

The Senate

Select Committee on the
Aboriginal Flag

Select Committee on the Aboriginal Flag

October 2020

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Foreword

As a Yanyuwa and Garrawa woman, and as Chair of the Senate Select Committee on the Aboriginal Flag, it is culturally important to follow what we say in Yanyuwa, is the wurrama (authority) of the Aboriginal flag.

In Yanyuwa culture, decisions are made collectively about kin, country and the wurrama by the Jungkayi (guardian) and the Ngimarringki (Traditional Owner) with the aim of peaceful outcomes for the people.

The cultural context is also respectfully seen from a Yawuru viewpoint with my Labor colleague in Western Australia Senator Pat Dodson.

It is also seen from a Gunnai-Gunditjmara cultural viewpoint with Greens Senator Lidia Thorpe, who joins this committee as her first task as the new Senator for Victoria.

This cultural view was naturally immersed in this Senate inquiry, along with the processes of the Australian Parliament, as we tried to navigate a respectful way through this serious dilemma between First Nations people and the copyrights of the creator of the Aboriginal flag, Mr Harold Thomas.

The committee considered it important to hear Mr Thomas' views, as an Aboriginal artist and the copyright holder of the Aboriginal flag. To that end, the committee did reach out to Mr Thomas and invite him to make a written submission or appear at a public hearing. Mr Thomas declined those invitations and alerted the committee to confidential negotiations underway with the Commonwealth government.

Deputy Chair Senator Perin Davey (NSW) joined us in determining a way forward through this inquiry, along with Senator Andrew Bragg (NSW), Senator Matt O'Sullivan (WA), Senator Amanda Stoker (QLD), Senator Sue Lines (WA) and Senator Rachel Siewert (WA).

My sincere thanks go to all who provided evidence to the committee, in written submissions and as witnesses at hearings. Thank you also to the committee secretariat and my staff, Martha Tattersall and Mandy Taylor.

The responsibility of this inquiry weighed greatly. The 50th anniversary of the Aboriginal flag is in July 2021: will it be a celebration or a commemoration?

Senator Malarndirri McCarthy
Chair

Members

Chair

Senator Malarndirri McCarthy

ALP, NT

Deputy Chair

Senator Perin Davey

NATS, NSW

Members

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Recommendations

Recommendation 1

- 6.4 The committee recommends that the Commonwealth government does not compulsorily acquire the copyright for the Aboriginal flag under section 51(xxxi) of the *Australian Constitution*.

Recommendation 2

- 6.8 The committee recommends that, in the negotiations underway with Mr Harold Thomas and the current licensees, the Commonwealth government aims to achieve a model for the future use of the Aboriginal flag by members of the community that is independent from government, that involves and consults with Aboriginal people, and that ensures that the body selected bears responsibility for:
- maintaining the integrity of the Aboriginal flag;
 - upholding the dignity of the Aboriginal flag; and
 - making decisions about the Aboriginal flag's use.
- 6.9 Subject to the rights of Mr Thomas, a parliamentary committee may be of assistance in framing the structure of a body that could have custodial oversight of the Australian Aboriginal Flag.

Chapter 1

Introduction

Referral and conduct of the inquiry

1.1 On 3 September 2020, the Senate established the Select Committee on the Aboriginal Flag to inquire into and report on 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.¹

1.2 The committee received 74 submissions which, together with responses to questions on notice and other information accepted by the committee, are listed at Appendix 1.

1.3 The committee took evidence over six days of public hearings in Canberra as follows:

- Monday, 14 September;
- Wednesday, 16 September;
- Tuesday, 22 September;
- Wednesday, 23 September;
- Thursday, 24 September; and
- Friday, 25 September 2020.

1.4 The witnesses who appeared at these hearings are listed at Appendix 2.

Current negotiations

1.5 The committee was advised that the Commonwealth government has entered into negotiations with the copyright holder and licensees for the Aboriginal flag for the purpose of providing the Australian community, particularly the

¹ *Journals of the Senate*, No. 66, 3 September 2020, p. 2324.

Aboriginal community, with the ability to freely use the flag.² While details of those negotiations are unknown to the committee, conclusions and recommendations in this report are made on the basis that negotiations are currently ongoing.

Acknowledgements

1.6 The committee thanks individuals and organisations that contributed to the inquiry, and takes this opportunity to express its gratitude to those who took the time to share their experiences with the committee.

Note on references

1.7 References to *Committee Hansard* are to the proof transcripts. Page numbers may differ between proof and official transcripts.

Structure and scope of this report

1.8 This report comprises 6 chapters:

- Chapter 1 outlines the conduct of the inquiry, the legal framework for copyright law in Australia and details the national flags of Australia;
- Chapter 2 discusses the birth and significance of the Aboriginal flag;
- Chapter 3 considers the Aboriginal flag in contemporary Australia;
- Chapter 4 details the current dispute around use of the Aboriginal flag;
- Chapter 5 discusses options for the future; and
- Chapter 6 provides the committee's comments and recommendations.

Legal framework for copyright law in Australia

1.9 In Australia, copyright is a bundle of rights which automatically attracts to works, including artistic, literary, dramatic or musical works and computer programs.³ As explained by the Australian Copyright Council (Copyright Council):

Copyright is automatic in Australia, so there's no system of registration here. Once a work is reduced into what's called material form—once paint is on a canvass, a book is written down or recorded in some way—copyright exists. It's only when someone purports to use it and there's a conflict in the evidentiary circumstances in which the work came about that it gets called into question.⁴

² The Hon Ken Wyatt AM MP, Minister for Indigenous Australians, correspondence received 11 September 2020.

³ *Copyright Act 1968* (Cth) (Copyright Act), s. 31.

⁴ Ms Eileen Camilleri, Chief Executive Officer, Australian Copyright Council, *Committee Hansard*, 22 September 2020, p. 4.

1.10 Copyright consists of moral and economic rights under the *Copyright Act 1968* (Cth) (Copyright Act). Moral rights vest exclusively in the creator of the work and are not transferable or assignable. They include the right:

- to be attributed (or credited) for their work;
- not to have their work falsely attributed; and
- not to have their work treated in a derogatory way.⁵

1.11 Economic rights exist separately to moral rights. Section 31 of the Copyright Act identifies these rights in relation to artistic work as the exclusive right:

- (iv) to reproduce the work in a material form;
- (v) to publish the work;
- (vi) to communicate the work to the public.⁶

1.12 Section 33 states that copyright in original works subsists for 70 years after the calendar year in which the author of the work died.

1.13 Under section 196, copyright may be partially or totally assigned to a person other than the work's creator, or may be licensed by the owner to another.⁷

1.14 The Copyright Council explained that licences may be:

- (i) **Exclusive.** The licensee (that is, the person/entity that receives the licence) is the only person/entity that may use the copyright material in the ways outlined in the licence. Like assignments, these must be in writing to be legally effective.
- (ii) **Non-exclusive.** These licences allow for multiple licensees to use the copyright material in the same way. These licences need not be in writing.
- (iii) **Implied.** These licences to use copyright material are implied from all the circumstances of a situation.⁸

1.15 Mr Michael Green SC explained:

If a copyright owner has granted a licence to someone else exclusively, they can't retract that licence without, of course, breaching that exclusive licence, and that can be a difficulty as well...[I]t's possible to do something quite specifically, and you can divide copyright by location or all other manner of things within the Commonwealth.⁹

1.16 The Copyright Act contains a number of exceptions to copyright, including use by educational institutions and fair dealing exceptions 'that permit use by

⁵ Australian Copyright Council, *Moral Rights*, (Information Sheet G043v15) October 2019, https://www.copyright.org.au/acc_prod/ACC/Information_Sheets/Moral_Rights.aspx. See also, sections 193, 195AC and 195AI of the Copyright Act.

⁶ Copyright Act, ss. 31(b).

⁷ Copyright Act, s. 196.

⁸ Australian Copyright Council, *Submission 30*, p. 2.

⁹ Mr Michael Green SC, *Committee Hansard*, 14 September 2020, p. 10.

anyone for particular purposes'.¹⁰ With regard to the latter, Dr Fady Aoun identified a number of these purposes, including research or study (section 40), criticism or review (section 41), parody or satire (section 41A), reporting the news (section 42) or for the purposes of judicial proceeding or professional advice (section 43).¹¹

National flags of Australia

1.17 The *Flags Act 1953* (Cth) (Flags Act) was enacted to declare the Australian National Flag¹² and to provide for the declaration of other flags of Australia by the Governor-General.¹³ It empowers the Governor-General to (a) authorise a person, body or authority to use¹⁴ and (b) make rules for the guidance of persons using¹⁵ a flag of Australia declared under the Flags Act.

1.18 Australian flags include the Aboriginal flag, Torres Strait Islander flag and many ensigns used in defence and civilian organisations.¹⁶

Australian flag

1.19 The Australian flag, designed by Australians and first flown on 3 September 1901, has status as Australia's chief national symbol and belongs equally to all Australians.

1.20 Before federation, the Australian colonies flew the Union Jack and other British flags. In 1901, the Commonwealth government held an international competition to design two flags: one for official and naval purposes and the other for merchant ships.¹⁷ There were 32,823 entries and five nearly-identical entries were awarded equal first.¹⁸

1.21 The five joint winners came from different parts of the community and they shared a £200 prize.¹⁹ On 3 September 1901, then Prime Minister, the Rt Hon

¹⁰ Australian Copyright Council, *Submission 30*, p. 2.

¹¹ Dr Fady Aoun, *Submission 34*, [p. 3].

¹² *Flags Act 1953* (Cth) (Flags Act) s. 3.

¹³ Flags Act s. 5.

¹⁴ Flags Act s. 6.

¹⁵ Flags Act s. 7.

¹⁶ Department of Prime Minister and Cabinet, *Australian Flags*, <https://www.pmc.gov.au/government/australian-national-symbols/australian-flags> (accessed 5 October 2020).

¹⁷ Department of Prime Minister and Cabinet, *Australian Flags*, 3rd edition, Commonwealth of Australia, 2006, p. 39.

¹⁸ Department of Prime Minister and Cabinet, *Australian Flags*, 3rd edition, Commonwealth of Australia, 2006, p. 40.

¹⁹ Department of Prime Minister and Cabinet, *Australian Flags*, 3rd edition, Commonwealth of Australia, 2006, p. 40.

Sir Edmund Barton announced the five joint winners of the competition and the key elements of their designs were used to create the new Australian flag.²⁰

- 1.22 The flag selected contained the Union Jack, the Commonwealth Star and the Southern Cross on a blue background; this flag became known as the blue ensign.²¹ The design selected for use by the merchant navy was known as the red ensign and was identical except for the red background colour of the flag. The blue and red ensigns were gazetted in 1903.²² Small changes have been made to the original design on three occasions in 1903, 1906 and 1911.²³
- 1.23 From 1903, the blue ensign has held primacy as the official flag of Australia, a status further enshrined by proclamation as the Australian National Flag in the Flags Act. As the highest flag of the nation, the Australian National Flag represents all Australians and is treated accordingly. Prior to the passage of the Flags Act, no legislative action had been taken to set down the precise form of the blue ensign or the circumstances in which it should be used.²⁴
- 1.24 Any person may fly the Australian flag; however, there are guidelines in place requiring that the flag should be treated with the 'respect and dignity it deserves as the nation's most important national symbol'.²⁵
- 1.25 The Department of Prime Minister and Cabinet advised there are three circumstances for which approvals from the government are required for the use of the Australian flag: in relation to importing products with the flag, applying for trademarks or registering designs. While there are guidelines and protocols for how the flag should be reproduced, this can occur without paying any licence fee or copyright loyalty.²⁶

Commercial use of the Australian flag

²⁰ Department of Prime Minister and Cabinet, *Australian National Flag*, <https://www.pmc.gov.au/government/australian-national-flag> (accessed 5 October 2020).

²¹ Department of Prime Minister and Cabinet, *Australian Flags*, 3rd edition, Commonwealth of Australia, 2006, p. 40.

²² Department of Prime Minister and Cabinet, *Australian Flags*, 3rd edition, Commonwealth of Australia, 2006, p. 40.

²³ AusFlag, *Flag History*, <https://www.ausflag.com.au/history.asp> (accessed 28 September 2020).

²⁴ J Norberry, 'Flags Amendment Bill 1996', *Bills Digest*, 18, 1996–97, Department of the Parliamentary Library, Canberra, 13 August 1996, p. 2.

²⁵ Department of the Prime Minister and Cabinet, Excerpt from *Australian flags* – Part 2: The protocols for the appropriate use and the flying of the flag, <https://www.pmc.gov.au/sites/default/files/publications/australian-flags-excerpt.pdf> (accessed 30 September 2020).

²⁶ Mr John Reid, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 16 September 2020, p. 8.

- 1.26 Guidelines issued by the Department of Prime Minister and Cabinet state that the Australian flag, or a representation of the flag, may be used for commercial or advertising purposes without formal permission, subject to the following guidelines:
- the flag should be used in a dignified manner and reproduced completely and accurately;
 - the flag should not be defaced by overprinting with words or illustration;
 - the flag should not be covered by other objects in displays; and
 - all symbolic parts of the flag should be identifiable.
- 1.27 Anyone seeking to import items bearing an image of the Australian flag must have approval from an authorised officer at the Department of Prime Minister and Cabinet. This approval must be produced to the Australian Border Force at or before the time of import.²⁷

Aboriginal flag

- 1.28 The Aboriginal flag was designed and created by Mr Harold Thomas, an Aboriginal artist from the Northern Territory. The flag was first raised on National Aborigines Day in Victoria Square, Adelaide, on 12 July 1971.²⁸
- 1.29 In July 1995, the Aboriginal flag was proclaimed to be an official flag of Australia under the Flags Act. In 1997, the Federal Court of Australia officially recognised Mr Thomas as the author of the flag.²⁹
- 1.30 Permission is not required to fly the Aboriginal flag. However, the Aboriginal flag is protected under the Copyright Act and can only be reproduced in accordance with this legislation or with the permission of Mr Thomas.
- 1.31 Further details about the use, reproduction and copyright associated with the Aboriginal flag are considered throughout this report.

Torres Strait Islander flag

- 1.32 The Torres Strait Islander flag was designed by the late Mr Bernard Namok Snr in January 1992. The flag's design represents the 'unique region and culture':

²⁷ Department of the Prime Minister and Cabinet, Excerpt from *Australian flags* – Part 2: The protocols for the appropriate use and the flying of the flag, <https://www.pmc.gov.au/sites/default/files/publications/australian-flags-excerpt.pdf> (accessed 30 September 2020).

²⁸ Department of Prime Minister and Cabinet, *Australian Flags*, <https://www.pmc.gov.au/government/australian-national-symbols/australian-flags> (accessed 5 October 2020).

²⁹ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *The Aboriginal flag*, <https://aiatsis.gov.au/aboriginal-flag> (accessed 5 October 2020).

It stands for the unity and identity of all Torres Strait Islanders. The two green lines represent the land. The blue represents the sea. The black represents our community, the people of the Torres Strait. The centre symbol is a headdress. The five pointed star represents the five clusters of the Torres Strait, as well as the seafaring navigation. White is representative of peace.³⁰

- 1.33 Mr Namok Snr's design was the winning entry in a competition held as part of a Cultural Revival Workshop, organised by the Island Coordinating Council (ICC), a Queensland statutory body representing the community councils of the Torres Strait.³¹ One of the conditions of the flag competition was that the successful applicant would assign copyright to the ICC.³²
- 1.34 The Torres Strait Islander flag was adopted at an ICC meeting on 24 March 1992 and was recognised by Aboriginal and Torres Strait Islander Commission (ATSIC) in 1992 and given equal prominence with the Aboriginal flag. It was recognised as an official flag of Australia under the Flags Act by proclamation on 14 July 1995.
- 1.35 Torres Strait Islander communities celebrate the anniversary of the flag's conception annually on 29 May. It was recognised as a gazetted public holiday for the Torres Strait region in 2019 and the day features special celebrations across the 15 islands to celebrate the Torres Strait flag and in recognition of Mr Bernard Namok Snr.³³
- 1.36 The National Indigenous Australians Agency (NIAA) advised that the Torres Strait Island Regional Council (TSIRC)³⁴ and its 15 communities own the copyright of the Torres Strait Islander Flag. Permission to reproduce the flag is granted subject only to the following conditions:
- (a) where appropriate, recognition is given to the original designer, the late Mr Bernard Namok;
 - (b) the original Pantone matching system colours are used;
 - (c) permission is received in writing from the TSIRC prior to reproducing the flag.³⁵
- 1.37 Mayor Phillemon Mosby explained that the TSIRC welcomes organisations and individuals wanting to fly the flag:

³⁰ Mayor Phillemon Mosby, Mayor, Torres Strait Island Regional Council (TSIRC), *Committee Hansard*, 24 September 2020, p. 53; see also, National Indigenous Australians Agency (NIAA), answers to questions on notice, 14 September 2020 (received 18 September 2020).

³¹ NIAA, answers to questions on notice, 14 September 2020 (received 18 September 2020), p. 1.

³² NIAA, answers to questions on notice, 14 September 2020 (received 18 September 2020), p. 2.

³³ Mayor Mosby, TSIRC, *Committee Hansard*, 24 September 2020, p. 53.

³⁴ In March 2008 the TSIRC replaced the ICC.

³⁵ NIAA, answers to questions on notice, 14 September 2020 (received 18 September 2020), p. 2.

Those organisations and individuals do not require our permission to do so. Council does, however, grant permission for requests made to reproduce the Torres Strait Islander flag subject to the following conditions: where appropriate, recognition is given to the original designer, the late Mr Bernard Namok Snr; the original PMS colours are used and permission must be received in writing from council prior to its use. Council does not currently seek financial reimbursement for the use of, or to reproduce, the Torres Strait flag. As I stated, this would be counterproductive to the purpose of driving wide acknowledgment and celebration of our island, identity and culture.³⁶

- 1.38 Permission to use the Torres Strait Islander flag must be sought in writing and requests are managed by a team of officers; on each island there is a contact person for requests who then provide advice to the corporate affairs area of the TSIRC. External bodies seeking to use the flag make contact directly with the corporate affairs area. Mayor Mosby acknowledged that this system works well particularly for people who may have English as their third or fourth language as they can speak directly with officers in each of the 15 divisions.³⁷
- 1.39 The TSIRC detailed the number of applications to use the flag received between 2014 and 2020:

Table 1.1 Number of applications received by the Torres Strait Island Regional Council: 2014-2020

Year	2014	2015	2016	2017	2018	2019	2020
Per month	2	3	5	4	5	6	5
Total	33	46	65	58	61	76	47 YTD

Source: TSIRC, answers to questions on notice, 24 September 2020

- 1.40 All applications received to date have been endorsed. While applicants vary the commonly fall within the following categories:
- individual artists;
 - education, including schools, universities, training organisations, childcare and individual students;
 - State or Commonwealth agencies;
 - commercial businesses, including international entities and tourism;
 - sporting code entities;
 - healthcare, including hospitals and aged care;
 - security firms;
 - professional services, including legal and superannuation;
 - social media entities; and

³⁶ Mayor Mosby, TSIRC, *Committee Hansard*, 24 September 2020, p. 49.

³⁷ Mayor Mosby, TSIRC, *Committee Hansard*, 24 September 2020, p. 51;

- miscellaneous publications.³⁸

1.41 In relation to the resources required to process applications and approve use of the flag, the TSIRC provided a 'conservative estimate' of the time required on a weekly basis as follows:

Table 1.2 Council resources required to process applications

Council department	Function performed	Weekly resource estimate
Legal Services	Application receipt, processing & administration	60-120 minutes
Corporate Affairs	General enquiries (phone, and online channels)	35 minutes
Divisional Offices	General enquiries (community-based / in-person)	12-20 minutes

Source: TSIRC, answers to questions on notice, 24 September 2020

1.42 In the event of a copyright breach coming to the council's attention, the TSIRC explained additional resources (estimated 30-60 minutes) would be required to prepare a letter to address the matter.³⁹

Constituents' Request Program

1.43 Australians can obtain Australian flags free of charge through the Constituents' Request Program by contacting the electorate office of their local Senator or Member of the House of Representatives.⁴⁰

1.44 For the purpose of conducting parliamentary business, senators and members may purchase flags, flag lapel pins and documents related to nationhood, of kinds approved by the Minister for Finance, for presentation to constituents or organisations. The minister has approved the Australian national flag, the Aboriginal flag and the Torres Strait Islander flag for presentation to constituents and organisations.⁴¹

1.45 Under the program, senators and members may present the flags to eligible constituents who live or are based in a senator's state or territory or a member's electorate. Eligible constituents include schools, local councils,

³⁸ TSIRC, answers to questions on notice, 24 September 2020 (received 1 October 2020).

³⁹ TSIRC, answers to questions on notice, 24 September 2020 (received 1 October 2020).

⁴⁰ Department of Prime Minister and Cabinet, '[Excerpt from the booklet Australian flags – Part 2: The protocols for the appropriate use and the flying of the flag](#)', 2006.

⁴¹ Department of Finance, *Flags, nationhood material and wreaths*, <https://maps.finance.gov.au/guidance/annual-budget-office-expenses/flags-nationhood-material-and-wreaths> (accessed 28 September 2020).

churches and other non-profit or benevolent community organisations. According to information provided to the Senate by then Special Minister of State, the Hon Senator Eric Abetz in 2006, senators and members may present a maximum of 50 flags per annum to individual constituents.⁴²

- 1.46 A constituent is defined in section 5 of the *Parliamentary Business Resources Act 2017* (Cth) as a person enrolled to vote or resident in the relevant electorate or state/territory if the request is being made to a senator. It is expected that there will be an element of formality in the act and/or ceremony attached to the manner in which flags, flag lapel pins and documents are presented and that the presentation to the recipient by the relevant senator or member.⁴³
- 1.47 There is no sub-limit to the amount parliamentarians may spend on these items provided that the annual budget for office expenses is not exceeded. Flag and nationhood material expenditure is reporting in monthly management and quarterly expenditure reports.⁴⁴
- 1.48 The Department of Finance provided information about the number, type and cost of the Australian, Aboriginal and Torres Strait Islander flags purchased by senators and members from the supplier for the last five financial years. There are a number of different types of flags purchased under the program with the cost of each item varying depending on type and size.⁴⁵
- 1.49 The Department of Finance advised it has no records of what proportion of these flags have been distributed to constituents by senators and members.
- 1.50 Table 1.3 details the total number of Aboriginal, Australian and Torres Strait flags purchased and the total cost for each financial year from 2015-2020.

Table 1.3 Total number and cost of flags purchased by senators and members from 2015-2020

⁴² Senator the Hon Eric Abetz, Special Minister of State, *Senate Hansard*, 9 February 2006, p. 217.

⁴³ Department of Finance, *Flags, nationhood material and wreaths*, <https://maps.finance.gov.au/guidance/annual-budget-office-expenses/flags-nationhood-material-and-wreaths> (accessed 28 September 2020).

⁴⁴ Department of Finance, *Flags, nationhood material and wreaths*, <https://maps.finance.gov.au/guidance/annual-budget-office-expenses/flags-nationhood-material-and-wreaths> (accessed 28 September 2020).

⁴⁵ Department of Finance, answers to written questions on notice, 28 September 2020, (received 2 October 2020).

2015–16	No. of flags	Total cost
Aboriginal	12,853	\$207,356.93
Australian	48,768	\$490,071.55
Torres Strait	4,914	\$58,182.07
2016–2017		
Aboriginal	16,682	\$484,801.94
Australian	63,996	\$867,371.14
Torres Strait	7,975	\$138,019.85
2017–2018		
Aboriginal	7,302	\$456,177.40
Australian	16,023	\$639,414.12
Torres Strait	3,427	\$129,903.15
2018–2019		
Aboriginal	5,267	\$412,437.20
Australian	13,991	\$698,269.98
Torres Strait	2,878	\$132,704.46
2019–2020		
Aboriginal	7,984	\$666,188.00
Australian	18,568	\$998,872.00
Torres Strait	4,233	\$213,030.00
TOTAL	234,863	\$6,592,878.79

Source: Department of Finance, answers to questions on notice.

Note: The total cost column presents the cost of all flags purchased. The cost of individual items for each category of flag is provided in the information provided by the Department of Finance published on the inquiry website.

- 1.51 The categories of flags purchased under this program have varied across the last five financial years. Table 1.4 shows the number and cost of flags purchased over six categories for the last three financial years.

Figure 1.1 Number and cost of flags (across categories) purchased by senators and members from 2017-2020⁴⁶

⁴⁶ Department of Finance, answers to written questions on notice, 28 September 2020 (received 2 October 2020).

Chapter 2

The birth and significance of the Aboriginal flag

- 2.1 The Aboriginal flag's existence is intertwined with the political context of 'terra nullius' and the denial of the dispossession of Aboriginal people. It was born during a time of great social upheaval, when the rights and treatment of Aboriginal people in Australia were attracting greater attention, and there was activism for political change within Indigenous affairs. The flag's significance in the lives of many Aboriginal people developed through its use as a symbol of protest against the doctrine of terra nullius, and in favour of a treaty and restitution for the impacts of colonisation, dispossession and destabilisation. The context in which the Aboriginal flag was created helps to demonstrate its meaning, symbolism and indivisible inter-connectedness with Aboriginal activism and protest.
- 2.2 This chapter discusses a number of significant events around the time of the flag's creation and some of the occasions on which it has been used as a symbol of Aboriginal solidarity and pride.

Petition by the Australian Aborigines' League

- 2.3 On 2 September 1937, William Cooper, Secretary of the Australian Aborigines' League, presented a formal petition to King George V, via the office of Prime Minister Joseph Lyons. The petition asked the King to intervene in order to:
- prevent the extinction of the Aboriginal race and [give] better conditions for all and grant us power to propose a member of parliament in the person of our own Blood, or White man known to have studied our needs and to be in Sympathy with our Race to represent us in the Federal Parliament.¹
- 2.4 The petition contained 1,814 signatures: approximately half from Queensland (all but 12 from Palm Island), 550 from Western Australia (WA), about 350 from South Australia (SA), less than 100 each from New South Wales (NSW) and Victoria, and nine from the Northern Territory (NT) (Goulburn Island Mission).²

¹ National Archives of Australia (NAA), *Petition to King George V from the 'Aboriginal Inhabitants of Australia'* <https://www.naa.gov.au/learn/learning-resources/learning-resource-themes/first-australians/rights-and-freedoms/petition-king-george-v-aboriginal-inhabitants-australia> (accessed 12 October 2020)

² NAA, *Aboriginal petitions*, <https://www.naa.gov.au/explore-collection/first-australians/aboriginal-petitions> (accessed 12 October 2020).

