



Australian Government

Australia  
Council  
for the Arts



# Protocols for using First Nations Cultural and Intellectual Property in the Arts

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The principles used in this document are based on the True Tracks® Principles.

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Joel Bray and Damion Hunter in *Djorra* - a NORPA Production, Credit: Kate Holmes;

Polly Hilton, Darren Edwards, Claire Voss, Christian Luck, Catherine Young and Oliver Edwardson in *Milnjiya, Milky Way - River of Stars*, image courtesy of West Australian Ballet. Credit Sergey Pevnev.

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Thank you for your time discussing your projects with us over the phone, through emails and in person.



## Language

Throughout this protocol guide, the terms 'Indigenous' and 'Aboriginal and Torres Strait Islander' are used interchangeably to reference the First Nations people and communities of Australia. Within the Australia Council for the Arts, we use the term 'First Nations'. However, when we work with specific communities or language groups, we seek guidance from those in authority about the respectful and appropriate language protocols.

## Warning

The Australia Council respects First Nations communities and cultures. Readers should be aware that this document contains the names of deceased Aboriginal and Torres Strait Islander people.

## Important notice

The information included in this document was current in July 2019.

This document was published under the following titles in 2007:

*Performing Arts: Protocols for producing Indigenous Australian performing arts*

*Music: Protocols for producing Indigenous music*

*Writing: Protocols for producing Indigenous writing*

*Visual arts: Protocols for producing Indigenous visual arts*

*Media arts: Protocols for producing Indigenous media arts*

This protocol guide provides general advice only. It is not intended to be legal advice. If you have a particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner.

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## Part 1:

# Concepts, principles and protocols

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## 1.1 Introduction

**Australia's unique Indigenous artistic and cultural expression is rooted in thousands of years of heritage and continuing practice and its uniqueness has been recognised internationally.**

When the Musée du Quai Branly opened in Paris in 2006, visitors were spellbound by the immense power of the vast collection of Australian Indigenous artworks, including special landmark commissions on the ceilings and façade by eight of Australia's best known Indigenous contemporary artists. In May 2007, Emily Kngwarreye's *Earth's Creation* was sold at auction for more than \$1 million, at the time the highest price ever for a painting by a female artist in Australia. In 2017, it was then sold for over \$2 million at a Sydney auction, making it the second highest price paid for an Indigenous artwork in Australia.

While works by individual artists such as these are protected by copyright, there are often no legal rights around the broader reproduction and use of Indigenous cultural heritage material. Australia does not yet have a law that prevents alteration, distortion or misuse of traditional symbols, songs, dances, performances or rituals that may be part of the heritage of particular Indigenous language groups.

That is where this Australia Council for the Arts' *Protocols for using First Nations Intellectual and Cultural Property in the Arts* comes in. This protocol guide spells out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material in arts and cultural projects. It can help people do the right thing.

This protocol guide recognises that in Indigenous Australian communities, the artist is a custodian of culture with obligations as well as privileges.

### 1.1.1 Background

First published in 2002 and revised in 2007, this protocol guide endorses the rights of Indigenous people to their cultural heritage and supports Indigenous creative practice. This protocol guide encourages self-determination and helps build a strong and diverse Indigenous arts sector. These are key goals and priority areas of the Australia Council for the Arts.<sup>1</sup>

Creative practitioners who work with Indigenous artists or engage with Indigenous cultural heritage in projects, and are funded by Australia Council for the Arts grant assessment panels are required to comply with this protocol guide as a condition of funding.

Over the years, the principles and protocols contained in this protocol guide have also been applied nationally and internationally – educating readers and users on Indigenous Australian cultural heritage, and encouraging meaningful collaborations with Indigenous artists and creators.

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### 1.1.2 What are protocols?

Protocols are appropriate ways of engagement with Indigenous cultural material and interaction with Indigenous peoples and communities. They encourage ethical conduct and promote interaction based on good faith, mutual respect and cultural values.

Responsible use of Indigenous cultural knowledge and expression will ensure that Indigenous cultures are maintained and protected so they can be passed on to future generations. It is important to recognise the diversity and complexity of the many different Indigenous cultures in Australia. Ways of dealing with issues and cultural material may differ from community to community. There are also many different protocols across the diversity of urban, rural and remote communities.

While it is not possible to prescribe universal rules for engaging with Indigenous peoples and their communities, there are some fundamental principles within which to conduct respectful work. The protocols outlined in this guide are shaped by ten principles. The protocols are, by definition, ways of applying these principles. For example, a cultural protocol to implement the underlying principle of respect is to acknowledge the Indigenous custodians of country at the site of each exhibition, performance, installation or event launch, and beforehand in the acknowledgement of a project that is about a specific Indigenous country, as well as on inscriptions that accompany art displays.

The protocol guide identifies many specific protocols which can be applied or adapted by artists, writers, producers, directors, designers, musicians, singers, songwriters, choreographers, arts organisations, event managers, and others working in the creative arts.

This protocol guide also aims to identify issues arising from the interaction between Indigenous cultural concerns and the law protecting the rights of artists. The Australian legal system incorporates some but not all of these concerns.

While protocols differ from legal obligations, the protocol guide outlines the current copyright law framework. The process of following the protocols supports the recognition of Indigenous heritage rights. It encourages culturally appropriate working practices and promotes communication between all Australians with an interest in Indigenous creative arts.

These protocols are accepted and used by many Indigenous artists and organisations and have also been used for several Indigenous creative arts projects.

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### 1.1.3 Who is this protocol guide for?

Primarily, this protocol guide intends to support Australia Council for the Arts funded activities that engage with Indigenous peoples, communities and their cultural heritage. It sets out a framework and methodology – from concept development to project delivery.

However, this protocol guide is also relevant to anyone working with Indigenous artists or in the Indigenous arts sector, including:

- indigenous and non-Indigenous artists
- international organisations and artists
- people working within related fields of Indigenous art form practice
- commonwealth and state/territory government agencies
- local governments/councils
- industry agencies and peak organisations
- galleries, museums and arts centres
- educational and training institutions; and
- Indigenous and targeted mainstream media.

This protocol guide is also used more broadly by the Australia Council for the Arts to inform its work, decision-making, research and promotion of cultural safety, as well being a useful tool for anyone wishing to learn more and build knowledge about Indigenous cultural heritage in the arts and creative sectors.

### 1.1.4 Using this protocol guide

This protocol guide is designed to be an initial point of reference when planning a work with Indigenous artists or using Indigenous cultural material in works.

**Part 1** sets out the framework:

- An overview of the important concepts – the rights to Indigenous cultural heritage as well as the legal and policy protections, both nationally and internationally;
- The 10 Guiding Principles developed to protect Indigenous cultural heritage;
- Protocols that break down the 10 Guiding Principles into practical and specific practice points.

**Part 2** compiles resources:

- Case studies to demonstrate implementation of the Guiding Principles and protocols – the successes and the pitfalls;
- Project resources such as checklists and templates for ongoing use, including further reference documents to deepen understandings.

If you need specific advice on the cultural issues of a particular community or group, speak to the people in authority or engage an Indigenous cultural consultant with relevant knowledge and experience. Reading this protocol guide from cover to cover is an important and highly recommended first step.



## 1.2 Indigenous Cultural and Intellectual Property

This protocol guide endorses Indigenous Cultural and Intellectual Property rights – the rights of Indigenous people to own and control their cultural heritage. Under copyright laws these rights are not always protected, and this is why we encourage the use of Indigenous protocols.

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### 1.2.1 What is Indigenous Cultural and Intellectual Property?

‘Indigenous Cultural and Intellectual Property’ or ‘ICIP’ refers to all aspects of Indigenous peoples’ cultural heritage, including the tangible and intangible. Indigenous Cultural and Intellectual Property includes:

- traditional knowledge (scientific, agricultural, technical and ecological knowledge, ritual knowledge)
- traditional cultural expression (stories, designs and symbols, literature and language)
- performances (ceremonies, dance and song)
- cultural objects (including, but not limited to arts, crafts, ceramics, jewellery, weapons, tools, visual arts, photographs, textiles, contemporary art practices)
- human remains and tissues
- the secret and sacred material and information (including sacred/historically significant sites and burial grounds)
- documentation of Indigenous peoples’ heritage in all forms of media such as films, photographs, artistic works, books, reports and records taken by others, sound recordings and digital databases.<sup>2</sup>

*Figure 1* diagram provides a general breakdown of ICIP rights.

Heritage comprises all objects, sites and knowledge – the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or territory.

Indigenous peoples’ heritage is a living heritage that includes objects, knowledge, artistic, literary, musical and performance works which may be created now or in the future.

The terms ‘cultural heritage’, ‘traditional knowledge’ and ‘traditional cultural expression’ are interrelated terms, embodying the complexities and intricacies of Indigenous culture and knowledge.<sup>3</sup>

Australian models for protection of cultural heritage, traditional knowledge and traditional cultural expressions currently use the language ‘**Indigenous Cultural and Intellectual Property**’ following *Our Culture: our future – report on Australian Indigenous cultural and intellectual property rights*.<sup>4</sup>

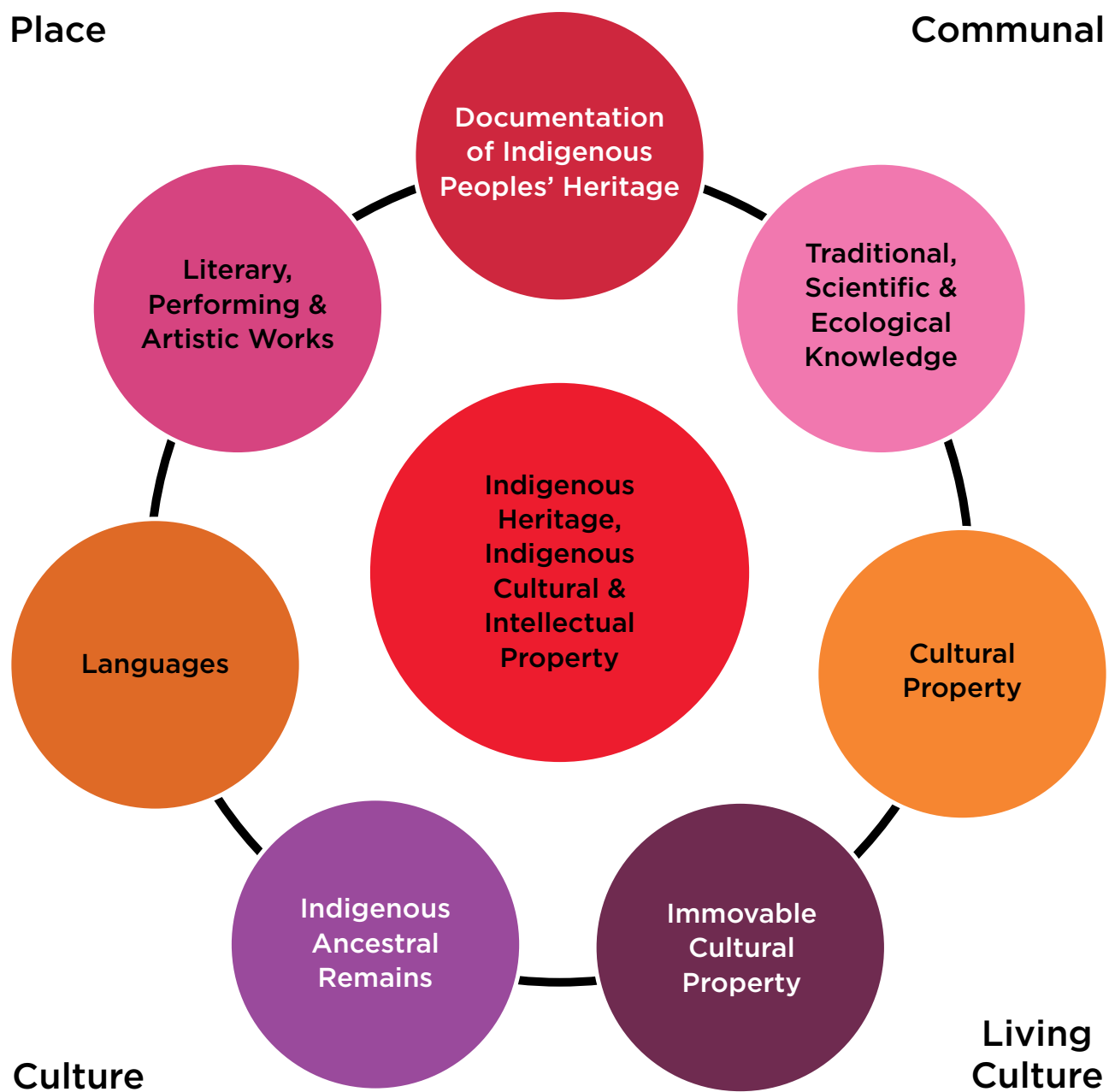


Figure 1: ICIP Breakdown  
© Terri Janke and Company, 2003

## 1.2.2 Rights to Indigenous Cultural and Intellectual Property

With regards to ICIP, Indigenous peoples have the right to:

- own and control ICIP
- ensure that any means of protecting ICIP is based on the principle of self-determination
- be recognised as the primary guardians and interpreters of their cultures
- authorise or refuse to authorise the commercial use of ICIP, according to Indigenous customary law
- maintain the secrecy of Indigenous knowledge and other cultural practices
- full and proper attribution
- control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

For a full list of rights see *Our Culture: our future – report on Australian Indigenous cultural and intellectual property rights*.<sup>5</sup>

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## 1.2.3 ICIP and the creative arts

The creative arts are an important means of expressing ICIP – past, present and future. For Indigenous cultures, artistic and creative expressions of ICIP are important ways of storytelling, transmitting knowledge, preserving, celebrating and expressing culture and languages, reclaiming and maintaining culture, as well as passing culture down to future generations and raising awareness about Indigenous issues.

ICIP can be embodied or captured across all art forms. Some examples are provided below, though noting that as art and culture constantly evolves and society innovates, so do the art forms and the ways in which ICIP can be manifested in them.

- **Visual arts** – through painting, drawing, printmaking, sculpture, photography, crafts and design such as ceramics, textiles and homewares.
- **Music** – in songs and performances. This includes activities such as composing, recording, publishing music, performing and touring.
- **Theatre** – this includes plays, scripted works, music theatre, cabaret, circus and physical theatre, installation theatre performance, puppetry, media-based theatre work, live art, and contemporary inter-disciplinary performance.<sup>6</sup>
- **Dance** – such as ballet, contemporary dance, traditional dance, intercultural dance.
- **Literature** – written works such as fiction and non-fiction works, poetry, biographies, and playwriting.

- **Community arts and cultural development** – works or projects with a community focus such as exploring social and environmental themes with collective, shared outcomes. Activities are by, with and for the communities.<sup>7</sup>
- **Multi arts** – or cross-disciplinary art, which are works that touch on multiple art forms. This includes multimedia arts, installation.
- **Emerging and experimental arts** – works and projects that challenge the traditional boundaries of art forms by using new technologies or processes.
- **Events-based projects** – including art and cultural festivals, art fairs, venue-based projects, exhibitions and programming.

The creative arts sector can adopt a ‘best practice’ approach by encouraging respect for the cultures of Indigenous Australians. It can do this by acknowledging their innate value, their difference from other cultures, and by respecting Indigenous ownership and control of Indigenous heritage.

