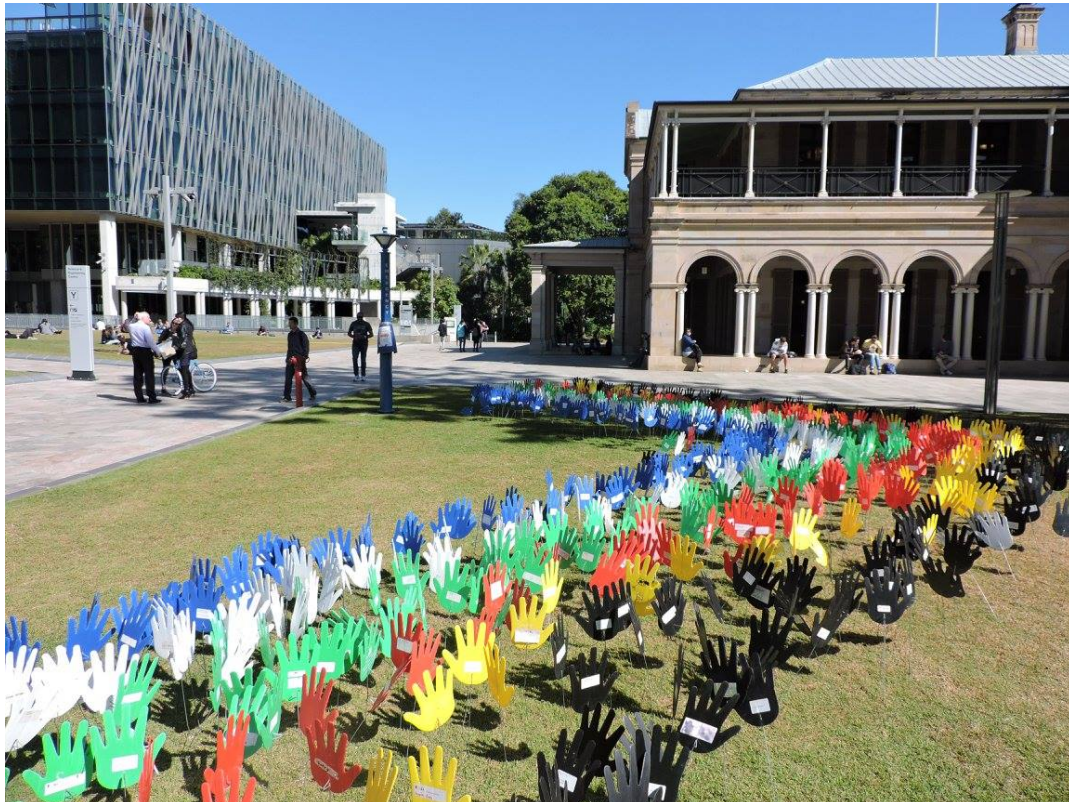


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THE SENATE SELECT COMMITTEE ON THE ABORIGINAL FLAG

**FREE THE FLAG: COPYRIGHT LAW AND INDIGENOUS
INTELLECTUAL PROPERTY**



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1. A History of Indigenous intellectual property

There is a long history of legal, political, and ethical debate in respect of the topic of Indigenous intellectual property in Australia.¹ It is worthwhile contextualizing the current controversy over copyright law and Aboriginal Flag against the background of that larger debate.

There has been a series of litigation in respect of Indigenous intellectual property – particularly over the last three decades. There have been a number of conflicts over the use of Indigenous intellectual property by the Reserve Bank of Australia as national symbols for currency.² There has also been skirmishes over the appropriation and counter-appropriation of Indigenous art.³ It is true that von Doussa J of the Federal Court of Australia has shown judicial innovation in a number of cases – most notably, the “Carpets” case,⁴ and the “Bulun Bulun” decision.⁵ However, there have been limits to the extent of judicial innovation in Australia – as illustrated by the refusal of the High Court of Australia to recognise the linkage between native title rights

¹ Matthew Rimmer, 'Mapping Indigenous Intellectual Property', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 1-44.

² Stephen Gray, 'Government Man, Government Painting? David Malangi and the 1966 One-Dollar Note' in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 133-154. *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481.

³ Matthew Rimmer, 'Four Stories About Copyright Law And Appropriation Art' (1998) 3 (4) *Media And Arts Law Review* 180-193

⁴ *Milpururru v. Indofurn Pty Ltd* (1994) 30 IPR 209.

⁵ *Bulun Bulun and Milpururru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513.

and traditional knowledge in the case of *Ward v Western Australia*.⁶ The case law has demonstrated that there is a need for a more fundamental legislative reform of laws with respect to traditional knowledge in Australia.

Over the past public policy inquiries into the topic of Indigenous intellectual property – although there has been only a partial and mixed array of responses. The Hawke and Keating Governments made an initial effort to explore the topic. In the 1990s, the Attorney-General's Department released the *Stopping the Rip-Offs Discussion Paper*.⁷ Terri Janke was commissioned to produce the landmark report, *Our Culture, Our Future* in 1999 – but many of its key recommendations have gone unheeded.⁸

The Howard Conservative Government did not fully realise its policy plans in respect of the protection of traditional knowledge. A Federal bill on the recognition of communal moral rights in respect of copyright works created by Indigenous communities has not been implemented.⁹ Thus far, there have only been piecemeal reforms. The authenticity trade marks scheme, which was set up in 2000, has collapsed. The Federal access to genetic resources scheme does make reference to native title rights; but only provides limited remedies for non-compliance with the

⁶ *Western Australia v. Ward* [2002] HCA 28; 213 CLR 1.

⁷ Attorney General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples: Issues Paper*, Canberra: Attorney-General's Department, 1994.

⁸ Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Sydney: Michael Frankel and Company, 1999.

⁹ Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27 (3) *University of New South Wales Law Journal* 585-605.

regime. The Queensland access to genetic resources regime has been recently revised to provide stronger protection of traditional knowledge.¹⁰

The Rudd Government introduced the right to resale scheme for visual artists – which would incidentally benefit Indigenous artists. There has been ongoing research as to the operation and the impact of this regime in Australia.¹¹ However, instead of taking legislative action, it instead passed a code of conduct in respect of Indigenous art.

The Gillard Labor Federal Government passed plain packaging of tobacco products – which incidentally has been of benefit in addressing tobacco consumption in Indigenous communities.

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¹⁰ David Jefferson, Daniel Robinson, David Claudie, Jocelyn Bosse, and Margaret Raven, 'Australia's plants and animals have long been used without Indigenous consent. Now Queensland has taken a stand', *The Conversation*, 16 September 2020, <https://theconversation.com/australias-plants-and-animals-have-long-been-used-without-indigenous-consent-now-queensland-has-taken-a-stand-144813>

¹¹ Robert Dearn and Matthew Rimmer, 'The Australian Resale Royalty Right for Visual Artists: Indigenous Art and Social Justice', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 200-230.

¹² Matthew Rimmer, 'The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products', in Tania Voon, Andrew Mitchell, and Jonathan Liberman (Ed.) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues*, London and New York: Routledge, 2014, 337-360; Matthew Rimmer (ed.), *The Plain Packaging of Tobacco Products*, Special edition of *QUT Law Review* (Vol. 17 (2)), Brisbane: QUT, 2017, <https://lr.law.qut.edu.au/issue/view/55>; Matthew Rimmer, 'The Global Tobacco Epidemic, the Plain Packaging of Tobacco Products, and the World Trade Organization' (2017) 17 (2) *QUT Law Review* 131-160; and Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products and the Trans-Pacific Partnership', (2017) 7 (1) *Victoria University Law and Justice Journal* 76-93.

The Turnbull Government was very much focused upon the issue of inauthentic Indigenous art and craft.¹³

Australian Aboriginal and Torres Strait Islander communities have been promoting the need for greater legislative protection of Indigenous Intellectual Property.

There has been international recognition of Indigenous intellectual property as part of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.¹⁴ Article 31 (1) of *UNDRIP* provides:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹⁵

¹³ House of Representatives Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples*, Canberra: Parliament House, 20 December 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report

¹⁴ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, 61st sess, UN Doc A/61/L.67, adopted by the General Assembly Resolution 61/295 on 13 September 2007. See Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples*, London and New York: Routledge, 2016; and

¹⁵ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, 61st sess, UN Doc A/61/L.67, adopted by General Assembly Resolution 61/295 on 13 September 2007.

Article 31 (2) provides: ‘In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.’¹⁶

2. Litigation over the Aboriginal Flag

The Australian Senate has established an inquiry into copyright and licensing arrangements in respect of the Aboriginal Flag in the hope of resolving decades of dispute and conflict.¹⁷

In 1995, the Aboriginal Flag was proclaimed as an official flag of Australia. As the National Museum of Australia has noted, ‘the Aboriginal Flag is recognised locally and internationally as a symbol of Indigenous pride and the continuing struggle for justice.’¹⁸

A. *Thomas v. Brown* (1997)

There was a conflict over the copyright ownership of the Aboriginal Flag in the 1990s – with competing claims from Harold Thomas, David George Brown, and James Tennant. Harold Thomas provided an affidavit in the matter, which is worthwhile quoting:

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, 61st sess, UN Doc A/61/L.67, adopted by General Assembly Resolution 61/295 on 13 September 2007.

¹⁷ Senate Select Committee on the Aboriginal Flag, *Aboriginal Flag*, Canberra: Australian Parliament 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Aboriginal_Flag/AboriginalFlag

¹⁸ National Museum of Australia, ‘A New Flag for an Independent Nation’, <https://www.nma.gov.au/exhibitions/symbols-australia/flag#!>

No one showed me any design whatsoever before I created the Aboriginal flag design prior to the NADOC March in 1971. I did not copy my design from any design whatsoever. I did not refer to anyone else's design. I created the Aboriginal flag design on my own without reference to any other design.¹⁹

In the case of *Thomas v. Brown* (1997), Sheppard J of the Federal Court of Australia declared that Harold Thomas was the author of the artistic work being the design of the Aboriginal Flag and that he was the owner of the copyright subsisting in the Aboriginal Flag.²⁰

The judge rejected competing claims to copyright authorship and ownership of the Aboriginal Flag.

The judge ordered: '(a) Harold Joseph Thomas is the author of the artistic work being the design for the flag described in Schedule 1 to the proclamation dated 27 June 1995 under s.5 of the *Flags Act* 1953 and published in the Commonwealth of Australia Gazette No. S259 of 14 July 1995, such flag being known as "the Aboriginal flag" ("the artistic work"); and (b) Harold Joseph Thomas is the owner of the copyright subsisting in the said artistic work.'

Barrister Colin Golvan has written about the complex history over the copyright dispute in respect of the Aboriginal Flag.²¹

¹⁹ *Thomas v Brown (Aboriginal Flag Case): Affidavit of Harold Thomas*, 9 December 1996 [1996] IndigLRes 38 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/1996/38.html>

²⁰ *Harold Joseph Thomas v. David George Brown & James Morrison Valley Tennant* [1997] FCA 215 (9 April 1997)

²¹ Colin Golvan, 'A Story of Conflicted Loyalties and the Origins of a Flag' [2008] *IndigLRes* 5 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/2008/5.html>

Harold Thomas has subsequently entered into licensing arrangements with Carroll & Richardson Flagworld in respect of Flags and Bunting, WAM Clothing in relation to clothing, digital and physical media, and Gifts Mate in respect of Souvenirs. The exact detail of those arrangements has not necessarily been publicly available.

B. *Flags 2000 Pty Ltd v. Smith* [2003]

In *Flags 2000 Pty Ltd v Smith* [2003], Goldberg J of the Federal Court of Australia considered a complaint by a Harold Thomas and his licensee Flags 2000 Pty Ltd that David Smith, who carried on business under the name ‘Flags and Poles’ in Western Australia, had infringed copyright in the Aboriginal Flag.²² The judge acknowledged: ‘I am satisfied that Mr Thomas is the creator, designer and author of the Aboriginal flag, that he is the owner of the copyright in the Aboriginal flag and that Mr Thomas has granted an exclusive licence to Flags 2000, which is current until April 2023, to reproduce or authorise the reproduction of the Aboriginal flag and to manufacture, promote, advertise, distribute and sell it throughout the world.’²³

The judge awarded an injunction, damages, and additional damages. The judge ordered: ‘The respondent, whether by himself, his servants, agents or otherwise howsoever, be restrained permanently from infringing the copyright of the second applicant in the artistic work being the design for the flag described in sch 1 to the proclamation dated 27 June 1995 under s 5 of the *Flags Act* 1953 (Cth) and published in the Commonwealth of Australia Gazette Number

²² *Flags 2000 Pty Ltd v. Smith* [2003] FCA 1067 (7 October 2003) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2003/1067.html>

²³ Ibid.

S259 of 14 July 1995, such flag being known as "the Aboriginal flag".²⁴ The judge demanded: 'The respondent deliver up within twenty-eight days of the date of the service of a copy of this order on the respondent all infringing copies of the Aboriginal flag in the possession, power, custody or control of the respondent.'²⁵ The judge ordered: 'The respondent pay to the applicants damages pursuant to s 115(2) of the Copyright Act 1968 (Cth) in the sum of \$320.' The judge also ordered that 'The respondent pay the applicants additional damages pursuant to s 115(4) of the *Copyright Act* 1968 (Cth) in the sum of \$1,000.'²⁶ The judge also ordered that the respondent pay the applicants' costs of and incidental to the proceeding.

The judge noted: 'Although the total amount recovered by the applicants is less than \$100,000, I consider that the proceeding was properly brought and continued in the Federal Court.'²⁷ The judge observed: 'In reaching this conclusion I have taken into account the significance of the issue of a challenge to the copyright in the Aboriginal flag which had been proclaimed pursuant to the provisions of the *Flags Act* and the fact that it was a case in which it was appropriate to grant a permanent injunction.'²⁸

C. *Thomas v. Google* (2010)

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

In 2010, Harold Thomas objected to the Aboriginal Flag being used in a drawing by 12 year old Jessie Du for a Google Doodle, without a copyright licence.²⁹ He observed that Google wanted to use the Aboriginal Flag on its home page in return for ‘a pittance’.³⁰ In response, the Big Tech firm published the Doodle, without a depiction of the Aboriginal Flag.³¹ Product marketing manager Katharina Friedrich commented: ‘You may have noticed that the Google Doodle on the homepage today is slightly different to Jessie's original entry, because that one contained copyright imagery that we weren't able to publish on the homepage today.’³² She observed: ‘However, I think you'll agree it's still absolutely beautiful, and inspires lots of wonderful ideas about the Australia of our future.’³³ The dispute between Harold Thomas and Google did not seemingly result in full-blown litigation in the courts.

D. *WAM Clothing v. Spark Health*

In November 2018, Thomas signed an exclusive licence agreement for the use of the Aboriginal Flag on clothing with WAM Clothing.

²⁹ Asher Moses, ‘Oh Dear, Google Flagged Over Logo Dispute’, *The Sydney Morning Herald*, 26 January 2010, <https://www.smh.com.au/technology/oh-dear-google-flagged-over-logo-dispute-20100126-mvhd.html>

³⁰ Ibid.

³¹ Staff Writers, ‘Google Erases Aboriginal Flag from Australia Day Doodle on Homepage’, *NewsComAu*, 26 January 2010, <https://www.news.com.au/technology/google-erases-aboriginal-flag-from-australia-day-doodle-on-homepage/news-story/5e4034be61b719a40fd535a417ec9e54>

³² Katharina Friedrich, ‘Happy Australia Day’, Australia Google Blog, 26 January 2010, <https://australia.googleblog.com/2010/01/happy-australia-day.html>

³³ Ibid.

Spark Health, an Aboriginal social enterprise, which makes merchandise with the tagline Clothing the Gap, received a legal letter. Laura Thompson objected to receiving a copyright notice in respect of the sale of T-shirts to raise money for Indigenous health: ‘I got a cease-and-desist letter from some lawyers who told me that I had to stop selling the clothes within three days.’³⁴ She established a campaign called Free the Flag, which has received widespread public support, with over 100,000 people signing the petition.³⁵

E. *Carroll & Richardson—Flagworld Pty Ltd v PayPal Australia Pty Limited (2020)*

In the case of *Carroll & Richardson—Flagworld Pty Ltd v PayPal Australia Pty Limited (2020)*, the licensee Flagworld sought orders for preliminary discovery to ascertain the description of two prospective respondents who it alleged were advertising, distributing and selling flags in the design of the Aboriginal Flag in breach of copyright.³⁶ The judge noted:

On the basis of the material before the Court the prospective applicant in this proceeding, Carroll & Richardson – Flagworld Pty Ltd (Flagworld), is the holder of an exclusive licence from Mr Thomas to reproduce or authorise the reproduction of the Aboriginal Flag on flags, pennants, banners and bunting and to manufacture, promote, advertise, distribute and sell such products. It has filed two originating applications under rule 7.22 of the Federal Court Rules 2011 (Cth) (the Rules) seeking orders for

³⁴ Frances Mao, ‘The fight to ‘free’ the Aboriginal flag’, *BBC News*, 4 September 2020, <https://www.bbc.com/news/amp/world-australia-49315063>

³⁵ Kiersten Papisidero, ‘Petition to free the Aboriginal flag from copyright law reaches 100,000 signatures’, *Nine.com.au*, 21 August 2020, <https://www.9news.com.au/national/aboriginal-flag-petition-to-remove-copyright-laws-reaches-100000-signatures-on-changeorg/c2361475-b426-4b8b-91db-7899a0517890>

³⁶ *Carroll & Richardson - Flagworld Pty Ltd v PayPal Australia Pty Limited* [2020] FCA 371 (19 March 2020) <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2020/371.html>

preliminary discovery to ascertain the description of two prospective respondents who it alleges are advertising, distributing and selling flags in the design of the Aboriginal Flag in breach of copyright:

(a) in VID 87 of 2020 Flagworld seeks orders for preliminary discovery by PayPal Australia Pty Ltd (PayPal), Vodafone Hutchison Australia Pty Ltd (Vodafone) and Shopify (Australia) Pty Ltd (Shopify) in relation to the description of the prospective respondent, being the person or persons operating the website <https://freetheflag.net> (the FreeTheFlag Website); and

(b) in VID 88 of 2020 Flagworld seeks orders for preliminary discovery by Australian Postal Corporation (Australia Post), Optus Mobile Pty Ltd (Optus) and eBay Marketplaces GmbH (eBay) in relation to the description of the prospective respondent, being Nichoff Inc of Hervey Bay, Queensland.

The judge noted: ‘It is undesirable that I express any firm view about the prospects of Flagworld’s intended action for copyright infringement.’³⁷ Murphy J commented: ‘The “Aboriginal Australia Flag” and the “Free the Flag, Flag” are not the same as the Aboriginal Flag, but that does not show that Flagworld may not have a right to obtain relief.’³⁸ Nonetheless, Murphy J allowed for preliminary discovery, finding ‘Flagworld has satisfied the requirements for an order for preliminary discovery against Shopify’ and ‘it is appropriate that preliminary discovery be granted against Australia Post.’³⁹

F. The Metropolitan Local Aboriginal Land Council

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

The Metropolitan Local Aboriginal Land Council told the committee it had stopped purchasing clothing bearing the Aboriginal flag because of the licensing restrictions.⁴⁰ Aunty Ann Weldon told the hearing: ‘Sadly what’s happened to the flag is about greed and about other people making money for the symbolism that certainly represents Aboriginal people.’⁴¹ She said: ‘First and foremost, this country needs to acknowledge that this is our flag that belongs to Aboriginal people across our country.’⁴²

G. *WAM Clothing v. Sporting Organizations*

The football codes of the AFL and the NRL, and the Wallabies have been in conflict with WAM Clothing in 2020 in respect of licensing the Aboriginal Flag.

A number of AFL Clubs and Indigenous footballers have supported the Free the Flag campaign.⁴³ In response, WAM Clothing has demanded a retrospective bill for past use of the Aboriginal Flag. The AFL’s Inclusion and social policy manager Tanya Hosch said that Wam Clothing has sought a “legal resolution” to the AFL’s past use of the flag on its merchandise, particularly club jumpers:

⁴⁰ Tom Stayner, ‘Tensions rise over use of Aboriginal flag design after testy exchanges during inquiry’, *SBS News*, 14 September 2020, <https://sbs.com.au/news/tensions-rise-over-use-of-aboriginal-flag-design-after-testy-exchanges-during-inquiry?cid=news:socialshare:twitter>

⁴¹ Ibid.

⁴² Ibid.

⁴³ Lorena Allam, ‘AFL Slugged With Retrospective Bill for Use of Aboriginal Flag as Fans Urged to Bring Their Own’, *The Guardian*, 21 August 2020, <https://www.theguardian.com/australia-news/2020/aug/21/afl-slugged-with-retrospective-bill-for-use-of-aboriginal-flag-as-fans-urged-to-bring-their-own>

Typically in the past, the Aboriginal and Torres Strait Islander flags have been printed on those jumpers. So WAM Clothing as part of the licence agreements, have asked for a legal resolution to the use of the flag on merchandise retrospectively, although I don't know how far back. "So there is an outstanding issue there, in relation to the way the flag has been represented on our merchandise. There is an agreement that any profit from the sale of those particular jumpers go into a fund to support Indigenous football programs. And those artists don't get royalties on their artwork, knowing that the money goes into Aboriginal football programs."⁴⁴

Hosch was disappointed by the predicament: 'And to feel that now, the extra hurdles to jump through to actually make use of that in an appropriate way, to demonstrate community and cultural pride, it's really bad, and to those people working hard behind the scenes to try and bring resolution to this issue for the good of the whole nation, I wish them well.'⁴⁵

In giving evidence to the Senate Select Committee on the Aboriginal Flag, the AFL's representative said: 'The AFL sadly acknowledges that it will not use the Aboriginal flag, other than in flag form, absent a change in arrangements.'⁴⁶

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Rob Harris, 'AFL Took Stance on Aboriginal Flag to Force Access for Indigenous Groups', *The Sydney Morning Herald*, 14 September 2020, <https://smh.com.au/politics/federal/afl-took-stance-on-aboriginal-flag-to-force-access-for-indigenous-groups-20200914-p55vko.html>

Shelley Ware has highlighted how Indigenous AFL stars such Eddie Betts and Lance Franklin have supported the Free the Flag campaign.⁴⁷ She commented ‘My hope is that this national conversation which has been started by people of all walks of life, coming together to make a stand about the Aboriginal flag, will continue.’⁴⁸ Shelley Ware was hopeful of reconciliation between the various stakeholders over the use of the Aboriginal Flag: ‘Hopefully, the powers that be can sit down to work out an agreement, one which suits self-determination and our people’s freedom to use the flag.’⁴⁹

The NRL has received a cease-and-desist notice.⁵⁰ According to the ABC, the NRL was sent a notice over its use of the Aboriginal Flag on jerseys during the Indigenous Round in 2019.⁵¹ For its part, WAM Clothing preferred to characterize the situation of one of negotiations.

The Australian Rugby Union team—The Wallabies—has declined to license the Aboriginal Flag from WAM Clothing.⁵² One of Australia’s iconic Indigenous Wallabies, Glen Ella, has called on WAM Clothing to change its approach to licensing:

⁴⁷ Shelley Ware, ‘Football Fraternity Unites to Free The Flag’, Footyology, 25 August 2020, <https://footyology.com.au/football-fraternity-unites-to-free-the-flag/>

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Belinda Jepsen, ‘#freetheflag explained: Why you won’t be seeing the Aboriginal flag at the AFL this weekend’, *MammaMia*, 20 August 2020, <https://www.mamamia.com.au/copyright-aboriginal-flag/>

⁵¹ Isabella Higgins, ‘New Licence Owners Of Aboriginal Flag Threaten Football Codes and Clothing Companies’, *ABC News*, 11 June 2019, <https://www.abc.net.au/news/2019-06-11/new-licence-owners-of-aboriginal-flag-threaten-football-codes/11198002>

⁵² Georgina Robinson, ‘“It’s So Divisive Now’: Aboriginal Flag Copyright Drama Hits Rugby’, *The Sydney Morning Herald*, 29 August 2020, <https://www.smh.com.au/sport/rugby-union/it-s-so-divisive-now-aboriginal-flag-copyright-drama-hits-rugby-20200829-p55qi9.html>

We're proud of who we are and we want to represent our country and our people. Not being able to use the flag, as I keep saying, is very disheartening. It's been a symbol of Aboriginal people and their struggles for many years. I was there that day and I helped promote the original jumper [in 2017]. It was an historic day. To have the then Australian Rugby Union use that on their national jumper - you can't buy that. We're not trying to make money off it. We just want to represent the people. That's what it's there for. To represent the people. What else do we use? As Aboriginal and Indigenous people, we need to be able to use that flag. I understand that people make a lot of money from selling those type of things but, in terms of the national perspective and Test matches and things like that, you should be able to use the flag.⁵³

Ella dismissed the notion that sporting bodies were being greedy capitalists in refusing to pay WAM 20 per cent of all sales which feature the flag.

A number of netball teams – and Super Netball - have recently joined the Free the Flag campaign as well.⁵⁴

Given the popularity of Australian Football, rugby league and rugby union, and netball, the topic of copyright and licensing of the Aboriginal Flag has reached a wider public level of consciousness.

H. Other Disputes?

⁵³ Sam Phillips, 'Ella Calls for Common Sense on Use of Aboriginal Flag', *The Sydney Morning Herald*, 1 September 2020.

⁵⁴ Super Netball, 'Free the Flag', 17 September 2020, <https://twitter.com/SuperNetball/status/1306173786052587520>

The Senate Select Committee on the Aboriginal Flag has been very much focused upon the role of WAM Clothing and related entities.⁵⁵ Unfortunately, the public record provides an incomplete picture of conflicts and disputes over intellectual property and the Aboriginal Flag. During the Senate inquiry, Western Australian Senator Patrick Dodson was looking for answers from WAM Clothing about how many organisations had been sent cease and desist letters; how many businesses had paid WAM to use the flag design; and what the company's profits had been over the last financial year.⁵⁶ WAM Clothing has declined to answer such questions thus far.⁵⁷ Such information, though, about licensing, cease-and-desist notices, and litigation does seem critically important in understanding the full situation in respect of copyright law and the Aboriginal Flag. Such information is also important in terms of fashioning policy solutions to resolve potential conflicts in this space.

In its appearance before the Senate Select Committee on the Aboriginal Flag, WAM Clothing also observed in evidence:

⁵⁵ Lorena Allam, 'Company that owns rights to Aboriginal flag in the spotlight at Senate inquiry', *The Guardian*, 14 September 2020, <https://theguardian.com/australia-news/2020/sep/14/company-that-owns-rights-to-aboriginal-flag-in-the-spotlight-at-senate-inquiry>

⁵⁶ Maddy King, 'Do you intend to answer any questions?' WAM Clothing Fronts Senate Committee <https://abc.net.au/triplej/programs/hack/%E2%80%98do-you-intend-to-answer-any-questions%E2%80%99-wam-clothing-fronts-se/12663006>

⁵⁷ Lorena Allam, 'Federal Government in Talks to Buy Licence for Aboriginal Flag Design, Senate Hears', *The Guardian*, 14 September 2020, <https://www.theguardian.com/australia-news/2020/sep/14/federal-government-in-talks-to-buy-licence-for-aboriginal-flag-design-senate-hears>

Our manufacturing is done in Bali, and it's all printed in Bali as well. Would you like to know why? It simply comes down to cost. We are, however, looking at options to manufacture in Australia.⁵⁸

There has been media discussion about whether it would be better for works featuring the Aboriginal Flag to be made in Australia by Indigenous artists and craftspersons. There has previously been judicial scrutiny of claims of authenticity in respect of work made overseas.

I. *ACCC v. Birubi Art Pty Ltd (2018)*

There has been a parallel controversy over fake and inauthentic art, which has been passed off as created by Indigenous people. The Australian Parliament held an inquiry into the topic, and issued a report, with a range of recommendations.⁵⁹ The Australian Competition and Consumer Commission took action against Birubi Art Pty Ltd for misleading and deceptive conduct for selling fake Indigenous art. (There has been a debate about whether or not WAM Clothing has any relationship with Birubi Art Pty Ltd.)⁶⁰ It is worth recounting the reasoning and outcome of that decision – especially as WAM Clothing has presented that case in a rosy light in its submission.

⁵⁸ Jade Gailberger and Angie Raphael, 'WAM Clothing: Senate inquiry probes copyright issues with Aboriginal flag', *News.com.au*, 14 September 2020, <https://news.com.au/national/politics/senate-inquiry-investigates-copyright-issues-with-aboriginal-flag/news-story/91f56d01e22f0d645ecd63e0fcb9a329#.wao9a>

⁵⁹ House of Representatives Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples*, Canberra: Parliament House, 20 December 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report

⁶⁰ Lorena Allam, 'Company that holds Aboriginal flag rights part-owned by man prosecuted for selling fake art', *The Guardian*, 11 June 2019, <https://www.theguardian.com/australia-news/2019/jun/11/company-that-holds-aboriginal-flag-rights-part-owned-by-man-prosecuted-for-selling-fake-art>

In October 2018, the Federal Court of Australia held that Birubi Art Pty Ltd, a wholesaler of souvenirs based in Queensland, had misleadingly given the impression that 18,000 of its boomerangs, bullroarers and other artefacts were genuine First Nations products, when in fact they had been made in Indonesia.⁶¹ The judge noted: ‘With respect to the Hand Painted by an Aboriginal person and Made by an Aboriginal person representations, it was accepted by Birubi that there was no evidence that anyone in Indonesia who was involved in the manufacture of the Products identified as an Australian Aboriginal person (notwithstanding the longstanding and historically significant Makassar trade route).’⁶² Perry J ruled:

In my view Birubi, by representing in trade and commerce during the relevant period to consumers that the loose boomerangs, boxed boomerangs, bullroarers, didgeridoos and message stones were hand painted by Australian Aboriginal persons, engaged in misleading or deceptive conduct in breach of s 18 and subs 29(1)(a) of the Australian Consumer Law.⁶³

The judge added: ‘Furthermore, during the relevant period, by representing to consumers that the loose boomerangs, boxed boomerangs, bullroarers, didgeridoos and message stones were made in Australia, Birubi, in trade or commerce, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law; and made false or misleading representations concerning the place of origin of goods in connection with the supply or possible supply of goods, or the promotion of the supply of

⁶¹ Ibid. 54. *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018) at [11].

⁶² *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018) at [11]

⁶³ *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018) at [163] [164]

goods, in contravention of subs 29(1)(k) of the ACL.’⁶⁴ The case is an important precedent in respect of consumer law and Indigenous intellectual property (following on from some similar actions in the 2000s).

The Australian Competition and Consumer Commission applauded the award of \$2.3 million against Birubi Art Pty Ltd.⁶⁵ ACCC Commissioner Sarah Court said: ‘This penalty sends a strong message to anyone considering selling fake Australian Aboriginal style art as the genuine article.’⁶⁶ Ms Court emphasized that ‘Birubi’s actions were extremely serious’. She noted: ‘Not only did they mislead consumers, they were liable to cause offence and distress to Australian Aboriginal people.’⁶⁷ Ms Court commented: ‘Engagement in the Indigenous Australian art industry is extremely important to a significant number of Australian Aboriginal people, especially those in remote regions.’⁶⁸ Ms Court observed: ‘The ACCC took this action because the misleading conduct has the potential to undermine the integrity of the industry and reduce opportunities for Australian Aboriginal peoples.’ Ms Court commented: ‘The ACCC will be monitoring traders of Indigenous Australian style art and souvenirs to ensure confidence in the Indigenous Australian art industry.’⁶⁹ Ms Court warned: ‘We will take action against those who mislead consumers about the nature of their products.’⁷⁰

⁶⁴ *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018) at [163] [164]

⁶⁵ Australian Competition and Consumer Commission, ‘23 m Penalty for Fake Indigenous Art’, Press Release, 26 June 2019, <https://www.accc.gov.au/media-release/23m-penalty-for-fake-indigenous-australian-art>

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

Indigenous lawyer Stephanie Parkin was hopeful that the decision would be influential in future disputes over Indigenous intellectual property in Australia.⁷¹ She notes: ‘What is clear is that Aboriginal and Torres Strait Islander artists and communities will, as they have done for decades, continue to advocate for proper protections and recognition of their cultural rights and expressions.’⁷²

3. House of Representatives Debate Over Copyright and the Aboriginal Flag

There has been significant debate in the House of Representatives of the Australian Parliament over copyright law and the Aboriginal Flag. That discussion does touch upon many of the issues raised in respect of the Senate Select Committee inquiry into the Aboriginal Flag. A range of members of the Australian Labor Party have made contributions to the discussion of the topic during speeches about the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020 (Cth)* at the end of August 2020.

A. The Hon. Linda Burney

Shadow Minister for Indigenous Australians, Linda Burney, has lamented in August 2020: ‘The recently introduced restrictions on the use of the Aboriginal Flag are unacceptable and

⁷¹ Stephanie Parkin, ‘Australian Court Clamps Down on the Sale of Fake Aboriginal Souvenirs’, (2019) 6 *WIPO Magazine* 32-38.

⁷² Ibid.

heartbreaking.’⁷³ She emphasized: ‘This is a national flag and the Government has to make sure that it is freely available to all Australians’.⁷⁴ Burney noted: ‘The Government has the power and the resources to fix this.’⁷⁵ She has been drafting a bill to address the topic of copyright in respect of the Aboriginal Flag.

In a second reading speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* (Cth), the Hon. Linda Burney discussed her reverence for the Aboriginal Flag, and her concerns about copyright and licensing restrictions upon its use.⁷⁶ She discusses the important history of the Aboriginal Flag:

The Aboriginal flag was first flown in Adelaide on National Aborigines Day in 1971—a very long time ago—at Victoria Square, also known in the Kaurna language as Tarntanyangga. In 1972 the flag became the national flag of the Aboriginal Tent Embassy in Canberra after it was flown there. I know that Harold Thomas and Gary Foley took that flag to the tent embassy. The upper, black half of the flag represents the Aboriginal people of Australia. The lower, red half represents the red ochre—earth. The yellow circle at the centre represents land and sun, the giver of life and protector.⁷⁷

⁷³ The Hon. Linda Burney, ‘Statement on Aboriginal Flag’, 21 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7514343%22>

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ The Hon. Linda Burney, ‘Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* (Cth)’, Hansard, Australian Parliament, 31 August 2020, 53 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa645d93b-9c50-4cec-be4f-41a182dc9b42%2F0132%22>

⁷⁷ Ibid.

Burney also acknowledges: ‘The Federal Court has recognised Harold Thomas as the author of that flag, and that is an important point in this discussion.’⁷⁸ The Shadow Minister notes that ‘Harold is a deeply respected Luritja man from Central Australia’, ‘the first Aboriginal person to graduate from an Australian art school’ and is the holder of ‘an honorary degree at the University of Adelaide.’⁷⁹ Burney reflects: ‘We understand that Harold has absolutely every right, as the copyright holder, to do as he wishes in terms of the flag.’⁸⁰ Nonetheless, she observed that the Aboriginal Flag had community importance and significance: ‘But we also say very much that, while we recognise Harold's copyright, Australia is made up of many Aboriginal nations—hundreds, as well as the Torres Strait—and the Aboriginal flag is one symbol that unites those Aboriginal nations.’⁸¹

The Hon. Linda Burney’s concerns relate to the licensee WAM Clothing: ‘The matter I want to speak of that has caught national attention is the ownership of the Aboriginal flag and the use of its copyright by a private company for profit, not pride.’⁸² She questioned whether WAM Clothing should be a gatekeeper in respect of the use of the Aboriginal Flag:

WAM Clothing and its associated entities assert that they hold the right to use of the flag on clothing and in digital form. It is a matter of public record that Aboriginal organisations—including health and community organisations,... —have been sent cease and desist orders and letters demanding that they stop putting the flag on clothes and uniforms unless they pay WAM to do so and have been told they can't use the flag online or on social media.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

This came to a head on the weekend, when the AFL could not use the Aboriginal flag for the Dreamtime round which was played in Darwin. There was no flag on the guernseys and no flag on the ground, but there were thousands of flags in the crowd as people, in an act of defiance, reclaimed this important symbol, a symbol which is protected under the Flags Act of this country. The takeover of the flag by private interests has appalled so many people, particularly because WAM Clothing has publicised links to another corporate entity, Birubi Art, a company which was last year fined \$2.3 million after being prosecuted by the ACCC for selling fake Indigenous art made overseas.⁸³

The Hon. Linda Burney has called for the company to relinquish its licensing rights to the Aboriginal Flag: ‘WAM Clothing should do the right thing and give the flag back, because just because something might be legal doesn't always mean that it's morally right.’⁸⁴ (It should be noted in parenthesis that copyright law seek to incorporate questions of fairness and equity into its schema – the defence of fair dealing seems quite important in this respect).

The Hon. Linda Burney has also discussed the importance of the Aboriginal Flag as a national icon. She stressed that the Aboriginal Flag served as a symbol to unify the diverse Aboriginal communities in Australia: ‘The one that unifies everyone, no matter what the diversity contains and no matter what the stories contain, is the image of the flag’.⁸⁵ She emphasized that the matter was an important and significant one: ‘People might argue that I'm playing identity politics and this is not something that should occupy the time of the House.’⁸⁶ She stressed that the Aboriginal Flag was important to First Nations, and the wider Australian public: ‘The Aboriginal flag is recognised as a formal flag of this country. It is part of the *Flags Act* 1953

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

and, therefore, it is a flag of this nation.’⁸⁷ She commented: ‘We all recognise it with pride and a collective sense of what it represents.’⁸⁸

B. The Hon. Warren Snowdon

The Hon. Warren Snowdon expressed his concerns about WAM Clothing and its copyright and licensing restrictions in respect of the Aboriginal Flag.⁸⁹ He noted: ‘I’m aware that WAM, the company which he’s assigned rights to, has been making cease and desist demands of Aboriginal organisations such as health services about the use of the flag.’⁹⁰ Snowdon emphasized that Indigenous health groups, community groups, and charitable organisations should be free to use the Aboriginal Flag, without being subject to copyright fees:

Many of these organisations, Aboriginal organisations, use clothing as a promotional tool or as an encouragement for First Nations people, for example, to have health checks. Deadly Choices, a product of the Institute for Urban Indigenous Health, is one of those organisations, and it now no longer uses the Aboriginal flag on its clothing because of a cease and desist letter from WAM. We’re not talking about a multinational organisation here, or the AFL or the Rugby League. We’re talking about Aboriginal community based organisations who see the flag as central to their purpose. What we’re

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ The Hon. Warren Snowdon - ‘Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* (Cth)’, Hansard, Australian Parliament, 31 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa645d93b-9c50-4cec-be4f-41a182dc9b42%2F0219%22>

⁹⁰ Ibid.

saying here is that it's inappropriate and wrong, really, for this company to exercise the rights they have in the way they are doing. I'd implore them to see what's going on here—there's a broader purpose.⁹¹

Snowdon recognized: 'We indeed need to accept and look after the intellectual property rights and the copyright of Harold Thomas.'⁹² Yet, he observed that there was still scope to address the licensing issues: 'That does not mean that we have to support the way in which the licence which has been issued to WAM is being utilised.'⁹³

C. The Hon. Sharon Claydon

The Hon. Sharon Claydon was concerned about the role of WAM Clothing acting as the custodian of the Aboriginal Flag in respect of certain uses.⁹⁴ She lamented: 'Tragically, Aboriginal people are finding themselves unable to use this important cultural symbol because the licensing rights now belong to a private company, WAM Clothing'.⁹⁵ She observed:

In 2018 WAM Clothing purchased the exclusive worldwide copyright licence for reproducing the Aboriginal flag for use on clothing, and WAM hasn't been shy about enforcing its legal power, prohibiting Aboriginal people and Aboriginal-owned organisations from any use of the Aboriginal flag on clothing from May 2019 onwards. Queensland's Indigenous Wellbeing Centre, a charitable

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ The Hon. Sharon Claydon, 'Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* (Cth)', Hansard, Australian Parliament, 31 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa645d93b-9c50-4ccc-be4f-41a182dc9b42%2F0220%22>

⁹⁵ Ibid.

organisation, was shamefully forced to pay \$2,200 in compensation when it used the Aboriginal flag on T-shirts that it then gave away to patients free of charge as an incentive to encourage Aboriginal people to come to the clinic for preventative health checks.⁹⁶

Claydon observed: ‘The idea that something so deeply symbolic as an official flag of Australia could be sold or licensed to a private company is profoundly troubling.’⁹⁷ She observed: ‘No other flag of Australia is licensed to a private, for-profit company—a company that, as I’ve said, is clearly determined to stop the very same people this flag represents from using the Aboriginal flag whenever they want without cost or the need for consent.’⁹⁸ In her view, ‘The recent events that have denied Aboriginal people the right to use their flag are heartbreaking.’⁹⁹

Claydon is concerned about the role of the Aboriginal Flag as a national icon. She said that ‘The Aboriginal flag was born out of resistance and struggle’ and ‘remains a powerful symbol of unity, pride and identity.’¹⁰⁰ Claydon support the call for ‘the government to do everything in its power to free the Aboriginal flag so that it can be used by all Australians, while also respecting and protecting the rights of the flag’s original designer, Harold Thomas.’¹⁰¹ Claydon commented:

Flags are important cultural artefacts. They are powerful symbols that can mean many things to many people. They can represent our shared, albeit contested, histories. They help us to understand ourselves and they unite people under a common banner. They shouldn’t be owned by anyone, much less a private,

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

for-profit company. The Aboriginal flag is an iconic national symbol that should always be about people and pride, not profit. Twenty-five years ago, this parliament recognised the Aboriginal flag as an official flag of Australia. It should not be beyond us now to free the flag so that First Nations peoples and communities can use the flag whenever they want without cost and without the need for consent.¹⁰²

The MP concluded: ‘It's now up to the Morrison government to act and to heed the calls of the almost 150,000 Australians who have now signed the online petition to free the Aboriginal flag and restore this important national symbol to public ownership.’¹⁰³

D. The Hon Ged Kearney

The Hon. Ged Kearney has been a vocal supporter of the Free the Flag campaign.¹⁰⁴ The Member for Cooper commented:

Laura and her colleagues started the Free the Flag campaign, and there's a petition that was created by Clothing The Gap. Over 140,000 people have signed the #PrideNotProfit petition, which is calling for a change to the current licensing arrangements around the Aboriginal flag, with the common goal of freeing the flag from copyright. I'm proud to be an advocate for and a supporter of the campaign.¹⁰⁵

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ The Hon. Ged Kearney, ‘Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* (Cth)’, Hansard, Australian Parliament, 31 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa645d93b-9c50-4cec-be4f-41a182dc9b42%2F0222%22>

¹⁰⁵ Ibid.

Kearney observed: ‘We hope many more organisations and people will join the protest and make it known that the flag should be able to be flown freely.’¹⁰⁶ She commented: ‘Indigenous and non-Indigenous Australians want no more and no fewer rights to the Aboriginal flag than we do to the Australian flag or the Torres Strait Islander flag’.¹⁰⁷ Kearney commended ‘the work of Clothing The Gap, Dreamtime Kullilla-Art and each and every organisation and individual who has added their voice to the call to free the flag.’¹⁰⁸ She cites the words of Laura Thompson, ‘The flag represented a struggle and a resistance movement, and now it just feels like a struggle to use it.’¹⁰⁹

E. The Hon. Peta Murphy

The Hon. Peta Murphy is a supporter of the Free the Flag campaign.¹¹⁰ She has supported Clothing the Gap: ‘Personally, I’m proud to have bought merchandise, including most recently a mask, to be worn in Frankston when I’m outside, in order to ensure that Aboriginal people across my community, across Victoria and across Australia feel heard and supported’. That’s also why, of course, we want a voice to parliament and to fully implement the Uluru Statement from the Heart.’ Peta Murphy was shocked that Clothing the Gap were targeted by WAM Clothing:

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ The Hon. Peta Murphy, ‘Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* (Cth)’, Hansard, Australian Parliament, 31 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa645d93b-9c50-4cec-be4f-41a182dc9b42%2F0224%22>

In June 2019, Clothing the Gap was served a cease and desist notice from WAM Clothing for celebrating their flag—the Aboriginal Flag. They were given three whole working days—three—to sell all of their flag stock or face legal action. Clothing the Gap asked this question: should WAM Clothing, a non-Indigenous business, hold the monopoly in a market to profit off Aboriginal people's identity and love for their flag? Well, 140,000 signatures to their online petition to Free The Flag suggests that there is a significant portion of the Australian public whose answer to that question is no.¹¹¹

Peta Murphy acknowledges: ‘Of course, Harold Thomas deserves the recognition and what comes from it as the creator of the Aboriginal flag’. Nonetheless, she observes that there is also a need to recognize the collective interest in the Aboriginal flag – shared by Clothing the Gap and others: ‘My contribution is to say, I am with you on the campaign to Free The Flag and to be able to celebrate your identity.’¹¹²

F. The Hon. Matthew Thistlethwaite

¹¹¹ Ibid.

¹¹² Ibid.

The Hon. Matthew Thistlethwaite – the member for Kingsford-Smith – was also concerned about the situation.¹¹³ He observed: ‘Many in our community are understandably upset by this, particularly Aboriginal and Torres Strait Islander Australians, who see the flag as a symbol of their enduring connection with this land, a symbol of their Australianness and their connection with Australia, and, understandably, want to proudly display that and tell everyone about that, by either flying the flag, wearing the flag or producing the flag as a symbol of their pride.’¹¹⁴ Thistlethwaite observed ‘That has generated a community campaign to free the flag so it can be used by all Australians, but particularly by all Aboriginal and Torres Strait Islander Australians, as a symbol of their pride in the oldest continuing culture in the world and their connection to this country’.¹¹⁵ He sought to represent his constituents on this issue: ‘I believe that that is important, and it's something that the Aboriginal community at La Perouse—proud of their ancestors and their connection with that land at La Perouse and Kamay, or Botany Bay—have said to me is important to them as well.’¹¹⁶ Thistlethwaite observed: ‘First Australians have inhabited these lands and these waterways for tens of thousands of years, and we recognise the Aboriginal flag as a symbol of that pride and as a symbol of that connection with the land and the waterways of Australia.’¹¹⁷ He concluded: ‘I sincerely hope that this parliament can work together on a solution that respects the rights of Harold Thomas and the

¹¹³ Matthew Thistlethwaite, ‘Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020 (Cth)*’, Hansard, Australian Parliament, 31 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fa645d93b-9c50-4cec-be4f-41a182dc9b42%2F0225%22>

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

rights holders, but, at the same time, frees the Aboriginal flag so that it can be used as a symbol of pride for all Australians.’¹¹⁸

G. The Hon. Luke Gosling

The Hon. Luke Gosling highlighted the views of sporting champions Michael Long and Nova Peris about the need to Free the Flag.¹¹⁹ He discussed their views in respect of the copyright and licensing restrictions on the use of the Aboriginal Flag by sporting organisations:

In the lead up to the Dreamtime at the 'G game, I spent some time with Michael Long at a school in Darwin. As a proud original Long walker, it was great to answer questions from those kids about the original Long Walk and about the Aboriginal flag. We were joined by another Territory legend, Nova Peris. Nova, an Olympian and former Northern Territory representative in the Senate, spoke about the need for action in relation to freeing the use of the Aboriginal flag. Nova said: 'We're calling on the government to fix it. We're calling on the Governor-General, who proclaimed it in 1995. You've got the power to make the rules, and we just want the Aboriginal flag to have the same rights as the Australian flag. How do you copyright something that represents a race of people? How do you copyright our pride? How do you copyright our history and our values and everything we stand for?'¹²⁰

He called on the Australian Parliament to listen to the views of the sporting leaders: ‘I just want to give both Michael Long and Nova Peris, a couple of constituents of mine—they are; they

¹¹⁸ Ibid.

¹¹⁹ Luke Gosling, ‘Second Reading Speech on the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020 (Cth)*’, Hansard, Australian Parliament, 31 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa645d93b-9c50-4ccc-be4f-41a182dc9b42%2F0223%22>

¹²⁰ Ibid.

live in Darwin—a voice on this issue that we all feel very strongly about.’¹²¹ He concluded: ‘I am very keen to see the agency of Harold Thomas, who owns the copyright, respected, and I am very, very keen to see the government fix this issue so that the rights to use the Aboriginal flag pass into the common domain, because it is valued collectively and it is a great source of pride so many Australians—in particular, the First Australians.’¹²² He also noted that ‘non-Indigenous Australians also see it as a very powerful symbol.’¹²³ Gosling emphasized that the Aboriginal Flag was a powerful symbol of land rights and self-determination: ‘These are critical issues to people who have been, to a large extent, disenfranchised, particularly in the Northern Territory.’¹²⁴

4. Australian Senate Discussion of Public Policy Options in Respect of the Aboriginal Flag

In September 2019, Senator Rachel Siewert of the Australian Greens expressed her concerns about the copyright licensing of the Aboriginal Flag.¹²⁵ She observed that ‘we had people in this place talking about the fact that the Aboriginal flag is under copyright and that First Nations sporting organisations are no longer able to use the flag on their uniforms without paying a

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Senator Rachel Siewert, ‘Governor General’s Address-in-Reply’, Hansard, Australian Senate 16 September 2019,

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F14ce5f3e-7418-4ec6-a358-e400de2ccc2f%2F0014%22>

On the 26th August 2020, Australian Labor Party Senator Malarndirri McCarthy moved the motion to establish the inquiry, noting: ‘There is so much confusion about what can and can’t be done about the flag.’¹²⁹ She suggested: ‘This inquiry is a chance to hear from all parties, their concerns and to seek a respectful way forward that guides the Australian parliament.’¹³⁰ Her motion – moved along with Senator Dodson -

- (a) notes that:
 - (i) the Aboriginal Flag is an official flag of Australia and a symbol of strength and unity,
 - (ii) the Aboriginal Flag is the single unifying symbol of Australia’s different and diverse Aboriginal Nations,
 - (iii) commercial interests are restricting the use of the flag and putting profit before pride, and
 - (iv) Aboriginal organisations have been sent cease and desist orders, simply for using the flag; and
- (b) calls on the Government to do everything in its power to free the flag, and get it back so it can be used by the whole community; at the same time as respecting Mr Harold Thomas.¹³¹

Minister for Finance, Matthias Cormann, said that the Federal Government supported the inquiry: ‘The Australian Government is aware of the concerns around the copyright of the Aboriginal flag and would like to see a resolution to this matter in a way that respects the rights

¹²⁹ Shahni Wellington, ‘Federal Inquiry Established into Aboriginal Flag’, *NITV News*, 3 September 2020, <https://www.sbs.com.au/nitv/article/2020/09/03/federal-inquiry-established-aboriginal-flag>

¹³⁰ Ibid.

¹³¹ Motion, Indigenous Australians— Aboriginal Flag, SJ No. 61 - 26 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2Fffa37b26-84cd-4920-a012-d7c4027fce76%2F0019%22>

of the flag’s creator while ensuring the flag continues to be a symbol of unity for Aboriginal people.’¹³²

The Select Committee on the Aboriginal Flag will consider ‘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.’¹³³ The Committee will also explore ‘options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community, including: negotiated outcomes with licence and/or copyright holders; the compulsory acquisition of licences and/or copyright, ways to protect the rights and interests of the flag’s legally recognised creator Mr Harold Thomas; and any other matters relevant to the enduring and fair use of the Aboriginal Flag design by the Aboriginal and Australian community.’¹³⁴ There are a range of policy options, which the Committee will have to evaluate.

A. Compulsory Acquisition

The Australian Government has broad power under the Australian Constitution to make laws with respect to intellectual property.¹³⁵ Past challenges to intellectual property laws under the Australian Constitution have often foundered. A challenge to copyright royalty rates under the

¹³² Ibid.

¹³³ Senate Select Committee on the Aboriginal Flag, *Aboriginal Flag*, Canberra: Australian Parliament 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Aboriginal_Flag/AboriginalFlag

¹³⁴ Ibid.

¹³⁵ *The Grain Pool of Western Australia v The Commonwealth* (2000) HCA 14.

acquisition of property clause was dismissed.¹³⁶ The tobacco industries' challenge to the plain packaging of tobacco products on the basis that there was an acquisition of property on something less than just terms was decisively rejected by the High Court of Australia.¹³⁷

A number of politicians considered the option of the compulsory acquisition of copyright in respect of the Aboriginal Flag. Liberal MP Russell Broadbent has said that he would support the Commonwealth buying out the copyright as 'the market is in this case not serving the national interest'.¹³⁸ Senator Andrew Bragg has reflected:

The Aboriginal flag is a national icon. The copyright is in private hands but it shouldn't be. The copyright should be purchased by the Commonwealth on behalf of all Australians.¹³⁹

Senator Bragg, though, has observed that any purchase should be subject to proper compensation: 'The notion that the government could take the rights without compensation is as absurd as the notion of terra nullius'.¹⁴⁰ He noted that 'A fair price should now be paid to

¹³⁶ *Phonographic Performance Co of Australia v. Commonwealth* [2012] HCA 8.

¹³⁷ *JT International SA v. Commonwealth of Australia* [2012] HCA 43, High Court of Australia, Order August 15, 2012, Reasons October 5, 2012.

¹³⁸ Rob Harris, 'Coalition MPs Back Government Buying Out Aboriginal Flag Copyright', *The Sydney Morning Herald*, 4 September 2020, https://www.smh.com.au/politics/federal/coalition-mps-back-government-buying-out-aboriginal-flag-copyright-20200904-p55sf9.html?utm_medium=Social&utm_source=Twitter#Echobox=1599250964

¹³⁹ Ibid.

¹⁴⁰ Ibid.

ensure this issue is put to rest forever.’ In his view, ‘It is the least the national government can do for Indigenous Australians.’¹⁴¹

There have been concerns, though, about whether it would be appropriate for the Australian Government to be the copyright owner of Indigenous intellectual property in such a way. Claire Coleman, for instance, argues that the Commonwealth should not be the owner or the steward of the copyright in the Aboriginal Flag.¹⁴²

While recognizing that the Australian Government has the power acquire intellectual property, the Minister Ken Wyatt has been hesitant about using such an approach – at least up front. He has said: ‘It is a delicate and sensitive matter.’¹⁴³ Minister Ken Wyatt commented: ‘In keeping with our efforts to battle inauthentic Indigenous art, the Morrison government respects the copyright of Mr Thomas and the interests of all parties.’¹⁴⁴ He observed: ‘We do not want to see efforts of the government, which are currently underway to resolve the matter and address community concern, jeopardised in any way.’¹⁴⁵

¹⁴¹ Ibid.

¹⁴² Claire Coleman, ‘Harold Thomas and the Legacy of Albert Namatjira’, *Meanjin Quarterly*, 4 September 2020, <https://meanjin.com.au/blog/harold-thomas-and-the-legacy-of-albert-namatjira/>

¹⁴³ Rob Harris, ‘Coalition MPs Back Government Buying Out Aboriginal Flag Copyright’, *The Sydney Morning Herald*, 4 September 2020, https://www.smh.com.au/politics/federal/coalition-mps-back-government-buying-out-aboriginal-flag-copyright-20200904-p55sf9.html?utm_medium=Social&utm_source=Twitter#Echobox=1599250964

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

B. Community Ownership Model

Another possible approach would be a community approach to copyright ownership. In contrast to the Aboriginal Flag, the Torres Strait Island Regional Council and its 15 communities own the copyright of the Torres Strait Islander Flag.¹⁴⁶ The Torres Strait Islander Flag was the winning entry by Bernard Namok in a design competition run by the Island Coordinating Council (ICC). The Council has advised: ‘We give permission for requests to reproduce the Torres Strait Islander Flag subject only under the following conditions: where appropriate, recognition is given to the original designer, the late Mr Bernard Namok; original PMS colours are used; and permission must be received in writing from us, prior to its use.’¹⁴⁷ Such a model could conceivably be employed in respect of the Aboriginal Flag.

C. Statutory Licensing

Another possible in-between option under copyright law would be statutory licensing.¹⁴⁸ While such a regime would still recognise the copyright ownership of Harold Thomas, statutory licensing would enable copyright users to use the work in return for a license fee—without needing the permission of the copyright owner or licensee. The Australian copyright regime has long relied upon statutory licensing—particularly with its system of copyright collecting societies.

¹⁴⁶ Torres Strait Island Regional Council, ‘Torres Strait Islander Flag’, <http://www.tsirc.qld.gov.au/our-work/torres-strait-islander-flag>

¹⁴⁷ Ibid.

¹⁴⁸ Australian Law Reform Commission, ‘What is a Statutory Licence?’, *Copyright and the Digital Economy*, Discussion Paper, 4 June 2013, <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-dp-79/6-statutory-licences/what-is-a-statutory-licence/>

Statutory licensing is often used to resolve problems in the marketplace. Henry Ergas, Jill McKeough, and John Stonier reflected upon the role of this mechanism in their report on intellectual property and competition policy:

The Committee recognises the important role of the statutory licences regime within the copyright system. We believe these licences can act to reduce the transactions costs that would otherwise arise in negotiating licence conditions between rights owners and users.¹⁴⁹

To this end, it would be helpful for WAM Clothing to produce documents in respect of its licensing arrangements, cease-and-desist notices, and any litigation. Such information would be relevant to a consideration of whether the option of statutory licensing would be appropriate and well-adapted for the situation of the Aboriginal Flag.

The adjacent intellectual property fields of patent law and designs law have well-elaborated regimes for compulsory licensing and crown use.

D. Copyright Exceptions

¹⁴⁹ Henry Ergas, Jill McKeough, and John Stonier, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, Canberra: Australian Government, 2000, https://www.ipaustralia.gov.au/sites/default/files/ergas_report_september_2000.pdf

A further approach would be the establishment of a copyright exception. Australia’s copyright regime recognises a number of fair dealing defences (dealing with purposes such as criticism and review, research and study, reporting the news, use in judicial proceedings, parody and satire, and disability rights)—as well as library and archives exceptions; and a number of miscellaneous exceptions.¹⁵⁰ The Australian Parliament could create a new defence of fair dealing or a particular copyright exception, which would allow for free and fair uses of the Aboriginal Flag. That could be particularly helpful in protecting the use of the Aboriginal Flag by community groups, health associations, charities, and sporting organisations.

E. Voluntary Licensing and Acquisition

The Minister for Indigenous Australians, Ken Wyatt, remains hopeful that the dispute can be resolved through voluntary negotiations with copyright owner, Harold Thomas. The Minister has said: ‘It’s important to note that the Australian Aboriginal Flag can be flown freely, as per the intention of copyright holder Mr Thomas.’¹⁵¹

¹⁵⁰ Australian Law Reform Commission, ‘Fair Dealing’, *Copyright and the Digital Economy*, Discussion Paper, 4 June 2013, <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-dp-79/7-fair-dealing/>

¹⁵¹ Shahni Wellington, ‘Federal Inquiry Established into Aboriginal Flag’, *NITV News*, 3 September 2020, <https://www.sbs.com.au/nitv/article/2020/09/03/federal-inquiry-established-aboriginal-flag>

There has been discussion about what the value of the Aboriginal Flag would be in respect of any copyright acquisition.¹⁵² Marketing expert Max Markson has argued that \$25 million and an ongoing royalty deal for Harold Thomas would be an appropriate fee. He observed that the Australian Olympic Committee paid \$13 million for the rights to the Boxing Kangaroo flag ahead of 2000 Olympics. Markson contended:

If the Boxing Kangaroo went for \$13million in 2000, the Aboriginal flag has to go for at least \$25million and when you do the deal, you set up an ongoing commission for any future deals, So Harold Thomas gets an ongoing trailer fee where he picks up one or two per cent for any deals, if it's licensed to a business or an AFL team for example.¹⁵³

Markson is wrong to suggest, though, that the licensing fee would last for ‘eternity’ – given the duration of copyright protection for artistic works is limited to life plus 70 years.

In addition to questions of economic rights, there has been a discussion between the Minister Ken Wyatt and Harold Thomas about protecting the integrity of the flag: ‘Mr Thomas shared his and his family’s deep concern to protect the integrity of the flag for all Australians, and reiterated his creative rights to his artwork.’¹⁵⁴

¹⁵² Josh Hanrahan, ‘Should the Government Pay \$25 Million to “Free” the Aboriginal Flag?’ Buying Back the Rights to the Symbol Will Cost Double What Was Paid for the Boxing Kangaroo’, *Daily Mail Australia*, 20 August 2020, <https://www.dailymail.co.uk/news/article-8646175/Aboriginal-Flag-copyright-purchased-government-25-MILLION.html>

¹⁵³ Ibid.

¹⁵⁴ Ibid.

The discussions about voluntary licensing and/or acquisition are ongoing.¹⁵⁵ During his evidence to the Senate Select Committee on the Aboriginal Flag, Michael Green SC commented that there were a variety of ways of splitting licensing as well: ‘You can divide copyright by location and all manner of things in the Commonwealth.’¹⁵⁶

There are certainly precedents for peaceful resolution of copyright conflicts. The long-running copyright dispute over the work of Albert Namatjira was resolved in part by the patient pro bono legal negotiations of Mark Leibler.¹⁵⁷ Some disputes, though, seem to be perennial. There have been significant conflicts over the years, for instance, in respect of the work of David Unaipon – without any seeming clear resolution.¹⁵⁸

¹⁵⁵ Rebecca Gredley, ‘Aboriginal flag copyright talks under way’, *The Canberra Times*, 14 September 2020, <https://canberratimes.com.au/story/6923613/aboriginal-flag-copyright-talks-under-way/>

¹⁵⁶ Rebecca Gredley, ‘Aboriginal flag copyright talks confirmed’, *The New Daily*, 14 September 2020, <https://thenewdaily.com.au/news/indigenous-news/2020/09/14/aboriginal-flag-copyright-talks/>

¹⁵⁷ Matthew Rimmer, ‘Albert Namatjira: Copyright Estates and Traditional Knowledge’ (2003) 24 (6) *Incite* 6; Stephanie Convery, ‘From Alice Springs to Buckingham Palace: The Fight for Albert Namatjira’s Legacy’, *The Guardian*, 5 August 2017, <https://www.theguardian.com/film/2017/aug/05/from-alice-springs-to-buckingham-palace-the-fight-for-albert-namatjiras-legacy>; Isabel Dayman, ‘Albert Namatjira’s Family Regains Copyright of His Artwork After Dick Smith Intervenes’, ABC News, 15 October 2017, <http://www.abc.net.au/news/2017-10-14/albert-namatjira-copyright-returned-to-family/9050550>; and Arnold Bloch Leibler, ‘Arnold Bloch Leibler negotiates historic settlement for descendants of Albert Namatjira’, Press Release, 27 August 2018, <https://www.abl.com.au/insights-and-news/namatjira-compensation/>

¹⁵⁸ Matthew Rimmer, ‘The Legacy of David Unaipon’, in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, xxi-xxvii.

F. No Copyright Protection?

It should also be noted that some other jurisdictions have denied copyright protection to flags in particular cases.

The US Copyright Office Review Board rejected an application for a Tommy Hilfinger flag, on the basis that it ‘lack[ed] the requisite authorship necessary to support a copyright claim’.

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The US Copyright Office Review Board elaborated: ‘After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain sufficient original authorship necessary to sustain a claim to copyright.’¹⁶⁰ The US Copyright Office Review Board reflected:

To begin, the Work is a combination of four rectangles and three colors: two equally sized blue rectangles and two equally sized red and white rectangles. The Office cannot register common geometric shapes or coloring. See 37 C.F.R. § 202.1(a) (“examples of works not subject to copyright and applications for registration [include] familiar symbols or designs [and] coloring”); COMPENDIUM (THIRD) § 906.1 (listing some of the geometric shapes not eligible for copyright protection, including rectangles); *id.* at § 313.4(J) (noting that familiar symbols and designs cannot be registered). Thus, the individual elements of the overall Work are not independently copyrightable.

¹⁵⁹ United States Copyright Office, ‘Re: Second Request for Reconsideration for Refusal to Register “Tommy Hilfinger Flag”’; Correspondence ID: 1-33DWZTC; SR 1-4413364221, 15 March 2019, <https://www.copyright.gov/rulings-filings/review-board/docs/tommy-hilfinger-flag.pdf>

¹⁶⁰ *Ibid.*

Indeed, Tommy Hilfiger acknowledges that “color alone and a standard shape alone are not registrable.”¹⁶¹

The US Copyright Office Review Board noted: ‘Essentially, the Work is one large rectangle divided into two equally sized blue rectangles and two equally sized red and white rectangles’.

¹⁶² The US Copyright Office Review Board commented: ‘The arrangement of four rectangles to create a larger rectangle, even if one among many possibilities, is not sufficiently creative to warrant copyright protection’.¹⁶³ The US Copyright Office Review Board observed: ‘Additionally, the red, white, and blue colors added to the arrangement of shapes do not raise the Work into copyrightability; they are exceedingly common for flag designs.’¹⁶⁴

The US Copyright Office Review Board held: ‘Overall, the Board finds that the Work is not copyrightable’.¹⁶⁵ The US Copyright Office Review Board held: ‘The level of creative authorship involved in its configuration of elements is, at best, de minimis, and too trivial to support copyright registration.’¹⁶⁶

Riana Harvey commented upon the ruling of the United States Copyright Office Review Board:

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

Originality in copyright has been considered as a fairly low threshold to reach. However, this decision shows that it is most definitely present, emphasising the need for a combination of shapes and colours with sufficient creativity that does not reduce the role of the author to a trivial one.¹⁶⁷

Riana Harvey commented: ‘This case obviously is not a catch-all for all copyright claims involving flags - the originality threshold would be the greatest challenge to overcome in order to obtain copyright protection in the US.’¹⁶⁸

Nonetheless, the dispute does demonstrate that governments do have the power to set the limits what subject matter is protected, as determining the thresholds of originality required for copyright protection.