- 2.5 In February 1938, the Cabinet decided not to forward the petition to the King, on the basis that 'no good purpose would be gained by submitting the petition'.³

Day of Mourning

- 2.6 On 26 January 1938, the sesquicentenary of the arrival of the First Fleet, Aboriginal activists held a conference at Australia Hall in Sydney at which a 'Day of Mourning' was declared. The conference, open only to Aboriginal people, passed the following resolution:

We, representing the Aborigines of Australia, assembled in conference at the Australian Hall, Sydney, on the 26th day of January, 1938, this being the 150th Anniversary of the Whiteman's seizure of our country, hereby make protest against the callous treatment of our people by the whiteman during the past 150 years, and we appeal to the Australian nation of today to make new laws for the education and care of Aborigines, and we ask for a new policy which will raise our people to full citizen status and equality within the community.⁴

- 2.7 The conference organisers included prominent Aboriginal activists from NSW and Victoria, Jack Patten (who had founded the *Abo Call*, a newspaper written and published by Aboriginal people), William Ferguson (from the Aborigines' Progressive Association) and William Cooper (from the Australian Aborigines' League).
- 2.8 The Day of Mourning was the first time Aboriginal activist groups from different states had fully cooperated⁵ and was 'the first national Aboriginal civil rights gathering and represents the most clearly identifiable beginning of the contemporary Aboriginal political movement'.⁶

Federal Council for Aboriginal Advancement

- 2.9 In February 1958, the Federal Council for Aboriginal Advancement (FCAA) was established at a conference of activists and interested groups in Adelaide's Willard Hall. An executive was elected and membership of the FCAA was open to Aboriginal advancement organisations. FCAA's platform was to:

³ NAA, *Petition by the Aboriginal Advancement League, 1937*, <https://www.naa.gov.au/explore-collection/first-australians/aboriginal-petitions#:~:text=and%20others%2C%201972-Petition%20by%20the%20Aboriginal%20Advancement%20League%2C%201937,land%20rights%20for%20Aboriginal%20people> (accessed 12 October 2020).

⁴ Parliament of Australia, *Overview of Indigenous Affairs: Part 1: 1901 to 1991*, 10 May 2011, https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/1011/indigenousaffairs1#_Toc293318912 (accessed 12 October 2020).

⁵ National Museum of Australia (NMA), *Day of Mourning*, <https://www.nma.gov.au/defining-moments/resources/day-of-mourning> (accessed 12 October 2020).

⁶ Dictionary of Sydney, *Day of Mourning*, https://dictionaryofsydney.org/entry/day_of_mourning_1938 (accessed 12 October 2020).

repeal discriminatory legislation at state and federal levels; amend the federal constitution to enable the Commonwealth Government to legislate for Aborigines; improve the lives of Aboriginal people through housing, equal pay, education and adequate rations in remote areas; and advocate land rights.⁷

2.10 In 1964, FCAA was renamed the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI).⁸

2.11 From 1963 to 1970, FCAA/FCAATSI conferences were held in Canberra; by 1970, the number of delegates and observers at the annual conference had grown to 350.⁹

2.12 During its early years, the FCAA executive had a white majority. As the years progressed, dissatisfaction grew amongst Indigenous members about their lack of power within the organisation and at the 1970 conference, the national advancement movement was split into two groups:

those who held that the organisation should continue being run as it had been (with white people able to vote and be on the executive) and those who opted for an all-Indigenous executive and voting rights to be limited to those of Indigenous descent. Aboriginal and Islander members as well as non-Indigenous members were represented on both sides of the debate.

Kath Walker (who would later change her name to Oodgeroo Noonuccal) had argued strongly and passionately for Indigenous people to take control of their own affairs. Together with Doug Nicholls she helped establish a National Tribal Council, a body which would seek Indigenous representation from all states and which would be run by and for Indigenous Australians. Though it started positively, this body lasted less than three years.

In 1973 FCAATSI did finally become an Indigenous-controlled organisation.¹⁰

2.13 In March 1978, FCAATSI changed its name again, to the National Aboriginal and Islander Liberation Movement; however, the Liberation Movement never met and, later in 1978, the Commonwealth government suddenly cut funding to the organisation and it was disbanded.¹¹

⁷ National Library of Australia (NLA), *Federal Council for the Advancement of Aborigines and Torres Strait Islands (1958-1978)*, <https://trove.nla.gov.au/people/720062?c=people> (accessed 1 October 2020).

⁸ NLA, *Federal Council for the Advancement of Aborigines and Torres Strait Islands (1958-1978)*, <https://trove.nla.gov.au/people/720062?c=people> (accessed 1 October 2020).

⁹ NMA, FCAATSI, www.nma.gov.au/explore/features/indigenous-rights/organisations/expansion-folder/fcaatsi (accessed 1 October 2020).

¹⁰ NMA, FCAATSI, www.nma.gov.au/explore/features/indigenous-rights/organisations/expansion-folder/fcaatsi (accessed 1 October 2020).

¹¹ NMA, FCAATSI, www.nma.gov.au/explore/features/indigenous-rights/organisations/expansion-folder/fcaatsi (accessed 1 October 2020) and NLA, *Federal Council for the Advancement of Aborigines*

The right to vote

- 2.14 Indigenous Australians were granted the right to vote in 1962, with the enactment of the *Commonwealth Electoral Act 1962* (Cth). The Act granted all Aboriginal and Torres Strait Islander people the option to enrol and vote in federal elections. Unlike other Australians, it was not compulsory for Indigenous Australians to enrol, but once enrolled, voting was compulsory.¹²
- 2.15 It is important to note that several Australian states granted Aboriginal people the right to vote earlier than 1962. In the 1850s, under the state constitutions of NSW, SA and Victoria, Aboriginal men had the same right to vote as other male British subjects aged over 21. In 1895, SA became the first electorate in the world to give equal political rights to men and women, and Aboriginal women shared these rights.¹³ However, the first federal electoral Act, the *Commonwealth Franchise Act 1902* (Cth), withheld the right to vote from Indigenous people unless they already had the right to vote before 1901.¹⁴
- 2.16 In contrast, laws specifically intended to deny the vote to Indigenous people were enacted by Queensland (1885), WA (1893) and the NT (1922).¹⁵
- 2.17 Prior to the Second World War, there was little impetus to change Indigenous voting rights in Australia but the war brought into focus the 'injustice of permitting an Aboriginal or Torres Strait Islander man to fight—and possibly die—for his country, but not to vote'.¹⁶ After the war, in March 1949, Prime Minister Ben Chifley introduced an amendment to the *Commonwealth Electoral Act 1918* (Cth) that extended the right to vote in federal elections to any Indigenous person who had been a member of the defence forces.¹⁷
- 2.18 As a result of campaigning by FCAA and other activists, in 1961 the Commonwealth government established the House of Representatives Select Committee on the Voting Rights of Aborigines. The committee took evidence from more than 300 witnesses around Australia and in its report found that

and Torres Strait Islands (1958-1978), <https://trove.nla.gov.au/people/720062?c=people> (accessed 1 October 2020).

¹² NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

¹³ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

¹⁴ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

¹⁵ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

¹⁶ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

¹⁷ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

'about 30,000 Aboriginal and Torres Strait Islander people had been denied the vote as a result of discriminatory legislation in the Northern Territory, Western Australia and Queensland'.¹⁸ The committee recommended that all Indigenous people be given the right to vote in federal elections, the catalyst for the *Commonwealth Electoral Act 1962*. Shortly afterwards, WA and the NT granted Aboriginal people the right to vote; Queensland extended voting rights to all Indigenous people in 1965.

- 2.19 It took another 22 years after the enactment of the *Commonwealth Electoral Act 1962* for Aboriginal and Torres Strait Islander people to gain full equality with other Australian electors, with the implementation of the *Commonwealth Electoral Amendment Act 1983 (Cth)*, which made enrolling to vote at federal elections compulsory for Indigenous Australians.¹⁹

Yirrkala Bark Petitions

- 2.20 According to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the modern Lands Right Movement dates back to 1963 when the Yolgnu people from Yirrkala in north-east Arnhem Land presented the Australian Parliament with a bark petition. The Yirrkala Bark Petitions protested the removal of land on which Aboriginal people had lived, hunted and maintained connections for thousands of years. Mining leases were granted and land excised without any consultation with the Aboriginal people of Yirrkala.²⁰

- 2.21 The Yirrkala Bark Petitions stated:

That the procedures of the excision of this land and the fate of the people on it were never explained to them beforehand, and were kept secret from them.

That when Welfare Officers and Government officials came to inform them of decisions taken without them and against them, they did not undertake to convey to the Government in Canberra the views and feelings of the Yirrkala aboriginal people.

That the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial; we were all born here.

...

¹⁸ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

¹⁹ NMA, *Indigenous Australians' right to vote*, www.nma.gov.au/defining-moments/resources/indigenous-australians-right-to-vote (accessed 2 October 2020).

²⁰ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Land rights*, <https://aiatsis.gov.au/explore/articles/land-rights#Yirrkala%20Bark%20Petitions> (accessed 29 September 2020).

That the people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear that the fate which has overtaken the Larrakeah tribe will overtake them.²¹

2.22 In 1971, the Yolgnu people again petitioned the Commonwealth government in the *Milirrpum v Nabalco Pty Ltd* land rights case (the Gove land rights case). While the NT Supreme Court acknowledged the Yolgnu people's ongoing relationship with the land and their complex system of laws to govern the land, the Court ultimately rejected the claim because the Yolgnu people's relationship did not align with the European concept of property.²²

Freedom Ride

2.23 In 1965, a group of students from the University of Sydney formed the Student Action For Aborigines (SAFA) to 'shine a light on the marginalisation of Aboriginal people in NSW towns'.²³ Charles Perkins, one of only two Aboriginal students at the University of Sydney, was elected president of SAFA.

2.24 SAFA undertook a 15 day journey through regional NSW, known as the Freedom Ride, during which the students challenged a ban against Aboriginal ex-servicemen at the Walgett Returned Services League (RSL) and local laws prohibiting Aboriginal children from the Moree and Kempsey swimming pools. According to Mr Perkins, the Freedom Ride 'was also a reaction to what was being done in America at that time'.²⁴

2.25 Assisted by Reverend Ted Noffs of the Wayside Chapel, SAFA ensured that its protests were covered by the media, to bring attention to racial discrimination and stir public debate about the 'disadvantage and racism facing Aboriginal people across Australia at the time'.²⁵

2.26 The Freedom Ride travelled from Sydney to Wellington, then on to Gulargambone, Walgett, Moree, Tenterfield, Grafton, Lismore and Cabbage Tree Island, Bowraville, Kempsey and Taree, before returning to Sydney.

2.27 After the Freedom Ride, Mr Perkins reported the events at the 1965 FCAATSI conference in Canberra. He called for the building of relationships with local

²¹ AIATSIS, *Transcript of the Yirrkala Bark Petitions 1963*, <https://aiatsis.gov.au/explore/articles/land-rights#Yirrkala%20Bark%20Petitions> (accessed 29 September 2020).

²² AIATSIS, *Land rights*, <https://aiatsis.gov.au/explore/articles/land-rights#Yirrkala%20Bark%20Petitions> (accessed 29 September 2020).

²³ AIATSIS, *1965 Freedom Ride*, <https://aiatsis.gov.au/explore/articles/1965-freedom-ride> (accessed 1 October 2020).

²⁴ AIATSIS, *1965 Freedom Ride*, <https://aiatsis.gov.au/explore/articles/1965-freedom-ride> (accessed 1 October 2020).

²⁵ AIATSIS, *1965 Freedom Ride*, <https://aiatsis.gov.au/explore/articles/1965-freedom-ride> (accessed 1 October 2020).

Aboriginal groups and improved services and access to education for Aboriginal residents in western NSW towns.²⁶

- 2.28 By the end of 1966, SAFA 'was finished as a political force' and while its life was relatively short, the Freedom Ride had a lasting impact, illuminating racial discrimination in Australia and strengthening campaigns to bring about greater equality and recognition for Aboriginal Australians.²⁷

Wave Hill Walk-Off

- 2.29 The Gurindji people had lived on their lands in what is now called the Victoria River area of the NT for tens of thousands of years. In 1883, the colonial government granted almost 3,000 square kilometres of Gurindji country to the pastoralist Nathaniel Buchanan.²⁸ The property, located 600 kilometres south of Darwin, became known as Wave Hill Station.

- 2.30 The following year, 1,000 cattle were moved onto the land and 10 years later, in 1894, there were 15,000 cattle and 8,000 bullocks on the station. The livestock put incredible pressure on the environment and:

Traditional ways of life came under intense pressure in this clash between Western and Aboriginal land usage. Aboriginal people generally wanted to stay on their land; their lives were so connected to the environment there was an existential need for them to remain on Country.

This necessity to stay played into the hands of pastoralists as the cattle and sheep stations required cheap labour, and over the next 70 years Aboriginal people became an intrinsic but exploited part of the cattle industry across Northern Australia.²⁹

- 2.31 From 1913, legislation required that Aboriginal people in the NT were paid for their work with food, clothes, tea and tobacco. However, Aboriginal children continued to be exploited for illegal labour; accommodation and rations provided to Aboriginal workers and their families were inadequate; Aboriginal women were sexually abused, and prostitution for rations and clothing was not uncommon.
- 2.32 In 1953, all Aboriginal people in the NT were made wards of the state and, in 1959, the Wards Employment Regulations outlined a scale of wages, rations and conditions applicable to wards employed in various industries. The ward

²⁶ AIATSIS, *1965 Freedom Ride*, <https://aiatsis.gov.au/explore/articles/1965-freedom-ride> (accessed 1 October 2020).

²⁷ AIATSIS, *1965 Freedom Ride*, <https://aiatsis.gov.au/explore/articles/1965-freedom-ride> (accessed 1 October 2020).

²⁸ NMA, *Wave Hill Walk-Off*, www.nma.gov.au/defining-moments/resources/wave-hill-walk-off (accessed 29 September 2020).

²⁹ NMA, *Wave Hill Walk-Off*, www.nma.gov.au/defining-moments/resources/wave-hill-walk-off (accessed 29 September 2020).

rates were up to 50 per cent lower than those paid to Europeans and some companies refused to pay Aboriginal labourers anything at all.

- 2.33 In 1965, the North Australian Workers Union—under pressure from the NT Council for Aboriginal Rights—applied to the Commonwealth Conciliation and Arbitration Commission (CCAC) to delete references to the NT pastoral award that discriminated against Aboriginal workers. Pastoralists objected to this proposal, arguing that any increase in wages should be gradual as this would help Aboriginal people 'adjust'. The CCAC agreed to increase wages but deferred implementation of the wage increase until 1968.
- 2.34 In 1914, the Buchanan family had sold Wave Hill Station to the British company Vestey Brothers. Vestey Brothers refused to pay Aboriginal workers' wages and this, together with the CCAC's deferment of wage increases for Aboriginal workers, led to conflict between the pastoral company and the Gurindji. After the CCAC's decision, negotiations between Vestey Brothers and the Gurindji continued through 1966 to no avail.
- 2.35 As a result, on 23 August 1966, the Gurindji community led by Vincent Lingiari walked off Wave Hill Station. This strike action precipitated ongoing consultation between the Gurindji, the North Australian Workers Union and the NT Council of Aboriginal Rights but no agreement was reached and Aboriginal workers did not return to work on the station.
- 2.36 In April 1967, in a symbolic move away from Wave Hill Station and closer to their sacred sites, the Gurindji moved to Daguragu. This move demonstrated:
- a fundamental difference between the view of the Gurindji and that of their white supporters on the purpose of the strike. The Gurindji were focused on reclaiming their land while the unionists believed the dispute was solely about wages and work conditions.³⁰
- 2.37 The Gurindji petitioned the Governor-General Lord Casey to grant a lease of 1,300 square kilometres around Daguragu to be run cooperatively by the Gurindji as a mining and cattle lease. In June 1967, the Governor-General replied that he was unwilling to grant the lease.
- 2.38 The Gurindji stayed on at Daguragu even though under Australian law they were illegally occupying a portion of the 15,000 square kilometres leased to Vestey Brothers. Over the next seven years, petitions and requests moved back and forth between the Gurindji, the NT Administration and the Commonwealth government, but no resolution was reached.
- 2.39 In 1972, a new Labor government came to power under Prime Minister Gough Whitlam. The Prime Minister announced that he would 'establish once and for all Aborigines' rights to land' and 'that funds would be made available for the

³⁰ NMA, *Wave Hill Walk-Off*, www.nma.gov.au/defining-moments/resources/wave-hill-walk-off (accessed 29 September 2020).

purchase of properties that were not on reserves'. In March 1973, Lord William Vestey of Vestey Brothers surrendered the original lease for Wave Hill Station and two new leases were issued: one to the Gurindji, through the Murramalla Gurindji Company, and another to Vestey Brothers.³¹

- 2.40 On 16 August 1975, Prime Minister Whitlam visited Daguragu and ceremonially returned a small portion of Gurindji land to the traditional custodians, pouring a handful of soil into Vincent Lingiari's hands with the words 'Vincent Lingiari, I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji people'.³²
- 2.41 The Wave Hill Walk-Off was a significant event that heightened understanding of Indigenous land rights in Australia and was a catalyst for the enactment of the *Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)*, the first legislation allowing for a claim of title if Indigenous claimants could provide evidence of their traditional relationship to the land. Under the Act, the Central Land Council (CLC) applied, on behalf of the Gurindji people, for the Daguragu pastoral lease and some adjacent un-alienated Crown land. In 1981, the Aboriginal Land Commissioner recommended that the land claim should be granted and, in 1985, the land claim relating to the South West Corner was granted.³³

The 1967 Referendum

- 2.42 In February 1967, Prime Minister Harold Holt announced that a referendum would be held on 27 May 1967 to change the *Australian Constitution*. One of the questions put to the Australian voting public was whether two references in the *Australian Constitution*, which discriminated against Aboriginal people, should be removed:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

...(xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

...

³¹ NMA, *Wave Hill Walk-Off*, www.nma.gov.au/defining-moments/resources/wave-hill-walk-off (accessed 29 September 2020) and NAA, *The Wave Hill 'walk-off'*, www.naa.gov.au/explore-collection/first-australians/other-resources-about-first-australians/wave-hill-walk (accessed 29 September 2020).

³² NMA, *Wave Hill Walk-Off*, www.nma.gov.au/defining-moments/resources/wave-hill-walk-off (accessed 29 September 2020).

³³ NMA, *Wave Hill Walk-Off*, www.nma.gov.au/defining-moments/resources/wave-hill-walk-off (accessed 29 September 2020) and NAA, *The Wave Hill 'walk-off'*, www.naa.gov.au/explore-collection/first-australians/other-resources-about-first-australians/wave-hill-walk (accessed 29 September 2020).

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

2.43 The effect of these provisions was that the Commonwealth government was precluded from making laws with respect to Aboriginal and Torres Strait Islander people.

2.44 Only a 'yes' campaign was run in the lead up to the referendum, with bipartisan support for change in the Australian Parliament.

2.45 With respect to the amendment to section 51, then Opposition Leader Gough Whitlam stated:

members of this Parliament will be able for the first time to do something for Aboriginals...it will be possible for the Commonwealth to provide the Aboriginals with some of that social capital with which most other Australians are already endowed.³⁴

2.46 Speaking on the proposed repeal of section 127, Prime Minister Holt stated 'The simple truth is that Section 127 is completely out of harmony with our national attitudes and modern thinking. It has no place in our Constitution in this age'.³⁵

2.47 Australians voted overwhelming to remove these sections of the Constitution, with the largest 'yes' vote ever recorded in a federal referendum (90.77 per cent).³⁶ The removal of these provisions made it clear that the Commonwealth government could pass laws that would affect the lives of Aboriginal people and override state laws.³⁷

The birth of the Aboriginal flag

2.48 During the 1960s and 1970s, a group of young Aboriginal men—who were later identified as part of the Stolen Generation—were active in the movement for the rights of Aboriginal people: in education, jobs and land rights through the Aborigines' Progress Association (APA).

2.49 One of those young men was John Moriarty AM, a Yanyuwa man born in 1938 in Borroloola.

2.50 At age four, Mr Moriarty was taken from his family, under the Commonwealth government's policies of removing part-Aboriginal children from their families. He was sent via Alice Springs to the Mulgoa Home at Mount Wilson in NSW,

³⁴ Mr Gough Whitlam QC, Leader of the Opposition, *House of Representatives Hansard*, 1 March 1967, p. 279.

³⁵ Rt. Hon. Harold Holt, Prime Minister, *House of Representatives Hansard*, 1 March 1967, p. 263.

³⁶ NAA, *The 1967 Referendum*, www.naa.gov.au/explore-collection/first-australians/other-resources-about-first-australians/1967-referendum (accessed 1 October 2020).

³⁷ Under section 109 of the *Australian Constitution*, Commonwealth law prevails in the event of inconsistency or conflict with state or territory law.

and later to the Anglican Institution for Aboriginal boys in Adelaide, the St Francis Home.

2.51 Another was Harold Thomas.

2.52 A Luritja and Wombai man from Central Australia, Mr Thomas was born in Alice Springs in 1947, and removed from his family as a young child. He was also sent to the St Francis Home in Adelaide.

2.53 After high school, in 1965, Mr Thomas was awarded a scholarship to study at the South Australian School of Art. He went on to become the first Aboriginal to graduate from an Australian art school.

2.54 It was there on Kurna country that Mr Thomas created the design for the Aboriginal flag and it was first flown on 12 July 1971, in Victoria Square, Adelaide on National Aborigines Day.

Aboriginal Tent Embassy

2.55 The Aboriginal Tent Embassy was founded on Australia Day in 1972 when four Indigenous activists pitched a beach umbrella and a sign on the lawns of Old Parliament House, Canberra. Michael Anderson, Billy Craigie, Bertie Williams and Tony Koorie were protesting against the McMahon government's failure to recognise land rights.³⁸ The encampment was intended to represent the living conditions of many Aboriginal people and the name 'embassy' was used with intentional irony, referring to the fact the Aboriginal people 'are treated like aliens in their own land'.³⁹

2.56 The Aboriginal activists at the Tent Embassy experimented with a number of flag designs before selecting the black, red and yellow flag.⁴⁰ The black, red and yellow land rights flag was first flown at the Tent Embassy in 1972, uniting Aboriginal people from around the country. Many have described the Tent Embassy as the birthplace of the final form of the Aboriginal flag designed by Harold Thomas. It has been reported that Mr Thomas responded to the request

³⁸ Reconciliation Australia, *Five Fast Facts – The Aboriginal Tent Embassy*, www.reconciliation.org.au/five-fast-facts-tent-embassy/ (accessed 29 September 2020) and NAA, *Activists at the Aboriginal Tent Embassy on the lawns of Old Parliament House*, www.naa.gov.au/learn/learning-resources/learning-resource-themes/first-australians/politics-and-advocacy/activists-aboriginal-tent-embassy-lawns-old-parliament-house (accessed 29 September 2020).

³⁹ NAA, *Activists at the Aboriginal Tent Embassy on the lawns of Old Parliament House*, www.naa.gov.au/learn/learning-resources/learning-resource-themes/first-australians/politics-and-advocacy/activists-aboriginal-tent-embassy-lawns-old-parliament-house (accessed 29 September 2020).

⁴⁰ NAA, *Activists at the Aboriginal Tent Embassy on the lawns of Old Parliament House*, www.naa.gov.au/learn/learning-resources/learning-resource-themes/first-australians/politics-and-advocacy/activists-aboriginal-tent-embassy-lawns-old-parliament-house (accessed 29 September 2020).

to have the black of the flag above the red, not the other way around, 'otherwise they've already buried us'.⁴¹

Figure 2.1 Activists at the Aboriginal Tent Embassy on the lawns of Old Parliament House⁴²



2.57 The Tent Embassy was removed twice from the lawns of Old Parliament House in 1972 and from 1975 to 1992, the Tent Embassy was intermittently closed and re-erected. In 1992, the Tent Embassy became a permanent fixture, representing the ongoing struggle for Aboriginal sovereignty and land rights. In 1995, the Tent Embassy was listed on the Australian Heritage Commission's National Estate as a place of significance to Aboriginal and Torres Strait Islander peoples.⁴³ It is the only place recognised nationally for the political struggle of Aboriginal people and has become a focal point for protests and marches:

⁴¹ Reconciliation Australia, *Five Fast Facts – The Aboriginal Tent Embassy*, www.reconciliation.org.au/five-fast-facts-tent-embassy/ (accessed 29 September 2020).

⁴² NAA, 1974, A6180, 14/3/74/338.

⁴³ NAA, *Activists at the Aboriginal Tent Embassy on the lawns of Old Parliament House*, <https://www.naa.gov.au/learn/learning-resources/learning-resource-themes/first->

The Embassy's mix of grassroots politics has seen it become a powerful symbol of resistance and cultural revival with many Aboriginal activists (such as Shirley Smith and Gary Foley) attributing their political consciousness and education to the Embassy.⁴⁴

2.58 As Dr Josie Douglas, Senior Policy Officer, Aboriginal Peak Organisations Northern Territory emphasised, the 'prominence of the flag that flies at the Aboriginal Tent Embassy' demonstrates 'an association with Aboriginal people's struggle for self-determination rights and sovereignty'.⁴⁵

Mabo case

2.59 Eddie Koiki Mabo was a Meriam man and grew up on Mer, part of the Murray Island Group in the Torres Strait. While working as a gardener at James Cook University, Mr Mabo discovered that, by Australian law, he and his family did not own their land on Mer. As a result, in 1982 Mr Mabo, together with Reverend David Passi, Celuia Mapo Salee, Sam Passi and James Rice brought an action against the State of Queensland and the Commonwealth of Australia in the High Court.⁴⁶

2.60 The Mabo case challenged the existing legal doctrines that:

- Aboriginal and Torres Strait Islander peoples had no concept of land ownership prior to the arrival of British colonisers in 1788 (the doctrine of terra nullius); and
- sovereignty delivered complete ownership of all land in the new colony to the Crown, abolishing any existing rights that may have existed previously.

2.61 *Mabo v Queensland (No. 1)*⁴⁷ was heard in 1986 and 1988. In the lead up to the hearings and in an attempt to pre-empt the Meriam peoples' case, the Parliament of Queensland passed the *Queensland Coast Islands Declaratory Act 1985* (Qld) which asserted that, upon being annexed by the Queensland Government in 1879, 'the islands were vested in the Crown...freed from all other rights, interests and claims'.⁴⁸ On 8 December 1988, the High Court ruled

[australians/politics-and-advocacy/activists-aboriginal-tent-embassy-lawns-old-parliament-house](#) (accessed 29 September 2020).

⁴⁴ Reconciliation Australia, *Five Fast Facts – The Aboriginal Tent Embassy*, www.reconciliation.org.au/five-fast-facts-tent-embassy/ (accessed 29 September 2020).

⁴⁵ Dr Josie Douglas, Senior Policy Officer, Aboriginal Peak Organisations Northern Territory, *Committee Hansard*, 23 September 2020, p. 5.

⁴⁶ AIATSIS, *Land rights*, <https://aiatsis.gov.au/explore/articles/land-rights#Yirrkala%20Bark%20Petitions> (accessed 29 September 2020).

⁴⁷ (1988) 166 CLR 186.

⁴⁸ NAA, *Mabo Case*, www.naa.gov.au/explore-collection/first-australians/eddie-koiki-mabo-and-mabo-case (accessed 29 September 2020).

this legislation invalid because it was in conflict with the *Racial Discrimination Act 1975* (Cth).

- 2.62 The High Court's decision in *Mabo v Queensland (No. 1)* led to the subsequent High Court case, *Mabo v Queensland (No. 2)*⁴⁹, to determine the matter of the plaintiffs' land rights.
- 2.63 On 3 June 1992, the High Court upheld the plaintiffs' claim and ruled that the lands of the Australian continent were not terra nullius when European settlement occurred. The High Court ruled that the Meriam people were 'entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands'.⁵⁰ The High Court decision in *Mabo v Queensland (No. 2)* established the doctrine of native title in Australian law and recognised that Indigenous peoples had lived in Australia for thousands of years and enjoyed rights to their land according to their own laws and customs. The following year, in 1993, the *Native Title Act 1993* (Cth) (Native Title Act) was passed by the Australian Parliament, opening the way for claims by Aboriginal and Torres Strait Islander peoples to their traditional rights to land and compensation.⁵¹

Native Title Act 1993

- 2.64 The *Native Title Act 1993* (Cth) was passed by the Australian Parliament following the Mabo decision. The objects of the Act are:
- (a) to provide for the recognition and protection of native title; and
 - (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
 - (c) to establish a mechanism for determining claims to native title; and
 - (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.⁵²
- 2.65 In his second reading speech, then Prime Minister the Hon Paul Keating MP described the passage of the Native Title Act as 'a milestone. In response to another milestone' in which the High Court determined that:

Australian law should not...be 'frozen in an era of racial discrimination'. Its decision in the Mabo case ended the pernicious legal deceit of terra nullius for all of Australia—and for all time. The court described the situation faced by Aboriginal people after European settlement. The court saw a 'conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and

⁴⁹ (1992) 175 CLR 1.

