

21 September 2020

Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: aboriginal.flag.sen@aph.gov.au

Dear Sir/Madam,

Submission to the Senate Select Committee on the Aboriginal Flag

We thank you for the opportunity to make a submission to the Senate Select committee regarding the current and former copyright and licensing arrangements for the Aboriginal flag design.

NTSCORP Limited

- 1 NTSCORP Limited (**NTSCORP**) is funded under section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA. This includes representing Registered Native Title Bodies Corporate (**RNTBCs**) and other corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**Traditional Owner Corporations**) in relation to matters arising under the NTA.
- 2 In summary, the functions and powers of NTSCORP under sections 203B to 203BK of the NTA include:
 - a. Facilitation and assistance, including representation in native title matters;
 - b. Dispute resolution;
 - c. Notification;
 - d. Agreement-making;
 - e. Certification; and
 - f. Internal review.
- 3 This submission is informed by our clients and from our experience working with Aboriginal Traditional Owners (**Traditional Owners**) of lands, seas and waters within NSW and the ACT.

Background and History of the Aboriginal Flag Design

- 4 The Aboriginal flag is an important symbol of identity and unity for Aboriginal People across Australia. The design is attributed to Mr Harold Joseph Thomas, who was recognised as holding the legal and moral rights in *Harold Joseph Thomas v David George Brown & James Morrison Valley Tennant* [1997] FCA 215 (**Thomas v Brown & Tennant**).

- 5 The flag was first flown in Adelaide at the NADOC (as it was then known) march on 12 July 1971 as a means to create greater visibility for Aboriginal People at the march. Political activist Gary Foley, who was present at the march then took the flag and it was flown at the Tent Embassy in Canberra. It has since appeared at numerous iconic moments in Aboriginal and Torres Strait Islander history.
- 6 The Aboriginal flag was given national status by the Commonwealth Government by a proclamation made under s 5 of the *Flags Act 1953* (Cth) on 14 July 1995.
- 7 The litigation in *Thomas v Brown & Tennant*, arose subsequent to this proclamation. Mr Thomas vociferously objected to and resented the proclamation, as it 'represented a usurpation of something which properly belonged to the Aboriginal people and not to the Australian people generally.'¹

The Torres Strait Islander Flag

- 8 The Torres Strait Islander flag (**TSI flag**) was designed by Bernard Namok of Thursday Island. It was created in 1992 for a design competition organised by the Island Coordinating Council, now known as the Torres Strait Island Regional Council (**TSIRC**). That same year, the TSI flag was recognised by the Aboriginal and Torres Strait Islander Commission (**ATSIC**).
- 9 Along with the Aboriginal flag, the TSI flag was proclaimed to be a national flag of Australia on 14 July 1995.
- 10 The copyright for the TSI flag continues to be owned by the TSIRC. Permission is not required to fly the TSI flag, but reproduction of the TSI flag is subject to the following conditions:
 - that, where appropriate, recognition is given to the original designer, the late Mr Bernard Namok;
 - the original PMS colours are used; and
 - that permission must be received in writing from the TSIRC, prior to its use.

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?

- 11 At present a person does not need permission to fly the Aboriginal flag, but as Mr Thomas holds copyright, the flag may only be reproduced in accordance with the provisions of the *Copyright Act 1968* (Cth) (**Copyright Act**) or with permission of Mr Thomas. Under Part IX of the Copyright Act, Mr Thomas holds a number of moral rights including the right of attribution of authorship and the right of integrity.
- 12 Mr Thomas has granted three parties exclusive licences to reproduce the Aboriginal flag:
 - a. Carroll & Richardson Flagworld (**Flagworld**) – who holds rights to reproduce and authorise the reproduction of the design of the Aboriginal flag on flags, pennants, banners and bunting; and manufacture, promote, advertise, distribute and sell above products throughout the world;

¹ *Harold Joseph Thomas v David George Brown & James Morrison Vallely Tennant* [1997] FCA 215 at [27].