All Indigenous artists are responsible for safeguarding cultural knowledge. They need to ensure that Indigenous cultures, both in the past and today, are protected and maintained in their works. In this way these cultures can be passed on to future generations. There are many Aboriginal and Torres Strait Islander cultures, which have developed over thousands of years and have been passed down from generation to generation. Despite the enormous impact of the invasion in 1788, Indigenous cultures have continued to develop.

Indigenous people express their connection to heritage in contemporary life through their relationship with land, waterways, animals and plants, as well as relationships with other people. Aboriginal and Torres Strait Islander people have a well-developed and complex web of relationships based on family ties, language group affiliations and community, organisational and government structures. A range of authority structures exists across urban, regional and remote communities. It is important to acknowledge the complexity of Indigenous Australia when negotiating the use of Indigenous heritage for a creative arts project.

Indigenous Australians are concerned that there seems to be no respect for their cultural knowledge, stories and other expression on the wider Australian landscape. Concerns include the current legal framework that does not promote or protect the rights of Indigenous people – particularly to own and control representation and dissemination of their stories, knowledge and other cultural expression.<sup>8</sup> The process of following the protocols not only supports Indigenous heritage rights, but also promotes diversity and new initiatives in Indigenous creativity, innovation and culturally appropriate outcomes.



### 1.2.4 International protections of ICIP

Across the world, Indigenous people continue to call for rights at a national and international level. Indigenous people are developing statements and declarations that assert their ownership and associated rights to Indigenous cultural heritage. These statements and declarations are a means of giving the world notice of the rights of Indigenous people. They also set standards and develop an Indigenous discourse that will, over time, ensure that Indigenous peoples' cultural heritage is respected and protected.

Indigenous peoples' rights to ICIP are enshrined in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) which states,

**'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.**

**In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.'**<sup>9</sup>

Australia adopted the Declaration in 2009 as a framework to inform the recognition and protection of the rights of Indigenous people and communities.

The World Intellectual Property Organisation (WIPO) has established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to discuss intellectual property issues that arise in the context of:

- access to genetic resources and benefit-sharing
- protection of traditional knowledge, innovations and creativity
- protection of expressions of folklore.<sup>10</sup>

Based on its extensive international, regional and national experience and on input from different countries, the WIPO IGC developed two important documents, which outline policy options and legal options for traditional cultural expression and knowledge. These are:

- i. The protection of traditional cultural expressions/expressions of folklore, Draft Articles
- ii. The protection of traditional knowledge, Draft Articles.<sup>11</sup>

The Draft Articles are the subject of extensive debates and discussions amongst international delegates of the WIPO IGC. Key provisions of the latest WIPO Draft Articles for the protection of traditional cultural expressions (TCEs) include:

- recognition of Article 31 of the Declaration – Indigenous peoples' rights to maintain control, protect and develop their cultural heritage
- definition of TCEs – the features of TCEs are that they are cultural expressions of Indigenous peoples linked to cultural and/or social identity, transmitted collectively from generation to generation, dynamic and evolving. It includes creative or spiritual artistic and literary expressions, both tangible and intangible
- different levels of protection for different kinds of TCEs – distinctions between TCEs that are sacred or secret, and TCEs that are in the public domain and widely known or used outside the community
- sacred or secret TCEs are afforded the highest level of protection – suggested measures include protection against unauthorised disclosure and unlawful use, authorisation based on free prior informed consent, protection against false or misleading use, prohibition against harmful use, attribution, using benefit sharing arrangements for use, following cultural protocols.<sup>12</sup>

While the Declaration and Draft Articles are not locally enforceable laws in Australia, they inform law and policy makers of possible options for protecting TCEs.

### 1.2.5 Current Australian protections of ICIP

Australia's current legal framework provides limited recognition and protection of ICIP rights. There is no Australian law set up specifically to protect ICIP, so Indigenous people and communities rely on existing laws – such as intellectual property laws – to protect parts of ICIP and enforce ICIP rights.

#### i. Copyright and moral rights

This section provides a general summary of copyright law under the *Copyright Act 1968* (Cth) (the Copyright Act).

For specific legal advice, we recommend consulting a lawyer with specialist knowledge on copyright. The Australian Copyright Council website at [copyright.org.au](http://copyright.org.au) is also a valuable source of information.

#### What is copyright?

Copyright is a bundle of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings and films, published editions and broadcasts under the Copyright Act.

Copyright protects the works of Indigenous artists and creators in the same way it does for other Australians.<sup>13</sup> There is no need to register copyright in Australia. Copyright is automatic, and exists as soon as a work is created and it meets the requirements of the law.

Copyright protects:<sup>14</sup>

- **artistic works** – such as paintings, sculptures, drawings, engravings or photographs
- **literary works** – such as stories, essays, reports, poems, song lyrics, compilations
- **musical works** – such as sheet music or music notations
- **dramatic works** – such as plays, notated choreography, scripts, screenplays and mimes
- **other subject matter:**
  - **cinematograph films** – the recording of visual images and accompanying sounds of film such as a documentary or a feature film
  - **sound recordings** – the recorded version of sound such as a CD, digital sound file, or in a vinyl, the sound recording of a performance
  - **television and sound broadcasts** – radio and television broadcasts
  - **published editions of works** – the layout and look of a publication such as in a magazine or collection of short stories.

### *Layers and intricacies of copyright*

The ways you create may not always fall clearly into one or more of the categories of works protected by copyright.

Works may sometimes incorporate several types of copyright works. If so, each work created will be a new form, to which copyright rights attach. In many cases each material form will incorporate several types of rights, that may be held by more than one person.

For example, a video installation incorporating short clips of films, artworks, photographs, performance, text and music or soundtrack, will need to consider the copyright, moral and ICIP rights of each creator of each work created and used. In addition, the final work itself – the video installation – is itself a work in material form and has its own set of copy, moral and ICIP rights attached.

Another example is musical works – music is reduced to material form in a number of ways. A separate copyright exists in each of the following forms:

- written version of the music
- written version of the lyrics
- recording of the song
- published edition of the song, for example, sheet music.

In some instances, you may even wish to incorporate works owned by other people, and you will need to appropriately manage their copyright, seek permission and also consider ICIP rights. For these types of projects, copyright and ICIP clearances must be obtained from each and every copyright owner of each included component.

Remember that writers, artists, musicians and other creative contributors are entitled to a fee for the reproduction of their works. Note, too, that these artists have the moral rights of integrity, attribution and the right against false attribution. It is a good idea to clear any material alterations with the artists and to carefully check proofs of the work before publication. It is also important to use correct labelling.

When reproducing copyright works, we recommend you seek the assistance of a lawyer, or speak to the relevant copyright collecting society.



## Requirements of copyright

Copyright will exist in a work as soon as it is created in a material form or as soon as a recording or film is made, provided that certain statutory requirements are met. They are:

- **Original work** – the new work must not be copied, and the creator must have used the necessary degree of skill, labour and effort to create a new work.<sup>15</sup>
- **Material form** – a work must be written down or recorded in some fixed form.<sup>16</sup>
- **Identifiable author** – there must be an author, or authors for a work to be a copyright work, although there is some protection for anonymous works.

## Copyright ownership

The owner of copyright in a work usually the creator. However, there are some significant exceptions to this general rule of copyright ownership:

- Where the work is produced under a contract of employment, copyright will belong to the employer.<sup>17</sup>
- Where work is produced under the direction or control of the Crown, copyright may belong to the Crown.<sup>18</sup>
- Where work has been commissioned under a written agreement, the agreement may specify who owns copyright.

Once copyright is assigned, the creator has no copyright interest in his or her work. Where possible, Indigenous artists and creators should keep the copyright in their works so they can maintain control over reproductions.

It is important for Indigenous creators to check agreements and make sure they are not assigning their rights away forever instead of licensing specific use of their work for a limited time.

Copyright owners need to think about who will control their copyright and receive any royalties that might be payable to their estate after their death.

## How long does copyright last?

The general rule is that copyright protects original works (literary, dramatic, artistic and musical works) during the lifetime of the creator and for 70 years after their death.<sup>19</sup>

From 1 January 2019, this copyright duration applies to both published and unpublished works. Previously, copyright in unpublished works used to continue to subsist so long as the work remains unpublished. However, the changes mean that copyright in works that remain unpublished by 1 January 2019 will expire 70 years after the death of the creator.<sup>20</sup> Many unpublished works (such as old diaries, letters, manuscripts, reports and theses) would have entered the public domain and are free for all to use and exploit.

Exceptions to the general copyright term rule include:

- copyright in works commissioned by the government lasts for 50 years from when it was made<sup>21</sup>
- copyright in sound recording and films last for 70 years from when it was made<sup>22</sup>
- works not made public before
- copyright in anonymous works (where the author is unknown):
  - copyright lasts for 70 years from when the work was made (if not made public or published)<sup>23</sup>
  - copyright lasts for 70 years from when the work was made public (if the work was made public or published within 50 years after it was made).<sup>24</sup>

Copyright protects works for a limited period only, and once the copyright term in a work expires, it is said to be in the public domain. Once a work is in the public domain, the law no longer prevents anyone from accessing, copying or using it. The law therefore assumes that some forms of Indigenous art and cultural expressions are in the public domain and are free for all to use and exploit.

### *ICIP rights are forever*

While copyright is time limited, rights to ICIP are perpetual. ICIP, as well as the rights and obligations attached to ICIP are handed down through the generations.

To respect ICIP rights, it may be necessary to get permission to use Indigenous stories, designs and themes even though legally, they are in the public domain.

Internationally, the United Nations *Principles and guidelines for the protection of Indigenous peoples' heritage* recommends:<sup>25</sup>

**Artists, writers and performers should refrain from incorporating elements derived from Indigenous heritage into their works without the informed consent of the Indigenous owners.**

Where projects wish to use old or archival works, and the author is not known or the material is not published, it is best to do your due diligence first and seek advice before using the material as copyright terms can vary and may be complex to work out. Never assume that a work is out of copyright and can be free to use without permission just because it is old. Where the work contains ICIP, even though a work is out of copyright, there may still be ICIP rights that require the consent of the relevant Indigenous custodians or communities.

### **What rights do copyright owners have?**

The creator of a work (the copyright owner) has specific rights over their work, which are theirs to do with as they choose.<sup>26</sup>

See Table 1 for a summary of a creator's rights according to the type of work.

**Table 1: What rights do copyright owners have?**

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### Literary, dramatic or music works

The creator or copyright owner has the exclusive right to:<sup>27</sup>

- reproduce the work in material form
- publish the work
- perform the work in public
- communicate the work to the public
- make an adaptation of the work
- broadcast the work.<sup>28</sup>

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### Artistic works

The creator or copyright owner has the exclusive right to:<sup>29</sup>

- reproduce the work in material form
- publish the work
- communicate the work to the public.

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### Sound recordings

The creator or copyright owner has the exclusive right to:<sup>30</sup>

- make a copy of the sound recording
- cause the recording to be heard in public
- communicate the work to the public
- enter into a commercial rental agreement for the recording.

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### Films

The creator or copyright owner has the exclusive right to:<sup>31</sup>

- make a copy of the film
- cause the film to be seen or heard in the public
- communicate the film to the public.

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### Broadcasts

The creator or copyright owner has the exclusive right to:<sup>32</sup>

- if a television broadcast, to make a film of the broadcast
- if a sound broadcast, to make a sound recording of the broadcast
- to re-broadcast or to communicate it to the public otherwise than by broadcasting it.

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### Published editions

The creator or copyright owner has the exclusive right to:<sup>33</sup>

- make a facsimile copy (an exact copy) of the work.

## Reproduction right

The reproduction right – the right of the creator to reproduce or make copies of their work – is the most important right, and probably the one most often infringed.

The Copyright Act provides that an original work, which is protected by copyright, can be infringed if it is reproduced in the same format or in a different format – for example, where a literary, dramatic or musical work is reproduced as a sound recording or film.

It is not necessary for a work to be reproduced completely for an infringement of the exclusive right of reproduction to occur. If a 'substantial' part of the material protected by copyright is reproduced without permission from the copyright owner – for example, when extracts of a work are digitally sampled, an infringement of copyright may occur. But this will always be a question of degree. It is not so much the quantity of what is copied or reproduced, but rather the quality of what is taken. In deciding on the issue, the court will consider the circumstances of each particular case.

An infringing work must be shown to have been copied from the copyright work – whether done consciously or unconsciously, directly or indirectly.

## Fair dealings provisions

The argument of fair dealings can be a defence to allegations of copyright infringement. It does not constitute an infringement of copyright in the work if it is used for:

- research or private study purposes<sup>34</sup>
- criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made<sup>35</sup>
- for the purposes of parody or satire<sup>36</sup>
- for the purposes of, or associated with the reporting of news in a newspaper or magazine and a sufficient acknowledgement of the work is made or for the purpose of or associated with the reporting of news by means of a communication (including television, radio and the internet) or in a cinematograph film<sup>37</sup>
- judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.<sup>38</sup>

## What is not protected by copyright?

There are some types of creativity that copyright does not currently recognise, and so are not protected by copyright law. Copyright does not protect ideas, unless they are expressed in material form.

Issues can arise as many aspects or forms of ICIP do not qualify for copyright protection. Examples include:

Example	Description
Knowledge, dance, designs and stories passed on orally	<p>These types of cultural materials and expressions are generally not in material form and is therefore not automatically protected under standard copyright laws.</p> <p>Further, with Indigenous cultural expression some stories have been passed down through many generations. An individual author may not be able to be identified, and indeed may not exist, because much of Indigenous cultural expression is owned communally.</p>
Styles and motifs like rarrk/cross-hatching, and depictions of symbols such as creation figures like the Wandjina from the Kimberley Aboriginal language group	<p>It is only the expression of the style, motif or symbol (i.e. expression through an artwork, a song, or a poem) that is protected by copyright, but not the style, motif or symbol itself.</p> <p>This means that unless someone is copying from a particular copyright work, it is not an infringement of copyright to paint, write about, make a performance, song or film about these styles, motifs or symbols.</p>
Indigenous languages	<p>Copyright only subsists in materials that write down or record language such as articles, books and compilations (e.g. language dictionaries). Copyright does not subsist in a word or language itself.</p> <p>Indigenous people cannot stop others from using Indigenous languages in their works.</p>

### Licensing the use of a copyright work

Copyright is personal property and can be licensed under agreement for a fee. A licence is the grant of a right to use or deal with copyright in a work. You can put limits on the licence, including limitations of time, territory and purpose. Some other points are:

- Written contracts are preferable to oral agreements. The written agreement should include certain terms, such as the fee for use, the purpose of the agreement, the nature of the rights granted and the period of time the agreement will last.
- Indigenous artists, writers and cultural owners should be given the opportunity to consider contracts and to obtain proper legal advice.
- The contract should be explained to Indigenous artists, writers and contributors, and if necessary, a translator should be used to explain the major issues of the contract.
- If the work is to be altered or adapted, artists should be given opportunity to approve, or otherwise reject, the alteration or adaptation of their work.

It is a good idea to seek legal advice on copyright licensing issues.

