

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: References within the National Indigenous Australians Agency submission to archival material

Senator: McCarthy

Question reference number: 0004

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 4

Question:

Can the NIAA please provide further detail in relation to the archival material and indication referenced in its submission?

Answer:

It was in an information paper prepared by the Aboriginal and Torres Strait Islander Commission (ATSIC) National Policy Office in January 2002 to inform the ATSIC Board about the Licence granted to ATSIC and the 35 Regional Councils for the use of the Aboriginal Flag design. The paper referred to an ATSIC Board meeting that took place on 15-17 August 2000. The paper stated "... if ATSIC is replaced by a Department of State, the Licence would not transfer to the Commonwealth." A copy of this document, as previously released under the FOI Act, is attached. However, it should be noted this was not part of the ATSIC Licence so whilst an expressed intention it is not a condition of the licence. Clause 7 of the ATSIC Licence under the heading "ENTIRE AGREEMENT" states "This Agreement constitutes the entire agreement between the Parties and supersedes any prior negotiations, discussions or agreements between the Parties concerning its subject matter.

COMMISSION - IN - CONFIDENCE
SUBMISSION

FILE NO:	AGENDA NO : 107 FC2 PAPER NO : 32 257 MEETING NO : 73 DATE : 19 - 21 February 2002
TITLE	Information Paper - Aboriginal Flag
ORIGINATING OFFICE	National Policy Office
PURPOSE	To inform the Board about the Licences granted to ATSIC and the 35 Regional Councils for the use of the Aboriginal Flag design.
COST FIN YR : (2002/03)	N/A
RELATED SECTIONS OF: • THE ACT (Section/s)	7 and 10
OUTPUT GROUP / OUTPUT (Ref: Output Funding Statements)	Output Group 2.5 - Indigenous Rights
ISSUES (Include special considerations, urgency)	Mr Thomas has granted a Licence to ATSIC and the Regional Councils to use the Aboriginal Flag design.
MEDIA IMPLICATIONS (If YES please provide details in submission).	No
AUTHORISATION • LEGAL COMPLIANCE • FUNDS AVAILABILITY	Section 22
CONSULTATION	YES
• COMMISSIONER / REGIONAL COUNCIL CONSULTED (Manager to contact)	N/A. Section 22
ENDORSEMENT • MANAGER • CHIEF EXECUTIVE OFFICER	Section 22 5/02/02

"This document may contain personal information, information supplied by applicants in confidence, or other information covered by Section 90 of the Aboriginal and Torres Strait Islander Commission Act 1989 or by privacy or Freedom of Information laws. Questions concerning its disclosure should be referred to ATSIC's Corporate Law Section."

COMMISSION - IN - CONFIDENCE

Released under the
FOI Act by the
National Indigenous
Australian Agency

ABORIGINAL FLAG

SUMMARY

1. The paper seeks to inform the Board about the Licence entered into between ATSIC and the copyright owner of the Aboriginal Flag design, Mr Harold Thomas, and the conditions of the Licence.

BACKGROUND

2. At Meeting No. 66 (15 – 17 August 2000), the Board gave in-principle support to a "one-off payment of Section 22" to Mr Harold Thomas for ATSIC's use of the Aboriginal Flag [its go¹ pending legal advice].

URGENCY

3. N/A.

CONSIDERATION OF ISSUES

4. The author of the Aboriginal Flag design, Mr Harold Thomas has granted to ATSIC and the 35 Regional Councils established under the *Aboriginal and Torres Strait Islander Commission Act 1989* a non-exclusive irrevocable worldwide Licence to reproduce the Aboriginal Flag design for any non-commercial purpose associated with the performance of their functions. The Licence extends to any Aboriginal representative bodies which may replace ATSIC and/or the Regional Councils in the future, eg if a Regional Council becomes a Regional Authority. However, if ATSIC is replaced by a Department of State, the Licence would not transfer to the Commonwealth.
5. The Licence requires that when it is proposed to reproduce the Aboriginal Flag design for any purpose other than for routine administrative purposes or for the benefit, ATSIC or the Regional Council concerned must acknowledge Mr Thomas as the author.
6. Schedule 1 of the Licence stipulates the Artwork (Item 1), Manner of Reproduction (Item 2) and Form of Acknowledgement and Attribution (Item 3) and is attached as **ATTACHMENT 1**.

