Section 180 of the *Copyright Act 1968* and the Assignment Deed for Copyright in the Australian Aboriginal Flag

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The assignment in Deed form on 21 January 2022 from its artist Harold Thomas to the Commonwealth of all copyright in the Australian Aboriginal Flag artistic work raises the issue of whether, by reason of that assignment, the Australian copyright in the work entered the Australian public domain. This piece interrogates that issue and concludes that such entry into the public domain is not merely a possibility but a likelihood. It also suggests a way to reverse any such entry by the parties agreeing to rescind the Deed and for Thomas to instead assign the copyright to a custodial body, independent from government, in accordance with a bipartisan and unanimous recommendation of a 2020 Senate Select Committee.

Introduction

By Deed on 21 January 2022 Mr Harold Joseph Thomas assigned to the Commonwealth of Australia all the exclusive rights under the *Copyright Act 1968* (Cth) relating to his artistic work known as the Australian Aboriginal Flag, and any copyright in the flag artistic work existing under foreign laws.[1] The status of Thomas as the author of the flag artistic work and (prior to the Deed) its copyright owner, was the crux of a 1997 Federal Court decision of Shepherd J which had found that Thomas had authored it by making the work in 1971.[2] That 1997 litigation was sparked by a 1995 Proclamation under the *Flags Act*

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[1] Assignment Deed for Copyright in the Australian Aboriginal Flag between the Commonwealth of Australia and Mr Harold Joseph Thomas, 21 January 2022, clause 2, clause 1.1 (definition of "copyright") and Background recital paragraph E. The Deed was released by the National Indigenous Australians Agency to Dr Mathieu Gallois on 3 June 2022 pursuant to an application under the *Freedom of Information Act 1982* (Cth); clause 10(a) of the Deed makes plain that the existence or terms of the Deed are not confidential. The Deed has been made available to the public by the National Indigenous Australians Agency at: https://www.niaa.gov.au/sites/default/files/foi-log/niaa-foi-2122-023.pdf.

[2] The litigation was sparked by the Commonwealth making a proclamation in relation to the flag in 1995 under the *Flags Act 1953* (Cth) which Thomas had alleged amounted to the Commonwealth authorising copies of his artistic work to be made. In seeking to arrive at a resolution of his claim, the Commonwealth first required that Thomas establish his authorship and ownership as against two other men who had separately claimed title to the artistic work: *Thomas v Brown* (1997) 37 IPR 207. The status of Thomas was re-affirmed in *Flags 2000 v Smith* (2003) 59 IPR 191, 195 where Goldberg J stated: "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".

1953 (Cth) appointing the Australian Aboriginal Flag to be a flag of Australia. Thomas had alleged that by the Proclamation the Commonwealth was authorising copies of his flag artistic work to be made.[3]

Therefore, since the mid-1990s the flag artistic work has been judicially acknowledged as being privately owned by Thomas, its author, and it has held a clear public law status as a national symbol under the *Flags Act*. While the broad section 183 remunerated exception in the *Copyright Act* was always available for government exploitation of Thomas's exclusive rights in the work, unresolved uncertainties and tensions led in 2020 to a Senate Select Committee on the Aboriginal Flag.[4] Thomas declined the Committee's invitations to make submissions to it and instead alerted the Committee to confidential negotiations underway with the Commonwealth government.[5] The Committee in October 2020 gave two bipartisan and unanimous recommendations: (1) the Commonwealth should not exercise its Constitutional powers to compulsorily acquire from Thomas his copyright ownership of the work; (2) in its then ongoing negotiations with Thomas the Commonwealth should ensure a body "that is independent from government, that involves and consults with Aboriginal people" has, subject to the rights of Thomas, "custodial oversight of the Australian Aboriginal Flag".[6] The oversight from such a non-government organisation was elaborated by the Committee as being its responsibility for "maintaining the integrity of the Aboriginal flag; upholding the dignity of the Aboriginal flag; and making decisions about the Aboriginal flag's use".[7]

However, the 21 January 2022 Deed did not reflect the Senate Select Committee's second recommendation: it purported to assign from Thomas all Australian and foreign copyright in the flag artistic work to the Commonwealth, rather than to a mandated independent body with a custodial remit. Given the view expressed in this article about the abridged copyright term duration imposed by section 180 of the *Copyright Act 1968* on Australian copyright owned by the Commonwealth, it seems regrettable that the copyright had not been assigned to a trustee or custodial body independent of government in accordance with Senate Committee's second recommendation. For the reasons explained in this article there appears a likelihood that upon execution of the 21 January 2022 Deed, the Australian copyright and some (but not all) foreign copyrights in the flag artistic work entered the public domain by reason of the operation of section 180. This article also goes on to explain why the operation

[3] The Australian Aboriginal Flag has been twice proclaimed (in 1995 and 2008) under the *Flags Act 1953* (Cth) "to be the flag of the Aboriginal peoples of Australia and to be known as the Australian Aboriginal Flag": Commonwealth, *Gazette: Special*, No S 259, 14 July 1995 and *Proclamation under the Flags Act 1953* (F2008L00209) 25 January 2008. In 2020 John Reid, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet the expressed the view that "A proclamation under the Flags Act doesn't affect private rights or interests, including those under the Copyright Act": Official Committee Hansard, Senate Select Committee on the Aboriginal Flag, 16 September 2020, 6.

[4] Senate Select Committee on the Aboriginal Flag, Report, October 2020. For example, the Australian Football League (AFL) which has held matches specifically honouring Indigenous Australians since the first "Dreamtime at the 'G" match between Richmond and Essendon in 2005, submitted that a recent copyright licensing impasse had precluded the flag artistic work being reproduced on player guernseys and on playing fields, and as a result the AFL was "concerned that there will be ongoing decreased use of the Aboriginal Flag": Australian Football League, Submission No 19 to Senate Select Committee on the Aboriginal Flag, 18 September 2020.

[5] Ibid iii.

[6] Ibid ix, Ch 6.

[7] Ibid. Such a body was proposed by Dr Terri Janke in her evidence as a witness to the Committee: Official Committee Hansard, Senate Select Committee on the Aboriginal Flag, 25 September 2020, 2-5.

of section 180 can potentially be reversed by rescinding the Deed and by Thomas assigning the copyright afresh to a body of the type recommended by the Senate Committee.

Section 180 is situated in "Part VII – The Crown" of the 1968 Act, a Part which itself has two Divisions. Its first Division is headed "Crown Copyright", where section 180 resides together with provisions governing the first ownership of certain copyright material that Australian governments were responsible for creating or publishing, safety-net subsistence provisions for that material and a limited exception for copying certain public law works.[8] It will be explained below that the first Division, as it relates to Part III (and indeed Part IV) of the 1968 Act, presents an array of issues that make it far from a perfect model of statutory drafting. Its second Division is "Use of Copyright Material for the Crown", and this has as its central provision section 183 which creates an exceptionally broad immunity from copyright infringement for Australian governments. When considering issues of the statutory interpretation of section 180 contextually, and relative to its UK progenitors and counterparts, it is informative to consider it in tandem with the extraordinary breadth of section 183 relative to UK law.

