



**Submission by Laura Thompson (Gunditjmara) on behalf of
Clothing The Gap Pty Ltd and Spark Health Australia Pty Ltd**

1. The Background Story

18 months ago, we started selling clothes at Spark Health that featured the Aboriginal Flag.

We sent Harold Thomas a letter in August 2018 to his Po Box as per the Flag Act permission requirements. We wanted to get permission from him to use the flag. But, we never did hear back from Harold and we knew nothing of WAM.

Like many others, we chose to still use the Aboriginal flag - just as we all have done, for the past 49 years.

In June 2019, we received a Cease and Desist (attached) from WAM Clothing informing us that:

WAM has the Worldwide exclusive license to reproduce the Aboriginal flag on Clothing, Spark Health had three days to stop selling these products – and time was of the essence.

We complied with the cease and desist and thanks to Community support we sold out of our “illegal flag” products in the 3 days. But, we didn’t sell out on our values and we have been campaigning to Free The Flag ever since.

In August 2019, we received another email from WAM, who was then acting as a litigation agent on behalf of Harold Thomas, demanding to see our financial records for sales and use of the Aboriginal flag on products in the past.

In October 2018, we received a letter from Lion Legal acting on behalf of Harold Thomas (attached).

Our manufacturer Daluna Industries received an email on 22 October 2018 (attached) stating that:

Any use of the Aboriginal Flag on clothing without our consent or agreement is prohibited, being by way of manufacturing, sale or otherwise.

We have been informed that you have been manufacturing clothing which bears the Aboriginal Flag, or variations thereof. We request that you contact us within 3 business days to discuss this matter and hereby require you cease and desist with any such manufacturing, given you do not have permission to do so.

We know of numerous other manufacturers who have received these notices and when they do, it then becomes their responsibility to make the customer aware of the copyright issue.

2. The Campaign to Free The Flag

If we were making products with the Australian flag on them, we wouldn't be part of this inquiry because anyone can essentially reproduce the Australian flag respectfully, anyway they choose provided they adhere to flag protocols and guidelines set out in the Flag Act 1953.

We believe if Aboriginal people had known Harold Thomas would end up asserting his private ownership rights over the flag and appointing non-Indigenous licensees to shut down its use unless fees were paid - we would never have adopted it.

Flags should always be about pride and not profit, so we started a petition.

Today, nearly 150 000 people have signed this petition (www.change.org/pridenotprofit) and supported what has become a movement - to #FreeTheFlag for the people.

On this journey, by our side we have had Nova Peris (former Senator, Olympian), Michael Connolly (Managing Director, Dreamtime Kullia Arts) and Peter Francis (Partner, FAL Law). We have heard stories from countless people: individuals, organisations, businesses and Community Groups who have been impacted.

3. Impact of licenses

We want to make it very clear: this issue is not only affecting people selling the flag for commercial use. It goes far beyond this, it affects everyone. We ask:

- *Where has the flag gone from this year's NAIDOC poster?*
- *Why is it disappearing from our email signatures?*
- *Can you spot the flag, on the Deadly Choices health check shirts now?*
- *Why it missing from our grassroots Aboriginal sports teams uniforms and at Aboriginal carnivals or knockouts?*

The Melbourne Warriors and their matriarch, Aunty Rieo Ellis fundraise tirelessly for new deadly uniforms every year and they were slugged an extra 20% on top of their invoice for including a small Aboriginal flag on the sleeve. This additional and unexpected cost was too expensive for them and Aunty Rieo didn't want to pay on principle to use the Aboriginal flag - that she believed belonged to the people, to her and the players.

The copyright and its licensees are putting an invisibility cloak over the Aboriginal flag.

We reflected on this issue with Aunty Muriel Bamblett, CEO of the Victorian Aboriginal Child Care Agency. Aunty Muriel shared that for vulnerable Aboriginal kids in Out Of Home Care many of them aren't strong in culture, confident in who they are, or connected to their Aboriginal Community. In this context the Flag becomes even more important.

It becomes absolutely everything to who they are as Aboriginal children.

When support staff ask these kids to draw something that makes them feel safe, so many of them reach for their red, black and yellow pencils and draw the Aboriginal flag. It really is so much more than just a flag.

