



# THE DEAD HAND OF COPYRIGHT: FLAGGING AN ISSUE

**Stephen Berry**

Flags Australia.

One of the curiosities of vexillology in Australia has been that the asserted ideal of inclusion is frustrated by the opposite idea of exclusion when it comes to efforts to define Australian identity in flags.

There has been no shortage of proposed alternatives to the Australian flag.

However, the resort to exclusive copyright in my view is a major obstacle to arriving at an appropriate flag for Australia.

What I wish to present is a very personal story. It is an account of my own involvement in the effort to find a flag that truly includes all Australians, and especially the survivors of the indigenous, first Australians.

My own starting point of interest in the Australian flag issue was different from many other proposals. I was moved and inspired by the achievement of an extraordinary young Australian and Aboriginal athlete Cathy Freeman in her victory lap bearing two flags at the 1994 Commonwealth Games. Her action was a riposte to the short-sighted official edict that Australian athletes could only carry the Australian flag.



Cathy’s example inspired me to acquire my first two flags – the Australian and the Aboriginal flags. These two were the key to the later design idea that I believe was simple and unique, as demonstrated in more detail below.



Both present a challenge to the designer.

The Australian flag (**left**) would seem to divide black and white Australia, for what it conveys and what it does not say. It advertises the country as a possession of the British Empire, while for the original people displaced a flag of their dispossession.



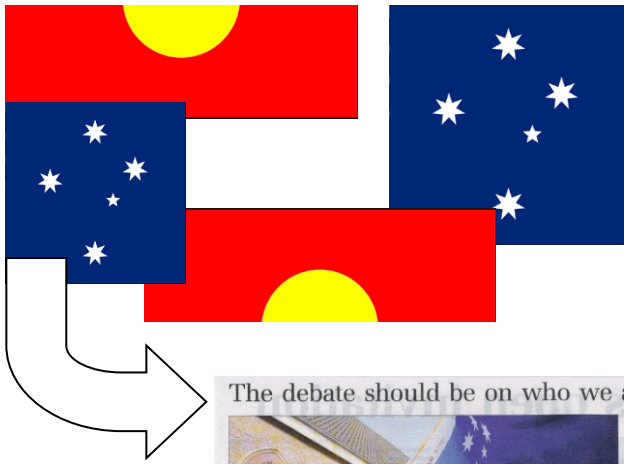
They are not included and so have resorted to their own flag (**left**) celebrating people and land under the single sun. Aboriginal Australians by this flag celebrate place – not race.

## THE CHALLENGE

One flag for a united people is surely not hard to find.

My own suggestion has seemed obvious and simple. It combines the two flags in the manner illustrated below.

Fold each flag in half, the Australia flag vertically, the Aboriginal horizontally, and then combine the red land and the visible half of the sun disk from the Aboriginal flag, and the outer half of the Australian flag - the Southern Cross.



The debate should be on who we are, says Berry

**BOEL ERIKSSON**  
CHANGING the Australian flag is not a question of if but when, says a federal flag designer who re-introduced his original design at a church service in Adelaide today.

Stephen Berry handed over his flag to a church on Sunday to continue the fight against the current design and proposed his "Sunburst" flag, which combines the Australian and Aboriginal flags, in a yellow sun against a blue sky over dark red earth.

Mr Berry said handing over his flag in front of a small congregation on Sunday was a symbolic gesture to show that the flag belonged to the people.

Other alternative flag designs, such as one suggesting a booby kangaroo, is privately owned and subject to copyright.

"Who we are is not subject to copyright," Mr Berry said the day after the service when he was asked at a string-up session.

"They were asking what we got out of the Union Jack and how you see that you are different from them are against it," Mr Berry said.

"Instead you should be whether indigenous Australians should be included in the flag, and whether the Anzacs should be included.

"The debate was all about sporting people... rather than education, like we got."

Mr Berry said he had people to sign the flag to show they were for it.

He hopes to get enough signatures to fill the white flag, and said it was now circulating widely.

Aboriginal communities and reconciliation groups.

Stephen Berry has handed his Sunburst flag to the people.