Section 180 was amended in 2017 as part of wider reforms to copyright term duration. However, it remained substantively unchanged in respect of its operation in relation to a work such as the flag artistic work.[9] Since 1 January 2019 section 180 provides:

> Copyright in copyright material subsists until 50 years after the calendar year in which the material is made if:
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> (a) the material is a work, sound recording or cinematograph film; and
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> (b) the Commonwealth or a State:
>
> (a) is the owner; or
>
> (b) would, but for an agreement to which section 179 applies, be the owner;
>
> of copyright in the material.

Section 179 applies to qualify the Crown copyright ownership that arises under sections 176(2), 177 or 178(2) in the relevant government which undertakes, directs or controls the creation of a work, or the first publication of a work, or undertakes, directs or controls the production of a sound recording or cinematograph film. Section 179 provides that such Crown ownership may, by agreement with the relevant government, vest in another person. The flag artistic work was authored and made by Thomas in 1971 on his own account. It was not made by the Commonwealth or a State, it was not made under

[8] *Copyright Act 1968* (Cth) ss 176(2), 177, 178(2) (ownership); 176(1), 178(1) (safety-net subsistence); 180 (term duration; 182A (exception for reproducing certain works relating to public law).

[9] *Copyright Act 1968* (Cth) ss 180 and 181 respectively amended and repealed by *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 12. Until its 2017 reform the 1968 Act regime contained in sections 180 and 181 provided for copyright which the Commonwealth or a State "is the owner" as follows. Section 180(1) provided in paragraph (a) indefinite terms for unpublished literary, dramatic and musical works and in paragraph (b) 50 years from year of the publication of such works. Section 180(2) applied a term of 50 years from making of all artistic works other than engravings or photographs, and the flag artistic work would have fallen within this provision if the assignment to the Commonwealth had taken effect prior to 1 January 2019. Therefore, the section 180 regime as it relates to a work such as the flag artistic work remained unaffected by the 2017 reforms. Section 180(3) imposed a term of 50 from year of publication of engravings or photographs, and section 181 (repealed by the 2017 reforms) imposed the same term in respect of sound recordings and cinematograph films. In all cases these terms also applied, as under the reformed law, where the Commonwealth or a State would, but for a section 179 agreement, be the owner. Section 179 was not reformed in 2017.

the direction or control of the Commonwealth or any State – and indeed there was no other basis on which the Commonwealth or a State could assert first ownership of the copyright.[10] The aspect of section 180 that deals with copyright material affected by a section 179 agreement is therefore not relevant to the 21 January 2022 Deed.

However, the balance of section 180 is apparently relevant to the Deed insofar as it applies its special Australian copyright term duration rule to works that the Commonwealth "is the owner". For the period that Thomas retained ownership of the Australian copyright in his artistic work, the standard copyright term would be until 70 years after the calendar year in which Thomas dies.[11] Assuming that on 21 January 2022 the Commonwealth was to become the Australian copyright owner of the flag artistic work, a straightforward application of section 180 would result in the Australian copyright now subsisting merely until 50 years after the calendar year in which the work was made. This means that for the 1971-made flag artistic work, on 21 January 2022 the work's Australian copyright expiry date under the provision became 1 January 2022. On this reading of section 180, the Australian copyright in the flag artistic work entered the Australian public domain upon its assignment to the Commonwealth on 21 January 2022.

Significantly, if this application of section 180 is correct it has a more mixed bearing on any foreign copyright assigned under the Deed, depending upon whether the relevant foreign copyright territory adheres to the rule of the shorter term permissible under the Berne Convention.[12] This permits a country to define a term of copyright for a foreign work that is shorter than that generally provided in its local law, if the foreign country of origin fixes in its territory that shorter term. Thus, in a copyright territory such as the UK, which has adhered to a rule of the shorter term since reforms in the mid-1990s, it seems that the UK copyright in the flag artistic work will now be determined by the period fixed by section 180 in Australia, because Australia appears to be the work's country of origin.[13] As such it appears that upon entry into the Australian copyright public domain the work simultaneously entered the UK public domain – rather than continuing to receive the local UK term duration of until 70 years after the calendar year in which Thomas dies.[14] However, a country such as New Zealand does not adopt the rule of the shorter term. As such it seems that regardless of the operation of section 180 the flag artistic work is not rendered public domain material in such a territory, and the Commonwealth of Australia will therefore own the New Zealand copyright in the flag artistic work.[15]

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[10] Compare the discussion of the *Welfare Ordinance 1953* (NT) in 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* (Elgar, 2015), 140-148.

[11] *Copyright Act 1968* (Cth) s 33(1)-(2).

[12] *Berne Convention for the Protection of Literary and Artistic Works* (Act of Paris of 24 July 1971) art 7(8) – being a permitted qualification upon national treatment principles.

[13] *Copyright, Designs and Patents Act 1988* (UK) c 48, ss 12(6) and 15A. In view of the holdings in *Thomas v Brown* (1997) 37 IPR 207 Australia will be the country of origin for UK purposes, unless there was a simultaneous publication of the work in the UK which will make the UK the country of origin for its copyright purposes and spare the flag artistic work an abridged UK term duration.

[14] *Copyright, Designs and Patents Act 1988* (UK) c 48, ss 12(2) and 159(1).

[15] New Zealand law provides the applicable local term duration for the flag artistic work is until 50 years after the calendar year in which Thomas dies: *Copyright Act 1994* (NZ), ss 18(2), 19(1)(b), 22(1) and *Copyright (Application to Other Countries) Order 1995* cl 4, 5, sch 1.

On entry into the Australian public domain, the Australian moral rights of Thomas as author of the work cease — these rights include the right to prevent derogatory treatment of the work.[16] The effect of section 180 on a straightforward reading of it is that upon the assignment of the Australian copyright in the flag artistic work to the Commonwealth on 21 January 2022, both the Australian economic rights in the work and the author's personal moral rights in Australia relating to the work simultaneously cease by entry into the public domain. In other words, the Australian copyright in the work, and its author's Australian moral rights pertaining to his work, no longer subsist.

What follows next is the reasoning that supports this straightforward interpretation of section 180. It is followed by an examination of two alternative interpretations of section 180 (labelled the evisceration theory and the harmonisation theory) and why neither seems highly plausible relative to the straightforward interpretation. A discussion of what follows if, on the basis that the straightforward interpretation is correct, the 21 January 2022 Deed was entered into under a common mistake shared by the parties as to the operation of section 180 putting the flag artistic work in the Australian public domain. This leads to a discussion around the rescission of the 21 January 2022 Deed and the making of a fresh assignment to a non-government organisation to act as custodian or trustee of the copyright in the artistic work as a possible curative measure. Some concluding comments are made about leaving the flag artistic work in the Australian public domain and section 180 itself.

