



Australian Government

**National Indigenous
Australians Agency**

Assignment Deed
for Copyright in the Australian Aboriginal Flag

The Commonwealth of Australia represented by the National Indigenous
Australians Agency

Mr Harold Joseph Thomas

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Assignment Deed

Date 21 January 2022

Parties The Commonwealth of Australia represented by the National Indigenous Australians Agency ABN 30 429 895 164 (NIAA)

Mr Harold Joseph Thomas ABN 15 283 585 876 (Mr Thomas)

Background

- A. On the important occasion of the 50th Anniversary of the Australian Aboriginal Flag (**Flag**);
- B. AND, in acknowledgement of the Indigenous communities at the heart of the Flag's accrued national significance;
- C. AND, in recognition that the Flag rose to prominence when it was raised at the Aboriginal Tent Embassy in Canberra on 26 January 1972;
- D. AND, against the background of the 1997 Federal Court of Australia decision in *Thomas v Brown and Another* [1997] FCA 215 which sets out the history of creation and use of the Flag on 9 July 1971 by Mr Thomas, the artist, prior to its proclamation as a national flag of Australia under the *Flags Act 1953* (Cth), and in which Mr Thomas was declared by the Court to be the copyright owner of the Flag;
- E. Mr Thomas has agreed to assign the copyright in the Flag to the Commonwealth on the terms of this deed so that the Flag may be permitted by the Commonwealth to be open for public use, including for reproduction or communication to the public by any person in any way without licence fee (subject to any continuing exclusive licences);
- F. AND, in acknowledgement of the Indigenous communities at large:
- (i) \$2 million of the consideration payment amount to Mr Thomas will be directed by Mr Thomas, as an initial capital amount, to establish an Australian Aboriginal Flag Legacy not-for-profit entity (or similar), with an intention to make periodic disbursements aligned with interests of Indigenous Australians;
 - (ii) an amount equivalent to the royalty payments by Flagworld to the Commonwealth will be directed by the Commonwealth to the National Aborigines and Islanders Day Observance Committee (NAIDOC) for disbursement in support of the ongoing work of NAIDOC, noting that the Flag was first raised on National Aborigine's Day, which has since grown into a national week-long celebration known as NAIDOC Week; and
 - (iii) the Commonwealth will allocate approximately \$100,000 per year to offer opportunities for Indigenous people to acquire a formal education in furtherance of the development of Indigenous governance and leadership;
- subject to further details being formalised;
- G. AND, in addition:
- (i) the NIAA will establish, maintain and update an online repository of information and educational material relating to the Flag, including its

artistic influences, and a history of Indigenous people in connection with the Flag as a symbol of unity; and

- (ii) Mr Thomas, as a gesture to the Commonwealth, will gift an original painting on canvas to the Commonwealth (pictured in the Schedule to this deed), initially for display at Parliament House or other agreed location.

- H. Mr Thomas, as the creator of the Flag, has minted a non-fungible token (NFT) of the Flag which will be held on behalf of Indigenous communities.
- I. Whilst Mr Thomas agrees to the termination of the licences in favour of WAM Clothing and Wooster Holdings and wishes these to end, Mr Thomas had no involvement in negotiating the commercial terms of those terminations.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

In this deed:

Business Day means a day that is not a Saturday, Sunday or a public or bank holiday in the Australian Capital Territory.

Claim means any claim, action, cause of action, liability, allegation, demand, suit or proceeding of any kind or nature, including for Loss, injunction, specific performance or any other remedy.

Commonwealth means the Commonwealth of Australia.

Commonwealth Agency means:

- (a) a Commonwealth department or agency, including the National Indigenous Australians Agency;
- (b) a body corporate or an unincorporated body established or constituted for a public purpose by a Commonwealth law, including by legislative instrument; or
- (c) an incorporated company over which the Commonwealth exercises control.

Commonwealth Entity means:

- (a) the Commonwealth;
- (b) each Commonwealth Agency;
- (c) each person authorised directly or indirectly by the Commonwealth or a Commonwealth Agency to do any act comprised in the Copyright; and
- (d) each current and former director, officer, contractor, employee and agent of a Commonwealth Entity referred to in paragraphs (a) to (c) of this definition.

Copyright means the exclusive rights in relation to the Work under the Copyright Act, and any copyright in the Work existing under foreign laws.

Copyright Act means the Copyright Act 1968 (Cth).

Effective Date means the date of this deed.

Existing Exclusive Licences means:

- (a) the Flagworld Licence;
- (b) the WAM Clothing Licence;
- (c) the Wooster Holdings Licence; and
- (d) the Royal Australian Mint Licence.

Flags Act means the Flags Act 1953 (Cth).

