Federal Court of Australia

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

CATCHWORDS

COPYRIGHT - copyright in design of Aboriginal flag - application for declarations that applicant owner of copyright therein - claims by two other persons to have designed flag - analysis of complex of evidence - question of fact - no question of law or principle - discussion of copyright/design overlap - no submission applicant disentitled to relief by reason of provisions of Division 8 of Part III of Copyright Act 1968 .

Copyright Act 1968 ; ss.74, 75, 77

Designs Act 1906

Flags Act 1953 ; ss.3, 4, 5

HAROLD JOSEPH THOMAS v DAVID GEORGE BROWN AND JAMES MORRISON VALLELY TENNANT

No. SG 62 of 1996

CORAM: SHEPPARD J

PLACE: ADELAIDE (JUDGMENT DELIVERED IN SYDNEY)

DATE: 9 APRIL 1997

IN THE FEDERAL COURT OF AUSTRALIA)

) No. SG 62 of 1996

SOUTH AUSTRALIA DISTRICT REGISTRY)

)

GENERAL DIVISION)

BETWEEN: HAROLD JOSEPH THOMAS

Applicant

AND: DAVID GEORGE BROWN

First Respondent

AND: JAMES MORRISON VALLELY TENNANT

Second Respondent

MINUTES OF ORDER

CORAM: SHEPPARD J

PLACE: ADELAIDE (JUDGMENT DELIVERED IN SYDNEY)

DATE: 9 APRIL 1997

THE COURT ORDERS THAT:

1. It be declared that:

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

(b) Harold Joseph Thomas is the owner of the copyright subsisting in the said artistic work.

2. Leave be reserved to the applicant to make application for the further relief sought in his amended application filed on 1 August 1996 provided that any such application is made on or before 23 April 1997. Such application may be made by notifying it to the associate to Sheppard J and to the respondents to the application on or before 23 April 1997.

3. There be no order as to costs.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

HIS HONOUR: This application concerns the ownership of the copyright in the design of a flag. The flag is well known. It is referred to throughout the community as the Aboriginal flag. The flag is divided into two sections. The upper half is black and the lower half is red. In the centre of the flag is a large yellow circle which, in present representations of the flag, has half its area in the black upper part of the flag and the other half in the red lower part of it. A representation of the flag is attached hereto.

The applicant is Mr Harold Joseph Thomas, a professional artist who resides at Humpty Doo, 60 kilometres

or so south of Darwin in the Northern Territory. Mr Thomas was brought up in Adelaide and spent much of his earlier life there. He claims to have designed the flag in 1971 when he was in Adelaide.

Mr Thomas's claim is disputed by the two respondents, Mr Brown and Mr Tennant. Each claims to be the owner of the copyright in the design of the flag. The respondents have not brought cross-claims seeking any relief themselves. Their resistance to the declarations which Mr Thomas seeks is defensive. That was apparently a deliberate course which each chose to follow. Mr Brown has lived in Adelaide or in places close to Adelaide all his life. Both Mr Thomas and Mr Brown are indigenous. Mr Tennant is not. At all material times he has lived in Canberra.

The principal relief which Mr Thomas claims is a declaration to the effect that he is the author of the artistic work being the design for the flag described in a schedule to a proclamation dated 27 June 1995 under s.5 of the Flags Act 1953 published in the Commonwealth of Australia Gazette of 14 July 1995. Mr Thomas also claims a declaration that he is the owner of the copyright subsisting in the artistic work which is comprised in the flag.

Mr Thomas's application was filed on 25 July 1996. On 1 August 1996 an amended application was filed. In addition to the two declarations sought in the original application, a declaration was claimed that Mr Brown had falsely attributed the authorship of the design of the flag or reproductions thereof as being works in respect of which he was the author. A declaration to the same effect was claimed against Mr Tennant on the basis of representations said to have been contained in his letter to the Tribunal of 9 May 1996.

On 8 March 1996 Mr Thomas had filed an application in the Copyright Tribunal (No. CT 3 of 1996) in which he alleged that, during 1971, he created the artistic work for what has become known as the Aboriginal flag and was the owner of the copyright therein. The respondent to the application was the Commonwealth of Australia. Mr Thomas alleged that the Commonwealth had "done acts comprised in the copyright" in the artistic work for the services of the Commonwealth.

The application was brought pursuant to the provisions of s.183 of the Copyright Act 1968 ("the Act"). That section provides that the copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, is not infringed by the Commonwealth or a State or by a person authorised 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. Subsection 183(5) provides that, where an act comprised in a copyright has been done for the services of the Commonwealth or a State, the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal.

In the particulars to his application, Mr Thomas alleged that the "Purchasing Australia Department of the Commonwealth had been engaged in arranging for the manufacture of flags bearing the artistic work, i.e. the Flag for the purpose of the use of such flags by the Commonwealth. As such it has caused the reproduction and/or authorised the reproduction of the flag." The application also alleged that, by a proclamation published in the Commonwealth of Australia Gazette on 14 July 1995, the Governor-General proclaimed the artistic work under s.5 of the Flags Act 1953 to be the flag of the Aboriginal people of Australia and to be known as the Aboriginal flag with effect from 14 July 1995. It was alleged that the Commonwealth had thus authorised or permitted copies of the artistic work to be made for its own purposes as well as by others generally, particularly non-Aboriginal people "arising from the recognition of the Aboriginal flag under the abovementioned proclamation."

The application alleged that the Commonwealth had advised Mr Thomas, by letter to his solicitors dated 31

August 1995, that it intended to reproduce the artistic work in a book that it was to publish entitled "Australian Flag". It was alleged that Mr Thomas had not consented to the conduct of the respondent which was referred to and that his solicitors had written to the Commonwealth requesting that it enter into an appropriate agreement for the fixing of terms for the use by the Commonwealth of the artistic work, that is the flag. The Commonwealth said that it was prepared to meet its obligations to any person who could establish ownership of copyright in the artistic work.

At that stage it was thought that the Copyright Tribunal had jurisdiction to determine the ownership of the copyright in the flag as a matter going to its jurisdiction to hear Mr Thomas's application. That was the course the matter took until the filing of Mr Thomas's application for declaratory relief in this Court on 25 July 1996. A good deal occurred before that application was filed.

I should perhaps explain that I am the President of the Copyright Tribunal as well as a judge of this Court. The matter first came before me for directions in my capacity as President of the Tribunal.

The Commonwealth filed particulars of defence. Amongst other things, it said that it did not know if Mr Thomas created the artistic work, i.e. the flag. It also said that it was aware that at least two other persons namely, Mr Brown and a Mr Gary Foley, had made claims to have created or contributed to the creation of the design of the flag.

The matter came into the list for directions on 18 April 1996. There were appearances on behalf of Mr Thomas and the Commonwealth. A direction was made that notice of the application be advertised in The Weekend Australian, The Northern Territory News, The Adelaide Advertiser and The Koori Mail (an Aboriginal newspaper). A direction was also made that notice of the application made by Mr Thomas be posted to Mr Brown and to Mr Foley who were referred to in the Commonwealth's particulars of defence. The matter was stood over to 14 June 1996. On that day, in addition to appearances for Mr Thomas and the Commonwealth, there were appearances also for Mr Brown and Mr Tennant. The matter was fixed for hearing in Adelaide on 23 July 1996. The hearing proceeded on 23, 24 and 25 July 1996 when the then available evidence was led. The matter was stood over to 9 August 1996 in Adelaide for any further evidence and for the submissions of the parties.

At the July hearing Mr Thomas and Mr Brown were represented by counsel; Mr Tennant appeared in person. On the last morning of the July hearing counsel for Mr Brown, Mr Robertson, announced that his instructions had been withdrawn. For most of the day he continued to appear as amicus curiae but eventually withdrew on the basis that he was unable further to assist the Tribunal. Mr Brown was then unrepresented.

During the hearing a number of witnesses were called. These included Mr Thomas, Mr Brown and Mr Tennant. I shall refer to the detail of their evidence and the other evidence which was called in due course.

The hearing which took place in July was well publicised by the media in South Australia. It was reported in The Australian and the Advertiser newspapers and was also the subject of news items on television and radio. There was thus widespread publicity in Adelaide and in South Australia about the case.

During the hearing which occurred in July there had been discussion by counsel and by me concerning the suitability of the Copyright Tribunal as an appropriate forum for the determination of the question of the ownership of the copyright in the flag. Plainly enough the Tribunal has jurisdiction to determine questions concerning matters upon which its jurisdiction depends. One of those matters is the ownership by an applicant for relief of the copyright which the applicant claims has been used for the purposes of the Commonwealth or a State. That is not, however, the only matter going to the Tribunal's jurisdiction under subsec. 183(5) of the Act. The purpose of the application is to have the Tribunal fix terms of remuneration for

the reproduction of the work by the Commonwealth or State. It will only have that jurisdiction if the parties have endeavoured to agree on the amount to be paid and have failed to do so. Here there has been no refusal by the Commonwealth to negotiate. Its particulars of defence show that it is willing to do so. But, reasonably enough, it will not negotiate with a particular person unless it is satisfied that that person is the owner of the copyright. It follows that, if the Tribunal had decided that the copyright was owned by Mr Thomas, that would not have been sufficient to give it jurisdiction. Mr Thomas would also have needed to show that he and the Commonwealth endeavoured to reach an agreement but failed. But that cannot occur until such time as negotiations take place and fail. They cannot reasonably take place until Mr Thomas is established as the owner of the copyright.

These considerations led to there being doubts about the Tribunal's jurisdiction to determine the question of the ownership of the copyright in question in the case. The safer course was to file an application for declaratory relief in this Court. That was what was done.

The application for declaratory relief was, as I have mentioned, filed on 25 July 1996, that being the last of the hearing days before the Tribunal. The respondents were Mr Brown and Mr Tennant who were present when the application was filed in Court. There was no objection by either to the course which was followed. Accordingly, both the present application and the matter before the Copyright Tribunal were adjourned to be further heard by me in Adelaide on 9 August 1996. The Commonwealth was not joined as a respondent to the present application. I am a little surprised at this because I would have thought that the joinder of the Commonwealth would have ensured that it was bound by the findings of the Court on the question of the ownership of copyright. I do not think the matter is of great moment because it seems clear that the Commonwealth will abide the outcome of these proceedings in relation to the question of the ownership of the copyright.

On 1 August 1996 an order was made that the evidence given before the Copyright Tribunal be evidence in the proceedings in this Court. That order was made by consent.

Early in August 1996 new solicitors were instructed by Mr Brown. They instructed Mr Abbott of counsel who had not appeared in the proceedings up to that time. An application by Mr Brown for leave to lead fresh evidence was foreshadowed. Without going to the detail of what occurred, this led to the hearing in Adelaide fixed for 9 August 1996 being vacated. Instead the matter was placed in the list on that day for directions. The hearing was partly by videolink conducted from Sydney. A direction was made that Mr Brown file a notice of motion for leave to lead fresh evidence on or before 16 September 1996. Eventually, on 24 October 1996, after further hearings, I granted leave to Mr Brown to lead further evidence. His application in that behalf had been strongly opposed by counsel for Mr Thomas.

The matter was listed for further directions on 2 December 1996 and for further hearing in Adelaide on 11 December 1996. The further hearing of the matter proceeded on 11 and 12 December 1996 when I reserved my decision. The fresh evidence relied upon by Mr Brown consisted principally of evidence given by a Mr Rennie who had not given evidence in the earlier hearing. Mrs Rennie also gave evidence. Mrs Brown, who had given evidence at the earlier hearing, gave further evidence as did Mr and Mrs Thomas. There were some other witnesses called to whose evidence I shall refer in due course. At the December hearing Mr Tennant, as well as Mr Thomas and Mr Brown, was represented by solicitors. He had been unrepresented at the July hearing.

The evidence in the matter consists of the evidence of the witnesses called at the hearings in July and December and of a large number of exhibits. It is necessary to go to the evidence in some detail. That is what I now do. There is a question of the order in which I should refer to it. Logically, I should refer to the

evidence more or less as it was presented, that is sequentially as it related to the cases of the parties on whose behalf it was called. Mr Thomas's case was presented first, Mr Brown's second and Mr Tennant's last. Counsel for Mr Thomas led some evidence in reply, or rather in anticipation of evidence to be led in Mr Brown's case. I propose to refer to Mr Thomas's positive case first. For reasons which will emerge, I propose next to refer to Mr Tennant's case and then to that of Mr Brown.

I commence the account of the evidence called in Mr Thomas's case with the evidence of Ms Sandra Lee Hanson. Ms Hanson is an exhibitions officer at the South Australian Museum. She commenced work at the Museum in 1969. She has worked there continuously since then. In 1969 she occupied the position of preparator in the exhibitions section. Her job was to prepare artwork and labels for exhibitions that were held in the Museum.

Ms Hanson first met Mr Thomas when he began to work in the Museum. She thought that this was in the early 1970s. She said that Mr Thomas was working in the anthropology section. She sometimes had discussions with Mr Thomas about Aboriginal matters. She remembered him mentioning a design for the Aboriginal flag. He came to her at work and said that he wanted to make a flag for a procession or a rally. Someone had told him that Ms Hanson had a sewing machine. He said he would like her to make a flag. He drew a diagram or showed her a diagram that he had with him. The diagram consisted of a rectangle which was made up of red and black with a yellow circle in the centre. She said she did not recall which colour was at the top and which was at the bottom. But one part of the rectangle was black and the other half was red. She thought that the black was on the top. She thought Mr Thomas explained to her that the circle represented the yellow sun. The earth was red and the sky was black. She thought that the circle was centred in the middle of the rectangle. Half was on the black side and the other half on the red side. Ms Hanson said she had not seen the design before.

Mr Thomas had brought with him fabric with which he wanted her to make the flag. The fabric consisted of three pieces of cloth, one black, one red and one yellow. Ms Hanson sewed the black and red fabric together in the centre to make a rectangle, half red and half black. She cut out a large yellow circle. She applied it to the black and red rectangle and turned it over. She cut from the other side so that the yellow could be seen from both sides. She kept some of the fabric. She produced the black and red piece from the cut out section, "the sort of blank that I cut out, I still had". She said some years later she had taken it into the Museum and that it was now part of the collection. The material was produced and is an exhibit. The material which was produced was said to be the piece that was cut out of the black and red rectangle to enable the yellow to be seen from both sides.

Ms Hanson said that the flag, when finished, was reasonably large.

Ms Hanson said that she carried out the sewing work at her residence. Whilst she was sewing, Mr Thomas came round on several evenings and eventually called to collect it. She said that she had a feeling that he had wished the yellow circle to have been bigger.

In the course of Ms Hanson's evidence, annual reports by the board of the Museum were produced. These showed that Mr Thomas was a member of the staff of the Museum during the years ended 30 June 1971 and 1972. An examination of the piece of material produced by Ms Hanson shows that the circle was divided between the black and the red sections of the material unevenly. There was more red material than black material. Counsel for Mr Brown suggested that there was about one- third black and two-thirds red. I do not think that the disproportion is as great as that, but there is a disparity in the size of the black and the red sections of the piece that was cut out.

I next turn to the evidence of Mr Thomas. In passing it may be observed at this point that he confirmed the request he made to Ms Hanson to make up the flag. His evidence and Ms Hanson's evidence in this respect are substantially in accord.

Mr Thomas said that he was born in 1947 in Alice Springs. He said that at the age of five he was taken from his mother and father. They had lived in a segregated area in Alice Springs called "The Cottages". He was placed in an institution at St Johns in Alice Springs. At the age of seven he was taken from that institution to South Australia to an institution called "St Francis House" at Semaphore which is in the Port Adelaide region. Except on one occasion he did not see his mother again. At the age of 11 he was sent back to his mother and father to the Northern Territory on a station called "Denippa". Mr Thomas's father was the manager of the station. Mr Thomas was there for the Christmas holidays. He had one sister who came from her institution to be with the family. At the end of the holidays he returned to St Francis House. After he was 12 he was cared for by the Reverend Donald Wallace and his wife who were his foster parents.

Mr Thomas did not see his mother again. When he was about 22 he found out where his father was living. Eventually he visited his father in 1970. He said that they were strangers. He thought that his father was more distraught than he was. He said that they tried to be cheerful but, "he was feeling a bit struck by it."

Mr Thomas said that he has been active in recent years in a campaign known as "The Stolen Children Campaign". He is on the "reference group committee".

Between 1959 and 1962, Mr Thomas attended the Willunga High School. Willunga is about 50 kilometres south of Adelaide. In 1963 and 1964 he attended Pulteney Grammar School. This was because his foster parents had moved from Willunga to Adelaide. Mr Wallace had been appointed director of a church known as St Johns. The parish was either in or close to Adelaide. Mr Thomas lived with the Wallaces there from 1963 onwards.

In 1964 Mr Thomas sat for an examination to enter the South Australian School of Art. He qualified for a scholarship. It was not a scholarship for Aboriginal students only but, to use Mr Thomas's expression, it was "mainstream".

At the age of 20 he had an exhibition of paintings and etchings in Adelaide. It was opened by Mr Dunstan in 1967. Mr Thomas described his work at the Museum. In the course of doing so he mentioned that both his foster mother and his natural mother had died in 1967. He did not return to the art school in 1968 because of these difficulties. He met his wife during that period. They were married on 3 July 1968.

Mr Thomas completed a diploma in fine art, specialising in painting in 1969. He received a diploma from the South Australian School of Art.

Mr Thomas thought he commenced work with the Museum either in December 1970 or January 1971. One of his first activities was to go to Tasmania and Flinders Island where there was an archaeological dig. He said that this was in January 1971. He was at the dig in his capacity as a representative of the South Australian Museum. There is some detailed evidence about the work which he did to which I do not refer.

Mr Thomas said that, at the time that he joined the Museum, he was becoming active in Aboriginal political issues. Mr Thomas was asked to recount the circumstances leading up to the creation of the flag. Mr Thomas said that the previous year he had marched on Aboriginal Day. It was called NADOC or Aboriginal Day. The march was held on the second Friday of July each year. The acronym NADOC stands for National Aboriginal Day Observation Committee. Apparently there were a great many other people in the march in addition to Aboriginals. He said that the Aboriginals used to march up front. In the 1970 march they had

placards which said "Land Right". At the rear were a lot of banners by the unions, teachers, universities and others. He said that the Aboriginals were outnumbered 10 or 20 to 1. He said that when he was marching, he felt, "We had to see something more visible in front of us. So something should go up front. So a flag was the thing that came to my mind."

Mr Thomas said that several weeks before the 1971 NADOC march he began to do drawings of the flag. He said that his intention in commencing to do drawings was to make a flag for the NADOC day march in 1971. About that time he met Mr Gary Foley and told him that there should be a flag. Mr Foley said to him, "bring in the drawings and we'll do that...".

In making the flag Mr Thomas said the first step was thinking of what colours. He said that, working in the Museum, he was closely associated with Aboriginal culture. He found that the predominant colours that were used by his people to embellish their artefacts and paintings and totem poles or pukamani poles were the colours, red ochre and yellow ochre. These were the most obvious colours to be used. He was asked what the yellow signified and said:

"Well, it's very difficult as an artist to say whether the colours mean this and stick to them at the beginning. I mean, I know when I have finished the actual design and showed Gary and had it made the meanings were fixed but where I began of saying - at what stage did I say what the meanings were, is not definite. ...Well it wasn't only red and yellow because black was the obvious colour that I would use. Even though I knew that white was a colour that was predominantly also used in Aboriginal art if you see any bark paintings and a lot of artwork, that white clay paint is evident and to me that wouldn't have been a suitable colour - if you can call it a colour - but black was the colour that had to be used because we were talking in terms of... black consciousness, black awareness, black power, be proud of your blackness and our understanding of what black American culture was all about. You know, that is why the colours were - the black colour was the most obvious colour to have present in the design."

Mr Thomas said that the next important stage concerned the shape of the flag. He said that present day flags were too long, too longitudinal. He said that he wanted the design more "squared up" so it looked more in that manner rather than long. He said that the Australian flag was, in his opinion, too long. It was far greater in length than breadth. He said that that was why a lot of Aboriginal flags were the wrong shape. Eventually Mr Thomas said that he wanted to achieve a shape that was not a square but was closer to a square than a long rectangle.

Mr Thomas said that the drawings were done both at home and at the Museum. There were two factors in his coming to the actual design that was adopted. He said that at one stage he had the black on the bottom and the red on top. But he thought that that was too obviously a balanced picture. He added:

"I wanted to make it unsettling. In normal circumstances you'd have the darker colour at the bottom and the lighter colour on top and that would be visibly appropriate for anybody looking at it. It wouldn't unsettle you. To give a shock to the viewer to have it on top had a dual purpose, was to unsettle... The other factor why I had it on top was the Aboriginal people walk on top of the land. It's an obvious fact as well. So it had - that was the reason why the black was on top was visibly unsettling and because of how I was trained at art school, not to make things too obvious but to have a bit of a shock but also to say that the people walk on the land."

Mr Thomas said that he had created a sketch which showed the design which he had described. This came into existence about a week or a couple of weeks before the march in 1971. In order to achieve the colours, he used some of the chippings of ochre in the Museum. He would break them off because they were

samples that were collected by various people. He would "pinch" a piece, break it and spit on it just to rub on paper to get the vivid red.

He said that during the process of design, he discussed the whole matter with his wife who knew about it. He said that he had not copied what he had done from any source. He had not met Mr Brown at that time. Mr Brown had not shown him a design that he had made prior to Mr Thomas creating his design. He said emphatically that no one had shown him any design whatsoever prior to his creating the design which was used for the flag.

