



*'A flag born of struggle': Dharpaloco (Dubs) Yunupingu and Abigail Delaney from Jannawi Dance Clan fly the Aboriginal flag atop the Sydney Opera House in 2019. Photograph: Daniel Boud*

## **Freeing the Aboriginal flag: how a 'uniting symbol' ended up in the hands of the few**

Every AFL club has signed on to the #freetheflag campaign but Ken Wyatt has ruled out the Australian government buying the flag's copyright

by Lorena Allam  
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The Aboriginal flag is a powerful symbol that has come to mean many things to many people. Since its creation in 1971, it has appeared on everything from jumbo jets to tattoos.

So who “owns” the flag? Who has the right to reproduce it, and why is there such a battle over these issues today? Here's a summary of how we got here.

### **Luritja artist Harold Thomas created the flag**

The flag was first used at a National Aborigines Day march in Adelaide in 1971. Dr Gary Foley later took it with him to Canberra, where it was flown at the Tent Embassy from 1972.

It was used at rallies and in imagery on posters, T-shirts and Aboriginal organisation logos from then on. The red, black and yellow came to symbolise the strength, resistance and resilience of Aboriginal people, particularly for the modern land rights movement.

In the 1980s, Thomas first asserted his rights to be recognised as its creator.

In 1995, it became an official flag of Australia by proclamation of the governor general, on 14 July. Other claimants came forward asserting they were the artist behind it, but in 1997 the federal court officially recognised Thomas as the sole author.

This means the flag is protected under the Copyright Act and can only be reproduced in accordance with that law, or by permission of Thomas.

### **What rights does this give Thomas?**

As creator and sole copyright holder, Thomas is its owner and can grant licences to other parties to make copies of the flag, or refuse permission entirely.

Under Australian law, this copyright will last for 70 years after his death, and can then be claimed by anyone to whom he assigns it.



Luritja artist Harold Thomas, creator of the Aboriginal flag.

### **Who has he given licences to?**

Thomas has made arrangements with several companies over time.

The licence to make and sell the Aboriginal flag is with Carroll and Richardson flags. This company has had an arrangement with Thomas since 1998.

In 2005, Thomas gave Birubi Art an exclusive licence for souvenir items bearing the flag image. He issued a statement saying he was glad to make an arrangement to respect his copyright and provide some financial benefit to him.

In 2017, Birubi Art published another statement from Thomas on their website in which he again explained the extent of the licensing he had permitted and his support for the company.

“I, Harold Thomas would like to make a sincere statement of how the Aboriginal flag design has been utilised by Birubi Art and Ben Wooster of Brisbane. I have been associated with Ben Wooster for more than 10 years. Ben’s company Birubi has an exclusive licence agreement to utilise the Aboriginal flag design for their products that are made available for purchase to the general public.

“Ben Wooster has maintained a professional standard of the highest order. He appreciates the sensitivity and is cognisant of what the Aboriginal flag design is to the Aboriginal people as well as others.”

### **Seems fair. It’s his choice. So why is there a problem with this licence?**

In 2018, the federal court found that Birubi had breached consumer law by selling fake Aboriginal art. Birubi copped a \$2.3m fine, the largest penalty of its kind awarded by the federal court. But it never had to pay up. A month later, it ceased trading and a liquidator was appointed.

In November 2018, Thomas signed an exclusive licence and agency agreement for the flag on clothing with another company, WAM Clothing.

WAM Clothing is part-owned by Wooster, from Birubi Arts.

Thomas said at the time: “As it is my common law right and Aboriginal heritage right, as with many other Aboriginals, I can choose who I like to have a licence agreement to manufacture goods which have the Aboriginal flag on it.

“It’s taken many years to find the appropriate Australian company that respects and honours the Aboriginal flag meaning and copyright and that is WAM Clothing.

“The Aboriginal flag is doing its job as it was intended to do, to bring unity and pride to all Aboriginals. At times we get the few who snigger and are disenchanted. I can’t satisfy all black people who wish to break up the Aboriginal unification.”

Since then, WAM Clothing has actively enforced its licensing rights. It has sent several “cease and desist” notices to companies including the AFL and the NRL.

Spark Health, an Aboriginal-owned and run social enterprise that makes merchandise with the tagline Clothing the Gap, also received a letter. Spark Health’s Laura Thompson said they were angry that “a white business has got full licensing agreement and it’s a white business that’s profiting off it” and began the campaign to #FreeTheFlag.