History and context of section 180

The kernel of the 50-year term duration for Crown-owned copyright in section 180 can be found in a belated addition to the UK Copyright Act 1911.[17] On its second-last sitting day, the House of Commons Standing Committee considering the Copyright Bill 1911 resolved to insert into the Bill a special ownership and term duration provision for Crown copyright.[18] This provided that where a work had been "prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work".[19] Under the 1911 UK Act the standard term duration for works was the "life of the author and a period of fifty years after his death".[20] It is clear that this Crown copyright term duration provision, which applied in Australia until the commencement of the 1968 Act, imposed the abridged 50-year term duration only to works that had been made or published by, or made or published under the direction or control of, the Crown.[21] The provision, therefore, had no relevance to the copyright in works such as

[16] *Copyright Act 1968* (Cth) s 195AM(2),(3).
[17] *Copyright Act 1911,* 1 & 2 Geo 5, c 46.
[18] Standing Committee A, Report from Standing Committee A on the Copyright Bill with the Proceedings of the Committee, House of Commons Paper No 223 (HMSO, 1911) 36.
[19] Ibid; *Copyright Act 1911*, 1 & 2 Geo 5, c 46, s 18. Because this was an apparent derogation from the author's life plus 50 years term duration norm of *Berne Convention for the Protection of Literary and Artistic Works* (Act of Berlin of 13 November 1908) art 7(1) possibly it might have been considered justified on the basis that such "Crown-created" works were regarded as "anonymous or pseudonymous" works that were outside that norm by article 7(3).
[20] *Copyright Act 1911*, 1 & 2 Geo 5, c 46, s 3.
[21] The 1911 UK Act applied in Australia by Imperial force until 1 May 1969 when the current 1968 Act came into force: *Gramophone v Leo Feist Incorporated* (1928) 41 CLR 1, 11; *Copyright Owners Reproduction Society v EMI*

the flag artistic work, which had been created independently of the Crown, and which the Crown merely took ownership of by *post hoc* assignment.

In 1951, however, the UK Gregory Committee undertook a review of the 1911 Act and one of its recommendations that led to a modest reform is quite relevant to the present analysis.[22] While a Crown use compulsory licence had existed in UK patent law since 1883 no similar provisions addressing Crown exploitation previously existed in UK copyright law. Because of the then-recent creation of civil liability in the Crown for copyright infringement in the *Crown Proceedings Act 1947*, the Gregory Committee observed the absence of a Crown compulsory licence to be an anomaly.[23] It considered that a modest exception should be introduced to confer upon the Crown a right of compulsory use of third-party copyright merely for national defence purposes, a reform that was ultimately enacted in the *Defence Contracts Act 1958* outside the 1956 UK Copyright Act.[24] The Gregory Committee justified the limited nature of the recommended exception on the basis that: "copyright covers a wide field over much of which, for example, copyright in musical works, the needs for Crown use without the prior consent of the owner are not the same as in the case, for example, of matters relating to military equipment".[25]

The Gregory Committee made no recommendations on the provisions touching on Crown-owned copyright. By section 39 the 1956 UK Copyright Act essentially restated the Crown copyright regime in the 1911 Act and did not fundamentally alter it.[26] There was, however, some reform and elaboration introduced that is pertinent. Subject matter akin to the work of Thomas, artistic works such as drawings or paintings that had been made or first published "by or under the direction or control of Her Majesty or a Government department" now had an abridged term of subsistence defined as "until the end of a period of fifty years from the end of the calendar year in which the work was first made" – rather than from when first published.[27] For such works, and indeed for all other works given special Crown copyright term durations, the abridged periods were confined to works made or first published by, or under the direction or control of, the Crown.[28] So that the section 39 regime of the 1956 UK Act operated in the same way as its 1911 predecessor regime and UK copyright subsisting in third-party works the creation of which was outside the Crown's making, direction or control received the usual term durations even if that subsisting copyright was subsequently assigned to the Crown and became Crown-owned.

The 1956 UK Act served as the starting point for the 1968 Australian Act. The Australian Spicer Committee, created to advise the government on the contours of new Australian copyright legislation, stated that: "we think the most desirable course for us … is to accept that Act as the basis for our examination of the problems raised for our consideration, to indicate which of its provisions we would in

(Australia) (1958) 100 CLR 597, 603-604; *Phonographic Performance Company of Australia v Commonwealth* (2012) 246 CLR 561, 574.

[22] Board of Trade, *Report of the Copyright Committee* (1952), Cmd 8662.

[23] Ibid 29; *Crown Proceedings Act 1947*, 10 & 11 Geo 6, c 44.

[24] *Defence Contracts Act 1958*, 6 & 7 Eliz 2, c 38, s 6(2).

[25] Board of Trade, *Report of the Copyright Committee* (1952), Cmd 8662, 30.

[26] *Copyright Act 1956*, 4 & 5 Eliz 2, c. 74, s 39.

[27] *Copyright Act 1956*, 4 & 5 Eliz 2, c. 74, s 39(4).

[28] *Copyright Act 1956*, 4 & 5 Eliz 2, c. 74, ss 39(3)(b),(4). There were no special abridged term durations for sound recordings or cinematograph film made or first published by, or under the direction or control of, the Crown: *Copyright Act 1956*, 4 & 5 Eliz 2, c. 74, s 39(5)(b).

principle accept or reject and, where necessary, to state amendments we would make to those provisions".[29] The manner of the reception of both the Crown use exception regime and the Crown copyright abridged term regime in the 1968 Act is telling in light of this statement.

It is instructive to consider Crown use exception first. The Spicer Committee recommended that the new Australian law should make clear that the Crown, as it was in the UK, would be liable for copyright infringement so as to rebut any presumption of Crown immunity.[30] It then expressed its position on a Crown use exception in the following way:

> The Gregory Committee recommended that the Crown should be empowered to reproduce copyright material in connexion with the equipment of the Armed Forces and possibly also for civil defence and essential communications, subject to compensation. This recommendation has, to a large extent, been put into effect by the provisions of the Defence Contracts Act, 1958. The Solicitor-General of the Commonwealth has expressed the view that the Commonwealth and the States should be empowered to use copyright material for any purposes of the Crown, subject to the payment of just terms to be fixed, in the absence of agreement, by the Court. A majority of us agree with that view.[31]

In the 1968 Act both these positions were reflected in section 7, with the creation of Crown copyright liability, and in section 183(1), with a broad Crown use copyright exception. While section 7 was loosely analogous to the position in the UK, under the *Crown Proceedings Act 1947* (UK) noted above, in the broad section 183(1) exception there was a stark and deliberate divergence from UK law. The basic section 183(1) exception has not been amended in the life of the 1968 Act and provides in sweeping terms that copyright in any work or other subject matter "is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State".[32] While it is a remunerated exception, the exception is not strictly speaking a compulsory licence. Leaving aside Constitutional issues, the exception is not conditional upon the giving of notice or even the payment of a reasonable royalty. The exception operates automatically within its scope to ensure that any Commonwealth or State government's exploitation of third-party copyright for the government's

[29] *Report of the Copyright Law Review Committee* (1959), 11.

[30] Ibid 76. At the time a general presumption of the Crown immunity from civil suit appeared to apply: *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58. (This position was altered by the High Court in *Bropho v Western Australia* (1990) 171 CLR 1 which replaced the presumption of immunity with an assessment of the relevant statute in the round.)

[31] *Report of the Copyright Law Review Committee* (1959) 77. There was Committee dissent on this point with the Report including that "[t]wo of us are of the view that the Crown's right to use copyright material without the consent of the copyright owner should be confined to use for defence purposes only": ibid.

[32] There has been operative streamlining of this exception by 1998 reforms which added collective administration of the reproduction and copyright exploitations done under the section 183(1) exception: *Copyright Act 1968* (Cth) ss 183A-183F. In late 2021 an Exposure Draft Bill was released which proposed expanding collective administration to exploitation by the communication to the public right: Copyright Amendment (Access Reform) Bill 2021 (Cth) sch 5 items 1-27.

purposes is non-infringing.[33] In modern UK copyright law, there is nothing equivalent to the Australian section 183(1) exception.[34]

With this in mind, when coming to the section 39 Crown copyright regime of the 1956 UK Act the Spicer Committee's position was much simpler: "We recommend the enactment of a provision similar to section 39 of the 1956 Act which should be applicable to the Crown in the right of the Commonwealth and the States".[35] Had that recommendation been reflected in the 1968 Act, the current issue surrounding the Australian copyright term duration of the Australian Aboriginal Flag artistic work would not have arisen: the abridged term duration would have only applied to works made or first published by, or under the direction or control of, the Crown. However, contrary to the Spicer Committee's recommendation, the enacted Australian legislation diverged from its UK progenitor.

