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SUBMISSION TO THE SELECT COMMITTEE ON THE ABORIGINAL FLAG

My background

I am an Associate Professor in the University of Western Australia Law School. I specialise in copyright law and moral rights, and I research and publish on copyright, moral rights and trade marks and the interface between art and law. I make this submission in my personal capacity. I address paragraphs b and c of the terms of reference regarding options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community and other matters relevant to the enduring and fair use of the Aboriginal Flag design by the Aboriginal and Australian community.

The nature of copyright

A copyright owner of an artistic work has the exclusive right to reproduce the artistic work in material form, or communicate the work to the public (for example, upload it to a website).¹ They also have the right to authorise others to engage in these acts. These rights endure for the life of Mr Thomas plus 70 years after his death.² Any member of the public who reproduces the Aboriginal Flag in material form or communicates it to the public, or authorises another to do so, is *prima facie* infringing Mr Thomas' exclusive rights unless they have permission to do so or an exception to infringement applies. It is important to stress that only acts engaging the exclusive rights of the copyright owner constitute infringements. There is no general exclusive right to "use" copyright works. Therefore, flying or displaying a flag, or draping a flag around one's body are not infringing acts.

Fair dealings

Copyright law has long sought to balance the rights of copyright owners with the interests of members of the community who wish to use copyright works for certain purposes by exempting certain acts from infringement. The primary infringement exceptions in the *Australian Copyright Act 1968* (Cth) ('the Act') are known as 'fair dealing' exceptions. These provisions stipulate that fair dealings for certain specific

¹ Sections 31(1)(b)(i) and (iii) *Copyright Act 1968* (Cth) ('the Act').

² Section 33 of the Act.

purposes do not constitute an infringement. Currently, these purposes are limited to: research or study,³ criticism or review,⁴ reporting news,⁵ parody or satire,⁶ judicial proceedings or professional advice,⁷ or disability access.⁸ None of these fair dealing exceptions are sufficiently broad to 'enable the Aboriginal Flag design to be freely used by the Australian community', although some may apply in limited circumstances (for example, if the Aboriginal Flag is depicted in a news report). A number of inquiries have recommended introducing a more broadly expressed 'fair use' defence which is not limited by enumerated purposes but by fairness criteria.⁹ However, successive governments have not demonstrated an appetite to do so. Instead, they have chosen to incrementally augment the suite of fair dealing exceptions in an ad hoc manner (evidenced by the government's recent decision to introduce a new fair dealing exception for quotation¹⁰ and the 2017 introduction of the new disability exception).

A new fair dealing?

It would be possible for Parliament to legislate an additional fair dealing exception designed to facilitate the 'free use' of the Aboriginal Flag. The wording of the exception would have to be carefully considered, but something like a fair dealing for the purpose of 'cultural expression' could be introduced. The potential problem with this approach is that 'freeing' the flag as a fair dealing comes at a corresponding cost to Mr Thomas and his licensees, because uses which currently require permission and are financially compensated would no longer require permission if they met the conditions of the exception. This would represent a financial loss for Mr Thomas and his licensees.¹¹ In addition to the diminution of Mr Thomas' rights, there are at least two important issues flowing from this potential legislative reform:

- It would extend well beyond the particular use of the Aboriginal Flag, applying to all copyright works and all dealings with copyright works which might arguably be for the purpose of 'cultural expression'. If the intention is only to facilitate the free use of the *Aboriginal Flag*, such a new fair dealing exception would constitute overreach.
- There will always be a degree of uncertainty about whether the fair dealing exception applies to any particular conduct, because the fair dealing must be for the nominated purpose of cultural expression, and it must also be 'fair'.

³ Section 40 of the Act.

⁴ Section 41 of the Act.

⁵ Section 42 of the Act.

⁶ Section 41A of the Act.

⁷ Section 43 of the Act.

⁸ Sections 113E and 113F of the Act.

⁹ Copyright Law Reform Committee, *Simplification of the Copyright Act 1968 Part I – Exceptions to the Exclusive Rights of Copyright Owners*, Report (1998), Joint Standing Committee on Treaties, Parliament of Australia, *Australia-United States Free Trade Agreement* (2004), recommendation 17, Australian Law Reform Commission, *Copyright and the Digital Economy*, Report Paper No 122 (2014), Australian Government Productivity Commission, *Intellectual Property Arrangements*, Final Report (December 2016), recommendation 6.1.

¹⁰ <https://www.communications.gov.au/departmental-news/copyright-access-reforms>

¹¹ There may also be a constitutional law issue beyond my expertise about whether such legislation effectively compulsorily 'acquires' Mr Thomas' copyright or the licensees' contractual rights. See Australian Law Reform Commission, *Copyright and the Digital Economy*, Report Paper No 122 (2014), 15.107-15.112.

What do we mean by ‘cultural expression’? When will a dealing be ‘fair’? In particular, there may be questions about *whose* purpose qualifies. For example, would the exception cover a third party manufacturer applying the Aboriginal Flag to coffee mugs for a clear commercial purpose if the downstream purpose is to facilitate their *customers’* cultural expression? How should the exception reconcile uses which have a profit objective but which are dedicated to Aboriginal causes?¹² It may take a few court decisions to clarify the contours of this new fair dealing, especially whether businesses can use the defence. In the meantime, uncertainty about the exception will likely lead to risk aversion and a poor uptake of the exception, defeating its purpose.