### *Creative Commons caution*

You may have seen the Creative Commons symbol before: 

Creative Commons is an American organisation that encourages creators to grant broad licences allowing other people to use their works. This may include commercial and derivative uses.

All Creative Commons licences allow others to freely use the creator's work on the sole condition that you are granted proper attribution. A limited number of additional conditions may be applied according to the creator's preference.

Creative Commons licences may not require you to give up your copyright. However, it is very important to get legal advice before issuing a Creative Commons licence. By signing a Creative Commons licence you may allow such wide use of your work that you lose a lot of control over the way it is used. It may also mean that you give up your rights to benefit financially from your work. This could also cause serious problems if you later want to enter into another licensing agreement, because you no longer have control of the rights the other party may need.

Importantly, granting a Creative Commons licence over your work could negatively impact any ICIP rights. You should be cautious when considering a Creative Commons licence.

### **Collaborative works**

It may be the case that you create a work in collaboration with another artist. Under the Copyright Act, a 'work of joint ownership' refers to a work resulting from the collaboration of two or more creators and where each creator's contribution is equal to the contribution of the other creators.<sup>39</sup>

The collaborator must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions.

Where the artwork has drawn on the knowledge or practices of Indigenous people it is often the case that this contribution will not meet the threshold for collaboration and the traditional owners will not be recognised as a joint author over the work. For example, the custodians of cultural images are generally not recognised as the legal copyright owners of an Indigenous artwork that depicts language group cultural images.

Each creative contributor to a work of joint authorship owns copyright in the resulting work.<sup>40</sup> This means that each artist must obtain the consent of the others before exercising any of their rights under copyright law. For example, if an artist wants to license the rights to reproduce a collaborative work, he or she must get the consent of all the artists who participated in the collaboration.

Where projects involve collaborative arrangements or the creation of collaborative works, participating artists should discuss issues of copyright and proposed use of works prior to the commencement of a project, to avoid any future disagreements.



### **Communal ownership vs joint ownership**

In *Bulun Bulun & M\* v R & T Textiles*,<sup>41</sup> the court considered that traditional Indigenous works containing ‘traditional ritual knowledge’, handed down through generations and governed by Aboriginal laws, are not works of joint ownership. Although under Aboriginal laws the entire community may have an interest in the particular artwork, and the designs and knowledge within the work, copyright law does not recognise the group as the owners.

The individual artist is recognised as the copyright owner and may have a special obligation to the language group to deal with the copyright in the art in ways that are consistent with Indigenous law. Depending on the circumstances, this obligation may be enforceable in the courts.

### **Moral rights**

Moral rights are separate from the economic rights of copyright owners. The Copyright Act recognises three moral rights – see Table 2 below.

**Table 2 – What are moral rights under the law?**

Right	Description
Right of attribution <sup>42</sup>	The author of a work (e.g. the artist, lyricist, composer, playwright) has the right to be identified as the author where his or her work is reproduced in material form, published, performed, adapted, or communicated to the public.
Right not to have authorship falsely attributed <sup>43</sup>	Artists or performers have a right not to have work or performance falsely attributed to another person.
Right of integrity <sup>44</sup>	Artists or performers can bring a legal action against parties who edit, alter or treat their works in an inappropriate way, causing harm to the artist’s or performer’s honour or reputation.

### **No communal moral rights**

Existing moral rights under the Copyright Act are individual rights only, and are personal rights of creators. The communal nature of ICIP and the right of an Indigenous language group to protect and guard against issues of misinformed source or integrity are not recognised.

It is best practice for projects to respect the collective rights and cultural protocols of communities, in the same way that authors are afforded moral rights under the law. Strategies are provided in **Part 1.4 Protocols in practice** of this protocol guide.



## ii. Performers' rights

Performers who are recorded on film or sound recordings have certain rights under the Copyright Act. Performers' rights can be divided into three basic areas: the right against unauthorised use of performance; performers' copyright in sound recordings; and moral rights in sound recordings.

In practice, these rights may be varied by contracts, so they may not result in large gains for performers.

### Performers' rights against unauthorised use of performance

A performer can refuse or grant consent for their performance to be recorded, reproduced (made copies of) or communicated to the public.<sup>45</sup> Distributing or selling recordings (that the person knows are unauthorised copies) of performances also need the consent of the performer.<sup>46</sup>

This means that anybody recording people for films or sound recordings must get the performer's permission to do so. This would include for example, recording a person singing a song, reciting excerpts from a book, or performing a traditional dance.<sup>47</sup>

However, where the performer has already given their consent for their performance to be recorded for a particular purpose, they will not be able to stop the recording from being used for that purpose.

Although a performer's consent does not have to be written, specially drafted consent forms are a useful and recommended way of clearing the necessary rights through contract.

### Performers' copyright in sound recordings

Under the Copyright Act, when a sound or audio recording is made, copyright belongs to the maker of the record. This person is referred to as the 'maker'. For sound recordings of live performances where the performer was not performing under an employment contract or a commission arrangement, the performer is also considered the maker, and will share copyright in the recording.<sup>48</sup>

Where performers are co-owners of copyright in a sound recording, they have exclusive rights to:<sup>49</sup>

- make a copy of the sound recording
- cause the recording to be heard in public
- communicate the work to the public
- enter into a commercial rental agreement in relation to the recording.

Again, these rights may be altered in a written agreement, but performers who may have copyright interest in audio recordings of their live performances should register with Australasian Performing Right Association (APRA), Australasian Mechanical Copyright Owners Society (AMCOS) and Phonographic Performance Company of Australia (PPCA), which will collect royalties on their behalf.

## Performers' moral rights

Performers also have moral rights in relation to recordings of their performances, but only where they have contributed to the sound of the recording. If a project involves making sound recordings of speeches or Indigenous songs or other performances, the performers, like authors of works (see Table 2), will have moral rights in their performance in those recordings as follows:

- Right of attribution;<sup>50</sup>
- Right not to have performership falsely attributed;<sup>51</sup>
- Right of integrity.<sup>52</sup>

## iii. Resale royalties

Commencing in 2010, the Resale Royalty Right for Visual Artists Act established the Resale Royalty Scheme to ensure that artists benefit from their work, particularly as their work increases in value with subsequent sales.<sup>53</sup>

It covers visual arts such as books, carvings, ceramics, digital artworks, engravings, drawings, jewellery, lithographs, multimedia works, paintings, photographs, prints, sculptures, video artworks and weavings.<sup>54</sup> Manuscripts of literary, dramatic or musical works are not covered by the scheme.<sup>55</sup>

Under the scheme:

- Visual artists are entitled to 5% royalties for the second and further commercial resales (e.g. sale through auctioneers, galleries, museums, art dealers or other art market professionals) of their artworks of \$1,000 or more.<sup>56</sup>
- This applies up to 70 years after the artist's death which means that artists' estates and beneficiaries can continue to receive a benefit.
- Artists must register their details with the Copyright Agency in order to receive resale royalty payments.

The Copyright Agency manages the scheme and has reported that over 63% of the artists receiving royalties are Aboriginal or Torres Strait Islander and those artists have received 38% of the total royalties. Most royalty payments are between \$50 and \$500 and between 2010 and 2018 1,600 artists earned a total of \$6.3 million.<sup>57</sup>

The law was reviewed in 2013,<sup>58</sup> with criticisms from some art market professionals and academics that not many artists know about the scheme, the administrative requirements are complex, and some galleries get around the scheme by consigning artworks rather than buying them outright. No changes have been made to the law since the review.

Nevertheless, the Resale Royalty Scheme can be an important revenue stream for Indigenous visual artists and artists who are selling their works should register with the Copyright Agency: [resaleroyalty.org.au](http://resaleroyalty.org.au).

#### iv. Language laws

New South Wales is the only state in Australia that has a law that recognises the importance of Aboriginal languages. The *Aboriginal Languages Act 2017* (NSW) recognises the custodianship of Aboriginal people over Aboriginal languages. As custodians, they have the right to control the growth and nurturing of languages.

The Act's Preamble states:

**'The languages of the first peoples of the land comprising New South Wales are an integral part of the world's oldest living culture and connect Aboriginal people to each other and to their land'.<sup>59</sup>**

The law also recognises the impact of past government policies on Aboriginal languages and the importance of preventing their loss through implementing measures for language reawakening, protection and revitalisation. The Act establishes a New South Wales government agency to be responsible for local, regional and state-wide Aboriginal language initiatives and developing a strategic plan for Aboriginal language protection in NSW.

While an important step in Aboriginal language and culture recognition, the processes for establishing these mechanisms take time and require extensive consultation. They are yet to be implemented. In any case, the use of Aboriginal languages will still require the following of protocols.

#### v. Heritage laws

##### Intangible cultural heritage protection

In Victoria, the *Aboriginal Heritage Protection Act 2006* (VIC) was amended in 2016<sup>60</sup> to allow for the protection of certain intangible aspects of cultural heritage (such as languages, oral stories and song lines). Protection requires Victorian Aboriginal groups to apply for the intangible cultural heritage to be registered with Aboriginal Victoria, a state government agency.

Once intangible cultural heritage is registered, those who wish to use that intangible heritage must ask for the registered owner's permission and enter into an agreement to use that registered cultural heritage commercially.<sup>61</sup> Penalties apply for breaching this requirement. A similar law is also being considered in New South Wales.<sup>62</sup>

However, not all intangible cultural heritage can be protected by heritage laws, as they only protect aspects of intangible cultural heritage that is not already widely known.

## Filming and photography on Commonwealth parks or reserves

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) requires permits and sets certain guidelines for commercial filming, photography on Commonwealth parks and reserves. This includes the Uluru Kata Tjuta National Park<sup>63</sup> and Kakadu National Park.<sup>64</sup>

Artists and creators working on Commonwealth parks and reserves should be aware of these guidelines. They inform photographers, filmmakers and artists about:

- the cultural significance of the area, including identification of sacred or sensitive sites in the park, and what can and can't be done at those sites
- naming conventions
- processes for involving the local community in projects
- restrictions and consultation requirements around digital manipulation of images
- approval process for use of images or footage for advertising or promotional purposes
- prohibitions in the use of drones.

## Movable cultural heritage

The *Protection of Movable Cultural Heritage Act 1986* (Cth) and *Protection of Movable Cultural Heritage Regulations 2018* regulate the export of cultural heritage objects, due to the significance of such objects to Australia's cultural heritage.<sup>65</sup> The Act and Regulations give effect to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

The Regulations prescribe the National Cultural Heritage Control List (the Control List) to specify significant cultural objects that are regulated by laws and subject to permit requirements, based on the object's age, value or significance.

The Control List includes Aboriginal and Torres Strait Islander heritage materials as a protected category,<sup>66</sup> which are defined as objects of cultural significance to Aboriginal and Torres Strait Islander people,<sup>67</sup> or made by an Indigenous Australian person,<sup>68</sup> and is not an object made specifically for sale.<sup>69</sup>

Fine and decorative art objects (such as paintings, craftworks, furniture, jewellery, sculptures and architectural fittings) are also a protected category under the Control List. It includes significant Aboriginal and Torres Strait Islander art of certain styles, regions and from specific historical periods which are regulated for export based on their value and age. The aim of these changes to the law was to reduce the overregulation of Aboriginal and Torres Strait Islander fine or decorative art, following a major review of the *Protection of Movable Cultural Heritage Act 1986* (Cth) in 2015.<sup>70</sup>

The Control List provides two Classes of protected objects – Class A and Class B objects. Class A objects cannot be exported from Australia. For Indigenous cultural heritage objects, Class A objects include:

- sacred and secret ritual objects
- bark and log coffins used as traditional burial objects
- human remains
- rock art
- dendroglyphs (carved trees).<sup>71</sup>

For objects of fine or decorative art, Class A objects include:

- pre-1901 Aboriginal or Torres Strait Islander artworks valued at least \$25,000
- pre-1960 Aboriginal or Torres Strait Islander bark paintings or sculptures valued at least \$25,000.<sup>72</sup>

Class B objects can only be exported from Australia with an export permit. All other Indigenous cultural heritage objects are classified as Class B objects. Example of these items include:

- objects relating to famous and important Aborigines or Torres Strait Islanders, or to other persons significant in Aboriginal or Torres Strait Islander history
- objects made on missions or reserves
- objects relating to the development of Aboriginal or Torres Strait Islander protest and self-help movements
- original documents, photographs, drawings, sound recordings, film and video recordings and any similar records relating to objects included in this category.<sup>73</sup>

For these Class B Indigenous cultural heritage objects, protection is afforded for the object if it is at least 30 years old;<sup>74</sup> and is not already adequately represented in Aboriginal or Torres Strait Islander community collections, or public collections in Australia.<sup>75</sup>

Class B objects of fine or decorative art specifically include:

- Aboriginal desert paintings (including pre-1974 Aboriginal Papunya paintings) valued at least \$100,000
- Aboriginal Kimberley paintings on canvas valued at least \$100,000
- Aboriginal or Torres Strait Islander ochre paintings that are on bark, composition board, wood, cardboard, stone or other similar supports valued at least \$20,000.<sup>76</sup>

While the movable heritage protection laws go a long way to protect Indigenous cultural objects and artworks, not all material is covered by the Control List. The protections have specific criteria, including age and value threshold requirements. This means that objects created recently or that have market value below the requirements of the Act are not regulated and do not need permission for export or import.<sup>77</sup>

Nevertheless, it is important for artists, art dealers, and curators of Indigenous Australian art and objects of significance to be familiar with the *Protection of Movable Cultural Heritage Regulations 2018* when seeking to trade or export Indigenous cultural objects or artworks.

## 1.3 Principles for respecting Indigenous Cultural and Intellectual Property

### 1.3.1 Snapshot of principles

Principle	Description
Principle 1 <b>Respect</b>	The rights of Indigenous people and communities to own, protect, maintain, control and benefit from their cultural heritage should be respected.
Principle 2 <b>Self-determination</b>	Indigenous people have the right to self-determination and to be empowered in decisions that affect their arts and cultural affairs.
Principle 3 <b>Communication, consultation and consent</b>	Indigenous people have the right to be consulted and give their free prior informed consent for the use of their cultural heritage.
Principle 4 <b>Interpretation</b>	Indigenous people have the right to be recognised and represented as the primary guardians and interpreters of their cultural heritage.
Principle 5 <b>Cultural integrity and authenticity</b>	Maintaining the integrity of cultural heritage is vital to the continued practice of culture.
Principle 6 <b>Secrecy and confidentiality</b>	Indigenous people have the right to keep secret and sacred their cultural heritage. Confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should also be respected.
Principle 7 <b>Attribution</b>	Indigenous people have the right to be respectfully acknowledged and attributed as the traditional owners and custodians of their cultural heritage.
Principle 8 <b>Benefit sharing</b>	Indigenous people and communities have the right to benefit from their contribution and for the sharing of their cultural heritage, particularly if commercially applied.
Principle 9 <b>Continuing cultures</b>	Indigenous cultures are dynamic and evolving, and the protocols within each group and community will also change. Consultation and free prior informed consent are ongoing processes.
Principle 10 <b>Recognition and protection</b>	Indigenous people have the right to protection of their cultural heritage and intellectual property rights in that cultural heritage. Laws, policies and contracts should be developed and implemented to respect these rights.

