Written Questions on Notice to Mr Nicholas Seddon

In relation to its licence agreement with Mr Harold Thomas, the National Indigenous Australians Agency (NIAA) submitted to the Senate Select Committee on the Aboriginal Flag:

The licence was with ATSIC not the Commonwealth.

1. To your knowledge, is it common for a government entity to enter into an agreement as the entity as opposed to the Commonwealth?

2. Are there particular reasons or circumstances in which a government entity might choose to do so?

3. What legal implications generally flow from a decision to enter into an agreement as the entity as opposed to the Commonwealth?

The NIAA further submitted that:

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.

4. Can you provide any views in relation to the possible argument that the licence agreement might have been preserved?

5. Can you provide any further information (including examples) regarding the fate of contracts with departments or government entities that later cease to exist?

6. Can you provide any further information related to, or examples whereby, a licence agreement might survive the dissolution of agency?

N Seddon responses.

1. ATSIC was a "body corporate" under its Act which means that it was a statutory corporation separate from the body politic (the Commonwealth). It is very common for Commonwealth statutory corporations (for example, the ANU, CSIRO, the National Gallery) to enter into contracts. A statutory corporation is a separate legal entity from the Commonwealth and it is the corporation that is bound by such a contract, not the Commonwealth.
2. There is no choice because there is no other entity but the statutory corporation to enter into agreements if it chooses to do so. ANU cannot say to the Commonwealth "please enter into this contract for us".
3. The legal implications are simply that the statutory corporation is bound by a contract and can enforce the contract against the counter-party. If the statutory corporation fails to perform the contract, it can be sued for breach of contract, just like any other corporation. Conversely, if the other party fails to perform, the statutory corporation can sue that party.
4. When ATSIC was abolished, the *Aboriginal and Torres Strait Islander Commissioner Amendment Act 2005* vested "assets" of ATSIC in the Commonwealth – see Schedule 1 item 192(1)(a). Class A and Class B exempted assets are not covered by this provision. Class A exempted assets were moneys standing to the credit of the Housing Fund before abolition which were then vested in Indigenous

Business Australia. Class B exempted assets were moneys held to the credit of the Regional Land Fund before abolition which were then vested in the Indigenous Land Corporation.

Putting Class A and B exempted assets to one side, simple ATSIC "assets" vested in the Commonwealth. Under Schedule 1 item 191(1) "assets" means "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 "chose 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 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 choses in action. Thus it is arguable that the *Aboriginal and Torres Strait Islander Commissioner Amendment Act 2005* vested these rights in the Commonwealth.

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.

The conclusion that licence rights vested in the Commonwealth does not depend on whether the copyright owner, Mr Thomas, gave permission for the licence to be transferred to the Commonwealth. The vesting has occurred by legislation. Legislation can override private rights or preferences. Only if the legislation is itself invalid would it be possible to say that the vesting in the Commonwealth did not take place.

It is perhaps arguable that the vesting of the licence in the Commonwealth amounted to an acquisition of property by the Commonwealth other than on just terms, contrary to s 51(xxxi) of the Commonwealth Constitution. A complication in this possible argument is that the "just terms" covers payment to the party divested of the property, that is, ATSIC. I do not know whether the Commonwealth paid ATSIC for the acquisition of the licence rights. This seems improbable as ATSIC was abolished by the same legislation. If no payment was made, then the vesting of the licence in the Commonwealth is, on the face of it, an acquisition of property other than on just terms.

It is worth noting that Mr Thomas, as owner of the copyright, does not affect the "just terms" argument because the legislation did not cause any property to be acquired from him.

If it could be argued that the legislation amounted to an acquisition of property other than on just terms, then the legislation is invalid. (This argument does not generate a right to compensation.) This does not mean that the whole Act is invalid. Instead, that part of the Act that infringes s 51(xxxi), that is, Schedule 1 item 192(1)(a) is invalid. If so, there was no transfer of the licence to the Commonwealth.

If this "just terms" argument is of interest to the Committee, I suggest that the Committee should seek a second opinion.

5. This question and question 6 ask about government departments and government entities. This goes back to the points made in 1,2 and 3 above. There are many historical examples of government departments disappearing and/or being replaced. So long as it is a government *department*, legally it does not matter if it is replaced. This is because the relevant contracting legal entity is the Commonwealth no matter what bit of the Commonwealth is involved and what it is called. Government departments are not legal entities in their own right (in contrast to statutory corporations which are). So when the Department of Administrative Services was abolished, any contracts that it had were in fact and in law Commonwealth contracts and the change of department made no difference.

The concept of government "entity" is not precise and could cover a department or a statutory corporation. If an "entity" is a statutory corporation, then, as can be seen from the experience with ATSIC, quite complex measures must be put in place to deal with the disappearance of such an entity.