PHOTOS COURTESY OF BOEL ERIKSSON

## Flagging a big change

**BOEL ERIKSSON**  
THE flag will change when Queen Elizabeth II, says federal flag designer Boel Eriksson, who is to meet personally and other flag designers.

"This is when Australia will first be treated to become a republic," he told the Daily Telegraph.

The heated debate stirred up the people show participation in the controversy of Mr Eriksson's design, which was introduced on Anzac Day and led by federal flag designer Boel Eriksson, who lives in Adelaide.

"I've had lots of phone calls and emails, some who are very positive and some who are saying 'how dare you touch our flag,'" Eriksson said.

The heated debate stirred up the

**Do you think the flag will change and Australia will become a republic when the Queen dies?**  
Comment on the day at [www.daily.com.au](http://www.daily.com.au)

"Of course, it's a very emotional subject," he said.

Eriksson said while he did not endorse a specific alternative flag, he just did not want the Union Jack to feature on it.

"Occasionally, I just don't want another country's flag on ours," he said.

"Most people who are against a change start off by saying 'my great-grandfather came here three generations ago' - but they need to realise it's not about you, it's about the country."

"Of course the flag will change. I have no idea when that will happen but my guess is when the Queen Elizabeth II dies."

Martin, who has long pushed for a new flag that does not feature the Union Jack, could not be reached for comment before the Daily's deadline.

There is also a certain Anzac spirit to the design. Flip the bottom half of the Aboriginal flag and the Rising Sun emblem of Federation and Anzac appears, the red band also recalling the sacrifice of the Anzacs.

If a good flag is to be simple, what could be simpler?

However, putting the design out in the open field was not a positive experience, particularly in dealing with Ausflag, an incorporated body and the chief sponsor of several flag design quests since 1985. Ausflag insists that ownership of copyright be transferred to it before it can offer any alternative design for an Australian flag to the Commonwealth Government.

That is all very well. However, the issue of copyright is not as clear in Australia as it ought to be, in comparison with world standards, and is open to dilute, even nullify, effective assertion of designers' intellectual property.

It is also convenient for Ausflag and flag-makers alike to appeal to copyright to secure their respective political and commercial interests.

For example, a design that incorporates whole or part of the Aboriginal flag can be asserted as either

**1 an innovation** – that is, a new design, with claim to originality

or

**2 derivative** from an existing design (over which formal copyright to secure restricted commercial trade has been put in place – as is the case with the Aboriginal flag – and to the annoyance of many Aboriginal people.

I ran up against the same quandary in seeking to promote a design that is both original and unique in the way it seeks to reconcile sentiments of belonging of Australians – all sharing the experiences and consequences of European settlement.

However, with confidence in the simplicity and logic of the design, I submitted it to the Ausflag Professional Designers' Competition announced in 1997, but qualifying surrender of copyright to apply only if the design were successful. If not, copyright (and the design) was to be returned. That stipulation was rejected by Ausflag. And the design? Ausflag managed to lose it, and to this day have failed to return it.

These same constraints apply even to Ausflag’s own gallery of designs it has tried to promote. They also partly explain why none have succeeded in gaining popular traction.



In my view, there are also other reasons for that and chiefly, a failure of imagination. For example, here is Frank Gentil’s design, Judges’ Choice in the Professional Designers Competition in 1997. A bland collection of stars, the same colours of the flag of Nauru, and not greatly different from the state flag of Alaska, nothing in it suggests Aboriginal presence, and attachment to the land, nor of the sacrifices of services in defence of our country.

Hoping for endorsement of my reconciliation design, I approached Harold Thomas, designer of the Aboriginal flag itself and Olympians Cathy Freeman and Ian Thorpe, but without success. Hoping also that cheek did not amount to *lèse majesté*, I also sent a flag to Buckingham Palace with the message: “After too many years in the Aussie Sun the Union Jack has melted into the colours of the earth, sky and stars”. This also melted.

It became clear, as other designers (and even Ausflag) have found, that the promotion of my flag would have to be a self-publishing exercise, first by registering the design as “The Sunburnt Flag” and then approaching Melbourne flag manufacturers Carroll and Richardson and Evan Evans.