For many of us, like these vulnerable kids, the Aboriginal flag is our safety blanket, it's our protection, it's our sense of belonging.

When we think about creating a culturally safe environment, one of the first thing we do is display the Aboriginal and Torres Strait Islander flags, right!

You can display and fly the flag for free, but you have already paid a premium price for the privilege from Flag World, the exclusive licensee to reproduce the Aboriginal flag on flags. There is an additional cost for the Aboriginal flag compared to the Australian flag, to cover the licensing fee and royalties based (based on a price comparison of flags of same size and material).

We shouldn't have to pay more for our flag than any other nationality.

Digital and physical media license

WAM Clothing extended their license with Harold Thomas to include the worldwide exclusive license of the use of the Aboriginal flag on digital and physical media.

WAM Clothing started a petition to garner community support for an Aboriginal Flag emoji and an application to Unicode (the organisation who controls emojis) to register the Aboriginal Flag as a 'flag emoji'. Dreamtime Kullia Arts has submitted a formal complaint to oppose their submission until the Aboriginal copyright issue has been resolved (as per their submission to the Aboriginal Flag Senate Committee).

The control of the 'digital and physical media license' on the Aboriginal Flag is complicated and far reaching, as we have heard from other non-profit organisations who have attempted to use the Aboriginal flag under the current licensing agreements. Upon reaching out to WAM to get clarification on the terms of use, they were informed that they could opt to enter in to an annual or multi-year agreement with WAM at a fee to use the Aboriginal flag in physical, print and digital media items.

From inquiries to WAM, the practical application of their license extends to the use of the flag in the following:

- in email signatures
- on business cards
- on social media graphics
- on websites
- on flyers, printed and digital copies
- on miscellaneous campaign collateral e.g. pledge cards, fact sheets, information booklets (printed)
- in an annual report or plan, printed and digital

If you wanted to use the flag on posters, either printed or digital copies, stickers or other printed miscellaneous campaign collateral (e.g. pledge cards, fact sheets, information booklets) you would need to contact Gifts Mate via Ben Wooster.

When WAM was asked what their digital license meant in regards to photos of the flag or people holding the flag that might be posted on social media, they informed the non for profit that if the flag as an image is being reproduced, then that falls under WAM's licence. For example, if it's a photo of someone holding a Flag, then that's not reproducing the image. An example of a breach of the license is if someone uploaded a JPEG image of the Flag itself, then that is reproducing the image.

The complication and control of this license over the use of the flag in digital and physical media is damaging to the visibility and representation of Aboriginal people and culture in Australia.

4. Flag Variations

Since this copyright dispute has come to light, the Community have stopped using the Aboriginal flag like they used to - for three key reasons.

1. to avoid possible legal action;
2. to avoid paying to do so and,
3. on principle, no one wants to have to ask to use the flag from non-Indigenous people.

As Aboriginal people we are now being forced to adapt the way we express our Aboriginality by creating different variations of the flag to show our pride.

The creativity of Community members in trying to sidestep and avoid the copyright issue in the last 12 months has been incredible...we even used the sky!

However, we should not have to go to these lengths. This is yet another hardship and a reminder of the oppression, Aboriginal people still feel today.

5. Value

The value of the flag, is only equal to the pride and passion of the people that it represents.

Without the Aboriginal people adopting it, using it and promoting it, like Cathy Freeman on an international sporting stage, it is no more than a piece of coloured cloth.

When we think about the value of the flag and what it is worth, we want you to take a moment and ask yourself: *who really created this value?*

Without Aboriginal people's endorsement and love of this symbol, the flag is meaningless and it's losing value every day.

Many people are talking about retiring the Aboriginal flag and creating a new one.

6. Flag vs. Artwork

Let's remember that the Aboriginal flag was *always* created to be a flag, to be flown on flag poles and displayed with pride.

It is not a piece of framed artwork and it was never intended to be.

7. Torres Strait Islander Flag

The Torres Strait Islander Flag was designed by Bernard Namok in 1992 after winning a flag design competition. This flag was proclaimed a "Flag of Australia" under section 5 of the *Flags Act 1953* in July 1995.

Unlike the Aboriginal Flag, the Torres Strait Island Flag copyright is not owned by the artist, it is owned by the Torres Strait Island Regional Council (TSIRC).

