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18 September 2020

Ms Sophie Dunstone
Committee Secretary
Select Committee on the Aboriginal Flag
Sent by email to:
aboriginal.flag.sen@aph.gov.au

Dear Ms Dunstone,

Re: Call for submissions to the Select Committee on the Aboriginal Flag (the Select Committee)

Thank you for the opportunity to make a submission on this most important issue.

I make my non-confidential submission in the **Schedule** below.

Kind regards

Dimitrios

SCHEDULE

Introduction

1. This submission is responsive to a general invitation to interested persons by the Select Committee to make a submission responsive to the terms of reference by Friday 18 September 2020.[i]
2. I note that the Select Committee's terms of reference are as follows:

   "Current and former copyright and licensing arrangements for the Aboriginal flag design, with particular reference to:

   (a) who benefits from payments for the use of the Aboriginal Flag design and the impact on Aboriginal organisations, Aboriginal communities and the broader Australian community of the current copyright and licensing arrangements;

   (b) options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community, including:

      (i) negotiated outcomes with licence and/or copyright holders:

      (ii) the compulsory acquisition of licences and/or copyright,

      (iii) ways to protect the rights and interests of the flag's legally recognised creator Mr Harold Thomas; and

   (c) any other matters relevant to the enduring and fair use of the Aboriginal Flag design by the Aboriginal and Australian community.
3. In considering the options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community, it is essential in my opinion, to firstly consider:

   (a) the Copyright Tribunal and Federal Court proceedings which resulted in declarations being made by the Federal Court, as to the ownership of the copyright in the Aboriginal Flag: *Thomas v Brown* 37 IPR 207 (Sheppard J, 9 April 1997).

   (b) the impact of the Governor General's Proclamation (Australian Aboriginal Flag) dated 27 June 1995 under s.5 of the *Flags Act* 1953 (Cth) and published in the Commonwealth of Australia Gazette No. S259 with effect from 14 July 1995 (the Proclamation).[ii]
4. This is predominantly because the historical context informs the issues of:

(a) Ownership of copyright in the Aboriginal Flag.
(b) The nature of the obligations arising between the Government and Mr Thomas.
(c) Mr Thomas' proper remuneration for his authorship of the Aboriginal Flag.

5. The Aboriginal Flag is identified by the image appearing in Schedule 1 to the Proclamation.

Background[iii]

6. On 8 March 1996, Harold Joseph Thomas (Mr Thomas), filed an application in the Copyright Tribunal (the Tribunal) pursuant to the provisions of s.183 of the *Copyright Act* 1968 (Cth). Under this provision, the terms for doing an act exclusively reserved for the copyright owner, are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright.[iv]
7. Mr Thomas' evidence was that he created the artistic work known as the Aboriginal Flag and claimed authorship and ownership from 1971, of the copyright in the Aboriginal Flag as an artistic work within the meaning of the *Copyright Act*.
8. Mr Thomas' application to the Tribunal to fix the terms for the Government's uses, which he said, involved doing acts comprised in the copyright of the Aboriginal Flag.[v]
9. The factual basis behind the application was that the Commonwealth Government had been arranging the manufacture of flags bearing the artistic work, the Aboriginal Flag, for its own purposes and in doing so reproduced and/or authorised the reproduction of the Aboriginal Flag without Mr Thomas' consent.
10. Further, by the Proclamation, the Government was authorising copies of the Aboriginal Flag to be made by others generally, including non-Aboriginal people. In this regard, the Proclamation stated:

> "[the Government]…noting the fact that the flag reproduced in Schedule 1 and described in Schedule 2 is recognised as the flag of

> the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally, appoint that flag, under section 5 of the *Flags Act 1953*, to be the flag of the Aboriginal peoples of Australia and to be known as the Australian Aboriginal Flag with effect from 14 July 1995."[vi]