### 1.3.2 Using the principles

The principles provide a framework for respecting ICIP. In the following pages, under each of these principles, we have suggested protocols for using ICIP, and interacting with Indigenous artists and Indigenous communities in creative arts projects and works.



## 1.4 Protocols in practice

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### 1.4.1 Principle 1 – Respect

**‘Recognizing the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.’**

**United Nations Declaration on the Rights of Indigenous Peoples, Preamble**

Respectful use of Indigenous cultural material and information about life experience is a basic principle. It underpins all aspects of engagement with Indigenous people, communities and their ICIP.

#### i. Welcome to Country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia. As such they have a strong link to country, meaning the totality of life and the spirit of the particular area of land they and their ancestors inhabited.

When organising an installation, performance or event of local, state or national significance, it is respectful to invite a representative of the traditional owners to attend and give a ‘Welcome to Country’ address.

A ‘Welcome to Country’ address is given by an Indigenous custodian of the land, included in the official opening of events. As a matter of cultural protocol, large cultural events should invite an Indigenous custodian or representative of the traditional landowner group to provide a ‘Welcome to Country’.

Alternatively, a prominent Indigenous person or an elder who has lived in the area and contributed to the Indigenous community may also be asked to acknowledge country if they are not in a position to welcome.

#### ii. Acknowledgement of Country

It is respectful for others who are speaking officially to also acknowledge country and custodians at the site of the event. This could be done by the master of ceremonies making an introductory acknowledgment to the traditional owners of the land.

It is important to acknowledge country and custodians at the site of each launch, performance, installation and event, in the acknowledgment of works that are about a specific Indigenous community, or in the introductory text of a film or screen-based work.

Seek advice from the Indigenous community on the preferred manner of acknowledgment, and the relevant groups to be acknowledged.

Acknowledgements can also be made on emails, websites, publications. For example, the Museum of Contemporary Art's website opens to an acknowledgement of the Gadigal people of the Eora Nation, the land on which the museum stands. It is the first thing that visitors of the museum's website see.<sup>78</sup>

### iii. Embracing diversity

Indigenous cultures are diverse. Indigenous people have right to belong to a community, clan or nation, based on the traditions and customs of the community or nation concerned.<sup>79</sup> In Australia, culture varies depending on the Indigenous country (area of land within Australia) and particular language groups.

Indigenous artists and creators come from many different backgrounds, cultivate their creative practice in many different ways, and develop their works in many different styles.

### iv. Representation

Indigenous cultures should be represented through Indigenous cultural values with respect to customary laws. Indigenous peoples and their cultures need to be represented in a manner preferred by those cultures. Inappropriate or outdated perspectives and terminology should be avoided. It is important to consult the relevant groups about this.

Non-Indigenous collaborators who wish to work with Indigenous artists, peoples or communities should collaborate from project development through to project completion. It is critical to have in place a clear process to enable a two-way exchange and meaningful partnership. This may involve the ongoing input of an Indigenous cultural consultant or consultants who liaise between groups, and advise on cultural protocols and the use of ICIP so that its integrity is valued, protected and respected.<sup>80</sup> In this way, Indigenous people can help shape the development of project ideas so that the project is relevant for the community.

## v. Living and evolving cultures

Indigenous cultures are living and evolving entities, not simply historical phenomena. Indigenous artists and creators draw upon their pre-existing cultural base, experiences and stories in many different ways. It is important to respect the diversity of cultural expression in Indigenous creative arts, and acknowledge its ongoing development through different styles and forms.

Extensive consultation is important to identify who has authority to speak for a work<sup>81</sup> and who can authorise any adaptation.

## vi. Cultural safety

Indigenous consulting firm, Inside Policy, defines cultural safety as:

**‘a culturally safe environment...where First Nations staff, peers, artists, arts organisations and communities feel their protocols, beliefs, knowledges, histories, practices and expressions are understood and valued.’<sup>82</sup>**

Cultural safety is a right. Indigenous people have the right to be free from any kind of discrimination<sup>83</sup> and the right to the dignity and diversity of their cultures, traditions, histories and aspirations.<sup>84</sup>

Indigenous people and communities should feel culturally safe when collaborating or working on projects, or when sharing their ICIP. There should be no prejudice, discrimination towards Indigenous people and communities – they should be empowered to be themselves.

Strategies for cultural safety include:

- Conducting cultural awareness and competency training for organisations that work with Indigenous people and communities, delivered by experts; and
- Having organisational policies and protocols for processes relating to Indigenous engagement, looking after Indigenous staff members across all levels and areas of the organisation, establishing a culturally safe environment to work or create in.<sup>85</sup>

### 1.4.2 Principle 2 – Self-determination

**‘Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’**

**United Nations Declaration on the Rights of Indigenous Peoples, Article 3**

Self-determination means empowering Indigenous people in decision-making processes. Indigenous people have the right to self-determination in their artistic and cultural affairs, as well as in the expression of their cultural material. There are many ways in which this right can be respected in projects.

#### i. Indigenous leadership in projects

A significant way to support self-determination is to discuss how Indigenous control over a project will be exercised. Projects that involve the use of ICIP should be Indigenous-led and take into account Indigenous perspectives.

#### *Community governance structures*

Establishing Indigenous control in a project raises the issue of who can represent language groups and give permission to use traditionally and collectively owned material.

Please see **Principle 3 – Communication, consultation and consent** for further guidance in this regard.

#### **Engaging Indigenous contributors, collaborators and/or experts**

When engaging Indigenous contributors or collaborators in a project, most organisations use the following three-part definition of ‘Aboriginal and Torres Strait Islander’ adopted by the Australian Government as a guide:

- a. must be of Aboriginal or Torres Strait Islander descent
- b. must identify as an Aboriginal or Torres Strait Islander person
- c. must be accepted as an Aboriginal or Torres Strait Islander person by the community in which they live or formerly lived.<sup>86</sup>

In line with this definition, Australia Council for the Arts requires applicants to identify and confirm as Aboriginal and/or Torres Strait Islander, as well as provide letters of support from community. For organisations, at least half (50%) or more of the organisation’s membership must be of Aboriginal and/or Torres Strait islander descent.

## Setting up an Indigenous advisory group or committee

Having an Indigenous advisory group or committee is a way to amplify Indigenous voices in a project. Indigenous advisory groups can be established to provide independent advice on cultural protocols, the use of cultural material and Indigenous content in projects. Advisory groups can be made up of experts in the arts sectors relevant to the project. It can also be a way to involve Indigenous decision-making bodies and cultural groups in the decision-making process.

## Indigenous governance within organisations

Organisations involved in projects should endeavour to have Indigenous representation within the organisation's governance. This can be a way to help ensure that projects take into account Indigenous perspectives in project planning. Some options to bolster Indigenous leadership in organisations include inviting representatives of local Aboriginal land councils to sit on an organisation's board of directors,<sup>87</sup> employing Indigenous staff members within the organisation, and engaging Indigenous consultants.

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### 1.4.3 Principle 3 – Communication, consultation and consent

**‘Indigenous peoples have the right to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as maintain and develop their own Indigenous decision-making institutions.’**

**United Nations Declaration on the Rights of Indigenous Peoples, Article 18**

Communication, consultation and consent is an important first step when developing and planning projects and when reproducing and including existing cultural material.

By communicating and consulting with the relevant Indigenous people and communities you can be better informed about project issues that require consent.

#### i. Identifying people in authority

To consult effectively and gain consent for use of ICIP in a particular project, the Indigenous people with authority for specific geographic locations, stories, languages, rhythms, song cycles and images need to be identified.

## Indigenous community governance structures

There is no singular body or authority in Australia that can make decisions about ICIP. So, speaking to the right people is very important. Indigenous communities, whether regional, urban or remote, have an infrastructure of organisations and individuals who can advise on a range of issues – including guidance about locating Indigenous people with authority to speak for specific Indigenous cultural material.

As a starting point, below are the common authorities and infrastructures within Indigenous communities:

- Elders, traditional owners or custodians of the relevant community
- where the ICIP relates to a particular person or family, the relevant individual or family members
- national peak bodies – including:
  - national Congress of Australia's First Peoples **humanrights.gov.au**
- representative bodies of a community – such as:
  - the relevant local, regional or state Aboriginal land council;
  - native title organisations – prescribed body corporates and native title representative bodies and service providers
- Indigenous organisations in the arts – there are Indigenous infrastructures and authorities for different areas of arts practice and industries, such as:
  - peak bodies including:
    - Australian Institute of Aboriginal and Torres Strait Islander Studies **aiatsis.gov.au**
    - Lowitja Institute **lowitja.org.au**
    - First Languages Australia **firstlanguages.org.au**
    - BlakDance **blakdance.org.au**
    - First Nations Australia Writers Network **fnawn.com.au**
  - the Indigenous Art Code **indigenousartcode.org**
  - Indigenous art centres – there are local art centres and regional peak bodies including:
    - Desert (the Association of Central Australian Aboriginal Art and Craft Centres) **desart.com.au**
    - Ananguku Arts and Culture Aboriginal Corporation **anangukuarts.com.au**
    - APY Art Centre Collective **apyartcentrecollective.com**
    - Association of Northern Kimberley and Arnhem Aboriginal Artists (ANKAAA) **ankaaa.org.au**
    - Indigenous Art Centre Alliance **iaca.com.au**
    - Saltwater Freshwater Arts Alliance **saltwaterfreshwater.com.au**
    - UMI Arts (Far North Queensland) **umiarts.com.au**
    - Aboriginal Art Centre Hub of Western Australia **aachwa.com.au**

- Indigenous language and cultural centres including:
  - institute for Aboriginal Development **iad.edu.au**
- Indigenous theatre and dance companies including:
  - ilbijerri Theatre Company **ilbijerri.com.au**
  - yirra Yaakin Theatre Company **yirrayaakin.com.au**
  - bangarra Dance Theatre **bangarra.com.au**
  - moogahlin Performing Arts Inc **moogahlin.org**
- Indigenous music peak organisations including:
  - central Australian Aboriginal Media Association **caama.com.au**
  - songlines Music Aboriginal Corporation **songlines.net.au**
  - abmusic Aboriginal Music Corporation **abmusic.com.au/home**
- There are also local, regional and national Indigenous representative organisations in other industries such as:
  - Indigenous medical and health service providers
  - Indigenous education consultative groups
  - Indigenous units or research centres within universities
  - Indigenous chambers of commerce
  - Indigenous ranger groups
  - Indigenous legal service providers
  - Indigenous child protection peak bodies
  - Indigenous tourism operator councils
  - Indigenous broadcasting and media organisations.

However, it is important to note that these structures vary between communities, and can also vary depending on the specific ICIP being consulted on. Multiple communities or language groups may also have custodianship over certain kinds or aspects of ICIP.

## ii. Communication and consultation – methods and processes

Consultation and communication processes will differ for each community.

General guidance on relevant features of what communication and consultation might include are outlined below. However, projects will need to cater communication and consultation methods to the needs of the particular community or communities being consulted.



## **Engaging cultural consultants**

It may be appropriate for projects to engage a local Indigenous cultural consultant or advisor. A cultural advisor will provide important information on the protocols relevant to ICIP used in a project or work. Cultural consultants are engaged for their expertise, knowledge and community connections, and so they should be paid for the provision of their services.

## **Interpreters and translators**

For some Indigenous communities, the consultation and consent process may require interpreters. Ask the Indigenous artists or contributors if they require an interpreter. If so, ask them to identify a suitable person to translate.

The local Aboriginal land council or a local community organisation might be able to assist if the Indigenous artist or contributor cannot identify an interpreter. Interpreters should be paid for their services.

## **Deep listening and building trust**

Vital to communication and consultation is listening, mutual respect and building trusting relationships. Deep listening is an important Indigenous tradition – the act of respectful listening and taking in the perspectives of others with an open mind. This should be embedded into the communication and consultation process.

## **Sensitivity of content**

Sensitive content, such as sacred and secret material or gender-based works, may require special communication procedures that should be ascertained first. Consultation may take time depending on the sensitivity of the material.

## **Gender**

When engaging in consultation with a community be aware there may be a gender division of responsibilities and cultural knowledge.

## **Plan your consultation and consult early**

Consultation can be very straightforward, but frequently it is more complex. It is not enough to find just one person who will agree to the project or a particular interpretation of a work. It will generally be necessary to discuss the project widely with language group or family members, and to get advice from several people to establish the custodian of ICIP.

Doreen Mellor outlines the importance of early consultation:

**‘Consultation with a community or group of people is not simply a formality...Consultation is required as a precursor to consent for it to proceed. It is not appropriate to have decided that the activity is to proceed, or that its structure or format is established before consulting the Indigenous group or person involved.**

**The idea may be a good one from an external point of view. Consultation establishes the internal, cultural perspective and it is important to accept that it is this perspective which should determine the appropriate course of action.’**

With regard to the process of obtaining consent:

- allow time (perhaps more than one meeting) for communication of a proposal, allow time for a decision to be made
- remember that the decision will be made on other bases than the ones brought from outside the community – different types of knowledge operating in Indigenous communities may conflict with the requirements of a project
- be prepared to take “no” for an answer (but do not take it personally)
- respect the views of all factions within a community, and ensure that consent comes from the appropriate quarter for a particular activity or project.’<sup>88</sup>

So, it is important and respectful to communities to plan consultations ahead of time and consult early on in a project, particularly for projects that require consultation with multiple communities or groups.

### **Consultation is ongoing – allow for time**

Effective consultation is rarely achieved in a single meeting. The consultation process is ongoing over a period of time and the quality of the process of consultation will be crucial to the development of a respectful, authentic work. It is rarely ‘one-off’ consent and may be a continuing process of working with the traditional owners as a project develops. It may take two years to develop a project or work because people have to meet their other obligations. There may be a death in the family and people have to attend.

Consultation should be undertaken within the time frames set by the Indigenous community or individual. Consultation fees with community, elders and any Indigenous community representatives and consultants should be set out within the budget of projects. This may require that funding bodies or other groups working on a project be alerted to the importance of the process and time frames.

## Modes of communication and consultation

Depending on the specific community, different modes of communication or consultation may be required. This could include discussions through emails, letters, phone or video conferencing meetings, face-to-face meetings, or a combination of these. Be receptive to the needs of the communities.

### iii. Obtaining free, prior and informed consent

Through the process of communication and consultation, consent to use ICIP can be obtained. For Indigenous people and communities, the standard of consent is free, prior and informed consent. This standard is enshrined in various international instruments and fundamental to Indigenous rights.<sup>89</sup>

## Elements of Free Prior Informed Consent (FPIC)

FPIC is should be obtained for *any* activity that involves Indigenous lands, culture and resources. In particular, the United Nations Declaration on the Rights of Indigenous People specifically refers to FPIC in relation to:

- taking or use of cultural knowledge or intellectual property<sup>90</sup>
- projects that affect Indigenous peoples' lands, territories or other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.<sup>91</sup>

### ***What does FPIC involve?***

There is no checklist or prescriptive means of obtaining FPIC, however projects should consider the following key elements and considerations of FPIC:

#### **Free**

Do the relevant Indigenous people and/or communities have the ability to say no?

#### **Prior**

Have the relevant Indigenous people and/or communities been given enough time to consider the implications of giving consent to the project or activity (and where applicable, discuss these with the wider community)?

Has consent been sought ahead of time, before the project or activity starts?