MANAGER'S STATEMENT ON FINANCIAL IMPLICATIONS

7. N/A

RECOMMENDATION

That the Commission, pursuant to sections 7 and 10 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (the Act), and in accordance with the ATSIC Corporate Plan:

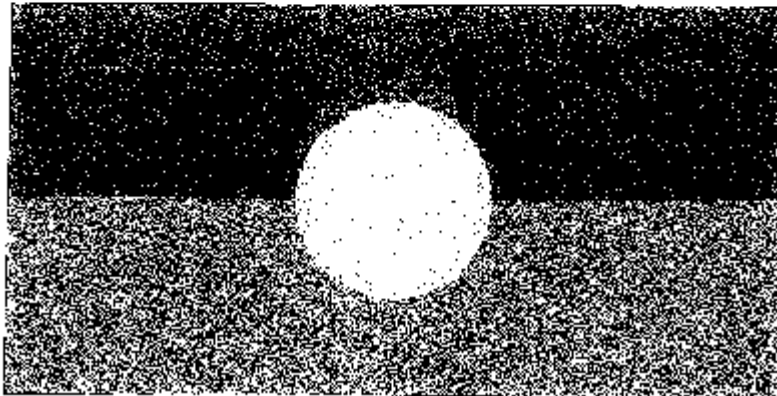
- a) **NOTE** that the author of the Aboriginal Flag design, Mr Harold Thomas has granted to ATSIC and the 35 Regional Councils established under the *Aboriginal and Torres Strait Islander Commission Act 1989* a non-exclusive irrevocable worldwide Licence to reproduce the Aboriginal Flag design for any non-commercial purpose associated with the performance of their functions.

Treaty Secretariat
National Policy Office

January 2002

Schedule 1

Item 1 – the Work



Item 2 – Manner of Reproduction

- A. The proportions of each reproduction of the Work shall be length/height = 2/1.
- B. When reproduced in colour the colours shall be:
 - Lower half – Scarlet Red, representing the red Earth, Aboriginal spiritual relationship to the land and red ochre used in ceremonies.
 - Upper half – Black, representing the Aboriginal people, past, present and future.
 - Centre Circle – Cadmium Yellow, representing yellow ochre and the Sun the giver of life.

Item 3 – Form of Acknowledgement and Attribution

Aboriginal Flag reproduced by permission of the author Harold Thomas © 1971

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Delivery of indication in Aboriginal and Torres Strait Island Commission archival material

Senator: McCarthy

Question reference number: 0005

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 1

Question:

Was the 'indication' expressed in formal advice, and if so, given by whom to ATSIC?

Answer:

The only document the National Indigenous Australians Agency has located to date is the information paper prepared by the Aboriginal and Torres Strait Islander Commission (ATSIC) National Policy Office in January 2002. The document refers to an ATSIC Board meeting that took place on 15-17 August 2000 in which the Board gave in-principle support to pay Mr Thomas for ATSIC's use of the Aboriginal Flag design.

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Location of indication in Aboriginal and Torres Strait Island Commission archival material

Senator: McCarthy

Question reference number: 0006

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 1

Question:

In what archival material was the 'indication' found (for example internal correspondence, formal minutes, advice to a minister)?

Answer:

In an information paper prepared by the Aboriginal and Torres Strait Islander Commission (ATSIC) National Policy Office in January 2002 which refers to an ATSIC Board meeting of 15-17 August 2000.

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Implications of the licence agreement not transferring to the Commonwealth

Senator: McCarthy

Question reference number: 0007

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 1

Question:

Is it apparent whether there was any discussion or consideration given to the implications of the licence not transferring to the Commonwealth, and if so was any action taken as a result of the indication that the licence would not transfer to the Commonwealth?

Answer:

Refer to the response to question answer 0004 relating to the hearing of the Senate Select Committee on the Aboriginal Flag.