Flagworld means Carroll & Richardson-Flagworld Pty Ltd ABN 89 050 021 666 (formerly Flags 2000 Pty. Ltd.) trading as Flagworld.

Flagworld Licence means the licence agreement between Mr Thomas and Flagworld dated 20 April 1998 (as varied) pursuant to which Mr Thomas granted Flagworld a licence of the Copyright.

Infringement Claim means a Claim arising out of or in connection with any past or existing infringement of the Copyright or exercise of the Copyright under section 183(1) of the Copyright Act.

Loss means any loss, damage, cost (including reasonable legal costs), charge, fine, penalty, liability (including tax liability) or expense (including those arising out of the terms of any settlement).

Moral Rights means the moral rights granted under the Copyright Act, and any similar rights existing under foreign laws.

Royal Australian Mint Licence means the licence agreement between Mr Thomas and the Royal Australian Mint dated 10 March 2020 pursuant to which Mr Thomas granted the Royal Australian Mint a licence of the Copyright.

Security Interest means a mortgage, charge, pledge, lien, title retention, preferential right, trust arrangement, contractual right of set-off and any other encumbrance, security interest, security agreement or arrangement in favour of any person, including any security interest as defined in the Personal Property Securities Act 2009 (Cth).

WAM Clothing means WAM Clothing Pty Ltd ABN 93 630 147 330.

WAM Clothing Licence has the meaning given to the term "Licence Agreement" in the WAM Clothing Licence Termination Deed.

WAM Clothing Licence Termination Deed means a deed between the parties and WAM Clothing to terminate the WAM Clothing Licence and made on or about the date of this deed.

Wooster Holdings means Wooster Holdings Pty Ltd ACN 625 909 284 as trustee for The Wooster Holdings Trust ABN 34 305 927 452.

Wooster Holdings Licence has the meaning given to the term "Licence Agreement" in the Wooster Holdings Licence Termination Deed.

Wooster Holdings Licence Termination Deed means a deed between the parties and Wooster Holdings to terminate the Wooster Holdings Licence and made on or about the date of this deed.

Work means the artistic work depicted in item 1 of Schedule 1 and known as the Australian Aboriginal Flag, and any prior version of the Work.

1.2 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

- (b) an obligation or a liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;
- (c) "**person**" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;
- (e) a reference to a document (including this deed) is to that document as varied, novated, ratified or replaced from time to time;
- (f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed, and a reference to this deed includes all schedules, exhibits, attachments and annexures to it;
- (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) "**includes**" in any form is not a word of limitation; and
- (k) a reference to "\$" or "**dollar**" is to Australian currency.

2. Assignment of Copyright

- (a) On the Effective Date, Mr Thomas assigns to the Commonwealth:
- (i) the Copyright; and
- (ii) all existing and future rights Mr Thomas has in connection with any exercise of the Copyright, including all causes of action, but excluding any rights to licence fees or royalties in connection with any licensed exercise of the Copyright prior to the Effective Date.
- (b) In agreeing to receive the assignment of the Copyright, and at Mr Thomas' request, the Commonwealth undertakes to permit public use of the Copyright on the same basis as the Australian National Flag pursuant to the Flags Act, but subject to:
- (i) Mr Thomas' Moral Rights;

- (ii) the Flagworld Licence; and
 - (iii) the Royal Australian Mint Licence.
- (c) If the assignment of the Copyright under clause 2(a) is illegal, invalid or unenforceable in any respect, Mr Thomas undertakes to permit public use of the Copyright on the terms set out in clause 2(b).

3. WAM Clothing and Wooster Holdings licences

- (a) The WAM Clothing Licence Termination Deed and Wooster Holdings Licence Termination Deed do not become effective until the NIAA notifies WAM Clothing and Wooster Holdings respectively in writing that the NIAA and Mr Thomas have entered into this deed.
- (b) The NIAA must promptly (and in any event within 2 Business Days after the Effective Date) notify WAM Clothing and Wooster Holdings in writing that the NIAA and Mr Thomas have entered into this deed, and must simultaneously send a copy of the notice to Mr Thomas.

4. Payment

4.1 Payment amount and directions

Within 10 Business Days after the Effective Date, the NIAA will pay the amount in item 2 of Schedule 1 to Mr Thomas in accordance with the payment directions in item 3 of Schedule 1.

4.2 GST

- (a) Unless stated otherwise, amounts to be provided under any other provision of this deed exclude GST.
- (b) Any payment or reimbursement required to be made under this deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- (c) Where GST is payable in relation to a supply that a party (**Supplier**) makes under or in connection with this deed, and the consideration for that supply excludes GST, the party providing the consideration for that supply (**Recipient**) will pay to the Supplier an additional amount equal to the GST payable when any part of the consideration is first payable subject to the Recipient being given a valid tax invoice by the Supplier.
- (d) Terms used in this clause have the meaning given to them in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) unless the context suggests otherwise.