Mr Thomas said that he knew that Mr Gary Foley was to visit Adelaide at the time of the NADOC march. He did not remember whether he met him before, but he was anxious to meet him because he knew that Mr Foley was the person who would have been able to take "on board" what he was doing and would be able to promote the flag, "the concept of having a national Aboriginal flag."

The two met in a Rundle Street book shop, which he thought serviced "a sort of left wing activities I think with books." Mr Thomas told Mr Foley about the drawings. Mr Foley asked him to bring them into the book shop. Mr Foley saw them the next day. He said that there were several small drawings. They were different versions of red, black and yellow designs. Some were just red and black with a yellow stripe. There were others. It was decided that the design which is similar to the present design of the Aboriginal flag was the appropriate one to use.

Mr Thomas then described the purchase of the fabric which he had taken to Ms Hanson. As mentioned, his evidence and Ms Hanson's on this matter are substantially to the same effect. I do not go to the detail of Mr Thomas's evidence about this aspect of the case. I have no hesitation in saying that I accept Ms Hanson's evidence. It corroborates what Mr Thomas himself said. There was no submission that I should not accept Ms Hanson's evidence.

Mr Thomas took delivery of the flag from Ms Hanson and said that the next step was to find a pole. He said:

"At St Johns church hall where my foster father was the priest. He was still alive then and I went into the hall. Actually, there was some bamboos in the garden and I didn't think they were useful enough somehow. They were too elastic. I wanted something more rigid so I went into the hall and scrounged around and I came across a projector screen for film, film projector screen, and there was a timber across the top. I took it down and I ripped that off and I noticed that there were screws that were joining the two pieces together. It was the most suitable way of attaching the flag to the post so I undid the screws and there were two pieces, two equal halves, put the flag there, put back - on one side of the timber and put the other side on and then I screwed back the timber and it was just a perfect size and I told my foster father some years later about that."

He said that this occurred on the day of the march. He thought this was so because he would have had to take his wife and leave her at the rectory because she was pregnant and there were two other children. It was the middle of winter. That was the explanation for Mrs Thomas not being present at the march.

On the day of the march Mr Thomas said that he took the flag to the bookshop where he had met Mr Foley. Mr Foley was not there although another Aboriginal man was. He told him that there was a new flag. They were late. Mr Thomas said that the two started to walk down King William Street to Victoria Square. The other man carried the flag and, according to Mr Thomas, started to run with it to the Square. Mr Thomas said that "that was one of the proudest moments I felt, that this other unknown Aboriginal was carrying the flag - it was a wonderful time." Mr Thomas said the flag was not unfurled, but added, "he was carrying it more aggressively than I was because he felt good."

Mr Thomas was asked what happened when the flag arrived at the march. He said:

"...people were congregated around Victoria Square near the fountains and as I arrived there, there were some speeches - I don't know who was speaking - but I do recall Gary Foley up on the little platform, or whatever, and he was talking the way Gary was talking at that time - very aggressively and politically, and all those mannerisms he had. Then, Gary noticed the flag there, then he sort of beckoned me to bring the flag to him and he, sort of - we sort of - I pulled it apart and he held the posts and said, 'This is the new Aboriginal flag'. Then he introduced me as the designer to explain the meaning of what the flag meant - the meaning of the Aboriginal flag, and I got up and I explained virtually the same explanation I've already said - what the flag meant."

After the march, Mr Foley said to Mr Thomas that he would take the flag with him to the east coast "to let them know about the new flag."

In evidence is a copy of page 29 of The Sydney Daily Mirror for 22 February 1972. It shows a photograph of Mr Foley. In large print appear the words "Black Power" and there is depicted a representation of the flag with an explanation of the meaning of the various colours. It was said that the upper half which was black represented the Aboriginal people, the lower half which was red, the land which once belonged to the Aboriginals, and the circle which was yellow, the sun, uniting the land and the people.

The flag which Mr Foley took away was the only flag which Mr Thomas ever made or caused to be made. He next saw the flag when he went to the Aboriginal tent embassy in Canberra. He said that this was in 1972.

The evidence to which I have referred is the essence of Mr Thomas's case. There is a substantial amount of evidence given by him as to events which occurred after 1972. The purpose of this evidence was to endeavour to show that throughout the years between 1971 and the present time Mr Thomas has consistently claimed to be the owner of the copyright in the flag. Subject to some matters of detail with which I must deal in relation to events which occurred in 1971 and in earlier years, the evidence satisfies me that Mr Thomas has behaved throughout the intervening years as if he were the owner of the copyright. He has the reputation in substantial sections of the Aboriginal community of being its designer. There is in the evidence independent testimony of that. But the critical question is whether Mr Thomas's account of what occurred in 1971 before the NADOC march in July is to be accepted. There is evidence which tends to corroborate his own testimony but there is no direct evidence which does so. The only evidence about how the design for the flag came into existence is that of Mr Thomas himself. There is no doubt, of course, that he did take a design of the flag and some material to Ms Hanson or that she made up the Aboriginal flag in the way that she described. But the critical question is whether he was the author of the design.

I shall refer to the evidence of other witnesses in a moment. They include Mrs Thomas and Mr Foley. But not even they can speak directly of Mr Thomas's authorship of the design. When the case is analysed, it will be seen that it is his evidence, and his evidence alone, consistent though it may be with a number of surrounding objective circumstances, which must be accepted if his claim to be the owner of the copyright in the design is to succeed.

Mr Thomas was cross-examined during the first hearing and again briefly during the second hearing. He was an impressive witness and left me with a feeling of belief in his evidence. But at that stage I had not heard the evidence of the two respondents.

Mr Thomas is deeply troubled about "the struggle", a term used by many members of the Aboriginal community, which they regard as still continuing. He is not an activist in the sense that Mr Foley was in the 1960s and 1970s or in the way that others have been. He is a quiet and reserved man but it is plain that he

feels intensely about the plight of Aboriginals in this country. The depth of his feelings is no doubt attributable, at least in part, to his early life and to his being taken away from his parents when he was so young. That does not mean that Mr Thomas is not grateful for the care given him by his foster parents. He was obviously very attached to his foster father. I have no hesitation in accepting Mr Thomas's evidence about these matters nor have I any doubt about Mr Thomas's deep sincerity about his feelings both of resentment and also of grief and great sadness at all that happened in his earlier life.

One of the problems in this case is the length of time which has elapsed between the design of the flag, which seems to have been no later than 1971, and the present time. Neither the application to the Tribunal nor the application to this Court was brought until 1996. One may well ask why the claim was so long delayed. An obvious reason for this is that there was no need to make a claim because, so far as Mr Thomas could tell, he was accepted, at least amongst the community that mattered to him, as the person who had designed the flag. Copyright as a concept was probably not thought about very much; what mattered was that a great many influential Aboriginal people believed that he had designed the flag. Why then was it necessary for this application to be brought at all?

The answer lies in the fact that Mr Thomas objected very strongly to the proclamation of the flag under the Flags Act 1976 . The flag was proclaimed under s.5 which empowers the Governor-General, by proclamation, to appoint such "other flags" and ensigns of Australia as he thinks fit. The expression "other flags" is used to draw a distinction between the national flag which is provided for in s.3 and the Australian Red Ensign which is provided for in s.4. The proclamation made on 14 July 1995 to which I have earlier referred said that the flag was recognised as the flag of the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally. Those responsible for the proclamation of the flag acted in good faith so that what I am about to say is not intended as any criticism of them. The fact is, however, that Mr Thomas, along with other members of the Aboriginal community, bitterly resented the flag being proclaimed in this way. In their view, the proclamation represented a usurpation of something which properly belonged to the Aboriginal people and not to the Australian people generally. Mr Thomas became angry about had happened and it was that anger which triggered this application.

In fairness to others I should say that there is material in the Tribunal's file, although not material which is in evidence, which indicates that not all members of the Aboriginal community feel as Mr Thomas and others do about the proclamation of the flag. Other members of the Aboriginal community are supportive of what was done. That material is of no relevance to the outcome of this case. I mention it only to show that there are some members of the Aboriginal community who have a view different from those who have objected so strongly to the proclamation of the flag.

I now refer to the other evidence called in Mr Thomas's case. Mrs Thomas lives with her husband at Humpty Doo. She recalled Mr Thomas working on artwork in connection with the design of a flag in July 1971. She said that at that time Mr Thomas was working at the museum and brought artwork home. This was a frequent occurrence. He used to work on the round kitchen table after dinner. She said that a couple of nights before the NADOC march in July 1971 he had taken some of the artwork that he had in the spare room adjoining the kitchen. He brought this into the kitchen and spread it out. Mrs Thomas looked at it. She went away to attend to the children. When she came back, Mr Thomas had his designs, "many designs", of Aboriginal flags, or different flags. They were not all Aboriginal flags, but in her words "just flags that he'd sketched". He had some paper cut-outs as well which he had put together. Mr Thomas told his wife that he was trying "to get an Aboriginal flag together" but he was not sure which colour or which design he should use. Mr Thomas showed his wife the design which she identified as being the Aboriginal flag. She had seen it amongst his work in the spare room on previous occasions. She saw the flag which had been made up by

Ms Hanson. She remembered the dates because she was four months' pregnant with her third child, Joshua. She said she remembered the dates very well. Mrs Thomas did not see the flag again.

In the course of her cross-examination Mrs Thomas confirmed that the flag had been one of a number of designs of flags which had been in the spare room well before July 1971.

Mrs Thomas's evidence leaves one with the impression that Mr Thomas was still uncertain which design to select for the flag only two days before the NADOC march at which it was to be flown. She also seems to say that she saw the flag made up by Ms Hanson at the same time. That cannot be correct. It seems more likely that she saw the collection of sketches and designs earlier than two days before the march. Furthermore, in later evidence, she said that she did not see the actual flag until the morning of the march when she went to the church rectory. Nothing turns upon these discrepancies. It all happened a long time ago and it is understandable that she should be confused about matters of detail. Essentially her evidence and that of her husband are to the same effect. He did have a number of sketches and selected the design from one of them.

Mr Foley gave evidence by videolink from Melbourne. He is currently a full-time student in arts and computer science at the University of Melbourne. He said that he had been active in Aboriginal political movements for some considerable time. He was active in this way in the late 1960s and early 1970s when, to use his expression, "we peaked."

He said that a group set up the first Aboriginal legal service in Australia in Redfern. A group of people in Adelaide contacted him and others and asked that somebody go to Adelaide to assist them to create a similar service. Mr Foley thought that was early in 1971. He was the one chosen to go and was involved in discussions with people in the early stages of the creation of the South Australian legal rights movement. He was in Adelaide at least twice and perhaps three or four times during 1971.

He could not remember when precisely he met Mr Thomas but remembered a range of discussions which he had with him. He said, "You've got to remember in those days Aboriginal political activists were thin on the ground and to be able to meet and talk in a serious political way with other Koori or Nunga people wasn't all that common, to actually find somebody who seemed to be a philosopher like oneself was a bonus, and I think that's the main thing I remember about my early discussions with Harold [Thomas]".

Mr Foley said that he could remember talking in general terms of the need for some sort of unifying symbol, some sort of symbol that would unite the whole range of groups that were starting to become very seriously politically active through 1971. He gave some background of the development of Aboriginal political movements in the '60s and said that the Koori political movement was not "anywhere nearly as strong" as it is today. He said that they were desperately seeking some sort of "thing" that might unify them but it was a difficult thing because they were such a diverse people.

Mr Foley's evidence continued:

"What did Mr Thomas say to you he was doing as regards those matters?---I can't remember the exact words. I mean, you know, we are talking 25 years ago. I've always - the main thing that I recall from the discussions I had with Harold was, as I said, discussions regarding you know, trying to think of some sort of design that incorporated symbols that were important to the Koori community. Whilst Harold was the artist and the person who, you know, who was doing the design and everything, I was also a draftsman, you know, at the time. Just prior to that I'd left a career as a draftsperson in Sydney. So I was interested in sort of aspects of graphic design that enabled symbols to be powerful. So we were talking both on a philosophical level about the need, the historical and political need of such a thing, and I was bringing to Harold I think

some of the thoughts of some of the political activists from the east coast of which I was caught up with fairly solidly through Brisbane, through Dennis Walker and his crew and through Melbourne and Bruce McInnes and the Victorian mob and through all of the Redfern mob, who were perceived at the time as the sort of vanguard of that phase of the Aboriginal political movement."

Inferentially, because he did not directly answer the question, Mr Foley said that Mr Thomas had shown him designs he was working on. He said that the one which is today regarded as the Koori flag was the one that finally, when he showed it to him, and explained the symbols and the significance of the symbols, he thought "like most people around the world today, the instant I looked at it I thought it was an absolutely brilliant piece of design."

Mr Foley had not seen the design before. He said, however, that it was consistent with the way in which it was evolving through the various talks that he was having with Mr Thomas at the time. It was consistent and it ended up being simple.

Mr Foley could only vaguely remember the NADOC march in Adelaide in July 1971. He pointed out that in the 25 years since then there were a great many events in many places and that it was hard for him to recall a particular march or other activity. He said that he could remember the flag being displayed at a demonstration in Adelaide in about 1971. He assumed it was the NADOC demonstration but his evidence, which was given very straightforwardly and honestly, is understandably vague because of the difficulty of recalling precise occasions over such a long period.

Mr Foley said that the focal point of the Aboriginal political movement in 1971 was not Adelaide; it was the east coast. He described himself as the main link between the east coast movement and certain of the political activists in Adelaide, of which Mr Thomas was one. But he said that it was not until the flag went to the east coast that the flag was perceived as a possible unifying symbol initially for the groups in Redfern. He referred to the article in The Sydney Daily Mirror which he said also appeared in other syndicated newspapers. He said thereafter the flag "took off".

Mr Foley said that the first time he ever heard of any person other than Mr Thomas claiming the authorship of the design was at the beginning of 1996 when the Copyright Tribunal wrote to him and sent a notice asking if he wanted to make a claim. He heard that some other people had done so.

Mr Foley could not remember ever having met Mr Brown. In the course of Mr Foley's cross-examination, Mr Brown was brought forward by his counsel. Mr Foley was asked whether he recollected Mr Brown. Mr Foley was obviously embarrassed by the exercise but said that he was sorry but could not recall having met him. I should say that, in this regard, Mr Brown is obviously unwell. He was then in a wheelchair. He is extremely thin and looks much older than his years. It would not be surprising if a person who had once known him, asked to identify him 25 years later, might find the exercise extremely difficult.

Mr Foley was cross-examined about some of the detail of his evidence and about some other matters. The cross-examination was relevant and helpful but I do not find it necessary to refer to it in this context. Mr Foley is obviously a truthful and reliable witness. I am satisfied that he gave me the best of his recollection to the best of his ability and gave his account of the events of 1971 and onwards honestly. I accept the general purport of his evidence but I stress that that evidence will not itself establish that Mr Thomas is the owner of the copyright in the flag. It tends to corroborate Mr Thomas's evidence because, in a general way, it supports him and is consistent with his evidence. But, as in the case of Mrs Thomas, Mr Foley cannot say that he saw Mr Thomas design the flag. It was produced as one of a number of drawings which Mr Thomas claimed to have prepared. Undoubtedly they were all in his possession, but the critical question in the case is whether

he was the author of each of them or, more correctly, the one that was used for the flag.

Mr R.W. Ellis is currently the manager of Land Claims at Goolburri Aboriginal Corporation Land Council in Toowoomba. In the early 1970s he was completing post-graduate studies in cultural policy at Flinders University in Adelaide. He was also tutoring in geography. In late 1970 he commenced employment as a curator of Aboriginal relics at the South Australian Museum. His recollection is that he first met Mr Thomas whilst at the University. He recollected that Mr Thomas commenced working at the Museum in 1971.

Mr Ellis was also involved in Aboriginal political activities in the 1960s and 1970s. He attended what was described as the inaugural NADOC march in 1970. He said it was an attempt to establish an Aboriginal identity against the history of prior oppression of Aboriginal people under European colonisation. There was no Aboriginal flag at the 1970 march. He said that Mr Thomas first raised the topic of an Aboriginal flag late in June or early in July 1971 prior to the second NADOC march in July 1971. The conversation took place in the Museum. Mr Ellis recalled Mr Thomas saying that he had designed a flag for the march. He also said that Mr Thomas showed him a coloured drawing of the flag now accepted as the Aboriginal flag.

Mr Ellis recalled seeing the flag at the NADOC march in 1971 in Adelaide and recalled, though not precisely, that Mr Thomas might have either spoken about the flag or raised it himself at Victoria Square in Adelaide. Mr Ellis also recalled seeing the flag at the Aboriginal tent embassy in North Adelaide and at the Aboriginal tent embassy in Canberra from 1972 onwards. He also saw it on other occasions.

Mrs McHughes lived next door to the Thomas family during the years 1970-72. The two families knew each other well. Both had young children. Mrs McHughes recalled the time that Mr Thomas was working on the design for an Aboriginal flag. She saw many drawings of different designs. She remembered an occasion when she was asked by Mr Thomas which of the designs she liked. She recalled seeing a drawing of the flag as it is today and Mr Thomas explaining to her the meaning of the design. She thought that the design was a pencil and colour sketch on art paper.

Essentially the evidence to which I have referred comprises Mr Thomas's case. Standing by itself it is a strong case. The evidence which he gave concerning the design of the flag may not be directly corroborated but the surrounding circumstances are all consistent with the case which he makes. Added to that is the fact that over the years he has had the reputation within many sections of the Aboriginal community of being responsible for the design of the flag. So far as the evidence discloses, that reputation has gone unchallenged for almost 25 years. There is an understandable reason why he did not assert his rights earlier than he did. He did not need to do so because there was no occasion for it. That occasion did not arise until the flag had been proclaimed under the Flags Act. That is what triggered it. It was not the fact that there was a competing claim whether by Mr Brown, Mr Tennant or anyone else. It was only when the Commonwealth in its particulars of defence in the Copyright Tribunal matter raised the question of ownership because of its receipt of notice of Mr Brown's claim that the prospect of a contest such as has developed arose.

In his oral evidence given during the July hearing, Mr Tennant said that in 1971 he was a student at the Canberra School of Art. Early in April 1971 he had discussions or was involved in discussions concerning the fact that the Aboriginal people wished to have their own flag. Mr Tennant said that he considered the matter for about a period of a week and began a design which developed into the first design. He was referred to an exhibit, Exhibit 5, which shows the design of two flags. The second or lower design is a design of a flag which resembles the present Aboriginal flag. A copy of Exhibit 5 is attached to these reasons. I should mention at this point that when Mr Tennant asked questions of witnesses, he usually showed the two designs to them and asked whether they had seen them before. Most recognised the Aboriginal flag but none recognised the other flag nor had any seen the two flags depicted on one sheet of paper.

Mr Tennant said that he did not have ochre paint. He said that he had to construct an ochre paint to suit the yellow and the red that were incorporated in his design. The black portion of the design was a matt black, not tending towards a gloss. Mr Tennant said that since he put in his claim, he had thought about it and he thought the date upon which he created the design was about 20 April 1971. He said that he did that because that was his birthday and he recalled wanting to have some association with "that in case I had to remember a date". He added, "for instance, if I ended up in a position like this, so it's just a point that - a significant point that I recall through time."

Mr Tennant said that about that date two Aboriginal male persons who looked very similar to each other - Mr Tennant thought they may have been twins - came to the school of art and took the drawing from him. Since then he had not seen the original. He said that he had attempted during the hearing to see if he could get at least some sort of "leverage" in that if anybody had seen it or knew where it was, "but I haven't been able to do that. This hearing - the Tribunal hearing - is the first opportunity I've had to officially put my claim that I designed the Aboriginal flag."

Mr Tennant said that in his claim he did say that the first design he had seen used by North American indigenous people. He saw it on a television program which he thought was a psychology series in Open Learning on the ABC. The particular program, so Mr Tennant thought, was on group identification. What was shown was a group of native Americans sitting on a hill and it was concerning land rights. The flag in the upper part of the page was shown in that scene. Mr Tennant did not take a note of it, because he did not think he would ever be in a position "like this" to have to defend his claim.

Mr Tennant said that he did not know who the Aboriginal people who took the drawings away were.

Mr Tennant said that he had flags for other indigenous people in the world ready, but he could not offer them to people because he had not been given credit for the Aboriginal flag. He said that, at the time that he created the flag in the School of Art, there were people there who saw him do it. He said that there were possibly photographs of him doing it.

There is some uncertainty in the evidence as to whether Mr Tennant was a student at the Canberra School of Art or the Sydney Technical College. Records which he tendered bear the name of the Sydney Technical College but he explained that a diploma in art at the Canberra School of Art involved two years there and one year at the Sydney Technical College. A document he produced dated 16 December 1974 from the East Sydney Technical College said that Mr Tennant, while a student in the painting diploma course, was awarded results in certain subjects which are specified. He said that the record came from the East Sydney Technical College because the file was held by the College in Sydney, not in Canberra.

I find this evidence puzzling but I do not think anything turns on it.

Mr Tennant was asked how he fixed the year in which the design was done. He said it was because that was the year he was studying in Canberra. Subsequently he was in Sydney. He said that he also recalled doing it in Sydney. He said that after he had finished at the Canberra School of Art, he joined the Post Office until 1974 and was in the Public Service until 1994. He had been studying at the University of Canberra up till about three weeks before he gave evidence. He was doing a Bachelor of Arts and Social Sciences. He said that he completed the course in the first semester of that year. Mr Tennant said his work with the Public Service was clerical.