11. Common to the patent, design and copyright statutory regimes, is the power of the Crown to use an intellectual property right (IPR) for the services of the Commonwealth or State, but subject to fixing terms of such use, such terms to be agreed in the first instance between the Government and the IPR owner or failing agreement, in the case of copyright, to be determined by the Copyright Tribunal.
12. It was thought at the initial stages of the Tribunal proceeding, that the Tribunal had jurisdiction to determine ownership of the copyright in the Aboriginal Flag as a matter going to its jurisdiction to fix the terms between the owner and the Commonwealth.
13. The Commonwealth's position was that it was willing to negotiate, however, it was aware of at least two other individuals who claimed authorship and ownership of the copyright in the Aboriginal Flag.
14. His Honour accepted the Commonwealth was willing to meet its obligations to any person who could establish ownership in the artistic work. It was therefore willing to negotiate but not willing to negotiate with a party unless that party was the owner of the copyright.
15. In the preliminary directions hearing held on 18 April 1996, in addition to appearances by Mr Thomas and the Commonwealth, there were appearances by Mr Brown and Mr Tennant, who were persons each claiming on their own respective facts, to be the author and the owner of the copyright in the Aboriginal Flag.
16. The proceeding before Justice Sheppard, as President of the Tribunal was heard on the 23, 24 and 25 July 1996. Mr Thomas and Mr Brown were represented by counsel and Mr Tennant appeared in person.
17. During the Tribunal hearing, discussion between his Honour and counsel

took place as to the appropriateness of the question of ownership to be determined by the Tribunal.

18. It was clear from those discussions that the Tribunal had jurisdiction to determine ownership, as a matter upon which its jurisdiction to fix terms depended, however, that jurisdiction was not enlivened until the parties had attempted to negotiate the terms and failed to reach an agreement.
19. It followed that the Tribunal would only have jurisdiction where the *owner* of the copyright and the Commonwealth attempted and failed to reach an agreement. This meant that a determination by the Tribunal that Mr Thomas was the owner of the copyright would not remedy the deficiency in its jurisdiction brought about by the failure of the copyright *owner* and the Commonwealth to reach agreement.
20. As a result of these considerations, doubts arose as to the Tribunal's jurisdiction to determine the question of ownership. It was therefore considered a safer course to seek declaratory relief from the Federal Court, as to the ownership of the copyright.
21. It followed that on 25 July 1996, the last day of the hearing, Mr Thomas filed an application in the Federal Court seeking declaratory relief as to his ownership of the copyright in the Aboriginal Flag, naming Mr Brown and Mr Tennant respondents to the Federal Court proceeding.
22. On 1 August 1996 an order was made by consent, that the evidence given before the Tribunal was to be evidence in the Federal Court proceeding.
23. The hearing of the Federal Court application concluded on 12 December 1996 and judgment was handed down 9 April 1997. Sheppard J made the following declarations:
    (a) Harold Joseph Thomas is the author of the artistic work being the design for the flag described in Schedule 1 to the proclamation dated 27 June 1995 under s.5 of the Flags Act 1953 and published in the Commonwealth of Australia Gazette No. S259 of 14 July 1995, such flag being known as "the Aboriginal flag" ("the artistic work");
    (b) Harold Joseph Thomas is the owner of the copyright subsisting in

the said artistic work.

24. His Honour also ordered that leave be reserved to Mr Thomas to make application for the further relief sought in his amended application filed on 1 August 1996 provided that any such application is made on or before 23 April 1997.
25. The Federal Court file indicates that there was no anticipated application by Mr Thomas after judgment was handed down.
26. It would be reasonably expected that once Mr Thomas obtained the declaratory relief he sought, that he would have pursued negotiations with the Commonwealth and failing any agreement, to ask the Tribunal to fix terms.
27. The Tribunal records available online, do not indicate that Mr Thomas, now with declarations in hand, resumed his application in the Tribunal to fix the terms under s. 183 of the *Copyright Act*.

"for the services of"

28. Relevantly:

(a) s.183(1) of the *Copyright Act* provided:

"The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State."