As noted above the 1911 UK Act (which applied in Australia by Imperial force[36]) and the 1956 UK Act both confined the abridged local copyright terms for works to those works that had been made or first published by or under the direction or control of the Crown. Thus, neither the 1911 regime nor the 1956 regime purported to abridge the local copyright term in works that were owned by the Crown merely as a result of the assignment of third-party copyright. The 1968 Australian Act, while it followed the drafting of the 1956 UK Act on Crown copyright treatment of initial ownership, was drafted in a strikingly different way in relation to the abridgment of Crown copyright terms. Its provision, section 180, was drafted to encompass not simply works made or first published by or under the direction or control of the Commonwealth or a State, but all works for which the Commonwealth or a State "is the owner" of the Australian copyright.[37] On its face, the scope of section 180 includes third-party created works owned by the Australian Crown through assignment or other forms of transmission.[38] Here, given the topic of this article, it is most relevant to focus on the Australian counterpart to section 39(4) of the 1956 UK Act which prescribed a term duration period of 50 years from making for the UK copyright term of artistic works such as painting or drawings that had been made or first published by or under the direction or control of the Crown. The Australian counterpart in the 1968 Act, as first enacted, was section 180(2).[39] Rather than adopting the confinement inherent in the UK model, section 180(2)

[33] David Brennan, *Copyright Law* (The Federation Press, 2021), 274-284 which concludes with an example based on a consideration of an equivalent to the David Malangi example (whose artistic work in 1966 was reproduced, without the licence of the artist, on Australia's one dollar paper currency) under current law.

[34] Contrast the more limited *Copyright, Designs and Patents Act 1988* (UK) c 48, s 48 which is a free exception for the UK Crown to exploit copyright subject matter for the purposes for which it was communicated to the Crown. There is a proposal for Australia to adopt a similar type of provision: Copyright Amendment (Access Reform) Bill 2021 (Cth) sch 5 item 28.

[35] *Report of the Copyright Law Review Committee* (1959), 77.

[36] Above n 21.

[37] As originally enacted the Act also prescribed 50 term durations from publication for the Australian copyright in sound recordings and cinematograph films for which the Commonwealth or a State "is the owner": *Copyright Act 1968* (Cth) s 181 repealed by *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 12.

[38] *Copyright Act 1968* (Cth) s 196(1). Article 17.4(6) of the US-Australia Free Trade Agreement 2004 obliges the parties to provide that a holder of any "economic right in a work" may freely transfer that right by contract to another person.

[39] While the provision was amended in 2017 by *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 12, how the regime applied to artistic works other than engravings and photographs remained substantively unchanged.

relevantly provided that "copyright in an artistic work of which the Commonwealth or a State *is the owner*, or would, but for an agreement to which [section 179] applies, be the owner, continues to subsist until the expiration of fifty years after the expiration of the calendar year in which the work was made".[40] The striking thing is that the words "is the owner" do not appear in the UK provision, and as can be observed from the discussion above, the words "is the owner" have remained intact within section 180 notwithstanding its 2017 revision to take account of wider term duration reforms to the Act that commenced operation in 2019.[41] The Australian model can also be distinguished from current UK copyright law under its 1988 Act which confines its abridged term durations to works "made by Her Majesty or by an officer or servant of the Crown in the course of his duties".[42] Yet both modern Australian law and modern UK law do share one common feature: those abridged term durations apply to works that had been made or first published by or under the direction or control of the Crown notwithstanding any subsequent assignment from the Crown to a third-party.[43]

There is a theme of Crown exceptionalism that emerges in Australian copyright law, and it differentiates modern Australian law from its UK origins. The public policy being expressed in Part VII is that Australian governments do not want to be unduly bothered by negotiating copyright licences *ex ante*, and neither wish to derive long-tail royalty revenues from a portfolio of copyright properties nor to burden society with undue exclusive rights in government material.[44] Section 183(1) and section 180 can be respectively seen as evidencing these attitudes. Thus, section 183(1) has no counterpart in UK law. Section 180, on a straightforward reading, seemingly casts a far wider net than any of its UK counterparts in the 1911, 1956 or 1988 regimes by admitting as term duration abridged Crown copyright all Australian copyright that the Commonwealth or a State "actually owns".[45] The policy justification for any such wider net was never made explicit at the time of the 1968 Act. In its 2005 report, the Copyright Law Review Committee expressed itself this way about the shortened Crown copyright term durations:

> The Committee considers there is also a strong public interest in government materials being in the public domain. For this reason, the Committee favours a limited statutory term, rather than the life of the author plus 70 years which will apply to literary, dramatic and musical works. The community's right to have more ready access to government material is consistent with the Committee's views about access to particular categories of material such as primary legal materials ... This approach also provides certainty for users, who otherwise would need to expend time and resources in locating authors, and simplifies the administration of copyright.[46]

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[40] *Copyright Act 1968* (Cth) s 180(2) as originally enacted with emphasis added.

[41] Since 2019 term durations under section 180 run for all works, sound recordings and films from the time of their making rather than first publication. An important aspect of the 2017 reforms abolished indefinite copyright terms for unpublished works, sound recordings and cinematograph films: *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 items 4, 9.

[42] *Copyright, Designs and Patents Act 1988* (UK) c 48, s 163.

[43] *Copyright Act 1968* (Cth) ss 179, 180(b)(b); *Copyright, Designs and Patents Act 1988* (UK) c 48, UK 163(1)-(3).

[44] An alternative alleviation of those burdens is readily open to governments today through open source and Creative Commons licensing options: David Brennan, *Copyright Law* (The Federation Press, 2021), 121.

[45] Copyright Law Review Committee, *Crown Copyright* (2005) 18 and 130 where the term "actually owns" is used to describe the provision's scope.

[46] Ibid 131.

This report will be revisited when some concluding observations will be made about the section 180 abridgement of term duration. For the moment, regardless of such policy concerns, it seems hard to argue with the contention about the 21 January 2022 Deed that Australian copyright law would have created less legal headaches had the 1968 Act either not had such an abridgement of term durations or it had adopted the more modest UK model for so doing. Both alternatives greatly simplify the law as might be gleaned from the discussion that follows.

Section 180 and Australian copyright in works assigned to Australian governments

While the discussion immediately above on section 180 admits little doubt as to the inclusion of Australian copyright assigned to Australian governments becoming subject to the abridged term durations, the anomalies such inclusion creates have been identified long prior to the assignment by Thomas to the Commonwealth of his flag artistic work. So that Knight in *The Laws of Australia* observes in 2013 that the section 180 abridged term durations "appear to apply equally to a work, film or sound recording which is assigned to the Commonwealth or a State, so that the assignment may have the effect of shortening the copyright term in the assigned work or other subject matter".[47] Such an outcome alone demands that any straightforward or plain reading of section 180 be carefully examined, with a focus here on its relevance to the 21 January 2022 Deed. As will be explained below there are two counter-interpretations of section 180 that can be identified, and which would remove the assigned Australian copyright in the flag artistic work from its scope. These approaches to interpreting the provision are set out below and labelled as: (a) the evisceration theory which gives section 180 a minuscule scope, and (b) the harmonisation theory which reads section 180 as applying in the same way as the more modest UK model.