The Torres Strait Islander flag is also impacted by the Aboriginal Flag copyright and is the innocent victim in this scenario.

We saw the Torres Strait Islander Flag be impacted by the Aboriginal flag copyright during the AFL Indigenous round when the Aboriginal Flag was absent from guernseys and the ground and so too was the Torres Strait Islander Flag. We have noticed that people and organisations are reluctant to display the Torres Strait Islander flag without the Aboriginal Flag alongside it.

8. Control vs Open Market

We want to see more Black flags in the world, not less.

The reality is though, when we see a flag pin we ask ourselves – 'is Wooster from Giftsmate / Birubi Arts profiting from this?' When we see the Aboriginal flag on clothes now, we wonder if a deal has been done with WAM.

Just look at what happened with Buddy Franklin in June 2020 and the Community outrage when they discovered Buddy had an agreement with WAM. It was the public pressure that saw him revoke his agreement and stop selling Aboriginal flag products from his online store.

This is a clear example of how the flags licensing agreements are not supported by Community.

Take a moment to imagine when we lift the invisibility cloak (this copyright) and everyone has an opportunity to make Aboriginal flag products and you can choose whether you buy a \$20 flag tee made in China from Vic Market or a \$50 flag tee made in Melbourne.

All Australians should be entitled to freedom of choice as a consumer.

We can't wait until we walk down the supermarket aisles on Survival Day (Jan 26) and we see Aboriginal flag paper plates, napkins, buntings and this won't happen until there is public license for all people. Wouldn't this be an incredible step towards reconciliation in Australia?

8. Resolution | Recommendation

We are advocating for flag equality – for the Aboriginal flag to be equal to the Australian flag.

We want all Australians to have a **free public license** to the Aboriginal Flag in the same way we do to the Australian flag.

It is our recommendation that the Government seek out an arrangement where Harold Thomas can continue to hold ownership of the copyright to the Aboriginal Flag, while a licensing agreement is provided to enable free use by the Australian public. Such an arrangement may be enabled under a 'Creative Commons' licence or similar, which ensures free use of the flag for all Australians.

Some Aboriginal people don't like the idea of the Commonwealth 'owning' the flag, nevertheless a rights for all Australians to use the flag are needed.

There are numerous benefits to this approach:

- Harold Thomas retain title as owner of copyright in the flag, which can be passed down as an heirloom of his family (for 75 years following his passing);
- Harold Thomas would be less likely to be seen as victimised the Government;
- There would be no need to determine which entity or structure would be best placed to hold and administer the copyright in the flag (since it would continue to be held by Harold Thomas);
- It is consistent with the history of Harold Thomas granting licences to use the flag (including his previous licence granted to ATSIC while ATSIC existed)

There has been much talk of alternative measures to resolve this issue, including the addition of further fair dealing exceptions and the like. These options representative an over-complication in resolving a one-off issue affecting an official Australian flag.

The Flags Act offers all the protection the Aboriginal flag will ever need. The introduction of another administrative body to hold the flag would offer no additional protection and would only add further layers of administration around its usage. If we introduce another body to hold the copyright - the Aboriginal flag would not be equal to the Australian flag.

Let's bring Harold Thomas's vision for the flag to be a symbol of unification to life and to maintain its integrity.

There is no integrity, in the way the flag is currently being managed.

Let's remove the shackles in which the flag is being held and find a fair and equitable resolution, to ensure the Aboriginal flag remains just that - an official flag of Australia protected under the Flags Act where the commercial exploitation and control of its copyright does not impact on everyday Australians and the Aboriginal Community.

This symbol holds too much national significance to be owned and controlled by one person and left open to exploitation and greed.

Before we celebrate the Aboriginal Flag's 50^h birthday next year in July, let it be free and to remain as representation of pride, resistance and a celebration of culture and identity.

Laura Thompson (Gunditjmara)

Spark Health Australia | Clothing The Gap

Supporting evidence



6 June 2019

Spark Health Australia Pty Ltd (ACN 622 429 663)
trading as Clothing the Gap

**URGENT
ACTION REQUIRED**

BY EMAIL:

Dear Sir/Madam,

RE: WAM CLOTHING PTY LTD (ACN 630 147 330)

**EXCLUSIVE WORLDWIDE LICENSEE FOR THE USE OF THE ABORIGINAL FLAG ON
CLOTHING (THE "EXCLUSIVE LICENCE")**

We refer to the above Exclusive Licence, which we hold.