Spark Health’s Laura Thompson, who began the campaign to #FreeTheFlag. Photograph: WAM also sent letters to several small Aboriginal community groups, including charities and health organisations.

One Queensland Indigenous health charity was forced to pay \$2,200 to WAM Clothing for using the flag on shirts it gave away for free to patients who came to the clinic for a health check.

WAM asserted the fee was based on its right to claim 20% of the manufacturing price. In letters seen by Guardian Australia, WAM offered to reduce the fee because it was a charity, providing they agreed to sign a confidentiality agreement. But the charity refused, paid up the \$2,200 and now gives away T-shirts without the Aboriginal flag. To keep using it would have cost them, a small Aboriginal health organisation from Bundaberg, between \$8,000 and \$10,000 a year.

WAM Clothing said it invited anyone who wanted to use the Aboriginal flag on clothing to contact them to discuss their options. But it would not make public the extent of its licensing rights, saying it was a confidential arrangement with Thomas.

This lack of transparency is of real concern to the hundreds of small, non-profit Aboriginal organisations around the country who are worried they may be liable to pay a non-Indigenous owned company for any past use of what they see as “their” symbol. In 2019, the situation got murkier. WAM announced it was now the “exclusive worldwide licensee for the use of the Aboriginal flag on digital media and physical media”.

But again, because the deal is confidential, it is unclear whether anyone who now uses the symbol in other ways – like on social media, or a tattoo, or painted on a football field – will have to pay a fee, and how much.

The company said “any exemption is at the discretion of WAM Clothing. Any organisations who wish to understand what WAM Clothing’s licences include are invited to contact us.”

### **So, who is trying to sort this out?**

In June 2019 the federal minister for Indigenous Australians, Ken Wyatt, said he was hopeful of finding a resolution to the dispute.

Labor’s spokesperson on Indigenous affairs, Linda Burney, who wondered about the legal status of the flag tattoo on her left arm, said “we need to find a way so that the flag remains the property of First Nations people”.

Even Bob Katter wrote to the prime minister requesting the government claim copyright ownership of the Aboriginal flag.

We need to find a way so that the flag remains the property of First Nations people

“It is outrageous that this great symbol has been used for commercial gain ... with a non-Indigenous, privately owned organisation,” Katter said.

Fiona Phillips, a former chief executive of the Australian Copyright Council, suggested the federal government could buy the rights from Thomas so the design could be made public.

But a few days later, after meeting Thomas in Darwin, Wyatt ruled out the government buying the copyright of the Aboriginal 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,” the minister said in a statement.

### **Is this why the AFL can’t use the flag?**

Yes and no. The AFL decided not to engage with WAM Clothing based on advice it received from its Aboriginal and Torres Strait Islander Advisory Council, chaired by Paul Briggs, which was “in line with Aboriginal community sentiment”.

That’s why the AFL is not using the flag on its jumpers, and why it isn’t in the centre for the weekend’s game. But the AFL also revealed on Friday that it too has been slugged with a bill for its past use of the flag on Indigenous round jumpers. AFL’s inclusion manager, Tanya Hosch, said that traditionally any profit from the sale of those particular jumpers goes into a fund to support Indigenous football programs.

Every single AFL club has now signed on to the #freetheflag campaign.

### **Is there any solution in sight?**

Wyatt said his agency has been in “quiet discussions” about ways to resolve the issue but it is “extremely complicated”.

Wyatt acknowledged that the government has the power to compulsorily acquire copyright, but he is reluctant to take that path.

“I think someone put forward a figure of \$25m based on the boxing kangaroo costing the Sydney Olympic Committee \$13m at the time,” Wyatt said. “But I suspect there are much more complex issues when you enter into licensing arrangements.”

Wyatt told the ABC “it is unfortunate that some common sense has not prevailed”.

Meanwhile, the Clothing the Gap petition has reached more than 110,000 signatures. “We really hope this is a tipping point for the government to take action and do what’s right for Aboriginal people and for all Australia to have the same flag rights,” Laura Thompson said.

WAM Clothing and Harold Thomas have remained silent in the latest media furore.

Burney said the legal issues had to be dealt with, but there is “a moral arc to this as well”.

“It’s not just any flag, it’s a flag born of struggle and the one uniting symbol for all Aboriginal peoples across this country. It’s something First Nations people feel deep ownership of and reverence to and I hope that everyone involved in this discussion can see that.”

“I call on everyone involved to recognise the flag’s significance and to work towards a resolution.”