The only record that has been located to date regarding the Aboriginal and Torres Strait Islander Commission's (ATSIC) consideration of the licence, is the information paper of January 2002. This document refers to the ATSIC Board meeting of 15-17 August 2000 and states "if ATSIC is replaced by a Department of State, the Licence would not transfer to the Commonwealth."

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Contracts entered into as Aboriginal and Torres Strait Island Commission as opposed to the Commonwealth

Senator: McCarthy

Question reference number: 0008

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 1

Question:

Is the NIAA aware of other examples in which the Aboriginal and Torres Strait Island Commission (ATSIC) entered into contracts as ATSIC, as opposed to the Commonwealth?

Answer:

The National Indigenous Australians Agency (NIAA) is unable to advise the Committee as to other examples in which Aboriginal Torres Strait Island Commission (ATSIC) entered into contracts as ATSIC, as opposed to the Commonwealth. The only ATSIC material that the NIAA has examined is in relation to the Aboriginal flag.

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Basis for decision to enter into contacts as Aboriginal and Torres Strait Island Commission

Senator: McCarthy

Question reference number: 0009

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 1

Question:

On what basis was a decision to enter into a contract as ATSIC rather than the Commonwealth made?

Answer:

The National Indigenous Australians Agency is unable to advise of the basis of Aboriginal and Torres Strait Islander Commission's (ATSIC) decision.

As a body corporate under the *Aboriginal and Torres Strait Islander Commission Act 1989*, ATSIC was a statutory corporation, that is, a separate legal entity from the Commonwealth, able to enter into agreements in its own right.

Senate Select Committee on the Aboriginal Flag

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Outcomes of contracts entered into as Aboriginal and Torres Strait Island Commission

Senator: McCarthy

Question reference number: 0010

Type of question: Written, Monday 28 September 2020

Date set by the committee for the return of answer: Wednesday 30 September, 2020

Number of pages: 1

Question:

What was the fate of those contracts with the dissolution of ATSIC?

Answer:

The National Indigenous Australians Agency (NIAA) is unable to advise what happened to all of Aboriginal and Torres Strait Islander Commission's (ATSIC) contracts.

As for the ATSIC Licence, as stated in the NIAA's submission of September 2020 (Submission 42), the ATSIC Licence only covered the reproduction of the Aboriginal Flag design for non-commercial purposes related to ATSIC's functions. The NIAA could only rely on the ATSIC Licence for functions which could be identified as previously performed by ATSIC and now NIAA. As such, the NIAA does not use, or purport to rely on, the ATSIC Licence.

Select Committee on the Aboriginal flag

ANSWERS TO QUESTIONS ON NOTICE

Aboriginal flag design

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Transfer of Aboriginal and Torres Strait Island Commission contracts

Senator: McCarthy

Question reference number: 0011

Type of question: Written

Date set by the committee for the return of answer: 30 September 2020

Number of pages: 1

Question:

Is the NIAA aware of other examples in which ATSIC indicated an intention that if ATSIC was to be replaced by a Department of State, contracts (such as the licence agreement with Mr Thomas) would not transfer to the Commonwealth, and the basis on which such a decision would be made?

Answer:

The National Indigenous Australians Agency is not aware of other examples.

Select Committee on the Aboriginal flag
ANSWERS TO QUESTIONS ON NOTICE

Aboriginal flag design

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency
Topic: National Indigenous Australians Agency licence agreements

Senator: McCarthy

Question reference number: 0012

Type of question: Written

Date set by the committee for the return of answer: 30 September 2020

Number of pages: 1

Question:

Does the NIAA enter into agreements?

Answer:

The National Indigenous Australians Agency (NIAA) is an Executive Agency of the Department of the Prime Minister and Cabinet established under section 65 of the *Public Service Act 1999*. It is not a separate legal entity.

The Commonwealth is the legal entity that enters into contracts. The NIAA represents the Commonwealth in relevant contracts.

Select Committee on the Aboriginal flag

ANSWERS TO QUESTIONS ON NOTICE

Aboriginal flag design

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: National Indigenous Australian Agency contracts

Senator: McCarthy

Question reference number: 0013

Type of question: Written

Date set by the committee for the return of answer: 30 September 2020

Number of pages: 1

Question:

Assuming the NIAA enters into agreements, does the NIAA enter into contracts as the NIAA or as the Commonwealth?