We also confirm that we are the Exclusive Authorised Agent for Mr Harold Thomas.

Mr Thomas is the owner of the copyright in the Works known as the Aboriginal Flag, including any variation thereof in whole or part, derivation or variation of the Work pursuant to the Copyright Act 1968 (Cth).

We formally notify you that we hold the said Exclusive Licence by virtue of an Exclusive Copyright Licence Agreement and Authorised Agency Agreement, between us and Harold Thomas.

We are aware that you sell clothing which is subject to the Exclusive Licence. Your unauthorised use of the Aboriginal Flag on clothing is in breach of our Exclusive Licence and the copyright and therefore constitutes copyright infringement and is a violation of Australian copyright laws.

You ought to be aware of this breach, due to your knowledge that you do not hold a licence agreement with Harold Thomas, nor do you have permission to sell clothing bearing the Aboriginal Flag.

We hereby require you cease and desist with the sale of clothing bearing the Aboriginal Flag.

To that end, we hereby provide you with 3 business days from the date of this letter to cease and desist with the sale of clothing bearing the Aboriginal Flag.

We otherwise invite you to contact us to discuss this matter within 3 business days from the date hereof and discuss any concerns you might have, particularly with respect to stock.

Failing satisfaction of the above however, we reserve our rights to take further action.

Time is of the essence.

Regards
WAM Clothing

Management



Our Ref:
Your Ref:

16 October 2019

Spark Health Australia Pty Ltd (ACN 622 429 663)

Dear Sir/Madam,

**RE: HAROLD THOMAS -V- SPARK HEALTH AUSTRALIA PTY LTD TRADING AS
CLOTHING THE GAP**

We refer to the above matter and advise that we act on behalf of Harold Thomas.

Harold Thomas is the author and owner of the copyright in the Work known as the Aboriginal Flag, including any variation or derivation thereof, in whole or part, pursuant to the *Copyright Act 1968* (Cth).

Harold Thomas has granted a worldwide Exclusive Licence to WAM Clothing Pty Ltd (the "Clothing Exclusive Licence") for the use of the Aboriginal Flag on clothing.

We are instructed that you sell clothing bearing the Aboriginal Flag, or variations thereof, whereby such use infringes WAM Clothing's Clothing Exclusive Licence, and which also infringes, and adversely affects, Harold Thomas' interests.

You are aware that you do not have a licence agreement with Harold Thomas, nor do you have any permission from WAM to sell clothing bearing the Aboriginal Flag.

You are required to cease and desist from engaging in any way in the sale of any clothing bearing the Aboriginal Flag or variations thereof within 3 business days from the date of this letter.

Failing compliance with the above, we anticipate being instructed to take steps to preserve and protect our client's interests. We reserve all rights accordingly.

Time is of the essence.

Yours faithfully,

**Nas Hanafi
LION LEGAL**

CC: Peter Francis, FAL Lawyers



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Reply Reply All Forward

Fri 11/09/2020 1:15

This message was sent with High importance.

From: Management
Subject: Manufacturing of Clothing bearing the Aboriginal Flag or variations thereof
Date: 09/09/2020 at 1:15:20 pm AEDT
To:
Cc:

Dear Sir/Madam,

We refer to the above and confirm we hold the exclusive licence for the use of the Aboriginal flag on clothing, by virtue of an exclusive licence agreement with Harold Thomas. Mr Harold Thomas is the creator and owner of the copyright in the Works known as the Aboriginal Flag pursuant to the Copyright Act 1968 (Cth).

Any use of the Aboriginal flag on clothing without our consent or agreement is prohibited, being by way of manufacturing, sale or otherwise.

We have been informed that you have been manufacturing clothing which bears the Aboriginal Flag, or variations thereof. We request that you contact us within 3 business days to discuss this matter and hereby require you cease and desist with any such manufacturing, given you do not have permission to do so.

We otherwise reserve our rights.

Regards, Semele