Ricketson and Creswell observe in their Thomson Reuters service, when discussing the provision prior to its reform in 2017:

> Although s 180 is located in Pt VII Div 1 which deals with the vesting of ownership of copyright in the Crown … there seemed no reason in principle or from its wording why the section should not also apply to works in which the copyright had been acquired by the Commonwealth and States by way of assignment or other transfer.[48]

Ricketson and Creswell then go on to suggest two qualifications that might provide such reason.

The first is a matter of contextual interpretation:

> However, ss 33 and 34 which prescribe the term of copyright for works … are not expressed to be subject to Pt VII – as, for example is s 35 on ownership – or subject to the Act generally – as is s 32 on subsistence.[49]

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[47] Peter Knight, *Copyright – The Laws of Australia* (Thomson Reuters, 2013), 123. See also David Brennan, *Copyright Law* (The Federation Press, 2021) 120-121 where additional curios about section 180 are pointed out with the comment that they "perhaps should receive legislative clarification before some hapless litigant encounters them".

[48] Sam Ricketson and Chris Creswell, *Law of Intellectual Property: Copyright, Design and Confidential Information* (Thomson Reuters Subscription Service at 26 February 2021) [6.95]. The treatment of the reformed section 180 omits this discursive commentary although it appears equally to applicable to it: ibid [6.140].

[49] Ibid [6.95].

Section 33 now alone deals with the term duration rules for works in general and in section 33(1) commences with the same text as considered by Ricketson and Creswell "This section applies to copyright that subsists in a work under this Part"— with this Part being Part III ("Copyright in Original Literary, Dramatic, Musical and Artistic Works") of the 1968 Act.[50] Ricketson and Creswell appear to hint at an overriding rule: if a work's subsistence arises by virtue of Part III, and in particular by section 32, the general section 33 term duration rules cover that field and trump the more specific section 180 abridged term duration rule. This can be labelled as the evisceration theory for interpreting section 180. If section 33 did cover the field for works subsisting by virtue of section 32, under this view the section 180 abridged term duration rule must have something to do. Because section 180 resides in Part VII, and because Part VII has its own safety-net subsistence rule for works in section 176(1), the abridged term duration rule of section 180 could presumably only apply under this view to works subsisting by virtue of section 176(1) in Part VII. Section 176(1) provides:

> Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.[51]

Hence this safety-net subsistence provision applies only where apart from it "copyright would not subsist" in a work – for example, in an odd setting such as if a citizen of a foreign country, to whom national treatment is not extended under Australian copyright law, authored an unpublished work under the direction of the Commonwealth or a State. Also, section 182(1) in Part VII provides that:

> Part III (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a literary, dramatic, musical or artistic work in like manner as it applies in relation to copyright subsisting in such a work by virtue of that Part.[52]

The parenthetical words in this provision could be read as implying that the rules in Part VII dealing with subsistence, duration and ownership only apply to works whose subsistence depends on section 176(1): such as the odd setting described above. Such a reading does somewhat dovetail with the view seemingly hinted at by Ricketson and Creswell. However, this narrow interpretive approach is highly problematic insofar as it eviscerates section 180. That is because, if section 180 was given such limited scope to apply only to such works (and only to such sound recordings and cinematograph films[53]), it would go from having a wide field of operation to an extremely narrow one. It would merely apply in those odd settings when copyright subsists in a work (and in a sound recording or cinematograph film[54]) only by virtue of Part VII. Under that view the section 180 abridged term durations would not apply to works that subsist by virtue of Part III (nor to sound recordings and cinematograph films subsisting by

[50] *Copyright Act 1968* (Cth) s 33(1) as amended by *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 4. Similar language in the counterpart provision in Part IV of the Act applies for sound recordings and cinematograph films: *Copyright Act 1968* (Cth) s 93(1).
[51] *Copyright Act 1968* (Cth) s 176(1). Section 178(1) is the counterpart provision dealing with sound recordings and cinematograph films.
[52] *Copyright Act 1968* (Cth) s 182(1). Section 182(2) is the counterpart provision dealing with Part IV sound recordings and cinematograph films.
[53] *Copyright Act 1968* (Cth) ss 93(1), 178(1), 182(2) being the counterpart provisions for this subject matter.
[54] Ibid.

virtue of Part IV) notwithstanding that subject matter was made or first published by or under the direction or control of the Commonwealth or a State.[55] The interpretation would be tantamount to repealing section 180.

An argument loosely based on this type of eviscerating interpretive approach was considered and rejected in *Commonwealth v Oceantalk Australia* where the respondent argued that the section 176(2) Crown first ownership provisions for works applied only in respect of works that subsisted by virtue of the section 176(1) subsistence safety-net.[56] Burchett J rejected that argument after hearing a pre-trial motion: the Crown ownership provisions did not depend for their operation upon copyright subsisting by virtue of only of Part VII.[57] Moreover, for section 180 to merely apply to works subsisting by virtue of section 176(1) there is an added hurdle. It requires that the operative scope of the words "is the owner" in section 180 should be narrowly read down to something much less than the scope of the UK regimes notwithstanding that in 1968 far broader language was chosen by the Australian legislature. This seems contrary to the object and purpose of the language chosen.[58]

Ricketson and Creswell put a second qualification on why there "seemed no reason in principle or from its wording" why section 180 (prior to its 2017 reform) ought not apply to works Crown-owned by assignment from a third-party. This qualification could be loosely termed the pain of a jarring consequence when what is now owned by the Crown was assigned third-party copyright that was expected to subsist for a long time under Part III, governed by the more general section 33 term duration rules:

> Also, if s 180 did apply to acquired copyrights, such transfer of ownership would have the rather dramatic effect of instantly terminating some copyrights, for instance those in literary, dramatic or musical works that had been published 50 or more years previously and of which the authors were still alive or not long dead. The issue does not seem to have received consideration, perhaps because such acquisitions may be uncommon.[59]

While it is indeed a "rather dramatic effect" for an assignment to put such a work in the Australian public domain, and the public domains of countries like the UK which adopt the rule of the shorter term, having adopted a blunt criteria of "is the owner" to trigger the abridged term durations of section 180, the only question is whether that provision means what it says. A way that could be suggested of overcoming its plain meaning would be to somehow read section 180 as only applying to works that the Crown is the owner by reason of sections 176(2) or 177, and to sound recordings and cinematograph films owned by section 178(2), so as to read section 180 as not applying to copyright material that the Crown is the owner by reason of assignment. This can be labelled as the harmonisation theory for interpreting section 180. Such an approach essentially contends that "Crown copyright" as used in the

[55] *Copyright Act 1968* (Cth) ss 176(2), 177, 178(2).
[56] *Commonwealth v Oceantalk* (1998) 79 FCR 520.
[57] Ibid 524.
[58] *Acts Interpretation Act 1901* (Cth) ss 15AA and 15AB which require consideration of the disjuncture between the Spicer Committee's recommendation (above n 35) on harmonisation with UK law and the distinctly different text of "is the owner" in section 180 when compared with the model text supplied by *Copyright Act 1956*, 4 & 5 Eliz 2, c. 74, 39(3)(b),(4).
[59] Sam Ricketson and Chris Creswell, *Law of Intellectual Property: Copyright, Design and Confidential Information* (Thomson Reuters Subscription Service at 26 February 2021), [6.95] (note omitted).