Carroll and Richardson informed me that the design might breach the copyright over the Aboriginal flag they had formalised with Harold Thomas and so declined to produce the Sunburnt Flag. (This was however countermanded after appointment of a new Manager).

Carroll and Richardson’s competitors, Evan Evans, on the other hand were delighted and offered discount on the cost of the first 100 flags produced, so I set about advertising both sewn and printed flags, table flags, towels, decals and lapel pins – and planned for eventual derivatives (**right**).

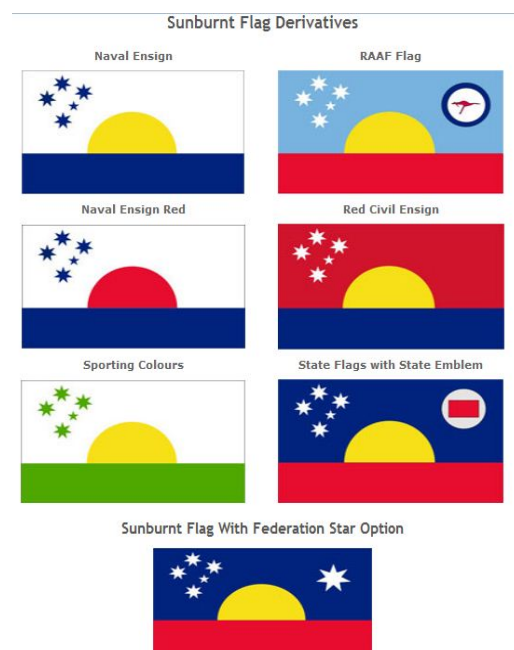
### THE CONTRADICTIONS IN DEMANDING COPYRIGHT

Since its launch in 1981, Ausflag has been consistent in two things:

- Its failure to produce, from the 50,000 designs it claims to hold, and despite unveiling around a dozen different models, an alternative flag to inspire and enthuse the general population.
- secondly, its insistent claim to own all designs submitted to it - again, all 50,000?

The first is obvious. No one is saluting anything.

The second is flawed as the following images would indicate:



Ausflag, like Carroll and Richardson, has had the effrontery to insinuate that if one designer incorporating a shape similar to someone else’s by that alone breaches copyright. Let us look at the consistency of this – or rather its lack.

For example, compare the hemispheric shape in my design with the “fried egg” ellipse (Design No. 29 of the 100 exhibited). Nothing here to convey the bold symbols of the Aboriginal flag or the Rising Sun device of our military. Does the White Man’s Federation seek to dominate the emerging sun?



The blue, gold and red kangaroo design by George Magaritis (**left**) was the People’s first choice, and Judges’ second in the 1998 Competition. (It was later turned around to face the hoist rather than retreat).



Again, compare this with the Ausflag “*Fried Egg Flag*”. Apart from showing a Kangaroo, what is the real difference? The colours are the same, the star a feature of both.



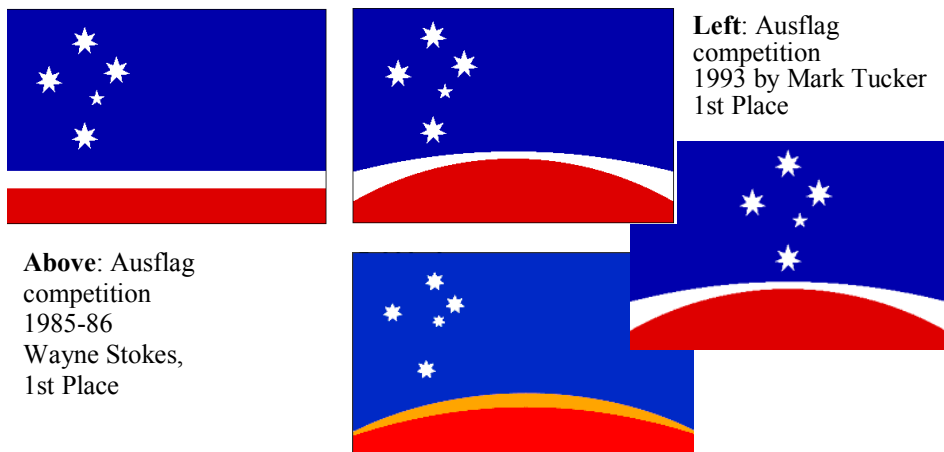
And in regard to the kangaroo itself, the idea of a kangaroo on the move was already copyrighted to QANTAS (**left**). And yet Ausflag was apparently happy to lift the logomark for its own 1994 design in the Aboriginal colours (**right**), itself a version of an earlier design by Lunn-Dyer not greatly different from the Japanese flag, and selected as the People’s third choice in 1998.