⁵⁰ AIATSIS, *The Mabo Case*, <https://aiatsis.gov.au/explore/articles/mabo-case> (accessed 29 September 2020).

⁵¹ AIATSIS, *The Mabo Case*, <https://aiatsis.gov.au/explore/articles/mabo-case> (accessed 29 September 2020).

⁵² *Native Title Act 1993* (Cth) (Native Title Act), s. 3.

devastate the Aboriginal people'. They faced 'deprivation of the religious, cultural and economic sustenance which the land provides' and were left as 'intruders in their own homes'.

To deny these basic facts would be to deny history—and no self-respecting democracy can deny its history. To deny these facts would be to deny part of ourselves as Australians. This is not guilt: it is recognising the truth. The truth about the past and, equally, the truth about our contemporary reality. It is not a symptom of guilt to look reality in the eye—it is a symptom of guilt to look away, to deny what is there. But what is worse than guilt, surely, is irresponsibility. To see what is there and not act upon it—that is a symptom of weakness. That is failure.

...some seem to see the High Court as having just handed Australia a problem. The fact is that the High Court has handed this nation an opportunity. When I spoke last December in Redfern at the Australian launch of the International Year for the World's Indigenous People, I said we could make the Mabo decision an historic turning point: the basis of a new relationship between indigenous and other Australians. For the 17 months since the High Court handed down its decision, the government has worked to meet this challenge.

...

[T]oday, as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women—as a defining element in the character of this nation—and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.⁵³

2.66 The Native Title Act also established the National Native Title Tribunal (NNTT) with a wide range of functions, including:

- mediating in native title proceedings, upon referral by the Federal Court of Australia;
- determining objections to the expedited procedure in the future act scheme;
- mediating in relation to certain proposed future acts on areas where native title exists, or might exist;
- determining applications concerning proposed future acts;
- assisting people to negotiate Indigenous Land Use Agreements (ILUAs), and helping to resolve any objections to registration of ILUAs;
- assisting with negotiations for the settlement of applications that relate to native title;
- providing assistance to representative bodies in performing their dispute resolution functions;

⁵³ The Hon Paul Keating MP, Prime Minister, 15 November 1993, *House of Representatives Hansard*, p. 2877.

- reconsidering decisions of the Native Title Registrar not to accept a native title determination application (claimant application) for registration;
- conducting reviews concerning native title rights and interests (upon referral by the Federal Court);
- conducting native title application inquiries as directed by the Federal Court, and
- conducting special inquiries under ministerial direction.⁵⁴

2.67 Australia's native title laws have been described as an 'imperfect system' because:

While the law recognises that native title may exist, the requirements for proof are significant and burdensome. Generally claimants must provide evidence of a continuous system of law and custom that gives rights to the land, and that this has been handed down from generation to generation since before colonisation.

Once a claim has been successfully filed and registered with the National Native Title Tribunal, Aboriginal and Torres Strait Islander applicants can claim the right to negotiate against development of the land. However, this does not mean exclusive land rights are given. If the rights of pastoralists, mining companies, federal government, or private owners come into conflict with native title rights, they supersede the native title rights.⁵⁵

2.68 Native title law also imposes a complex system of governance and reporting on native title holders. These governance and reporting structures have been criticised for imposing approaches to negotiation and decision-making that suit the Commonwealth government but fail to recognise the ways in which Aboriginal people negotiate and reach decisions.⁵⁶

Declaration as a Flag of National Significance

2.69 In 1995, the Council for Aboriginal Reconciliation, in a submission to the Commonwealth government on 'what measures might be appropriate to advance the cause of social justice for Aboriginal and Torres Strait Islander peoples', recommended that the *Flags Act 1953* (Flags Act) be amended to give official recognition to the Aboriginal flag and to the Torres Strait Islander flag.⁵⁷

2.70 On 14 July 1995, then Governor-General William Hayden proclaimed the flag (as described in the Schedule to the Proclamation) as the flag of the Aboriginal

⁵⁴ National Native Title Tribunal (NNTT), *Tribunal's role*, <http://www.nntt.gov.au/aboutus/Pages/default.aspx> (accessed 30 September 2020).

⁵⁵ AIATSIS, *About native title*, <https://aiatsis.gov.au/about-native-title> (accessed 30 September 2020).

⁵⁶ See for example Mr Mervyn Eades, Senate Legal and Constitutional Affairs Legislation Committee, Native Title Legislation Amendment Bill 2019, *Committee Hansard*, 10 March 2020, pp. 24–25.

⁵⁷ *Going forward: social justice for the first Australians: a submission to the Commonwealth Government from the Council for Aboriginal Reconciliation*, AGPS, Canberra, 1995, submission no. 66, p. 86.

peoples of Australia and to be known as the Australian Aboriginal Flag.⁵⁸ The Torres Strait Islander flag was also proclaimed an official flag of Australia on the same day.⁵⁹

2.71 The NIAA provided an overview of key consultation and discussion that took place leading up to the proclamation in July 1995:

- At an ATSIC Board meeting on 28 March 1995, a decision was made to support the formal recognition of the Aboriginal and Torres Strait Islander flags by proclamation.
- On 7 April 1995 ATSIC advised DAS of their support for the formal recognition of the Aboriginal and Torres Strait Islander flags by proclamation under the provisions of sections 5 of the *Flags Act 1953*.
- On 12 April 1995 ATSIC wrote to Mr Thomas to inform him that ATSIC had been negotiating with the Government about the recognition of the Aboriginal flag and that such recognition was a real possibility in the near future, that ATSIC would like him to be involved in the ceremony to accompany such recognition. This appears to be the first communication with Mr Thomas on the matter.
- ATSIC wrote to Mr Thomas again on 17 May 1995, confirming that they had been contacted by Mr Thomas's legal representatives and advised that Mr Thomas had concerns and reservations about the flag being officially recognised by the Government. The letter states that in supporting official recognition of both the Aboriginal and Torres Strait Islander flags, ATSIC was reflecting a community view that came through during consultations on the social justice report and they had no doubt that the vast majority of Aboriginal people would feel very positive about official recognition and that it would help reinforce the unique standing of Indigenous Australians. ATSIC state in their letter to Mr Thomas that it would be a great pity if he remained unable to support official recognition or be involved in any way.
- On 27 June 1995, the Governor General signed the proclamations, to take effect from Friday 14 July 1995 – NAIDOC Day. On 29 June 1995, ATSIC Deputy Chairperson and Commissioner Paterson met with Mr Thomas. Mr Thomas made it clear that the proclamation should not proceed. He also stated that he would like to meet with ATSIC about his reasons for not wanting the flag proclaimed and with staff about possible guidelines for use of the flag.
- On 14 July 1995, the flag was proclaimed.⁶⁰

⁵⁸ The proclamation of 1995 was not lodged in accordance with the requirements of the *Legislative Instruments Act 2003* due to administrative oversight. Consequently, the proclamation was automatically repealed on 1 January 2008. A subsequent proclamation, effective 1 January 2008, replaced the original proclamation to ensure that the Aboriginal flag continued to be an official flag of Australia: Proclamation under the Flags Act 1953 [Australian Aboriginal Flag], 25 January 2008. Gazette S259, 14 July 1995, <https://www.legislation.gov.au/Details/F2008L00209>; Explanatory Statement, <https://www.legislation.gov.au/Details/F2008L00209/Explanatory%20Statement/Text>.

⁵⁹ AIATSIS, *The Aboriginal flag*, <https://aiatsis.gov.au/aboriginal-flag> (accessed 30 September 2020).

2.72 The NIAA submitted:

It appears from the archived ATSIC material that substantive consultation with Mr Thomas on whether the Aboriginal flag should be proclaimed did not occur. Further, the proclamation proceeded despite his known objection to it.⁶¹

2.73 Mr Thomas, in an interview with the Central Australian Aboriginal Media Association in 2019, confirmed his opposition to proclamation of the Aboriginal flag as a Flag of National Significance:

The court case proved that I was telling the truth, from 1971 and up until 1997 when there was the court action. The story about that is that members of ATSIC then, which was a recognised institution created by the government to get people to vote in a democratic way, for individuals to speak and act on our behalf to the federal government; it was they who had the idea that the Aboriginal flag should be recognised under the Flags Act, and from that, the federal government accepted that...I objected it vociferously. Who are these people to allow the Aboriginal flag to be blessed under the Flag Act? When I said we don't need that. We've never asked that for any symbols we've created for thirty, forty thousand years or more.⁶²

Consideration by the Federal Court

2.74 Following the proclamation of the Aboriginal flag as a Flag of Australia under section 5 of the Flags Act, the Commonwealth government proceeded to arrange the production of flags and a book bearing the flag.⁶³

2.75 In 1996, Mr Thomas commenced legal proceedings against the Commonwealth government in the Copyright Tribunal.⁶⁴ He alleged that in producing these items, the Commonwealth government was not acting in accordance with section 183 of the *Copyright Act 1968* (Copyright Act). Section 183 relevantly provides:

- (1) 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

⁶⁰ National Indigenous Australians Agency (NIAA), *Submission 42*, pp. 3–4.

⁶¹ NIAA, *Submission 42*, p. 4.

⁶² Central Australian Aboriginal Media Association, 'Harold Thomas – creator and copyright owner of the Aboriginal flag respond to his critics!', CAAMA, 24 June 2019, <https://caama.com.au/news/2019/harold-thomas-creator-and-copyright-owner-of-the-aboriginal-flag-responds-to-his-critics> (accessed 12 October 2020).

⁶³ *Thomas v Brown and Anor* (1997) 37 IPR 207, 209.

⁶⁴ (1997) 37 IPR 207, 209.

any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.

...

- (5) Where an act comprised in a copyright has been done under subsection (1), 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.

2.76 Throughout the tribunal proceedings, it became apparent that appropriate jurisdiction for consideration of the matter was the Federal Court because Mr Thomas's claim had not yet been recognised and there were conflicting claims to copyright from two other people, Mr David George Brown and Mr James Morrison Vallely Tennant.⁶⁵ Mr Thomas subsequently commenced proceedings in the Federal Court against Messrs Brown and Tennant, seeking 'a declaration to the effect that he is the author of the artistic work being the design for the flag'.⁶⁶

2.77 Justice Sheppard, who presided over both the Copyright Tribunal and Federal Court proceedings, ultimately found in Mr Thomas's favour, recognising his copyright and affording him rights over the work under the Copyright Act.

Effect of the proclamation on copyright

2.78 Conflicting opinions were offered in relation to the effect of the proclamation under the Flags Act.

2.79 Dr Dimitrios Eliades submitted that 'the power to grant licences for doing acts comprised in copyright in relation to the Aboriginal Flag has been conferred on the Commonwealth' by operation of the proclamation.⁶⁷ He submitted:

[I]n 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.⁶⁸

2.80 Consequently, Dr Eliades submitted, the 'Commonwealth now has an obligation to compensate Mr Thomas'.⁶⁹

2.81 Dr Eliades also referred to section 6 of the Flags Act, which states:

⁶⁵ (1997) 37 IPR 207, 210.

⁶⁶ (1997) 37 IPR 207, 208, 210.

⁶⁷ Dr Dimitrios Eliades, *Submission 17*, p. 10.

⁶⁸ Dr Eliades, *Submission 17*, p. 11.

⁶⁹ Dr Eliades, *Submission 17*, p. 14.

The Governor-General may, by warrant, authorize a person, body or authority to use a flag or ensign referred to in, or appointed under, this Act, either without defacement or defaced in the manner specified in the warrant.

2.82 Dr Eliades argued that following the proclamation, the power to authorise use of the Aboriginal flag was vested in the Governor-General under section 6 of the Flags Act.⁷⁰

2.83 Additionally, Dr Eliades argued that prior to the proclamation, the Commonwealth government could use the Aboriginal flag under section 183 of the Copyright Act (set out in paragraph 2.75 above) without infringing copyright.⁷¹ He submitted that in applying to the Copyright Tribunal under this provision in 1996, 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," [as per the wording of the Proclamation] were acts done for the services of the Commonwealth or State [references omitted].⁷²

2.84 This position was refuted by the Department of Prime Minister and Cabinet. It explained:

The effect of a declaration is that the declared flag, the proclaimed flag, is regarded as 'an official flag of Australia'. That allows the Governor-General to make rules about that flag, if he or she so wished, and it puts the flag within orders of precedence in relation to flag protocol, which is published by the Department of the Prime Minister and Cabinet.⁷³

2.85 When asked how this proclamation might interact with rights afforded under copyright, Prime Minister and Cabinet stated that '[i]t doesn't, in any way. A proclamation under the Flags Act doesn't affect private rights or interests, including those under the Copyright Act'.⁷⁴

2.86 Other evidence to the inquiry suggested that proclaiming the flag without full consideration of the interaction with Mr Thomas's copyrights has contributed to present challenges associated with its usage. The Victorian Aboriginal Health Service stated:

But if Harold Thomas had the rights in 1997—or even if we go to 2008, the flag has been identified as a national flag for Aboriginal people, so,

⁷⁰ Dr Eliades, *Submission 17*, p. 10.

⁷¹ Dr Eliades, *Submission 17*, pp. 8, 10.

⁷² Dr Eliades, *Submission 17*, p. 10.

⁷³ Mr John Reid, First Assistant Secretary, Government Division, Department of Prime Minister and Cabinet, *Committee Hansard*, 16 September 2020, p. 6.

⁷⁴ Mr Reid, Department of Prime Minister and Cabinet, *Committee Hansard*, 16 September 2020, p. 6.

between then and now, knowing already that Harold Thomas owns the copyright, shouldn't these kinds of discussions have been happening back then rather than waiting until now, when all of a sudden we've got a non-Aboriginal corporation telling us when and when we can't use our own flag? Somewhere along the line there's been an opportunity missed.⁷⁵

⁷⁵ Mr Michael Graham, Chief Executive Officer, Victorian Aboriginal Health Service, *Committee Hansard*, 23 Wednesday 2020, p. 20.

Chapter 3

The Aboriginal flag in contemporary Australia

- 3.1 As discussed in chapter 2, the Aboriginal flag has been a symbol of and inextricably linked with Aboriginal pride and activism since its inception in 1971.
- 3.2 Witnesses contemplated the role the Aboriginal flag has played as a symbol of unity and pride as well as mobilising action for protests and community events.
- 3.3 Aunty Ann Weldon described the journey of the flag, from its creation—borne out of struggle and activism—to its adoption by Aboriginal people across the country:

The dreamings and the creation of it came from the forefathers, who certainly gave their blessing to the chap who ended up painting the colours and the symbolism on a piece of canvas that became known worldwide as a symbol of our rights and our sovereignty to our country. I was around as a younger, far healthier person in 1971 as part of the revolution that hit the streets of Redfern where the flag was born and created. It's a symbol that certainly represents Aboriginal people...First and foremost, this country has to acknowledge that this is our flag. It belongs to Aboriginal people across our country. Australia has only been known as Australia for the 230-odd years since the English decided to name it Australia. You are on the land of Aboriginal people.¹

- 3.4 Mr Michael Green SC commented on a thesis by Dr Mathieu Gallois which discusses the history of the flag as art and as cultural property:

The thesis itself, I think, is a very useful starting point. It talks about the importance of symbolism and, of course, of the very fact that declaring the flag in the first place was seen by some as a form of cultural appropriation. A flag that was seen as a flag of struggle was then appropriated under the Flags Act, and that was seen as a potentially undesirable thing by some. But it shows how the flag engages, and it shows how symbols are important in our community.²

- 3.5 The Metropolitan Local Aboriginal Land Council explained how the Aboriginal flag is 'symbolic for all Aboriginal nations across the continent':

There are hundreds of nations, tribes and clans, and we are very diverse in our views and in our practices. In terms of that diversity, one of the common themes, or common symbols, that we do have is the colours of the black, yellow and red. Those black, yellow and red colours were

¹ Aunty Ann Weldon, Metropolitan Local Aboriginal Land Council, *Committee Hansard*, 14 September 2020, p. 28.

² Mr Michael Green SC, private capacity, *Committee Hansard*, 14 September 2020, p. 14.

formulated by Harold Thomas as a teacher, but his views were collected from the students that he taught in his teaching days, and that's what we have in terms of this symbol. It is our connection to each other. It certainly is our connection and our respect for all that we come across.³

- 3.6 Evidence to the committee emphasised how the Aboriginal flag acts as a symbol of unity and connection for Aboriginal people. Mr Boe Spearim observed:

We see at the forefront of our movement things getting massive for us, the numbers of people starting to access rallies and these different things. One of the main things that they're coming under is the banner of the Aboriginal flag. It is one of the only, if not the only, and one of the most uniting images we've had on this continent in the last 250 years. There are many things that unite Aboriginal people on this continent. There is language, connection, culture, ceremony—many different things—but when we think of the Aboriginal flag, it takes it to another level in terms of connection and who we are and how we exist on this continent.⁴

- 3.7 Similarly, Professor Marcia Langton AO contemplated the 'sacred quality' of the Aboriginal flag:

It has the meaning it has today because of all the Aboriginal people who have flown it and used it as a symbol. It's that long history of Aboriginal use that has given it the meaning it has today. It is a uniting symbol for Aboriginal people. It's a symbol that gives Aboriginal people pride in their cultural identity. That matter should be, I think, paramount in your considerations. How do we preserve the great cultural symbolism of the flag and overcome the taint that the commercial use of it has resulted in but at the same time respect Harold Thomas's legal rights in it?⁵

- 3.8 Inquiry participants described the feelings of pride associated with the flag. Mr Will Carter, an Aboriginal community member, artist and small-business owner, explained:

I, like many Aboriginal people, have pride in the Aboriginal flag. I can recall some of my earliest memories of the flag in protest marches down the mainstream of Narrandera, where I'm from. The flag, to me, is a symbol of unity, resilience, peace, hope, love and identity. That is what adds value to the flag. Without Aboriginal people over the course of decades embracing and taking ownership of the flag, it would have no monetary value today.⁶

- 3.9 Ms Stephanie Parkin, Chair, Indigenous Art Code Ltd highlighted that the role of the Aboriginal flag has evolved over time 'not just as a symbol of that person's individual copyright ownership but also as something that is used in

³ Ms Yvonne Weldon, Metropolitan Local Aboriginal Land Council, *Committee Hansard*, 14 September 2020, p. 29.

⁴ Mr Boe Spearim, private capacity, *Committee Hansard*, 14 September 2020, p. 32.

⁵ Professor Marcia Langton AO, private capacity, *Committee Hansard*, 24 September 2020, p. 1.

⁶ Mr Will Carter, private capacity, *Committee Hansard*, 22 September 2020, p. 19.

so many of our community events', including marches, funerals and celebrations.⁷

3.10 Professor Langton acknowledged the 'enormous meaning' of the flag to Aboriginal people 'who use it in everyday life' including at functions, NAIDOC Week, Reconciliation Week, the opening of institutions and university graduation ceremonies.⁸ This sentiment was echoed by others who told the committee that the Aboriginal flag is displayed in schools⁹ and health centres,¹⁰ and is drawn by school children when asked to 'draw a picture of Aboriginality'.¹¹

3.11 Mr Jack Manning Bancroft, Chief Executive Officer, AIME Mentoring told the committee:

I think what the flag allows us to do is to tell a story of strength, because it's been part of the upward curve of which, again, many people in this call have led so many of the changes in the last 50 years—that's seen the Tent Embassy, that's seen Mabo, that's seen us walk across a bridge together, that's seen Cathy, that's seen an apology, that's seen us start to see generations of university students suddenly line up, that's seen us start to close the gap in medical Indigenous students graduating on parity with non-indigenous students. With this period of change in the last 50 years, we're on a momentum up, and the flag is central to that. The flag has been about the story of an uplift, of a reworking, of a rewriting of a painful past. For us, how we clothe ourselves, how we tell stories—you can make films, you can write, but we want to use every possible device we can to try and unravel so much of that trauma and that pain and that hurt of a couple of hundred years and try and give the freedom and truly emancipate kids' minds to have the space and strength to see their worth and hopefully be able to have that worth as a base to go on and take on the world and do anything they want to do.¹²

Role of NAIDOC

3.12 The National NAIDOC Committee (NNC) is a voluntary committee independent of government but operating within the portfolio of the National Indigenous Australians Agency (NIAA). NNC membership comprises eight

⁷ Ms Stephanie Parkin, Chair, Indigenous Art Code Ltd, *Committee Hansard*, 22 September 2020, pp. 13–14.

⁸ Professor Langton, private capacity, *Committee Hansard*, 24 September 2020, p. 1.

⁹ Mr Carter, private capacity, *Committee Hansard*, 22 September 2020, p. 16.

¹⁰ Mrs Janette Young, Communications Manager, *Committee Hansard*, 23 September 2020, p. 14; Mr Michael Graham, Chief Executive Officer, Victorian Aboriginal Health Service, *Committee Hansard*, 23 September 2020, p. 16.

¹¹ Mr Nyunggai Warren Mundine AM, private capacity, *Committee Hansard*, 24 September 2020, p. 11.

¹² Mr Jack Manning Bancroft, Chief Executive Officer, AIME Mentoring, *Committee Hansard*, 23 September 2020, p. 28.

committee members and two co-chairpersons who are chosen from a national public expression of interest process.¹³

3.13 The NNC determines the arrangements for the national NAIDOC Week celebrations each year including:

- setting dates for the week-long celebrations;
- establishing the national theme for NAIDOC Week;
- the national NAIDOC poster competition;
- selecting the focus city for the National NAIDOC Awards;
- the national NAIDOC Awards ceremony;
- selecting the National NAIDOC Award recipients; and
- working with Indigenous and non-Indigenous organisations and key stakeholders to help build on the success of NAIDOC Week.¹⁴

3.14 NAIDOC Week is usually held in the first week of July that incorporates the second Friday, which historically was celebrated as 'National Aboriginal Day'. NAIDOC Week 2020 was postponed due to the COVID-19 situation and will now be held 8–15 November 2020 with the theme *Always Was, Always Will Be*.¹⁵

3.15 The committee was advised that NAIDOC Week, and its predecessors National Aborigines Day and NADOC, have enjoyed 'a long association' with the Aboriginal flag.¹⁶ Each year during NAIDOC Week, the NNC 'unfurl [the Aboriginal flag] as a source of pride, mark of survival, sign of our strength and celebration of our unique identity'.¹⁷

3.16 A key feature of NAIDOC celebrations is the annual NAIDOC poster competition which invites Aboriginal and Torres Strait Islander artists aged 13 years or older to apply with an artwork that draws inspiration from the annual NAIDOC theme.¹⁸ The 2020 competition attracted 270 entries nationally.¹⁹

¹³ National NAIDOC Committee (NNC), *Submission 52*, p. 1.

¹⁴ NNC, *Submission 52*, p. 1.

¹⁵ NAIDOC, *Frequently Asked Questions*, <https://www.naidoc.org.au/frequently-asked-questions> (accessed 30 September 2020).

¹⁶ NNC, *Submission 52*, p. 2.

¹⁷ Mr John Paul Janke, Co-Chair, NNC, *Committee Hansard*, 24 September 2020, p. 43.

¹⁸ NAIDOC, *2020 National NAIDOC Poster Competition and Award Nominations Open!*, <https://www.naidoc.org.au/news/2020-national-naidoc-poster-competition-and-award-nominations-open#:~:text=The%20annual%20NAIDOC%20poster%20competition,defining%20feature%20of%20NAIDOC%20celebrations.&text=The%20National%20NAIDOC%20Committee%20invites,Always%20Was%2C%20Always%20Will%20Be> (accessed 30 September 2020).

¹⁹ NAIDOC, *Waigana wins coveted NAIDOC 2020 Poster competition*, <https://www.naidoc.org.au/news/waigana-wins-coveted-naidoc-2020-poster-competition> (accessed 30 September 2020).

- 3.17 The NNC explained that the Aboriginal flag has featured on several NAIDOC posters since the 1970s and that 'Mr Thomas has never denied NAIDOC use of the flag'. In recent years Mr Thomas has allowed the NNC to reproduce the Aboriginal flag on printed posters and online at no cost. The same permissions have been granted from the owner of the Torres Strait Islander flag.²⁰
- 3.18 Responding to evidence that suggested the NNC has removed the Aboriginal flag from its poster, the NNC advised that was not the case as the Aboriginal or Torres Strait Islander flags appear on the NAIDOC poster only when it is featured in the artwork.²¹ When the flag does feature, the NNC contacts:
- both Mr Thomas and the Torres Strait shire council for permission to use both their flags. We didn't speak to Harold Thomas this year; in fact WAM Clothing did not tell NAIDOC that they would have exclusive merchandising rights for the use of the flag. WAM had suggested a few options for us to use the flag on posters, if we wanted to, but NAIDOC had already committed to using an Indigenous business to provide those same services. We didn't explore any further arrangements on the Aboriginal flag or any existing arrangements or agreements that the NIAA might have with WAM.²²

The Aboriginal flag in sport

- 3.19 The Aboriginal flag has for many years been used by athletes and sporting codes, from grassroots community organisations to professional sporting codes. The importance of the Aboriginal flag in sport was raised consistently by submitters and witnesses to this inquiry. Sporting organisations described the Aboriginal flag as a hugely significant symbol of pride, solidarity and inclusion.²³ Referencing Cathy Freeman's performance at the 1994 Commonwealth Games, the Central Land Council described the impact of 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 of 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. 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". Her

²⁰ Mr Janke, NNC, *Committee Hansard*, 24 September 2020, p. 43.

²¹ Mr Janke, NNC, *Committee Hansard*, 24 September 2020, p. 42.

²² Mr Janke, NNC, *Committee Hansard*, 24 September 2020, p. 42.

²³ See for example, Australian Football League (AFL), *Submission 19*, p. 4; Cricket Australia, *Submission 28*, [p. 2]; Coalition of Major Professional and Participation Sports (COMPPS), p. 2; Aunty Rieo Ellis, *Submission 32*, [p. 1].

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.²⁴

Cathy Freeman and the Aboriginal flag

3.20 Ms Cathy Freeman won her first gold medal in the 4 x 100 metre relay at the 1990 Commonwealth Games in Auckland when she was sixteen years old. Four years later, at the Commonwealth Games in Canada in 1994, Ms Freeman won gold in both the 200m and 400m events. During her victory lap of the track for both events, Ms Freeman carried both the Australian and Aboriginal flags. At the time the Aboriginal flag was not recognised as an official Australian flag.²⁵ Mr Arthur Tunstall was Australia's Chef de Mission at the Games and criticised Ms Freeman for carrying the Aboriginal flag.²⁶

Figure 3.1 Ms Cathy Freeman carrying the Aboriginal flag at the Commonwealth Games²⁷

²⁴ Central Land Council, *Submission 46*, pp. 4–5.

²⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Cathy Freeman*, <https://aiatsis.gov.au/explore/articles/cathy-freeman> (accessed 29 September 2020).