Part VII Division 1 heading and in the heading to section 180 ("Duration of Crown copyright in original works, sound recordings and films") is implicitly confined to material covered by ss 176(2), 177 and 178(2).[60] This would therefore read the words "is the owner" in section 180 having an operative scope similar to that under the 1911, 1956 and 1988 UK regimes, and leave Australian copyright owned by the Crown merely by *post hoc* assignment under the general section 33 and section 93 term duration rules.

However, there are serious roadblocks to this UK-harmonised interpretative solution. The first is the plain and natural language of section 180. Next is the maxim *generalia specialibus non derogant*. When the Parliament by a particular provision (i.e. section 180) explicitly prescribes a particular abridged copyright term duration rule, it most likely excludes the operation of more general copyright term duration rules (i.e. sections 33 and 93) in the same Act for the subject matter that falls within the scope of the particular rule.[61] Reinforcing those is the Parliamentary intention that can be observed from the legislative history discussed above. It serves to buttress both the natural meaning of the statutory text and the operation of the maxim: a deliberate legislative choice was apparently made to reject the UK models and to extend the abridged term duration provision to all works, sound recordings and cinematograph film which the Commonwealth or a State "is the owner".[62] Or in other words to admit as "Crown copyright" for section 180 purposes all such Australian copyright material that the Commonwealth or a State actually owns by whatever means.

Thus, from the discussion above there seem two possible ways to attempt to exclude the Australian copyright in the flag artistic work from the operation of section 180 after the 21 January 2022 Deed:

(a) By some interpretive theory of evisceration, that very narrowly confines section 180 to works that entirely owe their Australian subsistence to Part VII, so that the words "is the owner" are interpreted as having added to them "of a work subsisting merely by virtue of section 176(1) or section 178(1)"; or

(b) By some interpretive theory of harmonisation, that confines section 180 consistent with UK law to works made or first published by or under the direction or control of the Commonwealth or a State, so that the words "is the owner" are interpreted as having added to them "pursuant to section 176(2), section 177 or section 178(2)".

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[60] The strongest secondary support for this interpretation can be found within the Copyright Amendment (Disability Access and Other Measures) Bill 2017, Explanatory Memorandum, 51 and a Table headed "Government copyright material made before or after 1 January 2019" where for works the abridged term duration material is described as "Works made, or first published, by a Commonwealth, State or Territory". However the same Explanatory Memorandum then goes on to describe the abridged term duration works more expansively as "literary, dramatic, musical and artistic works of which the Commonwealth or a State is the owner of copyright": ibid 56.

[61] Although it relates to administrative powers in an enactment the principle in *Anthony Hordern & Sons v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (discussed in *Deputy Commissioner of Taxation v Dick* (2007) 242 ALR 152, 173-174) applies powerfully by analogy to the choice between whether section 33 or section 180 governs the term duration of the Australian copyright in the flag artistic work upon the 21 January 2022 assignment.

[62] *Acts Interpretation Act 1901* (Cth) ss 15AA and 15AB (discussed above n 58). The mandated purposive methodology applies with even greater force here.

Both theories are strained given statutory interpretation principles, the history, the text and the context of section 180. The evisceration theory so narrowly constricts section 180 as to nigh repeal it: what was apparently intended to have a quite expansive scope of operation is given virtually no scope at all. The harmonisation theory, while giving the provision a more cohesive and logical scope, is contrary to the clear and natural meaning of the provision, contrary to the maxim *generalia specialibus non derogant* and contrary to its purposeful breadth that can be readily deduced from the legislative history. Section 180, similar to section 183(1), reveals an Australian legislative choice of Crown exceptionalism that set Australian copyright law quite apart from UK copyright law since the commencement of the 1968 Act.

Given the deliberate quality in 1968 of "is the owner", language maintained in the 2017 reforms notwithstanding the publication of the views on assigned copyright set out above of Knight in *The Laws of Australia* and of Ricketson and Creswell in their Thomson Reuters service, by the Commonwealth Parliament not choosing the more confining language of the 1911, 1956 and 1988 UK regimes the straightforward reading of section 180 appears as the most legally correct reading of section 180. In other words, it seems that section 180 means what it says it means, and likely includes Australian copyright in works, sound recordings and cinematograph films assigned to the Commonwealth or a State. If so, the assigned Australian copyright in the flag artistic work entered the Australian public domain on 21 January 2022, and the work also entered the public domain of those countries which adhere to the rule of the shorter term under article 7(8) of the Berne Convention – such as the UK. Under this analysis, the only flag copyright retained by the Commonwealth of Australia after 21 January 2022 is the copyright rights subsisting in foreign countries that do not adopt the rule of the shorter term – such as New Zealand. If this analysis of section 180 is correct it raises the issues discussed next: whether the 21 January 2022 Deed was entered into under a common (shared) mistake between the parties about the operation of section 180, and if so, what are the consequences and implications of any such mistake?

A common mistake about section 180?

Assuming that, as suggested above, the plain meaning of section 180 is also its meaning in law, it will apply to all Australian copyright assigned to the Commonwealth and a State, including that in the flag artistic work. This begs the question of whether the Assignment Deed was entered under some common mistake shared by the two parties about section 180 not applying to the assigned Australian copyright. Perhaps the parties had assumed that the Australian copyright in the flag artistic work assigned under clause 2(a)(i) of the Deed was not to become subject to section 180, possibly acting under one of the alternative two interpretative theories (evisceration or harmonisation) set out above. There is much on the public record to support the existence of a common perception that section 180 would have no application to the Commonwealth taking ownership of the Australian copyright in the flag artistic work.

First, there is the Deed itself: the express grandfathering of pre-existing Flagworld Pty Ltd and Royal Australian Mint copyright licences first conferred by Thomas in 1998 and 2020 respectively;[63] the express recital that an amount equivalent to the royalties derived from the Flagworld licence will be

[63] Assignment Deed for Copyright in the Australian Aboriginal Flag between the Commonwealth of Australia and Mr Harold Joseph Thomas, 21 January 2022, above n 1, clauses 1.1, 2(b)(ii) and (iii).

directed by the Commonwealth to NAIDOC;[64] the express reservation of the Australian moral rights of Thomas.[65] Moreover, subject to these express rights, the Commonwealth at the request of Thomas undertook "to permit public use of the Copyright on the same basis as the Australian National Flag pursuant to the Flag Act".[66] All of these aspects of the Deed rest on the assumption that Australian copyright in the flag artistic work was to subsist beyond 21 January 2022.

Equally, there appears ample evidence, by omission, of this perception in the public records of the 2020 Senate Select Committee on the Aboriginal Flag. The Committee, by its Terms of Reference, was considering the possibility of the Commonwealth acquiring the flag copyright from Thomas under section 51(xxxi) of the Australian Constitution.[67] Also before the Committee was the possibility of some type of bargained assignment of that copyright pursuant to what was described as "confidential negotiations" between the Commonwealth and Thomas.[68] Based on the published submissions and transcripts of evidence the issue of section 180 term duration abridgment upon the Commonwealth taking ownership (by whatever means) of the Australian copyright in the flag artistic work was not brought to the attention of the Committee by those who made submissions or by those who gave evidence as witnesses. The Committee's October 2020 Report makes no mention of the potential relevance of the section 180 term duration abridgment if the Commonwealth were to take ownership of the Australian copyright in the flag artistic work.

