs in the distribution of the damages.[11] These cases have enabled the scope of copyright law to be questioned and, if appropriate, as in the *Milpurrurru* case, to be adapted to accommodate the specifics of the Indigenous artists' concerns. There are clearly some important implications and lessons from cases such as *Milpurrurrru* for the way the Aboriginal flag has been treated. It is in this regard that there are questions about the notion of authenticity in Aboriginal culture, art and design, and how matters of authenticity are managed by the nation.

The recent issuing of 'cease and desist' notices by WAM Clothing, to other companies thought to be misrepresenting the use and reproduction of the Aboriginal flag re-introduces the discourses on breaches of copyright for Indigenous arts and cultural expressions that have been ongoing for many decades. It also brings into focus some difficult, seemingly contradictory aspects of the Aboriginal flag in a copyright context. The misuses of the Aboriginal flag are somewhat unusual when compared to instances of copyright breach such as the *Milpurrurru* case. The Aboriginal flag is a design by Harold Thomas, as an individual Aboriginal artist; whereas the designs on the carpets in *Milpurrurru v Indofurn* were based on communally held traditional clan designs. Nonetheless, the apparent misuse of the Aboriginal flag does go to matters of breach of copyright, with distortion, or misrepresentation of the original design. As the individual who designed the Aboriginal Flag, Mr Harold Thomas is entitled to pursue his own individual artistic and commercial interests in the use of the flag, and copyright law is an entirely appropriate vehicle for that. Harold Thomas expressed his views in a submission he made to the 2017 House of Representatives Standing Committee on Indigenous Affairs Inquiry into *The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia*. He argued for freedom of artistic expression without government intervention.[12]

The Aboriginal Flag in Sport

As a powerful symbol of Aboriginal identity, the flag has a very significant role in sporting events. It stands for pride in Aboriginal heritage and belonging, and, evoking the tragic history of Aboriginal people, providing a focal point for standing strong, for resilience, and for achievement in the wider society. These were the key factors in Cathy Freeman's public display of the Aboriginal flag during her wins in the international sporting arena.[13] Her proud and emotional public exhibition of the Aboriginal flag during the 1994 Commonwealth Games in Victoria, British Columbia, was indicative of this, where she had stated "I wanted to shout: 'look at me, look at my skin. I'm black and I'm the best'. There is no more shame".[14] Her display of the Aboriginal flag alongside the Australian flag invited considerable attention from the world's media, and aroused strong responses from the wider community. This was a clear illustration that the Aboriginal flag is not only an object of Aboriginal art and design that risks falling prey to the occult machinations of the world of Western copyright law. The flag is far

[11] See for example Michael Blakeney, Milpurrurru and Ors v Indofurn Pty Ltd and Ors – Protecting Expressions of Aboriginal Folklore under Copyright Law, *Murdoch University Electronic Journal of Law*, Vol 2, No. 1 (April 1995).

[12] Harold Thomas, Submission No. 48, 1 November 2017.

[13] Jock Given, Red, Black, Gold to Australia: Cathy Freeman and the Flags, *Media Information Australia*, 75(1), 1995, pp. 46-56.

[14] Quoted from 'Freeman', documentary directed by Laurence Billiet, ABC Television.

more than this: it is an iconic symbol of Aboriginal peoples' identity, heritage and history, and as such, must be considered in this context.[15]

The Aboriginal flag also plays a vitally important role in the wider sporting world, most prominently in its deployment in a variety of ways in the major football codes. It is in these arenas that, with the recent issues about copyright licensing arrangements, this flag has most recently come into public awareness, in questions about its use by the AFL in its Indigenous Round.[16]

Importance of the Aboriginal flag in the Alice Springs Region and use by the CLC

As well as in the sporting world, the Aboriginal flag's symbolism has continued to play a very important role in wider arenas. We acknowledge firstly the fact that the flag's designer, Mr Harold Thomas, is a Luritja man from the Central Australian region. This is also significant in the context of the ways in which the flag has brought out racialized tensions over its use in Alice Springs.

In Alice Springs the flying of the Aboriginal flag has been a divisive issue for some time. There has been a long-running struggle between Alice Springs Town Council, and others over flying the Aboriginal flag both on Anzac Hill and at the Civic Centre. Flying the Aboriginal flag atop Anzac Hill has resonated especially powerfully, given the crucial symbolism of the Anzac tradition in the Australian national consciousness. This issue is further complicated when we consider the fact of the still relatively unacknowledged role that Aboriginal and Torres Strait Islander peoples had in the Anzacs, and in the war efforts more generally.