5. Release

- (a) On the Effective Date, Mr Thomas:
 - (i) releases the Commonwealth Entities from all Infringement Claims;
 - (ii) agrees not to bring any Infringement Claim against a Commonwealth Entity; and

- (iii) agrees not to encourage, support (financially or in any other way), facilitate or otherwise assist any person to bring any Infringement Claim against a Commonwealth Entity.
- (b) A Commonwealth Entity may plead this clause 5 as a bar and complete defence to any Claim which is inconsistent with the release and covenants in clause 5(a).
- (c) Mr Thomas agrees that:
 - (i) the releases and covenants in this clause 5 are for the benefit of the Commonwealth Entities jointly and severally;
 - (ii) this deed takes effect as a deed poll in favour of each Commonwealth Entity in respect of those releases and covenants;
 - (iii) those releases and covenants may not be revoked without the prior written consent of the relevant Commonwealth Entity; and
 - (iv) a Commonwealth Entity may rely on and enforce those releases and covenants either together or separately and despite the Commonwealth Entity not having signed this deed.

6. Moral Rights

Nothing in this deed operates as a consent to an act or omission that would infringe Mr Thomas' Moral Rights in relation to the Work, or as a waiver of such rights by Mr Thomas.

7. Education

The NIAA will establish, maintain and update (as appropriate) an online repository of information and educational material relating to the Australian Aboriginal Flag, including its artistic influences, and a history of Indigenous people in connection with the Flag as a symbol of unity.

8. Artwork gift

- (a) Mr Thomas will give a painting by Mr Thomas (as set out in item 5 of Schedule 1) to the Commonwealth as a gift, initially for display at Parliament House or other agreed location.
- (b) For clarity, the gift of artwork to the Commonwealth referred to in clause 8(a) is a gift of the physical media containing the artwork and does not include copyright in the artwork, but Mr Thomas grants the Commonwealth a perpetual licence to exercise copyright in the artwork for any purpose.

9. Warranties

Mr Thomas warrants that:

- (a) immediately prior to the assignment under clause 2, he was the sole owner of the Copyright;
- (b) at the time of the assignment under clause 2, the Copyright is not subject to any Security Interest;
- (c) at the time of the assignment under clause 2, there are no exclusive licences of the Copyright on foot except for the Existing Exclusive Licences;

- (d) true and complete copies of the following have been disclosed to the NIAA prior to the Effective Date:
 - (i) the Existing Exclusive Licences; and
 - (ii) all documents varying or otherwise affecting the terms of any Existing Exclusive Licence; and
- (e) he is not aware of and has not consented to any:
 - (i) assignment, novation or sublicense; or
 - (ii) granting of a Security Interest over,

the exclusive rights of WAM Clothing or Wooster Holdings under or in connection with the WAM Clothing Licence or Wooster Holdings Licence, except for a sublicense granted by Wooster Holdings to Gifts Mate Pty Ltd ACN 625 907 977.

10. Confidentiality

- (a) This deed is not confidential. Either party may disclose the existence or terms of this deed.
- (b) For clarity, clause 10(a) does not affect an obligation of confidence in respect of information that is not in this deed.

11. Media

- (a) The parties will work together in good faith to develop and implement a coordinated media plan relating to the transaction effected by this deed.
- (b) The NIAA will (either alone or jointly with Mr Thomas if agreed) issue a media statement after the Effective Date which must refer to, at a minimum, those matters set out in paragraphs F and G of the Background section.

12. Notices

12.1 How notice to be given

Each communication (including each notice, consent, approval, request and demand) under or in connection with this deed:

- (a) must be given to a party:
 - (i) using one of the following methods (and no other method) namely, hand delivery, courier service, prepaid express post or email; and
 - (ii) using the address(es) or other details for the party set out in item 4 of Schedule 1 (or as otherwise notified by that party to the other party from time to time under this clause 12).
- (b) must be in legible writing and in English;
- (c) (in the case of communications other than email) must be signed by the sending party or by a person duly authorised by the sending party;
- (d) (in the case of email) must state the name of the sending party or a person duly authorised by the sending party.

12.2 When notice taken to be received

Each communication (including each notice, consent, approval, request and demand) under or in connection with this deed is taken to be given by the sender and received by the recipient:

- (a) (in the case of delivery by hand or courier service) on delivery;
- (b) (in the case of prepaid express post sent to an address in the same country) on the second Business Day after the date of posting;
- (c) (in the case of prepaid express post sent to an address in another country) on the fourth Business Day after the date of posting;
- (d) (in the case of email, whether or not containing attachments) the earlier of:
 - (i) the time sent (as recorded on the device from which the sender sent the email) unless, within 4 hours of sending the email, the party sending the email receives an automated message that the email has not been delivered;
 - (ii) receipt by the sender of an automated message confirming delivery; and
 - (iii) the time of receipt as acknowledged by the recipient (either orally or in writing).