G. Protection of National Icons

The Australian Government does retain the power to manage intellectual property in respect of national icons. There has also been a number of policy options previously mooted by the Advisory Council on Intellectual Property in respect of the Protection of National Icons.¹⁶⁹

¹⁶⁷ Riana Harvey, ‘US copyright registration for the Tommy Hilfiger Flag denied due to insufficient originality’, *IP Kat*, 29 June 2019, <https://ipkitten.blogspot.com/2019/06/us-copyright-registration-for-tommy.html>

¹⁶⁸ Ibid.

¹⁶⁹ Advisory Council on Intellectual Property, *The Protection of National Icons: A Report to the Parliamentary Secretary to the Minister for Industry, Tourism and Resources*, Canberra: IP Australia, 2002, https://www.ipaustralia.gov.au/sites/default/files/acip_final_report_protection_of_national_icos_archived.pdf?acsf_files_redirect

The report provided a broad definition of national icons: ‘To enable a comprehensive discussion of the issue a very broad view of what could constitute a national icon has been taken in this paper.’¹⁷⁰ The report noted: ‘An icon could be any tangible or intangible thing, including a word, name, sound, music, lyric, place, geographic feature, animal, colour, building, organisation etc’.¹⁷¹ The report observed: ‘The development of a definition of an icon, or criteria for recognition of an icon would be a very important part of any action to protect icons.’¹⁷² The report provided an array of examples of national icons – including the Australian Anthem, Waltzing Matilda, the ANZACS, Don Bradman, and Ned Kelly. The report reflected that ‘a variety of issues... can arise over what might be termed inappropriate use of words, names, tunes, images etc. that are so important to Australia's national heritage that they could be considered national icons’.¹⁷³ The report was concerned: ‘Such inappropriate use may dilute, diminish, or bring the word, name, tune or image itself, along with the reputation of any actual living or deceased persons related to it into disrepute.’¹⁷⁴ The report commented: ‘In some cases the disrespectful treatment of national icons, because of their close association with national history, traditions and values, provokes strong reactions of outrage, hurt and distress in the community.’¹⁷⁵

The report discusses the current protection of flags – including the Aboriginal Flag - as national icons:

¹⁷⁰ Ibid. 3.

¹⁷¹ Ibid. 3.

¹⁷² Ibid. 3.

¹⁷³ Ibid. 3.

¹⁷⁴ Ibid. 3

¹⁷⁵ Ibid., 3.

The *Flags Act* 1953 simply declares the Australian National Flag and the Australian Red Ensign. It also gives the Governor General the power to proclaim such other flags as he thinks fit. For example, in recognition of the fact that Aboriginal flag is increasingly being flown by both Aboriginal and non-Aboriginal people and is gaining in importance in Australian society, the government initiated steps in 1994 to give the flag legal recognition. After a period of public consultation, the government made its own decision in July 1995 that the flag should be proclaimed a "Flag of Australia" under section 5 of the *Flags Act* and the flag was proclaimed by the Governor General of Australia, William Hayden, on 14 July 1995. The Act also gives the Governor General the power to authorise use of the flags either without defacement or with specific defacement. He or she may also publish rules for the guidance of person's using or flying the flags. There are no penalty provisions in the *Flags Act*.¹⁷⁶

The report noted: 'Copyright owned Mr Harold Thomas, a Luritja man, originally from Central Australia. Mr Thomas designed the flag in 1971.'¹⁷⁷

The report discussed six possible policy options for the better protection of national icons. The first option involved 'recognition only' — granting of icon status with no further protection given. The second option offered protection for 'national symbols' option — the establishment of specific 'national symbols' legislation prohibiting the derogatory use of such symbols – for instance, the national flag, the national anthem (tune and words). A third option involved protection of 'national icons' — the establishment of specific 'national icons' legislation prohibiting the derogatory use of such icons. The fourth option consisted of amendments to current legislation to give support to the protection of national icons.' The fifth option was a 'combined national icons' option — a combination of options 3 and 4. The sixth option involved a 'non-exclusive trade mark.'

¹⁷⁶ Ibid., 15.

¹⁷⁷ Ibid., 54.

The report also noted the importance of the freedom of political communication in any construction of a regime in respect of the protection of national icons – particularly in light of the precedent of *Davis v. Commonwealth*.¹⁷⁸

Summary

The Select Committee on the Aboriginal Flag includes Senator Malarndirri McCarthy, Senator Patrick Dodson, Senator Andrew Bragg, Senator Perin Davey, Senator Amanda Stoker, Senator Matt O’Sullivan, and Senator Lidia Thorpe. The Committee is due to report to Parliament on the 13 October 2020. There is certainly a wide array of policy options available to the Australian Parliament in responding to the controversy over copyright law and the Aboriginal Flag.

It will be interesting to see whether the Select Committee on the Aboriginal Flag will be able to reach a consensus on its recommendations—given the spectrum of views expressed by legislators in the Australian Parliament. Of course, it should also be recognised that parliamentary committee recommendations are not always acted on by the Executive. It is possible that questions about copyright ownership and licensing of the Aboriginal Flag will instead be determined by market forces, and judicial decisions.

4. Indigenous Intellectual Property, Law Reform and Social Justice

There are of course difficulties and complexities in the Australian Parliament seeking to resolve one particular dispute in respect of Indigenous intellectual property. As Dr Fady Aoun

¹⁷⁸ *Davis v. Commonwealth* (1988) 166 CLR 79

observes, the dispute is not just merely a doctrinal matter – there are larger questions of politics, ethics, and morality at play.¹⁷⁹ No doubt there are more systematic issues underlying the dispute. The copyright dispute over the Aboriginal Flag also highlights the need for a broader approach to the protection of Indigenous Intellectual Property.

In the past, there has been various initiatives to boost the protection of Indigenous intellectual property – albeit with mixed success.

The Morrison Coalition Government is promising to respond to the inquiry into inauthentic Indigenous art. Minister Ken Wyatt has vowed to stamp out fake art.¹⁸⁰ He reflected: ‘It really is staggering, given tourists come here wanting authentic Indigenous artwork and they assume that the artwork they are buying is genuine, when in fact they are buying a fake.’¹⁸¹ Ken Wyatt observed: ‘We'd never buy a fake Pro Hart, because we'd be outraged.’¹⁸² The Minister was concerned about the production of fake Indigenous art in Australia and overseas: ‘Fake art is being done everywhere.’¹⁸³ He lamented: ‘We've even had it done here in Australia by people

¹⁷⁹ Tom Stayner, ‘Tensions rise over use of Aboriginal flag design after testy exchanges during inquiry’, *SBS News*, 14 September 2020, <https://sbs.com.au/news/tensions-rise-over-use-of-aboriginal-flag-design-after-testy-exchanges-during-inquiry?cid=news:socialshare:twitter>

¹⁸⁰ Anna Henderson and Sarah Collard, ‘Commonwealth vows to stamp out fake Aboriginal art made in ‘sweatshops’’, *ABC News*, 2 September 2020, <https://www.abc.net.au/news/2020-09-02/federal-government-moves-to-protect-indigenous-art-from-fakes/12621362>

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

who are quite happy to sit down in a sweatshop environment and recreate Aboriginal artworks.’

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For its part, the leading government intellectual property agency IP Australia has emphasized that protection of Indigenous intellectual property is a priority in its 2020–2021 Corporate Plan.

¹⁸⁵ IP Australia hopes to ‘improve Australia’s IP system to promote the cultural integrity and economic potential of Indigenous Knowledge.’¹⁸⁶

There remain many outstanding issues of public policy in respect of Indigenous intellectual property. It is worth outlining a number of areas, worthy of further law reform and development.

A. International Law

The *UN Declaration on the Rights of Indigenous Peoples 2007* provides a template for the protection of Indigenous intellectual property. Nation states – including Australia – could do more to implement the articles relating to the protection of Indigenous intellectual property. Moreover, at an international level, there is a need to progress stalled discussions on an international agreement on Indigenous intellectual property in WIPO. The WTO could play a more significant role in the protection of Indigenous Intellectual Property. Moreover, the language on the protection of Traditional Knowledge under the *Convention on Biological Diversity 1992* needs to be translated into effective action. The regional agreement - the *Trans-*

¹⁸⁴ Ibid.

¹⁸⁵ IP Australia, *Corporate Plan 2020-2021*, <https://www.ipaustralia.gov.au/corporate-plan-2020-21>

¹⁸⁶ Ibid.

Pacific Partnership 2015 – has some text on how nation states have the discretion to take action in respect of the protection of Indigenous intellectual property.¹⁸⁷

B. Copyright Law

Building upon the ‘Bulun Bulun’ decision, Australian copyright law should recognise communal ownership of Indigenous cultural works.¹⁸⁸

During the debate over the introduction of moral rights in 2000, there was discussion about the need for better protection of Indigenous cultural works, and recognition of communal ownership.¹⁸⁹ A draft version of a bill to recognize communal ownership of moral rights was published by Attorney-General Ruddock, but never acted upon.¹⁹⁰ Further reforms of moral rights should consider dealing with such matters.

As a result of implementing international WIPO agreements, Australia provides some protection of performers’ rights under copyright law. There is a need to review whether Australia’s regime provides adequate and sufficient protection of Indigenous performers.

¹⁸⁷ Matthew Rimmer, ‘The Trans-Pacific Partnership and Sustainable Development: Access to Genetic Resources, Informed Consent, and Benefit-Sharing’, in Charles Lawson and Kamallesh Adhikari (ed.), *Developments in Access and Benefit Sharing of Genetic Resources – New Approaches and Opportunities*, Abingdon (Oxon) and New York: Routledge, 2018, 151-184.

¹⁸⁸ *Bulun Bulun and Milpururru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513.

¹⁸⁹ Matthew Rimmer, ‘Bangarra Dance Theatre: Copyright Law And Indigenous Culture’ (2000) 9 (2) *Griffith Law Review* 274-302.

¹⁹⁰ Jane Anderson, ‘The Politics of Indigenous Knowledge: Australia’s Proposed Communal Moral Rights Bill’ (2004) 27 (3) *University of New South Wales Law Journal* 585-605.

C. The Right of Resale for Visual Artists

There is a need to review the conservative model for the right of resale for visual artists in Australia to determine whether the regime is meeting its aims and objectives. In particular, it should be evaluated whether the scheme has provided adequate benefits for Indigenous artists and their families. There could be further scope to strengthen the right of resale for visual artists in Australia – particularly in light of the High Court of Australia rulings on constitutional law and intellectual property.

D. Consumer Law

The ACCC has taken action under Australian consumer law in respect of misleading and deceptive conduct and representations made about Indigenous art and craft. In the cases that it has intervened in, the ACCC has been effective. However, there has been concerns whether the regulator has been able to cope with the systematic nature of the problem. The precedent of *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] will hopefully act as a deterrence to further production of inauthentic art.¹⁹¹ Thought should be given to giving the ACCC further resources in order to engage in comprehensive action in respect of misleading and deceptive conduct relating to Indigenous art and craft. There have been a number of proposals put forward to strengthen Australian consumer law.