Some of the key tensions are whether (a) the Aboriginal flag is permitted to be flown alongside other flags (either on the same pole, or on separate ones), and (b) whether the Aboriginal flag is permitted to be flown permanently, or only during special occasions such as NAIDOC.[17] The history of the Aboriginal flag's display shows that this has occurred at significant times in the calendar of Aboriginal history, culture and identity such as during NAIDOC Week, Reconciliation Week, and at key moments in the assertion of rights, such as land rights rallies, and the Sydney Harbour Walk for Reconciliation. The Aboriginal flag is a very significant symbol of unity and pride for Aboriginal peoples at events, commemorations, and many other events such as the Freedom Day Festival marking the Gurindji peoples' walk off at Wave Hill – an event of great significance in the history of land rights. The prominence of the flag's display at the Aboriginal Tent Embassy in Canberra also demonstrates its strong associations with our peoples' struggles for self-determination, rights and sovereignty. It is for these reasons the Aboriginal flag has become so widely recognised and used, as a symbol for Aboriginal peoples' unity and identity.

But the prevalence of racialized discourses within many sections of the wider society continues to infect attitudes towards the Aboriginal flag, and flying, or displaying the

[15] Leanne White, 'One Athlete, One Nation, Two Flags: Cathy Freeman and Australia's Search for Aboriginal Reconciliation', *Sporting Traditions*, 25(2), 2008, pp. 1-19.

[16] See for example Isabella Higgins, 'New licence owners of Aboriginal flag threaten football codes and clothing companies, *ABC News*, 11 June 2019; Tony Armstrong, 'Aboriginal flag's absence from AFL's Indigenous Round highlights ongoing issues', *ABC News*, 19 August 2020.

[17] There has been extensive media reporting on the flying of the Aboriginal flag in Alice Springs. See for example Kieran Finnane 'In a flap over flags – a possible compromise', *Alice Springs News*, Issue 2, Vol 25, 25 March 2018; Nick Hose, Aboriginal flag designer questions why the town that inspired it refuses to fly it', *ABC Alice Springs*, Sunday 25 March 2018.

Aboriginal flag alongside other flags such as the Australian flag has invited controversy.[18] This has been shown earlier in this submission in the case of Cathy Freeman, and also underpins the long running disputes about flying the Aboriginal flag in Alice Springs.

Controversy around the flying of the Aboriginal flag together with other flags in Alice Springs goes back to at least 1982. These controversies go to questions about when, and if the Aboriginal flag might be flown, whether for 'special occasions', or ongoing; and whether the flag might be flown together with other flags. In Alice Springs for example, whether at the town's Civic Centre, or at Anzac Hill, discussions and debates have revolved around whether the Aboriginal flag could be flown in conjunction with (or alternating with) other flags including the Australian flag and the Eureka flag. Anzac Hill (*Atnelkentyarliweke*, or *Untyeyetwelye* to Arrernte people) is an important and popular site where several cultural and national interests intersect: tourism, military and civic pride and remembrance, and Aboriginal sacred geography and heritage.

The Aboriginal flag also has an important place in the CLC's history and role in representing Aboriginal people throughout Central Australia (see images below). This organisation has played its part in advocating for the Aboriginal flag to be displayed and flown at Anzac Hill. In 1989 then CLC Director David Ross applied to the Alice Springs Council to have the flag flown at Anzac Hill, a request that was declined by the Council, with the view that only the Australian, Northern Territory, and ANZAC flags were to be flown there.

There were repeated attempts in 2000, and again in 2004, to obtain agreement from the Town Council to fly the Aboriginal flag at the Civic Centre and/or Anzac Hill. In late October

[18] On racialized discourses in Australian sports, see for example Laurence Bamblett, Straight Line Stories: Representations and Indigenous Australian Identities in Sports Discourses, *Australian Aboriginal Studies*, Vol 2, 2011, pp. 5-20.