Mediated outcome

The best option available to the government to resolve this conflict of interests would be a negotiated outcome between all interested stakeholders. Smart minds with good intentions can usually mediate a fair outcome, if they are willing participants in that process. This could be an agreement whereby the copyright in the Aboriginal Flag is assigned or partly or exclusively licensed for an agreed fee to a suitable trustee such as the National Indigenous Australians Agency and clear guidelines are established in relation to its use. This would also require compensation to the licensees if they were required to cede their contractual rights. The guidelines should be agreed following input from all representative stakeholders and could stipulate when permission to reproduce and communicate the flag is required and what licence fees may be applicable depending on those factors, and when permission is not required and no license fee would be payable. The scheme could structure on-going payments to Mr Thomas or an outright assignment of his copyright. Certain obligations should also be placed on the Trustee to act as a fiduciary in relation to the flag, ensuring that it is used respectfully and in accordance with the agreed guidelines and the scheme should specify who can take action if they consider the trustee is derelict in its duties. I understand the government is currently in discussions with Mr Thomas and the licensees with the objective of agreeing a negotiated outcome, but the details are currently confidential so it is difficult to comment on them. It would be ideal if the government sought submissions in relation to any proposed scheme to ensure that all stakeholder interests – which include those of the general community wishing to use the Aboriginal Flag for its symbolic and cultural significance – can provide suggestions for improvement if warranted. It is better that any flaws in the scheme be identified early, rather than after the scheme has commenced operation.

Moral rights

It is worth noting that, even following any assignment of the copyright from Mr Thomas to another entity, Mr Thomas would retain his moral rights in the Aboriginal

¹² Eg, Clothing the Gap <https://clothingthegap.com.au/pages/our-impact> and perhaps even the AFL’s Indigenous Round.

Flag as these cannot be assigned.¹³ Mr Thomas has the moral right to be attributed as the author of the copyright work¹⁴ and the moral right of integrity, which permits him to object to derogatory treatment of the Aboriginal Flag, namely treatment which would be prejudicial to his honour or reputation.¹⁵ It is possible for artists to consent in writing to specific acts in relation to their works which, in the absence of consent, would constitute an infringement of their moral rights.¹⁶ Should any negotiated outcome be agreed between Mr Thomas, the licensees and the government, it is important to consider how Mr Thomas' moral rights will be accommodated, and any consents to potential infringements that may be advisable.

A fair dealing for a prescribed purpose?

An alternative to a cultural expression fair dealing exception might be a more limited new fair dealing exception for a prescribed purpose authorised by regulation. This could allow a bespoke scheme to be crafted and then prescribed by regulation. Again, the prescribed scheme should follow consultation between the government, Mr Thomas, his licensees and relevant stakeholders. The scheme could more particularly specify permissible uses and any compensation that needs to be paid (perhaps managed through the Copyright Agency). It is conceivable that any mediated outcome resulting from the government's current negotiations could be recorded in a prescribed manner under such a new fair dealing defence. This could allow some of the jurisprudence surrounding fair dealing generally to be loaded into the scheme, which would be lacking from an independently negotiated agreement managed through the National Indigenous Australians Agency. Again, this fair dealing exception could have more general application than just the Aboriginal Flag and would allow the government to regulate fair dealing purposes more quickly than legislating other bespoke fair dealing exceptions as required. The potential disadvantage is the reduced Parliamentary oversight and public debate surrounding potentially important changes to the copyright balance effected by regulation.

Compulsory acquisition?

I do not recommend acquiring the copyright by compulsory acquisition, which presumably would proceed under s 51(xxxiii) of the Australian Constitution on just terms. This would be an extraordinary step, without any precedent that I am aware of, and there is no guarantee that the 'just terms' achievable under constitutional law principles would constitute truly fair terms. It would also painfully replicate the kind of involuntary dispossession Aboriginal people have endured for more than two centuries. While it may be considered essential that the public have greater rights to respectfully reproduce and communicate the Aboriginal Flag, it is not essential to compulsorily acquire the copyright in order to achieve this objective. As mentioned, a similar objective could be achieved by introducing a carefully crafted fair dealing defence.

The Aboriginal Flag in the Public Domain?

¹³ Section 195AN(3) the Act.

¹⁴ Section 195AO the Act.

¹⁵ Sections 195AI, 195AK, 195AQ(2) the Act.

¹⁶ Section 195AWA the Act.

Vitiating the copyright entirely through legislation is also a very undesirable means of dealing with the tension between the interests of Mr Thomas and the licensees and the general community, for all of the reasons outlined in the preceding paragraph. Importantly, this would relegate the Aboriginal Flag to the public domain, and all means of control of the flag under either copyright or Mr Thomas' moral rights would vanish. This could allow the flag to be utilised in an offensive and harmful manner with limited avenues under the law¹⁷ to restrain such use. It would then be necessary to step in and legislate specific protections for the flag.

I am more than happy to elaborate on any aspect of my submission, and respond to any questions from the committee.

Yours sincerely,

Associate Professor Jani McCutcheon

¹⁷ There may be limited avenues available under, for example, s 18C of *The Racial Discrimination Act 1975* (Cth).