#### **Informed**

Have the relevant Indigenous people and/or communities been given all the information they need to know about the project or activity (things like its nature, size, time frames, how ICIP is being used, the audience, project risks and benefits)?

Has information been given in a way that is easy to understand? In plain English? Is an interpreter needed?

#### **Consent**

Is there a formal written agreement for the consent?

Do the relevant Indigenous people and/or communities have the right to give conditions to the consent (for example, restrictions on using ICIP, specific cultural protocols to be followed)?

Do the relevant Indigenous people and/or communities have the right to revoke consent (for instance, if the consent conditions are breached)?

The United Nations Global Compact provides helpful, in-depth guidance on FPIC, contained in the resource, *Business Reference Guide to the United Nations Declaration on the Rights of Indigenous Peoples*.<sup>92</sup> **Part 2 – Project Resources** of this protocol guide also contains a checklist to guide projects on these considerations.

### Formalising consent

It is important to keep records of consents to use ICIP and to document them properly. The way in which consent is documented depends on the nature of the project, as well as the requirements of the community. Different forms of formally recording consent include:

- written agreements – cultural clearances, licence agreements, memoranda of understanding
- other written documents – consent provided through a letter of support, provided via email correspondence
- other media – such as an audio or video recording of consent
- records of consent made by the project manager – such as in a file note.

Written agreements are recommended as best practice, as this helps ensure clarity around what is agreed on, and the scope of consent being given. This avoids disagreements and disputes later on.

### New uses of ICIP require new consent

FPIC is dynamic and ongoing. As projects develop, it is important to remember that there may be new aspects of ICIP use that require the further permission of the source communities. Make sure that the relevant Indigenous people and/or communities are consulted adequately on these additional uses. This, too, should be documented and agreed to in writing.

### No means no

And finally, there is always the possibility that during consultation people will decide not to engage or discussions break down, or people just do not want to participate for any number of reasons.

**It was summed up to me by someone who said,  
'If someone says no, they mean no.'**<sup>93</sup>

#### iv. Common consultation and consent issues

This section outlines some common areas where communication, consultation and consent issues arise in projects that involve ICIP.

##### Using Indigenous languages

Indigenous languages are fundamental aspects of ICIP. A major issue for Indigenous people is the misuse of Indigenous language words, without the consent of their traditional owners.<sup>94</sup>

Copyright protects material expressions of language – such as language dictionaries and recordings that capture language. As a legal requirement, consent must be obtained from the copyright owners of such materials. For more information on copyright, see the section on **Current Australian protections of ICIP** in this protocol guide.

Individual language words, or traditional knowledge attached to language, is not protected by copyright. However, cultural protocols and rights attach to language in the same way it does to other forms of ICIP. Any use of Indigenous language in projects require the free, prior informed consent of the custodians of that language.

##### Using or recording Indigenous stories

Traditionally, Indigenous stories have been transmitted orally and passed on through the generations via the art of storytelling.

Committing these stories to material form now creates a copyright interest in the expression of the story. In the past, there have been instances where non-Indigenous individuals have worked with Indigenous people to record their language group and creation stories. Copyright attaches to the written expression, so the non-Indigenous person who wrote down the language group or creation story was recognised as the sole writer and copyright owner. Indigenous people see ownership of stories and information differently, not as something an individual can possess, but as elements of culture that are owned communally and passed down.

Copyright does not protect oral stories, as the requirement of material form is not met. Hence, people writing about what you said will have a copyright interest in the written form as they express it because they put in their own skill and labour to transfer the oral story to the written form. You may not be able to stop them writing your ideas, unless you told them in confidence. If you told them in confidence, and they knew it was confidential, you may be able to stop them publishing your ideas by taking an action in breach of confidential information.<sup>95</sup>

Capturing oral stories in writing, recordings, artworks or other material forms introduces issues relating to the dissemination and ownership of the resulting work. This is because copyright subsists in the resulting work, and the person who makes the work is usually the owner of that work.

The exception to this is sound recordings of a performance. Performers will share copyright in sound recordings of their performances. Performances can include expressions of folklore<sup>96</sup> (which could include Indigenous cultural material). This allows scope for exercising some control over the use of recordings of performances of oral stories. However, these general law provisions can be overturned by written agreement, and it is often the practice for performer's releases to determine the ownership of copyright in a recording.

For these reasons, it is important to obtain the consent of the Indigenous person or persons telling the story before recording it or writing it down. For Indigenous people, when agreeing to take part in recording of oral stories, it is a good idea for storytellers to discuss the copyright issue and to request a copy of the resulting work for their records.

These considerations are even more important where projects or works consider using creation stories. Creation stories are important to Indigenous cultures and it is protocol to consult with cultural custodians of a story and other community members. There may also be one or more groups that have custodianship of a story. Consultation with, and consent from each identified group should be sought. Be prepared to reconsider your project if consensus cannot be reached.

### **Commissioning Indigenous artists**

When commissioning the work of Indigenous artists or creators, it is important to provide briefs and to engage the artists in writing, for any design work before they commence. We recommend that written engagement contracts be used so that the commissioner and the artist are clear on the work to be provided and the terms of use, as well as the payment of fees.

Indigenous artists should be aware that they are at risk if they commence work without first establishing in writing whether they have been commissioned, what the scope of the project is, and what payment they will receive. Copyright issues should also be discussed. A written contract is recommended.



## Using Indigenous instruments

Some Indigenous people feel there should be restrictions on the use of particular instruments in accordance with customary laws or practice. Opinions differ among Indigenous musicians on the issue of who can play a yidaki or didgeridoo.

There is a strong belief that in most instances, women are not allowed to play the instrument. Some Indigenous people feel strongly that musicians should refer to the original custodians of the yidaki or didgeridoo for consent to play the instrument, particularly in view of widespread national and international sale and use.

Seeking permission shows respect for the status of the original instrument owners and respects their right to permit, deny or restrict the way the instrument is used. Permission should always be sought for playing, performing or recording any yidaki or didgeridoo song cycles belonging to language groups.<sup>97</sup>

## Visiting Indigenous owned lands

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, permission must be obtained from the local land council or trust, or the community council concerned. For information, consult the land council in the region you intend to visit or, for the Torres Strait, contact the Torres Strait Regional Authority.

There are also permit requirements (and at times, prohibitions) on conducting commercial or creative work in certain areas that are culturally significant to Indigenous people. See the section on **Current Australian protections of ICIP** in this protocol guide.

#### 1.4.4 Principle 4 – Interpretation

**‘Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.’**

**United Nations Declaration on the Rights of Indigenous Peoples, Article 11**

Indigenous people are the primary guardians of their cultures and should be given the opportunity to interpret and present their own cultures.

In the past, Indigenous cultural material has been subjected to interpretation by non-Indigenous people. Today, as Indigenous people seek to reassert and claim control over their cultural heritage material, Indigenous interpretation of cultural heritage is a means of giving power to the cultural significance of the work.

##### i. Cultural contexts and perspectives

Interpretation refers to how cultural material is interpreted and represented. This includes the perspectives and contexts given to the cultural heritage material and the language used.

Some important questions to consider about interpretation and context are:

- What story or message does this project or work tell about Indigenous culture, people and communities?
- ICIP is largely place-based, so stories, cultural expressions, knowledge are linked to places and communities. How are these place-based narratives being maintained in a project or work?
- What perspectives (including cross-cultural perspectives) need to be taken into account? Are there local, regional, national or international perspectives that have to be considered?
- How will your project or work affect the Indigenous language group or community it is based on?
- Does it empower them?
- Does the work reflect the cultural value of the subject matter?
- Does it expose confidential or personal and sensitive material?
- Does it reinforce negative stereotypes?

Always check with the source communities to make sure that interpretations of ICIP are appropriate.

### *Using guides for ICIP interpretation*

Projects should consider the use of guides to aid the interpretation of ICIP. Examples of interpretation guides include:

- An accompanying story to a work – accompanying stories give Indigenous artists or contributors control over the interpretation of culture, story or knowledge portrayed in a project or work. Accompanying stories are also a form of acknowledging cultural connections and attributing Indigenous artists and source communities.
- Style guide or curatorial and maintenance guide – such guides can contain cultural sensitivities and assist in the cultural maintenance of works.

### *ii. Adapting Indigenous content*

Projects that involve the adaptation of Indigenous content, or materials that contain ICIP, from different sources must obtain permission from copyright owners of the content or material.

It is also necessary to get cultural permissions to use the material and find out its context. Doing so is important – issues may arise as some Indigenous content may not be suitable for use, adaptation, edit, mixing or alteration.

Under the moral rights law it is an infringement to materially alter a work without the specific consent of the copyright owner. Similar consideration should be given to the cultural owners of material that contains ICIP, whether there is copyright protecting it or not.

Issues to consider include:

- Is it appropriate to alter and adapt the Indigenous cultural heritage material or to use and depict traditional ritual knowledge in the intended way?
- Who do I need to speak to, and get consent from, about my proposed use, alteration and adaptation?

Further, when permission to use and adapt is given, the copyright created in new work may not always be clear and can raise the following issues:

- Are there any limitations on the use of the new work that incorporates the Indigenous heritage material?
- Who will I approach and request prior consent from for adapting communally owned Indigenous heritage material?

It may not always be obvious whether the proposed uses or adaptations of Indigenous content raises issues of interpretation. Below are some areas and aspects of ICIP, where misunderstandings commonly arise from its use and adaptation.

## Traditional motifs

Indigenous traditional motifs such as the Wandjinas and Mimis are part of the cultural heritage of certain Indigenous groups. They may not be suitable for mass communication or dissemination. The context of the reproduction is an important consideration. It is necessary to discuss context and intended use and get moral rights clearances from the relevant Indigenous artists. You should also get permission from Indigenous custodians. Each and every intended context should be discussed so that there is an understanding of the envisaged extent of use.

## Projects involving life stories of Indigenous people

Where projects involve writing life stories of Indigenous people, it is important to respect the rights of the subject in terms of ownership and approval over their representation of the story.

The following questions arise:

- Who is in control of the representation of the story?
- Is there anything sensitive that needs to be removed from the story – particularly in relation to events and cultural beliefs that involve other people?

## Indigenous languages

Use of language in projects require consultation with all the relevant communities and knowledge holders to ensure that consent is obtained, and that language is represented correctly and appropriately.

Consider language interpretation and context issues, such as:

- Words or phrases from particular languages should not be used just because they are in a different language
- Words and phrases from particular Indigenous languages should only be used where their proper meaning is known and where they are used in the proper context.<sup>98</sup>

For further information on Indigenous languages and usage, contact the relevant Aboriginal language centre or First Languages Australia **[firstlanguages.org.au](http://firstlanguages.org.au)**

## Photographs

Projects might involve the use of photographs of Indigenous people, which may be digitally manipulated or edited such as collage, superimposition, heightened colouring and play with text.<sup>99</sup>

Some Indigenous artists apply cultural sensitivity by seeking consent from family members to use photographs of family, or by only using Indigenous language group material from their own regions. Other artists feel that unless they can ascertain the origins of archival photographs and gain permission then it may be unwise to reproduce or use such images – particularly where there is little or no information about the individual or community depicted in the photograph.

Some Indigenous artists have developed cultural sensitivity practices such as:

- Not using old photographs of deceased people in their work;
- Clearly discussing proposed future uses of photographs and getting written release forms when taking photographs of people;
- Working in close collaboration with an Indigenous community, giving them joint control of the project; and
- Using photographs only of their own family members and/or language groups.

### Indigenous imagery

The photographer is generally recognised as the owner of the copyright of a photograph. You must get permission from the photographer (or copyright owner) to reproduce artistic works protected by copyright. Copyright will generally protect photographs that are created by living artists, or created by an artist who passed away less than 70 years ago. See the **Current Australian protections of ICIP** section of this protocol guide for further information on copyright.

Because the artist of the original work has the moral right of integrity in respect of his or her work, special permission and consent will be needed to alter or adapt it. It is recommended that such consent be sought in writing, after fully explaining to the original artist how his or her work will be adapted or altered.

Certain cultural imagery may not be suitable for adaptation or alteration. For instance, it is considered culturally inappropriate to distort or adapt an artwork that embodies a creation story. This is because part of the cultural value of the artwork relates to the accuracy of the artwork in depicting that particular story. Although some very old artworks may no longer be in copyright, it is still good practice to consult with Indigenous people for the use of these works. Although such works might be able to be sourced and copied from the internet or accessed from cultural institutions, permission for context and use is culturally appropriate. Attribution is also important.

The artist may require consent for instances where communally owned knowledge and potentially sensitive material is used. It is important to develop strong consultative ties with the owners of such material and to keep them informed of how you intend to use the material. The owners should also be informed of any intended uses by third parties to whom you might license the rights to your works.

### Indigenous songs

When using Indigenous songs, you should also consider whether a particular song is appropriate for your project. When adding music to a media project, Nancia Guivarra recommends that you choose culturally appropriate music that represents the geographic and cultural content.<sup>100</sup>

Issues also arise when sampling existing songs.

Permission to use copyrighted songs will also be necessary if development of the work involves the reproduction and performance of a song. This includes doing your own version of it, or using an existing recording. For example, when sampling Indigenous music, issues arise when creators or custodians are not asked for permission to use their traditional songs. In some instances, the music has been sampled from recordings collected by ethnomusicologists or anthropologists, and held in museums. In these cases, the rights in customary and copyright law may be complex, and require considerable consultation before any use. For information on music and copyright see the **Current Australian protections of ICIP** section of this protocol guide.

The Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) also offer information on their website at [apraamcos.com.au](http://apraamcos.com.au)

However, many Indigenous musicians may not be members of these copyright societies and it may be necessary to obtain permission from them directly. For traditional songs, it is a good idea to consult with the performer and the relevant language group, and get permission to use the song in an appropriate context. Do not just assume there is no copyright in a traditional song. There may be copyright on the arrangement, for example, that will require copyright clearance.

## Film footage

If you are using film footage that you have not taken yourself, you will need to get permission from the copyright owner to use or incorporate it into your project or work.

For cultural protocol purposes, it is also necessary to consult on the use of old film footage, particularly if any of the Indigenous people depicted are deceased. Another issue that arises for media artists is the filming of performances. Generally, under the performer's rights of the Copyright Act, once a performer gives permission for a recording of his or her work to be used, it can be used in any way that the owner of the recording chooses in the future. Some Indigenous performance artists may not wish to be filmed while performing in public. Consent is necessary and all potential uses of the footage should be discussed prior to filming. Where possible, written release forms should also be used.

Jenny Fraser<sup>101</sup> encourages performers to ask questions such as:

- How many cameras will be recording the performance?
- Who is the film being made for?
- What are the proposed uses of the footage or stills from the performance?
- Can I view the edited version and consent to the context?
- Who has the rights to control the use of the footage, for example the film maker(s) or the participants, or both?

It is possible to ask to limit the rights given to the filmmaker by way of a written agreement (the release), which can include setting agreed terms about the nature and extent of permitted use. Some useful samples of agreements are available from the Arts Law Centre of Australia.

## Sensitive subject matter

Find out if the subject matter of material you wish to use or adapt is suitable for the proposed use and/or reproduction. Be aware that it is not acceptable in Indigenous communities to circulate widely sacred or secret material or works that have any gender restrictions. Artists should consider the appropriate context for use or reproduction of particular materials.