13. General

13.1 Amendments

This deed may only be varied by a document signed by or on behalf of each party.

13.2 Assignment

- (a) Subject to clause 13.2(b), a party cannot assign, novate or otherwise transfer any of its rights or obligations under this deed, including granting Security Interests in all or any of its rights, without the other party's prior written consent.
- (b) The NIAA may assign, novate or otherwise transfer any of its rights or obligations under this deed, on notice to Mr Thomas, to another Commonwealth Agency.

13.3 Consents

Consent required under this deed from a party may be given or withheld, or may be given subject to any conditions, as that party (in its absolute discretion) thinks fit, unless this deed expressly provides otherwise.

13.4 Costs and expenses

Except as otherwise provided in this deed, each party will pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed.

13.5 Counterparts

This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this deed, and all together constitute one deed.

13.6 Entire agreement

To the extent permitted by law, in relation to its subject matter, this deed:

- (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior written or other agreement of the parties.

13.7 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by the other party to give effect to this deed.

13.8 Governing law

This deed is governed by and must be construed according to the law applying in the Australian Capital Territory.

13.9 Independent legal advice

The parties acknowledge that prior to signing this deed they had a reasonable opportunity to seek independent legal advice with respect to the meaning, application, nature and effect of this deed.

13.10 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 13.10(a).

13.11 No bias against drafter

No provision of this deed is to be interpreted to the disadvantage of a party because that party (or its representative) drafted that provision.

13.12 No representation or reliance

- (a) Each party acknowledges that neither party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this deed, except for representations or inducements expressly set out in this deed.
- (b) Each party acknowledges and confirms that it does not enter into this deed in reliance on any representation or other inducement by or on behalf of the other party, except for representations or inducements expressly set out in this deed.

13.13 Severance

If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
- (b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this deed.

13.14 Stamp duties

The NIAA:

- (a) must pay all stamp duties and any related fines and penalties in respect of this deed, the performance of this deed and each transaction effected by or made under this deed; and
- (b) will reimburse Mr Thomas for the amount of any liability incurred by him arising from the NIAA's failure to comply with clause 13.14(a).

13.15 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this deed.
- (b) A waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this deed operates as a waiver of another breach of that term or of a breach of any other term of this deed.

Executed as a deed.

Signed, sealed and delivered for and on behalf of **The Commonwealth of Australia** represented by the **National Indigenous Australians Agency ABN 30 429 895 164** by its authorised signatory in the presence of:

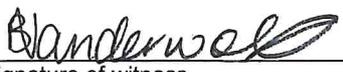

Signature of witness

Carla Stocks
Full name of witness

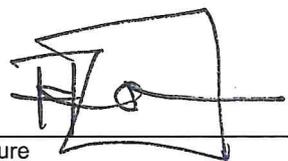

Signature of authorised signatory

Blair Exell
Full name of authorised signatory

Signed, sealed and delivered by **Mr Harold Joseph Thomas** in the presence of:


Signature of witness

Bridgette Ivy Vanderwolf
Full name of witness


Signature

Schedule 1 - Details

Item	Heading	Details
1.	Work	
2.	Payment amount	\$13,750,000.00 (excluding GST)
3.	Payment directions	Payment to be made by electronic funds transfer to an Australian bank account to be nominated by Mr Thomas
4.	Address for notices	<p>To the NIAA:</p> <p>Address for delivery by email:</p> <p>Brendan.Jacomb@niaa.gov.au</p> <p>Address for delivery by all other methods:</p> <p>Mr Brendan Jacomb Chief Lawyer, Legal Services Branch Corporate Division, National Indigenous Australians Agency Charles Perkins House, 16 Bowes Place PHILLIP ACT 2606</p> <hr/> <p>To Mr Thomas:</p> <p>Address for delivery by email:</p> <p>admin@haroldthomasart.com.au AND aboriginalflag@corrs.com.au</p> <p>Address for delivery by all other methods:</p> <p>Mr Harold Thomas C/O Corrs Chambers Westgarth Attention: Chrystal Dare (9155452) Level 23, 567 Collins Street Melbourne VIC 3000</p>

Released under the FOI Act by the National Indigenous Australians Agency

Item	Heading	Details
5.	Painting to be gifted to the Commonwealth	<p><i>The circle and square do need each other,</i> Mr Harold Thomas, 2021</p> 