(b) s.183(5) of the *Copyright Act* provided:

"Where an act comprised in a copyright has been done under sub-section (1) of this section, the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal."

29. There are very few cases which identify what is meant by "for the services of the Commonwealth or State".
30. In *George Stack and GS Technology Pty Ltd v the Brisbane City Council, Davies Shephard Pty Ltd and Davies Shephard (Queensland) Pty Limited*,[vii] a case involving the Brisbane City Council's use of the applicant's patented water meter manifold, Cooper J referred to *Pfizer Corporation v. Ministry of Health*,[viii] a House of Lords decision on appeal from the Court of Appeal involving the exercise of the Crown use rights in respect of a patent for tetracycline.
31. The drug was used in the National Health Services. In 1961 the Minister of Health invited tenders for the supply of tetracycline from various firms and offered protection to the tenderers relying on the authorisation under the Crown use provision.
32. Both the Court of Appeal and the majority in the House of Lords held that an act was done "for the services of the Crown" if it was done "*for the purpose of performing a duty or exercising a power which was imposed upon or invested in the executive government by statute or by prerogative.*"[ix] (My emphasis)

Recent events (publicised)

33. The conduct heretofore described, informs my responses to the terms of reference.
34. Before doing so it is necessary to briefly state the circumstances which are most likely, the catalyst for the current inquiry. These circumstances, in very broad terms are that Mr Thomas has purported to grant an exclusive license to a third party, a Queensland based company called "WAM Clothing" (WAM), of the copyright in respect of certain acts of copyright relating to their application to clothing. On the strength of this licence, WAM has presented certain users of the Aboriginal Flag on clothing with a "cease and desist" letter.[x]
35. On 11 June 2019 ABC News published online an article titled "*New*

licence owners of Aboriginal flag threaten football codes and clothing companies".[xi]

36. On 13 June 2019 SBS News published online an article titled "Explained: Australian copyright laws and the Aboriginal flag".[xii]
37. I do not intend to investigate the accuracy or extent of these events, predominantly because the real issues are between the Commonwealth and Mr Thomas as WAM can take no better title to the copyright than Mr Thomas can give.

Admissions

38. The owner of the copyright in the Aboriginal Flag and the Commonwealth have both submitted to the jurisdiction of the Tribunal.
39. Mr Thomas in making an application under s.183 of the *Copyright Act* has accepted that the Commonwealth by:
    (a) arranging the manufacture of flags bearing the artistic work, the Aboriginal Flag, for its own purposes; and
    (b) the Proclamation,

    is entitled to do the acts comprised in the copyright, subject to the fixing of the terms for doing such acts under s.183(5).
40. Mr Thomas' has accepted that, subject to fixing terms of its use, the Commonwealth could do all of the acts comprised in copyright under the *Copyright Act*, because its recognition of "the flag of the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally,"[xiii] were acts done for the services of the Commonwealth or State.
41. The Commonwealth in its defence, accepted that its conduct in relation to the Aboriginal Flag involved acts comprised in copyright which were done "for the services of the Commonwealth or State", within the meaning of s.183 which gave rise to an obligation to pay the copyright owner for such acts.
42. His Honour considered that the Commonwealth might have been joined to the Federal Court proceeding so as to bind it upon determination of the copyright owner, however his Honour also considered that "it seems clear

that the Commonwealth will abide the outcome of these proceedings in relation to the question of the ownership of the copyright."[xiv]

43. Mr Thomas also cited the Proclamation as a use within the meaning of s.183 of the *Copyright Act*. This paper opines that the Proclamation however was much more than a use generating an obligation to fix terms under s.183. Rather, the Proclamation shifted title in the copyright to the Government.