### 1.4.5 Principle 5 – Cultural integrity and authenticity

**‘Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.’**

**United Nations Declaration on the Rights of Indigenous Peoples, Article 12**

Giving proper consideration to authenticity and integrity means respecting any customary law or cultural obligations associated with a work. This includes gender, correct language, sensitivity to the context of the work, and respecting cultural norms in promotional materials.

Proper regard to these factors will help protect ICIP from misuse or exploitation.

#### i. Use of terminologies

When using or representing ICIP or referring to Indigenous people and communities, projects should ensure that the use of terminologies are accurate and empowering for the source communities. Consider the following:

- Are the terminologies used current or outdated?
- Across different Indigenous communities, there may be different preferences to terminologies used to refer to Indigenous people, or to identify someone’s language group and community connections. ‘Aboriginal and Torres Strait Islander’, ‘First Nations’, ‘First Peoples’, or ‘Indigenous’ are commonly used terms, however you should consult with and ask for the preferred terminologies rather than make assumptions.<sup>102</sup>

The following references provide guidelines on the appropriate use of grammar and terminology in relation to Indigenous people:

- Jackie Huggins, in her article *Respect v Political Correctness* provides some guidance. For example, she states that ‘a’ is for apple, agile, anger, another, address and alphabet, but not for Aboriginal.<sup>103</sup>
- There is a list of suitable terms in the Australian Society of Authors’ paper, *Writing about Indigenous Australia* by Dr Anita Heiss.<sup>104</sup>
- The *Style manual for authors, editors and printers* sets out guidelines for the non-discriminatory portrayal of Aboriginal and Torres Strait Islander people.<sup>105</sup>

## ii. Integrity – right of creators and communities

Integrity is an important aspect of the treatment of original literary, dramatic, musical and artistic works. It is also important for any copies that are made of them. Some projects might include aspects of all four types of works.

Under the Copyright Act the moral right of integrity provides a right of protection for individual artists against inappropriate treatment of their works. For example, the alteration of the work by adapting, cutting, editing or enhancing may materially alter the original intention of the work and infringe on the artist's moral rights.

Maintaining the integrity of a work is important for creators (and in fact a legal requirement of moral rights under the Copyright Act), but integrity of works is also very important for the Indigenous communities where the work includes or captures ICIP such as aspects of dance, story, song or art which is of special cultural significance to the community where it originates.

Unfortunately, there is no legal remedy yet for a community as a whole if traditional material is subjected to inappropriate treatment. See the section on Indigenous communal moral rights in this guide. At present, individual creators can exercise their moral right of integrity in their copyright.

When reproducing and dealing with Indigenous works, discuss the context of reproduction and any proposed material alterations. Be prepared to change your proposed use if the Indigenous language group or community do not agree with the proposed alteration or use.

### iii. Authenticity

Authenticity refers to the cultural provenance of a work. This can be a complex question. For the purposes of this protocol guide, authenticity may also refer to whether an Indigenous person produced the work and whether it was produced with proper regard to Indigenous customary laws, or cultural obligations associated with the work. For example, only an artist who has the right to depict imagery under customary laws may paint some Arnhem Land language group designs. Other images may only be depicted by males.

#### Authenticity of Indigenous arts and craft

Authenticity is a major concern in the Indigenous arts and craft sector. The rise in demand of Indigenous art has led to many rip-off practices including:

- production of artworks by non-Indigenous artists that depict Indigenous styles and are passed off as 'Indigenous art'
- painting of didgeridoos by non-Indigenous people. The decorated instruments are then sold as authentic Indigenous products
- the importing of fake boomerangs and didgeridoos sold as authentic Indigenous products
- the use of inappropriate images by artists and graphic designers, for example, copying sacred symbols from rock art books for commercial logos.

Indigenous people are concerned that such practices undermine the cultural authenticity of Indigenous visual arts, and also rob Indigenous artists and their communities of potential income streams. For decades, there have been calls for better protections for Indigenous artists and their ICIP against inauthentic copying, which are not adequately protected by Australian laws.<sup>106</sup>

One such industry body that advocates for these rights is the Indigenous Art Code.

### *The Indigenous Art Code*

The Indigenous Art Code Limited (Indigenous Art Code) was established to administer the Indigenous Art Code, which is to promote the ethical trading of Indigenous art, specifically:

- fair and ethical artwork trade
- transparency in the promoting and selling of artwork, and
- efficient and fair dispute resolution.

The Indigenous Art Code was established in 2007, following the Standing Committee on Environment, Communications, Information Technology and the Arts' inquiry report *Indigenous Art – Securing the Future, Australia's Indigenous visual arts and craft sector*.<sup>107</sup> The inquiry investigated the unethical trading of Indigenous visual arts and craft and a key recommendation was the establishment of an industry-wide code of conduct for those dealing with Indigenous arts and craft products, or otherwise involved in the industry.

Participants of the Indigenous Art Code include dealer members (including art centres), Indigenous artist members and Code Supporters (people and organisations who support the Code although they are not directly involved with commercial trade with Indigenous artists).<sup>108</sup>

In 2017, the Standing Committee on Indigenous Affairs adopted an inquiry into the growing presence of inauthentic Indigenous 'style' art and craft products and merchandise in Australia.<sup>109</sup> The Committee released its Inquiry report in December 2018, revealing that around 80% of Indigenous souvenir products for sale in Australian giftshops are inauthentic.<sup>110</sup>

The report makes eight recommendations to address the issue of inauthentic Indigenous arts. One key recommendation is to work with the Indigenous Art Code and the Indigenous arts sector, to provide resources and funds for the Indigenous Art Code to expand in order to adequately protect Indigenous artists and their ICIP.<sup>111</sup> A suggested strategy is a mandatory code of practice for the sector.

#### 1.4.6 Principle 6 – Secrecy and confidentiality

**‘Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their ceremonial objects; and the right to the repatriation of their human remains.’**

**United Nations Declaration on the Rights of Indigenous Peoples, Article 12**

Some Indigenous material is not suitable for wide dissemination on the grounds of secrecy and confidentiality. It is the responsibility of those putting together a project to discuss any restrictions on the use with relevant Indigenous groups.

##### i. Sacred and secret material

The reproduction or unauthorised use of sacred and secret material may be a transgression of Indigenous law.

##### What is sacred and secret material?

‘Sacred and secret’ refers to information or material that, under customary laws, is:

- made available only to the initiated
- used for a particular purpose
- used at a particular time
- information/material that can only be seen and heard by particular community members (such as men or women or people with certain knowledge).

Most material that is sacred has customary law restrictions on its use. The consultation process should clearly state the proposed use and observe any restrictions according to gender or other customs.

##### *Problems with publishing sacred and secret material*

The publication of sacred and secret material raises sensitive issues for Indigenous people. Some people question whether it is at all appropriate to publish sensitive material in a manner where it can be disseminated widely. One example that highlights concerns in this area is the case of *Foster v Mountford*<sup>112</sup> involving the issue of published secret and sacred material collected in research. Charles Mountford undertook a field trip in 1940 into remote areas of the Northern Territory.

The Pitjantjatjara people revealed tribal sites and items of deep cultural and religious significance to the anthropologist. Mountford recorded the information and later wrote a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory.

The book contained information that was of deep religious and cultural significance to the Pitjantjatjara men. The information was shown to have been given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society – should the book come into the hands of the uninitiated: women and children. The court allowed them an injunction to stop the sale of the book in the Northern Territory.

Clearly, copyright in the book would have belonged to Mountford. The claim was based on an action for breach of confidence. That is, the researcher had known the confidential nature of the information and the detriment it may cause to the informant's society, yet still published it. Therefore, the Pitjantjatjara were granted equitable relief to stop dissemination of the book where women, children and uninitiated people might find it.

This example illustrates the effect that publishing sacred or secret material may have on Indigenous cultures. In order to respect the cultural sensitivities associated with sacred and secret information, the wider publication of this material should be restricted.

## ii. Representations of deceased people

In many Indigenous communities, the reproduction of names and images of deceased people is not permitted. Where a deceased Indigenous person is the subject of an arts project, the person's family, language group members or community should be consulted so that the appropriate protocols and cultural mourning practices are respected, and the family's wishes are observed.

These issues should be considered when using sound recordings, films, images, or other portrayals of Indigenous people who have passed away.

Cultural protocols surrounding death may include not allowing artworks of a recently deceased artist to be displayed for a certain amount of time after their death. It may also be offensive to Indigenous communities to name or show photos of deceased persons in books or written materials.

### *Cultural sensitivity warnings*

Cultural sensitivity warnings are special written notices that can be published on printed, visual or audiovisual materials that feature images or names of deceased Indigenous people. This is a way of alerting Indigenous readers and viewers of the material content.

Please refer to **Part 2 – Project resources, Templates** for a sample cultural sensitivity warning.

However, those working on projects that feature or include deceased Indigenous people should first ask the person's family or community, to determine if the use, or the use of cultural sensitivity warnings, is culturally appropriate.

When recording Indigenous people as part of arts projects, you should discuss the issue of cultural death protocols with them, so that they can advise you of their position in relation to this cultural practice. These discussions should be reflected in the project agreement, which may include the Indigenous person nominating a representative to make decisions about using the person's name or image in the event of death.

### *iii. Personal privacy*

If you are planning to depict an identifiable individual or community group, ask the individual, community or relatives of the individual for permission, and check whether the details are correct and appropriate.

The privacy of Indigenous people should be respected. Personal information should not be disclosed without permission from the people who will be affected by the disclosure. This may be relevant to portrayal of people's lives in dances, and to publicity, promotional material and media releases.

Disclosure of personal information about an Indigenous person who has passed away should also be cleared with the family and community.

### *iv. Use of life stories*

If you are planning to depict an identifiable individual or community, ask the individual, community or relatives of the individual for permission, and check whether the details are correct and appropriate.

It is important to avoid disclosing sensitive information. Confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure. If you are planning to write a story, song lyrics, performance or base your project on an individual's personal life experiences, it is advisable to consult with that individual. There may be important cultural formalities to be observed in telling the story in specific art forms and media.



### 1.4.7 Principle 7 – Attribution

**‘Indigenous peoples’ rights are, by definition, collective rights... the international community clearly affirms that Indigenous peoples require recognition of their collective rights as peoples to enable them to enjoy human rights.’**

**United Nations Human Rights Office of the High Commissioner,  
Indigenous Peoples and the United Nations Human Rights Systems  
Fact Sheet No.9/Rev.2**

Relevant Indigenous language groups or communities should be attributed for the use of their ICIP.

In many instances in the past, and even today, Indigenous people have been used as informants for research, evaluations and theses. Today, Indigenous people are seeking greater acknowledgement than being recognised as mere informants. They seek the right to be acknowledged as owners of their ICIP, their knowledge and information. They also seek to have a greater share in any benefits generated from the use of their cultural stories.

#### i. Attributing communities or language groups

Under the moral rights provisions of the Copyright Act, the right of attribution is recognised for individual creators. The communal right of an Indigenous language group or community to ICIP is not recognised, leaving communities with no rights to protect and guard the integrity of ICIP.

When using ICIP, it is best practice for individual storytellers or custodians to also be attributed for their role in the development of a work. It is also important to attribute the cultural source of an image or story. For example, a work that shares a story originating from a particular language group should be attributed in each and every publication sharing the story.

#### ii. Attributing multiple contributors or communities

Where a work uses materials from many different sources, it is respectful practice to credit individuals, families, language groups or communities, cultural consultants and others who contributed to the work or project at any stage.

It has become the practice with many Indigenous artist to also list their language group affiliations after their own names. Indigenous custodians, contributors and relevant Indigenous organisations contributing resources and knowledge are now given a significant credit as collaborators on particular projects.

### iii. Strategies for attribution

It is important to consult on the form of attribution people may want such as proper wording and spelling of names.

Depending on the nature of the project and the needs and requests of the relevant communities, attribution could take the form of:

- an acknowledgement plaque – for example to accompany the displayed work resulting from the project
- attribution in the project catalogues or brochures
- an accompanying story – where stories are used in a project or creation of a work, accompanying stories are a form of attribution that allow the Indigenous artists or contributors to tell the story from their own perspectives. Accompanying stories also give the Indigenous artist or contributor control over the interpretation of story, as told through the work or project.
- traditional custodians notice – these are special notices that identify the cultural connections associated with ICIP used in a project or work. A sample traditional custodian's notice is provided in **Part 2 – Project resources, Templates.**

It may also be appropriate to involve the relevant source communities or language groups in the launch of the project or the work. Those involved should be paid for their participation. This is a form of attribution as well as a way of sharing the benefits flowing from the use of ICIP.

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#### 1.4.8 Principle 8 – Benefit sharing

**‘Encourage the equitable sharing of benefits arising from the utilization of [Indigenous] knowledge, innovations and practices’**

**United Nations Convention on Biological Diversity, Article 8(j)**

Indigenous people should share in the benefits and receive proper returns for use of their ICIP. The UN Global Compact's Business Guide to the Declaration suggests as a practical action to protect ICIP as:

**‘ensure that any arrangements with Indigenous peoples that relate to the use of their cultural or intellectual property grant them an equitable interest in the products ultimately produced that provides fair benefits (e.g. through compensation or royalties). Such intellectual property agreements should be based on international and relevant domestic norms so as to ensure the greatest possible protection for Indigenous communities.’<sup>113</sup>**

When using ICIP, especially for commercial purposes, it is important to consider ways in which the language group or community can benefit from the use of their material. Consult with the community on what benefits would be preferred for their participation in projects.

### ***Nagoya Protocol – international benefit-sharing standards***

The ***Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*** (Nagoya Protocol) is an international instrument that supplements the United Nations Convention on Biological Diversity and sets the standards for fair and equitable benefit-sharing with Indigenous people and communities for the use of their resources and knowledge.<sup>114</sup> Australia signed the Nagoya Protocol in 2012 but is yet to implement and ratify it.

Whilst focused on biodiversity related work, the Nagoya Protocol provides important benefit-sharing principles relevant to projects that involve using ICIP or working with Indigenous people or communities:

- obtaining the free, prior informed consent of Indigenous people for the use of their knowledge<sup>115</sup>
- monetary and non-monetary benefits should be considered in projects.<sup>116</sup> This includes capacity building, sharing data and resulting works, and transferring intellectual property ownership to Indigenous contributors
- benefits should be negotiated and on mutually agreed terms.<sup>117</sup>

#### **i. Wages and employment**

##### **Fair pay and work conditions**

An ongoing issue for Indigenous and non-Indigenous artists is that of fair rates of pay and conditions.

The *Fair Work Act 2009* (Cth) is the law that governs Australia's workplaces. It sets the required standards for employment and workplace conditions, including the National Employment Standards that cover minimum entitlements that must be provided to all employees in Australia, including:

- maximum weekly hours
- flexible working arrangements
- leave entitlements - parental leave, personal/carer's leave, compassionate leave, unpaid family and domestic violence leave, community service leave, long service leave
- public holidays
- termination – notice and redundancy pay entitlements.<sup>118</sup>

The Fair Work Act is administered by the Fair Work Ombudsman, a statutory authority that ensures compliance with the Act.<sup>119</sup> The Fair Work Ombudsman provides information for employers and employees on the requirements of the Fair Work Act, takes workplace issue complaints and assists with resolving such issues. Amongst its powers are the ability to conduct workplace investigations, issuing notices and undertakings and taking court action where there is a breach of the Fair Work Act.<sup>120</sup>

The Ombudsman also provides specific resources relating to Aboriginal and Torres Strait Islander employment, which can be found on their website here: **[www.fairwork.gov.au/find-help-for/aboriginal-and-torres-strait-islander-people](http://www.fairwork.gov.au/find-help-for/aboriginal-and-torres-strait-islander-people)**

### Modern awards and enterprise agreements

If an Indigenous artist is working for or engaged by a large, reputable company, their working conditions will be set by an award or an enterprise agreement.