Mr Tennant said that the first design he had seen used was by North American indigenous people. He said that the top flag on exhibit 5 was one of the flags from the television program. He said that the flag was familiar to him when he saw it. That was because it was part of his original drawing. He said that he drew the

flag and then saw it on television 25 years later. The program he saw was on the ABC about a year before he gave evidence, but the series had been made in 1988. Mr Tennant was asked the relevance of the top drawing to the drawing of the Aboriginal flag underneath it. He said it was incorporated on the one drawing; there was one page, one art sheet of paper with the two drawings on it. He said that the reason he had done that was that, when he heard that the Aboriginal people wished their own flag, he assumed it sounded like a competition and they were going to select the design, so he put two designs "on the actual drawings" so that they could contrast and compare the designs and make a choice. He said that he did not know how the North American people came to use it.

Mr Tennant said that he did suggest that the lower design, which is like the Aboriginal flag, did evolve from the first drawing. He explained that in a passage in his evidence which I find it difficult to understand. I simply do not comprehend it.

Mr Tennant was asked more questions about the two Aboriginal people who came to the College and took his design. I do not refer to the detail of this evidence but I have taken it generally into account. There is other evidence which Mr Tennant gave, but it does not take the matter further. It is not helpful to refer to the detail of it but again I have considered it.

Mr Tennant made an application himself for leave to lead fresh evidence. But in an affidavit sworn by him on 11 October 1996 he said that he had based his instructions for this application on the fact that he would be able to obtain further evidence from persons whom he knew at the time he was studying at the School of Art in 1971. He said that he had made enquiries but was unable to locate any persons who were present at that time and who were able to provide further evidence to the Court 25 years later. Mr Tennant was not called at the December hearing. As mentioned, he was then represented by a solicitor so the decision not to lead further evidence from his appears to have been a deliberate one.

This case presents difficult issues of fact for decision. Each of the cases of the parties depends on a separate set of facts supported by evidence which comes from different persons and sources. There are some points at which the cases of Mr Thomas and Mr Brown meet but these, although critical, are few. No doubt the strength or weakness of one case or another may have an effect, perhaps in only an indirect way, on the acceptance or rejection of other cases. But, subject to those considerations, each of the cases must be looked at and evaluated independently.

I have said what I have as a preface to my conclusion that I should at this stage state my firm conclusion that Mr Tennant's case could not succeed. I regard his evidence as entirely improbable. I do not think him dishonest. I think he believes in his case. But it has the hallmarks of improbability. Furthermore, the evidence called in Mr Thomas's case, and also that called in Mr Brown's case to which I have yet to refer, establishes to my satisfaction that the Aboriginal flag originated in Adelaide. That is the overall effect of the evidence called in Mr Thomas's case. It will in due course be seen that it is also the effect of much of the evidence called in Mr Brown's case. The evidence in Mr Thomas's case fixes the year as 1971. That called in Mr Brown's case puts the year variously as 1967, 1971 or 1972 or even later. Whatever the year, Adelaide, not Canberra, was the place of origin of the design.

Mr Tennant was unable to call any corroborating evidence in his case. This is understandable in view of the passing of so many years. No comment adverse to Mr Tennant's case based on the absence of corroborating evidence could properly have been made. But it is not the absence of any such evidence which has led me to say what I have about Mr Tennant's case. It is the inherent improbability of his evidence which is the problem. I have reached the conclusion that his case has no substance. Accordingly, I put it aside and go to Mr Brown's case.

The first witness called in Mr Brown's case was Mr A.B. Campbell otherwise known as "Chirpy" Campbell. He was called out of order for reasons associated with his personal convenience. He said that his tribal name was Ngarindjeri Kullingjeri. When he gave his tribal name he added, "I swear on my grounds".

Mr Campbell said that he first saw the Aboriginal flag when he saw it flown in Victoria Square in 1971. He said people were gathered there for NADOC week and added that it was Aboriginal Day. So, Mr Campbell, like Mr Thomas and Mr Ellis, remembers the flag being flown at the 1971 NADOC march in Victoria Square. Mr Campbell did not, however, see Mr Thomas present on that occasion. But he claims that he did see Mr Brown.

The remainder of Mr Campbell's evidence is not helpful to the case of either party. Mr Campbell simply does not know the facts himself. He is a strong supporter of the Browns in their endeavours in these proceedings and shows this very much but, upon analysis, the evidence which he gave does not assist them any more than it assists Mr Thomas except in a limited way in relation to the date when the flag was first flown.

Important for Mr Brown's case are events which are said to have happened at a reformatory known as "Magill" or "McNally's", a church known as the Flinders Street Baptist Church and an art school which is referred to under different names in the evidence. Mr and Mrs Thomas, in addition to giving evidence to support Mr Thomas's case, gave evidence of events at the church and the art school in effect in order to foreshadow their reply to Mr Brown's case. I shall refer as necessary to their evidence when I have referred to the detailed way in which Mr Brown's case is put.

Mr Brown is not a well man and I begin this account of his case by referring to the state of his health. During the July hearing it was quite obvious that he was unwell but no medical evidence was called at that hearing. This was something which I remarked upon at the close of the July evidence.

Between the July hearing and the December hearing, Mr Brown was examined by doctors whose reports are in evidence. One of the doctors, Dr C.D. Field, who is a neuro psychologist, gave oral evidence as well.

Dr J.M. White was retained by Mr Brown's new solicitors. He is presently the senior lecturer and drug and alcohol education co- ordinator within the Faculty of Medicine in the University of Adelaide. He is a psychologist. He has experience in drug and alcohol problems and in intellectual disability as a consequence thereof. He holds a number of degrees and has held a number of previous appointments.

Dr White interviewed Mr Brown on 3 October 1996. He said that Mr Brown had a long history of heavy alcohol consumption. He began drinking when he was about 13 years of age. By the time he was 18 or 19 years old, he was drinking alcohol daily. His drinking commenced early in the morning. The beverages he drank included beer, wine and methylated sprits. His drinking has continued at a heavy level since then although there have been periods of abstinence of varying duration. These included a period of nine months when he was resident at a treatment centre known as the Kuitpo Treatment Centre. Most recently his level of consumption of alcohol has been about 300 to 400 grams of alcohol per drinking day, but this has varied. Dr White said that Mr Brown exhibited signs of pronounced physical dependence. On cessation of drinking he experiences nausea, tremor, insomnia and hallucinations.

Dr White said that Mr Brown had experienced numerous problems as a result of his alcohol consumption. These included peripheral neuropathy which had caused him to acquire a walking frame, the break- up of his marriage and poor general health. Dr White said that these health problems were likely to have been exacerbated by his relatively poor nutrition while drinking heavily. Mr Brown first noticed difficulty with his memory about ten years ago. He told Dr White that he had frequent blackouts. These occurred on about 60 per cent of the occasions when he drank alcohol. Mr Brown noticed a particular deficit with recent memory,

that is for events up to and including the last few weeks to months. Dr White said that this pattern was typical in people with memory deficit brought on by heavy alcohol consumption.

Testing showed that Mr Brown had very poor short term memory, but retained good concentrations skills and was able to think logically and perform calculations. He was oriented as to time, place and person. In addition to poor recall over events for a period of minutes Mr Brown had considerable difficulty with events in the last few weeks or months. He was unable to give reliable information about major events that had occurred in his life over the last month. However, Mr Brown could recall "major life events" from his childhood until the period of about 1975 but could recount little of events occurring after that time. He could recall schools attended and places where he lived as well as the names of a number of childhood friends. He had particular difficulty with the sequence of events and placing them in time. Dr White said that a number of contradictions arose in Mr Brown's recall of events that occurred in the early 1970s. He added, "Mr Brown could be considered unreliable in his ability to recall dates on which events occurred or his age at the time of their occurrence." Dr White also said that it was unlikely that Mr Brown could accurately recall events that occurred in the period 1967 to 1972. While he might be able to describe certain events, his chronology was confused. There appeared to have been a gradual decline in his memory for events that probably began with his heavy drinking when he was 18 or 19 years old.

Dr White concluded that Mr Brown's memory dysfunction was consistent with his extensive history of alcohol abuse. In addition to the direct toxic effects of alcohol, thiamine deficiency was a major factor in brain damage of this nature. Hence poor nutrition could contribute to the disorder. Dr White said that, while some recovery could be expected with abstinence from alcohol, given Mr Brown's history, it was unlikely that his memory function would recover to normal at any stage. Maximum recovery was achieved after about 3 months of abstinence from alcohol and adequate nutrition during that period.

Dr Field has a part-time private practice in clinical neuropsychology. Until March 1996, he was senior clinical neuropsychologist at the South Australian Mental Health Service, Glenside Hospital and within the Department of Psychiatry at the Repatriation General Hospital at Daw Park. Dr Field was called in Mr Thomas's case.

Dr Field examined Mr Brown on 29 November 1996. Before he examined him, he read a number of documents which were supplied by Mr Thomas's solicitors, an extract from the Court transcript and Dr White's report to which I have referred.

Dr Field said that it was important to determine whether Mr Brown might be suffering from alcohol related brain dysfunction. He continued:

"It is important to determine this in the current case, as individuals suffering from alcohol-related brain dysfunction, in particular a severe form referred to as Korsakoff's syndrome which is an irreversible disease featuring profound disturbance of learning and memory function, would be presumed to be poor witnesses with respect to their own history. In its classic form, Korsakoff's syndrome is a disease where little or no new information may be learned and recalled, following the onset of the disease. Furthermore, it is noteworthy that some, but not all, Korsakovian individuals may present with two further disorders which can affect longer-term recall. Confabulation is a presentation whereby some aspects of a stated history may sometimes be exaggerated or fabricated by Korsakovian individuals, not necessarily consciously. Achronogenesis is a disorder of narrative or recall of historical details in their correct sequence. Individuals suffering from achronogenesis may give correct details of their history, but confuse the sequence of occurrences in their history. They may for example place the birth of their children at a time before they left school or commenced work, or claim that they have commenced work prior to the completion of schooling. In extreme cases they

may even give their own ages as lower than those of their children."

Dr Field said that the interview was conducted in order to determine whether Mr Brown might be presenting with a set of intellectual deficits consistent with the presence of alcohol-related brain dysfunction especially Korsakoff's syndrome. It was also important to determine whether any aspects of Mr Brown's stated history or presentation might be consistent with the presence of either confabulation or achronogenesis.

Dr Field said that Mr Brown was pleasant and co-operative. He took a history from him. Statements attributed to Mr Brown in what follows are to be found in Dr Field's history, not in Mr Brown's evidence. I shall refer to Mr Brown's evidence after I have completed this account of Dr Field's report and have referred to some other evidence.

Dr Field said that Mr Brown told him that he was born on 27 June 1950. He travelled extensively and attended a variety of schools when he was growing up. This was because his step-father worked for the railways. Mr Brown said that he married his wife Kaylene (Mrs Brown) in 1972. He said that they had been separated for some years. There were three children of the marriage born in 1972 and 1973 (twins). Mr Brown said that he had been imprisoned a number of times which he claimed was all due to "letting off steam on Friday and Saturday after working all week" and fighting. All convictions were associated with excessive alcohol consumption. He could not recall precisely when he had been in gaol but thought that the details contained in a letter from the Department of Correctional Services dated 4 October 1996 were probably correct.

Mr Brown readily admitted that he had a long-term pattern of excessive alcohol consumption. He reported some medical conditions associated with his history. He reported that he suffered from paralysis, which Dr Field referred to as peripheral neuropathy, as a result of his drinking history. Dr Field said that peripheral neuropathy was a neurological syndrome associated with chronic alcoholism whereby individuals suffered from loss of sensation and fine motor control. They might also suffer ataxia or difficulty with balance. Dr Field observed that Mr Brown walked unaided on the afternoon of 29 November although with a staggering gait. Mr Brown told him that he was previously confined to a wheelchair but more recently had been able to walk with a frame. He had now improved in his walking to the extent that he no longer needed to use this. He admitted, however, that he had a poor memory as a result of his alcohol consumption.

Mr Brown told Dr Field that he had had a head injury as a result of a motor accident. He could not remember when the accident happened but believed it was about 12 or 13 years ago. He had no recall of the accident itself.

Mr Brown said that he successfully completed first year high school at Murray Bridge leaving there at the age of 14. He later attended an Aboriginal college in Brougham Place, North Adelaide, in 1972 to 1973. He was studying but did not complete matriculation. He has had a variety of labouring and maintenance jobs spending most of his working life performing house maintenance with the Aboriginal Department. He has been on an invalid pension for a few years because of his drinking problems.

Dr Field said that Mr Brown claimed to have designed the Aboriginal flag. Mr Brown told Dr Field that, when attending the Aboriginal college in North Adelaide in 1972 or 1973, a nationwide competition was held among all Aboriginal colleges for the design of a new Aboriginal flag. He said that, although he was not formally enrolled in art classes at the college, he would go to the College's art room and "muck around with the paint". Mr Brown said that it was at this time that he created the design that became the Aboriginal flag. He said that it "just came off the top of my head." He said that he saw his design in with all the other entries. He was not aware that the design had been adopted as the Aboriginal flag until several years later when he saw

it used at a rally.

Mr Brown told Dr Field that his estranged wife recalled that he designed the flag while attending the College and that her recollection of the dates was consistent with his. He said that they were living at a place in Prospect and that she remembered that he used to do designs while at that place. He does not remember this. He said that he did recall that he designed the flag at around the time of the birth of his daughter Sharon. Sharon was born, so Mr Brown said, on 31 March 1972. Later in the interview, Mr Brown said that Sharon was taking her first steps at about the same time as he produced the design.

Mr Brown said that he understood that another man, Mr Rennie, indicated that he had witnessed Mr Brown design the Aboriginal flag at an earlier date. Mr Brown remembered nothing of this. He did not recall Mr Rennie at the time and in the circumstances claimed by him. Mr Brown himself did not claim that he designed the flag during this period. He said that Mr Rennie had stated that he saw the Aboriginal flag design pasted on the side of Mr Brown's locker when they were both attending a boys' reformatory. Mr Brown recalled that he attended a reformatory at Magill, otherwise McNally's, on several occasions. He could not recall precisely how many times as he was transferred between there and Yatala Prison on several occasions. He thought, however, that all of these attendances at the reformatory would have been prior to his 18th birthday, i.e. prior to 27 June 1968.

Mr Rennie was called as a witness at the second hearing in circumstances to which I shall refer in due course.

Mr Brown told Dr Field that he had met Mr Thomas at about the time that he, Mr Brown, had designed the flag. He knew Mr Thomas as the art teacher at the college. Mr Brown said that Mr Thomas lived in a house in Kensington or Magill and that he and his wife had visited the Thomases on at least two occasions.

Dr Field's assessment of Mr Brown commenced with the statement that he demonstrated relatively poor orientation. He was oriented in place; he was at home, he knew the correct day and the month but named the year as 1999 and then 1998. He was told that this was incorrect and then said that the year was 1996. Dr Field is critical of Mr Brown for not being able to name the Prime Minister of the day. I really cannot take a great deal from this because my understanding is that there are many people in the community who do not know, or do not remember, the names of current Prime Ministers or indeed of other leaders in the community.

An intelligence test suggested to Dr Field that Mr Brown had a premorbid intelligence level within the average range. Another test suggested that Mr Brown had "intact attentional skills as well as adequate motivation to perform the task." Less satisfactory were his learning and memory skills for newly presented information. He performed poorly on a task requiring immediate and delayed recall of paragraph-based material. His immediate recall of this material was not only poorly detailed but also showed evidence of "confabulation". Dr Field added that that meant that Mr Brown introduced material into his recall of the paragraphs that were not part of the original.

The word "confabulation" was also used by Mr Rennie in his evidence, in circumstances to which I shall later refer. According to the Oxford English Dictionary (1989) the primary meaning of "confabulation" is talking familiarly together, conversing or chatting. But Dr Field did not use it in this sense. It has a different meaning in psychiatry. Psychiatrists use the word to describe the fabrication of imaginary experiences as compensation for loss of memory. In Blakiston's Gould Medical Dictionary, 4th ed, the word "confabulation" is said to mean the fabrication of ready answers and fluent recitals of fictitious experiences in compensation for actual gaps in memory. It is seen primarily as a component of the amnestic syndrome. The dictionary refers to the primary meaning of the word which is said to be discussing together, this deriving from the Latin

origin of the word.

Dr Field's conclusions were as follows:

"I agree with the conclusions cited by Dr Jason White, dated 3 October 1996. Mr Brown presents with intact attention and language skills, but severe disorders of orientation, learning, and recall of all classes of new material, these findings being completely consistent with the diagnosis of Korsakoff's syndrome. While there was no clear evidence, on interview, of the presence of achronogenesis or disordered sequence of recalled information, there was evidence of confabulation in that there were some mild inconsistencies in claimed dates (for example the dates of birth and ages of his daughters, and the dates of his attendance at the college where he says he designed the flag). These dates are also inconsistent with his claimed design of the flag in that I understand that externally verified evidence suggests that your client Mr Thomas actually designed the flag at an earlier date, ie 1971, whereas Mr Brown claims the date of this event as 1972 or 1973.

Furthermore, it was noteworthy that on direct testing, Mr Brown demonstrated a marked tendency towards the confabulation of details, and then recalled those details with greater accuracy than those actually presented to him. In balance, I would consider it likely that Mr Brown's memory, both of recent and remote events, is likely to be faulty. I do not believe that he is intentionally fabricating his stated history, but rather there appears to be a sincere belief in his role in the design of the Aboriginal flag. I believe that his recall of this is probably a confabulation which has occurred as a direct result of his past history of chronic alcoholism."

The last sentence of Dr Field's conclusions was objected to by counsel for Mr Brown. I allowed the evidence but I do not regard the statement as particularly helpful. All Dr Field could really say was that Mr Brown's claim to have designed the flag may have been a "confabulation". I do not understand how he could be so sure as to say that it was probably a confabulation. In fairness, he may not have been using the word "probably" in the way that lawyers usually understand it. He may have meant no more than that Mr Brown's claim was possibly a confabulation or that his medical condition was consistent with that being the case.

Logically, the next step would be to go to Mr Brown's evidence. But that evidence will appear in its proper context if I refer first of all to the evidence which was called as a result of the re-opening of Mr Brown's case after the July hearing. The principal witness was Mr Andrew Rennie. Mrs Rennie was also called. Neither Mr Rennie nor Mrs Rennie is indigenous. Mr Rennie swore two affidavits, one in support of Mr Brown's application to re-open his case and the other supplementary to that. Both affidavits are in evidence in the principal proceedings. Additionally, Mr Rennie gave oral evidence.

The July hearing concluded on 25 July. On 30 July 1996 the Copyright Tribunal received an undated letter from Mr Rennie. At the top of the letter is a printed crest and Mr Rennie's address which is at Willunga in South Australia. The letter was addressed to the Copyright Tribunal and was as follows.

"To The Copyright Tribunal

In 1967 whilst at McNally's Training Centre I was shown a picture of a flag, a line drawing, shaded in pencil by a person called George Brown. He said it was an Aboriginal flag and described what it meant - I distinctly remember the 'blood of my people' comment and 99% sure it is the flag predicted to be his today.

I remember clearly being shown this. He was only about 17 years old, and some times called himself 'Bendissi'.

He was a quiet bloke."

By letter dated 31 July 1996 the Secretary of the Tribunal sent a copy of Mr Rennie's letter to each of the parties, that is to say copies were sent to Mr Thomas's solicitors, Mr Brown, Mr Tennant and the solicitor appearing for the Commonwealth. The Secretary's letter said that he had enclosed for the information of the parties copies of an undated letter received from Mr Rennie. He also enclosed a copy of his reply to Mr Rennie which acknowledged receipt of Mr Rennie's letter. In it he said that he had forwarded a copy to all the parties before the Tribunal. Information was given about when the matter was next in the list.

I have earlier mentioned the publicity which this case had in the media during the July hearing. According to Mr Rennie, it was that publicity which led him to write the letter which he did. Mr Brown's former solicitors filed a notice of ceasing to act on 30 July 1996. His present solicitors filed the notice of motion for an order that Mr Brown be given leave to lead fresh evidence on 16 August 1996. The notice of motion was supported by an affidavit sworn by Mr Rennie on 16 August 1996. He said that he was married with two children both of whom were dependent upon him. In 1967 he was an inmate at the McNally Training Centre at Magill in South Australia. He was then 17 years of age. He recalled meeting Mr Brown on the first day of his detention.

Mr Rennie said that he had recently seen Mr Brown on television claiming to have designed the Aboriginal flag. Mr Rennie said that, although he knew the name, Mr Brown was so changed that he would not have recognised him "until I saw him smile and lift his head." Mr Rennie said that he knew Mr Brown had made a design of what is now known as the Aboriginal flag at the McNally Training Centre in 1967. He thought it an issue of national importance and that he should make his knowledge available to the Court.

Mr Rennie said that on his first day in McNally he was "bashed" in the yard from behind. He went into the annexe and talked with a Mr Bonney, who is now dead. He had known Mr Bonney in Port Adelaide beforehand. While he was talking to Mr Bonney, he was interrupted by a Mr Wilson who is also deceased. Mr Wilson overheard that Mr Rennie was an apprentice printer. Mr Wilson took him to Mr Brown who was standing by his clothes locker wearing only a towel. Mr Rennie said that Mr Brown was very well built and thought he was going to be involved in a fight. He said that he was very wary and very alert. Because of this he had a very detailed memory of the incident.

Mr Rennie said that Mr Murray asked Mr Brown, "partly using the language Aboriginal lads conversed in," to show him "the piece of paper". Mr Brown opened his locker and retrieved a folded piece of paper which was wedged on the side of the top shelf with a few other pieces of paper. There was a discussion between Mr Brown and Mr Wilson as to which piece of paper to show.

Mr Rennie said that he had been a printer and that mechanical drawing was very interesting to him. He had done well at school. He said that he had "a vivid and detailed memory" of the drawing which Mr Brown showed him because the matter seemed to concern his trade and it was of great interest to him for that reason.