- b. WAM Clothing Pty Ltd (**WAM Clothing**) – who holds rights to reproduce and authorise the reproduction of the design of the Aboriginal flag on clothing and apparel, towels, digital and physical media products; and
 - c. Wooster Holdings Pty Ltd (**Wooster**) – who holds rights to reproduce or authorise the reproduction of the design of the Aboriginal flag on souvenir products.
- 13 Mr Thomas received licence fees from Flagworld, WAM Clothing and Wooster for the grant of the above licenses and he continues to receive royalties for any reproductions of the design of the Aboriginal flag in accordance with the licences.
- 14 The Aboriginal flag may not be commercially reproduced in situations listed in the licences without permission from the licensees. In other circumstances, Mr Thomas has indicated that he will not enforce his rights arising under the Copyright Act unless the Aboriginal flag is used in racist, exploitative, or offensive situations.²
- 15 All copyright over the design of the Aboriginal flag has a termination date of 70 years after Mr Thomas' passing. This applies to the licences, though they may terminate earlier depending on the terms of each agreement. Once copyright expires, restrictions on the use of the Aboriginal flag will no longer apply: s 33 of the *Copyright Act 1968* (Cth).

Effect of current licencing arrangements on Traditional Owners

- 16 NTSCORP proudly flies the Aboriginal flag at our offices and recognises its significance to Traditional Owners in NSW and the ACT.
- 17 Traditional Owners in NSW and the ACT have a strong and proud affinity with the Aboriginal flag.
- 18 NTSCORP is aware that some RNTBCs and Traditional Owner Corporations would like the opportunity to produce T-shirts and other clothing items, which include the Aboriginal flag in their design, for sale to their members, but which under the current licencing arrangements would require permission from the licensees.

What options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community.

a. negotiated outcomes with licence and/or copyright holders;

- 19 NTSCORP strongly supports the ongoing recognition by the Commonwealth Government of Mr Thomas' legal and moral rights to the design of the Aboriginal flag. Any negotiated outcome should ensure that these rights and interests are protected and Mr Thomas' wishes are observed.
- 20 NTSCORP does not support a negotiated approach that gives equal weight to the views of private non-Indigenous licence holders, vis-à-vis Mr Thomas, or Aboriginal People more broadly. This would be contrary to the self-determination of Aboriginal Peoples.

² The Hon Ken Wyatt AM MP, 2019, 'Protecting the Integrity of the Aboriginal flag' *Media Release*, 20 June 2019.

b. the compulsory acquisition of licences and/or copyright;

- 21 NTSCORP does not support the compulsory acquisition of copyright from Mr Thomas. As the copyright holder and designer of the Aboriginal flag, he should retain autonomy to decide whether and how he enforces his rights. The non-consensual acquisition of rights by the Commonwealth Government of Aboriginal intellectual property would be a further act of colonisation and is a disproportionate and offensive approach.
- 22 NTSCORP recognises that in addition to Mr Thomas' rights, Aboriginal People more generally strongly identify with the Aboriginal flag and accordingly, there is a public sentiment that the flag should be made available for use by Aboriginal People and organisations.
- 23 If a decision is made to make reproduction of the flag more widely available, the Commonwealth Government should be willing to guarantee financial compensation to Mr Thomas and his licence holders, and ensure that Mr Thomas' wishes regarding the manner in which the flag is reproduced are respected.
- 24 Should the Commonwealth Government decide to acquire the licensees' rights, NTSCORP submits the most appropriate arrangement is one akin to that of the TSI flag, whereby Aboriginal People retain the right to control the use of the flag and receive benefits from any third party use of the Aboriginal flag.

c. ways to protect the rights and interests of the flag's legally recognised creator Mr Harold Thomas; and

- 25 NTSCORP supports corresponding guidelines for the Aboriginal flag as for the TSI flag. That is, where appropriate, recognition should be given to Mr Thomas as the original designer of the Aboriginal flag.

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

- 26 Strong consideration should be given to how the integrity of the Aboriginal flag may be protected from exploitative use. This could include ensuring the Aboriginal flag is not reproduced in association with inauthentic art or products purporting to be made by Aboriginal People.³ This could also include better protection of Aboriginal Intellectual Cultural Property generally.

Conclusion

- 27 We thank you for the opportunity to make a submission to the Senate Committee regarding the current and former copyright and licencing arrangements for the design of the Aboriginal flag. We trust our feedback will be meaningfully considered and we look forward to being notified of the findings of the Senate Committee.

³ Commonwealth of Australia 2018, *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, House of Representatives Standing Committee on Indigenous Affairs, December 2018.

28 If you require any further information or would like to discuss this submission, please do not hesitate to contact

Yours sincerely,

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited

