

ATSIC

COMMISSION DECISION

Meeting No. 50, 22 - 24 October 1997

Decision No. 1966

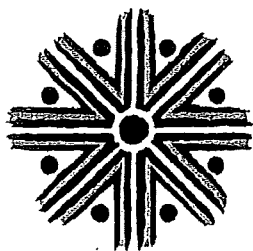
Paper No. 2482

Agenda No. 8.1.6

ABORIGINAL FLAG DESIGNER - LICENSING AGREEMENT WITH HAROLD THOMAS

The Commission pursuant to Section 7 of the *Aboriginal and Torres Strait Islander Commission Act 1989* and Objectives 4, 5 and 6 of the Corporate Plan:

- (a) **AGREED** to negotiations commencing for ATSIC to either purchase the copyright for the Aboriginal flag or enter into a licensing agreement with Mr Harold Thomas;
- (b) In the event that Mr Thomas is unwilling to relinquish copyright, the licensing agreement is:
 - to allow ATSIC, including all Regional Councils and ATSIC's successor and the Regional Councils' successors to use the image of the Aboriginal flag on publications and associated electronic material, on the proviso that the primary purpose of such use is not commercial advantage;
 - the agreement is to be perpetual;
- (c) **AGREED** that ATSIC is not prepared to undertake a "watchdog" role over its funded clients, who are corporate entities in their own right, as to their usage of the Aboriginal flag or its image; and



ATSIC

- (d) Subject to agreement being reached with Mr Thomas, **AGREED** to meet with Mr Thomas at the December Board meeting to make a formal presentation in recognition of his significant contribution, not only to the continuation of Aboriginal Culture through his artwork, but also for the design of a powerful symbol of Aboriginal unity and empowerment.

Section 22

Chairperson

23/10/1997

COMMISSION - IN - CONFIDENCE SUBMISSION

FILE NO:	AGENDA NO : 8.1.6 PAPER NO : 2402 MEETING NO :50 DATE : 21-23 Oct, 1997 22-24
TITLE	Aboriginal Flag designer - licensing agreement with Harold Thomas
ORIGINATING OFFICE	Central Office
PURPOSE	1. To provide advice on proposed negotiations with Mr Harold Thomas, designer of the Aboriginal flag, and seek approval of negotiation parameters for ATSIC to enter into a perpetual licensing agreement with Mr. H Thomas for it to use the image of the flag on ATSIC publications and electronic material.
RELATED SECTIONS OF :	/
• THE ACT	s.7 and s.14
• CORPORATE PLAN	Objectives 4, 5 & 7.
PROGRAM / SUB-PROGRAM	Program 3 - Corporate and Strategic Program.
ISSUES	• Licensing agreement for use of image of Aboriginal flag at a proposed one off cost of: Section 22
MEDIA IMPLICATIONS (If YES please provide details in submission).	Nil <i>As per</i>
AUTHORISATION	
LEGAL COMPLIANCE	
• FUNDS AVAILABILITY	
CONSULTATION	
• Commissioner/	
• Regional Council Consulted	
ENDORSEMENT	
• ASSISTANT GENERAL MANAGER	Section 22
• GENERAL MANAGER	Section 22
• CHIEF EXECUTIVE OFFICER	Section 22

All initiatives to be met from within the 1997-98 ATSIC budget.
 Section 22 2/10, Section 22 2/10/97
From the Budget reserve - contingencies/emergencies.
 Yes - The Chairman has been consulted on the key issues.
 N/A Section 22 2/10.

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Board of Commissioners

THE ABORIGINAL FLAG - COPYRIGHT ISSUES

Purpose

1. To provide advice to Commissioners regarding proposed negotiations with Mr Harold Thomas, designer of the Aboriginal flag.
2. To seek Board agreement to a one off payment for a negotiated perpetual licensing agreement between ATSIC and Mr Thomas, to enable ATSIC (and its successors, including Regional Councils and its successors) to use the image of the Aboriginal flag in publications and associated electronic material.
3. To suggest a formal meeting with Mr Thomas and the Board at the December meeting.

Background

ATSIC representatives met with Mr Thomas and his legal advisers in Darwin on 27 June 1997 to discuss a possible agreement between ATSIC and Mr Thomas regarding:

- ATSIC's usage of the flag and its image
- Indigenous organisations usage of the flag and its image
- Financial restitution for Mr Thomas as part of an agreement to recognise his work and contribution, obtain a license to use the image of the flag, and to enable Mr Thomas to protect his copyright in the future.

The meeting also discussed possible negotiations with the Commonwealth regarding a package of reforms for the protection of Indigenous cultural and intellectual property rights generally.

Mr Thomas' legal advisers wrote to ATSIC on 9 July 1997 to confirm these discussions (*Attachment A*) and followed up with a further faxed letter on 1 September (*Attachment B*).

Current Situation

Given the unprecedented proposals of Mr Thomas and his lawyers, (as outlined in their letter of 9 July 97 at *Attachment A*) officers within the SD&S Division have been considering how best to respond to Mr Thomas' representations within the confines of legal and statutory funding parameters.

These discussions have led us to conclude that ATSIC could enter into a licensing arrangement with Mr Thomas whereby:

- ATSIC* would not reproduce the flag or its image for commercial gain
- ATSIC* could use the flag and the image of the flag on its publications and associated written and electronic material

(* ATSIC being regarded as the current Commission and its successors and Regional Councils and their successors)

The Board is asked to approve a one-off negotiated payment of up to **Section 22** for Mr Thomas. Should the Board agree to this price range, the legal details of an appropriate license agreement could be negotiated and attended to by ATSIC's Legal Branch in time for a formal meeting and presentation to Mr Thomas at the December Board meeting.

Because of the lack of precedent, it is difficult to obtain a valuation to quantify the amount of the licence agreement, however the amount suggested would provide Mr Thomas with the financial capacity to meet the legal costs of protecting his copyright in the foreseeable future. Such a basis for determining the amount in our view could, if required, be a reasonable publicly defensible position.

Source and Basis for Funding

The one-off payment of up to **Section 22** could be made under the Public Awareness Program component and given the sensitivities of the issue approval is being sought from the Board (who have the authority to approve projects outside normal funding guidelines in accord with S14 of the Act).

The 97/98 Public Awareness Program allocation would be supplemented by arranging a transfer from the \$1.025 million set aside in the 97/98 Budget for emergencies/contingencies.

The purpose of the Public Awareness Program *"is to support related initiatives that have significant public awareness value in the wider community in relation to Aboriginal and Torres Strait Islander affairs"* (page 182 97/98 ATSIC Policy Statements, Program Guidelines).

Ancillary Consideration

The broader issue of Cultural and Intellectual property rights as suggested by Mr Thomas' legal advisers in their letter of 9 July, could be taken up once the final report (*Our Culture, Our Future- proposals for the recognition and protection of Indigenous and Intellectual Property*) is forwarded by AIATSIS through the Indigenous Reference Group to ATSIC (and other agencies) for consideration.

The suggestion by Mr Thomas that ATSIC provides a "watchdog" role over funded ATSIC organisations as to appropriate usage of the Aboriginal flag, is in our view impractical and difficult to enforce. In any event such organisations are corporate entities in their own right. We suggest that such a proposition be rejected.

The Board should be aware that there will not be a likelihood that similar licensing agreements will need to be negotiated with the designer of the Torres Strait Islander flag as this was commissioned work.

Mr Thomas' Meeting with the Board

If agreement can be reached with Mr Thomas and his legal advisers by November, we would endeavour to remit the one-off payment immediately thereafter.

Given Mr Thomas' contribution as the designer of the flag it would be appropriate that the Board consider presenting him with a plaque to recognise Mr Thomas' significant contribution in providing Australia with a powerful symbol of Aboriginal empowerment and aspirations. Media coverage could be discussed with OPA closer to the time.

Recommendations

That the Board of Commissioners pursuant to section 7 of the ATSIC Act and in accordance with Corporate Plan objectives 4, 5 and 6:

1) **Agree** to legal negotiations commencing for ATSIC to enter into a licensing agreement with Mr Harold Thomas within the following parameters;

- The agreement is to allow ATSIC, including all Regional Councils and ATSIC's successor and the Regional Councils' successors to use the image of the Aboriginal flag on publications and associated electronic material, on the proviso that the primary purpose of such use is not commercial advantage.
- The agreement is to be perpetual.
- ATSIC is prepared to pay a one-off lump sum of up to **Section 22** to Mr Thomas for such a licence.
- ATSIC is not prepared to undertake a "watchdog" role over its funded clients, who are corporate entities in their own right, as to their usage of the Aboriginal flag or its image.

2) Subject to agreement being reached on the terms of a licence, **agree** to meet with Mr Thomas at the December Board meeting to make a formal presentation in recognition of his significant contribution, not only to the continuation of Aboriginal Culture through his artwork, but also for the design of a powerful symbol of Aboriginal unity and empowerment.

3) Agree that the payment for the licence be recorded against the Public Awareness Program component and be sourced from the contingent 97/98 Program Funds.

Strategic Policy Section
Strategic Planning and Policy Branch
September 1997

Contact Officer

Section 22

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CH 970385

COPYRIGHT ISSUES - THE ABORIGINAL FLAG

You wrote to me on 9 July 1997 regarding the Aboriginal Flag and my meeting with Harold Thomas and you in Darwin on 27 June 1997. You followed up with a further letter on 1 September 1997.

During our meeting, I advised you that I was not meeting Mr Thomas or you on behalf of the Commonwealth Government. On the contrary, I agreed to the meeting to work out a way for Aboriginal people generally to be able to use the Aboriginal flag (copyright in which is acknowledged to be owned by Mr Thomas) without impediment. You asked at our meeting if I was aware of the Commonwealth position, to which I replied that I was not. I now understand that the Department of Prime Minister and Cabinet is instructing the Attorney General's Department on behalf of the Commonwealth.

I am pleased that Mr Thomas understands that the use of the flag (in terms of flying it) is not a breach of his copyright and that he has no objections to the use of the flag for this purpose.

In regard to your proposal for a licence agreement with ATSIC wherein ATSIC would sub-license use of the design to the organisations it funds, ATSIC sees difficulties in assuming such a responsibility.

ATSIC funds in excess of 4,000 indigenous organisations per annum, and given that these organisations are corporate entities in their own right, it would be impractical for ATSIC to take on a "watchdog role" in relation to an organisation's use of the flag. Nor do we consider it practicable to incorporate any "watchdog" provisions as part of ATSIC's funding conditions.

Instead I would support a proposal to be considered by ATSIC's Board at its October meeting, that ATSIC enter into a perpetual licensing arrangement with Mr Thomas, who in return for a one-off lump sum payment would allow ATSIC to produce images

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of the flag on ATSIC publications and associated written and electronic material. Such an agreement would preclude ATSIC from reproducing the image of the flag where the purpose of the publication was primarily commercial.

As ATSIC is primarily funded from the public purse, the basis for determining the amount for such a licensing arrangement needs to be publicly explainable. Consequently the determination of the amount could perhaps be based on an estimate of Mr Thomas' likely future defence of his copyright.

The ATSIC Board at its October meeting will be asked to approve the parameters of ATSIC's negotiation position, including financial limitations.

Should the ATSIC Board concur with this proposal, ATSIC's representative from our Legal Branch would contact you later October to settle with you a mutually acceptable licensing arrangement as quickly as possible.

As the October ATSIC Board meeting will be taken up with major Budget and other dominant issues, it would, regrettably be inconvenient for Mr Thomas and his legal representative to meet with the Board at this time. In any event, the Board, in being asked to determine the parameters of negotiation with Mr Thomas needs to be given the opportunity to consider the issues on the basis of professional advice from its officers and therefore it is perhaps also inappropriate for Mr Thomas to meet with the Board until negotiating parameters have been determined.

Nevertheless I reiterate my invitation for Mr Thomas to meet with the Board as a mark of respect and recognition of his significant contribution to not only the continuation of Aboriginal culture through his art work, but also to acknowledge his creation of the flag as a symbol of empowerment of Aboriginal Australia.

On the assumption that negotiations between ATSIC and Mr Thomas can be satisfactorily concluded in November, I would like to suggest that Mr Thomas meet with the Board during its scheduled December meeting which will be held 9-11 December.

I confirm that his expenses will be met by the Commission.

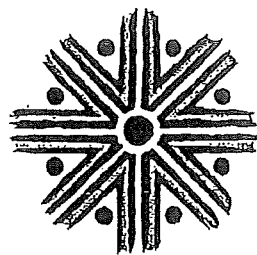
Please be assured, that despite the delay in this response I am anxious for ATSIC and Mr Thomas to arrive at a mutually acceptable arrangement as soon as possible.

Yours sincerely

Section 22

Chairman

cc Mr Thomas



ATSIC

COMMISSION DECISION

Meeting No. 51, 9 - 11 December 1997

Decision No. 1996

Paper No. 2520

Agenda No. 7.1.2

AGREEMENT WITH HAROLD THOMAS TO REPRODUCE ABORIGINAL FLAG DESIGN

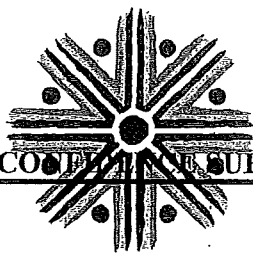
The Commission pursuant to Sections 7 and 10 of the *Aboriginal and Torres Strait Islander Commission Act 1989* and Objective 3 of the Corporate Plan:

- (a) **NOTED** the direction in which negotiations with Mr Harold Thomas have progressed;
- (b) **DECIDED** to suspend negotiations with Harold Thomas regarding a licence agreement for ATSIC to reproduce the image of the flag; and
- (c) **AGREED** that Harold Thomas be invited to the February Board meeting to address the Board and to receive a presentation of a plaque from ATSIC in recognition of his past contribution for the design of the Aboriginal flag that is so extensively used, accepted and respected by Aboriginal people.

Section 22



Chairperson
11 / 12 / 1997



COMMISSION - IN - CONFIDENTIAL SUBMISSION

FILE NO: 95/4170

AGENDA NO : 7.1.2

PAPER NO : 2520

MEETING NO : 51

DATE : 8-10 Dec, 1997

ATSIC

TITLE

Agreement with Harold Thomas to reproduce Aboriginal flag design

ORIGINATING OFFICE

Central Office

PURPOSE

1. To provide further advice on proposed negotiations with Mr Harold Thomas, designer of the Aboriginal flag, and seek approval of negotiation parameters for ATSIC to enter into an agreement with Mr. H Thomas for ATSIC to reproduce the flag on its publications and electronic material.

RELATED SECTIONS OF :

THE ACT

s.7

• CORPORATE PLAN

Objectives 4, 5 & 7.

PROGRAM / SUB-PROGRAM

Program 3 - Corporate and Strategic Program.

ISSUES

Purchase of copyright, or licence to reproduce flag design

Proposed duration of licence

Licence fee

Other terms

MEDIA IMPLICATIONS

(If YES please provide details in submission).

Yes

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AUTHORISATION

LEGAL COMPLIANCE

FUNDS AVAILABILITY

All initiatives to be met from within the 1997-98 ATSIC budget.

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CONSULTATION

- Commissioner/
- Regional Council Consulted

Yes - The Chairman has been consulted on the key issues.

ENDORSEMENT

- ASSISTANT GENERAL MANAGER

Section 22

Section 22

- GENERAL MANAGER

Section 22

P/ CHIEF EXECUTIVE OFFICER

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Board of Commissioners

THE ABORIGINAL FLAG - COPYRIGHT ISSUES

Purpose

1. To provide advice to Commissioners regarding negotiations with Mr Harold Thomas, designer of the Aboriginal flag.
2. To seek Board authority to continue negotiations along the lines recommended.
3. To suggest a formal meeting with Mr Thomas and the Board in the New Year.

Background

ATSIC representatives met with Mr Thomas and his initial legal advisers in Darwin on 27 June 1997 to discuss a possible agreement between ATSIC and Mr Thomas regarding:

- ATSIC's use of the flag and its image
- Indigenous organisations' use of the flag and its image
- Financial restitution for Mr Thomas as part of an agreement to recognise his work and contribution, obtain a license to use the image of the flag, and to enable Mr Thomas to protect his copyright in the future.

The meeting also discussed possible negotiations with the Commonwealth regarding a package of reforms for the protection of Indigenous cultural and intellectual property rights generally.

Mr Thomas' new legal adviser has recently been negotiating on Mr Thomas's behalf.

Current Situation

Mr Thomas has not accepted the proposal authorised by the October Board meeting that ATSIC purchase the copyright in the flag. He has instead proposed a licensing agreement for 20 years beginning at the date ATSIC was established, ie until 5 March 2010. The licence would cover ATSIC and Regional Councils. At this stage Mr Thomas is not willing to allow the licence to pass to ATSIC's successor if a Commonwealth Government replaces ATSIC or transfers its functions elsewhere before that date, but it is essential that this eventuality be covered, as well as the possible replacement of Regional Councils by other bodies. (Regional Authorities for example)

Because a licence of copyright is a commercial arrangement both ATSIC and Mr Thomas' lawyer have contacted other bodies such as the Sydney Organising Committee for the Olympic Games and the Australian Broadcasting Corporation to try to establish what would be a commercially reasonable licence fee. No guidance was available, partly because licence fees could not be disclosed because they were commercial in confidence but also because no comparable licensing situation could be found. After initial reluctance on both sides to nominate a fee, Mr Thomas' lawyer has now, on instructions from Mr Thomas, proposed a fee of Section 22 per year, ie a total for the 20 year term of Section 22

It is understood that no negotiations have taken place between Mr Thomas and other statutory bodies although an approach has been made by Mr Thomas to the Northern Land Council. It is likely therefore that the outcome of negotiations with ATSIC will set a precedent for arrangements with Mr Thomas for the reproduction of the flag on a non-commercial basis. It is less likely that any statutory body would be prepared to pay the fee currently proposed by Mr Thomas.

There is no expectation that negotiations will conclude before the December Board meeting. However the authority of the Board is needed to allow negotiations to proceed, given that negotiations have already moved outside the parameters set by the Board at its October meeting.

If it is decided not to insist that ATSIC purchase the copyright rather than take a licence, it is suggested that the essential elements of a licence agreement should be:

A perpetual licence as already recommended to and endorsed by the Board, to ATSIC and Regional Councils and their successors. If the licence is perpetual it can be passed on to any successor of ATSIC or of Regional Councils without having to renegotiate the arrangement. Only if there is a perpetual licence should payment be by way of a lump sum. If Mr Thomas is unable to accept a perpetual licence with a right to assign the licence to ATSIC's or the Regional Councils' successors, the licence should be short term (1 to 3 years) with a recurring option for ATSIC to renew the licence on the same terms.

The fee should take into account the duration of the licence and the past use by ATSIC of the flag design on publications, and should be defensible from an accountability point of view. Section 22 a year is arguably not defensible for the use of a design when the design will not be used to generate income for ATSIC.

There seems no reason to move from the Section 22 fee for a perpetual licence proposed in the October Board paper.

Ancillary consideration

At the October Commission Meeting it was also agreed that subject to an agreement being reached that Mr. Thomas meet with the Board at its December meeting so that a formal presentation (of an appropriate plaque) could be made. Such a presentation was to be in recognition of his past significant contribution, not only to the continuation of Aboriginal Culture through his artwork, but also for the design of a

powerful symbol of Aboriginal unity and empowerment. As an agreement has not been reached we suggest that this initiative is also deferred.

Recommendations

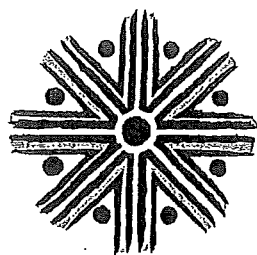
That the Board of Commissioners pursuant to section 7 of the ATSIC Act and in accordance with Corporate Plan objectives 4, 5 and 6:

- 1) AUTHORISE negotiations to continue with Mr Thomas for ATSIC and Regional Councils and their successors to have the right to reproduce the design of the Aboriginal flag on material produced for primarily non-commercial purposes (including cost recovery publications and media works);
- 2) AUTHORISE officers to offer up to Section 22 as a lump sum for a perpetual licence;
- 3) If a perpetual licence is not accepted by Mr Thomas, AUTHORISE officers to offer up to Section 22 per year for a licence of up to 3 years, with an option to renew on similar terms. The fee would be adjusted on renewal in line with the change, if any, in the cost of living index produced by the Australian Bureau of Statistics which had occurred since the previous adjustment;
- 4) REAFFIRM that an appropriate presentation to Mr. Thomas by the Board should occur at an appropriate time in the new year;

Strategic Policy Section
Strategic Planning and Policy Branch
December 1997

Contact Officer

Section 22



ATSIC

COMMISSION DECISION

Meeting No. 52, 17 - 19 February 1998

Decision No. 2051

Paper No. 2549

Agenda No. 10.1.2

REPRODUCTION OF ABORIGINAL FLAG DESIGN

The Commission pursuant to Section 7 of the *Aboriginal and Torres Strait Islander Commission Act 1989* and Goal 3 of the Corporate Plan:

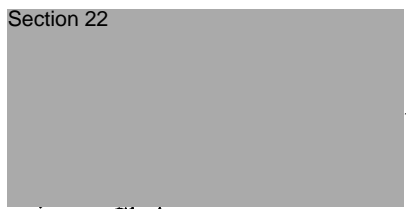
Section 47F, Section 47C





- (c) **DIRECTED** that, if Mr Thomas refuses to authorise reproduction of the design until final agreement has been reached on an amount of compensation and other conditions of use, then Harold Thomas' design of the Aboriginal flag not be reproduced on ATSIC publications, including electronic publications, until Mr Harold Thomas agrees to authorise such publication on conditions satisfactory to the Commission.

Section 22



Chairperson

19/12/1998

COMMISSION - IN - CONFIDENCE SUBMISSION

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FILE NO:	AGENDA NO :10.1.2 PAPER NO : 2549 MEETING NO 52: DATE: 17-19 February 1998
TITLE	Addendum to Paper 2549 - Reproduction of Aboriginal Flag design
ORIGINATING OFFICE	Legal Branch
PURPOSE	To obtain more specific direction from the Board on ATSIC's position in regard to any future negotiations with Harold Thomas and the use of the Aboriginal flag design on ATSIC publications.
COST FIN YR :	Nil
RELATED SECTIONS OF :	Sections 7 and 10
THE ACT	Goal 3
CORPORATE PLAN	Corporate and Strategic
PROGRAM / SUB-PROGRAM	
ISSUES	Board decision 1996 did not make clear whether the Commission should regard negotiations with Harold Thomas as broken off or suspended; and did not address the continuing use by ATSIC of the flag design in which Harold Thomas has the copyright. Further direction from the Board is therefore sought.
MEDIA IMPLICATIONS (If YES please provide details in submission).	Yes
<u>AUTHORISATION</u>	Section 22 Section 22 <i>Not applicable</i> 18/2/98
LEGAL COMPLIANCE	
FUNDS AVAILABILITY	
<u>CONSULTATION</u>	Yes Raised in Portfolio Committee
COMMISSIONER / REGIONAL COUNCIL CONSULTED (SM / AGM to confirm)	Section 22 18/2/98
<u>ENDORSEMENT</u>	Section 22 18/2/98
ASSISTANT GENERAL MANAGER	
GENERAL MANAGER	
CHIEF EXECUTIVE OFFICER	

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COMMISSION - IN - CONFIDENCE

Released under the FOI Act by the
National Indigenous Australians Agency

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AGENDA ITEM 10.1.2

ADDENDUM to Paper 2549 – Attendance of Harold Thomas at the February Board Meeting

BACKGROUND

Harold Thomas had been invited to attend this 52nd Board meeting to receive a presentation honouring his contribution to the Aboriginal cause through his design of the Aboriginal flag. He has declined to attend, pleading prior commitments. He has also asked that the negotiations regarding the use of his copyright in the flag be continued. It is understood informally that Mr Thomas is unlikely to accept an invitation to attend a Board meeting while the issue of copyright is unresolved.

It had been expected that Mr Thomas would address the Board on the occasion of the presentation and would deal with the issue of copyright in the Aboriginal flag. This will now not occur.

ATSIC has made proposals for the use of the flag to Mr Thomas through his lawyers, first ^{Section 22} [redacted] and later ^{Section 22} [redacted]. The ATSIC proposal to buy the copyright was rejected by Mr Thomas and a proposal for a perpetual licence has also been rejected. It appears that the amount of compensation sought by Mr Thomas will be in the order of several hundred thousand dollars for a limited licence period and limited assignment rights. The Board found these terms unacceptable.

At its last meeting the Board decided to suspend negotiations with Mr Thomas regarding a licence agreement for ATSIC to reproduce the image of the flag.

ISSUES

Section 47F, Section 47C



Intention to honour legal obligations

Section 47F, Section 47C



While not legally binding Goal 3 of the 1998-2001 Corporate Plan explicitly includes “ensuring legislative protection of indigenous intellectual property rights” as an important element of ATSIC’s focus on legislative recognition.

Exposure to legal action


If the Commonwealth uses someone’s copyright it cannot be sued for damages for breach of copyright. Instead the matter is taken to the Copyright Tribunal if the parties cannot agree on compensation. ATSIC is in a different position from the Commonwealth and can be sued for damages if it uses someone’s copyright without permission.

Section 47F, Section 47C



OPTIONS FOR ATSIC

Section 47C



Current Reproduction of the Flag

Section 47F, Section 47C



Section 47F, Section 47C

Mr Thomas' approval of the use while negotiations continued in good faith would need to be clarified however. The continued use would merely be taken into account in determining the amount of compensation to be paid to Mr Thomas.

Section 47C

Whatever position is taken by the Board, a clear decision on the continued reproduction of the flag needs to be made as soon as possible.

RECOMMENDED that:

Pursuant to section 7 of the Aboriginal and Torres Strait Islander Commission Act 1989 and Goal 3 of the 1998-1001 Corporate Plan, the Commission:

EITHER

Section 47F, Section 47C

DIRECT that Harold Thomas' design of the Aboriginal flag not be reproduced on ATSIC publications, including electronic publications, unless and until Mr Harold Thomas is prepared to authorise such publication on conditions satisfactory to the Commission.

OR

Section 47F, Section 47C

DIRECT that the Chief Executive Officer clarify with Mr Thomas whether he is prepared to allow the Commission to continue reproducing the design of the flag on the understanding that negotiations will continue in good faith once a reasonable basis for negotiation has been established,

DIRECT that, if Mr Thomas refuses to authorise reproduction of the design until final agreement has been reached on an amount of compensation and other conditions of use, then Harold Thomas' design of the Aboriginal flag not be reproduced on ATSIC publications, including electronic publications, until Mr Harold Thomas agrees to authorise such publication on conditions satisfactory to the Commission.

Strategic Development and Support Division

COMMISSION - IN - CONFIDENCE SUBMISSION

FILE NO:	AGENDA NO : <i>INFO</i> PAPER NO : <i>2624</i> MEETING NO : <i>53</i> DATE : 21-23 April, 1998
TITLE	Aboriginal Flag - negotiations with Harold Thomas
ORIGINATING OFFICE	Central Office
PURPOSE	1. To inform the Board of developments since the last Board meeting
RELATED SECTIONS OF :	
• THE ACT	s.7 and s.10
• CORPORATE PLAN	Goal 2
PROGRAM / SUB-PROGRAM	Program 3 - Corporate and Strategic Program.
ISSUES	• Reproduction by ATSIC of Aboriginal flag design; compensation for Harold Thomas
MEDIA IMPLICATIONS (If YES please provide details in submission).	Nil
<u>AUTHORISATION</u>	
• LEGAL COMPLIANCE	
• FUNDS AVAILABILITY	N/A
<u>ENDORSEMENT</u>	
• ASSISTANT GENERAL MANAGER	
• GENERAL MANAGER	<i>4.5.98</i>
CHIEF EXECUTIVE OFFICER	

Section
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Purpose

1. To inform Commissioners concerning contacts with Mr Harold Thomas, designer of the Aboriginal flag and the state of negotiations.

Background

At the 52nd meeting of the Board in February 1998 the Board directed that the Chief Executive Officer report to the 53rd meeting on any progress which may have been made by then towards an agreement with Mr Thomas on the reproduction of his flag design on publications (*Attachment A*).

Current Situation

On 26 February the Chairman met Harold Thomas in Darwin. Discussion covered compensation for past use, the terms of a licence for future use, and ATSIC's freedom to continue reproducing the flag design while negotiations continued.

Mr Thomas suggested a figure of between Section 22 for past use. The Chairman made no commitment on ATSIC's part. Mr Thomas also said that he would forward a draft licence agreement to ATSIC in the near future as a basis for negotiations.

Mr Thomas clarified that he was happy to allow ATSIC to continue to reproduce the Aboriginal flag while negotiations continued with ATSIC over compensation for past and future use.

Future Action

The clearance for ATSIC to continue reproducing the flag on publications takes away the risk of a breach of copyright action and makes it unnecessary for ATSIC to cease all reproduction of the flag as contemplated in paragraph c of Decision 2051. Such use will, however, be the subject of compensation in due course.

The draft licence agreement for future use promised by Mr Thomas has been received but the proposed terms have not been discussed with Mr Thomas. The draft proposes an annual licence fee but does not propose an amount.

The aspect of most concern remains the amount of compensation being sought by Mr Thomas for past use.

It is intended that further discussions take place with Mr Thomas to establish a defensible basis for compensation. The starting point will be a clarification of the outcome of the meeting on 26 February, which Mr Thomas appears to believe confirmed that compensation for past use would be in the range of the figures he suggested.

Strategic Development and Support Division

COMMISSION DECISIONMeeting No. 70, 18-20 APRIL 2001Decision No. 2545

Paper No. 3180

Agenda No. 13

ABORIGINAL FLAG

The Commission pursuant to Sections 7 and 10 of the *Aboriginal and Torres Strait Islander Commission Act 1989* and Goals 1, 2, and 3 of the Corporate Plan:

- (a) **AGREED** to reopen negotiations with Mr Harold Thomas, the copyright owner of the Aboriginal Flag design with a view to reaching an agreement for use by the Commission of the Aboriginal Flag design on the Commission publications, including electronic publications; and
- (b) **AGREED** that the Chairman be authorised to negotiate with Mr Thomas.

Section 22



Chairperson

20/04/2001



COMMISSION - IN - CONFIDENCE
SUBMISSION

FILE NO:	AGENDA NO : 13 PAPER NO : 3180 MEETING NO : 70 DATE : 18-20 April 2001
TITLE	Aboriginal Flag
ORIGINATING OFFICE	National Policy Office
PURPOSE	To seek the Commission's agreement to reopen negotiations with the flag's copyright owner, Mr Harold Thomas, for a licensing agreement enabling ATSIC to use the Aboriginal Flag design in its publications.
COST FIN YR : (Year/s relating to submission)	Unknown at this stage.
RELATED SECTIONS OF : • THE ACT (Section/s) • CORPORATE PLAN (Goal/s)	Sections 7(1)(c) and (d) and 10(1) 1, 2 and 3
OUTPUT GROUP / OUTPUT (Ref: Output Funding Statements)	Advancement of Indigenous rights and equity
ISSUES (Include special considerations, urgency)	Previous attempts at negotiating a licensing agreement with Mr Thomas have been unsuccessful. Mr Thomas has approached the Chairman about reopening negotiations. The use of the flag design on ATSIC produced treaty material would necessitate ATSIC entering into an agreement with Mr Thomas.
MEDIA IMPLICATIONS (If YES please provide details in submission).	NO
<u>AUTHORISATION</u> • LEGAL COMPLIANCE • FUNDS AVAILABILITY	Section 22 Section 22 Section 22 <i>will need to be made within the NPO Output Group Jtt</i> <i>30/3/01</i>
<u>CONSULTATION</u> • COMMISSIONER / REGIONAL COUNCIL CONSULTED (Manager to confirm)	The Chairman has had discussions with Mr Thomas.
<u>ENDORSEMENT</u> • MANAGER • CHIEF EXECUTIVE OFFICER	Section 22 <i>30 March 2001</i>

'This document may contain personal information, information supplied by applicants in confidence, or other information covered by Section 90 of the Aboriginal and Torres Strait Islander Commission Act 1989 or by privacy or Freedom of Information laws. Questions concerning its disclosure should be referred to ATSIC's Corporate Law Section.'

COMMISSION - IN - CONFIDENCE

Released under the FOI Act by the
National Indigenous Australians Agency

ABORIGINAL FLAG

SUMMARY

1. This paper will ask Commissioners to agree to reopen negotiations with the copyright owner of the Aboriginal Flag, Mr Harold Thomas, so that ATSIC can use the image on publications, videos, computers etc. This is especially important for treaty material being prepared and the treaty website as the use of the flag design cannot be envisaged without such an agreement.

BACKGROUND

2. Section 47F, Section 47C

3. Agreement has been reached with Mr Thomas for past use of the Flag design but no further negotiations have occurred regarding future use.

URGENCY

4. During his visit to the Northern territory in January this year, the Chairman was approached by Mr Thomas who asked that negotiations be reopened. The Chairman is particularly concerned that agreement is reached so that the Flag design can be used in conjunction with the Treaty campaign.

CONSIDERATION OF ISSUES

5. The Aboriginal Flag was designed by Harold Thomas in the early 1970s and was first used during the establishment of the Aboriginal Tent Embassy in 1971. The Flag became a powerful symbol of Aboriginal unity and protest and was used by many Aboriginal organisations in their publications, letterheads etc.
6. However, following the gazettal in 1995 by the Government of the Aboriginal flag as an official flag of Australia, Mr Thomas asserted his copyright ownership of the flag design. Subsequently, in 1997, the Federal Court determined that Harold Thomas is the owner of the design.
7. Throughout 1997 and early 1998, negotiations were held with Mr Thomas through his Lawyers for the Commission to either acquire the copyright ownership on behalf of all Aboriginal people or purchase a perpetual license for the use of the flag design. These negotiations were suspended by the Commission in February 1998.
8. During his visit to the Northern Territory in January this year, the Chairman was approached by Mr Thomas who expressed an interest in reopening negotiations with ATSIC for a licensing agreement to allow ATSIC and Regional Councils to use the flag design. The Chairman indicated that he would take the matter to the Board for consideration.
9. Use of the Aboriginal flag on treaty material cannot occur without a formal agreement with Mr Thomas.

FINANCIAL/LEGAL/MEDIA IMPLICATIONS

10. There will be financial implications should negotiations prove successful and the Commission is able to enter into an agreement with Mr Thomas for the use of the Flag design. It is not possible to quantify the level of funds required until negotiations occur.

RECOMMENDATION

11. That the Commission, pursuant to Sections 7 and 10 of the Aboriginal and Torres Strait Islander Commission Act 1989, and in accordance with Goals 1, 2 and 3 of the ATSIC Corporate Plan:
- a) **AGREE** to reopen negotiations with Mr Harold Thomas, the copyright owner of the Aboriginal Flag with a view to reaching an agreement for use by the Commission of the Aboriginal Flag design on Commission publications, including electronic publications; and
 - b) **AGREE** that the Chairman be authorised to negotiate with Mr Thomas.

Rights and Cultural Development Team
National Policy Office

12. March 2001

MINUTES

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION


MEETING NUMBER 71

19 – 21 June 2001

Adelaide Town Hall

PRESENT:

Section 22



MEETING OPENED:
MEETING CLOSED:

9.10am Tuesday 19/6/2001
3.10pm Thursday 21/6/2001

CONFIRMED

21/08/01.


Section 22



CHAIRPERSON


Following officers were in attendance for all or part of the Meeting:

Section 22




APPENDICES

Section 22



3 ACTION SCHEDULE

Section 22



APPENDIX 3

Section 22

Section 22

[Redacted]

Board	Aboriginal Flag	Section 22 [Redacted] Section 22 Thomas to discuss copyright issues associated with the use of the Aboriginal Flag design in conjunction with [Redacted] Section 22	[Redacted] Section 22 [Redacted]	ASAP	[Redacted]
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Section 22

[Redacted]

MINUTES

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION


MEETING NUMBER 72

21 – 23 August 2001

Brisbane City Hall

PRESENT:

Section 22



MEETING OPENED:
MEETING CLOSED:

9.10am Tuesday 21/8/2001
3.10pm Thursday 23/8/2001

CONFIRMED *13/11/2001*

Section 22




CHAIRPERSON

Released under the FOI Act by the
National Indigenous Australians Agency

Following officers were in attendance for all or part of the Meeting:

Section 22



The minutes of the 71st Board of Commissioners were accepted as a true and correct record of that meeting.

Section 22

Business arising from the minutes of the 71st meeting

Section 22 accompanied Section 22 to meet with Mr Harold Thomas to discuss issues related to the use of the Aboriginal Flag design. In-principle support was given to the one off payment of Section 22 to Mr Harold Thomas for ATSIC's use of the Aboriginal Flag pending legal advice. Motion moved by Section 22 and seconded by Section 22 (This was not supported by Section 22)

Section 22

Pages 56-66 inclusive deleted under section 22 of the FOI Act (irrelevant information)

**COMMISSION - IN - CONFIDENCE
SUBMISSION**

FILE NO:	AGENDA NO : 11/F02 PAPER NO : 3235 MEETING NO : 75 DATE : 19 - 21 February 2002
TITLE	Information Paper - Aboriginal Flag
ORIGINATING OFFICE	National Policy Office
PURPOSE	To inform the Board about the Licence granted to ATSIC and the 35 Regional Councils for the use of the Aboriginal Flag design.
COST FIN YR : (2002/03)	N/A
RELATED SECTIONS OF :	
<ul style="list-style-type: none"> • THE ACT (Section/s) 	7 and 10
OUTPUT GROUP / OUTPUT (Ref: Output Funding Statements)	Output Group 2.5 - Indigenous Rights
ISSUES (Include special considerations, urgency)	Mr Thomas has granted a Licence to ATSIC and the Regional Councils to use the Aboriginal Flag design.
MEDIA IMPLICATIONS (If YES please provide details in submission).	No
<u>AUTHORISATION</u>	Section 22
<ul style="list-style-type: none"> • LEGAL COMPLIANCE • () FUNDS AVAILABILITY 	
<u>CONSULTATION</u>	YES
<ul style="list-style-type: none"> • COMMISSIONER / REGIONAL COUNCIL CONSULTED (Manager to confirm) 	N/A.
<u>ENDORSEMENT</u>	Section 22
<ul style="list-style-type: none"> • MANAGER • CHIEF EXECUTIVE OFFICER 	Section 22

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COMMISSION - IN - CONFIDENCE

ABORIGINAL FLAG

SUMMARY

1. The paper seeks to inform the Board about the Licence entered into between ATSIC and the copyright owner of the Aboriginal Flag design, Mr Harold Thomas, and the conditions of the Licence.

BACKGROUND

2. At Meeting No. 66 (15 – 17 August 2000), the Board gave in-principle support to a “one-off payment of Section 22 to Mr Harold Thomas for ATSIC’s use of the Aboriginal Flag [design] pending legal advice”.

URGENCY

3. N/A.

CONSIDERATION OF ISSUES

4. The author of the Aboriginal Flag design, Mr Harold Thomas has granted to ATSIC and the 35 Regional Councils established under the *Aboriginal and Torres Strait Islander Commission Act 1989* a non-exclusive irrevocable worldwide Licence to reproduce the Aboriginal Flag design for any non-commercial purpose associated with the performance of their functions. The Licence extends to any Aboriginal representative bodies which may replace ATSIC and/or the Regional Councils in the future, eg if a Regional Council becomes a Regional Authority. However, if ATSIC is replaced by a Department of State, the Licence would not transfer to the Commonwealth.
5. The Licence requires that when it is proposed to reproduce the Aboriginal Flag design for any purpose other than for routine administrative purposes or for the intranet, ATSIC or the Regional Council concerned must acknowledge Mr Thomas as the author.
6. Schedule 1 of the Licence stipulates the Artwork (Item 1), Manner of Reproduction (Item 2) and Form of Acknowledgement and Attribution (Item 3) and is attached at **ATTACHMENT 1**.

MANAGER’S STATEMENT ON FINANCIAL IMPLICATIONS

7. N/A

RECOMMENDATION

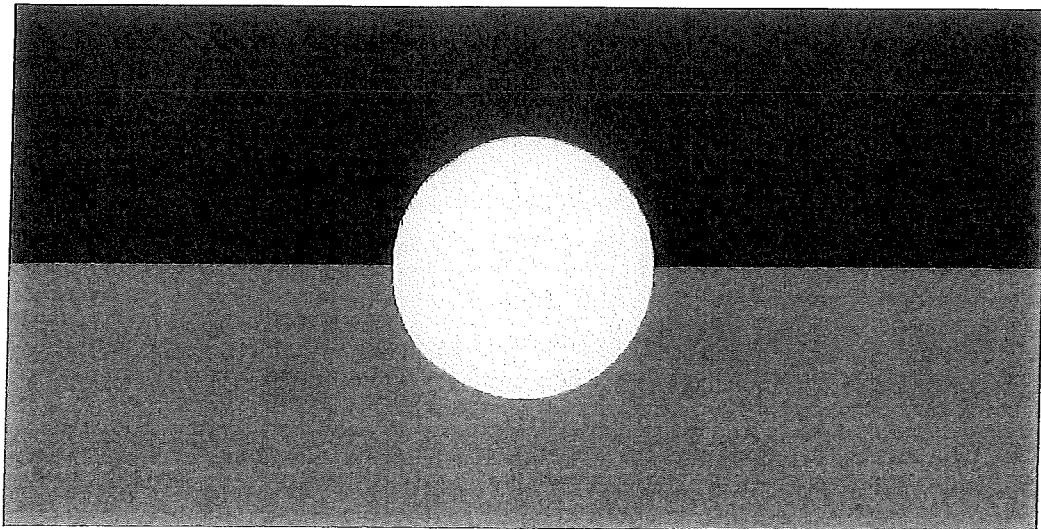
That the Commission, pursuant to sections 7 and 10 of the *Aboriginal and Torres Strait Island Commission Act 1989* (the Act), and in accordance with the ATSIC Corporate Plan:

- a) **NOTE** that the author of the Aboriginal Flag design, Mr Harold Thomas has granted to ATSIC and the 35 Regional Councils established under the *Aboriginal and Torres Strait Islander Commission Act 1989* a non-exclusive irrevocable worldwide Licence to reproduce the Aboriginal Flag design for any non-commercial purpose associated with the performance of their functions..

Treaty Secretariat
National Policy Office

January 2002

Item 1 – the Work



Item 2 – Manner of Reproduction

- A. The proportions of each reproduction of the Work shall be length/height = 2/1.
- B. When reproduced in colour the colours shall be:
 - Lower half – Scarlet Red, representing the red Earth, Aboriginal spiritual relationship to the land and red ochre used in ceremonies.
 - Upper half – Black, representing the Aboriginal people, past, present and future.
 - Centre Circle – Cadmium Yellow, representing yellow ochre and the Sun the giver of life.

Item 3 – Form of Acknowledgement and Attribution

Aboriginal Flag reproduced by permission of the author Harold Thomas © 1971