Mr Rennie said that the piece of paper shown to him had a design on it, a lined drawing, partly shaded, drawn in pencil. The size of the paper was about three inches by four inches, ragged on two sides and blue lined. The design was rectangular about two inches by one and a half inches with a circle in the centre.

Mr Wilson asked Mr Rennie if he could print the design. He explained that a block could be made of it. He explained the printing process and then a lot was said between Mr Wilson and Mr Brown "in dialect while the explanation went on."

Mr Rennie said that he was under the impression that the design was for a business card or something of that kind. He did not initially pick up the fact that there were two separate colours in the shading outside the circle. He was told that there were two colours, red and yellow. The circle was yellow. Mr Rennie was under

the impression that it was a yellow circle on a red background outlined in black at the edge of the rectangle and around the yellow circle. Mr Brown then explained the colours "properly". He drew in the line more clearly between the circle and the edge of the rectangle which Mr Rennie had interpreted as part of the shading. It became clear that the design was a rectangle with a yellow circle in the centre with half red background and half black background. It was divided horizontally. Mr Brown said it was a flag. He said that it was for "his people". Mr Wilson repeated this. Mr Brown said that the red represented blood. He remembered this clearly because at that stage someone was having a fight a little further over and five to six lockers were nearly pushed over. Mr Rennie said that the mention of blood made him think that he would be next.

Mr Rennie told Mr Wilson and Mr Brown that he could not print the flag because he only printed on paper. Mr Wilson asked who would do that sort of work and was told that a silk screen printer was needed. Mr Rennie said to look in the pink pages. He said that he remembered this because, after the conversation was over, Mr Wilson called out to him, "Yellow Pages, hasn't been pink for two years". Mr Rennie said that he felt a bit stupid.

I pause here to say that one of the factors in Mr Rennie's evidence which needs to be considered is this conversation. At the relevant time the business entries in the telephone directory were on pink and not on yellow paper. Evidence later to be referred to shows that yellow did not replace pink as the colour of the business entries section of the telephone book until 1974.

Mr Rennie said that, after some discussion with Mr Wilson, Mr Brown took another piece of paper from his locker on which there was a coloured drawing of the same design he had been shown. He said that he had become less interested at that time as there would not be any printing work in it for him. He said that he did not want to look carefully at the coloured drawing. He mainly remembered the big yellow circle. He asked if the yellow was to do with being part Chinese as Mr Bonney was. Mr Brown said that it was the sun. He said that his father's name was Bendissi and that he was from the west coast.

Mr Rennie said, "What is wrong with the red, white and blue, what do you want another flag for?". Mr Brown looked at Mr Rennie "as though I had hurt his feelings."

Mr Rennie said that that was the only time the flag was mentioned "between us".

Mr Rennie's second affidavit was sworn on 11 October 1996. Records relating to his period of apprenticeship as a letterpress machinist were produced. Mr Rennie said that in 1967 he was first an inmate of the Magill Boys Reformatory for a couple of months and for the last two months was moved to a new building known as McNally's Training Centre which replaced the Reformatory. In his evidence he referred to both these institutions as McNally's.

Mr Rennie married Mrs Rennie, who was formerly Miss Carol Lester, on 3 December 1971. At about the time of his marriage, he was told by his wife that she had known Mr Brown when she was younger. Mr Rennie said that from the time he left McNally's until he saw Mr Brown on television, he did not see Mr Brown nor did he believe that his wife had seen him.

Mr Rennie said that he was in the Yatala Labour Prison for three years from July 1968. Mr Bonney was also there.

Mr Rennie said that when he saw Mr Brown on television and learned that there was a dispute about the authorship of the design of the flag, he remembered the episode at McNally's which he had forgotten. He appreciated the significance of it and told his wife about it. He had not previously mentioned it to anyone.

He referred to the letter written to the Copyright Tribunal. He said that he had never met Mrs Brown nor any other member of the Brown family until after he lodged the letter with the Tribunal.

Mr Rennie said that on 9 August 1996, he gave a detailed statement of his meeting with Mr Brown in the McNally Training Centre in 1967 to a solicitor appearing for Mr Brown. The conversation took place at the Federal Court Building in Adelaide. It will be recalled that 9 August was the day which had been fixed for the continuation of the hearing. Because of Mr Rennie's letter, the hearing on 9 August was turned into a directions hearing conducted from Sydney with a videolink to Adelaide.

Mr Rennie said that, on or about 10 August 1996, he visited Mr Brown in the Murray Bridge Memorial Hospital in Swanport Road, Murray Bridge, to satisfy himself that the David George Brown who is the first respondent in these proceedings, was the same person that he had met in the McNally Training Centre. He said that he did not believe that Mr Brown recognised him when he visited him at the Murray Bridge Hospital. Mr Rennie had recognised him on television but he did not recognise him initially face to face. Mr Rennie said that Mr Brown appeared much smaller and older and was in a wheelchair. He said that when he was in the Training Centre he was very muscular. Mr Rennie said that, when he chatted to Mr Brown about their time at the Reformatory, he remembered incidents and officers and fellow prisoners there. Mr Brown said to him, "Didn't you work in the cement gang?", which Mr Rennie said he had done. He said that, after talking to Mr Brown, he had no doubt that he was the same man as he had met in the Reformatory.

There is some significance in the reference to the "cement gang". This appears from other evidence which I shall mention in due course. Another matter I should mention at this point is that, on the face of the records that have been produced, there can be no question but that Mr Rennie, Mr Brown, Mr Bonney and Mr Wilson were all inmates of the Magill Reformatory or the McNally Training Centre in 1967. Of the four, only Mr Brown and Mr Rennie are still alive.

Mr Rennie's evidence in chief is much in accordance with that given in his affidavits. The evidence is given somewhat more graphically than it is in the affidavits but the substance and effect of it is the same. Except in one respect, I do not refer to the detail of it. The evidence to which I refer provides a more detailed account of what happened after the second piece of paper was produced by Mr Brown at the Reformatory. Mr Rennie's evidence proceeded as follows:

"What did that piece of paper look like?---The memory of that is - I can only remember the yellow circle, because I asked him after Murray had grabbed on the guts and said: the black skin. The red - he said the red - just as he said the blood - there was a fight, or a pushing further down the other end of the annex at the end of the lockers from where we were standing to the left because Georgie [Mr Brown] was standing with the paper in his hand and he went up on his toes and he looked over the other people's heads and he just went back real casual - casual as if it was nothing. To me on the first day and I'm sort of looking, you know, seeing what's going on and he was so casual - I'll never forget that - the look of how casual he looked and just went back to the piece of paper - and that's when he said, 'blood' - the red.

What did he say?---'Blood', that's what he said, 'Blood' - and I was thinking then because I'd been hit in the arm. I didn't know all these strange people around me - a lot of them Aboriginals and I'm worrying about getting another punch in the back of the head - while this was all going on I was very alert - very alert, waiting for another assault on myself and when he said, 'The blood', that's when I really looked around and started, you know, what's going on, because you know - - -

Did you see this second piece of paper?---Yeah, yeah.

What was on it?---I only remember the yellow circle, because I asked him if the yellow was for Chinese

because Bonney was from Kingston in the south-east and he was part Chinese, and I said: was the yellow Chinese? Or Chinese in you - and he said: no, my father's name is Bendissi and he's from the west coast."

In the course of his evidence, Mr Rennie drew sketches of the flag which he said that Mr Brown had produced on the pieces of paper. These were, of course, drawn from memory. Mr Rennie's drawings, which were made in the witness box are in evidence.

Mr Rennie said that he only met Mrs Brown on the day he gave "the three page affidavit" to the lawyer who was representing her and Mr Brown. He said that was the first time he had seen her. Mr Rennie's evidence about the three page document - it is a statement and not an affidavit - needs to be considered. The matter arose in the course of Mr Rennie's cross-examination in an answer to a question in which he said that "the affidavits that I signed in the lawyer's office which I never really read real good." He said that he had not read the affidavit of 16 August "in real great depth". He said that this was because "the lady" said that it was basically what was in the three page document. The three page document was produced. It is a statement written by Mr Rennie, so he said on a computer, and signed by him. It is dated 5 August 1996 which was a Monday.

Mr Rennie was asked whether he had spoken to anyone about the contents of the statement when it was being prepared. He said that he spoke to no one. He got up at 7 a.m. and finished at 2 p.m. He used the computer in his daughter's room. He said that nobody had asked him to write it out. He said that he had made no contact with Mrs Brown or her lawyers prior to preparing the document. It should here be mentioned that telephone records establish that there was a call from Mrs Brown's telephone number to Mr Rennie's telephone number on 2 August 1996, another on 4 August and two calls on 5 August 1996.

Mr Rennie said that he typed the document straight on to the computer. It was done on a WordPerfect program. He put it through the printer:

"...and none of the spacing came up - it was all together - and around about 1 o'clock or lunch-time I asked my daughter to type - I read it again and I asked her to type it on WordPerfect program and she typed it. Then I edited it. On the Sunday I put it up on the screen again and I went through it, and I thought and thought as deep as I could to whatever happened and a lot of it was coming in the present case. I edited that to put it back in the past and anything what was confabulated I cut out and I really looked in it. It took me a long time."

The emphasis is mine.

Mr Rennie confirmed that he had used the word "confabulated". He was asked his understanding of its meaning. He said that it meant "to confabulate - to say something what never happened - to continue talking." He was asked how he had come to hear of the word. He said that his wife had only recently finished five years at Flinders University and he used to read her notes. Mr Rennie's evidence proceeded as follows:

"So in part - one version of this document, the first version, there were things in here that you felt you might have made up and you took them out?---That's right.

Bearing in mind the nature of your memory do you now say that on a first go at recording the facts you put down things that you unavoidably made up?---That's right.

Correct?---That's correct."

It will be recalled that Dr Field had used the word "confabulation" in his report which was not made until well after Mr Rennie's affidavits and his statement. But the word does not appear in the affidavits or the

statement. It appears in Mr Rennie's oral evidence given after Dr Field's report was made. A copy of the report was given to Mr Brown's solicitors. But there is no evidence that Mr Rennie ever saw the report and he expressly denied that he had ever seen it or discussed the contents of it with either Mr or Mrs Brown.

I have earlier referred to the dictionary meaning of "confabulation" when dealing with Dr Field's evidence. Mr Rennie is not using the word in the ordinary sense in which it is used, namely as indicating conversation, but in its psychiatric sense, i.e. the sense in which it was used by Dr Field. Nevertheless, I could understand that lay people might use the word in that sense as well. It could be mistaken for a word having a similar meaning to fabrication. Some might think that it has that sort of ring about it. It seems odd, though, if this were the case, that this meaning would not appear at all as one of the ordinary meanings of the word. It does not appear in the Macquarie Dictionary where only the primary meaning of the word, i.e. discussion or conversation, is given.

Strangely enough, Mr Rennie referred to that meaning of the word in the evidence quoted above. After saying that it meant to say something that had never happened, he added that it also meant to continue talking. There is a question in my mind whether the word is used by ordinary people in day to day conversation. And even if it be correct to say that Mr Rennie learned of the word because of his wife's university studies, it still seems somewhat strange that he should use it as part of his ordinary vocabulary. That is a matter which I shall need to consider in context in due course. For the moment all I will say is that it may be a mistake to place too much emphasis on Mr Rennie's use of the word. The exercise may be too speculative, really too analytical, to be useful.

The three page document compiled by Mr Rennie is important. Rather than set out sections of it, I have appended a copy of it to this judgment.

Mr Rennie had said that he was in the cement gang at McNally's. He was also asked about a period he spent in later years at Yatala Prison. Counsel for Mr Thomas has pressed upon me the submission that the evidence establishes that there was no cement gang at McNally's but there was a cement gang at Yatala.

Mr J.H. Stanley was employed by the South Australian Prisoners' Aid Association from 1969 to 1973 or 1974 as a welfare officer. He worked as an Aboriginal prison aide. He said that he was the first Aboriginal prison aide in South Australia. He had a very good knowledge of the condition of Aboriginal people in detention, particularly in the Adelaide area. His duties included visiting all South Australian prisons and institutions and contacting Aboriginal inmates and their families. Most of his time was spent at Yatala gaol and Adelaide gaol although he occasionally visited Magill Boys Reformatory which was also known as McNally Boys Reformatory. Prisoner accommodation at Yatala was in three wings. A group of "B" wing prisoners had to perform hard physical labour. They were known as the "cement gang". Mr Stanley said that, to the best of his knowledge, the Magill Boys Reformatory never had hard physical labour gangs or cement gangs. It had an educational orientation. Inmates were taught apprenticeship skills at a metalwork shop and received schooling. He could not recall ever having heard of any group at Magill known as the cement gang, although there were such groups at Yatala.

In his cross-examination, Mr Stanley said that he had no knowledge of boys in the McNally Reformatory doing hard work or hard labour. Mr Stanley acknowledged that he had much more to do with the Aboriginal people in the gaols than those in the Reformatory. He said he could not dispute that in 1967 a group of boys was sent out of the institution to do renovation work at a building in Norwood. The evidence suggests that Mr Brown and Mr Rennie were not in Yatala at the same time.

Mr Rennie explained the crest on his letter to the Tribunal. He said that the letters "CRL" were a reference to

Carol, his wife, Raymond and Robert, his two sons and Leah and Lauren his two daughters. The crest contains a depiction of Scotch thistle. His father was a Scot. He said the block was found in an old type drawer full of blocks and he thought it looked nice.

Mr Rennie was asked detailed questions about the conversation concerning the flag in the Reformatory in 1967. I have read the cross- examination. I do not refer to the detail of it but Mr Rennie was pressed for his recollection of every detail of the conversation which had taken place and of the drawings which had been produced. He was also pressed about whether there was ever any indication that what was drawn was intended to be a flag.

Mr Rennie was also asked about his conversation with Mrs Brown. His evidence was as follows:

"She asked me whether I was an officer. Actually, she was asking me about the letter, did I write a letter, yes. She asked me whether I was an officer. She asked me that a few times and she was talking quite clearly and I said no, I was just one of the blokes there, and I told her I had a three-page - no, she said: will you be able to come to court for me. I said: I've already got a three-page document. I've got a - no, she said: would you be able to give me a letter about it, would you be able to give my lawyer a letter. I said: I've already got a three-page document, and she said: three pages, three pages. I mentioned that my wife knew George, and she said: who is your wife's name? I said her name was Carol Lester, and she said: Carol Lester, Carol effing Lester. She says: I know her. That was about, you know.

Why did you bother to prepare the three-page document, Mr Rennie?--- Because I wrote the letter and I realised that it was important and I realised that I had better write down while I remembered, too. Who is to say that my memory would not fade again on the point. I said I will write it down, I will write everything while it's fresh. When you get a flash like that and a memory like that, is it going to be there in a month's time.

Has your wife Carol mentioned to you Mr or Mrs Brown prior to your seeing the item on the news?---She would have mentioned George Brown at some stage but it would have been that long ago, you know, I couldn't recall for certain.

You did not say anything to her about the flag design?---No. I didn't even tell her I wrote the letter. I didn't even tell her I wrote this letter. I said the only thing she knew was when Kaylene Brown said Carol Lester's initial was tattooed on his hand, CL was tattooed on George Brown's hand. That's when I confronted my missus with that. I said: Kaylene said George has your initials tattooed on his hand. That's the only time she would have known."

Mr Rennie was at first adamant that the statement was prepared before he spoke to Mrs Brown. She asked him in their conversation whether he could write a letter and he told her that he already had a three page statement. Mr Rennie denied strongly that he had had a conversation with Mrs Brown before the statement was prepared. Eventually Mr Rennie conceded that it was "more than likely possible" that he had spoken to Mrs Brown before the statement was finished. He added, however, that the statement would have been "done". He said it was on the hard drive of the computer. He agreed that he had had to make changes to remove things that he had "made up". He said these changes were made on the day the statement was "sworn, I'm pretty sure." Mr Rennie denied again that Mrs Brown had had any input into the statement or into alterations made to it. He added, "The only input was from me, but absolutely she has no influence on that statement at all."

As mentioned there is in evidence a copy of a letter dated 31 July 1996 written by the Secretary of the Tribunal to each of the parties. Mr Rennie accepted that Mrs Brown had first rung him on 2 August. Telephone records produced in respect of the telephone service installed at Mrs Brown's house show that a

call was made from that number to Mr Rennie's number at 11.18 a.m. It lasted for almost eight minutes. Mr Rennie agreed that she had rung him on 4 August and had spoken for over eight minutes. Mr Rennie also agreed that she had rung him on 5 August at about 7.30 a.m. He was asked to explain what the conversation was about. He said it was possibly about a date, that is the court date. She rang back an hour later. He could not remember what she had said to him. Mr Rennie said that nothing was said in the second conversation on 4 August about the contents of the document that he was preparing. Indeed the effect of his evidence is that at no time did he discuss with Mrs Brown the detail of the contents of his statement or anything connected with the matters dealt with in it.

Mr Rennie has a criminal record. He was cross-examined about this. He was asked about certain comments in the record which were adverse to him in a general sense. He was asked other questions about the training that he had had and the sort of work that he did. I have taken all this generally into account but I do not find it helpful in resolving the issue of credit which arises for determination.

I should refer to a psychological report dated 7 November 1988 by Mr Warwick Lloyd. This was tendered not by counsel for Mr Thomas but by counsel for Mr Brown. It was tendered to rebut suggestions in the run of the cross-examination that Mr Rennie was exaggerating his level of intelligence and his ability to recall matters that occurred in the past. There was a discussion before the report went in to which I do not refer. It can be said that the report tends to support the view that Mr Rennie's ability to think clearly and apply intellectual skills to a range of different tasks is in the superior range of ability overall. It was said in the report that Mr Rennie's general level of ability was higher than that of 95 per cent of the population.

The report was made necessary because Mr Rennie had suffered a back injury which prevented him from continuing his former employment. Mr Lloyd thought that he was exhibiting depressive symptoms. He thought that these could hamper his continued investigation of options for alternative employment and, if maintained, could affect his performance in education which he might take up. There is no evidence that he is now suffering from any depressive state.

It should be mentioned, however, that there was cross-examination about a request that was said to have been made to Mr Rennie to submit himself to an examination by a psychologist to be retained on behalf of Mr Thomas. There is a vagueness in the evidence about this matter which leaves it in an unsatisfactory state. At the time the questions were asked, I formed the view that the matter was of limited significance for the purposes of the case. I thought then, and think now, that this case must be approached in the same manner as all other cases. One has to take the relevant evidence, weigh it up and come to a conclusion on which version of events is to be preferred. That is the course I propose to follow.

Mr Rennie was cross-examined by Ms Ryan who appeared for Mr Tennant. She asked whether he thought that his involvement in the matter might bring him a certain amount of fame. His answer was strange. He said, "Possibly, I was a bit worried about the adverse publicity, certainly." I have not understood what the reference to adverse publicity could be. Mr Rennie was not asked about this matter. He was asked whether it, i.e. the adverse publicity, was a factor in his coming forward. His evidence proceeded as follows:

"Not really. No, there's a few ghosts I think, most probably, that made me come forward.

HIS HONOUR: What do you mean by a few ghosts?---Raymond Bonney was a close friend of mine, your Honour. He was a person I liked and he died terrible. He died terrible without any assistance and was left out in the corridor of a hospital. He had a bad heart and I knew he had a bad heart. They just messed him around and he died for nothing really. George Brown would look like he was dying, and what if I didn't say it? What if I didn't come here? And he did die, you know. I know he could die without anyone sort of saying, so

that's the main reason.

MS RYAN: What possible connection did Mr Bonney's death have to make you come forward in 1996?---I guess you'd have to be in a situation where you've been in that situation yourself. It's more of a person - more of a personal emotional - - -

HIS HONOUR: You were emotionally upset at the fact that he died in the circumstances in which he did?---Yes.

It is something you have never forgotten; you named one of your children after him?---That's right.

When you saw about this dispute on the news, the Aboriginal flag, you thought you had a duty to do something about it?---That's right, that's right."

At that point Mr Rennie became distressed. He was unable to proceed with his evidence and had to leave the witness box. He was allowed to leave the Court and the Court building to recover himself.

When he returned Mr Rennie was asked further questions about the circumstances in which his statement of 5 August 1996 was prepared. He denied that one of his children had helped him compose it. He was also asked again about "confabulation". He said that his wife had corrected him the previous evening. She had told him that it was "gap filling". It meant "filling between gaps, things you don't know and you know, you fill in." He confirmed, however, that he understood "confabulation" as something that had not really happened, something that one could presume had happened.

Mrs Rennie said that she was born on 28 October 1952. She is a member of the nursing profession. She said that she first met Mr Brown when she was 14 or 15. He was amongst a group of friends who used to congregate at the Torrens River. This was at weekends. She said that she did not see him during the week because, so far as she understood, he was at McNally's Reformatory. She herself was at a girls' vocational centre known as Vaughan House. That was in 1967 or 1968. She said that Mr Brown was then fit, strong and healthy. He was very tall and muscular. Mrs Rennie left Vaughan House in 1969. She did not see Mr Brown then but saw him again at his 21st birthday party. Mr Brown turned 21 in June 1971. Mrs Rennie said that there was a birthday party at Meningie. She came back with a group who included Mr Brown. She stayed at his house overnight. She then went back to work and she did not see him again until recently. That was when she visited the Murray Bridge hospital with Mr Rennie in September or October 1996. She was adamant that she did not see Mr Brown from the day after his 21st birthday until the visit to the hospital in 1996.