To my mind such inconsistencies make a nonsense of claims that my design or others with similar features might infringe anyone else’s work.

Ausflag’s Professional Designers Competition designs were declared in 1998, the Judges awarding first place to Frank Gentil’s blue flag replacing the Union Jack with a gold star as a symbol of another union. But what does it say about Aboriginal identity, inclusion or the spirit of the Anzacs?

Previous winners of Ausflag’s sponsored designs were no less bland – and also proclaimed as Ausflag’s copyright. The absurdity of appeal to prior copyright is illustrated by several other similar flags accepted in Ausflag’s stable. Consider:

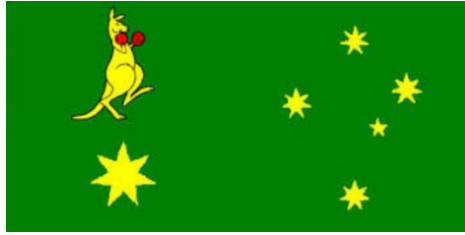


**Above:** Ausflag competition 1985-86 Wayne Stokes, 1st Place

**Left:** Ausflag competition 1993 by Mark Tucker 1st Place

There have been other private actors in the lists of the flag debate, all without recourse to Ausflag, which through its own policies has managed to discourage - even alienate - talent that could have been more tactfully and courteously co-opted to the cause of a new Australian flag.

Ausflag’s pretensions notwithstanding, designers have done their own thing. Some have combined the official colours green and gold with the Aboriginal flag or with the Southern Cross:



As we heard on the first day of this Congress, the cartoon-style Boxing Kangaroo is now owned by the Australian Olympic Committee. Yet here it is on an Ausflag proposal. Has Ausflag rejected this as a breach of copyright?

Designers who would not surrender their copyright to Ausflag include Fred Rieben, with his innovative boomerang and stars flag (**right**) that he has toured around the country.



James Parbery's "All Australian" flag offers a unique approach to a Commonwealth star (or sunburst) of 12 points and implied reference to the symmetry of the Eureka flag. Parbery's design predates Ausflag Professional Design winner Frank Gentil's, and had been prominently displayed from the mast of the *Bounty* replica on Sydney Harbour in the mid-1990s.



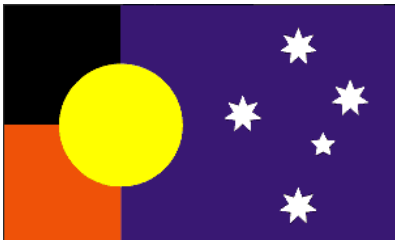
## FUTURE PROSPECTS

In April 2010, Channel 9 television *60 Minutes* as a special topic around Anzac Day staged a "debate" on the national flag at Leichhardt Town Hall, Sydney. Depending on point of view, the choice of venue alone was appropriate or provocative. It was here that one of the designers in 1901 of the current flag was born and lived.



The idea was a controversial and still risky bid by the station to raise its profile - and ratings. It did generate publicity – negative, as the proceedings descended into farce, the "defenders" of the current flag swamping the meeting, while outside, an anti-immigrant "patriotic" group demonstrated under the Australian and Federation flags. The photo above conveys some of the mood, and keen observers will notice the array of Australian flags around the walls. The Producer had contacted Fred Rieben and myself, ostensibly wanting to include our designs as focal points of interest and to tell our stories of our independent designs. Neither of us got that opportunity. Ausflag's agenda and that of its opposition dominated.