2000 the council resolved to fly the Aboriginal flag at the civic centre, but separately from the others. In 2004 an application to the Town Council from the CLC to have the Aboriginal flag flown on Anzac Hill was declined. What these debates and divisions show all too clearly is the persistence of race-based prejudices within the wider community about Aboriginal identity, as citizens of Australia, and as having our own, proud identity as First Peoples.[19] As one report claimed *"In Alice Springs, a town marred by deep-seated racial divides, something as simple as flying the Aboriginal flag can become a flash point for civil unrest"* [20] That refusal from Alice Springs Council to fly the Aboriginal flag, or to only fly it in very limited ways, is also an affront to Mr Harold Thomas, a proud Luritja man from Central Australia, and the creator of the flag's design. Mr Thomas has described how his flag was influenced by Alice Springs landscapes and imagery. Harold Thomas had been among the many who had called for the Alice Springs Council to fly the Aboriginal flag on Anzac Hill, a place that has a special significance as both an Aboriginal sacred site, and an important place in the Anzac tradition. In 2018, a breakthrough was achieved for limited exhibition of the Aboriginal flag at Anzac Hill. Alice Springs Council agreed to have it flown during special occasions such as during NAIDOC Week.[21] While that was an important step on the path to recognition of the powerful symbolic importance of the Aboriginal flag, there continued to be lobbying for the flag to become a permanent presence.[22] It was not until 2019 that the Alice Springs Council agreed that the flag can be flown permanently throughout the year. While this was a victory, shadows of the old racialized tensions about the Aboriginal flag remain, as the Council stated that the exception to flying the Aboriginal flag will be on ANZAC Day, when, instead of the Aboriginal flag, the New Zealand flag would be flown alongside the Australian flag.[23]

Comparative Examples of Ownership and Uses of Flags

An understanding of the distinctiveness of the Aboriginal flag, not only in its design and history, but also in terms of its roles and functions as a symbol for a displaced, oppressed, marginalised or colonised peoples, can be further gained by looking to other peoples' flags.

The Torres Strait Islander Flag

The Torres Strait Islander flag was designed by the late Bernard Namok from Thursday Island in 1992. It was recognised by the former national body, the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1992, and, like the Aboriginal flag, was recognised in 1995 by the Australian Government as an official flag under the *Flags Act 1953*. However, while the copyright in the Aboriginal flag is held by an individual, Harold Thomas, the Torres Strait Island Regional Council holds copyright for the Torres Strait Islander flag.

The debates and discussions around the Aboriginal flag find some parallels with flags of other peoples in settler colonised or colonised countries, such as the West Papua and Maori flags.[24]

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[19] For a discussion on Australian Indigenous identities see for example Michael Davis, Australian Indigenous Identity in Colonial and Postcolonial Contexts, In Steven Ratuva, ed., *The Palgrave Handbook of Ethnicity*, (Singapore: Palgrave), 2019.

[20] Nick Hose, 'Aboriginal flag designer questions why the town that inspired it refuses to fly it', *ABC News*, 25 March 2018.

[21] Nick Hose and Mitchell Abram, 'Alice Springs flies the Aboriginal flag for the first time' NAIDOC Week, *ABC News*, 9 July 2018**.**

[22] Katrina Beaven, 'NAIDOC Week sparks renewed calls to permanently fly Aboriginal flag in Alice Springs**',** *ABC News*, 8 July 2018.

[23] Kieran Finnane, Aboriginal Flag to fly year round on Anzac Hill, *Alice Springs News*, 26 August 2019.

[24] On the West Papua flag see for example David Webster, '"Already Sovereign as a People": A Foundational Moment in West Papuan Nationalism', *Pacific Affairs*, Vol. 74, No. 4 (Winter, 2001-2002), pp. 507-528. For

In both of those contexts, the respective flags have been subject to tensions and divisions regarding their display with flags of the dominant or colonising power. But there are some important differences, as Gallois explains:

> As the pan-*Aboriginal flag*, it represents Indigenous Australians but it is not a nationalistic flag that claims the nation of Australia for Indigenous Australians. Rather, it is the flag and symbol of a displaced peoples. In this sense, the *Aboriginal flag* has a different reading and intended purpose to most nation state flags, such as the Australian flag. The *Aboriginal flag's* reading is also different to the West Papuan flag, which is also the flag of a displaced Indigenous people. The latter, however, *does* claim West Papua for Indigenous West Papuans. As a non–nation-claiming flag, the *Aboriginal flag* is best understood as a flag of identity, political activist agendas and ideals. In this sense, the *Aboriginal flag* has much in common with the Eureka flag and the Peace/Gay Pride flag, as they are flags that affirm identities and political agendas or ideals. The national Maori flag and the Torres Strait Islander flag, both of which were inspired by the *Aboriginal flag*, are perhaps the flags with which the *Aboriginal flag* shares the greatest number of themes, agendas and historical contexts.

Importantly, Gallois states 'neither Maori nor Torres Strait Islander people claim, however, that their flags are works of art'.[25]

Options for Consideration

In this submission we suggest an approach that might potentially resolve the tensions between the rights of Harold Thomas in the flag he designed, and the need to be able to use the flag freely by the nation, and the wider society. To achieve these dual objectives, we suggest a role for the Federal Government, in assuming ownership of the flag on behalf of the Australian nation. The Aboriginal flag already has standing as one of Australia's officially proclaimed flags, having been thus recognised in 1995 under the *Flags Act 1953*.