Estoppel

44. It has been said in relation to estoppel in the context of government and prior Creative Commons licences, that "[t]o successfully raise estoppel, the licensee would need to show that they had, in reliance on the … licence, altered their position such that it would now be unreasonable (unconscionable) for the government agency/licensor to withdraw permission to use the licensed material."[xv]
45. Mr Thomas created the Aboriginal Flag in 1971. I am not familiar with the various uses he allowed or on what terms he allowed them. I understand from the decision of Sheppard J that one of the "problems" with the case for Mr Thomas was that he designed the flag in 1971 and did not until 1996 take steps to assert his copyright. His Honour recognised that an obvious reason for the failure was that Mr Thomas did not need to assert that ownership. He was recognised as the person who designed the flag by the people who to him mattered.
46. His Honour considered the answer lay in the Proclamation, which Mr Thomas "opposed very strongly". This was the understandable catalyst for the application to the Tribunal. His Honour also noted, but not relevant to the Federal Court proceeding he was determining, that there was evidence before the Tribunal of others in the Indigenous community who did not object to the Proclamation.
47. The fact is that the Government may well face organisations and individuals, who before and after the Proclamation relied on a licence from Mr Thomas to use the Aboriginal Flag to identify as a community with a unique history, their First Nation heritage.

Responses to the Terms of Reference

48. Current and former copyright and licensing arrangements for the Aboriginal flag design, with particular reference to:

(a) who benefits from payments for the use of the Aboriginal Flag design and the impact on Aboriginal organisations, Aboriginal communities and the broader Australian community of the current copyright and licensing arrangements;

Response:

(i) The power to grant licences for doing acts comprised in copyright in relation to the Aboriginal Flag has been conferred on the Commonwealth.

1. In the period before the Proclamation, s.183 of the *Copyright Act* applies and:
   a. under s.183, the Commonwealth (or State) is exercising a power conferred on it to do acts comprised in copyright in relation to copyright works or subject matter other than works or to have those act done by a person/s authorised in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.
   b. the authorisation under s.183, may be given before or after the acts in respect of which the authority is given have been done.[xvi]
   c. This right in the Commonwealth (or State) is subject to an obligation to do such acts comprised in copyright, on terms between itself and the owner (or exclusive licensee).
2. Section 6 of the *Flags Act*, gives the Governor General the discretion to licence or authorise a person, body or authority to use the Aboriginal Flag in the manner specified in the license.
3. There is no provision in the *Flags Act* (as there is in the *Copyright* Act), requiring that the use of the copyright in the Aboriginal Flag, to be subject to any obligation to fix terms for its use.

However, the copyright in the Aboriginal Flag is personal property and as such, can be acquired and assigned.[xvii]

4. Accordingly, in my opinion, the *Flags Act* has effectively taken the property belonging to Mr Thomas for the peace, order, and good government of the Commonwealth and such an acquisition must be on just terms, where property is acquired from any State or person for any purpose in respect of which the Parliament has power to make laws.[xviii]
5. The powers of the Commonwealth:
   a. to acquire the property, in this case copyright in the Aboriginal Flag, is for the purpose of exercising a power imposed upon or invested in the executive government by statute by the Proclamation; and
   b. to compulsorily acquire the use of the copyright material under s.183 for the services of the Commonwealth or State,

   are <u>not</u> co-existent because the first involves an acquisition of the copyright and the latter a use of the copyright but not its acquisition per se.
6. If the Commonwealth did acts comprised in the copyright of a work before the Proclamation, which it appears to accept from its defence in the Tribunal proceeding, terms should be agreed or fixed failing agreement with the *then* owner Mr Thomas.
7. However, by the Proclamation, the Commonwealth has in effect acquired the copyright in the Aboriginal Flag. In support of this construction, it is part of the indicia of ownership of copyright, that the owner may authorise others to do acts associated with copyright.[xix] Further, it is an infringement if an act is done without the licence of the copyright owner. The *Flags Act* appoints the Governor General as the person who, since the Proclamation, holds the right to licence the use of the Aboriginal Flag.[xx]
8. Based on this construction, it follows that:

a. Mr Thomas is entitled, failing agreement with the Government, to apply to the Tribunal for terms under s.183(5) for the Commonwealth or State's use in the period before the Proclamation.

b. Mr Thomas is entitled to compensation on just terms after the Proclamation for the Commonwealth's acquisition of his property.