Mrs Rennie said that she once worked in a delicatessen in Grenfell Street, Adelaide. She was then on a work release program from Vaughan House. She was fostered to a lady from the shop and worked there until she was married on 3 December 1971. After her marriage she continued to work at the delicatessen until the Rennies went to Western Australia. That was in 1972.

She saw Mr Brown on the television news in July 1996 but she did not recognise him as the same man who she had known in earlier years. She did not recognise him at the Murray Bridge hospital either. But she said that the person she and her husband visited was the same man as she had seen on television. She said, however, that she had no doubt that the two were the same.

Mrs Rennie did not previously know Mrs Brown whom she met for the first time in October 1996 at the chambers of Mr Abbott, by Mr Brown's then counsel.

Mrs Rennie said that she did not hear about the events which Mr Rennie said took place in the reformatory in 1967 until after he wrote the letter to the Tribunal. She said that the two had been separated from time to

time. At the time she gave her evidence they were living together. She said the longest period of separation was six weeks.

Mrs Rennie swore an affidavit on 11 October 1996. The affidavit is to the same effect as her oral evidence except that in it she said she saw Mr Brown after his 21st birthday when she was working at the delicatessen which was next door to the Department of Aboriginal Affairs in Grenfell Street, Adelaide. She said that she used to serve Mr Brown and his friends. In her oral evidence she said that she did not remember serving him but did serve Aboriginal people from the Aboriginal Affairs office.

Mrs Rennie was not asked any questions about the tattoo on Mr Brown's arm which consists of his and her initials. The only evidence of that is in the telephone conversation which Mrs Brown had with Mr Rennie. I have referred to this earlier.

Before I go to Mr Brown's evidence, I should refer to certain documents signed by him in 1995 and 1996. The first is a handwritten statement dated 15 March 1995. There is no clear evidence of the purpose for which the statement was prepared. It was signed approximately one year before the making of the application to the Copyright Tribunal by Mr Thomas.

In the statement Mr Brown said that, while attending the Aboriginal Community College at North Adelaide in the early 1970s, there was an Australia-wide competition involving anyone who could come up with a suitable design for an Aboriginal flag. I should interpolate to say that after his reference to the 1970s there appears in brackets a reference to the years 1972-1974 followed by a question mark. Mr Brown said that at the time he was attending the College his art teacher was Mr Thomas. He said that he designed the present Aboriginal flag and showed the design to Mr Thomas for him to look at and submit to the national competition. Mr Brown said that the design was chosen as the winner of the competition. He said that he submitted the design to Mr Thomas on paper. It was about two feet by one foot and was coloured black on top for the people with a red horizontal lower half for the blood of the Aboriginal people which had been spilled up to the time of the design and a yellow circle representing the sun touching both the very top and the very bottom of the flag.

The statement said that Mr Brown wanted the recognition of designing the Aboriginal flag. He said that it was time to set the Aboriginal record straight. He said that there were many people who had been trying to set it straight ever since the flag became recognised as the Aboriginal flag of Australia from 1972. Mr Brown said that, when Gary Foley took it from Adelaide around Australia without giving him any credit as the designer, he had never given Mr Thomas, his former art teacher, any consent or permission to copy or claim credit for the design which he claimed. The statement was signed by Mr Brown.

That statement is consistent with Mr Thomas's evidence, in one respect, namely that it was Mr Foley who took the flag from Adelaide. That statement was made prior to Mr Brown having any knowledge of the evidence which Mr Thomas would give or indeed without any knowledge of any intention by Mr Thomas to bring proceedings in the copyright Tribunal. The evidence is silent on the matter but it seems unlikely that mr Thomas was then contemplating any proceedings. The proclamation under the Flags Act which triggered the application was not made until 27 June 1995.

The next document is an undated document again bearing Mr Brown's signature. It is typewritten. It repeats the fact that he won a competition to design a flag to represent all Australian Aboriginals and that the credit was not given to the designer but to Mr Thomas. It goes on to deal with the meaning of the colours used in the flag.

There are then two documents entitled "Notice of Interest". One is dated 3 May 1996 and the other 8 May

1996. That dated 3 May 1996 was signed by Mr Brown. It was a notice to the Tribunal of his interest in the matter. The grounds of his interest were stated as follows:

"1. That I, David George Brown, now of 76 Railway Terrace, Murray Bridge, in the State of South Australia, designed, by creating the artistic work, for what has become known as the Aboriginal Flag of Australia, and should thereby be recognised and become known as the owner of the copyright in this artistic work and designer of this flag.

2. That I, David George Brown, of the above address, created the artistic work whilst the applicant was a teacher at the Flinders Street Baptist Church, in Flinders Street, Adelaide, and I was a volunteer assisting the applicant with his duties at the classes the applicant held there.

3. That I, David George Brown, of the above address, designed what has come to be known as the Aboriginal flag of Australia whilst a student at the same school that the applicant was a teacher.

4. The Applicant is seeking copyright in this artistic work which rightfully belongs to myself, David George Brown."

The notice of interest signed on 8 May 1996 was signed by Mrs Brown on her husband's behalf. It was also lodged with the Tribunal. Why two notices of interest were lodged is not explained. The second notice of interest was as follows:

"TAKE NOTICE that David George Brown c/- Ms Kaylene Jennifer Brown of 1 Rice Avenue, Gawler West, South Australia gives notice of an interest in the above application.

The grounds of the interest in the application are -

1. That David George Brown created the artistic work for what has become known as the Aboriginal flag and should be the owner of the copyright in the artistic work.

2. That David George Brown created the artistic work whilst a student at the same school that the applicant was a teacher.

3. The applicant is seeking copyright in the artistic work which rightfully belongs to David George Brown."

I come now to the evidence of Mr Brown. He gave evidence before the Tribunal on 25 July 1996, the last day of the July hearings. When he came to give evidence, the instructions of his counsel, Mr Robertson, had been withdrawn. Counsel was then appearing as amicus curiae. After Mr Brown had been affirmed, I asked Mr Robertson whether he wished to examine him. He said he did not and that Mr Brown wished to make a statement.

Mr Brown said that he lived in Murray Bridge and was an invalid pensioner. I asked him whether he wished to make a statement or whether he wanted me to ask him questions. He said, "Can I just make a statement?" The statement was as follows:

"As far as the design for the Aboriginal flag, I was attending the North Adelaide College - the Aboriginal College at the time, as in Brougham Place. Me and my wife were living at Prospect and that was about 1971, `72 - I'm not too sure of the years or the months on that but, you known, while I was attending the college there the Australia- wide competition for Aborigines for a design of their own flag and while I was at college I designed what is known as the Aboriginal flag now and I just left it in amongst all the other entries and then went, you know - they must have went to Canberra or wherever they went to and it was picked out of the group or - I think it probably would have been all the other Aboriginal colleges around Australia. I never really

- I was proud, you know, but I never really made a big fuss about it, you know.

It's - all I really wanted, you know, since this started, all I really wanted is the recognition, you know, nothing else. I just want to be known as the - you know, other Aborigines could say: well, there's Georgie Brown there, he's the one who designed the flag. You know, I want them to be proud of me. That's what I'm after, just recognition of being the designer of the flag. And, you know, that's about all I got to say."

I then asked Mr Robertson, Mr Brown's former counsel, whether he had any comment to make on my asking Mr Brown whether he agreed with Mrs Brown's evidence. At the time Mr Brown was called, Mrs Brown's evidence was complete. I said to Mr Robertson that Mr Brown seemed only to wish to make the statement which he had made. I said that I did not feel disposed to ask the question I had foreshadowed. Mr Robertson did not comment and I said that I would not ask the question. Mr Brown said that he did not wish to add anything to what he had said. His reply was, "No, not at the moment, if this is possible."

Counsel for Mr Thomas did not ask any questions nor did Mr Tennant who was appearing in person. That was the extent of the evidence given by Mr Brown before the Tribunal.

In due course I will need to refer to evidence concerning the institution referred to by Mr Brown as the North Adelaide College in Brougham Place. There is no evidence to support his statement that there was ever an Australia-wide competition to select a design for an Aboriginal flag. Mr Brown plainly believes that there was such a competition. The only support for it is in statements made by other witnesses, including Mrs Brown, which seem to have been based upon what Mr Brown had told them at some time in the past. I find that there was no such competition but I accept that Mr Brown believes that there was.

Mr Brown gave his evidence in a wheelchair. He presented a pathetic picture. He is extremely thin and drawn. He looked much older than his age. Nevertheless, although he spoke in a very quiet voice, he gave his statement clearly and without hesitation. In the circumstances it was quite understandable that neither counsel for Mr Thomas nor Mr Tennant should have wished to cross-examine Mr Brown. At that stage there was no evidence of his medical condition but it was plain that he was far from well. Notwithstanding that, he was articulate and composed as he made the statement which he gave in the course of his evidence on 25 July 1996.

After leave to reopen his case had been granted, Mr Brown made an affidavit which was sworn on 10 October 1996. He said that he was 46 years old. He was married but had been separated from his wife, Mrs Kaylene Brown, for 18 years. There were three children of the marriage. He said that he was born on 27 June 1950 at Point McLeay in South Australia. He said that he had no recollection of his natural father. His mother, Margie Brown, lived with a man named Peter Bendissi for a while. He said that they got on well together. Mr Brown said that on 20 September 1996 he lodged an application for his Offender History with the Murray Bridge police. The record he received dealt only with the periods of his imprisonment in Adelaide gaol, the first commencing on 2 January 1970. Nevertheless, he said that he was detained in the Magill Boys Reformatory when he was a juvenile. He said that he could not recall exactly when it was that he was detained there. It could have been any time between 1965 and 1967 or possibly 1968. He said that he absconded twice and was also in the new McNally Training Centre. He said that he was in the Adelaide gaol a few times in the early 1970s but could not recall exactly when. A report from the Department of Correctional Services is exhibited to his affidavit.

Mr Brown said that he did not have a good memory. He said that he could be told something and that he would almost certainly forget it unless it was very important information. He said that he had great trouble remembering years and dates and when things happened.

He said that he knew Miss Carol Lester, now Mrs Rennie, in the late 1960s and the early 1970s. He said that he was friendly with her before he married Mrs Brown on 29 July 1972. He said that they were then part of a large group of friends. He said that he went out with his wife for about 18 months before they were married. Once he started seeing his wife, he lost touch with Miss Lester. He said that he heard later that she had been married but he did not know to whom.

Mr Brown dealt with a number of other matters. He said that he had no recollection of Mr or Mrs Rennie visiting him in the Murray Bridge hospital although he had been told that they did.

Mr Brown said that he met Mr Rennie on 10 October 1996 in the waiting room at Mr Abbott's chambers. After talking to him for a little while he thought that he did remember him from the Magill Reformatory. He said, "Until today I had no memory of him or his name."

Mr Brown said that his memory was that he "just drew the flag in the Aboriginal College at Brougham Place, North Adelaide in accordance with my evidence." He said that he believed that he was the author of the flag but had no explanation for the fact that his memory placed his authorship at a date "well after July 1971." He said that he had no memory of designing the Aboriginal flag when he was in Magill Boys' Reformatory in 1967 or when he was in the Adelaide gaol or at the Kuitpo Colony, i.e. the Kuitpo Treatment Centre, in 1971. He said that he had no recollection of attending any art classes earlier than those he attended at the Aboriginal College at North Adelaide.

Mr Brown said that throughout the 1970s and 1980s he had drinking problems and could not hold down a steady job. He said that in those years he did not see any reason for claiming to be the designer of the flag until Mr Thomas claimed that he had designed it. He heard that on the television but he could not remember when. He said that he believed that, after seeing the television program, Mrs Brown took steps of which he was unaware in order to dispute Mr Thomas's claim.

Mr Brown said that, in July 1996, during "the court case", his solicitors told him that they no longer wished to represent him. He said that he did not understand why. He said that the solicitors "seemed to get in touch" with Mrs Brown more often than with him because he was in the country, i.e. at Murray Bridge. He said that his solicitors talked to him about getting medical evidence concerning his memory and having a brain scan done. He said that he did not know whether this was done, nor did he know why no such evidence was called in the Court. He said, "I do not recall getting any assistance from Mr Robertson (his former counsel) after the lawyers walked out. I cannot even remember Mr Robertson."

Mr Brown said that he recalled going to see a doctor of some sort at the Adelaide University Medical School and telling him about his drinking and his memory and doing some tests. He said that he did his best to give an accurate history.

That is the extent of the evidence which Mr Brown gave at the hearing in December. He gave no further evidence in chief. He was not asked about the histories he had given to Dr White and Dr Field. Nor was he was he asked about his statement of 15 March 1995 or the notices of interest lodged with the Tribunal. I do not know why this was. I can understand that it may have been believed that he would have no memory of these documents but I would have thought it may have been as well for it to be established that this was the case. I assume, however, that Mr Abbott chose not to ask further questions because that that was his assessment of how best to present Mr Brown's case.

As occurred during the July hearing, there was no cross-examination of Mr Brown. I had the opportunity of observing Mr Brown who was in court for most of the December hearing. He seemed to me to have improved somewhat in health. He was no longer in a wheelchair nor do I recollect his using a frame to walk.

But he was still extremely thin and had the same pathetic look which he had had in July. In the circumstances I think the decision of counsel not to cross-examine Mr Brown was understandable.

Understandably, counsel for Mr Thomas raised questions about the retainer of Mr Brown's solicitor. But no application was made to challenge the retainer so that no occasion for considering that matter arose.

After Mr Brown made his statement towards the end of the July hearing, and again about the time that the application for leave to lead fresh evidence was made, I considered whether or not there was a question of Mr Brown's competence properly to instruct solicitors. But I had heard him make an articulate statement about the matter which was relevant, succinct and, although brief, comprehensive. There was no sign then that Mr Brown lacked a proper understanding of what was involved in instructing solicitors. Since then Mr Brown has been examined by two psychologists. Neither suggests that he is incapable of looking after his own affairs except to the extent indicated in their respective reports. Mr Brown's present solicitors have taken instructions from him and have prepared the affidavit for him to swear to which I have referred.

The case is a strange one because Mr Brown is not able to support the case which Mr Rennie makes on his behalf. In a moment, when I refer to Mrs Brown's evidence, it will be seen that she cannot support it on that basis either because she is not in a position to know. She gives a different account of events from that of her husband and really makes a third case. As mentioned, she had given evidence by the time Mr Brown gave his statement. It was that evidence which made me wonder whether I should not ask Mr Brown whether he would confirm what his own wife had said, but for reasons which I think are apparent, I decided not to take that course.

Of course, Mr Brown's case can stand up with the evidence of Mr Rennie and his own evidence. The medical evidence explains why it may be that Mr Brown has no recollection of events in 1967 so is unable to confirm Mr Rennie's account of what transpired at the reformatory in that year. Mr Brown deposed to designing the flag at a much later point of time. He cannot have designed the flag where he said he did if it was designed earlier than July 1971. It must have been designed before then because the evidence establishes that it was flown in Victoria Square in July 1971. The Aboriginal College to which Mr Brown referred was not at Brougham Place as early as 1971. Evidence later to be referred to establishes this. In the light of the medical evidence, I would not hold Mr Brown to any particular time or place but the difficulty for him is that I cannot replace the evidence which he gave and did not seek to change with something that does not appear otherwise in the evidence. Accordingly, it seems that Mr Brown's case cannot succeed unless Mr Rennie's account of events is correct. It will later be seen that that itself would not be sufficient for Mr Brown's case to succeed but it would tend to establish that the creation of the design occurred earlier than June or July 1971 which is the date contended for by Mr Thomas.

Nevertheless, it would be true to say that, if Mr Rennie's evidence were correct, Mr Brown would have been able to draw and redraw his design from memory. It is not as if the design is difficult to remember. Part of its attraction is its simplicity. It may be that he was in the habit of drawing it from time to time but remembers only one occasion when this was done. I mention these various matters to show the difficulty which this case presents for the Court. It will soon be seen that the difficulties I have mentioned are compounded by Mrs Brown's evidence and by the evidence of some other witnesses called in Mr Brown's case.

Before I come to Mrs Brown's evidence, I should refer to a letter written by her to the editor of the Australian Newspaper. It was published in the edition of The Australian for 13 July 1995. Mrs Brown acknowledged the authorship of the letter in the course of her evidence. In it she referred to an article which had previously been published in the Australian and said that the article was fundamentally wrong. She added, "I ought to know as I am the wife of the designer of the distinctive, black and yellow (not gold) Aboriginal flag, Mr David

George Brown." Mrs Brown said that the facts were known to Mr Thomas who was Mr Brown's art teacher when they were both at the North Adelaide Aboriginal Community College "from the very early 1970s". Mrs Brown expressed surprise that the earlier claims by Mr Thomas that he was "merely the `creator' of the design, or the person who held the intellectual copyright for the design, have given way to this bald mis-statement of fact."

In her letter Mrs Brown said that the first mock-up of the flag was done on a solid non-cloth backing in Adelaide before it was first flown in Victoria Square. She said that the work was done at their home. She said Mr Brown entered his design in a competition for a national Aboriginal flag brought to his attention by his teacher, Mr Thomas. Mrs Brown then dealt with some more general matters to which I do not refer and went on to correct "the mistaken interpretation" of the flag which he had designed which she said was often advocated in support of Mr Thomas's claim to intellectual copyright over the Aboriginal flag. She said that the red lower half represented all the blood shed by "our ancestors" in defence of this land, not the red of the earth. She agreed that the black represented the Aboriginal people and the yellow centre circle was for the sun which gives life to the people.

There are also three letters written by Mrs Brown to Mr Yunapingu of the Northern Land Council, Mr Frank Walker, the then Minister for Administrative Services, and the Chief of Staff of The Australian. All are dated July 1995. Mrs Brown agreed that these letters had been written by her at that time. The letters are important and I have taken then generally into account in reaching my conclusion but they are repetitive of the statements made in her letter to the Australian. For that reason, I do not refer to the detail of them. The letters are not in identical terms but they are to the same effect. In the letter to Mr Yunapingu, Mrs Brown said that she referred him to "the enclosed signed two pages of his (i.e. Mr Brown's) statement setting out the facts of his position." I do not think that statement is in evidence. It is probably not the statement signed on 15 March 1995 by Mr Brown because that occupied only one page.

I go then to Mrs Brown's evidence. Her evidence was given on 25 July 1996. That was the morning upon which Mr Robertson, up to then counsel for Mr Brown, announced that he was unable to continue to act for Mr Brown. His instructing solicitor was under a similar difficulty. I gave them leave to withdraw but asked Mr Robertson whether he would be able to remain for the time being as amicus curiae. He did so and was able to lead Mrs Brown through her evidence. Mrs Brown lives at Gawler not far from Adelaide. She has been separated from Mr Brown for 17 years but is obviously in touch with him and is concerned about his welfare and his health.

Mrs Brown said she remembered that she first started going out with Mr Brown late in May 1971. She said that Mr Brown came down from Kuitpo Colony which was a rehabilitation place for alcoholism. She said that he had been in the Colony for many years "trying to get off the drink." I gather that the effect of her evidence, although it is not clear, is that he would come and go; in other words he was not confined in Kuitpo all the time. But Mrs Brown said that, "if you wanted your sobriety that was the place for black fellows and white fellows. If you wanted to feel free to leave that was your rights."

Mrs Brown said that she used to go up to Kuitpo with a Mr Smith who is no longer alive. She said that she saw Mr Brown doing drawings early in June 1971. She was asked how she fixed the time and said that she met Mr Brown in May. She said that she was pregnant in June with her eldest daughter, Sharon. Sharon was born on 31 March 1972. She added, "it would have been about a week or so - because George came down for the weekend from Kuitpo so - in and out and I'd go back there with Neville [Mr Smith] all the time and spend the day there with the fellows and that so, you know, to support George."

Mrs Brown said that she was present in June 1971 when Mr Brown did the drawings. She said she walked

into a room, which I gather was at the Kuitpo Colony, and saw a few Aboriginal fellows. There were white men there as well. They were sitting down doing art. She said that she was next to Mr Brown when he did the flag. She said that he was drawing on a big piece of board. She said that he started to draw with a pencil. He drew a circle first then he did the lines. He did the black first at the top, then he did the red down the bottom and then he did the sun which was yellow. He applied the colours with paints, which I gather were water colours. The flag occupied the whole board so that there was no boundary other than the edges of the board itself. Mr Brown told her that the red was "red blood". He said the black was for the black fellows, the sun that gives life and light was yellow. The red "...was red blood, the blood shed when the Europeans - it was blood shed for our people when the Europeans came over 200 years ago." He said that the meanings came from his aunt. Mrs Brown added, "that's the greatest thing that he's ever done and it's a bloodshed, it's a wonderful meaning and we're proud and Georgie's proud that he done that... and my children and my grandchildren are proud too."

Mrs Brown said that once the painting was complete, Mr Brown stayed in Kuitpo. Mr Smith brought Mrs Brown to her sister's in Adelaide. Mr Brown and Mr Smith said they were going to meet her the next day. It was a couple of weeks or a couple of days afterwards near the NADOC day march and they brought it down to the crypt in the Maughan Street Church in Pitt Street, Adelaide. They had the painting with them. She said she knew a Mrs Maureen Cain who was probably there. Mrs Cain gave evidence to which I shall refer in due course. The painting was taken to a place in Norwood for silk screening. She went with Mr Brown and Mr Smith as well as some other people whose names she could not remember. She said that the flag was produced on that day. It was made of cotton.

