



Chairperson
Senate Select Committee on the Aboriginal Flag
PO Box 6100
Parliament House
Canberra ACT 2600

18 September 2020

Inquiry into the Aboriginal Flag

The Arts Law Centre of Australia (**Arts Law**) welcomes the opportunity to contribute to the inquiry by the Select Committee on the Aboriginal Flag.

In particular, we make submissions in relation to paragraphs (a) and (b) of the Terms of Reference of the Select Committee, being:

"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; and*
- (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."*

Our submissions focus on the recognition and protection of Mr Harold Thomas's intellectual property rights in the design of the Aboriginal Flag, while also acknowledging the importance of an Aboriginal Flag that is more freely available to the Australian community, especially to the Aboriginal community who unite through the flag and associate it as a symbol of personal and collective cultural identity.

Who are we?

Arts Law is a not-for-profit national community legal centre for the arts, actively protecting the rights of artists since 1983. Our dedicated service for Aboriginal and Torres Strait Islander artists, Artists in the Black (**AITB**), was established in 2004,



providing targeted legal services for Aboriginal and Torres Strait Islander artists and arts organisations across Australia. Arts Law is in the unique position of having consulted with and advised Aboriginal and Torres Strait Islander communities throughout Australia. Much of that advice has focused on ways of securing protection for Indigenous cultural heritage as expressed through Indigenous art, music and performance, and educating Indigenous artists on their intellectual property rights to ensure that these rights are legally recognised and respected.

For more than 15 years, Arts Law has advocated for the legislative protection of Indigenous Cultural and Intellectual Property (**ICIP**) and the need for a legislative prohibition against the misappropriation of Indigenous artists' works. Arts Law has made a number of submissions to government on ICIP, including to the Productivity Commission's Draft Report on Intellectual Property Arrangements in 2016, and the House of Representatives Standing Committee on Indigenous Affairs Inquiry into the growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia. In 2016, Arts Law, in collaboration with the Indigenous Art Code and the Copyright Agency, started the Fake Art Harms campaign. However, to date, no legislative protection or enforceable rights have ensued. The failure to recognise ICIP rights and the continued proliferation of fake Aboriginal and Torres Strait Islander arts and crafts in the market remain an ongoing concern for Indigenous artists.

Over the lifetime of the AITB service, Arts Law has assisted Aboriginal and Torres Strait Islander artists with their legal queries thousands of times. During 2019, Arts Law advised 911 Aboriginal or Torres Strait Islander artists and arts organisations. In most instances, the advice sought by these artists and their organisations related to the protection of their copyright and cultural heritage. Through our outreach to over 100 Aboriginal and Torres Strait Islander communities, Arts Law has consulted with Aboriginal and Torres Strait Islander artists in metropolitan, regional and remote areas across Australia.

The need to recognise and protect Mr Harold Thomas's intellectual property rights

It is fundamental to the protection of all artists' rights that Australia maintain a strong system of copyright protection. Any erosion of an artist's intellectual property rights, and by extension their potential income streams, will negatively affect Australia's arts community. As an organisation which serves to protect the rights of Aboriginal and Torres Strait Islander artists, Arts Law has invested a significant amount of time and money educating Indigenous artists to ensure that their legal rights are recognised and respected.

Accordingly, Arts Law is strongly of the view that Mr Harold Thomas's intellectual property rights in the design of the Aboriginal flag (the **Aboriginal Flag**) (which was also recognised by the Federal Court in 1997) must be both acknowledged and respected. The Aboriginal Flag is a testament to Mr Harold Thomas's ability as an artist. His design has become a powerful symbol for the Aboriginal people and has for many years united them in pride and unity.



As the owner of the copyright in the design of the Aboriginal Flag, Mr Harold Thomas has a legal right to decide how his intellectual property is used and by whom, and to receive compensation for this use. While some people, including within the Aboriginal community, may not agree with Mr Harold Thomas's choices, these rights must be recognised and respected.

The importance of an Aboriginal Flag that can be freely used by the Australian community

However, Arts Law recognises that there is a great deal of disquiet and distress within the Indigenous community (and indeed more broadly within the Australian community), about the fact the Aboriginal Flag is not freely available for use — not even by Aboriginal people or their organisations. This issue is raised regularly by Aboriginal people participating in Arts Law's educational workshops.

Arts Law acknowledges that it is highly undesirable to have a recognised Flag of Australia and a symbol which unites Aboriginal people in Australia that is privately owned, albeit by a senior Aboriginal artist.

We submit that when assessing the options available to the Australian Government to enable the free use of the Aboriginal Flag by the Australian community, regard should be had to the following:

- Any solution involving acquiring Mr Harold Thomas's intellectual property rights should only be done with fair remuneration, taking into consideration the duration of the copyright and the extensive use which is likely to be made of the Aboriginal Flag design over that period.
- Any arrangement which involves the intervention of the Australian Government includes a risk that the act is seen as an appropriation of Aboriginal property rights (in this case, the rights of an artist to maintain ownership of his work) and an act of colonisation, which is clearly undesirable in the broader context of Australian history. As a result, careful consideration should be given to the appropriate body who would hold copyright in the Aboriginal Flag.
- If ownership of the copyright in the Aboriginal Flag design is transferred to the Australian Government or another existing agency, an advisory body should be established to make decisions about the use of the Aboriginal Flag. Mr Harold Thomas should be given the option to be a member of any advisory body that is established.
- The advisory body would be responsible for, among other things:
 - ensuring that the Aboriginal flag is used appropriately;
 - considering applications to use the Aboriginal Flag;
 - determining how any royalties or payments that are made for the use of the flag are to be used; and



- establishing guidelines and protocols to govern the commercial and non-commercial use of the Aboriginal Flag in relation to, for example, the attribution, integrity and non-derogatory treatment of the Aboriginal Flag (akin to the existing protocols established by the Department of Prime Minister and Cabinet to regulate the use of the Australian National Flag and the conditions upon which the Torres Strait Island Regional Council (which holds the copyright in the design of the Torres Strait Island flag), states that it grants permission to reproduce the Torres Strait Islander Flag for commercial purposes).

Arts Law's position is that it is extremely important to acknowledge and respect Mr Harold Thomas's intellectual property rights. Any solution must balance the need to recognise and protect these rights with the importance of an Aboriginal Flag that can be freely used by the Australian community.

Yours sincerely

Robyn Ayres
Chief Executive Officer