c. Since WAM claims an exclusive licence dated after the Proclamation, WAM is not entitled to anything from the Commonwealth or State because its use was not an authorised use under s.6 of the *Flags Act.* In addition, Mr Thomas at the time WAM took a licence did not have the right to licence the copyright after the Proclamation and so he could not give WAM the exclusive licence upon which it now bases its claims.

d. In accordance with its recognition in the Proclamation that the Aboriginal Flag is the flag of the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally, the Commonwealth may now authorise those persons "either without defacement or defaced in the manner specified in the warrant", taking into account any uses prior to the Proclamation under the authority of Mr Thomas and any uses after the Proclamation.

e. There will be persons who, like Mr Thomas, strongly oppose the dispensation of licences to be determined by the Government. As noted by Sheppard J, there are other elements however that do not hold the same objection.

f. If the expression "the current copyright and licensing arrangements" in the terms of reference, is a reference to the arrangements Mr Thomas has entered into with WAM, then those arrangements are unauthorised by the Commonwealth or State both under s.6 of the *Flags Act*. Mr Thomas could

not grant a licence to WAM as he did not hold the copyright after the Proclamation. The legal principle being, that a person cannot give title to what they do not own. This is subject to his being compensated for the loss of his personal property, the copyright in the Aboriginal Flag.

g. Threats of an action or proceeding for copyright infringement by WAM (or Mr Thomas), would therefore enliven in my opinion, s.202 of the *Copyright Act* as groundless threats.

h. Subject to a threshold issue referred to below, Mr Thomas and the Commonwealth should now undertake negotiations as to uses under s.183 before the Proclamation and on just terms after the Commonwealth's acquisition of the copyright in the Aboriginal Flag by the *Flags Act*.

i. If Mr Thomas and the Commonwealth fail to negotiate terms, the parties (or either of them), may apply to the High Court to determine two issues, namely, the effect on the copyright title of Mr Thomas of the Proclamation and what are "just terms". The High Court has original jurisdiction in all matters in which the Commonwealth is a party.[xxi]

j. Where either the Commonwealth or Mr Thomas have re-commenced the Tribunal proceeding failing any negotiated outcome, for the period before the Proclamation, the Tribunal has the power on its own motion to refer a question of law to the Federal Court.[xxii]

k. In this regard, I do not believe any statutory limitation can be imposed on Mr Thomas under the *Copyright Act*,[xxiii] as this limitation relates to copyright infringement claims. Section 183(1) specifically states that the Crown's use of copyright for the services of the Commonwealth or State does not infringe copyright.

49. Current and former copyright and licensing arrangements for the Aboriginal flag design, with particular reference to:

(b) options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community, including:

(i) negotiated outcomes with licence and/or copyright holders:

(ii) the compulsory acquisition of licences and/or copyright,

(iii) ways to protect the rights and interests of the flag's legally recognised creator Mr Harold Thomas;

Response:

(i) For the reasons expressed in my response to paragraph (a) of the terms of reference, the Government's options are informed by the proper construction of the Proclamation on the copyright title of Mr Thomas.

(ii) On my construction in this submission, the Commonwealth has acquired the copyright in the Aboriginal Flag by the Proclamation and now has an obligation to compensate Mr Thomas. In addition to this obligation, it has used under s.183 the copyright in the Aboriginal Flag before the Proclamation, which also gives rise to an obligation to compensate Mr Thomas.

(iii) In an ironic turn of events, the Government may now consider that it must apply to the High Court for a legal determination of its rights following the Proclamation vis a vis the copyright in the Aboriginal Flag, before it commences negotiations with Mr Thomas. This will be the case particularly, where Mr Thomas challenges this interpretation of the effect of the Proclamation.

(iv) It is a matter of practicality that a key issue for First Nation's Peoples is self-determination.[xxiv] A potential course for further discussion is the appointment of a body as exclusive licensee of the copyright under licence from the Government to appoint sub-licensees.