Mrs Brown said that the flag was made on 8 July 1971, the day before the NADOC march. She said that she went with Mr Brown and Mr Smith to Victoria Square with the flag. They came from the Maughan Church. She said that she did not remember whether the flag was furled or unfurled or whether it was attached to a pole. She gave some account of what occurred in Victoria Square to which I do not refer. She said that the flag was flying in the Square at the end of the march, but she could not remember whether someone was holding it or whether it was attached to a pole stuck in the ground. The flag was left in the Square. She did not see it again. The Browns went to Point McLeay in July and stayed there until January 1972. They returned in January 1972. She said that was when Mr Brown started taking her to the Flinders Street Baptist Church. She did not see the flag again. Mrs Brown said that when she was at the Flinders Street Baptist Church, she met Mrs Thomas.

Mrs Brown said that art was taught at the Flinders Street Baptist Church while she was there. She referred to a photograph which is in evidence and said that it depicted where "we did the arts and crafts". She said there were two parts at Flinders Street Baptist Church. There was the church itself and there was another area through a door and a passageway. This was on the right hand side and this is where the photograph was taken. The photograph, so Mrs Brown said, depicted both Mrs Thomas and herself.

Mrs Brown said that she saw Mr Thomas at the Flinders Street Baptist Church on many occasions. She said that she saw Mr Thomas conducting art classes at the Flinders Street Baptist Church.

The matter of the Flinders Street Baptist Church was then left and Mr Robertson (of counsel) returned to the board (i.e. not the flag itself) on which the flag was said to have been painted. Mrs Brown said that she did not know what became of it because she and her husband went to Point McLeay. She did not know what had become of it after it was taken to Norwood for silk screening. It will be recalled that she last saw the flag itself in Victoria Square.

Mrs Brown said that Mr Brown had drawn the design of the flag on a board about three times. I find Mrs

Brown's evidence in relation to this matter confused and difficult to follow. At the time she gave her evidence, she was very emotional and, of course, as she herself said, was faced with the problem of trying to remember events which had taken place some 25 years beforehand. Nevertheless, the effect of her evidence seems to be that the first time Mr Brown painted the flag on a board was in the Adelaide gaol in May or June 1971. The second time was at Kuitpo Colony and the third time was at the Flinders Street Baptist Church in 1972.

Mrs Brown recalled visiting Mr Brown in the Adelaide gaol in 1971. She said that her visit was prior to July 1971 and thought it was early in June. She went into a room at the gaol where art classes were being conducted. As I understand it, that is where she first saw her husband paint the flag on a board.

In evidence is a letter from the Department for Correctional Services dated 4 October 1996. The letter says that Mr Brown was admitted to the Adelaide gaol on 2 January 1970, transferred to Cadell Training Centre on 15 January 1970, transferred to the Adelaide gaol on 5 February 1970 and discharged on 13 March 1970. On 14 March 1970 Mr Brown was again admitted to the Adelaide gaol. He was discharged on 20 March 1970. He was admitted again on 14 May 1970, transferred to the Yatala Labour Prison on 28 May 1970 and discharged from the Cadell Training Centre on 19 May 1971. Mr Brown was admitted to the Adelaide gaol again on 24 July 1971 and discharged on 30 July 1971. These records would suggest that Mr Brown remained in prison from 14 May 1970 to 19 May 1971 when he was discharged. He remained out of gaol during the rest of May, the whole of June and until 24 July 1971. That is of course a critical period for the events in this case. It was apparently after Mr Brown's discharge from gaol on 30 July 1971 that he went to Point McLeay.

Mrs Brown does not suggest that Mr Thomas was present when the flag was done on the board at either the Adelaide gaol or the Kuitpo Colony but she does suggest that he was present when the flag was drawn on the board at the Flinders Street Baptist Church in January 1972. She said that she was present when Mr Thomas drew or painted it and Mr Thomas was present also. The trouble about January 1972 is that it is six months after the flag was flown in Victoria Square at the time of the NADOC day march.

Mrs Brown concluded her evidence in chief with an account of a conversation which she said took place in 1991 which was the year that there was a commemoration of the 20th anniversary of the Aboriginal flag. She described it as the "Commemoration of the Aboriginal flag 1971 to 1991". Mrs Brown gave an account of a conversation she had with Mr Thomas in which she complained to him about the fact that he had not acknowledged Mr Brown as the designer of the flag.

Mrs Brown was asked in cross-examination about the notice of interest which her husband had signed, but which she said she helped compose with the aid of a Mr Ames of "Legal Aid". Mrs Brown acknowledged that the statement in para. 2 of the notice of interest dated 8 May 1996 signed by Mrs Brown for Mr Brown in which it was said that Mr Brown created the artistic work, i.e. the flag, whilst a student at the same school that the applicant was a teacher was wrong. She acknowledged that Mr Brown was not a student at the time. She said that he went to the College in 1975 and was a student there. She was asked whether her evidence was that Mr Brown created the artistic work when he was a student of Mr Thomas at the Aboriginal College in North Adelaide. No doubt she was having trouble remembering past events. This is understandable in the light of the lapse of time, but I must say that her answer was quite evasive.

Mrs Brown was then asked about the notice of interest signed by Mr Brown on 3 May 1996. She was referred to para. 2 of that document in which Mr Brown was said to have created the flag whilst Mr Thomas was a teacher at the Flinders Street Baptist Church in Flinders Street Adelaide and Mr Brown was a volunteer assisting Mr Thomas with his duties at the classes Mr Thomas held there. Mrs Brown's cross- examination about that document proceeded as follows:

"Does that appear to you to be Mr Brown's signature, Mrs Brown?--- Yes, it is Mr Brown's signature.

Would you read paragraph 2, please? I will read it out?---No, I'll read it out. Can I read it out?

Read it to yourself. Have you read 2?---Mm.

Do you now accept that the artwork was not created at Adelaide Gaol but rather at Flinders Street Baptist Church?---No, it's created at Adelaide Gaol. Georgie painted again, Mr Golvan, in the Flinders Street Baptist Church in 1972 - in January 1972.

Would you read paragraph 3 in that event, Mrs Brown?---Yes, I know the mistakes. I made two mistakes.

Whose mistakes were they, Mrs Brown? Were they Mr Brown's or were they your mistakes?---Both of us.

You both made mistakes?---Yes, because, you know, we've got to think you know, Mr Golvan.

Yes, I understand that, Mrs Brown?---And 25 years - - -"

Mrs Brown was cross-examined about the letter she had written to the editor of The Australian newspaper in which she said that the first mock-up of the flag was done on a solid, non-cloth backing in Adelaide. This was said in the letter to have taken place at the Browns' home. Mr Brown was said to have entered his design in a competition for a national Aboriginal flag brought to his attention by his teacher, Mr Thomas. Mrs Brown was asked whether it was her understanding that Mr Thomas was a teacher of Mr Brown prior to the NADOC march in July 1971. She said categorically "No, he wasn't." She said that Mr Thomas became her husband's teacher in 1972 at the Flinders Street Baptist Church. He was a part-time teacher. She added, "I know I've made errors, Mr Golvan, but I'm thinking for two people here." She said that Mr Thomas did art part-time at Flinders Street Baptist Church in 1972. The Browns had come back from Point McLeay in January 1972.

Mrs Brown was referred to the handwritten statement signed by Mr Brown on 15 March 1995. The cross-examination proceeded:

"Do you identify that writing as being your husband's writing?---Yes, that's Mr Brown's writing.

And what it says in part is:

I am David George Brown born at Pt McLeay of the Ngarrindjeri tribe in 1950. While attending the Aboriginal Community College at North Adelaide in the early 1970's (72-74?), there was an Australia wide competition involving anyone who could come up with a suitable design for an Aboriginal flag. At the time I was attending the College my art Teacher was Harold Thomas. I designed the present Aboriginal flag and showed the design to Harold Thomas for him to look at and submit to the national competition. This design of mine was chosen as the winner of the competition.

Now, what is the correct position, Mrs Brown, as regards the creation of this flag?---The correct position, Mr Golvan, is my husband - as you can see my husband George is very, very sick. Georgie does it (sic) have to make me look at him. His mind has gone. Mr Golvan, give me respect. Georgie's been in and out of a lot of rehabilitations. I left George in 1978, Mr Golvan. Look at him, come on.

Can I ask you this question, Mrs Brown? Look, I respect what you are saying, Mrs Brown, because - - -?---And he's the father of my daughters, okay, and how you think it's hurting my girls and my grandchildren and you've got the rights to - Georgie doesn't know them. He's forgotten. Look. I hate to get up here and be upset, you fellows. Come on, give me a bit of respect and a bit of dignity, eh?"

At this point Mrs Brown became most distressed and I urged counsel to bring the cross-examination to an end as soon as he reasonably could. Counsel did so soon afterwards, but not before asking some questions about a document referring to a flag referred to as the Meewee flag and the identity of persons in photographs contained therein. The document is in evidence but I do not refer to the detail of it. There was no re-examination and the witness withdrew. Mr Tennant did not wish to ask any questions.

At that stage of the proceedings, there was a good deal of distress in the courtroom amongst people who were watching as well as on the part of the Browns. Mrs Brown's evidence was followed by Mr Brown's evidence to which I have referred.

The next witness called in Mr Brown's case at the July hearing was Mrs Maureen Cain, a retired welfare worker. She said that she worked with the Adelaide Central Mission in the 1970s until 1982. She was working from the crypt in the basement of the Maughan Church which was in Pitt Street adjacent to the Central Market. Mrs Cain said that the crypt was a place where homeless people met. They were of all nationalities. There were a great number of Aboriginal people. When they came in, they would be given cups of tea and coffee; there was counselling; there was medical aid available for them and visits were made to gaols and appearances for them were made in courts. Mrs Cain said a lot were alcoholics. Many were regularly known to those who ran the Mission's activities in the crypt.

Mrs Cain said that she knew the Browns. She did not know Mr Brown well because he was a patient at Kuitpo Colony. She had very little involvement with him in the early 1970s. He did come down on day leave from time to time. A counsellor at the crypt was Mr Smith who was from Redfern in New South Wales. Mr Smith used to go to Kuitpo Colony and "bring the boys down".

Mrs Cain said that she recalled Mr Smith and Mr Brown coming to see her at about that time in relation to an Aboriginal flag. She said that Mr Brown, Mr Smith and a Mr Lindsay, who was another Aboriginal man, were together. They wanted to go to Norwood. They were talking mainly with a group worker who did the art work in the crypt. That was a Mr Hart. Mrs Cain said that she had very little involvement that day. Mrs Cain said that Mr Hart was looking at some items that Mr Smith showed him. Mr Smith was very excited about these. Mr Brown and Mr Lindsay were standing in the background because they were quiet men. She said they wanted to go to the Health Department at Norwood in Sydenham Road. She gave them the telephone number and told them where the Health Department was. She said that she saw artwork at the time. She added, "I just glanced. It was Mr Hart that was doing most of it [i.e. the talking], but I did see some art work." She said that Mr Hart was picking it up and looking at it and having discussions with Mr Smith. "It was just between the two of them at that time."

Mrs Cain said that there were two items she saw. One was a crayon drawing. The other, so she said, "was supposed to be a painting - I didn't take much attention to it... it was the very vibrant colours that I was looking at." She said that these were black, red and a very large gold shape in the middle. She said the black and the red took up equal space on either side of an imaginary centre line of the page. The large "thing in the centre was... superimposed and that hit me more than anything." The page was a rectangle. Mrs Cain was asked how she was able to fix when this occurred. She said that it was a long time. She added, "Well, at the time I know that we had a researcher who was working on the Henderson Poverty Report still working at the Mission and I really can't - you know, it's so long ago." She said it happened in 1971 "About there." She said that she selected 1971 because she had not long been working at the Mission. That is why she could remember. She said that she started at the Mission at the beginning of 1971. She knew that they moved from there in September 1973. She added, "It's very difficult to think all that far back but I know it was at the beginning of the year."

Mrs Cain said that before Mr Brown, Mr Smith, Mr Hart and Mr Lindsay left for Norwood she heard Mr Hart talking about silk screen printing.

In her cross-examination, Mrs Cain was asked about the worker on the Henderson Poverty Report. She said that the person she described as the worker (no doubt a researcher) was very interested in a group known as the Aboriginal Sobriety Group which was starting up. There was more cross-examination of Mrs Cain but I do not refer to the detail of it. It principally concerned the research worker who was connected with Professor Henderson.

Later there was tendered an extract from the report "Poverty in Australia" issued by the Australian Government Publishing Service in 1975. The extract said that the terms of reference of the inquiry were announced on 29 August 1972. The terms were significantly expanded on 6 March 1973. It may be unfair to Mrs Cain to tie her too closely to a period when somebody connected with the Henderson enquiry was working in the crypt but the objective facts would suggest that her recollection in this regard is astray one way or the other. Either she is wrong in thinking that the events leading to the visit to Norwood of the flag occurred in 1971 or she is wrong in her recollection about the presence of the person working for Professor Henderson at that time. She herself said she had suffered a minor stroke in 1982. As a result she had some difficulty in remembering events. She added, however, that she recalled "this woman", meaning the researcher from the Henderson Inquiry, very well being concerned with the people and being involved probably "in the whole of Adelaide..."

Mrs Cain's evidence concluded Mr Brown's case as it was at the end of the July hearing. Thereafter Mr Tennant gave evidence. I have referred to this evidence earlier.

The matter was adjourned to 9 August 1996 for any further evidence and for submissions. The history of the matter which I have earlier recounted discloses why matters did not proceed in this way.

It should be observed that, at this stage of the proceedings, Mr Brown's case was not strong. The evidence which had been given to support it, particularly Mrs Brown's evidence, as she herself acknowledged, contained a number of inconsistencies. It is obvious that there was confusion in her mind, as well as that of her husband, as to where he had first drawn the flag and in what circumstances. It seems to be most probable that the flag was first flown in Victoria Square at the NADOC march in 1971. It was in existence then so whoever designed it, must have designed it prior to that time. Mr Brown's evidence did not support that case. Nor did the two notices of interest signed by Mr Brown lodged with the Copyright Tribunal.

Mr Campbell's evidence was not helpful. It provided confirmation of the flying of the flag at the NADOC march in July 1971. It is true that, according to Mr Campbell's evidence, it was not flown by Mr Thomas. So Mr Campbell's evidence is not necessarily supportive of Mr Thomas's case. Really it is difficult to take a great deal from anything which Mr Campbell said. He is a most enthusiastic supporter of Mr Brown's case but that is about as far as it goes.

A major problem confronting the Browns at the end of the July hearing was the fact that Mr Brown had put the date of the design of the flag too late. His earlier documents, which had been prepared, at least in part, by Mrs Brown, did the same. Mrs Brown was clearly aware of this in the course of her evidence and it worried her. She overcame the problem by saying that she saw the design done at the Adelaide gaol in June 1971 - it must have been before June if that in fact is what occurred - and at the Kuitpo Colony prior to July 1971. That had not been suggested at any earlier time.

Mrs Brown would not say that Mr Thomas was her husband's art teacher at the Flinders Street Baptist School as early as June or July 1971. She made it clear that that was not the position. That is consistent with

the Thomases' evidence. Mr Thomas denies, and in this he is corroborated by Mrs Thomas, that he ever taught art at the Flinders Street Baptist Church. He taught it later at the art school to which I have referred. Whether he did teach it in a part-time way or on infrequent occasions at Flinders Street may be a question that is still open, although Mr Thomas's denial is very strong as is the evidence of Mrs Thomas. I shall refer to this evidence as evidence in reply after I have dealt with the balance of the evidence called on Mr Brown's behalf in December. The important point I make now is that, at the end of the July hearing, Mr Brown's case could not have been regarded as having a great deal of strength.

It was in these circumstances and against that background that Mr Rennie came upon the scene. His letter of 30 July 1996 to the Tribunal was the first step in what then occurred. I have recounted the events as they occurred and analysed his evidence. In due course I will need to come to a conclusion as to whether I accept it. If I were to do so, the problem about time would be overcome, but there would still be a problem because it would be difficult to establish how it was that Mr Thomas procured a drawing of the flag done by Mr Brown. As mentioned, Mr Brown was confined in the Adelaide gaol for a good deal of the relevant period and, when he was not so confined, he was more often than not at the Kuitpo Colony. It may be that Mr Brown did, from time to time, draw the Aboriginal flag which he had designed much earlier. As I have said, it would not have been very difficult for him to have done this. But the question is when and in what circumstances could he have provided Mr Thomas with an opportunity of seeing or taking a copy of his design.

There were other witnesses called in the Browns' case at the December hearing. The first of these to whom I refer is Miss Watkins. She is an Aboriginal Cultural Educator and a Gunna Language Specialist. She works at three different employment locations. She works for the Para West Adult Campus, for Tauondi Aboriginal College and at Gunna Plains School. She teaches the Gunna language at Tauondi College. Miss Watkins said that the Tauondi College was in Port Adelaide and the other institutions were at Elizabeth.

Miss Watkins said that in the late 1960s she was the Secretary to the Council of Aboriginal Women of South Australia. This was from 1967 until 1971. She said that she helped in the setting up of an art group. A survey was done and visits were made to see if there was an interest in an art group. There was "quite a bit of interest." Together with a Dr John Morley and other members of the Council of Aboriginal Women, the art group was begun at Currie Street late in 1968 or early in 1969. It was held weekly on Wednesday evenings. Miss Watkins was present at the classes. Usually 50 to 70 people came. She thought that the art school moved from Currie Street to Challa Gardens Primary School in 1972. From Challa Gardens it went to Walter Street, Thebarton.

A report issued to commemorate the 20th anniversary of Tauondi College was tendered. It gives an account of the history of the development of the College. The report probably provides the most reliable guide to when these various changes occurred. I find that the art classes commenced at Currie Street in the late 1960s. They then moved to Challa Gardens Primary School in 1972. In 1973 it moved to Walker Street, Thebarton where the Tauondi College had its formal beginnings. The College moved to Brougham Place in 1975. In that year it became known as the Aboriginal Community College. The report records Mr Thomas as having been a part-time art/drama teacher at the College in 1973. The report also shows that Mr Brown was a student of the College in 1975. I should mention that the report, wrongly in Miss Watkins opinion, contains a reference to "Pennington" which Miss Watkins says is an error. It should have read "Currie Street". I accept that this is the case.

Miss Watkins said that she knew Mrs Brown. She attended the art classes as a teenager of approximately 16. She came with another group of teenage girls from one of the hostels. She was at Currie Street to begin with

and then was at Challa Gardens. Miss Watkins also knew Mr Brown. She said that she had known him for quite a while, but did not have a lot of contact with him earlier. She could not recall seeing Mr Brown at the classes at either Currie Street or Challa Gardens. She said that Mrs Thomas went to the art classes quite regularly at Currie Street. She said that Mr Thomas came on two or three occasions to Currie Street and one or two occasions to Challa Gardens, but she added, "I can't recall that, I am only guessing there."

Miss Watkins said that the classes were not so much a class as a way of Aboriginal people being able to express themselves through art. It was self-expression. There were not very many teachers at all. There were just people there who were guiding and making sure that the facilities, the materials and the equipment were there for the people to use. She said that there was not only painting; there were also copper enamelling, pottery and wood carving. Miss Watkins said that Dr Morley was the instigator of the classes. He attended almost every week. His main role was as a facilitator and that of a catalyst to encourage people to express themselves in various ways within the art field.

Miss Watkins said that Mr Thomas exhibited at a couple of exhibitions that were held. One was held at the Maughan Church in the city and the other was held at Kingston Park at the unveiling of a monument.

Miss Watkins could not say what Mr Thomas was doing at the College. She said that he was mostly discussing matters with Dr Morley. She did not know what they were discussing, but thought it was artwork and the classes. She could not say any more than that. However, Mrs Thomas was involved, "as the rest of us with doing art pieces." Miss Watkins said that the events which she had described took place between late 1968 up to 1972.

Miss Watkins agreed that it was possible that she had seen Mr Thomas at the art classes after July 1971. She could not say one way or the other.

Miss Watkins first remembered seeing the Aboriginal flag when it was flown at the tent embassy in North Adelaide in 1972. She said that was the first occasion she had seen the flag. She said that she was active in Aboriginal political circles in the early 1970s but could not remember whether she attended the 1971 NADOC march.

Miss Watkins said that she had only met Mr Brown recently - about 2 years ago. This does not quite sit with her earlier evidence which suggested that she had known him for some time. Nothing turns on this. Miss Watkins could not recall ever seeing a design for the Aboriginal flag produced at any of the art classes at Currie Street. She said that it needed to be remembered that she was very busy with the younger students. She also looked after children who had to be minded whilst the art classes were going on.

Miss Watkins gave some other evidence but it is not useful to refer to it. I have taken it generally into account.

The next witness to be referred to is Mrs Karpany. She swore an affidavit on 22 November 1996. Mrs Karpany is a welfare worker. She went to New Zealand in 1971. She returned early in 1972. She obtained a job at Kuitpo Colony working for the Adelaide Central Mission. Mrs Cain was her supervisor although she worked in Adelaide at the crypt at Maughan Church. She began work in February or March 1972 at Kuitpo Colony. Mr Smith was the Aboriginal Councillor there. Mrs Karpany said that in late 1972 or in 1973, Mr Brown was a resident at Kuitpo. He was in his early 20's. She got to know him very well. She said that at Kuitpo "There were all sorts of art and craft available - ceramics, wood carving, painting and drawing."

Mrs Karpany also came to know Mrs Brown and their three children. In October or November 1973 Mrs Karpany married Mr Smith in a ceremony at Kuitpo Colony. Mr Smith and Mrs Karpany were separated late

in 1974 because of his drinking. She said that one day before they separated, Mr Smith came home and dropped a big roll of sketching paper on the bed. She asked what it was. Her husband replied, "That's what Georgie [Mr Brown] did when he entered for the flag". Mr Smith said that he was keeping the roll for Mr Brown. She said that Aboriginal people gave Mr Smith and herself, and in later years, her present husband, property to keep for them while they were moving around. Mrs Karpany said that the sketches were large pieces of paper. They were taken to the kitchen and shown to some other people who were there. There were ten sheets. One sheet was in water colour painted of red and yellow and black. There was a black background on the top half, a red background on the bottom half and a yellow circle in the middle covering both the red and black halves of the rectangular shape. There was a notation describing the meaning of the colours. Mrs Karpany could not read this. Mr Smith then took out a photograph which showed Mr Smith at the crypt with a flag draped over a desk.

