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Submission by McCulloch & McCulloch Australian Art Books Pty Ltd

Thank you for the opportunity to make a submission to this inquiry.

1. We are making this submission as authors, writers, curators, publishers, gallerists and commentators on Australian art of more than 45 years professional experience. We are the authors and publishers of the major reference book *McCulloch's Encyclopedia of Australian Art* (in publication since 1968) and *McCulloch's Contemporary Aboriginal Art: the complete guide*, as well as the publishers of a range of other art books in partnership with Aboriginal art centres, communities and other Australian art entities. As gallerists we represent 45 Aboriginal-owned art centres.

2. As such we have an extensive working knowledge of the provisions of the Copyright Act as writer/creators, publishers whose books require copyright permissions from thousands of Australian artists as well as protecting the rights of artists whose work we show.

3. We fully recognize and support the rights of Harold Thomas as copyright owner of the artwork whose main usage is as the Aboriginal flag and acknowledge his absolute right to license the use of this image in whatever manner he sees fit.

4. We further acknowledge Mr. Thomas's long standing and unwavering commitment given widely and freely to all Aboriginal individuals, groups, medical and legal services and other Aboriginal community organisations to use the flag in numerous ways (including clothing) in a non-commercial manner.

5. Through the licensing arrangements Mr. Thomas has made, he has enabled authorized reproductions of the image made as a flag to be widely available for sale and with no requirements to obtain permission to actually fly the flag. In effect, the flag is free to fly by all.

6. Sadly there has been a wide degree of misreporting in the main media about this issue that portrays a different view and supports the notion that the flag is not free.

7. Should these licensing arrangements be allocated to an Aboriginal-owned entity? Preferably. However, allocating the rights to any one entity may not result in the flag being given any greater "freedom" to be used by other entities than it is currently.

7. Would the compulsory acquisition of the flag by the government result in the aim of the flag being 'free'? Not necessarily. A government may wish to acquire rights to an image such as that of the flag for their own purposes such as suppressing or downplaying its use. Governments also change and what the government of the day puts in place may well not be maintained by subsequent governments. And/or a government or its agent, may allocate licensing rights to commercial entities whose practices and philosophies may be at even greater odds with Aboriginal communities' concerns than is perceived of one of the entities which currently holds such rights.

8. The compulsory acquisition of a creator's copyright would instantly and irrevocably set a precedent for a similar acquisition of any creator's copyright. It would completely destroy the basic tenets of copyright for artists, writers, musicians, playwrights, film

makers and any other creators. For Aboriginal creators whose works have been, in the past, reasonably often reproduced or otherwise used in breach of copyright, such a possibility is of extreme concern.

9. What is the best way forward? Firstly, Mr. Thomas has the right to negotiate copyright agreements with whomever and in whatever way he deems appropriate. As has been noted during the course of this enquiry Mr. Thomas and several entities which currently holds licensing rights for certain products, are in negotiation for the possible transfer of his copyright to the National Indigenous Australians Agency - a Federal Government agency. We are however concerned that the level of public anger directed at Mr. Thomas over this issue may cause him to feel pressured into such relinquishing of his copyright. For a creator to relinquish copyright in an artistic work is a huge step and one we believe ought to be taken with great caution - not least because of the precedent it would set for other creators. Should NIAA become the owner of copyright in the Aboriginal flag, it would have unhindered rights for copyright and licensing arrangements as it saw fit. There could well be widespread concern of this by many Aboriginal people who would see it as government acquisition of a most important Aboriginal intellectual property.

10. An alternative solution could be to establish an independent trust with Mr. Thomas and his inheritors (the future copyright holders) to assist in the management of copyright and to negotiate fair and equitable licensing arrangements for the flag design.

Such a trust could be along the lines of two similar existing trusts:

- Trust to manage the Tino Rangatiratanga flag (used as the symbolic Māori Flag) of Aotearoa (New Zealand As outlined in an article in the NZ Herald(4/02.2010. **The** designers of the Maori Flag asserted their copyright in order to reclaim its correct usage after seeing it denigrated by commercialisation by overseas companies
 - The flag's designers then worked with a lawyer and established a Trust with 8 trustees to create and ensure money received from royalties would be used to work for Māori needs and causes
 - The trust is transparent, so the public is able to be aware of how the money is spent
 - The trust is used to help establish community initiatives such as education scholarships, a marae-based art school for all New Zealanders and a programme teaching Māori and New Zealand culture
- Namatjira Legacy Trust Established in 2017, the Namatjira Trust was instrumental in regaining copyright for the family of the late Albert Namatjira following a lengthy battle with the commercial entity which had bought the entire copyright in Namatjira's work from the Public Trustee of the Northern Territory for \$8500 in 1983. The Trust's board includes members of the Namatjira family and it works in partnership with the family's representative Aboriginal-owned art centre Iltja Ntjarra Many Hands Art Centre. As well as organising licensing and royalty provisions now managed by the Copyright Agency, the Namatjira Trust uses monies from royalties and licensing income to enable a wide range of professional and other initiatives for Indigenous watercolour artists.

In conclusion

Both of these Trusts, we believe, offer valuable examples for the benefits of establishing a trust with and to support Mr Thomas and his family which would provide an accountable, independent entity to manage copyright and licensing arrangements for the Aboriginal flag while enabling its creator to maintain copyright.

Yours sincerely,
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