Assuming that a common mistake about section 180 of some sort existed in the contracting parties, what follows? Australian contract law, both at equity and the common law, is in an unfortunate state when applied to contractual settings where both parties contract on the predicate of a shared mistake, and where neither contracting party has engaged in any blameworthy conduct related to that mistake. There is no clear position as to the existence of any equitable doctrine of common mistake as a ground for rescission as a result of conflicting UK Court of Appeal decisions. Since that conflict, there has been a

[64] Ibid Background F (ii) where NAIDOC is the acronym for the National Aborigines and Islanders Day Observance Committee.
[65] Ibid clauses 1.1, 2(b)(i).
[66] Ibid clause 2(b).
[67] Parliament of the Commonwealth of Australia, Senate Journals No 66, 3 September 2020, 2313-4 setting out the terms of reference for a select committee, to be known as the Select Committee on the Aboriginal Flag.
[68] Senate Select Committee on the Aboriginal Flag, Report, October 2020, iii.

cacophony of Australian judicial voices on the issue.[69] It is also obscure at what point common law will characterise a common mistake as so going to the fundaments of a contract as to render it void.[70]

It is clear, however, that the nature of any mistake relating to the 21 January 2022 Deed transcends merely the financial implications around the transaction (such as taxation), or the parties' motivations, and goes more fundamentally to the substratum of the assignment.[71] A Deed that vests ownership of the Australian copyright in the flag artistic work in the Commonwealth is vastly different from a Deed that triggers that copyright's immediate entry into the Australian public domain. Although if the position contended for above holds, and section 180 indeed applies, certain foreign copyright (i.e. in those copyright territories such as New Zealand where the rule of the shorter term does not apply) was duly assigned to the Commonwealth by virtue of the Deed, so long as the common law did not declare the contract void on the basis of a common mistake about its fundamental subject matter. Assuming that the plain reading of section 180 applies as contended, if a party (or the parties jointly) applied to the ACT Supreme Court (which has jurisdiction[72]) to seek because of a common mistake an order that the Deed be rescinded in equity, or be declared at common law to be void, would that order or declaration be made? Regretfully the answer in equity and at common law lacks predictive certainty given the state of contract law. Moreover, there might be institutional reasons why the Commonwealth would be

[69] The conflicting UK Court of Appeal cases are *Solle v Butcher* [1950] 1 KB 671 which supports common mistake as a ground of rescission at equity and *Great Peace Shipping v Tsavliris (International)* [2003] QB 679 which held *Solle v Butcher* to be in error on the issue. The leading Australian case supporting the *Great Peace Shipping* view is *Australia Estates v Cairns City Council* [2005] QCA 328 (a decision of the Supreme Court of Queensland Court of Appeal) although this was by way of obiter. Other case law has expressed more hesitancy on the point. For example, in *Schwartz Family v Capitol Carpets* [2019] NSWSC 238 where Wright J merely observes at [92] "there may be some doubt whether there exists any equitable jurisdiction to set aside a contract for common mistake". In *Hawcroft v Hawcroft General Trading* (2016) 18 BPR 35,863 Young AJ adopted the view at 35,872 that "the *Great Peace Shipping* approach is a retrograde step". One Victorian Supreme Court case has flatly rejected it. In *Rees v Rees* [2016] VSC 452 McMillan J at [103] stated: "While the circumstances under which rescission is available at equity for common mistake may not be clearly defined, there is High Court authority for the proposition that the remedy exists for common mistake … To the extent that *Australia Estates Pty Ltd v Cairns City Council* says otherwise, I decline to follow it".

[70] *Hawcroft v Hawcroft General Trading* (2016) 18 BPR 35,863 where Young AJ at 35,872 neatly summarises the position: "[C]ommon mistake was traditionally only a vitiating factor at common law in two cases — *res sua* (where a buyer contracted to buy something that he or she already owned) and *res extincta* (where the buyer contracted to buy something which in fact did not exist). In each case, the purported contract was void at law. However, as the law developed, a third category of 'fundamental' common mistake emerged as a further case of a common mistake for which the common law would declare a contract void". Prior to *Great Peace Shipping v Tsavliris (International)* [2003] QB 679 the leading UK case which developed the third category was *Bell v Lever Bros Ltd* [1932] AC 161. Notably the Assignment Deed for Copyright in the Australian Aboriginal Flag between the Commonwealth of Australia and Mr Harold Joseph Thomas, 21 January 2022, above n 1, clause 2(c) provides that if the assignment "is illegal, invalid or unenforceable in any respect" Thomas undertook "to permit public use of the Copyright on the same basis as the Australian National Flag pursuant to the Flag Act" subject to certain express reservations – being the same undertaking that the Commonwealth had assumed under clause 2(b). However, if the agreement is declared void ab initio at common law, any contractual obligation in clause 2(c) of the Deed would also be likewise void.

[71] Contrast the facts in *Baird v BCE Holdings* (1996) 40 NSWLR 374 where the mistake merely concerned the capital gains tax consequences of a share transaction.

[72] Assignment Deed for Copyright in the Australian Aboriginal Flag between the Commonwealth of Australia and Mr Harold Joseph Thomas, 21 January 2022, above n 1, clause 13.10.

hesitant about conceding in open court that it was in any way mistaken about the operation of a provision in a Commonwealth Act of Parliament.[73]

However, and in contrast to the above morass of confusing copyright and contract law, there appear a couple of legal propositions that are relatively clear and potentially curative. The first is that the parties (the Commonwealth and Thomas) can by subsequent Deed rescind the 21 January 2022 Deed of Assignment and simultaneously replace it with a new Deed of Assignment which could have a non-government party as the assignee. The second is that if the rescission were to be done properly, the 21 January 2022 Deed of Assignment would be set aside ab initio and logically so too would any role for section 180: the ordinary Australian copyright term (of until 70 years after the calendar year in which Thomas dies) should be revived. Each of these points can be briefly elaborated on.

Notwithstanding the obscurity of the topic of rescission or voiding of a contract for common mistake, it appears clear enough that: "Where a contract is executory on both sides, that is to say, where neither party has performed the whole of its obligations under it, it may be rescinded by mutual agreement, express or implied".[74] Here there appears to be such performance obligations. While the 21 January 2022 Deed of Assignment has as its core performance obligation on Thomas one that is performed on its date (i.e. assigning his flag artistic work copyright to the Commonwealth) it also includes one clear ongoing performance obligation: the grant by Thomas of a perpetual licence to the Commonwealth for it to exercise copyright for any purpose in the artwork created on a gifted chattel being his painting titled *The circle and square do need each other*.[75] The core performance obligation on the Commonwealth is its payment to Thomas of $13.75m within 10 business days from 21 January 2022.[76] However, it too has assumed more ongoing performance obligations. Aside from that referred to above (i.e. permitting certain public use of the flag artistic work copyright) the Commonwealth is obliged to establish, maintain and update "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".[77] It, therefore, seems clear enough that the 21 January 2022 Deed may be rescinded by a subsequent Deed between the parties. Moreover, as Young J had made plain:

> [I]f a contract is properly rescinded [by subsequent agreement], it is set aside ab initio. However, the terms of the rescission agreement may set up additional terms and those terms will apply by virtue of the new (rescission) agreement, even though the original agreement has been avoided ab initio.[78]

[73] It should be added here that Australian copyright legislation is in an unnecessarily complex state and long overdue for thorough root and branch revision: David Brennan, *Copyright Law* (The Federation Press, 2021), xvii-xviii.