The balance of Mrs Karpany's affidavit is not helpful because it is not direct evidence of any matter which is in question in this case. I have read it but I do not regard it as relevant.

Mrs Karpany was cross-examined. I do not find it necessary to refer to the detail of the cross-examination but I have taken it generally into account.

The next witness was Mr L.W. Webster. He is a first cousin to Mr Brown. He works as a teacher in Alice Springs. His evidence was taken by videolink from Alice Springs.

Mr Webster recalled seeing a design similar to the Aboriginal flag. He said that this occurred about August or September 1971. Mr Brown showed him the flag. Mr Webster said that he did not know how he fixed this time.

In cross-examination Mr Webster's attention was drawn to evidence given by Mrs Brown that the Browns were in Point McLeay from July 1971 until January 1972. He agreed that the meeting at which he spoke could have occurred in January 1972. He did not go to Point McLeay.

The most that could be said of Mrs Karpany's and Mr Webster's evidence is that, if their evidence be accepted, it provides some support for Mr Brown's case in that it establishes that he was claiming to have designed the flag and made this claim in the presence of both Mrs Karpany and Mr Webster.

I next refer to Mrs Brown's evidence given at the July hearing. Mrs Brown swore an affidavit on 14 October 1996. She said that she first met Mr Brown late in May or early in June when she was working at Coles in Rundle Street, Adelaide. She met him at a hotel. She was pregnant with her daughter Sharon in June 1971. Sharon was born on 31 March 1972. The two went to Point McLeay in July 1971 after the NADOC day march.

Mrs Brown said that, at the July hearing, she said that Mr Thomas became Mr Brown's teacher in 1972 at the Flinders Street Baptist Church. She said that she had since remembered that Mr Thomas was a teacher at the Wednesday evening art classes held at the Western Teachers College in Currie Street, Adelaide and later at the Challa Gardens Primary School. He was also a teacher, so she said at Thebarton. She said that she remembered taking Mr Brown to art classes in June 1971 and remembered him doing a design of the flag in 1971 at those classes and also at Kuitpo Colony and later still at the Adelaide gaol. She said that she had completely forgotten about the Wednesday evening art classes until she read the history of the Aboriginal College, Tauondi, some time after the July hearing. She said that in the history was a photograph of Dr Morley, "the Englishman who ran the classes, with a pipe in his mouth and this made me recall the classes that we had called `Kids Club' and the smell of his pipe."

Mrs Brown mentioned people with whom she went to the art classes. She has endeavoured to contact these

and explained why she had been unable to do so. I have taken this evidence into account but I do not set out the detail of it.

Mrs Brown went on to explain that she had had limited contact with Mr Brown's previous solicitors and said that that was the reason that "I was not able to give the first respondent's previous legal advisers any statements about the existence of these art classes or of the matters" referred to in earlier paragraphs of her affidavit.

I pause to say that I have not, of course, heard Mr Brown's previous solicitors on this matter. It is therefore difficult to make a judgment about the reliability of what Mrs Brown has said. I do not regard it as important to do so, but it is to be noted that in the earlier part of her affidavit of 14 October 1996 Mrs Brown said that she had completely forgotten about the Currie Street art classes. If that be so, it seems unlikely that Mrs Brown would have remembered to tell Mr Brown's previous solicitors about them even if she had had more contact than she did with them.

Mrs Brown dealt with other matters connected with the earlier representation of her husband. I do not regard this as important simply because there has been the further hearing in December and any gaps or other deficiencies have presumably been filled in at the second hearing.

In her oral evidence Mrs Brown said that she had been attending the art classes held on Wednesday evenings from 1969. She said that she saw Mr Brown do the design of the Aboriginal flag at Thebarton. She was sitting next to him at the time he did this. She corrected earlier evidence in which she had said variously that the first time she had seen him draw the design was at the Adelaide gaol and the Kuitpo Colony. In saying that she saw the design for the flag drawn for the first time at Thebarton, she is not only in conflict with her earlier evidence, but with her more recent affidavit sworn on 14 October 1996 in which she said that it was at Currie Street. It is not as if her reference to Thebarton was a slip. She mentioned it a number of times in her oral evidence. The evidence establishes that the art classes did not go to Thebarton until 1972. Yet in cross-examination Mrs Brown confirmed that the design was drawn at Thebarton and that this occurred in 1971. She fixed the year because that was when she and Mr Brown went to Point McLeay. All this is most confusing. That is all that can be said about it.

Mrs Brown agreed that she had had a series of telephone conversations with Mr Rennie between 2 and 5 August 1996. She said that she had not met Mrs Rennie.

Mrs Brown was asked some further questions but I do not find it helpful to refer to any answers.

That completes the account of the evidence given in Mr Brown's case. The remaining evidence is evidence given in reply by the Thomases. Some of this evidence was given when they presented their case in the Copyright Tribunal at the July hearings and some of it was given in reply at the December hearings. I have earlier referred to Mr Thomas's evidence in which he emphatically said that the design of the flag was "totally" his. He also said that no one helped him in any way whatsoever with the design. Mr Thomas was asked what had become of all the papers which he had. He said that the sketches were thrown away. He said that he was not a collector or saver of his art work. He said that "the practice of artists drawing" was not relevant to the finished article. That was far more important. He said that the drawings which he disposed of when the family moved house were thrown out with the other drawings. He thought that this was about the time they moved to the Northern Territory in 1976.

Mr Thomas said that he had started work at the College in 1973. He taught art and drama. Amongst his students were Aboriginal people. He said that the College was then at Thebarton. Mr Thomas had no recollection of teaching Mr Brown art and did not think he was ever a student of his, nor did he assist him in

his teaching work. He considered that it was possible that he may have been amongst his students although he did not remember him. He said that it was not possible that he could have taught him in any capacity before July 1971. He was not teaching then; he was working full-time at the Museum. He did not recall whether he was engaged in teaching activities prior to going to the Museum.

Mr Thomas said that the first time he became aware that Mr Brown claimed to have created the Aboriginal flag was in 1991 when there was a celebration to commemorate 20 years of the flag. He said that a Mrs Jackson had rung his house. Mrs Jackson was a reference to Mrs Brown. Mr Thomas said that his wife had met Mrs Brown at the Flinders Street Baptist Church in 1973. He saw Mrs Brown on occasions.

Mr Thomas said there was never a competition to design a flag. He was then shown a series of letters to which I have earlier referred. I do not find it necessary to refer to the detail of these.

In his cross-examination Mr Thomas denied ever teaching art on a voluntary basis at the Flinders Street Baptist Church. He did not recall ever attending that church when art was taught in one of the upper rooms. He said he had a recollection of craft work by the women but not of art work. He said that he probably would have met Mr Brown at the Flinders Street Baptist Church. He said that Mr Brown's wife had gone there. He added, "I mean, you know, probably had the Aboriginal husbands and whatever - had a visit there but I know I went there to visit my wife or have morning tea break because she was pregnant." He had no recollection of the Browns coming to his home at St Morris from time to time.

Mr Thomas was asked about a photograph said to have been taken after another march, i.e. not the NADOC march in 1972 where the Aboriginal flag is flying. The march was said to have been called the "Brutality March". It was intended to mark protests against police brutality alleged to have been committed against Aboriginal people. In the photograph the flag is being held by someone whom Mr Thomas identified as Mr MacDonald.

I have earlier referred to the fact that the remnant of material produced by Miss Hanson would suggest that the flag which was made from that material had a greater area of red than black in it. In other words it would seem likely that the flag that was produced did not divide the red from the black evenly but consisted of a greater proportion of red material than black material, although not as much as the two-thirds which was suggested by counsel.

When, in the course of the hearing, I looked at the photograph said to be of the group taken after the Brutality March in which Mr MacDonald is holding the flag, I observed that the flag he was holding seemed to have more material that was red than material which was black. At the conclusion of Mr Thomas's evidence I referred this matter to him. He was non-committal about it. The matter was not taken up further at the July hearing nor at the December hearing. But the matter is significant because it would suggest that the flag flown at the Brutality March in 1972 consisted of more red than black material. This was no doubt an unintended result of Mrs Hanson's sewing, but that is how it was.

The question I asked myself, but did not myself pursue, was whether the flag flown at the Brutality March was the flag which Mr Thomas had had made. That flag, so Mr Thomas said, was taken by Mr Foley after the NADOC march to the east coast. Mr Thomas did not see it again. He did not recall being at the Brutality March. It is possible, of course, that the flag which he had had made came back from the east coast for that march or it is possible that a replica of the flag he had made with its uneven quantities of red and black material was made.

The matter was not taken further, notwithstanding that Mr Brown was advised by new solicitors and counsel and represented by new counsel at the December hearing. In those circumstances I do not think that any

point is to be made of it. I did not think it appropriate myself to ask further questions about the matter or to press Mr Thomas. That was a matter for others. Mr Robertson may have felt inhibited because of his difficult position at the time the questions were asked. But that would not have inhibited Mr Abbott if he had wished to take the matter up. He did not.

I have mentioned the matter only to indicate the appearance of the flag used at the Brutality March. I have not taken anything from this one way or another in reaching my conclusion. Of course, if the flag were flown for the first time at the Brutality March, that could put the date of its design later than Mr Thomas has put it. There is no satisfactory evidence that that was the case. Mr Thomas, and also Mr Ellis, have remained firm in their recollection that the flag was first flown in July 1971 at or during the NADOC march of that year.

Mrs Thomas gave evidence, to which I have earlier referred, about her husband doing art work in connection with designing a flag. I do not refer to this again. Mrs Thomas said that there was not an art class at the Flinders Street Baptist Church. She said that no art work whatsoever was created there. She said her husband did no work there at any time. She said her husband was a visitor who occasionally had a cup of tea with the women. That was all he had to do with the centre. Mrs Thomas denied that the Browns had come to visit them at St Morris.

In further evidence he gave during the December hearing, Mr Thomas said that he was never involved in a teaching capacity at Currie Street. He was also asked about his talks with Dr Morley. He said that while he was at the museum he began to collage Aboriginal toys and games. He did not remember where he first met Dr Morley but he understood that he was doing some analysis of remote area Aboriginal children's drawings and paintings. He said they had something in common regarding children's development.

Mr Thomas said that he went to Currie Street three or four times in 1972 and a bit more afterwards. He had by then produced his own art work as well. He was a water colourist and he submitted a selection of art works so it could be sold and the money returned to the organisation. His recollection was that he first went to the art class at Currie Street late in 1972. He was asked whether he might have gone in 1971. He said, "That is unclear because I was actively doing - I was actively involved with my work at the Museum and I mean, politically active with the Aboriginal movement." Mr Thomas's evidence proceeded as follows:

"MR ABBOTT: I just want to understand what your evidence is?---Yes.

You say you did not go to these art classes before July 71?---That - to my knowledge, yes, that's probably the case, yes.

But you do not seem sure about it, do you?---Well, I'm more sure because there's my activity. I was working with the museum at the time, full time that is.

HIS HONOUR: When you did go, how long did you stay?---The classes? When the door opened. It was always run by John Morley. He'd be there.

Yes, I wondered how long it went on for? Was it an hour or two hours or?---Yes, two or three hours I would imagine, two hours - two or three hours.

MR ABBOTT: The occasions that you went, would you stay the full evening?---Yes, I would stay all the time, or stay for a short while. I think my wife was pregnant at the time. We'd stay a short while and go home early or something.

Did you offer any guidance to the children and the people working there?---No - what do you mean by guidance?

Guidance?---Guidance?

In terms of what - the art or creation they were doing?---I don't think I did. I wasn't instructing anybody, no, but if there were children there I would automatically help to arrange sticking colours on the surface or whatever.

Well, would you walk around the room offering helpful suggestions to people because they were painting?---No. I wasn't there for that reason.

That may be so but did you do it?---No, no. I was in the background. I was more interested in talking to John [Morley] about my work at the museum.

You also were there to support this work, were not you?---Yeah, because my wife - yeah. I'm an artist so I was, sort of, setting myself apart from people who were learning to be artists. It was a - - -

I might be quite wrong about this, Mr Thomas, but as an artist and a supporter of this group one might have expected that if you turned up you would offer some hints to people and guide them?---I could have, yeah. Could have, yeah, yeah. It's so long ago I don't recall giving any tuition to any child or adult only at a later stage at the Aboriginal College."

There was some further cross-examination of Mr Thomas to which I do not refer. Mrs Thomas was also cross-examined. I do not refer to the detail of her cross-examination but essentially she was pressed on the question whether, either at Flinders Street Baptist Church or at Currie Street, Mr Thomas might have taught art to classes which included Mr Brown prior to July 1971. She denied that that had occurred. At times I considered that her evidence about this matter revealed some doubt in her own mind about what the position in fact was but an overall reading of her answers to the questions which were asked shows that she maintained her denial and, to the extent that she repeated evidence which she had previously given, gave evidence which was consistent with it in substance and effect.

I must say that I am left with some impression that the Thomases are not as positive about whether there were art classes conducted by Mr Thomas at Currie Street prior to July 1971. But there is no evidence that they were conducted by him prior to that date nor is there evidence which would establish that, if Mr Thomas did conduct any such classes, Mr Brown was a member of the classes. Furthermore, there is really no evidence that Mr Thomas was ever involved in the running of a competition for the design of an Aboriginal flag either in 1971 or at any other time.

Counsel for Mr Brown made some submissions, with which I shall deal in due course, about the manner of the Thomases in giving evidence about the question whether Mr Thomas taught at Currie Street prior to July 1971. It is better that I come to those submissions when I come to the overall task of weighing up the evidence of the various witnesses in the case.

Finally, it is necessary to refer to the evidence of Mr C.D. Love who gave evidence in Mr Thomas's case during the July hearing. Mr Love is an administrative officer employed by the Tauondi College. He said that he was first involved with the College in 1973. The College was then situated in Thebarton. Mr Love said that Mr Brown was not then a student. He said that he had grown up with Mr Brown until about 1964 at Wellington in South Australia. He lost contact with him until about 1976. Mr Brown was then a student at the Tauondi College.

Mr Love had attended the College for one year in 1973. The year was from June 1973 until March 1974. He moved to the Torrens College of Advanced Education where he commenced a teacher training course. He was still there in 1975. He said that when the Tauondi College was initially set up, it was part of Torrens

College of Advanced Education. He retained his contact with the College even though he was no longer a student.

Mr Love commenced employment with the Tauondi College on 31 August 1976 and has since been continuously employed there. He is responsible for maintaining student records. He located records concerning the period during which Mr Brown was a student and the period during which Mr Thomas was employed by the College.

Mr Love said that he first saw the Aboriginal flag flying at the NADOC march in 1973. He had the contact with Mr Brown in 1976 to which I have referred. He used to see him sporadically. When he did see him, he would talk to him. Mr Love said that Mr Brown at no time said anything to him about creating the design of the Aboriginal flag. He said that he was not aware "of any of this" until it appeared in the newspaper or the media the previous year, i.e. 1995. Mr Love also had some contact with Mrs Brown but did not speak to her about the flag. She made no mention of it to him. He said that he had always taken it that Mr Thomas was the creator of the flag. Mr Love said that in 1973 Mr Thomas was "our art teacher" and at the time it was public knowledge "that students talk about who Harold was and what Harold had done..."

That then completes the review of the evidence in the case. I have earlier discarded Mr Tennant's case because of its inherent improbability. The ultimate question is whether I accept or reject Mr Thomas's case. He is the only party who seeks relief. That does not mean that it is not important to consider whether Mr Brown's case should be accepted. Its acceptance would automatically lead to the rejection of Mr Thomas's case. That is what Mr Brown apparently wants, not so much for the sake of having Mr Thomas's case rejected, but in order to achieve himself recognition as the designer of the flag.

To a degree, I must engage in a weighing or balancing process when coming to conclusions on what the outcome of the case should be. It is not appropriate to become too analytical when engaging in this process but it may be said that there are essentially two possibilities. The first is the acceptance or the outright rejection of Mr Thomas's case. The second is that, although I may not be persuaded that Mr Thomas's case should be rejected so positively, I may reach the conclusion that there are matters in the evidence called in Mr Brown's case which cast uncertainty on Mr Thomas's case to such an extent that I should reject it. That will not establish Mr Brown's case but it would secure the rejection of Mr Thomas's case. It would leave the position uncertain in the sense that neither would have established himself as the author of the design of the flag.

Mr Thomas brings the case and he must prove it. His evidence need not establish his case beyond reasonable doubt. It is sufficient if he establishes his case on a balance of probabilities. Nevertheless, I ought not to find for him unless I am left with an actual belief in the truth of his case. In my opinion, proof on the balance of probabilities does not involve a mechanical weighing of evidence accepted on one side or the other, as if one were placing it on a pair of scales. I know that that view is not universally held but, in my respectful opinion, the correct approach is that described by Dixon J in Briginshaw v Briginshaw (1938)60 CLR 336. His Honour there said (at 361) that the truth was that, when the law required the proof of an effect, the tribunal must feel an actual persuasion of its occurrence or existence before it could be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

Important in this exercise is my own reaction to the evidence of each of the witnesses, particularly the critical ones. They are Mr Thomas himself, Mrs Thomas, Mr Foley and Mr Ellis on the one side and Mr and Mrs Brown and Mr Rennie on the other.

A serious problem from which Mr Brown's case suffers is that it contains so many inconsistencies. Important in weighing Mr Brown's case are the documents which came into existence in 1995 well before Mr Thomas had initiated any proceedings. Those documents included the statement made by Mr Brown in March 1995, Mrs Brown's letter to the Australian in July 1995 and Mrs Brown's letters to the Land Council, the Minister for Administrative Services and the Staff Editor of the Australian, also in July 1995. Then there are Mr Brown's notices of interest filed in the Tribunal in May 1996. Why two were filed is not explained. It is to be observed that the two are not themselves consistent and that there are inconsistencies between them, Mr Brown's March 1995 statement and Mrs Brown's letters.

Mr Brown's evidence is quite general. He is in bad health and has the various problems dealt with in the medical evidence. He is unable to deal with the detail of his own case. This is no criticism of him. He cannot help his health but, of course, there is a real danger that he has, as a consequence of his medical condition, fabricated his claim. That does not mean that he does not believe in his case. I am sure that he does, but his own version of it cannot be right. He puts the events too late. I am satisfied, as earlier said, that the flag was first flown at the NADOC march in July 1971. The design of it occurred some time before then.

Mrs Brown's evidence has many inconsistencies as she herself has acknowledged. I have reached the conclusion that I cannot place any credence on any of her evidence. I frankly say that I do not know whether she is untruthful or whether she believes so implicitly in her husband's authorship of the design that she has adjusted her evidence from time to time to meet the exigencies of the case as it developed. She may not maliciously have given unreliable evidence simply because she thought that the end justified the means. Her belief in her husband's case may be so strong that it has blinded her to the need to keep the account of her evidence to her own recollection so that it does not contain reconstructions, many of which are themselves inconsistent.

I regret to say that I do not have a good impression of Mrs Brown as a witness. I have great sympathy for her particularly because of the difficult times she has had with her husband over many years. Despite their separation, she has remained loyal to him and has continued to be concerned about his health and his general welfare. It is perhaps significant that she has never sought a divorce. Nevertheless, my overall reaction to her evidence gleaned from her manner in the witness box, the many inconsistencies which are to be found in her evidence and the overall circumstances of the case have led me to the conclusion that I should reject her evidence and I do so.

That leaves Mr Rennie. He presents a puzzle. Counsel for Mr Thomas pressed on me the submission that Mr Rennie's evidence was essentially improbable. He said that Aboriginal activism was in its very early years in 1967. Such activism as there was was centred in the eastern states. That was Mr Foley's evidence. Furthermore, it was unlikely that a 17 year old Aboriginal youth such as Mr Brown, would have had the interest and the motivation and concern to set about designing a flag for the Aboriginal people.

But Mr Thomas himself was no more than 24 when, according to his evidence, he designed the flag in 1971. It is clear from his evidence that he did not commence his interest in Aboriginal problems in 1971. Plainly he had been interested at least since the late 1960s.

Public concern about the plight of Aboriginal people was not new in the late 1960s. It is true that it was not to the forefront of public concern and discussion as has been the case over the last 20 years. Nevertheless, in the early 1960s a group of Aboriginal people in the Northern Territory raised questions about a proposed mining development of land situated on the Gove Peninsula on the north eastern corner of the Northern Territory. Protests occurred. These were taken up by two members of the Federal Parliament. Eventually a case was brought in the Supreme Court of the Northern Territory. Judgment in the case was not given until

1971 but, as the report of the case shows, it had a long history. The case is reported as Milirrpum v Nabalco Pty Limited (1971) 17 FLR 141. There was a degree of publicity in relation to the events leading up to the hearing of the case and after the case was over there was a Royal Commission headed by the Honourable Sir Edward Woodward who had appeared for the Aboriginal plaintiffs in the Nabalco case. Later still came the Aboriginal Land Rights (Northern Territory) Act which contained provisions for the establishment of Aboriginal Land Councils and the appointment of an Aboriginal Land Commissioner. That was all much later than 1967 but, bearing in mind Mr Foley's evidence that political activism amongst Aboriginal people had commenced at least on the east coast of Australia in the late 1960s and the fact that the Nabalco case and the events leading up to it were complaining of a number of grievances which they had, it seems difficult to me to say categorically that a 17 year old Aboriginal youth might not have thought that it would be a good idea to design a flag which would become a symbol for his people. I have thought about counsel's submission but I do not think that I can take very much from it. In other words I do not think that one can say that it is either probable or improbable that a 17 year old Aboriginal youth in 1967 would have endeavoured to design a flag.