²⁶ Commonwealth Sport, *Commonwealth Sports Moments #4: Cathy Freeman carries the Aboriginal and Australia flag on victory laps at Victoria 1994*, <https://thecgf.com/stories/commonwealth-sports-moments-4-cathy-freeman-carries-aboriginal-and-australian-flags-victory> (accessed 29 September 2020).

²⁷ David Callow, *At Ease*, National Gallery of Australia, <https://nga.gov.au/federation/detail.cfm?WorkID=27708&ZoomID=2> (accessed 29 September 2020).



[Courtesy of SPORT, The library, National Gallery of Australia]

- 3.21 Following her gold medal-winning 400m race at the 2000 Sydney Olympics, Ms Freeman again carried both the Australian and Aboriginal flags on her victory lap.²⁸
- 3.22 Inquiry participants described the importance of watching Ms Freeman carrying the Aboriginal flag during such an important moment in Australia's sporting history. Mr Nyunggai Warren Mundine AM described the emotion:

For me, it's the emotion—Cathy Freeman carrying it at the Commonwealth Games in Victoria, in Canada, and then at the Olympic Games in 2000, when she got up and ran around that stadium with that flag. Tears were running out of my eyes. The whole nation got behind it, not just Indigenous people. It means so much to us. It's in our DNA now. Tears were running out of my eyes. And if you looked at her in the Olympic Games in 2000, everyone—the whole nation—got around her, not just Indigenous people. It meant so much to us; it's in our DNA now. It's also

²⁸ AIATSIS, Cathy Freeman, <https://aiatsis.gov.au/explore/articles/cathy-freeman> (accessed 29 September 2020).

carried many non-Indigenous people along with us in that struggle. So it's become so very strong and symbolic. It's about DNA for us.²⁹

- 3.23 Ms Amelia Telford, National Director, Seed Indigenous Youth Climate Network, explained how Ms Freeman's use of the Aboriginal flag impacted her growing up:

As a young Aboriginal girl growing up, for as long as I can remember, the Aboriginal flag has always been a symbol of who we are as Aboriginal people, whether it's the flag hung up in my brother's room, which I'm in right now at home; learning about what the colours meant from my dad; or seeing Cathy Freeman wearing it proudly over her shoulders at the 1994 Olympics—seeing videos of that, because I was born that year—wearing it like a cape over her shoulders as if her ancestors were giving her a massive hug, keeping her grounded and connected to who she was and to her community who were at home cheering her on. I've always loved the flag, and it's always been a symbol of who we are as well as our struggle and our resilience.³⁰

Australian Football League

- 3.24 Ms Tanya Hosch, General Manager, Inclusion and Social Policy, outlined the significance of the Aboriginal flag to the Australian Football League (AFL):

Certainly the AFL understand the importance of the flag to so many of our fans and, increasingly, more and more Australians. We're in the very fortunate situation where, for a long time now, the game of AFL, the men's game at the elite level, has had the strong contribution and participation of Aboriginal players—around 10 to 11 per cent. Given that we're 3.3 per cent of the Australian population, to be represented at that level in this really large national game for such an extended period of time is significant. I think that has really been what has been behind the AFL's understanding and appreciation of the importance of the Aboriginal flag and who it represents, and the AFL has obviously wanted to respond appropriately. You will find at AFL House in Melbourne that the Australian flag, the Aboriginal flag and the Torres Strait Islander flag fly outside our headquarters. You will find it at most of the stadia where we play. Certainly we have communicated to any stadia where we play that we expect to see at least the Aboriginal flag flown alongside the Australian flag. It's important to us because it's an important symbolic piece of respect for the First Australians and Aboriginal people in particular who not just are represented highly in our game but are a very important part of the Australian nation. It's our responsibility to demonstrate that we respect and understand that.³¹

²⁹ Mr Mundine AM, private capacity, *Committee Hansard*, 24 October 2020, p. 12.

³⁰ Ms Amelia Telford, National Director, Seed Indigenous Youth Climate Network, *Committee Hansard*, 23 September 2020, p. 24.

³¹ Ms Tanya Hosch, General Manager, Inclusion and Social Policy, AFL, *Committee Hansard*, 14 September 2020, p. 46.

- 3.25 Several AFL players have sought to raise awareness about Aboriginal pride and activism both on field and following retirement from the game. For example, in 1993 Mr Nicky Winmar, a St Kilda player responded to racist comments from opposition spectators by lifting his jersey and pointing at his skin, shouting, 'I'm black and I'm proud to be black'.³²
- 3.26 In 2004, Mr Michael Long, a former Essendon player walked over 650 kilometres from Melbourne to Parliament House to meet then Prime Minister John Howard and raise issues concerning Aboriginal and Torres Strait Islander communities. This journey also inspired the Long Walk Trust, a charity that promotes indigenous cultural awareness through The Long Walk and related programs. The Long Walk to Dreamtime at the 'G has become Australia's largest reconciliation event, with up to 14,000 people taking part each year.³³
- 3.27 Mr Adam Goodes played for the Sydney Swans from 1999 to 2015, winning two Brownlow medals and two premierships, and playing more games in the AFL than any other Indigenous footballer.³⁴ He is a four-time All-Australian, member of the Indigenous Team of the Century, and has represented Australia in the International Rules Series. In 2013, Mr Goodes challenged an opposing fan for calling him an ape while on the field.³⁵ Following the incident, the racist abuse of Mr Goodes escalated, ultimately leading to his early retirement from the game in 2015.³⁶ Together with his cousin and former teammate Michael O'Loughlin, Mr Goodes established the Go Foundation which empowers the next generation of Indigenous role models in all walks of life. Mr Goodes was Australian of the Year in 2014.³⁷
- 3.28 Since 2005, the AFL has played an annual 'Dreamtime at the G' match between Richmond and Essendon. In 2007, this single match was extended to an Indigenous round featuring all teams across the competition. In 2016, the Indigenous round was renamed the Sir Doug Nicholls Indigenous Round in

³² National Museum Australia (NMA), *Nicky Winmar's stand*, www.nma.gov.au/defining-moments/resources/nicky-winmars-stand (accessed 29 September 2020).

³³ Michael Long Foundation, *About Michael Long*, www.michaellongfoundation.org.au/about/michael-long (accessed 29 September 2020).

³⁴ Donald McRae, Adam Goodes: 'Instead of masking racism, we need to deal with it day-to-day', *The Guardian*, 3 March 2020, www.theguardian.com/sport/2020/mar/02/adam-goodes-interview-racism-walk-away-afl (accessed 29 September 2020).

³⁵ Donald McRae, Adam Goodes: 'Instead of masking racism, we need to deal with it day-to-day', *The Guardian*, 3 March 2020, www.theguardian.com/sport/2020/mar/02/adam-goodes-interview-racism-walk-away-afl (accessed 29 September 2020).

³⁶ Donald McRae, Adam Goodes: 'Instead of masking racism, we need to deal with it day-to-day', *The Guardian*, 3 March 2020, www.theguardian.com/sport/2020/mar/02/adam-goodes-interview-racism-walk-away-afl (accessed 29 September 2020).

³⁷ Australian of the Year Awards, *Adam Goodes*, www.australianoftheyear.org.au/recipients/adam-goodes/1144/ (accessed 29 September 2020).

honour of his contribution to AFL football and reconciliation off the field.³⁸ Matches in the Indigenous round 'incorporate various cultural activities that focus on the contribution of Indigenous people to our game and to Australian society more generally'.³⁹ Furthermore:

An important feature of the Sir Doug Nicholls Round and the forthcoming AFLW Indigenous Round [to be held for the first time in 2021] is and will be the proud demonstration of celebrating the contributions of Aboriginal and Torres Strait Islander people across the code at all levels, and this occurs through the prominent display of the Aboriginal and Torres Strait Islander flags on the playing surface of all grounds hosting matches over the round and through the clubs donning unique jumpers that feature Indigenous designs that often bear representations of the Aboriginal and Torres Strait Islander flags.⁴⁰

3.29 The AFL emphasised that:

The depiction of the Aboriginal flag on the centre circle in particular has become closely associated with the Sir Doug Nicholls Round and is fondly regarded by Indigenous and non-Indigenous supporters alike.⁴¹

3.30 The committee was advised that the inclusion of the Aboriginal flag on player jumpers has 'varied over time'. Most recently, in 2019:

when last Aboriginal flags were displayed, there were six club clubs that wore them, but on other occasions I think there have been more. They generally appear on the back of the jumpers. On one side would be the Aboriginal flag, with the Torres Strait Islander flag beside it, in a relatively small representation—three centimetres by 2½ centimetres or something to that effect.⁴²

3.31 During the Sir Doug Nicholls round in 2020, none of the Indigenous jumpers worn by the 18 clubs featured the Aboriginal flag.⁴³

3.32 The AFL explained that, because of its commitment to act in accordance with the rights of Mr Harold Thomas and his licensees in relation to the Aboriginal flag copyright, it agreed to the terms of a commercial licence with Carroll & Richardson Flagworld Pty Ltd (Flagworld) (the relevant licensee in 2019) to depict the Aboriginal flag in the centre circle of grounds for the 2019 Sir Douglas Nicholls Indigenous round. For the same round of matches, the AFL pursued commercial negotiations with WAM Clothing Pty Ltd (WAM

³⁸ AFL Queensland, *Sir Doug Nicholls Indigenous Round launched*, 22 May 2017, www.aflq.com.au/sir-doug-nicholls-indigenous-round-launched/ (accessed 30 September 2020).

³⁹ Mr Stephen Meade, Head of Legal and Regulatory, AFL, *Committee Hansard*, 14 September 2020, p. 43.

⁴⁰ Mr Meade, AFL, *Committee Hansard*, 14 September 2020, p. 43.

⁴¹ Mr Meade, AFL, *Committee Hansard*, 14 September 2020, p. 43.

⁴² Mr Meade, AFL, *Committee Hansard*, 14 September 2020, p. 46.

⁴³ Mr Meade, AFL, *Committee Hansard*, 14 September 2020, p. 45.

Clothing) in relation to the use of the Aboriginal flag on six guernseys but the negotiations did not result in an agreement.⁴⁴

- 3.33 In preparation for the Sir Doug Nicholls Indigenous round in 2020, the AFL initiated discussions with WAM Clothing, which by that time was the relevant licensee, to depict the Aboriginal flag in the centre circle. The AFL explained that WAM Clothing was amendable to a commercial licence on the same terms as previously agreed with Flagworld the previous year, however the AFL did not pursue those negotiations. The AFL explained the basis of its decision on this matter:

[T]he AFL made a decision to not pursue that arrangement...[because] essentially...the AFL is concerned that, whilst entering into commercial arrangements with WAM may facilitate our use of the Aboriginal flag, whether that be on the centre circle or on jumpers, those arrangements may ultimately prevent other persons—in particular, Aboriginal persons and enterprises—from being able to use the Aboriginal flag as they would like and to celebrate their Indigeneity.⁴⁵

- 3.34 The AFL submitted to this inquiry that its position was formed with guidance, direction and advice from its Aboriginal & Torres Strait Islander Advisory Council.⁴⁶

Cricket Australia

- 3.35 Cricket Australia described its historical usage of the Aboriginal flag:

Australian Cricket has consistently used the Aboriginal flag in many events for celebration, respect and education. The flag has been used on uniforms, physical signage, flown at grounds and stadiums and shared widely in content across various digital platforms at both an elite and community level.⁴⁷

- 3.36 Cricket Australia told this inquiry that its decision not to use the flag not only reflects Cricket Australia's position, but also its solidarity with other organisations and individuals who are precluded from using it.⁴⁸ Cricket Australia characterised the current circumstances as regrettable:

Regrettably the current circumstances relating to the licensing of the copyright in the Aboriginal flag is impacting the ability of Cricket Australia, community cricket clubs, partners of Cricket Australia and Indigenous charities from reaching agreement with the licensees to enable use of the Aboriginal flag at their events.

...

⁴⁴ Mr Meade, AFL, *Committee Hansard*, 14 September 2020, p. 43.

⁴⁵ Mr Meade, AFL, *Committee Hansard*, 14 September 2020, p. 43.

⁴⁶ AFL, *Submission 19*, p. 3.

⁴⁷ Cricket Australia, *Submission 28*, [p. 2].

⁴⁸ Cricket Australia, *Submission 28*, [p. 2].

The saddest outcome of this is that Aboriginal and Torres Strait Islander cricketers who represent our National or State Indigenous squads were unable to wear a flag that represents so much about their identity when taking the field in their most recent events. This was despite the fact there was no intention of any financial gain in the production of their uniforms. They were to be made purely in small quantities for the use of the players representing their State and National Indigenous squads.⁴⁹

National Basketball League

3.37 The National Basketball League (NBL) described its commitment to 'recognising and advancing the specific contribution' that Aboriginal and Torres Strait Islander peoples have made to basketball in Australia.⁵⁰

3.38 Regarding its use of the Aboriginal flag, the NBL stated:

The NBL proudly displays the Aboriginal flag at our games, during community activities, as well as at NBL headquarters and in several other contexts. The league intends to continue doing so to ensure that Indigenous Australians will always be represented across the NBL including our world-class player talent, our staff and our very large Indigenous fanbase.⁵¹

3.39 The NBL articulated the tension between protecting Mr Thomas's rights as the creator and copyright holder of the flag, with the desire for free community use:

Whilst we understand and support Harold Thomas' right as the creator and copyright holder of the flag, we also recognise that Aboriginal people have adopted this symbol and given it value...⁵²

Other sporting professional organisations

3.40 The Coalition of Major Professional and Participation Sports (COMPPS) is made up of seven member organisations:

- AFL;
- Cricket Australia;
- Football Federation Australian (FFA);
- National Rugby League (NRL);
- Netball Australia;
- Rugby Australia; and
- Tennis Australia.⁵³

3.41 COMPPS outlined how its member sporting organisations seek to:

⁴⁹ Cricket Australia, *Submission 28*, [p. 2].

⁵⁰ National Basketball League (NBL), *Submission 13*, p. 1.

⁵¹ NBL, *Submission 13*, [p. 2].

⁵² NBL, *Submission 13*, [p. 2].

⁵³ COMPPS, *Submission 31*, p. 1.

...recognise and celebrate the role and contribution of Aboriginal and Torres Strait Islander players and communities in their respective sports in a number of ways, including through such celebratory events as matches featuring Indigenous teams, holding Indigenous rounds that incorporate cultural activities and domestic and national teams playing in specially designed Indigenous jerseys.⁵⁴

- 3.42 The Aboriginal flag has 'typically been a feature of such celebrations' by incorporating the flag into jersey design, use as ground markings, venue signage and memorabilia. Moreover:

The broadcast of these events and the significant media reach of the COMPPS sports mean that they represent a significant opportunity to increase recognition amongst the broader Australian population of the contribution of Aboriginal and Torres Strait Islander peoples and develop greater understanding of the challenges faced by their communities.

In addition to such nationally broadcast, high profile events, sport plays a critical role at the community level. The COMPPS members recognise the importance of grassroots Indigenous-focussed carnivals, festivals, development camps, competitions etc in growing the participation of Aboriginal and Torres Strait Islander peoples and providing a platform for them to express, share, and celebrate their cultures. COMPPS understands that taking pride in playing under and recognising the Aboriginal flag is of great importance for these occasions.⁵⁵

- 3.43 COMPPS advised the committee that several of its member organisations have stopped using the Aboriginal flag:

I'm aware that Cricket Australia have taken that decision, and I believe that Rugby Australia, who have a joint initiative with the Lloyd McDermott Foundation, have also made that decision, as well as the NRL. That's my understanding. In relation to the other member sports, I think it's just been that—as we say in our submission—because of the different season cycles and event cycles which also have been interrupted, obviously, by COVID, they might not have had a recent event where they've had to make that decision, but their current position is that they wouldn't intend to use the flag at the moment, while this situation with the licensing exists.⁵⁶

- 3.44 COMPPS acknowledged the broad confusion in a range of sporting organisations with respect to displaying and using the Aboriginal flag:

What is being reported up through to the national governing bodies, who are the actual members of COMPPS, is that it is a source of distress and dismay that the flag has been—first of all, there's this real confusion and lack of understanding and lack of clarity as to how it is or isn't able to be used. Then where decisions have been made at the community level that's clearly a source of distress, disappointment, et cetera, because there's such

⁵⁴ COMPPS, *Submission 31*, p. 2.

⁵⁵ COMPPS, *Submission 31*, p. 2.

⁵⁶ Ms Jo Setright, Executive Director, Policy, COMPPS, *Committee Hansard*, 24 September 2020, p. 30.

pride in using it at these events that come together to celebrate and share Aboriginal culture with non-Indigenous Australians. Sport provides such an opportunity and such a platform to unite Australians. It feels like that's being taken away, as well as that fundamental concept of playing under the flag and having that pride.⁵⁷

Community sporting organisations

3.45 In addition to various peak and professional sporting codes, the committee heard directly from a number of community sporting organisations which described how they have been impacted by the current licencing arrangements.

3.46 Aunty Rieo Ellis, a Waka Waka/Bundijilung Elder and Matriarch of the Melbourne Warriors Football and Netball team described how she became aware of WAM Clothing's exclusive licence:

We are always excited to showcase our new uniforms which represented pride, equity, inclusion and wellbeing. However, this year, the excitement was soon compromised when our manufacturer had shared with us that they were no longer able to place the Aboriginal Flag on our uniforms unless we paid an additional 20% on top of the manufacturing costs. Being a small team driven by Community volunteers and relying heavily on sponsorship, this was way too much and we simply couldn't do it.

This was the first time I had heard about a non-Indigenous business holding the licencing agreements to our flag. This is wrong. It is wrong to give authority to a non-Indigenous business who won't allow us to utilise the flag the way we want or without an expense. I don't want to give Community money to hungry corporates.⁵⁸

3.47 Aunty Rieo Ellis told the committee that not only have the current licensing arrangements made use of the flag in community sport unaffordable, a number of organisations have made a principled decision not to use it:

We just want to say something about the flag not being put on our uniforms last year, our 20th anniversary, not only because we couldn't afford the extra payment to put it on but because of the principle. Why should we pay someone to benefit from something that's spiritually ours? That's how we see it. I think my community, my family—that's our cultural identity. We got our people to put me up to speak on behalf of them. It's a big mob. I think it's disgraceful.⁵⁹

3.48 Describing the relationship between community sports organisations and peak bodies, the Lloyd McDermott Rugby Development Team further articulated how solidarity has resulted in entire sporting codes ceasing to use the Aboriginal flag:

⁵⁷ Ms Setright, COMPPS, *Committee Hansard*, 24 September 2020, p. 31.

⁵⁸ Aunty Rieo Ellis, *Submission 32*, [p. 1].

⁵⁹ Aunty Reio Ellis, Melbourne Warriors, *Committee Hansard*, 24 September 2020, p. 34.

With the Lloyd McDermott Rugby Development Team, working with Rugby Australia and also all the member unions, a decision was made, in consultation with our board, who were representatives of the Aboriginal rugby community nationally, that we would not be proceeding with having the flags on any of our jerseys. The great thing for us is that our governing body, Rugby Australia, made the decision to support us. They removed the flags from the Wallabies jersey. We then saw the flow-on effect of that with our member unions or state unions, with the Queensland Reds, New South Wales Waratahs, ACT Brumbies all removing the flag from their representative jerseys as well, most recently during in the Super 15 Indigenous round.

We engaged with our people to design the images on the jerseys, but we do not incorporate the flag at any stage, and we won't be doing that in the near future. You will see in the upcoming rugby championships against other international countries a beautifully designed jersey, but without the flag. That's something that we, as a First Nations rugby committee, completely support Rugby Australia's stance on. We won't change it. It goes all the way down to our schoolkids; they can't play in a jersey with the flag on it.⁶⁰

⁶⁰ Mr Dean Duncan, President, Lloyd McDermott Rugby Development Team, *Committee Hansard*, 24 September 2020, pp. 40–41.

Chapter 4

The current dispute

4.1 Mr Harold Thomas is the designer and copyright holder of the Aboriginal flag. As copyright holder, Mr Thomas has exercised his right to grant several exclusive licences for the reproduction of the Aboriginal flag, most recently to WAM Clothing and Wooster Holdings. These licensing arrangements and the conduct of the licensees are considered in this chapter.

Licensing arrangements

4.2 Mr Thomas has entered into a number of licensing agreements with various organisations. These include exclusive world-wide licences for the manufacture and sale of products, non-exclusive licences, including a licence agreement with the Aboriginal and Torres Strait Islander Commission (ATSIC), and bare or gratuitous licences (which do not involve the exchange of consideration) to Aboriginal organisations providing essential services.¹ The first two types of licences are considered below.

Carroll & Richardson Flagworld

4.3 In 1998, Mr Thomas entered into a world-wide exclusive agreement with Flags 2000 Pty Ltd, known today as Carroll & Richardson Flagworld (Flagworld), to:

- (a) Reproduce or authorise the reproduction of the design of the Aboriginal Flag on flags, pennants, banners and bunting (Products); and
- (b) Manufacture, promote, advertise, distribute and sell Products throughout the world.²

4.4 Flagworld's licence agreement with Mr Thomas is ongoing and has a lifetime of 70 years after Mr Thomas's death.³ The licence is therefore contracted to expire when copyright in the Aboriginal flag ends.

Aboriginal and Torres Strait Islander Commission

4.5 ATSIC entered into a licence agreement in 2001 for the non-commercial use of the Aboriginal flag.⁴ The licence terms stipulated:

The Artist grants to ATSIC and the Regional Councils established by the *Aboriginal and Torres Strait Islander Commission Act 1989* and any bodies of elected Indigenous representatives that may succeed them a non-exclusive

¹ Dr Fady Aoun, *Submission 34*, [p. 2].

² Carroll & Richardson Flagworld (Flagworld), *Submission 1*, [p. 1].

³ Flagworld, *Submission 1*, [p. 1].

⁴ National Indigenous Australians Agency (NIAA), *Submission 42*, p. 2.

irrevocable worldwide licence to reproduce the Work for any non-commercial purpose associated with the performance of their functions by them or by other persons authorized by them.⁵

- 4.6 Mr Mick Gooda occupied senior roles within ATSIC at the time the licence agreement was negotiated and entered into, and at the time ATSIC was abolished in 2005. With regards to the licence negotiations, Mr Gooda stated:

It took a fair while to negotiate. Let's just say there were robust parts of that negotiation that went on. The agreement was really about community use of the flag and the use of ATSIC and its successors. I think there were things built in around...it not ever being held by government. As I understood it, it was really around the non-commercial use, and ATSIC negotiated it on behalf of, mainly, the Aboriginal community use of the flag. That, as I understood it, went through and there was an exchange of some money. I wouldn't tell you if I knew but I can't remember how much money was involved, except that it was fairly significant...⁶

- 4.7 Following the abolition of ATSIC in 2005, the ongoing status of this agreement is unclear. The National Indigenous Australians Agency (NIAA) submitted that the licence agreement was between Mr Thomas and ATSIC, not the Commonwealth government, because ATSIC was a statutory corporation and as such, a separate legal entity from the Commonwealth government and able to enter agreements in its own right.⁷ An information paper prepared by the ATSIC National Policy Office in January 2002 about the licence stated that '...if ATSIC is replaced by a Department of State, the Licence would not transfer to the Commonwealth'.⁸ The NIAA submitted that the information paper is '...the only record that has been located to date regarding [ATSIC's] consideration of the licence...'.⁹

- 4.8 Mr Gooda similarly told the committee:

I'm not a lawyer but I'd say it just became null and void...To go back to your original question, my thing is, not being a lawyer, given what Mr Thomas put in the conditions, once ATSIC was abolished that agreement lapsed, I'd say...The really strong point that Mr Thomas made was that, if anything happened in ATSIC, it should never go into the hands of government. I think it would be a little bit dishonest to say it now goes there if he was strong about that. I think you've got to respect his wishes in that, and it's in the contract...As it was stipulated in that agreement that it

⁵ NIAA, copy of licence agreement between ATSIC and Mr Harold Thomas dated 17 December 2001 (tabled 14 September 2020).

⁶ Mr Mick Gooda, private capacity, *Committee Hansard*, 24 September 2020, p. 17.

⁷ NIAA, answers to questions on notice, 28 September 2020 (received 6 October 2020), [p. 9].

⁸ NIAA, answers to questions on notice, 28 September 2020 (received 6 October 2020), [p. 1].

⁹ NIAA, answers to questions on notice, 28 September 2020 (received 6 October 2020), [p. 7].

could never go to government, I'd say that's the reason. Once ATSIC was abolished, that agreement would have lapsed.¹⁰

- 4.9 The legal implications of the abolition of ATSIC appear to be less clear cut. The NIAA submitted:

There is a possible argument that the effect of ATSIC Amendment Act in replacing all references to 'ATSIC' with "the Commonwealth" preserved the licence agreement after ATSIC was abolished in 2005.¹¹

- 4.10 The NIAA provided further information on the basis of this 'possible argument', stating:

Section 193 of Schedule 1 of the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (ATSIC Amendment Act) states that:

A Commission instrument...in force immediately on ATSIC Abolition day has effect on and after that day, in relation to everything occurring on or after that day, as if a reference in the instrument to [ATSIC]...were a reference to the Commonwealth.

Under item 191(1) of the ATSIC Amendment Act, the term 'Commission instrument' includes an instrument subsisting immediately before Aboriginal and Torres Strait Islander Commission abolition day to which [ATSIC] was a party. The ATSIC Licence agreement therefore may be regarded as a Commission instrument.¹²

- 4.11 Professor Nicholas Seddon, a leading Australian authority on contract law, explained that ATSIC was a 'body corporate' and a separate legal entity from the Commonwealth government:

It is very common for Commonwealth statutory corporations (for example, the ANU, CSIRO, the National Gallery) to enter into contracts...it is the corporation that is bound by such a contract, not the Commonwealth.

- 4.12 Professor Seddon stated that upon the abolition of ATSIC, the *Aboriginal and Torres Strait Islander Commissioner Amendment Act 2005* 'vested "assets" of ATSIC in the Commonwealth'. 'Assets', he explained, are defined as:

property of every kind and, without limiting the generality of the foregoing, includes:

(a) choses in action; and

(b) rights, interests and claims of every kind in or to property, whether arising under an instrument or otherwise, and whether legal or equitable, liquidated or unliquidated, certain or contingent, accrued or accruing.

The question then is whether the copyright licence was an 'asset' under this definition. A "choses in action" is a right that is enforceable at law and is regarded in law as a form of property. Prior to abolition, ATSIC had a licence to use copyright in the flag. The licence is a permission. So long as

¹⁰ Mr Gooda, private capacity, *Committee Hansard*, 24 September 2020, pp. 17–18.

¹¹ NIAA, *Submission 42*, p. 2.