A Negotiated Arrangement

The breaches of Harold Thomas' copyright in the Aboriginal flag raises important questions about the nature of copyright law. In this context, we suggest that the Committee recommend that a close examination be made of the copyright held by Mr Thomas in the Aboriginal flag, to explore legal options. These may include sharing, or 'splitting' the copyright between Harold Thomas, and the Commonwealth Government (as vested in a new Indigenous governed entity as suggested below), or Mr Thomas assigning his copyright in the flag to the Commonwealth, to allow the flag to be used by Indigenous Australians and others as the collective symbol of Aboriginal people and their rights.

Assigning copyright

Copyright law in Australia provides for holders of copyright to license, or to assign their rights.[26] We suggest that the Committee recommends to Government that negotiations be

discussion on the Maori flag, Taylor Annabell, Nationhood by Design? The Discursive Construction of a "New" New Zealand in the Flag Consideration Project, Unpub. MA Thesis, Auckland University of Technology, 2016; Morris, Ewan Morris, 'Banner Headlines: The Maori Flag Debate in Comparative Perspective', *The Journal of New Zealand Studies* 9, 2010.

[25] Mathieu Gallois, The Aboriginal flag as art, p. 48.

[26] Copyright Council, *Assigning and Licensing Rights*, Information Sheet GO24v12, November 2019.

entered into with Mr Harold Thomas with a view to requesting that he consider assigning his copyright in the Aboriginal flag to the Commonwealth Government. The feasibility of, and details for such an assigning of copyright would need to be examined closely by appropriate intellectual property legal expertise. We would also suggest that if Mr Thomas is agreeable to assigning his copyright in the Aboriginal flag to the Commonwealth, then the Government should give consideration to offering Mr Thomas a key role, possibly as its chairperson, in a newly established entity such as a National Aboriginal Flag Commission, or Council. This would enable him to retain a central role in decision making regarding the management and use of the flag, and it would acknowledge the critically important place that the flag has in Mr Thomas' personal and professional life.

A new Aboriginal Flag Commission or Council: Indigenous Governance for the Aboriginal Flag

We would invite the Committee to recommend that the Commonwealth Government assumes control of the Aboriginal Flag under a newly established entity. This could be designated as an Aboriginal Flag Commission, or Council, and may be a subsidiary organisation within a National Indigenous Cultural Authority (NICA).[27] The idea of a NICA was one of the recommendations in a 1999 report by Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous cultural and intellectual property rights.* It was further proposed in 2009 in a report by Janke called *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, and formed the basis for an Australian Council for the Arts Public Discussion Paper released in 2018 entitled *A Proposed National Indigenous Arts and Cultural Authority*.

An entity of this kind could also enable Indigenous Cultural and Intellectual Property Rights across the entire scope to be equitably managed and regulated by Indigenous peoples, in a self-determining way. In developing an arrangement such as this, effective recognition and protection of the existing rights of the flag's designer Mr Harold Thomas will be essential. This may be achieved through a negotiated settlement.

The roles and functions of a newly established Aboriginal Flag Commission, or Council, should include an information, education and awareness campaign to create better understanding of, and respect for the Aboriginal flag among the wider community. This should include workshops, information and discussion forums, aimed at fostering greater understanding about the history of the Aboriginal flag, including the vitally significant role the flag has had in the movement for land rights, justice and reconciliation, and its importance to Aboriginal peoples as a universally accepted symbol of their identity.

Australia's International Obligations: Indigenous Peoples' Cultural and Intellectual Property Rights

A NICA would also fulfil Australia's obligations under international standards and treaties such as the 2007 United Nations Convention on the Rights of Indigenous Peoples (UNDRIP). Adoption of responsibility for the Aboriginal flag within a structure such as the NICA would enable Indigenous governance within a fully equitable and ethical arrangement. It would provide for free, prior and informed consent for fair uses and dealings regarding the Aboriginal flag.

[27] On this concept, see T Janke, *Beyond Guarding Ground: A vision for a National Indigenous Cultural Authority*, Terri Janke and Company, 2009.

Recommendations

1. Explore options for Commonwealth acquisition of Harold Thomas' copyright in the Aboriginal Flag;

2. Consider the establishment of a formal governance structure for the Aboriginal Flag, possibly based on exploring comparative models of collective ownership and management of national symbols such as the Torres Strait Islander flag;

3. Explore the possible role of an entity provisionally entitled a National Aboriginal Flag Commission, or Council, within the National Indigenous Cultural Authority; and

4. Explore ways to recognise or protect Mr Harold Thomas' rights in the Aboriginal Flag as the person who designed it, within the structure of a National Aboriginal Flag Commission or Council.