

Current and former copyright and licensing arrangements for the Aboriginal Flag design

Submission to Senate Select Committee on the
Aboriginal Flag

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Senate Select Committee's consideration of the current and former copyright and licensing arrangements for the Aboriginal Flag design.
2. The ALA recognises the importance of the Aboriginal Flag as a uniting symbol for the hundreds of Aboriginal nations across Australia. The Aboriginal Flag has also become an important medium by which non-Aboriginal Australians and organisations can express support for Aboriginal people. The ALA is concerned that the use of the Flag is now being significantly curtailed by private commercial interests and is opposed to the restrictions that have come into force regarding the use of the Flag. The ALA submits that the Government must take steps to ensure that the Flag is freely available to all Australians by legislating that copyright is not infringed by anyone making 'fair use' of the Flag.
3. The ALA also submits that the issue of intellectual property for Aboriginal and Torres Strait Islander people deserves further review as there is insufficient protection within the *Copyright Act 1968* (Cth) ('the Act') for the protection of Indigenous Cultural and Intellectual Property (ICIP). The ALA acknowledges that this is beyond the scope of the current inquiry.

The 'fair use' proposal

4. The ALA submits that the Committee should consider whether the introduction of a fair use exception into Australian copyright law would provide the mechanism necessary to ensure that the Aboriginal Flag is freely available to all Australians. The ALA notes that the Australian Law Reform Commission (ALRC) recommended in 2014 that a fair use exception be legislated into Australian copyright law.²
5. Such a fair use statutory provision in the Act could provide that the use of copyright material, in this case the Aboriginal Flag, does not infringe copyright if it is 'fair'. The provision could further stipulate certain principles, or 'fairness factors', to be considered when assessing whether the use is fair. The provision could also include a list of 'illustrative purposes'.

² Australian Law Reform Commission (ALRC) (2014), *Copyright and the Digital Economy – ALRC Report 122*, 'The Case for Fair Use' – Chapter Four.

6. As the ALRC noted, the same four fairness factors are used in fair use provisions in many other jurisdictions. These are also the factors that appear in the current Australian exceptions for fair dealing for the purpose of research or study. The four fairness factors are non-exhaustive and other relevant factors may be considered.³

The four fairness factors are:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
 - The nature of the copyrighted work;
 - The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - The effect of the use upon the potential market for or value of the copyrighted work.
7. The ALRC also noted that in other jurisdictions, fair use provisions set out illustrative purposes, i.e. examples of broad types or categories of use or purposes that may be fair. A particular use does not have to fall into one of these categories to be fair. Fair use is not limited to a set of prescribed purposes.⁴
8. In 2016 the Productivity Commission also recommended that the Act be amended to replace Australia's current exceptions with a broader fair use exception. The Commission stated that the key policy question for Government should be how to design exceptions that maximise the net benefit to the community.⁵ The Commission concluded that a principles-based fair use exception as Australia's system of user rights would assist to redress the imbalance between copyright holders, consumers and intermediate users, and that it would also go some way to addressing the disconnect between Australia's copyright arrangements and community expectations.⁶

³ Ibid, paragraph 4.8.

⁴ Ibid, paragraph 4.9.

⁵ Productivity Commission (2016), *Intellectual Property Arrangements - Productivity Commission Inquiry Report No. 78*, 23 September 2016, 184.

⁶ Ibid, 172–173, 183.

9. In the case of the Aboriginal Flag, the ALA submits that there are particular circumstances that warrant specific legislative attention to ensure appropriate fair use of the Flag. The Flag is a widely accepted symbol of unity for Aboriginal people and represents an essential medium by which Aboriginal people assert their identity. This significance of the Aboriginal Flag was acknowledged in 1995, when the Australian Government recognised the Aboriginal Flag as an official 'Flag of Australia' under the *Flags Act 1953* (Cth).
10. The ALA therefore submits that any amendment to the Act in relation to fair use should specifically address the issue of the Aboriginal Flag. This means that the Act could expressly provide that the copyright would not be infringed by anyone making fair use of the Flag, with specific provision that this include applying the Flag to clothing for charitable purposes, where individuals/organisations would otherwise experience undue hardship, private uses, and the production of images that incorporate the Flag for cultural, social or political events. Such a provision would also ensure that the copyright owner (Harold Thomas) maintains the ability to license the Flag for purely commercial uses.

The need for further protections of intellectual property for Aboriginal and Torres Strait Islander peoples

11. While acknowledging that it is beyond the scope of this current inquiry, the ALA considers it important for the Committee to note its concerns that the Act does not adequately protect the intellectual property of Aboriginal people, as it does not allow the benefits from publishing and reproducing ICIP to be easily transferred to, or shared with, all of the owners of that ICIP (being a group of people rather than an individual or a business).⁷
12. The ALA considers that under the Act, Aboriginal and Torres Strait Islander artists' rights are not adequately protected. The Act does not prevent persons from copying a *style* of artwork, and it will not always recognise the kind of communally-created and communally-owned artistic expression that is central to Aboriginal and Torres Strait Islander culture.⁸ The ALA

⁷ Stephanie Parkin and Kylie Pappalardo (2020), 'Protecting Indigenous art and culture: How the law fails to prevent exploitation', *Precedent* 159, 2020, 32-37.

⁸ See Terri Janke, *Our Culture: Our Future*, Report on Australian Indigenous Cultural and Intellectual Property Rights (Michael Frankel & Company, Sydney, 1998) 51–63; Terri Janke, *Indigenous Knowledge: Issues for protection and management*, Discussion paper, Commissioned by IP Australia and the Department of Industry, Innovation and Science (DIIS), 2018, 30–5.

submits that a comprehensive, standalone legislative framework is necessary to protect Indigenous cultural expression in Australia.

13. In 2018 the House of Representatives Standing Committee on Indigenous Affairs recommended that the Australian Government begin a consultation process to develop standalone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.⁹ The ALA submits that the current issue regarding the Aboriginal Flag provides the ideal opportunity to commence such a consultation.

14. The ALA submits that any consideration of a comprehensive, standalone legislative framework to protect Indigenous cultural expression in Australia must ensure that there is intimate involvement of Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander voices and perspectives should be included at all stages of legislative development, and should be properly listened to, respected and acted upon. The United Nations Declaration on the Rights of Indigenous Peoples should inform and guide the development of the legislation, particularly Article 31, which provides that Indigenous people have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.¹⁰

Conclusion

15. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Senate Select Committee's consideration of the current and former copyright and licensing arrangements for the Aboriginal Flag design. The ALA is available to further assist the Committee in its consideration of this issue.



Graham Droppert
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⁹ Australian Parliament 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) 3.

¹⁰ United Nations Declaration on the Rights of Indigenous Peoples 61/295 (13 September 2007).