¹² NIAA, answers to questions on notice, 28 September 2020 (received 6 October 2020), [p. 17].

its terms are adhered to, the party who uses or otherwise exploits the copyright cannot be sued for breach of copyright. The licence holder (ATSIC) had rights determined by the terms of the licence. In my view the licence rights that ATSIC had prior to abolition were chosen in action. Thus it is arguable that the Aboriginal and Torres Strait Islander Commissioner Amendment Act 2005 vested these rights in the Commonwealth.¹³

4.13 In respect of possible limitations on this, Professor Seddon stated:

It could be the case that the terms of the licence are such that it is futile for the Commonwealth to take over the licence. This would be so if, for example, conditions attached can only apply to ATSIC. I note that in the submission by NIAA that the original licence was limited to reproduction of the flag for non-commercial purposes associated with ATSIC's functions. ATSIC's functions were set out in its Act. It is at least arguable that the Commonwealth cannot reproduce the flag for non-commercial purposes associated with the Commonwealth's functions. Possibly, this argument could be countered by saying the Commonwealth, as the new licensee, is restricted to non-commercial purposes associated with what were ATSIC's functions.¹⁴

4.14 This position was echoed by the NIAA, which stated:

However, it is not without some doubt, and even if this is the case, the original ATSIC Licence only covered the reproduction of the Work for non-commercial purposes related to ATSIC's functions.¹⁵

Gooses T-Shirts and Vaguce T-Shirts

4.15 Clothing manufacturer Neil Booth had a relationship with Mr Thomas for over 20 years to print items such as shirts, hoodies and singlets through his companies Gooses T-Shirts and subsequently Vaguce T-Shirts.¹⁶ The committee understands that that relationship ended in 2018.¹⁷

WAM Clothing Pty Ltd

4.16 WAM Clothing 'is the exclusive licensee for a range of clothing and apparel, towels, and digital and physical media products featuring the Aboriginal Flag'.¹⁸ The first licence agreement between Mr Thomas and WAM Clothing commenced in late 2018.¹⁹ The committee is unaware of the number of licence

¹³ Professor Nicholas Seddon, answers to questions on notice, 25 September 2020 (received 28 September 2020), [p. 2].

¹⁴ Professor Seddon, answers to questions on notice, 25 September 2020 (received 2 September 2020), [p. 2].

¹⁵ NIAA, *Submission 42*, p. 2.

¹⁶ Mr Michael Connolly, private capacity, *Committee Hansard*, 22 September 2020, p. 17.

¹⁷ Mr Connolly, private capacity, *Committee Hansard*, 22 September 2020, p. 17.

¹⁸ WAM Clothing Pty Ltd (WAM Clothing), *Submission 2*, [p. 1].

¹⁹ WAM Clothing, answers to questions on notice, 15 September 2020 (received 30 September), p. 1.

agreements that have been entered into since then, but is aware of at least one additional agreement, dated 7 June 2019.²⁰

4.17 The directors of WAM Clothing are Ms Semele Moore and Mr Ben Wooster. Mr Wooster is also a director of Wooster Holdings (discussed below).

4.18 The duration of the licence agreement between WAM Clothing and Mr Thomas is unknown to the committee. WAM Clothing refused to discuss this aspect of the agreement, citing confidentiality concerns.²¹

4.19 The committee was told that the licence agreement with WAM Clothing may apply to the use of the Aboriginal flag:

- in email signatures;
- on business cards;
- on social media graphics;
- on websites;
- on flyers, printed and digital copies;
- on miscellaneous campaign collateral e.g. pledge cards, fact sheets, information booklets (printed);
- in an annual report or plan, printed and digital;²²
- any horizontal or partially horizontal surfaces including:
- naturally occurring or artificial ground – solid dirt, grass, stone, snow, ice etc.;
- any vertical or partially vertical surfaces including;
- cliff faces, hills, mountains; and
- the whole part of:
- atmosphere of earth including sky or the air; or
- any building, sporting ground, stadium, arena.²³

4.20 A redacted version of the licence agreement between WAM Clothing and Mr Thomas appears to grant WAM Clothing 'exclusive authority to act as Agent for the purpose of enforcing...Copyright', including permission:

to take whatever action it sees for breach of Copyright of the Work, without notice to, or consent from the Licensor...[including negotiating] payment of a fee, in favour of the Licensee, from anyone who is in breach of the Copyright, whilst permitting those persons to use the Products which would otherwise be in breach of copyright.²⁴

²⁰ Ms Amelia Telford, National Director, Seed Indigenous Youth Climate Network, copy of Copyright Exclusive Licence Agreement between Mr Harold Thomas and WAM Clothing Pty Ltd dated 7 June 2019 (tabled 23 September 2020), p. 4.

²¹ Ms Semele Moore, Director, WAM Clothing, *Committee Hansard*, 14 September 2020, p. 18.

²² Spark Health Australia and Clothing the Gap, *Submission 27*, p. 3.

²³ Dreamtime Kullilla-Art, *Submission 43*, p. 4.

²⁴ Ms Telford, Seed Indigenous Youth Climate Network, copy of Copyright Exclusive Licence Agreement between Mr Harold Thomas and WAM Clothing Pty Ltd dated 7 June 2019 (tabled 23 September 2020), p. 4.

Wooster Holdings Pty Ltd and Gifts Mate Pty Ltd

- 4.21 In 2018, Mr Thomas entered into an exclusive licence agreement with Wooster Holdings, which subsequently granted permission to Gifts Mate Pty Ltd (Gifts Mate) to manufacture and wholesale a range of souvenir products featuring the Aboriginal flag.²⁵
- 4.22 Mr Ben Wooster is a director of both Wooster Holdings and Gifts Mate. Mr Wooster is also the former sole director of Birubi Art Pty Ltd (in liquidation)²⁶ (Birubi), which also held a licence to manufacture souvenirs bearing the Aboriginal flag from 1 January 2010.²⁷

Implied licence

- 4.23 The question of whether or not Aboriginal people enjoy an implied licence to use the flag was raised during the course of the inquiry. Mr Michael Connolly, Ms Nova Peris OAM and Mr Peter Francis argued that the origins of the flag and the purpose for which it was created point to the existence of an implied licence for the benefit of Aboriginal people.²⁸ The Australia Council for the Arts stated:

While Mr Thomas is the copyright owner of the Aboriginal flag, the communal use of the flag has been practiced since the 1970s. Dr Gary Foley has argued that this communal recognition of the flag almost gives it an implied licence for all Aboriginal people to use as they wish. This free use of the flag is no longer allowed due to the exclusive licence granted to WAM clothing company.²⁹

- 4.24 Dr Terri Janke, a leading legal practitioner in the area of Indigenous cultural intellectual property (ICIP), advised that while it is unlikely that shared copyright exists between Mr Thomas, Professor Gary Foley and other individuals who were involved in the creation of the flag, 'it certainly opens up the idea of its implied use'.³⁰ Dr Janke explained:

It was implied that people would use it for that particular purpose—an implied licence to use it as a flag, as it has been used for many years. The issue is to what extent that implied licence might extend. The commercial uses are, in my opinion, where the sticky points have been. For many years

²⁵ Gifts Mate Pty Ltd (Gifts Mate), *Submission 3*, [p. 1].

²⁶ *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595, 7.

²⁷ WAM Clothing, answers to questions on notice, 28 September 2020 (received 30 September 2020), p. 2.

²⁸ Mr Connolly, private capacity, *Committee Hansard*, 22 September 2020, p. 18; Ms Nova Peris OAM, private capacity, *Committee Hansard*, 24 September 2020, p. 20; Mr Peter Francis, FAL Lawyers, *Committee Hansard*, 24 September 2020, p. 23.

²⁹ Australia Council for the Arts, *Submission 57*, p. 2.

³⁰ Dr Terri Janke, Solicitor Director, Terri Janke and Company, *Committee Hansard*, 24 September 2020, p. 4.

the use of the flag was an implied licence, I think by Mr Thomas, in the way that it was used as a symbol of Aboriginal rights.³¹

- 4.25 Associate Professor Jani McCutcheon acknowledged that while an implied licence may exist, 'implied licences can also be revoked pretty reasonably. I think that's what he's done through his court case and his subsequent legitimate behaviour in exploiting his exclusive rights'.³²

Conduct of licensees

Birubi Art Pty Ltd

- 4.26 Fake or inauthentic Aboriginal art was raised by numerous submitters and witnesses as an ongoing matter of concern. The committee heard these concerns raised in the context of successful action against Birubi, and the connection between Birubi and the current Aboriginal flag exclusive licence holders.³³
- 4.27 In March 2018, the Australian Competition and Consumer Commission (ACCC) instituted court proceedings against Birubi. At the time, Mr Ben Wooster was the sole director of Birubi.³⁴
- 4.28 The Federal Court of Australia found that between 2015 and 2018 Birubi had sold almost 18,000 products in Australia featuring images, symbols and design associated with Australian Aboriginal art and words such as 'Authentic Aboriginal Art', 'Hand Painted, and 'Australia', but were all made in Indonesia.³⁵ On October 2018, the Federal Court found that Birubi engaged in false or deceptive conduct that products it sold were made in Australia and hand painted by Australian Aboriginal persons, in breach of the Australian Consumer Law.³⁶ As of 29 October 2018, Birubi resolved to enter voluntary liquidation.³⁷

³¹ Dr Janke, Terri Janke and Company, *Committee Hansard*, 24 September 2020, p. 4.

³² Associate Professor Jani McCutcheon, private capacity, *Committee Hansard*, 14 September 2020, p. 11.

³³ See for example, Thungutti Local Aboriginal Land Council, *Submission 9*, [p. 1]; Reconciliation Victoria, *Submission 11*, [p. 1].

³⁴ Gifts Mate, *Submission 3*, [p. 1]; [2018] FCA 1595, 7.

³⁵ Australian Competition and Consumer Commission (ACCC), *\$2.3M penalty for fake Indigenous Australian art*, 26 June 2019, www.accc.gov.au/media-release/23m-penalty-for-fake-indigenous-australian-art, (accessed 1 October 2020); ACCC, *Court finds that Birubi Art misled consumers over fake Indigenous Australian art*, 24 October 2019, www.accc.gov.au/media-release/court-finds-that-birubi-art-misled-consumers-over-fake-indigenous-australian-art (accessed 1 October 2020).

³⁶ [2018] FCA 1595.

³⁷ *Australia Competition and Consumer Commission v Birubi Art Pty Ltd (in liq)* [2019] FCA 996.

4.29 On 26 June 2019, the Federal Court of Australia ordered that Birubi pay a fine of \$2.3 million,³⁸ despite acknowledgment by Justice Perry that 'given that Birubi is in liquidation, it is unlikely that Birubi would be able to pay any pecuniary penalty in any event'.³⁹

4.30 At the time the penalty was imposed, the ACCC Commissioner stated:

This penalty sends a strong message to anyone considering selling fake Australian Aboriginal style art as the genuine article...Birubi's actions were extremely serious. Not only did they mislead consumers they were liable to cause offence and distress to Australian Aboriginal people...The ACCC took this action because the misleading conduct has the potential to undermine the integrity of the industry and reduce opportunities for Australian Aboriginal peoples.⁴⁰

4.31 The ACCC provided evidence to this inquiry that it is unable to pursue Mr Wooster as he was not party to the original Birubi proceedings in any personal capacity, adding that Gifts Mate, WAM Clothing and Mr Wooster cannot be held liable to pay the penalty awarded to Birubi.⁴¹

4.32 In 2018 the House of Representatives Standing Committee on Indigenous Affairs tabled its 'Report on the impact of inauthentic art and craft in the style of First Nations peoples'. The report cited Birubi as a successful case of enforcement against inauthentic Indigenous art and craft products and that the outcome of the court proceedings would be used to frame some of its future guidance.⁴²

4.33 In evidence to the committee, Gifts Mate stated that no complaints were ever made by the ACCC against Mr Wooster personally and emphasised that Justice Perry did not find that Birubi had intentionally sought to mislead potential purchasers of the products.⁴³

Relationship between Birubi, WAM Clothing and Gifts Mate

4.34 WAM Clothing was registered with the Australian Securities and Investment Commission (ASIC) on 21 November 2018; Ms Semele Moore and Mr Ben Wooster are both current company directors. WAM Clothing has been the exclusive worldwide copyright licensee for the use of the Aboriginal flag since

³⁸ [2019] FCA 996.

³⁹ [2019] FCA 996.

⁴⁰ ACCC, *\$2.3M penalty for fake Indigenous Australian art*, 26 June 2019, www.accc.gov.au/media-release/23m-penalty-for-fake-indigenous-australian-art (accessed 1 October 2020).

⁴¹ ACCC, answers to written questions on notice (received 28 September 2020).

⁴² House of Representatives Standing Committee on Indigenous Affairs, *Report on the impact of inauthentic art and craft in the style of First Nations peoples*, December 2018, p. 71.

⁴³ Gifts Mate, *Submission 3*, p 1; Mr Ben Wooster, Director, WAM Clothing Pty Ltd and Director, Gifts Mate Pty Ltd, *Committee Hansard*, 14 September 2020, p. 16.

that time.⁴⁴ Gifts Mate was registered with ASIC on 2 May 2018; Mr Wooster is the sole director. Gifts Mate is the manufacturer and wholesaler of a range of souvenir products featuring the Aboriginal flag.⁴⁵ Mr Wooster is the former sole director of Birubi.⁴⁶

4.35 The Birubi case was known to a number of witnesses and submitters to this inquiry, who expressed concerns⁴⁷ that Mr Wooster, an exclusive licence holder of the Aboriginal flag, was the former director of Birubi.⁴⁸ Mr Wooster's connection to Birubi was a particular point of contention,⁴⁹ with one submitter describing the connection as 'egregious'.⁵⁰

4.36 The Indigenous Art Code emphasised the lasting impact that the Birubi case, including the non-payment of the \$2.3 million fine, continues to have on the Aboriginal arts community:

As noted in evidence provided to the committee last week and today, the former director of Birubi Art is now a director of both GiftsMate and WAM Clothing, which have the exclusive licences to reproduce the Aboriginal flag on clothing and merchandise. These issues are regarded as connected and relevant by many of the Indigenous Art Code stakeholders. These issues are regarded as connected and relevant by many of the Indigenous Art Code stakeholders. The non-payment of the fine has caused considerable concern and distrust within the community.⁵¹

4.37 The Australia Council characterised this aspect of the current licensing arrangements as 'a moral issue':

There is a moral issue as WAM clothing company is a non-indigenous company and is also associated with Birubi Art...questions have been raised as to whether Mr Thomas knew about his case and their association.⁵²

WAM Clothing

⁴⁴ Clothing the Gap, *Aboriginal Flag timeline*, <https://clothingthegap.com.au/pages/aboriginal-flag-timeline> (accessed 1 October 2020).

⁴⁵ Gifts Mate, *Submission 3*, [p. 1].

⁴⁶ [2018] FCA 1595, 7.

⁴⁷ See for example, Bar Association of Queensland, *Submission 56*, p. 2; Ms Robyn Ayres, Chief Executive Officer, Arts Law Centre of Australia, *Committee Hansard*, 14 September 2020, p. 1.

⁴⁸ Gifts Mate, *Submission 3*, [p. 1].

⁴⁹ See for example, Reconciliation Victoria, *Submission 11*, [p. 1]; Mindaribba Local Aboriginal Land Council, *Submission 16*, [p. 1]; New South Wales Aboriginal Land Council, *Submission 22*, [pp. 2–3]; Thungutti Local Aboriginal Land Council, *Submission 9*, [p. 1].

⁵⁰ Reconciliation Victoria, *Submission 11*, [p. 1].

⁵¹ Ms Stephanie Parkin, Chair, Indigenous Art Code Ltd, *Committee Hansard*, 22 September 2020, p. 11.

⁵² Australia Council for the Arts, *Submission 5*, p. 6.

- 4.38 WAM Clothing's conduct, in particular its approach to enforcing its rights as a licensee, was raised throughout the course of the inquiry.
- 4.39 Numerous submitters and witnesses voiced distress about the way in which WAM Clothing had communicated with them. In most instances, organisations received a cease and desist letter or a 'notice to potential consumer' demanding payment for use of the Aboriginal flag design or stating that products adorned with the Aboriginal flag must not be used without WAM Clothing's permission. An example of a 'notice to potential consumer' provided to the committee states that WAM Clothing is the exclusive licensee for use of the Aboriginal flag on clothing and advises that 'if you are currently using the Aboriginal Flag on clothing or have orders with manufactures for clothing incorporates the Aboriginal Flag, you are required to contact us immediately'.⁵³
- 4.40 A cease and desist letter is typically a communication in which a party asserts that it is the owner or exclusive licensee of the copyright, and advises the recipient that they are believed to be infringing on copyright.⁵⁴ The party asserting copyright may alert the recipient to the relevant breach and advise them to cease and desist.
- 4.41 Based on the evidence before it and media reporting, the committee understands that the following individuals and/or organisations have received correspondence from WAM Clothing of the nature of a cease and desist letter or a 'notice to potential consumer':
- Spark Health Australia Pty Ltd (Spark Health) and Clothing the Gap;⁵⁵
 - National Rugby League;⁵⁶
 - Rugby Australia (and the Lloyd McDermott Rugby Development Team under the auspice of Rugby Australia, along with other First Nations rugby teams);⁵⁷
 - Renee Tighe, Chastity & Co;⁵⁸
 - Australian Football League;⁵⁹

⁵³ See for example Koori Knockout, Notice to Potential Consumer (tabled 24 September 2020).

⁵⁴ Dr Dimitrios Eliades, *Submission 17*, p. 18.

⁵⁵ Ms Laura Thompson, Managing Director, Spark Health Australia, *Committee Hansard*, 14 September 2020, p. 27.

⁵⁶ Isabella Higgins, 'New licence owners of Aboriginal flag threaten football codes and clothing companies', *ABC*, 11 June 2019, <https://www.abc.net.au/news/2019-06-11/new-licence-owners-of-aboriginal-flag-threaten-football-codes/11198002> (accessed 1 October 2020).

⁵⁷ Mr Dean Duncan, President, Lloyd McDermott Rugby Development Team, *Committee Hansard*, 24 September 2020, p. 35.

⁵⁸ Ms Renee Tighe, *Submission 50*, [p. 2].

- Diabetes Victoria;⁶⁰
- Seed Indigenous Climate Network;⁶¹
- Koori Knockout;⁶²
- Stephen Hogarth (Aboriginal artist);⁶³
- Vaguce T-shirts;⁶⁴
- Gooses T-shirts;⁶⁵
- North Stradbroke Island Aboriginal & Islander Rise Co-op Society;⁶⁶ and
- Nugurrubul Baadhin Clothing.⁶⁷

4.42 According to WAM Clothing, it has issued '[v]ery few cease and desists. The total would be less than 10'. WAM Clothing conceded, however, that there has:

been a range of correspondences issued to third parties with respect to our licences. Being cease and desists, notices to potential consumers, notices to manufacturers and general information letters on processes for reproducing the Flag under our licences...⁶⁸

4.43 Spark Health considered WAM Clothing's approach to enforcing its rights as an exclusive licensee a marked difference with the previous licence holder:

My understanding is that there was a clothing licensee before WAM, called Gooses Clothing, and they produced the Aboriginal flag on clothing. They paid a licensing fee and royalties to Harold but they didn't actively pursue other people in communities that were also using the flag. I think that's been the real difference since Ben Wooster and Semele came on board—it's them actively looking to see who's using the flag and then issuing them a cease and desist. It's hard to find everyone who's reproducing the flag on clothing, so they'll often go to manufacturers and issue the manufacturer with a cease and desist, and, in some ways, ensure that the manufacturer is passing on the message to Aboriginal communities about who to go to produce stuff.⁶⁹

⁵⁹ Isabella Higgins, 'New licence owners of Aboriginal flag threaten football codes and clothing companies', *ABC*, 11 June 2019, <https://www.abc.net.au/news/2019-06-11/new-licence-owners-of-aboriginal-flag-threaten-football-codes/11198002> (accessed 1 October 2020).

⁶⁰ Diabetes Victoria, *Submission 7*, [pp. 1–2].

⁶¹ Ms Amelia Telford, National Director, Seed Indigenous Youth Climate Network, *Committee Hansard*, 23 September 2020, p. 24.

⁶² Koori Knockout, Notice to Potential Consumer (tabled 24 September 2020).

⁶³ Dreamtime Kullilla Art, *Submission 43*, p. 9.

⁶⁴ Dreamtime Kullilla Art, *Submission 43*, p. 9.

⁶⁵ Dreamtime Kullilla Art, *Submission 43*, p. 9.

⁶⁶ Dreamtime Kullilla Art, *Submission 43*, p. 9.

⁶⁷ Dreamtime Kullilla Art, *Submission 43*, p. 9.

⁶⁸ WAM Clothing, answers to written questions on notice, 15 September 2020, (received 30 September 2020).

⁶⁹ Ms Thompson, Spark Health Australia, *Committee Hansard*, 14 September 2020, p. 39.

4.44 Other submitters and witnesses stated that interactions with WAM Clothing had left them feeling uncertain and confused about permitted use of the flag and/or the potential costs associated with its use.⁷⁰ For example, Seed Youth Climate Network told the committee that after receiving a notice and subsequently seeking clarification from WAM Clothing regarding use of the flag, it was left feeling less clear about how the Aboriginal flag could be used:

It didn't use the words 'cease and desist', but, through further correspondence, they did end up giving us three days to take action and implied that, to continue using the flag, we would need to enter into an agreement. We had quite a bit of back and forth, asking them to specify the exact uses and clarify how the fees would be applied on email signatures, on business cards, on a website. Eventually, after a bit of back and forth, we didn't enter into the agreement because we felt really confused and conflicted.⁷¹

4.45 Similarly, Cricket Australia told the committee that prior to making a decision not to use the flag it had 'failed to receive complete clarity on licensing requirements for non-commercial and non-merchandised use of the flag for our Indigenous State and National teams as well as community clubs'.⁷²

4.46 These experiences were echoed by Tandanya National Aboriginal Cultural Institute:

There's great concern about how they can use it. You can look at a lot of people, including our institute. We think twice about using the flag on any marketing material, so we've stopped that. We don't use it at all, and most organisations that we're talking to are doing the same thing because they're not sure whether they're going to get a cease and desist letter or whether or not they're able to deal with getting that.⁷³

4.47 The Gurindji Aboriginal Corporation told the committee about a festival it runs each year, and how uncertainty around using the flag has become a risk management issue:

I guess there are concerns as we now do our designs for the festival or as to flying the flag at the festival. We need to know where we stand with that, and it's a bit of a risk management thing, now, for us to consider. There are fees and charges or whatever we need to consider that does impact on our planning now, because this event is quite a monster...Are we in breach right now, for example? That's a bit of a risk for us if we're using that flag.⁷⁴

⁷⁰ See, for example, Mr John Burgess, *Submission 23*, [p. 1].

⁷¹ Ms Telford, Seed Indigenous Youth Climate Network, *Committee Hansard*, 23 September 2020, p. 25.

⁷² Cricket Australia, *Submission 28*, [p. 2].

⁷³ Mr Dennis Stokes, Chief Executive Officer, Tandanya National Aboriginal Cultural Institute, *Committee Hansard*, 24 September 2020, p. 26.

⁷⁴ Mr Phil Smith, Chief Executive Officer, Gurindji Aboriginal Corporation, *Committee Hansard*, 24 September 2020, p. 7.

4.48 Some submitters and witnesses advised that in the past, Mr Thomas may have authorised use of the Aboriginal flag free of charge for certain non-commercial purposes.⁷⁵ The Queensland Bar Association remarked:

Historically, Harold Thomas allowed Aboriginal health and not-for-profit Aboriginal community to openly connect with a collective identity in circumstances where there is otherwise no homogenous tribal identity that exists in Australia. As a result of the licence agreements with WAM Clothing and Flagworld Pty Ltd, Aboriginal health and not-for-profit organisations can no longer reproduce the flag and have been issued cease and desist letters by WAM Clothing. This has jeopardised the economic sustainability of Aboriginal health and not-for-profit organisations who provide much needed support to Aboriginal people in the community, because many of their branding and products featured the Aboriginal flag.⁷⁶

4.49 The Victorian Aboriginal Health Service (VAHS) suggested that more recently, with WAM Clothing as an exclusive licensee, Mr Thomas is still amenable to use of the Aboriginal flag for certain non-commercial purposes but that held no sway in negotiations with WAM Clothing:

...I've been talking with my promotional health manager, who did talk with Harold about us using the flag. I've actually got it here in writing from Harold himself, and he says: 'It was a pleasure speaking to you yesterday. The Aboriginal medical and legal services has always promoted and used the Aboriginal flag design from the beginning, and we're all grateful. Because of recent events, some individuals have been reckless to say the least. I suggest contacting WAM Clothing and say we have spoken. The issue will be amicable. I support you 100 per cent. Your friend, brother and member of a beautiful great race.'

To which, my manager spoke to WAM through email explaining the situation. WAM then asked for a copy of the email from Harold, and we don't have much more from WAM in emails. But my manager has let me know that they did talk over the phone and he said it was a lengthy conversation. They apparently looked into VAHS's financial records online and said that, financially, we were viable to pay a fee and also that they could offer a discount but we would still have to pay...⁷⁷

4.50 The licencing fees charged by WAM Clothing were not provided to the committee and figures provided by witnesses differed. Similarly, the overall value of the exclusive licensing agreements between the copyright holder and licensees are unknown to the committee.

4.51 Aunty Rieo Ellis told the committee:

⁷⁵ See, for example Diabetes Victoria, *Submission 7*, [p. 1]; McCulloch & McCulloch Australian Art Books Pty Ltd, *Submission 8*, [p. 1].

⁷⁶ Queensland Bar Association, *Submission 56*, p. 2.

⁷⁷ Mr Michael Graham, Chief Executive Officer, Victorian Aboriginal Health Service (VAHS), *Committee Hansard*, 23 September 2020, p. 22.

...our manufacturer had shared with us that they were no longer able to place the Aboriginal Flag on our uniforms unless we paid an additional 20% on top of the manufacturing costs. Being a small team driven by Community volunteers and relying heavily on sponsorship, this was way too much and we simply couldn't do it.⁷⁸

- 4.52 The Indigenous Wellbeing Centre (IWC) was initially advised by WAM Clothing that a twenty per cent fee was payable, which was later discounted to fifteen per cent, so long as the IWC signed a confidentiality agreement. In relation to WAM Clothing, the IWC stated:

They initially offered for us to be charged 20 per cent and later on they gave us an additional discount of five per cent. With that five per cent discount we had to sign a confidentiality agreement that we could not share with anybody or speak of that five per cent additional discount. So we refused the agreement. Now we do not put the Aboriginal flag on our shirts, unfortunately, and we haven't from last year.⁷⁹

- 4.53 In its written submission, the Lloyd McDermott Rugby Development Team discussed the financial burden currently associated with using the Aboriginal flag and concluded that current licensing arrangements are not in the public interest:

The First Nations Rugby Club (FNRC) also wishes to highlight the significant financial burden that the current licencing has on smaller Aboriginal sporting teams. These small community-run teams simply cannot afford to include the flag on their merchandise. The fact that Aboriginal-run sporting clubs are prevented from using the Aboriginal flag is all the evidence needed that a change is required...The FNRC requests the Senate to take an informed and principled approach to its review, by recognising that the current licencing arrangement is not in the best interests of the Nation.⁸⁰

- 4.54 While many organisations have refused to pay the licencing fee, Koori Knockout told the committee it had paid WAM Clothing a sum of around \$10,000 to keep WAM away from its 2019 competition:

We were organising the Koori Knockout last year on the Central Coast. I think it was about March, April or May, we received an email from the clothing company that's got the copyrights, telling us that we need to notify all the teams they can't have the flag, or if they wanted the flag they've got to pay the extra costs and whatever else. But by then teams had already ordered their gear with the flag on it. So they said they were going come to the knockout and come around and have a look and see who's got it and fine everybody—so to prevent them from doing that and fining all

⁷⁸ Aunty Rieo Ellis, *Submission 32*, [p. 1].

⁷⁹ Mr Ara (Julga) Harathunian, Director and Chief Executive Officer, Indigenous Wellbeing Centre, *Committee Hansard*, 23 September 2020, p. 13.