[74] Hugh Beale, *Chitty on Contracts* (Thomson Reuters, 34th ed, 2021) 25-027 citing *Davis v Street* (1823) 1 Car & P 18, 171 ER 1084; *Foster v Dawber* (1851) 6 Ex 839, 155 ER 785; *Morris v Baron & Co* [1918] AC 1; *Rose & Frank Co v JR Crompton & Bros* [1925] AC 445.

[75] Assignment Deed for Copyright in the Australian Aboriginal Flag between the Commonwealth of Australia and Mr Harold Joseph Thomas, 21 January 2022, above n 1, clause 8(b), schedule 1 item 5.

[76] Ibid clause 4 and schedule 1 item 2.

[77] Ibid clause 7.

[78] *Baird v BCE Holdings* (1996) 40 NSWLR 374, 380-1.

Chitty on Contracts explains that one classic example of this is termed novation which "denotes the rescission of one contract and the substitution of another in which the same acts are to be performed by different parties".[79] As a matter of logic and law, there seems no impediment to the Commonwealth and Thomas effecting a novation. The 21 January 2022 Deed of Assignment could be rescinded by a subsequent Deed that simultaneously assigns the flag copyright from Thomas to a non-government custodial body.[80] This should have the effect of reviving the Australian copyright to the ordinary term duration of until 70 years after the calendar year in which Thomas dies. In this regard, it might be noted that the restoration of lapsed individual patents occurs globally *ad hoc* under slip rules, typically where renewal fees have not been paid due to some mistake by the patentee.[81] More controversial in the USA has been the restoration in public law of whole classes of copyright subject matter from the public domain.[82] The Australian copyright in the flag artistic work, if the 21 January 2022 Deed is duly rescinded and the copyright is indeed revived in the hands of a non-government assignee, is more akin to the *ad hoc* patent restoration paradigm than the public law copyright restoration controversies from the USA.

Conclusions

Therefore, even if section 180 now applies to the Australian copyright in the flag artistic work in the way that has been contended above, there appears to be an escape hatch if the parties are willing to agree to rescind the 21 January 2022 Deed of Assignment and replace it with a fresh assignment to a body independent from government. Such a novation would also permit the protection of third-party licensees, in particular, Flagworld, which may be commercially prejudiced were its exclusive licence to commercially manufacture "Aboriginal flags and bunting" be scuttled by any entry of the flag copyright into the public domain.[83] It bears recalling that an assignment to a custodial body "that is independent from government" was the unanimous and bipartisan recommendation of the Senate Standing Committee, being a recommendation arrived at seemingly oblivious to the added reason for such an assignee: avoiding any possible impact of section 180.[84]

However even if, unintended by the parties, the Australian copyright in the flag artistic work has entered the Australian copyright public domain by virtue of section 180, there may be a viewpoint that it should

[79] Hugh Beale, *Chitty on Contracts* (Thomson Reuters, 34th ed, 2021) 25-033.

[80] Being the very type of assignee recommended in unanimous and bipartisan way in 2020: Senate Select Committee on the Aboriginal Flag, Report, October 2020, ix and Ch 6. Without rescinding the Deed, any direct purported assignment of the flag artistic work Australian copyright to such a body by the Commonwealth after 21 January 2022 would encounter the basic property rule of *nemo dat quod non habet*.

[81] The Australian regime is found in *Patents Act 1990* (Cth) ss 223(2A),(7) where the Commissioner of Patents must be satisfied that "the person concerned took due care, as required in the circumstances, to ensure the doing of the act within that time". By way of contrast the practice of the USPTO is set out in a rule-making which makes clear that restoration of US patents is permitted for unintentional lapse, but if an application is made more than two years after the date the patent has expired for non-payment the USPTO will require a statement from the patentee of the facts and circumstances surrounding the delayed payment to support a conclusion that the delay was unintentional: *Clarification of the Practice for Requiring Additional Information in Petitions Filed in Patent Applications and Patents Based on Unintentional Delay*, 85 Fed Reg 12 222 (2 March 2020).

[82] Neil Weinstock Netanel, 'First Amendment Constraints on Copyright after *Golan v. Holder*' (2013) 60 *UCLA Law Review* 1082, 1100-1103.

[83] Prime Minister of Australia, 'Free Use of Aboriginal Flag Secured for All Australians' *Media Release* 25 January 2022.

[84] Senate Select Committee on the Aboriginal Flag, Report, October 2020, ix and Ch 6.

now remain in the public domain. In this regard the following question from Senator Patrick Dodson and answer by Dr Terri Janke (whose proposal for flag copyright ownership in a non-government trustee was recommended by the Committee) on the last day of the Senate Standing Committee Hearings on 25 September 2020 is insightful:

> Senator Dodson: How would you describe a flag in the Aboriginal context? Is it a creation of the artist or is it some kind of Aboriginal artefact?
>
> Dr Janke: Yes, it's interesting because the communal connection with it is very strong, but I see the flag as an artistic work created by someone. Though it was a while ago now, they are still alive, so copyright is there. In terms of being an artefact, the original physical flag might be seen as an artefact, something that is a cultural object that is of strong significance to Indigenous people. In terms of the image itself belonging as cultural heritage of a group, I think it's on its way there, but normally you see cultural heritage in terms of intangible cultural heritage. It's where things are already in the public domain. It might be old rock art or a story that comes from country and that's very old. It's interesting that here we have a flag that is old but not so old that it's in the public domain, so it could be on its way there but we're not yet to the point where it's in the public domain. I believe it possibly could be seen as Aboriginal cultural heritage once it's there or even if there is a negotiated outcome, but, at the moment, we are in that point where there is still the Copyright Act, which recognises individual authorship rights to Mr Thomas.
>
> So we have a work that's of strong significance to everyone, and he still has a copyright in. That's not uncommon. We link into the poetry of Oodgeroo Noonuccal, for example, or music written by Aboriginal people, and that's seen as something we identify with, but they are still the owners. It is not yet an artefact or moved past that point of individual ownership, and the limitations of the law don't recognise communal rights in that, but also the artist's rights are performing strongly here.[85]

The flag copyright is an important and sensitive matter. It should be considered in a deliberative way and not dealt with by the seemingly accidental operation of section 180 which itself is an obscure provision that should, if not repealed, be clarified by legislative reform.[86] While the Copyright Law Review Committee rejected it in 2005, there is much to be said for the Australian Copyright Council (ACC) submission made to that Committee that "the term of copyright protection for government copyright material should be the same as for other material".[87] Had the ACC's submission been accepted in 2005, and then acted upon by the Commonwealth Parliament, none of the legal headaches and uncertainties created by the Crown exceptionalism of section 180 would have been inflicted on the 21 January 2022 Deed of Assignment.

[85] Official Committee Hansard, Senate Select Committee on the Aboriginal Flag, 25 September 2020, 2-3.
[86] David Brennan, *Copyright Law* (The Federation Press, 2021), 120-121.
[87] Copyright Law Review Committee, *Crown Copyright* (2005) 130-131.