There are three matters in Mr Rennie's evidence upon which counsel particularly relied as showing that Mr Rennie's evidence was unreliable. There was his use of the word "confabulation" in the context in which he used it, bearing in mind its use by Dr Field in his report, the probability that there was no cement gang at Magill as distinct from the Yatala Prison, and Mr Rennie's evidence about the pink and yellow pages of the telephone book.

On reflection, I do not think that one can take very much from Mr Rennie's use of the word "confabulation". It is I think a straw in the wind; no more than that. It may be that he did take the word from looking at Dr Field's report but he has denied that this occurred and he has given an explanation of how he came to use the word. There is, however, a matter arising from his use of that word which is significant. It will be recalled that he deposed to having undertaken a careful review of his statement signed on 5 August 1996. In this exercise he removed from it all "confabulations", i.e. things that were not true or which he did not recollect. Mr Rennie is plainly quite emotional about his experience. His distress in the courtroom was due, so he said, to his affection for Mr Bonney and his sadness at the circumstances of Mr Bonney's death. It seems likely that Mr Rennie found the whole experience of endeavouring to recall events at the reformatory which had occurred almost 30 years beforehand a highly emotional one. In those circumstances one must be careful that one does not accept at face value everything that Mr Rennie has said because of a purported strong recollection. I am left with the impression that one needs to scrutinise Mr Rennie's evidence with a good deal of care.

I do not think I can take anything from the evidence about the cement gang. It was Mr Brown who raised the matter, at least according to Mr Rennie. Mr Brown may have been mistaken but Mr Rennie accepted that he was in the cement gang at Magill so the matter is capable of affecting Mr Rennie's credit if indeed there was no cement gang there. Mr Stanley's evidence suggests that there was not. But his evidence reveals that he was not as familiar with reformatories as he was with prisons. He could have been mistaken about what he said. After all he was endeavouring, as were others, to recall events that were almost 30 years old. In all the circumstances I think I should put the matter of the cement gang aside.

The matter of the colour of the pages of the telephone directory in which business entries appeared is, I think, in a different category. It is not that Mr Rennie made a simple mistake about the colour of the pages used for the business entries. If that were all, the matter could be put aside as an understandable mistake in Mr Rennie's recollection.

Miss Van Mourik is the assistant curator of technology at the History Trust of South Australia where a

collection of telephone directories for Adelaide and South Australia is maintained as a historical collection. Miss Van Mourik said that the change to the now commonly accepted yellow pages occurred in 1974, that is seven years after the incident at Magill. Until then the pages for business entries were invariably pink. How in those circumstances could Mr Wilson have thought, as he must have done, if Mr Rennie's account of events is to be accepted, that they were yellow? Furthermore, how, if Mr Wilson did say what Mr Rennie attributed to him, could Mr Rennie have thought Mr Wilson was correct? That is the assumption that underlies the evidence. In other words both thought that the business entries of the telephone directory were on yellow and not pink pages. It seems most improbable that two would make the same mistake. The only other explanation is that Mr Rennie's evidence about this matter is wrong and wrong in the sense that no such conversation ever occurred.

Mr Rennie sought to explain the matter to himself by justifying his recollection on the basis that the pages containing the telephone numbers for the Adelaide outer metropolitan zone were yellow, albeit a pale shade of yellow compared with the yellow now used for business entries. But that explanation, satisfying though it may be to Mr Rennie, will not help overcome the problems to which I have referred. Neither Mr Wilson nor Mr Rennie was referring to any telephone number in the outer metropolitan zone. They were referring to telephone numbers for silkscreen printers. They wanted a business number. They wanted to look in that part of the telephone book which would collect silkscreen printers together. The only place where that would be done would be in the business entries which were on pink paper. They were not on yellow paper and never had been on yellow paper up to that time. They were not put on yellow paper until seven years later. Mr Wilson's criticism, if indeed he said what he did, was unjustified, but Mr Rennie accepted it. Or so he said. The question I must ask myself is whether any such conversation occurred. It seems most unlikely that it did. Why then was it given such prominence in Mr Rennie's account of his recollection? The answer may be that it lent to the account a verisimilitude which Mr Rennie may have thought it otherwise lacked. It could have been, as was put to Mr Rennie, "a nice touch", in other words a little bit of embroidery or embellishment to make his account of events at Magill the more believable. Without being unkind, it could have been one of Mr Rennie's "confabulations" which he failed to remove from his statement when he edited it.

Notwithstanding what I have said, I think one needs to be careful before rejecting the general purport of Mr Rennie's evidence in its entirety simply because of this matter. But, if this were a fabrication, one could the more readily accept that Mr Rennie's graphic account of the conversation about "blood" set out earlier in these reasons was also contrived. It tends to give Mr Rennie's evidence a reality it might have been thought the bare bones of the story did not have. Eventually I have to ask myself whether I believe Mr Rennie's account of the events which occurred at Magill in 1967 or whether his evidence, notwithstanding some criticism that may be made of it, leaves me in such a state of uncertainty that I am unable to say whether or not I accept it but its effect has been to damage Mr Thomas's case. But there is also a question whether Mr Rennie is telling the truth at least in substance or whether he is a good story teller.

There are some other matters in his evidence relating to more recent events. Mr Rennie is a very adamant witness. As has been mentioned, he claims a very good memory. He was forthright in this claim although he did make some qualifications to his general statements. He was cross- examined about the way in which his three page statement (Attachment 3) of 5 August 1996 came into existence. Initially, he left me with the impression that he had commenced to compose it at about 7 a.m. on 5 August and had worked continuously at his task until about 1 p.m. or 2 p.m. when the statement was finished. He had the problem with the computer which he described but the statement itself was complete although a satisfactory copy could not be obtained until his daughter made one later in the day. But it then emerged that Mr Rennie began work on the statement earlier. Much of the time spent on 5 August 1996 was occupied in removing his

"confabulations".

I am not particularly critical of him for this in itself. Witnesses asked to make a statement about an event or series of events often tend to reconstruct their evidence. They need to understand the difference between actual recollection and reconstruction. Unlike most lay witnesses Mr Rennie seemed to understand this distinction very well. What he said he was doing on 5 August was in reality removing anything which he considered to be reconstruction and not recollection.

It is unusual to find a lay witness, even one of reasonable intelligence, performing such an exercise alone. It is not a very easy one even for those who have a close familiarity with the giving of evidence. I can understand a witness feeling the need to revise a statement of evidence and that such revision might involve deletion, omission or amendment. Nevertheless, the exercise of recollection was reasonably straightforward. Due allowance needs to be made for the passage of almost 30 years, although Mr Rennie did not seem to be overconcerned about having to remember the detail of events which had happened so long beforehand.

Mr Rennie seems to have remembered what occurred more because of his association with Mr Bonney than with any association he had with Mr Brown. It was because of the mention of Mr Bonney that he became upset in the course of his evidence. But what had occurred must have come back to him almost at once when he saw Mr Brown on television. The essentials of the story are not complex. They occurred in a comparatively short space of time. I find it difficult to understand why, particularly having in mind his degree of intelligence, he should have needed to spend so much time in preparing his account of the relevant events. In itself, this is a small matter but it has caused me to reflect on the overall reliability of Mr Rennie's evidence.

There is a further matter associated with this. Mr Rennie claimed to have read his first affidavit prepared for him by Mr Brown's solicitor only perfunctorily. The impression I have is that he did no more than glance at it for more than a minute or so. At least that is the effect of his evidence. He said that the essentials of the matter were in his own statement. He acted on the assurance of the solicitor that the affidavit was in accordance with that statement. There is no evidence from the solicitor and it may have been difficult for it to have been led. Nevertheless, I am surprised that any competent solicitor would allow the deponent of any affidavit dealing with a matter of any significance to swear it without ensuring that the deponent was clear about its contents. Either Mr Rennie's evidence about this matter is true or it is not. I have reservations about whether it could be true. If it is not, it reveals a somewhat detached - really cavalier - attitude to such an important document.

Counsel for Mr Thomas was critical of Mr Rennie in relation to his telephone conversations with Mrs Brown. I do not consider there is anything in this. The calls were made by Mrs Brown. It is what she might have been expected to have done. There were four calls in all, two lasting approximately eight minutes and the others of shorter duration. Counsel is really asking me to draw an inference that there was something sinister about all this. There may have been. But, having reflected on the matter, I do not feel able to draw that inference. Nor do I regard eight minutes on the telephone as a particularly long period. It can pass very quickly especially if the two participants have occasion to recall past events and acquaintances and friends of years gone past. The evidence is that Mrs Brown and Mr Rennie did not know each other before August 1996. I think that that is probably true. But Mr Brown had known Mrs Rennie. He has the tattoo of his and her initials on her arm. And there were other people whom Mrs Brown and Mr Rennie knew or knew of even though they themselves were not acquainted.

I have noted that there is no telephone number shown on the letter which Mr Rennie wrote to the Copyright Tribunal on 30 July 1996. But there was no cross-examination of Mrs Brown or Mr Rennie about that matter

and I assume she obtained his telephone number from the directory or through the exchange.

I do think it somewhat puzzling that Mr Rennie did not tell his wife about the matter at about the time of the television broadcast and later on as he prepared his statement. He must have told his daughter because she helped him produce a proper copy of what he had written. It is true that Mr and Mrs Rennie have had periods of separation but they were not estranged at the time in question. One could speculate about these and other matters at greater length as I suppose I have done during my consideration of the matter since I reserved my decision.

I did not find anything in Mr Rennie's demeanour which would cause me concern. As indicated, I think the most puzzling evidence he gave was of his conversation with Mr Wilson about the colour of the pages of the telephone directory which contained the business entries. I really find that evidence difficult to explain except on the basis that Mr Rennie has made up that part of his evidence. There are some other matters to which I have referred which have all given me occasion for anxiety about Mr Rennie's reliability. I have referred to these and I do not go over them again.

What needs to be done is to weigh up Mr Rennie's evidence in the light of Mr Thomas's evidence. As mentioned Mr Thomas bears the onus of proof. I have earlier said that his case is a strong one. I was favourably impressed by him as a witness. The question I have to decide is whether the fact that Mr Rennie's evidence may be true should dissuade me from accepting Mr Thomas's evidence.

Despite my favourable opinion of Mr Thomas, there is one matter which appears in his evidence, and also to a degree in that of Mrs Thomas, which has occasioned me some concern. At the December hearing he gave evidence in reply. His evidence included the passage quoted earlier in these reasons. In the course of that evidence Mr Thomas became uncertain. He was asked about the Currie Street art classes, not art classes held at the Flinders Street Baptist Church. He was asked about his statement that he did not go to these art classes before July 1971. His answer both in the typescript and in the way that he gave it revealed uncertainty. He said "that - to my knowledge, yes, that's probably the case, yes." The next question suggested that he did not seem sure about "it" and he said, "Well, I'm more sure because there's my activity. I was working with the Museum at the time, full-time that is." One has to read the passage as a whole, but I mention that later he was asked whether he had offered guidance to the children and the people working there. He said no but added, "What do you mean by guidance?" Counsel said that he meant guidance in terms of "the art or creation they were doing". Mr Thomas answered, "I don't think I did. I wasn't instructing anybody, no, but if there were children there I would automatically help to arrange sticking colours on the surface of whatever." He denied that he walked around the room offering helpful suggestions to people as they were painting. He said that he was not there for that reason. He said he was in the background. He was more interested in talking to Dr Morley about his work at the Museum. It was suggested to Mr Thomas that as an artist and a supporter of the group one might have expected that he would offer some hints to people and guide them. His answer was, "I could have, yeah. Could have, yeah, yeah. It's so long ago I don't recall giving any tuition to any child or adult only at a later stage at the Aboriginal College." Mr Thomas is there referring to the Tauondi College at which he taught later on.

I think I have a concern about Mr Thomas's evidence at this point because of the uncertainty which appears implicit in it. It is unlike the evidence which he had given earlier. The case made on Mr Brown's behalf is that he drew the flag at an art class and Mr Thomas copied it, either by taking Mr Brown's drawing or by making a mental note of it and then making a subsequent copy. Mr Thomas has denied this. At the July hearing his evidence was very strong and his denial explicit.

In the evidence to which I have just referred Mr Brown was not asked about having copied anything done by

Mr Brown. There is nothing in the evidence about that matter. He was not even asked whether Mr Brown was there. In those circumstances, despite some reservation I have about Mr Thomas's evidence in relation to this matter, I do not see how it helps Mr Brown's case. It does not assist Mr Brown to establish that Mr Thomas took his design. Mr Rennie's evidence will not do that because he goes out of the matter in 1967. He has no other part to play in it. Mrs Brown's evidence will not help because she herself has given evidence which contains so many inconsistencies that I feel unable to accept any of it. The evidence called from Ms Watkins, Mrs Karpany and Mrs Cain does not help either because it does not establish Mr Brown's case.

Really my concern about Mr Thomas's evidence in the passage to which I have referred arises because he is not prepared to say straight out that he may have been present at art classes and he may have offered some help from time to time to students who were there. That would have been a very natural thing for him to do. It could not have involved him in any infringement of Mr Brown's copyright or the copyright of anyone else. At all previous times he denied ever having rendered such assistance before the design of the flag was made by him and the flag was flown in July 1971 in Victoria Square. His art teaching came later. The passage in his evidence to which I have referred suggests that the position may have been different in the sense that he did give some teaching help not in the form of formal lectures or lessons but in an informal way in the manner which was suggested to him in cross-examination.

The question I must decide is whether I should let that matter destroy Mr Thomas's case. One only has to ask the question to realise that the answer must be in the negative. I could not possibly do so. My favourable impression of Mr Thomas as a witness overall remains. It is just that I am puzzled by this latter piece of evidence. Naturally counsel for Mr Brown made a good deal of it in his submissions.

It is difficult to reach the conclusion that Mr Thomas's case should be accepted without at the same time deciding that Mr Rennie's evidence is not credible. That, however, is the conclusion to which I have come. Mr Thomas's case is so powerful that it outweighs Mr Rennie's evidence which, in any event, as I say would not establish Mr Brown's case for him because there is no support in it for Mr Thomas having taken the design from Mr Brown. Nor is any such evidence to be found elsewhere.

Of course it is not unusual in cases involving the infringement of copyright for infringement to be found without direct evidence. It would indeed be unusual for direct evidence to be available. What usually happens is the giving of clear and cogent evidence by the applicant for relief of having created the work in question coupled with evidence of an opportunity by the alleged infringer to have copied it and the production of copies of the work by that person. Here the evidence of the creation of the work by Mr Brown is far from satisfactory as I have endeavoured to show. Nor is there satisfactory evidence that Mr Thomas had the opportunity of copying any of Mr Brown's work, at least prior to July 1971 when the flag came into existence.

Having reflected on the matter at some length and given the weight to a number of matters which I have indicated I have, I have come to the conclusion that I should accept Mr Thomas's case and reject that of Mr Brown. That means that, subject to the next matter with which I deal concerning the copyright/designs overlap which exists in this case, Mr Thomas is entitled to succeed.

The final matter to be dealt with concerns the relationship between the Copyright Act 1989 and the Designs Act 1906. I should preface my treatment of this aspect of the case by saying that the matter was raised by me when the case was in the Tribunal. Short submissions were made on behalf of the Commonwealth and Mr Thomas. There was no submission on the part of any party that the provisions of the Copyright Act dealing with works which were also designs operated to deprive Mr Thomas of the relief which he seeks. The relevant provisions of the Copyright Act are to be found in Division 8 of Part III of that Act. The Division is

entitled "Designs". There have been two occasions when significant amendments have been made to the sections in the Division since 1969 when the Copyright Act came into force. The Division took its present form on 1 October 1990. There was no submission that it was inappropriate to have regard to the provisions as they were after that date in order to resolve the present problem. That was so, notwithstanding that the design was created no later than July 1971. I have therefore referred to the provisions of Division 8 in their present form.

The relevant sections are ss.74, 75 and 77. Section 74 defines "corresponding design". In relation to an artistic work, it means a design that, when applied to an article, results in a reproduction of that work, but does not include a design consisting solely of features of two-dimensional pattern or ornament applicable to a surface of an article.

The design in question was applied to a surface, namely cloth or paper. It consists solely of features of two-dimensional pattern or ornament. There is thus a question whether it is a corresponding design within the meaning of the section. The matter was not fully argued. For other reasons I have reached the conclusion that Mr Thomas's claim for the relief which he seeks in paras 1a and 1b of his amended application is not affected by the provisions of Division 8 of Part III of the Copyright Act. In those circumstances I do not need to express a view on the matter and I do not.

Section 75 deals with the situation which applies where copyright subsists in an artistic work and a corresponding design is or has been registered under the Designs Act. It is not an infringement of that copyright to reproduce the work by applying it or any other corresponding design to an article. That section has no application to the present circumstances because there has been no registration of the design of the flag under the Designs Act.

The relevant section is s.77 which applies where copyright subsists in an artistic work whether made before the commencement of the section or otherwise; a corresponding design is applied industrially, whether in Australia or elsewhere, by or with the licence of the owner of the copyright in the work in the place where the industrial application happened; at any time on or after the commencement of the section articles to which the corresponding design has been applied are sold, let for hire or offered or exposed for sale or hire, whether in Australia or elsewhere; and at that time, the corresponding design is not registrable under the Designs Act or has not been registered under that Act.

Subsection 77(2) provides that it is not an infringement of the copyright in the artistic work to reproduce the work, on or after the day on which articles made to the corresponding design are first so sold, let for hire, or offered or exposed for sale or hire, by applying that, or any other, corresponding design to an article. Regulation 17 of the Copyright Regulations provides that, for the purposes for s.77 of the Act, a design is taken to be applied industrially if it is applied to more than 50 articles or to one or more articles, other than hand-made articles, manufactured in lengths or pieces.

The provisions of Division 8 of Part III of the Act were amended by the Copyright Amendment Act. The new provisions come into force on 1 October 1990; see the Copyright Amendment (Re- enactment) Act 1993 , s.4. In Ametex Fabrics Inc. v C & F Fabrics Pty Limited [1992] FCA 529; (1992) 24 IPR 449 Wilcox J held that the immunity from suit for infringement conferred by s.77 deprived the copyright owner of a right of action but did not have the effect of divesting the copyright interest. There was no submission by counsel for any party that I should not follow Wilcox J's decision. In those circumstances, it is appropriate to make declarations to the effect of those sought by Mr Thomas in paras 1a and 1b of his amended application if I consider that he is otherwise entitled to them. In reaching my conclusion I have adopted submissions made on behalf of the Commonwealth, as a party to the proceedings before the Tribunal, that ss.74 to 77 do not affect the

ownership or subsistence of copyright. They provide defences to an action for infringement by prescribing circumstances in which conduct which would otherwise infringe copyright will not do so.

In Ametex Fabrics, Wilcox J also held that the applicant in that case had no right of action in respect of any reproduction in Australia of the relevant design before 1 October 1990, when the new legislation came into force, because the design fell within the then definition of "corresponding design" in s.74 of the Copyright Act with the result that s.77 deprived it of copyright protection. But his Honour also held that, in relation to actions after 1 October 1990, the new definition applied.

The relief I propose to grant is limited to declarations to be made in the form of those sought in paras 1a and 1b of the application. I do not propose to grant any other relief at least without further argument. I have, however, reserved liberty to Mr Thomas to make such application as he may be advised for the relief sought in the balance of his amended application provided any such application is made within 14 days of today and notified to the other parties within that time. The application may be made by sending a copy of it to my associate.

One reason why I have not thought it appropriate to grant that relief is that I have not heard full argument on the matter; indeed I think the argument on it was extremely limited. Furthermore, it may be that Mr Thomas will be satisfied with the declaratory relief which I have decided should be granted. That should enable him to pursue now his case in the Copyright Tribunal.

In the result I make declarations in terms of paras 1a and 1b of the amended application. I reserve leave to Mr Thomas to make such application for the balance of the relief sought by him in his application provided any such application is notified to my associate and to the solicitors for Mr Brown and Mr Tennant on or before 23 April 1997. Mr Thomas's and Mr Brown's costs have been funded by legal aid agencies. It seems unlikely that any order for costs made against Mr Brown would be satisfied. In the circumstances I make no order as to costs.

I certify that this and the one hundred and fifty-eight (158) preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Sheppard.

Associate

Dated: 9 April 1997

APPEARANCES

Counsel for Mr Thomas: Mr C.R. Golvan

Solicitors for Mr Thomas: North Australian Aboriginal Legal Aid Service

Counsel for Mr Brown:

23-24 July 1996 Mr I.C. Robertson

25 July 1996 Mr Brown appeared in peson

(Mr Roberston remained as amicus curiae)

11-12 December 1996 Mr H.A.L. Abbott

Solicitors for Mr Brown:

23-25 July 1996 Johnston Withers

11-12 December 1996 Steven M. Clark Pty Ltd

Counsel for Mr Tennant:

23-25 July 1996 Mr Tennant appeared in person

11-12 December 1996 Ms E. Ryan

Solicitors for Mr Tennant:

11-12 December 1996 Ryans

Dates of Hearing: 23, 24, 25 July 1996

11 and 12 December 1996

Place of Hearing: Adelaide

Date of Judgment: 9 April 1997

ATTACHMENTS

1. Aboriginal flag - Page 1
2. Tennant's drawings - Page 117
3. Mr Rennie's three page document - Page 64