⁸⁰ Lloyd McDermott Rugby Development Team, *Submission 39*, [pp. 1–2].

the teams who may have it on their shirts and their guernseys, we just gave them \$10,000 to stay away.⁸¹

- 4.55 WAM Clothing's approach to exercising its exclusive rights to reproduce the Aboriginal flag on clothing has, at best, discouraged its use,⁸² and at worst, caused distress to notice recipients and others seeking to produce the clothing or products. Clothing the Gap summarised evidence consistent with a number of witnesses and submitters to this inquiry:

Community have stopped using the Aboriginal flag like they used to – for three key reasons.

- to avoid possible legal action;
- to avoid paying to do so; and
- on principle, no one wants to have to ask to use the flag from non-Indigenous people.⁸³

Carroll & Richardson Flagworld

- 4.56 Comparisons have been drawn between the conduct of WAM Clothing and Flagworld, the holder of the worldwide exclusive licence to reproduce the design of the Aboriginal flag on flags, pennants, banners and bunting.
- 4.57 Flagworld told the committee how it gives effect to Mr Thomas's wishes that that the flag be freely available for non-commercial, individual use:

In accordance with Mr Thomas' wishes, the Aboriginal flag can also be produced by an individual for their own use, but not for commercial gain as this would breach his IP and our licence. Therefore the manufacture of a flag is open to an individual not engaged in commercially gaining from the design, therefore ensuring at a local level it can be freely made and used.

- 4.58 The committee heard no evidence to suggest that Flagworld has acted contrary to its public position, or to Mr Thomas's wishes. Notably, the committee heard a comparatively low number of concerns regarding the conduct of Flagworld in relation to the exercise of its exclusive licence.
- 4.59 The Australian Football League (AFL) informed the committee that the:

AFL has agreed that it will purchase all depictions of the Aboriginal Flag on flags, pennants, banner or bunting (Flag Form) from Carroll & Richardson – Flagworld Pty Ltd...AFL has no concerns or complaints with the arrangement as apply to the use of the Aboriginal Flag in Flag Form. In contrast, AFL does have concerns with respects to the current situation as exists with the us of the Aboriginal Flag in all other respects (i.e. other than in Flag Form)...AFL is most concerned that the commercial terms sought by WAM Clothing with respect to the use of Aboriginal Flag by all potential user of it are either not reasonable and/or are not affordable by

⁸¹ Mr Graham, *Committee Hansard*, 23 September 2020, p. 22.

⁸² See for example, Legal Aid Queensland, *Submission 29*, p. 3; Cricket Australia, *Submission 28*, [p. 2].

⁸³ Spark Health Australia and Clothing the Gap, *Submission 27*, p. 3.

many persons, in particular Aboriginal people and enterprises, who seek to celebrate their indigeneity through the proud display of the Aboriginal Flag in many forms.⁸⁴

4.60 In relation to enforcing its rights as a licensee, Flagworld stated:

From time to time, yes, but normally not against individuals. The usual people that we find breach the licence are those who are often importing from overseas countries, from low-cost labour countries, who will bring in cheap and inferior products into Australia. So we will often contact those people and suggest that that's not a very good idea. More often than not, many of them, probably through ignorance, are not aware of the licensing arrangements and end up becoming re-sellers for the Aboriginal flag and buy the genuine product rather than buying cheap imports from overseas.⁸⁵

4.61 In 2003, Flags 2000 Pty Ltd (as Flagworld was then known) took action in the Federal Court against Mr David Smith who carried on business under the name 'Flags and Poles' in Bassendean, Western Australia for infringements of Mr Thomas's copyright. The Court found in favour of Flags 2000 and ordered Mr Smith to refrain from infringing Mr Thomas's copyright and deliver up all infringing copies of the flag. Mr Smith was also ordered to pay damages of \$320, additional damages of \$1,000, and the applicant's costs.⁸⁶

4.62 In March 2020, Flagworld successfully applied to the Federal Court for the production of names and contact details for the person/s operating the website <https://freetheflag.net> from Paypal, Vodafone and Shopify.⁸⁷ Flagworld alleged that the operators of the website advertised, distributed and sold flags in the design of the Aboriginal flag in breach of copyright. It sought the contact details under Rule 7.22 of the *Federal Court Rules 2011* (Cth), which

is intended to provide a person with a means of obtaining information as to the identity of a party against whom the person wishes to commence a proceeding, in circumstances in which the person is unable to do so because of a lack of sufficient information about that party's description to enable an originating application to be filed.⁸⁸

4.63 Whether or not subsequent legal action against the website administrators has commenced is unknown to the committee.

4.64 What, if any, connection the administrators of this website have to the Free the Flag movement, led by Spark Health is unknown. During the committee's

⁸⁴ Australian Football League (AFL), *Submission 19*, pp. 3–4.

⁸⁵ Mr Wayne Gregory, Managing Director, Carroll & Richardson Flagworld, *Committee Hansard*, 14 September 2020, p. 23.

⁸⁶ *Flags 2000 Pty Ltd v Smith* [2003] FCA 1067.

⁸⁷ The matter proceeded against Shopify. Paypal and Vodafone agreed to provide the details of their own accord: [2003] FCA 1067, [5].

⁸⁸ [2003] FCA 1067, [3].

public hearing, Spark Health stated that the current licensing arrangements have:

...never really been an issue with Flagworld, because not many of us want to actually produce flags that go on flagpoles. So we haven't seen it playing out. It's more that the mob want to use it on clothes, and that's when we've seen it play out.⁸⁹

Spark Health and Clothing the Gap

- 4.65 WAM Clothing's heavy-handed (yet entirely legal) approach to enforcing its rights as an exclusive licensee for the Aboriginal flag was the catalyst for a campaign—led by Spark Health—to garner community support to 'free the flag'.
- 4.66 Spark Health is an Aboriginal-owned and led social enterprise specialising in health promotion and Aboriginal community engagement.⁹⁰ The organisation designs and delivers preventative health and health engagement programs and offers Aboriginal community engagement consultancy services.⁹¹
- 4.67 Spark Health also trades as Clothing the Gap, a Victorian Aboriginal-owned and led social enterprise. Clothing the Gap is a fashion label managed by health professionals.⁹² Ms Laura Thompson is co-founder and managing director of Spark Health and Clothing the Gap.
- 4.68 In March 2019, Spark Health started selling clothing that featured the Aboriginal flag.⁹³ On 6 June 2019, Spark Health received a letter from WAM Clothing demanding that within three business days from the date of the letter it cease and desist with the sale of clothing bearing the Aboriginal flag.⁹⁴ In August 2019, Spark Health wrote to Mr Harold Thomas to seek permission to use the flag, but did not receive a response.⁹⁵
- 4.69 On 16 October 2019, Spark Health received a letter from Lion Legal acting on behalf of Mr Thomas, requiring that Spark Health cease and desist from 'engaging in any way in the sale of any clothing bearing the Aboriginal flag or variation thereof'⁹⁶ within three business days from the date of the letter.⁹⁷ On

⁸⁹ Ms Thompson, Spark Health Australia, *Committee Hansard*, 14 September 2020, p. 39.

⁹⁰ Spark Health, *About us*, <https://sparkhealth.com.au/pages/about-us> (accessed 28 September 2020).

⁹¹ Spark Health, *About us*, <https://sparkhealth.com.au/pages/about-us> (accessed 28 September 2020).

⁹² Clothing The Gap, *About us*, <https://clothingthegap.com.au/pages/our-impact> (accessed 28 September 2020).

⁹³ Spark Health and Clothing the Gap, *Submission 27*, p. 1.

⁹⁴ Spark Health and Clothing the Gap, *Submission 27*, p. 1.

⁹⁵ Clothing The Gap, *Aboriginal Flag Timeline*, <https://clothingthegap.com.au/pages/aboriginal-flag-timeline> (accessed 28 September 2020).

⁹⁶ Spark Health and Clothing the Gap, *Submission 27*, p. 8.

22 October 2019, Spark Health's clothing manufacturer, Daluna Industries, also received an email advising that any use of the Aboriginal flag on clothing without the consent or agreement of WAM Clothing was prohibited.⁹⁸

4.70 After receiving the initial cease and desist letter from WAM Clothing, Ms Thompson began the Free the Flag campaign.⁹⁹ The campaign is promoted via the Clothing the Gap website and calls for the Aboriginal flag to be free from its current exclusive worldwide licencing agreements with WAM Clothing, Wooster Holdings and Flagworld.¹⁰⁰ The campaign encourages free use of the Aboriginal flag for all, provided that usage adheres to the flag protocols and guidelines set out in the *Flags Act 1953* (Cth), consistent with arrangements for the Australian flag.¹⁰¹ Free the Flag encourages people to support the movement by signing the Pride Not Profit petition, writing to their local Member of Parliament, buying Free the Flag merchandise produced by Clothing The Gap and using the Free the Flag logo.¹⁰²

4.71 Spark Health and Clothing the Gap submitted:

We believe if Aboriginal people had known Harold Thomas would end up asserting his private ownership rights over the flag and appointing non-Indigenous licensees to shut down its use unless fees were paid - we would never have adopted it. Flags should always be about pride and not profit, so we started a petition. Today, nearly 150 000 people have signed this petition (www.change.org./pridenotprofit) and supported what has become a movement to #FreeTheFlag for the people.¹⁰³

4.72 Free the Flag has garnered support from individuals and organisations that have been issued with cease and desist notices as well as from the broader community. The campaign is supported by a number of prominent Aboriginal Australians including former Senator and Olympian Ms Nova Peris OAM, and former AFL players Mr Michael Long¹⁰⁴ and Mr Eddie Betts¹⁰⁵. A number of

⁹⁷ Spark Health and Clothing the Gap, *Submission 27*, p. 1.

⁹⁸ Spark Health and Clothing the Gap, *Submission 27*, p. 1.

⁹⁹ Clothing The Gap, *Aboriginal Flag Timeline*, <https://clothingthegap.com.au/pages/aboriginal-flag-timeline> (accessed 28 September 2020).

¹⁰⁰ Spark Health and Clothing the Gap, *Submission 27*, p. 1.

¹⁰¹ Spark Health and Clothing the Gap, *Submission 27*, p. 1.

¹⁰² Clothing The Gap, *Free the Flag Journey*, <https://clothingthegap.com.au/pages/free-the-flag> (accessed 28 September 2020).

¹⁰³ Spark Health and Clothing the Gap, *Submission 27*, p. 2.

¹⁰⁴ Lorena Allam, 'AFL slugged with retrospective bill for use of Aboriginal flag as fans urged to bring their own', *The Guardian*, 21 August 2020, www.theguardian.com/australia-news/2020/aug/21/afl-slugged-with-retrospective-bill-for-use-of-aboriginal-flag-as-fans-urged-to-bring-their-own (accessed 28 September 2020).

professional sporting organisations have also expressed support for the movement, including most AFL clubs¹⁰⁶ and the Super Netball.¹⁰⁷

4.73 On 28 July 2019, Ms Thompson, Ms Peris and Mr Michael Connolly (an Aboriginal artist) travelled to Canberra to meet with federal parliamentarians to advocate for the campaign.¹⁰⁸ On 31 July 2019 the Pride Not Profit petition was acknowledged by Ms Ged Kearney MP in the House of Representatives.¹⁰⁹

4.74 Ms Peris described her work with the campaign:

I appear as a member of the Free the Flag campaign and also in my own capacity as a well-known Aboriginal identity here in Australia...I spent hundreds of hours in discussions with Ms Laura Thompson, Mr Michael O'Connor and our lawyer, Peter Francis, from FAL, who have all worked tirelessly together. I've also spent hundreds of hours working across [inaudible] speaking with Aboriginal natural people [inaudible] for them to be able to use their symbol. As this committee will have heard, many of these people have not sought to profit from the use of the flag; rather they have included the flag on uniforms or team jumpers to wear as a symbol of pride and belonging...You've received some 50 submissions, but we've got close to 160,000 people who have signed on to say, 'We want to free the flag.'

4.75 Mr Connolly stated:

I'm also a strong advocate for the fake Aboriginal art campaign and the Free the Flag campaign with Laura Thompson and Nova Peris. With Nova and Laura, we have received cease and desist letters from WAM Clothing and our passion is to free the flag for all peoples – all our people – who have fought under the flag, been buried under the flag and have marched under the flag.¹¹⁰

4.76 Several Aboriginal Land Councils expressed support for the campaign, emphasising that the matter is of national significance to First Nations people in particular, but also the broader community. The Bahtabah Local Aboriginal Land Council, Mindaribba Aboriginal Land Council and Thungutti Local Aboriginal Land Council submitted:

¹⁰⁵ Shelley Ware, 'Football fraternity unites to free the flag', Footyology, 25 August 2020, <https://footyology.com.au/football-fraternity-unites-to-free-the-flag/> (accessed 28 September 2020).

¹⁰⁶ AFL, *Submission 19*, p. 4.

¹⁰⁷ Suncorp Super Netball, <https://www.facebook.com/supernetball/posts/1829394177214512/> (accessed 29 September 2020).

¹⁰⁸ Clothing The Gap, *Aboriginal Flag Timeline*, <https://clothingthegap.com.au/pages/aboriginal-flag-timeline> (accessed 28 September 2020).

¹⁰⁹ Ms Ged Kearney MP, *House of Representatives Hansard*, 31 July 2019, p. 1675.

¹¹⁰ Mr Michael Connolly, private capacity, *Committee Hansard*, p. 16.

We echo the calls of the #FreeTheFlag campaign for Aboriginal people to have equal rights and access to the flag. The flag is an important part of our contemporary heritage and identity as First Nations people.¹¹¹

- 4.77 Mr John Burgess, a Gurindji Aboriginal business owner expressed support for Free the Flag's key message, stating:

This flag is about identity and once again, Aboriginal Australia are fighting for it, where someone wants to control and profit off it. More than ever, the Australian government needs to acknowledge our existence and our place in this country, especially given the context of what has happened to our people.

In relation to the Senate Select Committee on the Aboriginal Flag, I wanted to add my voice to the chorus of thousands of Australians seek to Free the Flag from its current commercial license agreement...¹¹²

- 4.78 Other business owners impacted by restrictions on producing merchandise featuring the Aboriginal flag similarly expressed support for Free the Flag. For example, Yarn Strong Sista (YSS), an Aboriginal education consultancy in Victoria submitted:

At the end of 2018 we were approached by a Victorian Aboriginal organisation who wanted YSS to develop a range of Back Packs and Duffel Bags with the Aboriginal Flag, Torres Strait Island flag and Tiwi Flag printed on the product. This Organisation works to support Indigenous children who are living in Kinship Care and Out of Home Car. The Indigenous children are very vulnerable and find comfort and strength in these important Flag symbols.

Whilst Yarn Strong Sista has not received a cease and desist letter from WAM, we were aware that Clothing the Gap had been sent a letter in the post. We became scared and stopped selling our YSS items that had the Aboriginal Flag printed on the products. We had invested \$5000 into the development of our Back Packs and Duffel Bags and now we are left with boxes and boxes of stock we are not allowed to sell. We support the "Free The Flag" Movement!¹¹³

- 4.79 Aunty Rieo Ellis stated 'I will continue my right to practice integrity and continue to fight to Free The Flag'.¹¹⁴
- 4.80 While there is community support for Free the Flag, some submitters raised concerns regarding free use of the flag for all Australians, referring to the solution proposed by the campaign. The National NAIDOC Committee stated:

¹¹¹ Thungutti Local Aboriginal Land Council, *Submission 9*, [p. 2]; Mindaribba Local Aboriginal Land Council, *Submission 16*, [p. 1]; Bahtabah Local Aboriginal Land Council, *Submission 37*, [p. 2].

¹¹² Mr John Burgess, *Submission 23*, [p. 1].

¹¹³ Yarn Strong Sista, *Submission 52*, [p. 2].

¹¹⁴ Aunty Rieo Ellis, *Submission 32*, [p. 1].

We believe that completely “Freeing the Flag” - like the Australian Flag that some have suggested, could lead to it being exploited for commercial gain by non-Indigenous businesses, particularly foreign companies.¹¹⁵

- 4.81 The implications of making the flag free to use for all was partly articulated by Associate Professor Jani McCutcheon, who emphasised that any attempt to do so would have a corresponding effect on the rights of the copyright owner:

Any push to free the flag, in copyright speak, would demand an augmentation of the list of fair dealings that we currently entertain under the Copyright Act—something like a fair dealing for cultural expression, or something like that. But, of course, that will always have a corresponding effect on Mr Thomas's rights, because what he was able to demand monetary compensation for he no longer will be, once that new exception comes into place. So any augmentation of the list of fair-dealing exceptions would need to be carefully thought through and would have serious implications for the rights of the licensees as well.¹¹⁶

- 4.82 While Mr Thomas's view has been notably absent from this inquiry, he expressed the following opinion in a media interview in June 2019:

Now the court made it clear, they posted advertisements to say are there any other people of interest for the flag?...No one came forward to say, if Mr Thomas wins the case or something, the copyright shouldn't got to him, or should go to all black people throughout Australia. Not one group of people came up with that not even the government...Those people on this petition, where were they?...See this is the silly argument about the flag...See under copyright, and I'm now and proved as that, you can exercise that. You can make agreements between companies, with manufacturing companies, that you can give agreements for a day, you can give agreements that are non-exclusive, you can give agreements that are exclusive, that no one else can no one else can produce those Aboriginal flag designs on them. That's the first step...That means I can make an agreement with a non-aboriginal company.

Those who are signing this so called petition, has any of those people...worked for a grassroots black organisation like the medical and legal service? Have they been on the committee?...No of course they haven't. You come on my journey...when it started, there was nobody. Only a few who stood up to be counted to be black. Only a few, people like Gary Foley and all those people. Who were activists at the time. They were no were near these people... These idiots of a people, where were their family? During the 70's, 80's and 90's?¹¹⁷

¹¹⁵ National NAIDOC Committee, *Submission 52*, p. 7.

¹¹⁶ Associate Professor McCutcheon, *Committee Hansard*, p. 8.

¹¹⁷ Central Australian Aboriginal Media Association, 'Harold Thomas – creator and copyright owner of the Aboriginal flag respond to his critics!', CAAMA, 24 June 2019,

4.83 Despite differing views, Free the Flag has generated attention and stimulated discussion and debate in relation to this issue.

Chapter 5

The future of the Aboriginal flag

- 5.1 Throughout the inquiry, the committee heard views regarding the future of the Aboriginal flag including compulsory acquisition, a negotiated outcome, models for custodianship of the flag, the possibility of a new fair dealing exception and whether it may be time for a new Aboriginal flag.
- 5.2 The possibility of compulsory acquisition of the copyright and/or the existing copyright licences drew strong, largely adverse views from numerous submitters and witnesses. Many suggested that the preferred outcome was one in which Mr Thomas voluntarily allowed the Commonwealth government to acquire the copyright and/or existing licences through a process of negotiation. No clear consensus was formed around the way forward in the event that a negotiated outcome could not be achieved. Should government acquisition occur, evidence indicated broad support for ongoing recognition (a moral right)¹ and compensation on just terms for Mr Thomas.
- 5.3 In relation to the future administration of the Aboriginal flag, some called for an ongoing role for government (such as ownership and administration of the flag through a statutory agency) while others felt that ongoing government control of the Aboriginal flag was inappropriate. The committee received a number of different suggestions for potential models of administration and a preference for Aboriginal custodianship of the flag, either through an Aboriginal community controlled organisation, or an elected or representative body.
- 5.4 Suggestions around how freely the Aboriginal flag should be able to be used also varied. Many submitters and witnesses advocated for use free-of-charge for all Australian people and organisations, while others warned of possible exploitation and suggested some kind of scaled fee system for commercial use of the flag. Despite differing views, evidence consistently supported use at no or low cost for Aboriginal people and organisations that seek to use the flag to advance the interests of Aboriginal people.

Compulsory acquisition

- 5.5 Section 51(xxxi) of the *Australian Constitution* provides that the Commonwealth government can compulsorily acquire property on just terms:

¹ Under section 189 of the *Copyright Act 1968* (Cth) (Copyright Act), moral right means a right of attribution of authorship, a right not to have authorship falsely attributed, or a right of integrity of authorship.

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.²

- 5.6 Compulsory acquisition of the copyright subsisting in the Aboriginal flag and, or the existing copyright licences was discussed at length during this inquiry. Numerous witnesses and written submissions put forth views regarding the legal ability of, and moral basis for, the Commonwealth government pursuing this option.
- 5.7 If the Commonwealth government acquired the copyright subsisting in the Aboriginal flag, the Commonwealth, as opposed to Mr Thomas, would own the flag's copyright. A number of submitters acknowledged that the Commonwealth would then be subject to the operation of subsection 196(4) of the *Copyright Act 1968* (Cth) (Copyright Act) should it take such an approach, which provides that:³
- [a] licence granted in respect of a copyright by the owner of the copyright binds every successor in title to the interest in the copyright of the grantor of the licence to the same extent as the licence was binding on the grantor.⁴
- 5.8 As the successor of the copyright, the Commonwealth government would be bound by the licence agreements made by Mr Thomas with WAM Clothing, Wooster Holdings (Gifts Mate) and Carroll & Richardson Flagworld (Flagworld). If the Commonwealth was to control the use and reproduction of the Aboriginal flag design as a flag or banner and/or on clothing and other merchandise, it would also need to acquire those existing licences in addition to the flag copyright.⁵
- 5.9 Another option is for the Commonwealth government to acquire the three existing licences (with WAM Clothing, Wooster Holdings and Flagworld) for the Aboriginal flag, as opposed to the copyright subsisting in the flag. Under this arrangement, Mr Thomas would continue to be the owner of the copyright.
- 5.10 Ms Stephanie Parkin, Chair of the Indigenous Art Code, provided evidence to the committee regarding this approach, outlining that changes to the licensing

² *Australian Constitution*, s. 51(xxix).

³ Dr Dilan Thampapillai, Mr Andrew Ray and Ms Georgia Reid, *Submission 40*, pp. 6–7; FAL Lawyers, *Submission 33*, p. 3.

⁴ Copyright Act, ss. 196(4).

⁵ Dr Thampapillai, Mr Ray and Ms Reid, *Submission 40*, pp. 6–7; FAL Lawyers, *Submission 33*, p. 3.

agreements may impose obligations or burdens on Mr Thomas, but would otherwise not infringe upon on his rights as the copyright owner:

My understanding is that, in that situation, Mr Thomas would still remain the copyright owner of the flag and that the acquisition would occur further on down the track, in terms of those exclusive licensees. In terms of impinging or infringing upon his rights, I think that would also depend on what that licence agreement looks like that Mr Thomas has between him and those exclusive licensees and what, if any, type of obligation he would have to adhere to if the licences were compulsorily acquired. Obviously I recognise that we don't know the terms of the licensing agreement, but if there were any changes to those exclusive licenses then there could be burdens or obligations that the copyright owner—for example, Mr Thomas—would have to comply with.⁶

- 5.11 A number of submitters and witnesses voiced their preference for an outcome in which Mr Thomas retains ownership of the flag copyright, preferably through a negotiated agreement about the use and fees for use of the Aboriginal flag.⁷

Support for compulsory acquisition

- 5.12 Some submitters and witnesses expressed support for compulsory acquisition.⁸ For example, FAL Lawyers (which represents Spark Health Australia, Clothing the Gap and Free the Flag) argued in support of compulsory acquisition on the basis that acquiring the copyright is no different to circumstances in which government acquires real property where it is in the public interest to do so:

All levels of Australia government routinely engage in the compulsory acquisition of land. Specific legislation is enacted at state and federal level to regulate these acts...Compulsory acquisition is by its nature against the wishes of the owner, and there are many reasons a land owner may be reluctant to hand over his or her rights...Despite these owner misgivings, governments routinely engage in compulsory acquisition...We ask why compulsorily acquiring someone's home to widen a road is commonplace and acceptable at all levels of government, but compulsorily acquiring copyright in a flag design (or a licence thereto) for the benefit of an entire race of Australians is entirely unacceptable.⁹

- 5.13 FAL Lawyers further argued that Mr Thomas, as demonstrated through the existing licences, is prepared to divest control of and monetise his copyright:

⁶ Ms Stephanie Parkin, Chair, Indigenous Art Code, *Committee Hansard*, 22 September 2020, p. 14.

⁷ See, for example, Ms Eileen Camilleri, Chief Executive Officer, Australian Copyright Council, *Committee Hansard*, 22 September 2020, p. 4; Spark Health Australia and Clothing the Gap, *Submission 27*, p. 5; National Association for the Visual Arts, *Submission 36*, [p. 2]; Mrs Janette Young, Communications Manager, Indigenous Wellbeing Centre, *Committee Hansard*, 23 September 2020, p. 22.

⁸ See, for example, Ms Nova Peris, *Submission 44*, p. 2; Reconciliation Tasmania, *Submission 26*, [p. 2].

⁹ FAL Lawyers, *Submission 33*, pp. 1–2.

Mr Thomas has granted an exclusive licence to a third party to produce flags. This means Mr Thomas cannot himself produce a flag without authorisation from his licensee. Mr Thomas can, as a result of the licences he has already granted in consideration for financial gain, infringe his own copyright. However, any idea that the Government should respect the desire of Mr Thomas to retain control of any use of the Flag is misplaced. Mr Thomas has demonstrated he is well-prepared to divest such control entirely (to the exclusion of himself), for appropriate monetary compensation.¹⁰

- 5.14 Ms Nova Peris OAM expressed a strong preference for compulsory acquisition, at the same time suggesting that just terms should not be afforded to current licence holders:

To resolve this issue, I believe that the Aboriginal Flag ought to be considered and given the same rights as the Australian Flag and the freedom of the Torres Strait Islander Flag. I believe that the Aboriginal flag should be federally compulsory acquired under Section 51(xxxi) of the *Constitution of Australia* as a matter of national emergency, by "urgent acquisition". I do not believe that the current licence agreements should be paid out by the taxpayer.¹¹

- 5.15 When asked whether compulsory acquisition should be considered if the Commonwealth government is unable to resolve the current dispute about the use of the Aboriginal flag, Spark Health Australia stated:

I feel like the flag is a significant national symbol and that it's worth acquiring. In that process, it's not nice but the government acquires things of national significance all the time. In that process Harold will still be fairly compensated and so will the licensees, and, again, he'll maintain his moral rights.¹²

Concerns regarding compulsory acquisition

- 5.16 While acknowledging the legal basis for compulsory acquisition, many submitters and witnesses objected to it.¹³ Key among their concerns was that compulsory acquisition of the Aboriginal flag copyright would mirror past

¹⁰ FAL Lawyers, *Submission 33*, p. 4.

¹¹ Ms Peris, *Submission 44*, p. 1.

¹² Ms Laura Thompson, Managing Director, Spark Health Australia, *Committee Hansard*, 14 September 2020, p. 22.

¹³ See, for example, Dreamtime Art, *Submission 53*, [p. 2]; Dr Fady Aoun, *Submission 34*, [p. 5]; Ms Katherine (Kate) Kelleher, Director, New South Wales Indigenous Chamber of Commerce, *Committee Hansard*, 22 September 2020, p. 38; National NAIDOC Committee, *Submission 52*, p. 10; Ms Parkin, Indigenous Art Code Ltd, *Committee Hansard*, 22 September 2020, p. 12; Ms Pamela Bigelow, Chief Executive Officer, Indigenous Art Centre Alliance, *Committee Hansard*, 22 September 2020, p. 28; Mr Mick Gooda, private capacity, *Committee Hansard*, 24 September 2020, p. 15; Professor Kimberlee Weatherall, private capacity, *Committee Hansard*, 14 September 2020, p. 9; Dr Terri Janke, Solicitor Director, Terri Janke and Company, *Committee Hansard*, 25 September 2020, p. 32.

experiences of dispossession and appropriation experienced by Aboriginal people.