(v) This body of indigenous representatives duly elected by their indigenous communities to be the exclusive licensee may grant sub-licenses with a tiered approach to licences. For example, non-commercial First Nation people's use; commercial First Nation people's use; non-commercial non-First Nation peoples use and commercial use by non-First Nation peoples.

(vi) That body will be best suited to determine the merit of applications and whether they warrant a nominal license fee, giving them the opportunity to use the copyright in the Aboriginal Flag within the terms of the licence and in accordance with its recognition in the Proclamation that the Aboriginal Flag is the flag of the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally.

50. Current and former copyright and licensing arrangements for the Aboriginal flag design, with particular reference to:

(c) any other matters relevant to the enduring and fair use of the Aboriginal Flag design by the Aboriginal and Australian community.

Response:

(i) As from 13 September 2019, any licenses of intellectual property rights, including copyright in the Aboriginal Flag, no longer have the benefit of the limited exemption under s.51(3) of the *Competition and Consumer Act* 2010 (Cth). The Government and any body, representative of First Nation's peoples established as exclusive licensee, if such a body comes to fruition, must be mindful that the terms of any licence it grants does not contravene conduct prohibited in Part IV of the CCA.

(ii) I anticipate that the estoppel issues raised briefly in this submission, will be raised in many discussions regarding the continued use of the Aboriginal Flag for many organisations.

(iii) I do not consider that s.183A of the *Copyright Act* has any application to the facts in this case, as it was introduced into the

Copyright Act by the *Copyright Amendment Act (No. 1)* 1998 (Cth), some three years after the Proclamation. As such, I have opined that by the Proclamation, the matter has moved from a s.183 situation, once the Proclamation came into operation. Should my thesis be wrong, the s.183A is applicable as a special arrangement for copying for the services of government.

Conclusion

51. I have concluded that the submission of Mr Thomas to the jurisdiction of the Tribunal by his application to fix terms under s.183, is a recognition that the use of the Aboriginal Flag by the Commonwealth is a use for the services of the Crown.
52. The Government's acceptance that its conduct in relation to the Aboriginal Flag raised an obligation on it under s.183, is a recognition of a liability to Mr Thomas for the Crown's use.
53. On my construction, the Proclamation is an intervening event, which altered the dynamics of these parties towards the copyright in the Aboriginal Flag in that:
    (a) Prior to the date of effect of the Proclamation, 14 July 1995, Mr Thomas was the owner with rights under the Crown use provisions of the *Copyright Act* as they existed at the time.
    (b) After the date when the Proclamation came into effect, the Commonwealth acquired the copyright in the Aboriginal Flag as personal property, "acquired" for a purpose in respect of which the Parliament has power to make laws, namely under the *Flags Act.*
54. Failing any agreement being reached in respect of these separate uses, it is open for the Tribunal upon application, to fix the terms for use by the Commonwealth **prior** to the coming into effect of the Proclamation.
55. Negotiations between the Commonwealth and Mr Thomas should include the question of whether there was an acquisition of the copyright in the Aboriginal Flag by the Proclamation and what constitutes "just terms".

56. Should either or both of those issues for discussion fail to produce a set of agreed terms, the Commonwealth on its own motion or with Mr Thomas, should apply to the High Court for a determination of those issues under the Court's original jurisdiction.
57. As a matter of practicality however, it is unlikely that the position that the Proclamation had the effect of the Commonwealth acquiring the copyright will be accepted by Mr Thomas. The determination of the threshold question, as to whether the Proclamation effected an acquisition of the copyright in the Aboriginal Flag, will give direction and context to the negotiations. to compensate Mr Thomas on "just terms", if indeed it is found that the was that the Proclamation implemented an acquisition of Mr Thomas' copyright in the Aboriginal Flag.
58. During these anticipated discussions, the Government must recognise that self determination is a key issue for the First Nation's peoples. Accordingly, the option of a body comprising First Nation representatives being the exclusive licensee of the copyright under licence from the Government, such body having the power to appoint sub-licensees according to proposed uses, seems to be a mechanism which is worthy of investigation.
59. Finally, for completeness, provided WAM's cease and desist letters involve a threat within the meaning of s.202 of the *Copyright Act,* WAM's threats of action for copyright infringement are groundless as it has not been authorised under the *Flags Act* s.6 by the Government "either without defacement or defaced in the manner specified in the warrant".