The question - the wrong question - became *Get rid of the Union Jack*, when the real issue should have been: *What unites us?* and *How do we include Indigenous Australians?* If you ask Australians the wrong question, you get a very wrong answer – exclusion, instead of inclusion.



Irrespective of conditions that Ausflag imposes, and publicity that it mismanages, some designs seem to be on the right track toward inclusion of all Australians, even to literally, and clumsily, including the Aboriginal flag.

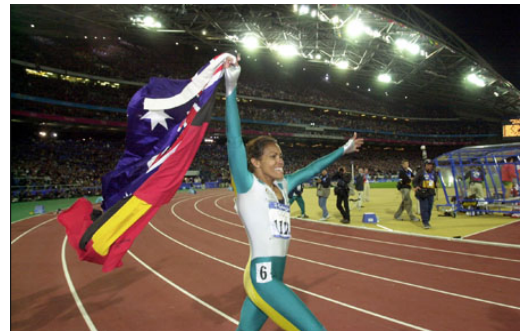


Only a united country can agree on a unified flag. Three obstacles have impacted on and impeded the quest for a single Australian Flag:

- Copyright – if left open to abuse and manipulation;
- Entrenched symbols of a foreign monarchy;
- A deep and persistent cultural mentality supporting exclusion (in regard to so many minorities: (“you are not us”) rather than an inclusivist acceptance and welcome.

Australia’s settlement history is marked by a long record of resentment of successive new arrivals – and starting with ostracism of those who had arrived in the first place.

Inclusiveness - and that means recognition and inclusion of the Aboriginal people, excluded as they were in the Constitution as drawn up in 1900 – is the primary issue facing Australians, even before considering the flag.



There was a moment of acceptance at Freeman’s run in 2000. But it took eight more years to reach the next milestone in the whole country’s greater run. Saying “Sorry” without practical follow-up is not enough.



If there must be debate on the design of the national flag (and I think there must), it has to be a flag that represents a real nation, not just the assumption of one. Who we are together cannot be subject to the claims of “copyright”. For my own part I am proud to say that my own design is one result of asking “who we are.”

## SUMMARY

Ausflag insists that it is necessary to hold copyright of any design, so that it is free to recommend an alternative flag to the Government - a condition also of the legislation enacted for the two-stage New Zealand flag referendum in 2015-16.

This blanket condition is however flawed. In the New Zealand process, copyright transfer was only permanent in respect of designs presented as suitable alternatives - in that case, this applied to just five designs out of the more than 10,000 submitted.

Ausflag’s demand of blanket assignment has proven counterproductive in the 35 years of its campaign. It is significant that many of Australia’s leading graphic designers stayed away from the Professional Designers’ Competition sponsored by Ausflag.

Copyright can of course be alienated – given away – but what cannot be given away are the right and moral obligation to recognise designers and the intellectual property which cannot be abrogated.

Designers - and entrepreneurs – might confuse copyright and intellectual property. Intellectual property cannot be bought and sold, and for those who can sustain the expense, litigation is one response against plagiarism, the 1997 Federal Court challenge to Harold Thomas’ authorship of the Aboriginal flag precisely one such.

## POSTSCRIPT

In 2012, I relinquished copyright to my design, gifting it to the Aboriginal people.

The possibility of Australia's flag changing at this point seems remote – with a succession of unstable governments, a looming budget deficit, unresolved constitutional issues regarding recognition of Aboriginal people in the Constitution, and the prospect of revisiting the Republic - while external factors in our region will compete as priorities for some time to come.

In the meantime, and a great consolation in the face of sheer obstructionism of those purporting to encourage debate on the flag, I have been fortunate in having the genuine friendship of Aboriginal people in Sydney drawn by the ideas proposed on this flag. Among them are Redfern Elder Ali Golding whose own assessment of the flag I am proud to present at this gathering of vexillologists:

*“I believe (Stephen) has been touched by the Big Spirit to inspire him to such a well-designed flag ... that I believe could break down all negative barriers so we can all live together in unity, harmony and peace.”*



With Ali Golding at Redfern Housing Co.,  
“The Block” off to see Nelson Mandela at  
Sydney University on 4 September 2000.  
*Sydney Morning Herald p.4.*