Answer:

Refer to the response to question 0012 from the hearing of the Senate Select Committee on the Aboriginal flag . The Commonwealth is the legal entity that enters into contracts. The National Indigenous Australians Agency represents the Commonwealth in relevant contracts.

Select Committee on the Aboriginal flag

ANSWERS TO QUESTIONS ON NOTICE

Aboriginal flag design

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Basis of decision to enter into contracts as the National Indigenous Australians Agency or the Commonwealth

Senator: McCarthy

Question reference number: 0014

Type of question: Written

Date set by the committee for the return of answer: 30 September 2020

Number of pages: 1

Question:

On what basis does the NIAA make a decision to enter into a contract as either the NIAA or as the Commonwealth?

Answer:

Refer to the response to question 0012 from the hearing of the Senate Select Committee on the Aboriginal flag. The Commonwealth is the legal entity that enters into contracts.

Select Committee on the Aboriginal flag

ANSWERS TO QUESTIONS ON NOTICE

Aboriginal flag design

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency

Topic: Copyright agreement held in relation to artwork

Senator: McCarthy

Question reference number: 0015

Type of question: Written

Date set by the committee for the return of answer: 30 September 2020

Number of pages: 2

Question:

The committee understands that the copyright of the work of art *Prime Minister Gough Whitlam pours soil into the hands of traditional land owner Vincent Lingiari, Northern Territory 1975* by Mervyn Bishop from the NPG collection is held by the NIAA on behalf of the Australian Government. Can a copyright agreement that the NIAA holds in relation to this artwork be provided to the committee?

Answer:

The National Indigenous Australians Agency (NIAA), on behalf of the Commonwealth, is the copyright owner of the photographic work of art *Prime Minister Gough Whitlam pours soil into the hands of traditional land owner Vincent Lingiari, Northern Territory 1975* by Mervyn Bishop (the work). This is by virtue of the fact that Mr Bishop was employed by the Commonwealth at the time the photo was taken.

In accordance with subsection 35(6) of the *Copyright Act 1968* (Cth) (the Copyright Act), where an artistic work is made by the author in pursuance of the terms of his or her employment by another person under a contract of service, that other person is the owner of any copyright subsisting in the work.

Any person or entity wishing to use the work can seek permission from the NIAA. Attached is an example of the terms of which the NIAA would typically grant a license to use the work.

Mr Bishop retains the moral rights in the work as the author. When granting any licence to use the work, NIAA notes Mr Bishop should be acknowledged as the author of the image to respect his moral rights of attribution under the Copyright Act. The NIAA also encourages any licensee to consider any Indigenous cultural and intellectual property rights that may exist in the work and to seek the consent of Mr Lingiari's senior family members for the proposed use by contacting the Gurindji Aboriginal Corporation. While not required by law, NIAA takes a "best practice" approach to ensure that any intended use does not cause harm or offence and respects the cultural content of the image.

Select Committee on the Aboriginal flag
ANSWERS TO QUESTIONS ON NOTICE

Aboriginal flag design

Prime Minister and Cabinet Portfolio

Department/Agency: National Indigenous Australians Agency
Topic: ATSIC Amendment Act

Senator: McCarthy

Question reference number: 0016

Type of question: Written

Date set by the committee for the return of answer: 30 September 2020

Number of pages: 2

Question:

In its submission, the NIAA stated:

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

Can the NIAA elaborate on the basis of that possible argument?

Answer:

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.

The original ATSIC Licence agreement only covered the reproduction of the work for non-commercial purposes related to ATSIC’s functions. The fee paid to Mr Thomas by ATSIC only related to reproduction for these limited purposes.

The National Indigenous Australians Agency considers the scope of the ATSIC Licence would, if it continues, be limited to reproduction of the Aboriginal flag for non-commercial purposes associated with the performance of ATSIC's functions.

As it is limited to non-commercial purposes, it could not be used to address the concerns in relation to the existing licences which cover commercial purposes.