Modern awards cover an industry, profession or occupation and, together with the National Employment Standards,<sup>121</sup> set minimum requirements for payments and employment conditions.<sup>122</sup> Enterprise agreements are collective agreements on employment terms negotiated between employers and a union.<sup>123</sup>

It is important for Indigenous artists to read the award or agreement in order to understand their, and their employer's, rights and responsibilities before signing any agreements. The Fair Work Commission publishes enterprise agreements on their website at **[www.fwc.gov.au/search/document/agreement](http://www.fwc.gov.au/search/document/agreement)**.

How do artists find out more about fair pay and conditions? Below are some key representative organisations and service providers that could provide further guidance and information to Indigenous artists on fair pay and work conditions.

### Media Entertainment and Arts Alliance

The Media Entertainment and Arts Alliance (MEAA) is the union representing the media, entertainment, sports and arts industries. MEAA provides advice and support for its members on many different issues including employment and fair rates of pay. MEAA provides equity minimum rates of pay for performers, including information on annual salaries, hourly rates or pay and rates for rehearsal, screen tests and extra work.

More information can be found on the MEAA website at **[www.meaa.org](http://www.meaa.org)**.

### National Association for the Visual Arts

For visual artists, the National Association for the Visual Arts (NAVA) is the peak body that represents the visual arts, craft and design industries. NAVA's Code of Practice includes the organisation's accepted benchmarks and scales of fees and wages, based on the type of artist, seniority and the kind of work being conducted.<sup>124</sup> The figures were based on an industry survey and interviews conducted by NAVA in 2013–2016.

NAVA provides services to its members such as fact sheets, templates, guides, discounted insurance, professional development programs and advocacy. More information can be obtained on the NAVA website at **[www.visualarts.net.au](http://www.visualarts.net.au)**.

## Australian Society of Authors

For writers and literary creators, the Australian Society of Authors (ASA) is the peak professional association for Australia's literary creators with more than 3000 members in Australia and overseas. Its members include biographers, academics, food and wine writers, children's writers, ghostwriters, librettists, travel writers, romance writers, translators, journalists, poets and novelists.<sup>125</sup>

The ASA provides information and advice to both emerging and established writers and illustrators, offers mentorship programs and seminars, and is a strong national advocate for authors' interests. It sets minimum rates of pay and conditions for authors.<sup>126</sup>

ASA members can use a subsidised contract advisory service, receive discounts on ASA publications, seminars and events, and can call anytime for friendly and informative advice about all aspects of writing and publishing.

For more information about ASA, visit **[www.asauthors.org](http://www.asauthors.org)**.

## Arts Law Centre of Australia

The Arts Law Centre of Australia gives advice to artists, writers and filmmakers on legal matters relating to arts practice. The Arts Law Centre website publishes useful information sheets on copyright and the arts at **[www.artslaw.com.au](http://www.artslaw.com.au)**.

The Arts Law Centre also runs 'Artists in the Black' (AITB) which employs an Indigenous Coordinator. AITB provides:

- legal services and information to Indigenous artists, communities and arts organisations
- informed advocacy work on issues relating to ICIP, such as the Fake Art Harms Culture campaign.<sup>127</sup>

### ii. Other payment and condition issues

Apart from the usual wages and allowances for travel and accommodation, Indigenous artists participating in projects may have specific cultural requirements, which must be met if they are to participate in a work. For instance, some Indigenous participants may have dietary or medical requirements that must be met if they are to spend extended periods away from home – touring, for example.<sup>128</sup>

In New South Wales, the government has set policy guidelines for a recommended fee for service for Aboriginal cultural performances.<sup>129</sup> The policy guidelines included recommended fees for Welcome to Country, smoking ceremony, dance and music performances, as well as guest speaking engagements.

### iii. Copyright ownership in resulting works

The Nagoya Protocol provides that joint ownership of relevant intellectual property rights is a form of monetary and non-monetary benefit for Indigenous peoples, where traditional knowledge or cultural heritage is used and commercially applied.<sup>130</sup>

Copyright ownership should be discussed at the outset of projects. Indigenous contributors or the cultural custodians could own or jointly own copyright in resulting works, particularly where works incorporate or embody ICIP.

### iv. Royalties and residuals

Copyright owners of works are entitled to receive payment for authorised uses of their works. A royalty is the name given to payments that copyright owners receive for authorising the use of their works. Royalties are a vital form of income for Indigenous artists, musicians, authors and performers.

#### Royalties and the visual arts

For artists, once an artwork has been created and sold, the artist can still control the copyright and receive income from it. Royalties are generally paid to the copyright owner, usually the artist when it comes to visual art. Australia also has the Resale Royalty Right Scheme in place (see the Resale Royalty Rights section of this protocol guide, under **Current Australian protections of ICIP**).

One question is whether cultural heritage custodians are entitled to payment of a royalty when communally owned Indigenous cultural expressions is incorporated into a work that is out of copyright, and when cultural heritage is commercially used or reused in a copyright work. By example, rock art on T-shirts would not ordinarily require the manufacturer to pay copyright royalties to the traditional owners of the rock art because the rock art is not protected by copyright (being too old).

While there is generally no legal entitlement for royalties to be paid to custodians of communally owned Indigenous cultural expression, it is possible for this to be negotiated, and paid by users.

Further, another issue for the artist is the ability to monitor use of copyright, particularly where the permitted use is broad. It is important to use written agreements and keep good records, so that that permitted use can be managed.

#### Royalties and performing arts

For performers, royalties are paid as a percentage of either the box office or the sale of the work. Writers generally receive royalty payments on the first season. Directors, dramaturges, designers and in some instances, actors, may receive royalties on the first season, but often they are not paid royalties until subsequent seasons. Royalties may be negotiated by individuals and included



in contracts. In some cases royalties are paid to the Indigenous community, which has participated in the work.<sup>131</sup>

Royalties are also paid to the originating theatre company when it licences the performance rights to the work. Generally, a small Indigenous theatre company will license to a larger non-Indigenous theatre company. At present there is no recognition in the royalty structure for the effort, time and cost to Indigenous theatre companies of consultation and adherence to cultural protocols in the development phase.<sup>132</sup>

## Residuals

Residuals are amounts of money which may be paid to performers for future uses of recordings of their work, such as repeats of television shows and commercials. Residuals will only be paid for future uses of works when it is a term of the agreement between the actor and producer. If the agreement includes payment of residuals, they will be distributed by MEAA at the end of each quarter to performers who are alliance members. It is important to check any agreements before signing them.

Not all performers wish to be paid at the award rate. Some Indigenous people suggest that the award rate does not include recognition of the nature of Indigenous performance. It was suggested that rates of pay should include an amount that recognises the additional cultural element in Indigenous performance.<sup>133</sup>

## Royalties and music

Royalties are available to copyright owners who are registered with the collecting societies. Songwriters and composers are strongly advised to register with APRA AMCOS so their royalties can be paid (see more about APRA AMCOS below under **Copyright collecting and management organisations**). Unless the music copyright owner is registered with APRA AMCOS, for instance, he or she cannot be paid royalties on the public performance or broadcast of his or her songs.

## v. Other benefit-sharing issues

### Speaking engagements

Many Indigenous artists are experienced presenters and are willing to speak at exhibition openings and other public events. It is courteous to pay them for their time and reimburse the cost of transport, childcare and any other services that may be required.



## Interviewing Indigenous artists

When undertaking interview engagements, Indigenous artists should be aware that while information gained from an interview is the property of the artist, copyright in the resulting podcast, film, article, book, thesis, television or radio program produced as an outcome of this and other interviews remains with the author (or publisher or producer).

Interviewers and researchers should pay Indigenous artists, community representatives a fee for their contributions. The Indigenous contributor can negotiate with the writer, publisher or filmmaker for proper credit and a share in any money made, for example, from the exploitation of the book or film. The terms of the arrangement can be incorporated in a written agreement.

## Digitising works and internet publishing

Indigenous artists are entitled to a fee for the reproduction of their works on the internet. The right to communicate the work to the public on the internet is a separate right to the reproduction right, and consent should be obtained prior to digitising and placing works on the internet. The website developer should discuss the proposed format or reproduction with the artist, and measures, such as technological protection measures or watermarks, should be taken to limit the ease of copying.

Before placing Indigenous art online, website producers should discuss how the work will be reproduced, and ensure that appropriate attribution is given.

Indigenous people are often concerned about the publication of Indigenous cultural heritage on the internet. Prior discussion of these issues will assist in identifying and addressing any concerns.

## Benefit-sharing in collaborative works

For collaborative or large-scale projects such as multimedia works, resolving ways in which benefits can be shared among all contributors is a challenge given that there may be many different components in the resulting works. Projects should consider developing methods of benefit-sharing which allow for projects to be undertaken – for instance, exchanging technical information for free copies of the product for members of the contributing cultural groups.

Brenda L Croft says, 'Artists should also receive licence or royalty payments for any commercial product generated by the collaboration.'<sup>134</sup> This should apply to all creative contributors. When applying for funding, these fees should be incorporated in the project budget.

Collaborative projects can constitute a range of outcomes, and is flexible to allow sharing of benefits by way of copies as focused outcomes.

The Nagoya Protocol provides examples of a wide range of project benefits such as:<sup>135</sup>

- sharing of research and development results
- education and training
- capacity building
- access to information
- contributions to the local economy
- development of institutional and professional relationships.

These examples are not exhaustive, but indicates the range of benefits projects could result in.

#### vi. New uses of ICIP require new benefits

Projects should provide new, additional benefits to Indigenous artists or contributors for new uses of ICIP.

If the new use goes beyond the scope of existing permissions, further consultation and consent may also be required. See **Principle 3 – Communication, consultation and consent.**

#### vii. Copyright collecting and management organisations

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. For management and administration of copyright, there are several collecting societies and agencies that have been established within Australia.

These organisations administer the rights of members for a fee or share of the royalties. This system means that copyright owners are not individually trying to chase up their royalty payments. Some of them, such as the Copyright Agency and Screenrights, have a legislative basis for collecting royalties. Others are voluntary organisations that collect royalties based on artist membership.

#### Copyright Agency

Copyright Agency is the Australian copyright management organisation that provides a bridge between creators and users of copyright material. In 2017, Copyright Agency merged with Viscopy, the former copyright collecting society for visual artists in Australia and New Zealand

Copyright Agency is the non-exclusive copyright agent for authors, poets, playwrights, cartoonists, illustrators, journalists, visual artists, photographers and publishers to license the copying and communication of works to the general community. Copyright Agency manages licences for the copying and digital communication of print material by educational institutions, government agencies, corporations, associations, places of worship and other organisations.

Copyright Agency also manages the Resale Royalty scheme for visual artists and the special provisions in the Copyright Act for institutions assisting those with print disabilities.

Authors must register to receive monies directly from Copyright Agency. If not registered, the monies may go to the publisher who is then responsible for passing on the author's share under terms of the publishing contract.

For more information on the Copyright Agency, visit **[www.copyright.com.au](http://www.copyright.com.au)**.

### **Australasian Performing Right Association (APRA)/Australian Mechanical Copyright Owners Society (AMCOS)**

The Australasian Performing Right Association (APRA) collects and distributes licence fees for the public performance and communication (including broadcast) of its members' musical works. Public performances of music include music used in pubs, clubs, fitness centres, shops, cinemas and festivals, whether performed live, on CDs or played on the radio or television. Communication of music covers music used for music on hold, music accessed over the internet or used by television or radio broadcasters.

The Australasian Mechanical Copyright Owners Society (AMCOS) collects and distributes 'mechanical' royalties for the reproduction of its members' musical works for many different purposes. These include the manufacture of CDs, music videos and DVDs, the sale of mobile phone ringtones and digital downloads, the use of production music and the making of radio and television programs. Since 1997, APRA has managed the day-to-day operations of the AMCOS business.

When organising a concert or other event, it is important to contract APRA AMCOS, which will arrange for the songwriters to be paid royalties for the performance of their work. It is the event promoter or organiser's responsibility to ensure that the appropriate permissions to perform and communicate recorded and live music are obtained. If tickets are sold to the concert or admission fees are charged, APRA will arrange a concert promoter's licence, and a fee to be paid and distributed to the copyright owners.<sup>136</sup>

Different licensing requirements apply for music used in a dramatic context – that is, a live performance with a story line or narrative and characters, or a ballet.<sup>137</sup> Licence fees depend on the gross box office amounts, how music is used in the performance, and the subject of the performance.<sup>138</sup>

For more information about APRA AMCOS, visit **[apraamcos.com.au](http://apraamcos.com.au)**.

## Screenrights

Screenrights collects royalties from schools, TAFEs and universities when they copy from television. It distributes this money on a non-profit basis to the producers, screenwriters, distributors, copyright owners of music and artistic works and other rights holders in the copied programs.

To help filmmakers market their programs to educational institutions and to assist teachers in getting the most out of their copying licence, Screenrights set up **EnhanceTV**. This site gives educators free resources for using television in the classroom, as well as a weekly email guide to television highlights.

Screenrights also administers provisions in the Copyright Act that allow pay-television operators to retransmit to air broadcasts as part of their service provided they pay royalties to the underlying copyright owners. Copyright owners in television can register titles with Screenrights to collect these royalties. They can also make their registration global, appointing Screenrights International to collect any royalties being held for them by other similar societies in Europe, Canada and the United States. This enables filmmakers to maximise their returns and minimise their costs.

For more information on Screenrights, visit **[www.screenrights.org](http://www.screenrights.org)**.

## Phonographic Performance Company of Australia Limited (PPCA)

PPCA is a non-profit company whose members are sound recording copyright owners. These are mainly record companies, but performers may also be joint owners of copyright in recordings. Performers on sound recordings should check their recording contracts to see whether they are joint copyright owners. PPCA grants licences on behalf of record companies and recording artists to venues such as hotels, shops, restaurants, and radio and TV stations which play recorded music (CDs, tapes, records) or music videos. It also licenses online users of sound recordings. It collects royalties from broadcasters and businesses publicly playing recorded music. The money is distributed to the copyright holders and Australian recording artists registered with PPCA.

If sound recordings will be played as part of a project or a work, it is important to get a licence from PPCA.

For more information on the PPCA visit **[www.ppca.com.au](http://www.ppca.com.au)**.

## Australian Record Industry Association (ARIA)

ARIA represents recording companies in the industry. It has more than 100 member companies ranging from large companies with international affiliations to small boutique labels run by a handful of people. ARIA provides licences on behalf of ARIA members to individuals and organisations wishing to make legitimate reproductions of sound recordings for some specific limited purposes – such as commercial background music suppliers. The royalties generated from ARIA licences are collected and then distributed to copyright owners, usually the record companies.