5.17 Professor Marcia Langton AO argued that:

I do not believe that the compulsory acquisition of the licences and/or copyright of the Aboriginal flag is appropriate. First of all, there are constitutional issues and, moreover, it is my very strong view that the cultural property and the intellectual property of Mr Harold Thomas should not be compulsorily taken away from him.

I say this for a number of reasons. One is that he is an Aboriginal person, and doing so would create a very bad precedent in terms of breaching the Constitution and any appearance of an act based on racial discrimination. Two, he is a member of the stolen generations, and for the government to cause him harm a second time would be unconscionable. His ownership of the rights in the Aboriginal flag has been affirmed by the Federal Court. The only way forward is for him to voluntarily relinquish all of his rights to the Australian government, and I understand, from reading newspapers, that Minister Ken Wyatt is engaged in negotiations with him to acquire the rights in the flag and to overcome all the problems with the licences that have been issued by acquiring all rights.¹⁴

5.18 Associate Professor Jani McCutcheon was similarly concerned about the implications of compulsory acquisition, and described the challenge of quantifying just terms:

This would be an extraordinary step, without any precedent that I am aware of, and there is no guarantee that the 'just terms' achievable under constitutional law principles would constitute truly fair terms. It would also painfully replicate the kind of involuntary dispossession Aboriginal people have endured for more than two centuries.¹⁵

5.19 Reflecting on compulsory acquisition, Mr Will Carter, an Aboriginal community member, artist and small-business owner, stated:

If I really sit here and think about that, I kind of lean more towards that being almost another form of oppression. It dismisses our sovereignty, noting that we don't have constitutional recognition. So if there's a constitutional avenue for the flag to be acquired compulsorily, then those are my thoughts around that.¹⁶

5.20 Other Aboriginal artists and art organisations were concerned about the precedent compulsory acquisition of the Aboriginal flag would establish with respect to artists' copyright in their works, in circumstances where there have

¹⁴ Professor Marcia Langton AO, private capacity, *Committee Hansard*, 24 September 2020, p. 1.

¹⁵ Associate Professor Jani McCutcheon, *Submission 6*, [p. 4].

¹⁶ Mr Will Carter, private capacity, *Committee Hansard*, 22 September 2020, p. 21.

been calls for greater protection of their intellectual property and copyright rights.¹⁷

5.21 Ms Claire Coleman argued that 'compulsory acquisition of the flag copyright by government is to be avoided at all cost' because it 'endangers copyright laws and agency for artists particularly Aboriginal artists and credibly increase the risk of a proliferation of fake art'.¹⁸

5.22 The Bar Association of Queensland shared this view, adding that compulsory acquisition may adversely impact work that has already been done to protect the intellectual property of Aboriginal artists:

It would be problematic to compulsorily acquire the licences or copyright as this may have drastic consequences to the intellectual property rights of other Aboriginal artists. If this was to occur, it may reverse the important work done by Indigenous Art Code and Senate Committee findings set out in the *Report on the impact of inauthentic art and craft in the style of First Nations peoples*.¹⁹

5.23 McCulloch & McCulloch Australian Art Books Pty Ltd emphasised the potential impact of compulsory acquisition on the broader arts community, suggesting that it 'would completely destroy the basic tenets of copyright for artists, writers, musicians, playwrights, film makers and any other creators' which is of 'extreme concern' to the Aboriginal arts community in particular.²⁰

A negotiated outcome

5.24 While compulsory acquisition was raised as a possible outcome, evidence to the inquiry indicated that a negotiated outcome with the copyright holder is clearly the preferred way forward.²¹ A negotiated outcome could ultimately result in the Commonwealth government acquiring the flag copyright, the

¹⁷ See, for example, House of Representatives Standing Committee on Indigenous Affairs, *Report on the impact of inauthentic art and craft in the style of First Nations people*, December 2018, pp. 41–65.

¹⁸ Ms Claire Coleman, *Submission 15*, [p. 2].

¹⁹ Bar Association of Queensland, *Submission 56*, p. 2.

²⁰ McCulloch & McCulloch Australian Art Books Pty Ltd, *Submission 8*, [pp. 1–2].

²¹ See, for example, Mr Carter, private capacity, *Committee Hansard*, 22 September 2020, p. 21; Ms Jacqui Katona, private capacity, *Committee Hansard*, 14 September 2020, p. 31; Ms Thompson, Spark Health Australia, *Committee Hansard*, 14 September 2020, p. 42; Ms Parkin, Indigenous Art Code Ltd, *Committee Hansard*, 22 September 2020, p. 11; Ms Bigelow, Indigenous Art Centre Alliance, *Committee Hansard*, 22 September 2020, p. 28; Mr Peter Francis, FAL Lawyers, *Committee Hansard*, 24 September 2020, p. 24; McCulloch & McCulloch, *Submission 8*, [p. 2]; Reconciliation Victoria, *Submission 11*, [p. 2]; Ms Claire Coleman, *Submission 15*, [p. 2]; National NAIDOC Committee, *Submission 52*, p. 5; Dr Josie Douglas, Senior Policy Officer, Aboriginal Peak Organisations Northern Territory, *Committee Hansard*, 23 September 2020, p. 2; Associate Professor Jani McCutcheon, *Submission 6*, [p. 3].

existing licences, or another arrangement, but the committee heard that Mr Thomas's consent would be pivotal.

- 5.25 Submitters and witnesses recommended basic principles for a negotiated outcome. Dr Fady Aoun suggested:

Of the multiple options canvassed before the Select Committee championing more liberalised access to the Aboriginal flag, the most sensible and appropriate approach may well be to negotiate sustainable and mutually beneficial outcomes with Mr Thomas and the exclusive licensees.²²

- 5.26 The Shepparton Regional Reconciliation Group (SRRG) expressed a preference for negotiations with Mr Thomas, rather than licence holders:

SRRG believes there should be negotiated outcomes, which recognise Mr Harold Thomas's rights as the author of the flag, but free up the flag for general use, especially by Aboriginal communities and organisations. Negotiations directly with Mr Thomas may be preferable to those with licence holders.²³

- 5.27 Acknowledging the competing interests in relation to the Aboriginal flag, the Australian Copyright Council further articulated that Mr Thomas should have a voice regarding how the flag is used into the future:

Well, the negotiated outcome, given the existing contractual landscape, is really limited by what the contracts say and how the licensees are prepared to give over the rights that they have. The ideal situation, given the fact that there is such a community interest in it and a balancing of these unique factors, is that Mr Thomas retains copyright ownership and that continued royalties flow to him and that he gets a say in the landscape in which the flag continues to be used.²⁴

Custodianship of the flag

- 5.28 The concept of custodianship was raised by a range of submitters and witnesses, largely in the context of who might be responsible for administering the flag and approving its use into the future.

- 5.29 The Aboriginal Advisory Council of Western Australia and the Indigenous Wellbeing Centre outlined why an outcome where there is a custodian of the flag is preferable to one where the flag is owned:

[S]o much is owned by the government. It seems that our heritage is owned, our country is owned and our people are owned because of all the different acts that are imposed upon us. If government are going to do that, they'd have to be very clear about how they're going to inform our

²² Dr Fady Aoun, *Submission 34*, [p. 5].

²³ Shepparton Regional Reconciliation Group, *Submission 35*, p. 2.

²⁴ Ms Camilleri, Australian Copyright Council, *Committee Hansard*, 23 September 2020, p. 4.

community that it is actually for our betterment—it's protecting the flag but it's not real ownership. That's a sticky one.²⁵

In our community people are custodians of knowledge. We do a lot of cultural healing work. We don't own that knowledge. We have to explain that to government all the time—'You can't take that IP, because it doesn't belong to us; it belongs to the community.' Custodianship is probably the approach that needs to be taken rather than ownership.²⁶

5.30 The Indigenous Wellbeing Centre added:

[W]e would like to see the custodianship held, not ownership; that Harold will continue to own it; and that it will be custodianship for the Aboriginal nation, and people who are running not-for-profit organisations, which are Aboriginal community controlled, should be able to use it freely, with the intention of actually bringing the community together and improving the health and wellbeing of our communities...So we're not looking for a blanket thing. It's more that we need to think about custodianship rather than ownership.²⁷

Aboriginal people live in two worlds—one in the West, where these contracts, laws, and copyright stuff under the act are—and then, from a cultural perspective, their freedom in how they express themselves is being hindered now because of this copyright issue...set off some sort of custodianship where it is used and define exactly who can use it and how they can use it. That will clear up a lot of the issues.²⁸

Custodianship models

5.31 Various models for custodianship of the Aboriginal flag were raised during the course of the inquiry, for example custodianship via a newly established independent government body, an Aboriginal community controlled organisation or an existing national Aboriginal entity such as the National NAIDOC Committee. The extent of the role for the Commonwealth government varied between models: while some saw a key role for the Commonwealth government as 'owner' of the flag, others raised concerns and suggested that the Commonwealth government's role should be negligible.

5.32 Professor Langton emphasised the importance of Commonwealth government ownership of the flag, but suggested administration be vested in an independent body:

...it's very important that the flag is owned by the government of Australia but that there are checks and balances in legislation that sets out very clearly the ownership and the use of the flag and how the use of the flag in

²⁵ Ms Gail Beck, Chair, Aboriginal Advisory Council Western Australia, *Committee Hansard*, 23 September 2020, p. 19.

²⁶ Mrs Young, Indigenous Wellbeing Centre, *Committee Hansard*, 23 September 2020, p. 19.

²⁷ Mrs Young, Indigenous Wellbeing Centre, *Committee Hansard*, 23 September 2020, p. 22.

²⁸ Mr Ara (Julga) Harathunian, Director and Chief Executive Officer, Indigenous Wellbeing Centre, *Committee Hansard*, 23 September 2020, p. 19.

special circumstances would be determined by an independent body. But most uses of the flag should be freely available to every Aboriginal person, club, corporation and association without any financial impost so that the flag can be used freely. It would only be in extraordinary circumstances, particularly in relation to commercial uses of the flag, that the independent body I am recommending would have a mandate to consider that matter.²⁹

5.33 In contrast, Australians for Native Title and Reconciliation (ANTaR) reiterated concerns with the notion of Commonwealth government 'ownership', and considered that even if the Commonwealth government was to acquire rights to the Aboriginal flag, Aboriginal people should be responsible for how it is used:

...I can certainly see the perception and probably the reality of a government acquiring the copyright off the Aboriginal artist and holding it in government hands, when it's really about a broader Aboriginal ownership and that's what, ultimately, needs to be the outcome in its free and proper use...If the government were to acquire the copyright, it should still be free for Aboriginal people to determine how it's used and enacted. It should be a government decision beyond holding it 'on behalf of', if that makes sense.³⁰

5.34 While no clear consensus emerged regarding the copyright ownership of the Aboriginal flag, submitters and witnesses expressed that an independent body, controlled by Aboriginal people should be a custodian.

An independent body

5.35 Some witnesses recommended that an existing body could take on the responsibilities of being custodian of the Aboriginal flag. For example, the National NAIDOC Committee suggested it could have a role, given the committee's longevity:

As suggested in our paper, we believe that the National NAIDOC Committee could play a part in that. We're one of the only committees that have lasted, since the 1970s, through the various changes and machinations of the Indigenous affairs portfolio...We believe and we've suggested to the agency that NAIDOC could play a part in some part of a solution or be part of the dialogue with Mr Thomas to make sure that that licence, if it's a non-commercial licence, is with an Aboriginal or Indigenous entity.³¹

5.36 Others suggested that an Aboriginal community controlled organisation would be well placed to be the custodian of the flag. Tandanya National Aboriginal Cultural Institute suggested to the committee that Mr Thomas had

²⁹ Professor Langton, private capacity, *Committee Hansard*, 24 September 2020, p. 1.

³⁰ Mr Paul Wright, National Director, Australians for Native Title and Reconciliation (ANTaR), *Committee Hansard*, 23 September 2020, p. 24.

³¹ Mr John Paul Janke, Co-Chair, National NAIDOC Committee (NNC), *Committee Hansard*, 24 September 2020, p. 44.

at one stage, entered into discussions with the organisation regarding custodianship of the flag:

Our understanding is that he was going to offer copyright to Tandanya to look after the flag. This was many years ago. Obviously there has been a lot of changeover within Tandanya in the last two to three years...I'm trying to get the information from this organisation as to what sorts of conversations were had, if at all. But that is my belief, that he had some sort of thought about bringing the copyright to Tandanya, and as the national institute.³²

- 5.37 The Victorian Aboriginal Health Service (VAHS) echoed this view, adding that perceived or actual government control would be likely to cause issues within the community:

One thing I think our community wouldn't accept would be if government owned the rights to the flag. I think it would need to be some kind of community-controlled organisation or perhaps a trust or something like that. I don't think they would accept it being government owned and controlled. That's probably going to cause more issues than not.³³

- 5.38 Dr Matthew Rimmer speculated that an approach such as that taken by the Torres Strait Islander Regional Council (see chapter 1) could be a potential model for community control:

In my submission, I go through an array of different options, some within the frame of copyright law and some outside it. Already there has been a lot of discussion of the merits and problems in relation to acquisition of copyright by the government. I think the community ownership model being put forward in relation to the Torres Strait Islander flag has been quite useful and successful.³⁴

- 5.39 Aboriginal Peak Organisations Northern Territory emphasised the significance of being custodian of the Aboriginal flag and on that basis argued for the establishment of a national authority, rather than a local Aboriginal controlled organisation having responsibility for the flag:

I think it needs to be national because of the symbolism of the flag and what it means to Aboriginal people in Australia as a whole. So I don't think it's appropriate that a local Aboriginal-controlled organisation has the—it's a big thing. It would be a big thing to hold the workings of the flag within an organisation. I think it needs to be a national agency, with Aboriginal control and governance.³⁵

³² Mr Dennis Stokes, Chief Executive Officer, Tandanya National Aboriginal Cultural Institute, *Committee Hansard*, 22 September 2020, pp. 26–27.

³³ Mr Michael Graham, Chief Executive Officer, Victorian Aboriginal Health Service (VAHS), *Committee Hansard*, 23 September 2020, p. 18.

³⁴ Dr Matthew Rimmer, private capacity, *Committee Hansard*, 22 September 2020, p. 2.

³⁵ Dr Douglas, Aboriginal Peak Organisations Northern Territory, *Committee Hansard*, 23 September 2020, p. 2.

5.40 Professor Langton suggested that:

...the flag should be in the ownership of a Commonwealth body that acts as a trust and which would have an Aboriginal board—a small board, say three people—to give approvals for its use. It also should be covered by Commonwealth legislation setting out very clearly the way in which the flag is used. The flag is already, of course, an official Australian flag, but, unlike the Torres Strait Islander flag, it's not owned by an Aboriginal body. The only way to overcome that problem, as far as I can see, is to put it into some kind of trust arrangement with legislation, but firmly under the control of an Aboriginal board of directors of a trust kind of arrangement.³⁶

5.41 Associate Professor McCutcheon held a similar view, suggesting that:

the copyright in the Aboriginal Flag is assigned or partly or exclusively licensed for an agreed fee to a suitable trustee such as the National Indigenous Australians Agency and clear guidelines are established in relation to its use.³⁷

5.42 Associate Professor McCutcheon offered further input regarding how such a trustee could operate:

This would also require compensation to the licensees if they were required to cede their contractual rights. The guidelines should be agreed following input from all representative stakeholders and could stipulate when permission to reproduce and communicate the flag is required and what licence fees may be applicable depending on those factors, and when permission is not required and no license fee would be payable. The scheme could structure ongoing payments to Mr Thomas or an outright assignment of his copyright. Certain obligations should also be placed on the Trustee to act as a fiduciary in relation to the flag, ensuring that it is used respectfully and in accordance with the agreed guidelines and the scheme should specify who can take action if they consider the trustee is derelict in its duties.³⁸

5.43 Dr Terri Janke has previously recommended the establishment of a National Indigenous Cultural Authority comprised of various Aboriginal organisations to be 'the peak advisory body on indigenous cultural and intellectual property rights'.³⁹ Such a body could, among other things, 'develop policies and protocols with various industries' and 'authorise uses of Indigenous cultural material through a permission system which seeks prior consent from relevant Indigenous groups'.⁴⁰ Dr Janke suggested that a trust or cultural authority could carry out a similar function in respect of the Aboriginal flag, particularly

³⁶ Professor Langton, private capacity, *Committee Hansard*, 24 September 2020, p. 1.

³⁷ Associate Professor McCutcheon, *Submission 6*, [p. 3].

³⁸ Associate Professor McCutcheon, *Submission 6*, [p. 3].

³⁹ Terri Janke and Company, *Our culture: our future*, 1998, p. XLI.

⁴⁰ Terri Janke and Company, *Our culture: our future*, 1998, p. XLI.

to ensure that its usage is in connection to Aboriginal people for the advancement of their rights:

The role of a trust or a national Indigenous cultural authority is like a guardian for its integrity. It could be like saying that you still need to consult and think about how you use that flag. It's not going to be put on everything. It's got to have some connection to Aboriginal people or some connection to the way it was originally intended, as advancing Indigenous rights. So to put it on a beer bottle might be against that spirit, but if you're a football team or a kids netball team wanting to put it on your guernsey, for when you're running on the field, that might be something that would fall within a suitable use.

I think the guardians, a trust, could look after and make sure that the process is appropriate, that there is that connection, and have consultation with people for its suitable use. We don't want to see it derogatorily treated. I think we must be mindful also of the right of attribution, the connection to the creator of the flag.⁴¹

- 5.44 The Central Land Council recommended the establishment of an Aboriginal Flag Commission or Council as a subsidiary of a National Indigenous Cultural Agency as envisaged by Dr Janke:

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).⁴²

A voice to parliament

- 5.45 Several submitters and witnesses stated that an Indigenous voice to parliament could play a role in the context of the Aboriginal flag. A voice to parliament could involve amending the Constitution to establish an Aboriginal and Torres Strait Islander group of people to provide advice to parliament about Indigenous issues.⁴³
- 5.46 One submitter noted that a dedicated voice to parliament may have identified the issue earlier and made the resolution process easier,⁴⁴ while others suggested that such a body would be best placed to administer the flag. Ms Claire Coleman stated that she did not believe 'that any organisation currently is set up to administer the flag copyright in the situation we're in right now', and that a new body would need to be established unless 'there were actually the constitutional arrangements suggested in the Uluru

⁴¹ Dr Janke, Terri Janke and Company, *Committee Hansard*, 25 September 2020, p. 2.

⁴² Central Land Council, *Submission 46*, p. 9.

⁴³ Referendum Council, *An Indigenous voice*, www.referendumcouncil.org.au/discussion-topics/indigenous-voice.html (accessed 5 October 2020).

⁴⁴ Reconciliation Victoria, *Submission 11*, [p. 1].

statement, which would give us an administrative body which could in fact administer the flag'.⁴⁵ Mr Ngunggai Warren Mundine AM shared this view, stating that while there are a number of existing peak bodies that could administer the flag, eventually voice to parliament would be the preferred option.⁴⁶

Future licensing structure

5.47 If the current licence agreements are negotiated or wrested away from the current licensees, submitters and witnesses suggested how a future licensing scheme for use of the Aboriginal flag could be structured. A tiered licensing system was raised by a number of submitters and witnesses, with different fees and conditions applying to commercial and non-commercial use. For example, Dr Dimitrios Eliades suggested:

This body of indigenous representatives duly elected by their indigenous communities to be the exclusive licensee may grant sublicenses 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...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.⁴⁷

5.48 The National NAIDOC Committee also advocated for different fees for different uses, distinguishing, in particular, between use by community organisations and multinational companies:

It depends on what licence the federal government is able to secure. So, at the moment, we're saying a non-commercial licence. That would still allow Mr Thomas and licensees to have their commercial rights to that material. If they grant both licenses, then that would be a different sort of structure. But, yes, I think there would have to be a sliding scale of fees, focused on community organisations and how much they want to use the flag or on multinational companies that want to use the flag.⁴⁸

5.49 The National NAIDOC Committee determined that the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) might provide a useful framework to 'filter' organisations into a scaled system:

⁴⁵ Ms Claire Coleman, private capacity, *Committee Hansard*, 24 September 2020, p. 15.

⁴⁶ Mr Ngunggai Warren Mundine AM, private capacity, *Committee Hansard*, 24 September 2020, p. 15.

⁴⁷ Dr Dimitrios Eliades, *Submission 17*, pp. 14–15.

⁴⁸ Mr Janke, NNC, *Committee Hansard*, 24 September 2020, p. 44.

What's the legislation that encompasses the majority of Aboriginal or Torres Strait Islander organisations or corporations? At the moment it's the CATSI Act, which has about 3,300 organisations. You might also be able to include not-for-profit organisations and charities that are listed under the commission's register. You could extend that to Indigenous businesses, if the businesses were part of a commercial licence, and registration with Supply Nation. I think the object of using the CATSI Act is that it would filter down to as many organisations, corporations and community based companies as possible. If you think that there are 3,300 organisations, they might cover hundreds of thousands of Aboriginal and Torres Strait Islander people within their core functions, so something like that would allow them to use it for non-commercial purposes.⁴⁹

- 5.50 AIME Mentoring supported differential fees, adding that the fee for use of the Aboriginal flag could also depend on whether the flag was being used to advance the interests Aboriginal people:

One was that there's a licence available for free for organisations registered through the CATSI Act and potentially for Indigenous organisations at large or people who can prove that they benefit the work of Aboriginal people. Potentially it might extend to all First Nations people in that process...I don't mind that there's a little bit of a pendulum swing to mainstream organisations; I think it's an opportunity to challenge some of the mainstream organisations if they do use the Aboriginal flag or want to use the Aboriginal flag. It says, 'Okay, what are you going to be doing with this?' I don't think the fashion groups being able to put an Aboriginal flag on a pair of swimmers, for example, or something else that they then go and make profits from necessarily advances the progress of Aboriginal people. I think that's a grey zone where it's worth thinking about the design frame around it.⁵⁰

A new 'fair dealing' exception

- 5.51 Introducing a new fair dealing or fair use exception under the Copyright Act was raised by a number of submitters and witnesses as an option to balance the interests of those wishing to use the Aboriginal flag, with Mr Thomas's rights as the copyright owner.⁵¹ Paragraph 1.16 outlines a number of exceptions to copyright that are presently legislated for 'fair dealings'; none of these currently apply to use of the Aboriginal flag in a general sense.
- 5.52 The Australian Lawyers' Alliance argued that a fair dealing exception warrants serious consideration, as the Aboriginal flag has become a 'widely accepted

⁴⁹ Mr Janke, National NAIDOC Committee, *Committee Hansard*, 24 September 2020, pp. 47–48.

⁵⁰ Mr Jack Manning Bancroft, Chief Executive Officer, AIME Mentoring, *Committee Hansard*, 23 September 2020, pp. 23–25.

⁵¹ Associate Professor McCutcheon, *Submission 6*, p. 2; Dr Matthew Rimmer, *Submission 14*, p. 41; Reconciliation Australia, *Submission 25*, p. 3.

symbol of unity for Aboriginal people' and 'represents an essential medium by which Aboriginal people assert their identity'.⁵²

- 5.53 In a joint submission, Dr Dilan Thampapillai, Mr Andrew Ray and Ms Georgia Reid outlined the difference between 'fair dealing' and 'fair use' (some submitters and witnesses without copyright expertise did not distinguish between the two concepts), stating:

We note that a number of commentators have recommended a 'fair use' option. However, there is a significant difference between fair dealing, which is an established exception under Australia's *Copyright Act*, and fair use, which does not presently exist within the Act. If Australia were to enact a fair use exception, particularly for the specific purpose of the Aboriginal Flag, it would give rise to an extraordinarily complex question of interpreting and applying domestic Australian copyright law. As this would likely frustrate the purposes of the Committee's inquiry, we make no further comment on the issue of fair use other than to advise the Committee against adopting that terminology.⁵³

- 5.54 Associate Professor McCutcheon explained how an exception could be legislated to allow 'free use' of the flag for certain purposes:

It would be possible for Parliament to legislate an additional fair dealing exception designed to facilitate the 'free use' of the Aboriginal Flag. The wording of the exception would have to be carefully considered, but something like a fair dealing for the purpose of 'cultural expression' could be introduced.⁵⁴

- 5.55 Others were hopeful that an exception could facilitate use for Aboriginal people seeking to use the flag for non-commercial use.⁵⁵ For example, Ms Jacqui Katona stated:

It shouldn't be controversial to negotiate fair use, for a nominal fee or no fee, for a range of uses of the Aboriginal flag by Aboriginal people for Aboriginal people. These shouldn't be issues that are causing controversy...I think it's pretty well agreed that we don't want to see any copyright protection diminished for any copyright holder, given the difficulty there is in maintaining protections, generally, for Aboriginal art and Aboriginal artists. Harold being central to any process, going forward, is something that everybody is agreed upon. But the nature of fair use by Aboriginal people—that is, non-commercial use—I think, is really at the heart of the problem. Commercial use can be problematic where organisations are engaged in profit making, yet they're not prepared to financially acknowledge the holder rights. That's a problem with very basic

⁵² Australian Lawyers Alliance, *Submission 21*, p. 6.

⁵³ Dr Thampapillai, Mr Ray and Ms Reid, *Submission 40*, p. 4.

⁵⁴ Associate Professor McCutcheon, *Submission 6*, p. 2.

⁵⁵ Ms Kelleher, New South Wales Indigenous Chamber of Commerce, *Committee Hansard*, 22 September 2020, p. 37.

Australian law not just the moral issue that it carries for Aboriginal people.⁵⁶

- 5.56 Another option could be 'fair dealing for a prescribed purpose authorised by regulation', which would be a more prescriptive scheme for permissible uses, but with flexibility to ensure appropriate protection and compensation for Mr Thomas:

An alternative to a cultural expression fair dealing exception might be a more limited new fair dealing exception for a prescribed purpose authorised by regulation. This could allow a bespoke scheme to be crafted and then prescribed by regulation...The scheme could more particularly specify permissible uses and any compensation that needs to be paid (perhaps managed through the Copyright Agency)...Again, this fair dealing exception could have more general application than just the Aboriginal Flag and would allow the government to regulate fair dealing purposes more quickly than legislating other bespoke fair dealing exceptions as required. The potential disadvantage is the reduced Parliamentary oversight and public debate surrounding potentially important changes to the copyright balance effected by regulation.⁵⁷

- 5.57 As with many options raised with the committee, such an exception would have a corresponding impact on Mr Thomas's rights as the copyright owner. Associate Professor McCutcheon remarked:

The potential problem with this approach is that 'freeing' the flag as a fair dealing comes at a corresponding cost to Mr Thomas and his licensees, because uses which currently require permission and are financially compensated would no longer require permission if they met the conditions of the exception. This would represent a financial loss for Mr Thomas and his licensees.⁵⁸

- 5.58 Associate Professor McCutcheon did forewarn, however, that uncertainty around whether the fair dealing exception applies in any particular circumstance may ultimately defeat the purpose of such a solution:

What do we mean by 'cultural expression'? When will a dealing be 'fair'? In particular, there may be questions about *whose* purpose qualifies. For example, would the exception cover a third party manufacturer applying the Aboriginal Flag to coffee mugs for a clear commercial purpose if the downstream purpose is to facilitate their *customers'* cultural expression? How should the exception reconcile uses which have a profit objective but which are dedicated to Aboriginal causes? It may take a few court decisions to clarify the contours of this new fair dealing, especially whether businesses can use the defence. In the meantime, uncertainty about the

⁵⁶ Ms Katona, private capacity, *Committee Hansard*, 14 September 2020, pp. 34–35.

⁵⁷ Associate Professor McCutcheon, *Submission 6*, p. 4.