E. Trade Mark Law

¹⁹¹ *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018).

Australia's authenticity marks scheme – introduced for the Sydney 2000 Olympics - was a failure.¹⁹² Nonetheless, trade mark law can play a useful role particularly in respect of protecting Indigenous businesses and entrepreneurs. There is a need for IP Australia to play an active role in policing the trade marks register for any deceptive marks relating to Indigenous culture. The Morrison Government is considering the option of a certification trade mark scheme anew – in light of the inquiry into fake art. There has been an academic discussion about how geographical indications may be employed to protect Indigenous linkages between place and culture.

F. Designs Law

The work of Professor Maree Sainsbury has highlighted that there have been instances of misleading design registrations relating to Indigenous culture.¹⁹³ IP Australia needs to take action in respect of the designs register in such matters. There is an ongoing law reform process in respect of designs law. IP Australia has opportunity to consider ways and means of how Australia's design system could better support Indigenous communities.

G. Confidential Information

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¹⁹³ Maree Sainsbury, 'Indigenous Cultural Expression and Registered Designs' in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 233-249.

Confidential information and trade secrets have been employed successfully in the past by Indigenous communities in Australia in disputes over Indigenous intellectual property.¹⁹⁴ There is also increasing scope for the use of privacy law to protect private spheres in relation to Indigenous intellectual property.¹⁹⁵

In one of its inquiries into privacy, the Australian Law Reform Commission recommended that ‘The Office of the Privacy Commissioner should encourage and assist agencies and organisations to develop and publish protocols, in consultation with Indigenous groups and representatives, to address the particular privacy needs of Indigenous groups.’¹⁹⁶ The Australian Law Reform Commission has also recommended the creation of a statutory cause of action in respect of serious invasions of privacy. That could be useful for Indigenous communities.

H. Patent Law

¹⁹⁴ Sarah Holcombe, ‘Confidential Information and Anthropology: The Politics of the Digital Economy’ in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 417-436.

¹⁹⁵ Bruce Baer Arnold, ‘Dignity, Trust and Identity: Private Spheres and Indigenous intellectual property’, in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 455-476.

¹⁹⁶ Australian Law Reform Commission, ‘Privacy Protocols for Indigenous Groups’ in *Australian Privacy Law and Practice*, ALRC Report 108, 12 August 2008, <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/7-privacy-beyond-the-individual/privacy-protocols-for-indigenous-groups/>

The recent High Court of Australia decision in *Myriad* is an important precedent in respect of patentable subject matter in Australia.¹⁹⁷ There is a need for IP Australia to take into account Indigenous knowledge as prior art when making determinations in respect of patent threshold standards – such as novelty, inventive step, and utility. There has been considerable policy discussion about the relationship between patent law, disclosure, informed consent and benefit-sharing in relation to Indigenous genetic resources.¹⁹⁸

I. Plant Breeders' Rights

Much like in the patent regime, IP Australia needs to take into account Indigenous knowledge in respect of determinations of distinctiveness, uniformity, and stability, when assessing plant breeders' rights applications.

J. Access to Genetic Resources

Australia has a fragmented federal and state and territory system of regimes in respect of access to genetic resources. There is a lack of consistency and harmony between the systems – particularly in respect of the treatment of Traditional Knowledge and Indigenous intellectual property. There is a need to ensure that benefits are passed onto Indigenous communities through the biodiscovery regimes – across the Federal Government, States, and Territories.

¹⁹⁷ *D'Arcy v Myriad Genetics Inc* [2015] HCA 35 (7 October 2015). Matthew Rimmer, 'An Exorbitant Monopoly: The High Court of Australia, Myriad Genetics, and Gene Patents' in Duncan Matthews, Herbert Zech (Eds.) *Research Handbook on Intellectual Property and the Life Sciences*. Edward Elgar, Cheltenham (UK) and Northampton (Mass.), June 2017, 56-103.

¹⁹⁸ Matthew Rimmer, 'The Genographic Project: Traditional Knowledge and Population Genetics' (2007) 11 (2) *Australian Indigenous Law Review* 33-55.

There have been some successful schemes, with Indigenous rangers protecting biodiversity in Australia.¹⁹⁹

The interim Samuel Review has recommended that there is a need to improve the protection of traditional knowledge and Indigenous intellectual property in the context of environmental laws for the protection of biodiversity and conservation.²⁰⁰ Chapter 2 focuses upon Indigenous culture and heritage. In his press statement, Graeme Samuel emphasised that ‘the *EPBC Act* had failed to fulfil its objectives as they relate to Indigenous Australians.’²⁰¹ He commented: ‘Sustained engagement with Indigenous Australians is needed to properly co-design reforms that are important to them.’ Samuel observed: ‘Much more needs to be done to respectfully incorporate valuable Traditional Knowledge of Country in how the environment is

¹⁹⁹ Matthew Rimmer, 'The World Indigenous Network: Rio+20, Intellectual Property, Sustainable Development, and the Future We Want', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 106-130.

²⁰⁰ Graeme Samuel, *The Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, Canberra: Australian Government, June 2020, <https://epbactreview.environment.gov.au/resources/interim-report>

²⁰¹ Graeme Samuel, ‘Release of the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*’, Press Release, 20 July 2020, <https://epbactreview.environment.gov.au/news/media-statement-professor-graeme-samuel-ac-releases-interim-report>

managed.²⁰² He concluded: 'Indigenous Australians seek, and are entitled to expect, greater protection of their heritage'.²⁰³

There are increasing challenges faced by Indigenous communities in respect of biodiversity and climate change.²⁰⁴

K. Cultural Heritage

In respect of cultural heritage, there has been some good progress in respect of the repatriation of Indigenous ancestral remains.²⁰⁵

There has been issues in terms of the protection of Indigenous cultural heritage in Australia.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Matthew Rimmer, 'Intellectual Property, Indigenous Knowledge, and Climate Change', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 382-414; and Matthew Rimmer, 'The Alliance of Small Island States: Intellectual Property, Cultural Heritage, and Climate Change', in Christoph Antons and William Logan (ed.) *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Abingdon (Oxon) and New York: Routledge, 2018, 102-132.

²⁰⁵ Matthew Rimmer, 'Travelling Bones: The Repatriation of Indigenous Remains', in Susanne Berthier-Foglar, Sheila Collingwood-Whittick and Sandrine Tolazzi (Eds.) *Biomapping Indigenous Peoples: Towards an Understanding of the Issues*, Amsterdam/New York, NY: Rodopi, 2012, 369-390; and AIATSIS, *Return of Cultural Heritage Report 2018-2020*, Canberra: AIATSIS, 2020, <https://aiatsis.gov.au/research/research-themes/culture-and-heritage/return-cultural-heritage>

In 2016, Victoria passed the *Aboriginal Heritage Amendment Act 2016* (Vic) to provide protection for tangible and intangible cultural heritage. Under the new provisions in the act, a group of traditional owners or native title holders can apply to have a piece of intangible heritage included on the Aboriginal heritage register.

Aboriginal Intangible Heritage means any knowledge of/or expression of Aboriginal tradition, including: oral and expressions (including language, songs and stories); performing arts (vocal and instrumental music, dance and performance); social practices, rituals and festive events; knowledge and practices concerning nature and the universe (including environmental and ecological knowledge) and/or visual arts and craftsmanship (skills and knowledge involved in their production). The legislation then makes it an offence to knowingly use any registered Aboriginal intangible heritage for commercial purposes without consent from the ownership group, with penalties of up to \$280,000 for an individual or \$1.5m for a corporation. It will be worthwhile monitoring this regime in operation. If this system is effective, it could be a useful model to emulate by other Australian Governments.

The 2020 controversy over Rio Tinto's destruction of cultural heritage in Western Australia has led to calls for the reform of Federal, State, and Territory laws, impinging upon Indigenous cultural heritage and Indigenous intellectual property.²⁰⁶

²⁰⁶ Lorena Allam, Ben Butler, and Calla Wahlquist, 'Rio Tinto: Why the Sacking of Three Executives Isn't Enough for Mining Investors', *The Guardian*, 12 September 2020, <https://www.theguardian.com/business/2020/sep/12/indigenous-leaders-say-rio-tinto-dumping-executives-must-be-beginning-of-genuine-transformation>

L. Native Title

The native title regime does not extend to intellectual property rights at present.²⁰⁷

The Australian Law Reform Commission reconsidered the relationship between intellectual property and native title:

‘The decision in *Ward HCA*, and its approach to cultural knowledge, predates key international developments, including UNDRIP. Contemporary understanding of connection to country is being shaped by a growing body of academic and anthropological literature which is not reflected in the current state of the law.’²⁰⁸

Terri Janke has pointed to a ‘paradox’ where cultural material is used in native title claims as evidence of continuing connection, but where cultural knowledge is not recognised as a native title right.

In summary, the ALRC has raised the potential for a native title right to protect cultural knowledge and for cultural knowledge to be considered in relation to rights to be exercised for any purpose, including commercial purposes. The ALRC does not have a concluded view on whether this would be a desirable development, but has identified the need for an in-depth inquiry that can assess the legal and policy issues.”

M. Indigenous Cultural Authority

²⁰⁷ *Western Australia v. Ward* [2002] HCA 28; 213 CLR 1.

²⁰⁸ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) [2015] ALRC 126, 262-270.

Terri Janke has called for the establishment of an Indigenous Cultural Authority in order to provide a co-ordinate institutional response to the protection, enforcement, and exploitation of Indigenous intellectual property. Such a regime would provide institutional support for the array of codes and protocols for the protection of Indigenous intellectual property in Australia. Such an authority might also play a role in the management of national Indigenous icons – like, for instance, the Aboriginal Flag.

N. The Uluru Statement from the Heart

The *Uluru Statement for the Heart* recognizes the importance of culture and heritage to Australia's First Nations:

We seek constitutional reforms to empower our people and take a rightful place in our own country.
When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

The proposals in respect to an Indigenous voice, truth-telling, and a treaty would perhaps be helpful in the resolution of the dispute over the use of the Aboriginal Flag.

Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, Indigenous Intellectual Property, and intellectual property and trade. He is undertaking research on intellectual property and 3D printing; the regulation of robotics and artificial intelligence; and intellectual property and public health (particularly looking at the coronavirus COVID-19). His work is archived at [QUT ePrints](#), [SSRN Abstracts](#), [Bepress Selected Works](#), and [Open Science Framework](#).

Rimmer is a member of the QUT Centre for the Digital Economy – which is part of the QUT Centre for Future Enterprise; the QUT Digital Media Research Centre (QUT DMRC), the QUT Centre for Behavioural Economics, Society, and Technology (QUT BEST); the QUT Centre for Justice; the QUT Australian Centre for Health Law Research (QUT ACHLR); and the QUT Centre for Clean Energy Technologies and Processes (which is based in the Institute for Future Environments). Rimmer was previously the leader of the QUT Intellectual Property and Innovation Law Research Program from 2015-2020 (QUT IPIL).

Rimmer has also a research interest in Indigenous intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, [*Indigenous Intellectual Property: A Handbook of Contemporary*](#)

[Research](#) (Edward Elgar, 2015). He has focused upon the adoption and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.