Dimitrios Eliades[xxv]

18 September 2020

[i] I would like to thank Professor Brian Fitzgerald and Dr Anne Fitzgerald for their time and comments in this window of opportunity to express a view.

[ii] Due to an administrative oversight, the 1995 proclamation was not lodged so that it would continue in force indefinitely; hence it automatically expired on 1 January 2008. It was therefore almost identically replaced, on 25 January 2008, with effect as from 1 January 2008. The Proclamation in 2008 in like terms, was exempt from sunsetting by the *Legislation (Exemptions and Other Matters) Regulation* 2015 (Cth) s12 item 30:

https://www.legislation.gov.au/Details/F2008L00209/Explanatory%20Statement/Text#:~:text=A%20proclamation%20was%20made%20by,the%20flag%20of%20the%20Aboriginal .

[iii] The background facts are taken from the reasons for judgment of Sheppard J in *Thomas v Brown* 37 IPR 207 pages 208 – 211.

[iv] *Copyright Act* s.183(5).

[v] The acts comprised in copyright of an "artistic work" are contained in the *Copyright Act* s.31(1)(b).

[vi] See endnote ii above as to the extension of the Proclamation from 1 January 2008.

[vii] [1995] FCA 1427 (*Stack*).

[viii] (1965) AC 512.

[ix] *Stack* [46].

[x] I have not seen a copy of any such letter but what is meant by the terms a "cease and desist letter" is a communication whereby a party maintains (in copyright terms), that they are the owner or exclusive licensee of the copyright in a work or other subject matter, and by reason of the use by the recipient of the letter of the copyright without the licence of the owner are infringing the copyright. The letter may go on to threaten infringement proceedings.

[xi] https://www.abc.net.au/news/2019-06-11/new-licence-owners-of-aboriginal-flag-threaten-football-codes/11198002

[xii] https://www.sbs.com.au/news/explained-australian-copyright-laws-and-the-aboriginal-flag

[xiii] The Proclamation.

[xiv] *Thomas v Brown* p 210.

[xv] Creative Commons (CC) & Government Guide, CC v 2.5 Au, 1 September 2010 p36 https://eprints.qut.edu.au/32519/4/100901_CC_and_Govt_Guide_v2.5_FINAL_2.pdf

[xvi] *Copyright Act* s.183(3).

[xvii] *Copyright Act* 196(1).

[xviii] The Constitution s.51(xxxi). Parliament also has the power to make laws in respect of copyrights: s.51(xviii).

[xix] For example the definition of "exclusive licensee under *Copyright Act* s.10 states: ***"exclusive licence*** means a licence in writing, signed by or on behalf of the owner or prospective owner of copyright, authorizing the licensee, to the exclusion of all other persons, to do an act that, by virtue of this Act, the owner of the copyright would, but for the licence, have the exclusive right to do, and ***exclusive licensee"*** has a corresponding meaning.(Underline added)

[xx] *Flags Act* s.6.

[xxi] *The Commonwealth of Australia Constitution* s.75 (Cth).

[xxii] *Copyright Act* s.161(1).

[xxiii] *Copyright Act* s.134.

[xxiv] Research Paper: Aboriginal and Torres Strait Islander Peoples' Cultural property and Copyright Project 2016 https://deliades.com.au/copyright/ [1.13] referring to the *'Our Culture: Our Future Report – Report on Australian Indigenous Cultural and Intellectual Property Rights'*. A report prepared for the AIATSIS and ATSIC; Michael Frankel & Company and Terri Janke, 1998, the Executive Summary at p. XX.

[xxv] http://deliades.com.au/experience/