⁵⁸ Associate Professor McCutcheon, *Submission 6*, p. 2.

exception will likely lead to risk aversion and a poor uptake of the exception, defeating its purpose.⁵⁹

A new flag

5.59 While many submitters and witnesses opined that an outcome should be reached through negotiations with Mr Thomas, others suggested that the Aboriginal flag is 'dying' and that the time has come for a new Aboriginal flag to be created.

5.60 According to Mr Michael Connolly:

...the flag is slowly dying. I've had people that have come to my business, my shop, my emails. They are sick and tired of non-Indigenous people running our country, running our businesses and running our flag. They have said to me over the last 18 months, "We don't even want the flag".⁶⁰

5.61 Ms Gail Beck, Chair of the Aboriginal Advisory Council of Western Australia, described the anger and distress felt by some Aboriginal people about the current situation with the Aboriginal flag. Ms Beck told the committee:

...there are quite a large number of people who have decided to turn the flag upside down and are seeking to create a new one which the people will forever own. Also with us creating a new flag they see then that WAM will get nothing. They're very angry basically.⁶¹

5.62 Mr Michael Graham, Chief Executive Officer for the VAHS, explained how this distress and anger has created division, with some Aboriginal people arguing for the creation of a new flag:

What's happening is some people are getting so angry they're just saying, 'Stuff it, we'll just create a new one.' Others are saying, 'My family have been fighting under this flag as a united people since it first came to the embassy, because then it became more nationally recognised. So you've got two groups of people. I haven't heard a lot saying, 'Create a new one,' but it is out there. When I say that, it's probably more the social media stuff that you see, because, as you know, in Melbourne we're locked in our houses, basically. We don't get the chance to get out so we use the media, social media outlets, more than anything. There are people saying, 'No, it's been tainted.' There are people saying, 'No, my family fought hard for this.'⁶²

5.63 The Indigenous Wellbeing Centre highlighted that the prospect of a new flag is particularly painful for some Aboriginal Elders:

A lot of the younger ones, in particular, been saying, 'We should have a competition to design a new flag.' I suppose what a lot of the elders are

⁵⁹ Associate Professor Jani McCutcheon, *Submission 6*, [pp. 2–3].

⁶⁰ Mr Michael Connolly, private capacity, *Committee Hansard*, 22 September 2020, p. 18.

⁶¹ Ms Beck, Aboriginal Advisory Council of Western Australia, *Committee Hansard*, 23 September 2020, p. 17.

⁶² Mr Graham, VAHS, *Committee Hansard*, 23 September 2020, p. 17.

saying, 'Well, that's not actually really a resolution; that's really accepting defeat and allowing this to happen to us.'⁶³

- 5.64 Witnesses told the committee how Aboriginal people identify with the history of the Aboriginal flag, and explained that the suggestion to design a new flag is borne out of anguish:

...for the first time since the early 1970s, that Aboriginal people are electing to not use the flag, starting conversations about designing a new flag. This is unprecedented in my lifetime. It speaks to the fact that Aboriginal people identify with the history of this symbol – as a mix of pride and resistance and our shared history. But they are now in distress and seeking a new way forward. It would be a great shame for a new flag to be required based on a failure to resolve this complex issue.⁶⁴

- 5.65 Mr Mick Gooda told the committee that he had already 'abandoned the flag' and explained that the Gangalu people in Central Queensland had started developing their own flag:

I understand and support Mr Thomas's right to benefit from his intellectual knowledge and his contribution. But I've taken a different view. I've decided that, while he has a right to do that, I've got a right not to buy and contribute to some white bloke who is going to benefit from our flag. I've sort of abandoned the flag now. I belong to the Gangalu people in Central Queensland, and we're starting to develop our own flag. I understand what [Mr Warren Mundine] was saying—it's iconic, it's a symbol of where we are—but I just take a personal view that I'm paying a ransom, paying people for that right. What I've done is work out the balance between the right for Mr Thomas to benefit from that against my right to make a choice, and that's the choice I've made.⁶⁵

- 5.66 Professor Langton saw a new flag as the only way forward in the event that ongoing negotiations between the Commonwealth government and Mr Thomas are unsuccessful:

I do hope those negotiations are successful. If they are not, then the only alternative we have is to have a competition for a new flag. I think that would be a tragic outcome. I think it's enormously important to preserve the flag designed by Mr Harold Thomas as the Aboriginal flag.⁶⁶

- 5.67 AIME Mentoring was more optimistic about the prospect of a new Aboriginal flag, and described the current situation as an opportunity to create something new:

There's constantly renewal as we grow into the shoes of what we're inheriting and we start to be able to vote and think about what that looks like. So I think there's opportunity for creativity. Our suggestion is that

⁶³ Mrs Young, Indigenous Wellbeing Centre, *Committee Hansard*, 23 September 2020, pp. 21–22.

⁶⁴ Ms Peris, *Submission 44*, p. 2.

⁶⁵ Mr Gooda, private capacity, *Committee Hansard*, 24 September 2020, p. 12.

⁶⁶ Professor Langton, private capacity, *Committee Hansard*, 24 September 2020, p. 2.

there could be a national flag designing campaign which could have some freedom and flavour to it and which could see people designing a new Australian flag as well and continuing to explore: What does the Australian story look like? Does the Australian flag tell our story as First Nations people with strength? I would say that there is potentially scope for evolution. I hope that we might see some of that evolution in the way that our national symbols are portrayed in the next 30 years.⁶⁷

⁶⁷ Mr Manning Bancroft, AIME Mentoring, *Committee Hansard*, 23 September 2020, p. 31.

Chapter 6

Committee view

- 6.1 The Aboriginal flag tells a story of three intertwined but at times conflicting identities. It is at once the creation of an artist, a symbol of Aboriginal pride and struggle, and an official flag of Australia. For that reason, it is a flag quite unlike others.
- 6.2 Mr Harold Thomas's copyright over the design of the Aboriginal flag was recognised by the Federal Court of Australia in 1997 and that legal recognition is central to consideration of this issue. Mr Thomas has neither assigned nor transferred his rights to another person or entity at any stage since the court's decision. He continues to hold his copyrights, and will continue to do so until 70 years after his death under current arrangements. Mr Thomas is entitled to all rights vested in him under the *Copyright Act 1968* (Cth), including the right to enter into licence agreements.
- 6.3 The committee considers it vitally important to protect artists' copyright, particularly, Aboriginal artists. The committee therefore rejects calls for the Commonwealth government to invoke its constitutional power to compulsorily acquire the copyright in the Aboriginal flag. As various submitters and witnesses told the committee, such an outcome would perpetuate the dispossession, injustices and racial discrimination endured by Aboriginal Australians for more than 200 years, and establish a dangerous precedent in circumstances where much work has been undertaken to strengthen protections for Indigenous artists.

Recommendation 1

- 6.4 **The committee recommends that the Commonwealth government does not compulsorily acquire the copyright for the Aboriginal flag under section 51(xxxi) of the *Australian Constitution*.**
- 6.5 The committee supports the government's desire to negotiate an outcome with Mr Thomas and the current licence holders. Those negotiations—whilst based on the legal realities of the situation—are not occurring in a vacuum. A balance must be struck between the legal rights and the value of the Aboriginal flag to the copyright holder and licensees, and the Aboriginal flag's deep and intrinsic significance to Aboriginal people and their lives. At present, the extent to which the distress and anguish voiced by many Aboriginal people about the flag, its use and its future are being weighed in negotiations is opaque.
- 6.6 The committee is amenable to an outcome where the current exclusive licences expire or are terminated, particularly those held by WAM Clothing and Wooster Holdings (Gifts Mate); the Commonwealth enters into an

agreement(s) for community use of the Aboriginal flag leaving Mr Thomas's rights intact; and custodianship of the flag is vested in an independent Aboriginal body, such as the kind recommended by Dr Terri Janke. Such a body would therefore bear responsibility for maintaining the integrity and upholding the dignity of the Aboriginal flag, as well as make decisions about the flag's use.

- 6.7 The committee considers that the creation of an independent Aboriginal body with custodianship of the Aboriginal flag could be informed by a parliamentary inquiry to ensure its independence and transparency regarding its membership. An independent body with custodianship of the Aboriginal flag could also assist, if the Torres Strait Island Regional Council (TSIRC) requests it, the TSIRC with applications for the use of the Torres Strait Islander flag given the resourcing and administrative burdens associated with processing those applications.

Recommendation 2

- 6.8 **The committee recommends that, in the negotiations underway with Mr Harold Thomas and the current licensees, the Commonwealth government aims to achieve a model for the future use of the Aboriginal flag by members of the community that is independent from government, that involves and consults with Aboriginal people, and that ensures that the body selected bears responsibility for:**

- **maintaining the integrity of the Aboriginal flag;**
- **upholding the dignity of the Aboriginal flag; and**
- **making decisions about the Aboriginal flag's use.**

- 6.9 **Subject to the rights of Mr Thomas, a parliamentary committee may be of assistance in framing the structure of a body that could have custodial oversight of the Australian Aboriginal Flag.**

**Senator Malarndirri McCarthy
Chair**

Additional comments from Senator Andrew Bragg

- 1.1 I would like to begin by paying tribute to all members of the committee for the manner in which this inquiry was held. It was collaborative, respectful and constructive.
- 1.2 As a non-indigenous person, I feel the strength and symbolism of the Aboriginal flag and believe it should be available to all Australians to use widely.
- 1.3 The Aboriginal flag should be as free as the Australian flag. It is a wonderful symbol.
- 1.4 The evidence is overwhelming that Aboriginal people are ceasing use of the flag because of the complex flag use arrangements, some of which were put in place from 1995.
- 1.5 The gazetting of the flag under the Flags Act was bungled. It is a classic case of the government failing to consult with Indigenous Australians before acting – exactly what the Uluru Statement proposes that we stop doing through an Indigenous Voice.
- 1.6 In this case, the creator of the flag, Mr Harold Thomas, was informed as an afterthought. He refused to attend the ceremony.
- 1.7 The government and this inquiry now seek to right this wrong without injuring Mr Thomas. It is very important that Mr Thomas's rights are respected as Professor Langton noted during the inquiry.
- 1.8 At first I was sceptical about what this inquiry could achieve.
- 1.9 I was concerned that it may undermine sensitive negotiations which Minister for Indigenous Australians Ken Wyatt has been undertaking with the flag's designer Harold Thomas for some time.
- 1.10 Instead, I found the inquiry to be a very positive process which shed light on many issues which were misunderstood and/or culturally sensitive.
- 1.11 I agree with Recommendation One, that the Commonwealth should not compulsorily acquire the rights to the Aboriginal flag. I believe that would be abhorrent, both morally and culturally. It would be an ugly precedent.
- 1.12 Recommendation Two reinforces the position the Minister is seeking to land. It again raises the question of how the Commonwealth should engage with Indigenous Australians. This is an area of policy which has failed over the generations.

- 1.13 Accordingly, if the Commonwealth's negotiations are successful and the rights are acquired, a body of Aboriginal people should advise on the protocol and governance of the flag.
- 1.14 One option I favour is to provide the Indigenous Voice, as proposed in the Uluru Statement, with a mandate to perform this role. Any such proposal should be decided in concert with Mr Harold Thomas, respecting his rights as copyright holder.
- 1.15 The Voice is currently under development through a process of co-design in accordance with the statements issued by the Minister for Indigenous Australians, Ken Wyatt.
- 1.16 It is desirable for issues like this to be subject to community agreement. The importance of community involvement in formulation and implementation of policy cannot be overstated.
- 1.17 Finally, I would like to congratulate the Chair, Senator Malarndirri McCarthy, on the professional and constructive manner in which she conducted this inquiry.
- 1.18 The bipartisan way in which this committee was run with a mutual desire for a positive result for Indigenous Australians was clear.
- 1.19 My thanks to all the Senate colleagues on this committee, as well as the community members who gave their time to support our deliberations.

Senator Andrew Bragg
Senator for New South Wales

Additional comments from the Australian Labor Party

- 1.1 The Australian Labor Party supports the recommendations of this inquiry. We are strongly of the view that the negotiations over the future use of the Aboriginal flag be concluded in a timely manner.
- 1.2 With this in mind, the ALP recommends that in the event that the Commonwealth government is unable to negotiate an outcome with Mr Harold Thomas and the current licensees, the government compulsorily acquires those licences. The purpose of any such acquisition should be limited to allowing the collective free use of the flag and its design for Aboriginal individuals, communities and organisations as well as the general public for non-profit purposes. The commercial rights of the parties should be respected as far as possible in any compulsory acquisition.
- 1.3 It is clear that the conduct of WAM Clothing and its approach to enforcement of its rights as a licensee is a significant contributor to the harm and distress experienced by Aboriginal people. Evidence to the committee that the Aboriginal flag is being held upside down or that it is slowly dying emphasises the deep distress and anguish about the current circumstances. Sorry Business is a deeply significant ceremony; references by First Nations people to the flag as dying heighten that distress.
- 1.4 In that regard, the ALP is concerned that prolonged negotiations between the Commonwealth government, Mr Thomas and the licensees will exacerbate the distress and harm to Aboriginal communities. Resolution of the current dispute in 12 or 18 months' time may be too late and may result in Aboriginal people—as some have already done—abandoning the flag, a flag that has since its inception been a symbol of solidarity and struggle, of pride and protest, a unifying flag of and for Aboriginal people. We therefore urge the Commonwealth government, Mr Thomas and the licensees to engage in negotiations constructively, in good faith and good time. The ALP is concerned that the importance and history of the flag is being lost to community and feels that it is appropriate to have the negotiations completed by 26 January 2021.

Senator Malarndirri McCarthy
Chair
Senator for the Northern Territory

Senator Patrick Dodson
Senator for Western Australia

Additional comments from the Australian Greens

- 1.1 The Australian Greens are concerned at the amount of community distress and harm caused by the licensing arrangements currently in place over the Aboriginal flag, particularly as the licenses are held, and are being profited from, by non-Aboriginal people.
- 1.2 We support the recommendations in the committee's majority report, and in the Chair's additional comments.

Community involvement

- 1.3 In line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Australian Greens affirm the rights to self-determination by all Aboriginal and Torres Strait Islander people.
- 1.4 We support the committee's view that an independent Aboriginal body be created for the custodianship over the Aboriginal flag and to make decisions about its use.
- 1.5 The Australian Greens believe that to uphold the rights to self-determination for Aboriginal people enshrined in the UNDRIP, the proposed independent Aboriginal body needs to meaningfully include and engage a broad representation of grassroots Aboriginal community members and voices.

Commercial uses of the flag

- 1.6 We believe that it's important for the proposed independent Aboriginal body to also make decisions regarding any commercial uses of the Aboriginal flag, and for any fees collected within any future licencing arrangements to be directed in the way that body chooses, for the benefit of Aboriginal people and communities.

Resourcing and administration of flag permissions

- 1.7 The Australian Greens acknowledge the cultural authority of the Torres Strait Island Regional Council (TSIRC) and their leadership in ensuring that the Torres Strait Islander flag is used in accordance with their community's wishes and cultural protocols.
- 1.8 In evidence, the TSIRC advised the committee that their limited funding can restrict what actions they can take when there are instances of misuse of the Torres Strait Islander flag.¹

¹ Mayor Phillemon Mosby, Mayor, Torres Strait Island Regional Council, *Committee Hansard*, 24 September 2020, pp. 50-51.

- 1.9 The Australian Greens note that the committee, in paragraph 6.8, considers that the proposed independent Aboriginal body could also assist the TSIRC with applications for the use of the Torres Strait Islander flag if the Council requests it.
- 1.10 Until such a time that the TSIRC can make that request to this independent body, if that is in fact their wish, the TSIRC should be properly resourced to ensure that the Torres Strait Islander flag is used in accordance with their community's wishes and in line with all relevant cultural protocols.

Recommendation 1

- 1.11 That the Torres Strait Island Regional Council receives sufficient public funding and resourcing to ensure the Torres Strait Islander flag is used in accordance with the Council's requirements.**

Senator Lidia Thorpe
Senator for Victoria

Appendix 1

Submissions, additional information, answers to question on notice, tabled documents and published correspondence

Submissions

- 1 Carroll & Richardson Flagworld
- 2 WAM Clothing Pty Ltd
- 3 Gifts Mate
- 4 Department of the Prime Minister and Cabinet
- 5 Australian National Flag Association
- 6 Associate Professor Jani McCutcheon
- 7 Diabetes Victoria
- 8 McCulloch & McCulloch
- 9 Thungutti Local Aboriginal Land Council
- 10 Ms Louise Robinson
- 11 Reconciliation Victoria
- 12 Arts Law Centre of Australia
- 13 National Basketball League
- 14 Dr Matthew Rimmer
- 15 Ms Claire Coleman
- 16 Mindaribba Local Aboriginal Land Council
- 17 Dr Dimitrios Eliades
- 18 Bubup Wilam Aboriginal Child and Family Centre
- 19 Australian Football League
- 20 Gurindji Aboriginal Corporation
- 21 Australian Lawyers Alliance
- 22 NSW Aboriginal Land Council
- 23 Mr John Burgess
- 24 Professor Peter Yu
- 25 Reconciliation Australia
- 26 Reconciliation Tasmania
- 27 Spark Health Australia and Clothing The Gap
- 28 Cricket Australia
- 29 Legal Aid Queensland
- 30 Australian Copyright Council
- 31 Coalition of Major Professional and Participation Sports (COMPPS)
- 32 Aunty Rieo Ellis
- 33 FAL Lawyers
- 34 Dr Fady Aoun

- 35 Shepparton Region Reconciliation Group
- 36 National Association for the Visual Arts
- 37 Bahtabah Local Aboriginal Land Council
- 38 Copyright Agency
- 39 Lloyd McDermott Rugby Development Team Inc.
- 40 Dilan Thampapillai, Andrew Ray and Georgia Reid
- 41 The Institute of Patent and Trade Mark Attorneys of Australia
- 42 National Indigenous Australians Agency
- 43 Mr Michael Connolly
- 44 Ms Nova Peris
- 45 Dr Anne Fitzgerald and Dr Brian Fitzgerald
- 46 Central Land Council
- 47 *Confidential*
- 48 Aboriginal Peak Organisations NT
- 49 Tasmanian Government
- 50 Miss Renee Tighe
- 51 Soroptimist International Moreton North Inc
- 52 National NAIDOC Committee
- 53 Dreamtime Art
- 54 Yarn Strong Sista
- 55 NTSCORP
- 56 Bar Association of Queensland
- 57 Australia Council
- 58 Mr Darren Williams
- 59 National Aboriginal Community Controlled Health Organisation
- 60 AIME
- 61 Aboriginal Legal Services NSW/ACT
- 62 Indigenous Art Code
- 63 Mrs Janice Van der Spek
- 64 Mr Robert Heron
- 65 Mr Russell Logan
- 66 Ms Jenna Smith
- 67 Mr Martin Falcongreen
- 68 Mr Haydyn Bromley
- 69 Ms Meg Friel
- 70 Ms Charlotte Burton
- 71 *Confidential*
- 72 Mr Trevor Walley
- 73 Ms Sharon Gollan
- 74 Mrs Chris Knight

Additional Information

- 1 Correction to evidence provided by John Reid at the Select Committee into the Aboriginal Flag public hearing on 16 September 2020, received 22 September 2020.
- 2 Additional information provided by Dr Mathieu Gallois on 28 September 2020.
- 3 Correction to evidence provided by the Australian Institute of Aboriginal and Torres Strait Islander Studies at the Select Committee into the Aboriginal Flag public hearing on 22 September 2020, received 1 October 2020.
- 4 Additional information provided by the Indigenous Wellbeing Centre on 23 September 2020.

Answer to Question on Notice

- 1 Answers to questions taken on notice by the Australian Football League at a public hearing in Canberra on 14 September 2020.
- 2 Answers to questions taken on notice by Carroll & Richardson Flagworld at a public hearing in Canberra on 14 September 2020.
- 3 Answers to written questions on notice from WAM Clothing, received 18 September 2020.
- 4 Answers to questions taken on notice by the National Indigenous Australians Agency at a public hearing in Canberra on 14 September 2020.
- 5 Answers to questions taken on notice by the Attorney-General's Department at a public hearing in Canberra on 14 September 2020.
- 6 Answers to questions taken on notice by the National Indigenous Australians Agency at a public hearing in Canberra on 16 September 2020.
- 7 Answers to written questions on notice by Professor Nicholas Seddon received 28 September 2020.
- 8 Answers to written questions on notice by the ACCC received 30 September 2020.
- 9 Answers to questions taken on notice by Australian Copyright Council at a public hearing in Canberra on 22 September 2020.
- 10 Answers to questions taken on notice by the Central Land Council at a public hearing in Canberra on 23 September 2020.
- 11 Answers to questions taken on notice by Tandanya National Aboriginal Cultural Institute Inc at a public hearing in Canberra on 22 September 2020.
- 12 Answers to questions taken on notice by the Australian Institute of Aboriginal and Torres Strait Islander Studies at a public hearing in Canberra on 22 September 2020.
- 13 Answers to questions taken on notice by the Torres Strait Island Regional Council at a public hearing in Canberra on 24 September 2020.
- 14 Answers to written questions on notice from WAM Clothing, received 30 September 2020.
- 15 Answers to written questions on notice from the Department of Finance, received 2 October 2020.

- 16 Answers to written questions on notice from the National Indigenous Australians Agency, received 6 October 2020.
- 17 Answers to written questions on notice from Mr John Moriarty, received 7 October 2020.

Correspondence

- 1 Public Interest Immunity Claim received from The Hon Ken Wyatt AM MP, 11 September 2020

Tabled Documents

- 1 Document tabled by the National Indigenous Australians Agency at a public hearing in Canberra on 14 September 2020
- 2 Document tabled by Amelia Telford at a public hearing in Canberra on 23 September 2020
- 3 Document tabled by Mr Peter Francis at a public hearing in Canberra on 24 September 2020
- 4 Document tabled by Koori Knockout at a public hearing in Canberra on 24 September 2020
- 5 Document tabled by Koori Knockout at a public hearing in Canberra on 24 September 2020
- 6 Document tabled by Lloyd McDermott Rugby Development Team Inc at a public hearing in Canberra on 24 September 2020
- 7 Concept for the Aboriginal Flag (c.1960's) tabled by Mr John Moriarty at a public hearing in Canberra on 24 September 2020

Appendix 2

Public Hearings

Monday, 14 September 2020

Parliament House

Canberra

Arts Law Centre

- Ms Robyn Ayres, Chief Executive Officer

Mr Michael Green SC, Private capacity

Mr Edward (Ed) Heerey QC, Private capacity

Ms Frances St John, Private capacity

Professor Kimberlee Weatherall, Private capacity

Dr Fady Aoun, Private Capacity

Associate Professor Jani McCutcheon, Private capacity

WAM Clothing

- Mr Ben Wooster, Director
- Ms Semele Moore, Director

Gifts Mate Pty Ltd

- Mr Ben Wooster, Director

Flagworld

- Mr Wayne Gregory, Managing Director

Metro Local Aboriginal Land Council

- Ms Yvonne Weldon, Chair
- Mr Nathan Moran, Chief Executive Officer
- Aunty Ann Weldon

APY Art Collective

- Ms Sally Scales, Chairperson
- Ms Skye O'Meara, Collective Manager
- Ms Leah Brady, Director and Anangu woman
- Ms Yaritji Heffernan

Ms Jacqui Katona, Private capacity

Mr Boe Spearim, Private capacity

Spark Health Australia

- Ms Laura Thompson, Managing Director

Australian Football League

- Mr Stephen Meade, AFL Head of Legal and Regulatory
- Ms Tanya Hosch, AFL General Manager - Inclusion and Social Policy

Attorney-General's Department

- Mr David Lewis, General Counsel (Constitutional), Office of Constitutional Law

National Indigenous Australians Agency

- Mr Ray Griggs, Chief Executive Officer
- Mr Brendan Jacomb, Branch Manager, Legal Services Branch

Wednesday, 16 September 2020

Parliament House

Canberra

Department of Prime Minister and Cabinet

- Mr John Reid, First Assistant Secretary, Government Division

Department of Infrastructure, Transport, Regional Development and Communications

- Mrs Emma Shadbolt, Copyright Reform and Policy Section, Content and Copyright Branch

IP Australia

- Mr Michael Schwager, Director General

Copyright Agency Ltd

- Ms Libby Baulch, Policy Director

Tuesday, 22 September 2020

Parliament House

Canberra

Australian Copyright Council

- Ms Eileen Camilleri, Chief Executive Officer

Institute of Patent and Trade Mark Attorneys of Australia

- Mr Michael Caine, President

Indigenous Art Centre Alliance

- Ms Pamela Bigelow, Chief Executive Officer

Indigenous Art Code

- Ms Stephanie Parkin

Mr Michael Connolly, Private capacity

Mr Will Carter, Private capacity

Mr Matthew Rimmer, Private capacity

Tandanya National Aboriginal Cultural Institute

- Mr Dennis Stokes, Chief Executive Officer

Australian Institute of Aboriginal and Torres Strait Islander Studies

- Mr Craig Ritchie, Chief Executive Officer

New South Wales Indigenous Chamber of Commerce

- Ms Katherine (Kate) Kelleher, Director

Wednesday, 23 September 2020

Parliament House

Canberra

Aboriginal Peak Organisations Northern Territory

- Dr Josie Douglas, Senior Policy Officer

Diabetes Victoria

- Ms Kristie Cocotis, Access and Equity Manager
- Mr Colin Mitchell, Aboriginal Liaison Officer

Indigenous Wellbeing Centre

- Mr Ara (Julga) Harathunian, Director and Chief Executive Officer
- Mrs Janette Young, Communications Manager

Victorian Aboriginal Health Services

- Mr Michael Graham, Chief Executive Officer

Aboriginal Advisory Council of Western Australia

- Ms Gail Beck, Chair

AIME Mentoring

- Mr Jack Manning Bancroft, Chief Executive Officer

Australians for Native Title and Reconciliation

- Mr Paul Wright, National Director

Seed Indigenous Youth Climate Network

- Ms Amelia Telford, National Director

Thursday, 24 September 2020

Parliament House

Canberra

Professor Marcia Langton AO, Private capacity

Gurindji Aboriginal Corporation

- Mr Rob Roy Coordinator
- Ms Rosie Smiler, Director
- Mr Phil Smith, Chief Executive Officer

Ms Claire Coleman, Private capacity

Mr Mick Gooda, Private capacity

Ms Quitaysha Thompson, Private capacity

Mr Nyunggai Warren Mundine AO, Private capacity

Ms Nova Peris OAM, Private capacity

FAL Lawyers

- Mr Peter Francis

Coalition of Major Professional and Participation Sports (COMPPS)

- Ms Jo Setright

Mr John Moriarty AM, Private capacity

Melbourne Warriors

- Aunty Rieo Ellis

Lloyd McDermott Rugby Development Team Inc.

- Mr Dean Duncan, President

Koori Knockout

- Mr Edward Smith, Chairperson

National NAIDOC Committee

- Mr John Paul Janke, Co-Chair

Victorian NAIDOC Committee

- Ms Stacie Piper, Chairperson

Canberra and District NAIDOC Corporation

- Mr Maurice Walker, Chairperson

Torres Strait Island Regional Council

- Mayor Phillemon Mosby
- Ms Hollie Faithful, Chief Financial Officer
- Mr Peter Krebs, Legal Counsel and Manager
- Mr Luke Ranga, Head of Corporate Affairs

Friday, 25 September 2020

Parliament House

Canberra

Terri Janke and Company

- Dr Terri Janke, Solicitor Director