More information about ARIA can be found at [www.aria.com.au](http://www.aria.com.au).

## Australasian Music Publishing Association (AMPAL)

AMPAL operates as a trade association representing music publishers in Australia and New Zealand. AMPAL does not grant licences for the use of music. It collects statistical information about the economic value of music publishing; provides a forum for music publishers to discuss matters relating to the industry; provides information to government, the education sector and the general public about the role of music publishers and the copyrights in music that they administer.

For more information on AMPAL visit [www.ampal.com.au](http://www.ampal.com.au).

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### 1.4.9 Principle 9 – Continuing cultures

**‘Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures...’**

**United Nations Declaration on the Rights of Indigenous Peoples,  
Article 13(1)**

Indigenous people are responsible for ensuring the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

#### i. New uses of ICIP need new consents

Cultures are dynamic and evolving, and the protocols within each group and community also change. Consultation is an ongoing process, and thought should be given to ways of maintaining relationships for future consultation.

It is important to consider how you will maintain relationships for future consultations. This might include consultation at a later date for future uses of the work that were not envisaged during the initial consultation.

Also, projects, art forms and technologies employed change and develop over time, so consultation with Indigenous custodians may often be required when responding to new conditions or opportunities that are outside the scope of consent already provided. For example, consultation would be needed if a production is to tour overseas, or if a cultural story contained in a visual artwork is to be translated into a virtual reality piece or a song.

## ii. Archiving or depositing works

Projects should also consider how resulting works might be made available to the relevant communities in the future. Some artists have dealt with this issue by donating collections to Indigenous cultural centres or depositing material at the Australian Institute of Aboriginal and Torres Strait Islander Studies and/or the National Film and Sound Archive. Before depositing material, research and discuss the deposit terms with participants and communities.

## iii. Future custodians of ICIP

Those putting together arts projects should recognise that their rights and responsibilities to ICIP are ongoing, as ICIP rights are perpetual and they do not end when a knowledge holder or custodian passes away, or when copyright expires.

Indigenous people should be given the opportunity to provide the name and details of their nominated representative, their next-of-kin, to give consent on their behalf in the event that they are incapacitated or have passed away.

A sample next-of-kin clause is provided in **Part 2 – Project resources, Templates.**

#### 1.4.10 Principle 10 – Recognition and protection

**‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... [and] their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.**

**In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.’**

**United Nations Declaration on the Rights of Indigenous Peoples,  
Article 31(1), (2)**

Australian law and policies should be developed and implemented to respect and protect ICIP.

Special consideration needs to be given to where works incorporate ICIP. There are currently no special laws dealing with ICIP ownership and reproduction rights. The Copyright Act has been criticised for not recognising the communal ownership of ICIP and the continuing right of traditional custodians to control the use of ICIP.

The increasing level of non-Indigenous appropriation of ICIP has compelled Indigenous people to seek greater protection of Indigenous creative arts, including the call for new legislation recognising communal rights to ICIP.

Agreements should also be used to recognise and protect ICIP rights. When preparing project contracts, those partnering with Indigenous people should ensure that rights to ICIP and copyright in any resulting works vest in the Indigenous contributors, rather than assigned from them. Licences can be given to project partners for specific purposes that are negotiated and relevant to the project.

Agreements should be understood by the Indigenous person or representative and they should be given the opportunity to consider the implications of signing the agreement and get legal advice on its terms. The Arts Law Centre of Australia runs the Artists in the Black legal service for Indigenous artists, communities and arts organisations.<sup>139</sup>



## Part 2:

# Implementation of protocols

## 2.1 Case studies

This part provides case study examples of Australia Council for the Arts funded projects and/or organisations across a wide variety of art forms to demonstrate how the principles and cultural protocols are applied in practice. Supplementary resources are also provided in this part for ongoing use in projects.

Remember that Australia Council for the Arts grant funding recipients are required to follow the protocols in their work.<sup>140</sup>

### *Indigenous Cultural and Intellectual Property: Summary*

Indigenous Cultural and Intellectual Property or ICIP refers to the cultural heritage belonging to Indigenous people and communities. Indigenous people have rights to their ICIP, and these are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, particularly Article 31(1).

It is of utmost important for projects to uphold these rights to ICIP.

For more on ICIP, please see **Part 1.2 of this protocol guide**.

Each case study is set out under ten headings, corresponding to each of the following ten key principles for respecting ICIP:

Principle 1 **Respect**

Principle 2 **Self-determination**

Principle 3 **Communication, consultation and consent**

Principle 4 **Interpretation**

Principle 5 **Cultural integrity and authenticity**

Principle 6 **Secrecy and confidentiality**

Principle 7 **Attribution**

Principle 8 **Benefit sharing**

Principle 9 **Continuing cultures**

Principle 10 **Recognition and protection**

## 2.1.1 Visual arts

### *i. untitled (giran) by Jonathan Jones*

© Jonathan Jones

This case study was written by Jonathan Jones and edited by Maiko Sentina and Gabriela Dounis.

*untitled (giran)* is a project led by Wiradjuri/Kamilaroi artist Jonathan Jones. It involved the creation of a major art installation exploring the Wiradjuri gulbanha (philosophy) of giran (wind). The work was developed in collaboration with leading Wiradjuri language-holder and elder Dr Uncle Stan Grant Snr. It was featured in the *9th Asia Pacific Triennial of Contemporary Art* (APT9) at the Queensland Art Gallery & Gallery of Modern Art (QAGOMA) in Brisbane over late 2018–19.

The final largescale gallery installation comprises nearly 2000 small sculptural objects and an immersive 48-channel soundscape. Each sculpture represents a Wiradjuri tool and is affixed with feathers speaking to the concept that winds bring ideas and knowledge. The soundscape includes Wiradjuri language, recordings of country and sounds of the tools in use. This animates the sculptures as they swarm across the gallery walls in the formation of an infinity or figure-eight symbol to convey a sense of flight.

This work and the process behind its creation reflects the ongoing importance of Indigenous Cultural and Intellectual Property (ICIP), particularly giran and language, for Wiradjuri people. It forms part of the cultural revival currently being experienced in the south-east region (New South Wales and Victoria).

#### Image credits page 71, 72 and 77

Jonathan Jones / Kamilaroi/Wiradjuri people / Australia b.1978

Dr Uncle Stan Grant Sr AM / Cultural advisor and speaker of recorded Wiradjuri / Australia b.1940

*untitled (giran)* 2018

Bindu-gaany (freshwater mussel shell), gabudha (rush), gawurra (feathers), marrung dinawan (emu egg), walung (stone), wambuwung dhabal (kangaroo bone), wayu (string), wiiny (wood) on wire pins, 48-channel soundscape, eucalyptus oil

1742 pieces (comprising 291 Bindu-gaany; 290 Galigal; 292 Bagaay; 291 Dhalany; 280 Bingal; 298 Waybarra): installed dimensions variable

Purchased 2018 with funds from Tim Fairfax AC through the Queensland Art Gallery | Gallery of Modern Art Foundation

Collection: Queensland Art Gallery | Gallery of Modern Art

Photographs: Natasha Harth, QAGOMA

## 1. Respect

**Project managers must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to protect, maintain, control and benefit from their ICIP.<sup>141</sup>**

The conceptual foundation of *untitled (giran)* is the creative development of Wiradjuri gulbanha regarding giran. This involved many elements such as tracking and recording the movement of giran in Wiradjuri country, and engaging with the associated cultural stories. It also involved the knowledge embedded within Wiradjuri language. These cultural understandings were collated in a culturally appropriate way under the guidance of highly respected Wiradjuri elder Dr Uncle Stan Grant Snr. It raises awareness and respect for Wiradjuri culture and highlights the collective relationship we all have to the wind which moves through countries, connecting peoples and ideas.

A key part of this project was a public call-out in early 2018 for feathers involving the Wiradjuri principle of yindyamarra (respect). Jonathan encouraged the general public to connect with and understand their local environment by asking participants to collect feathers with yindyamarra. This principle encourages people to slow down as they move through country, to take notice of places where feathers collect and to consider how they got there. This culturally informed way of moving through country enabled participants to connect with the principle of yindyamarra that underpins ICIP and the collective experiences of country. Donations of feathers were received from across the country for the project.





## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>142</sup>**

This project was conceived and directed as a Wiradjuri project, led by principal Wiradjuri artist Jonathan Jones in collaboration with Wiradjuri elder Dr Uncle Stan. Jonathan's leadership and Dr Uncle Stan's guidance means the process of making the work involved the principle of Walan-ma-ya Wiradjuri mayiny-galang (Wiradjuri self-determination). This principle underpins the revival and assertion of cultural knowledge in the project, strengthening Wiradjuri culture, aspirations and identity, which in turn empowers the wider community.

The process of Wiradjuri self-determination was experienced on multiple levels: a public call-out to collect feathers; inviting artists from around the south-east to contribute; and consulting with elders and community members as the project developed. It underpins the enduring practice of making objects, the use of Wiradjuri language and the role of art to bring community together to learn skills and assert a sense of pride. All of this is part of the development and encouragement of Wiradjuri understandings regarding giran that ran throughout the project and is evident in the final installation.

Image credit: see page 70.



### 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous people. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

The process of making *untitled (giran)* engaged with Aboriginal people, knowledges and practices from across the south-east region. Key community members contributed to the project through consultation, artwork production and language recording. The role of respected elder Dr Uncle Stan Grant Snr, a highly respected leader not only within the Wiradjuri community but across the south-east region, played a central role as the key cultural consultant. He provided much-needed language and knowledge advice, interpreting community feedback and providing general guidance to keep the project on track. Jonathan (based in Sydney) and Uncle Stan (based in rural New South Wales) regularly met in person over the course of the project.

The objects that make up *untitled (giran)* were created with the approval of community. The act of making these objects—some of which, such as *bagaay* (emu-egg scoop), *bingal* (kangaroo-bone awl), *galigal* (stone knife) or *dhala-ny* (hardwood spear-point), have not been made for generations — is one of cultural maintenance, ensuring that the knowledges associated with them are not lost. The process of creation involved many stages such as the collection of materials, asking elders how to make these objects and then deliberating over their potential public display. This provided opportunities for community members to discuss the objects in a contemporary and living context.

The use of Wiradjuri knowledges and language is central to *untitled (giran)* and involved a high level of consultation within the Wiradjuri community. While the success of the language component is owed to Uncle Stan, several other Wiradjuri elders and community members were consulted about the concept of *giran*. This consultation was around both cultural and personal meanings and discussions on what stories could be shared publicly and how to tell them. As ideas developed, they were shared with the community and feedback was sought. The consultation process was ongoing, informal, flexible and long-term to meet the needs and interests of the community and ensure positive outcomes.

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>143</sup> This includes the past, present and future manifestations of culture in the visual arts.<sup>144</sup>**

The connections between art and cultural practice in *untitled (giran)* are grounded in Wiradjuri contexts. The use of Wiradjuri language draws from the orthography in the Wiradjuri dictionary developed by Dr Uncle Stan Grant Snr, the key language-holder for the Wiradjuri community. The Wiradjuri language featured in the soundscape was also recorded by him. The artwork thus maintains the correct pronunciation of words and construction of sentences. The project is well publicised and cited as having been conceived, created and delivered within a Wiradjuri worldview by a Wiradjuri artist and elder.

Interpretation guides are also used in the work. A key interpretative text panel within the exhibition outlines the concept of the project and exhibition labels and a catalogue essay further describe the ways in which the project creatively engages with Wiradjuri ideas. This assists audiences in understanding the deep cultural importance of the project, including the specific cultural connections and meanings. In addition, a short online film produced by QAGOMA offers the general public a deeper understanding of Wiradjuri culture and knowledges. The project is thus specific in how it is framed and understood, actively resisting notions of pan-Aboriginal knowledges and culture.

#### 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>145</sup>**

It is important that *untitled (giran)* continues to be understood within a Wiradjuri framework, including being exhibited with the same credits and acknowledgements. In the installation, Jonathan creatively connects the two key forms of ICIP – cultural objects and the Wiradjuri language – to authentically represent and celebrate Wiradjuri knowledges. With the approval of Dr Uncle Stan Grant Snr, specific Wiradjuri names were given to each object, many of which are made across the south-east region. This includes bagaay (emu-egg scoop), bingal (kangaroo-bone awl), galigal (stone knife) and dhala-ny (hardwood spear-point).

Many artists, community members and elders also contributed to the making of *untitled (giran)* in the collection and production of materials. This included galigal (stone knives) from the Bathurst Wiradjuri and Aboriginal Community Elders group; bindu-gaany (freshwater mussel shells) and gawurra (feathers) from Auntie Lorraine Connelly-Northey; the creation of the waybarra (weavings) by Auntie Yvonne Koolmatrie (Ngarrindjeri); the carving of dhala-ny (hardwood spear-points) by Lachlan McDaniel (Wiradjuri); and the making of wayu (string) by Auntie Lorraine Tye (Wiradjuri), Auntie Joyce Hampton (Ngiyampaa) and

Rachel Piercy (Murrawarri). These connections demonstrate the strength and shared commitment to cultural integrity and authenticity within the south-east Indigenous community.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

In addition to working with community, the project involved archival research into Wiradjuri understandings of *giran*. This archival research was conducted as part of the conceptualisation of the project and involved analysing a variety of resources, including anthropological material and missionary notes. Archival material regarding Indigenous peoples and cultures is often poorly documented, so in order to ensure that these sources related to Wiradjuri, the project only used information that was collected from Wiradjuri people or on Wiradjuri country.

This research was first brought to Dr Uncle Stan Grant Snr for discussion and approval. As the project developed, the underpinning concepts, knowledges and representations were brought to other respected community members for discussion and feedback. Following this process, much of this research was not made public as it was determined that some of the archival material did not correlate with the living knowledge of the community.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

Each contributor is acknowledged for their role in the project in the exhibition catalogue, the artwork labels, on the APT9 website and within any other material relating to the project. Participants' language groups and connections to country are included to acknowledge the distinctive cultural contexts behind their involvement. These acknowledgements are important as these acts of collaboration, collective responses and engagements are central to the project's conceptual framework.

Although not an artistic collaborator, Dr Uncle Stan Grant Snr played a highly significant role within the project. His teachings are vital to the growth and development of Jonathan's practice and to this project. In many ways, *untitled (giran)* is a tribute to the work that he and many other Elders have done and continue to do in maintaining and reviving cultural practices. It also forms part of an ongoing series of collaborative projects between Jonathan and Uncle Stan that involve working with Wiradjuri language concepts to inform major artworks. This collaboration has created a cultural platform for a new type of community engaged practice.



## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their culture, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Over the course of making the artwork, hundreds of people from across the state and the south-east region contributed by collecting and donating feathers. The process of connecting with these participants was enabled by Kaldor Public Art Projects who ran a call-out for feathers via their social media networks (they have more than 11,000 followers on Facebook and more than 14,000 on Instagram). Kaldor Public Art Projects ran this social media campaign as in-kind support for the project. As part of this and to encourage cultural knowledge within the collection of feathers, a fortnightly online post about certain birds and their importance in the Australian environment was written by Jonathan and posted by Kaldor Public Art Projects.

The community members and other artists who contributed to the making of *untitled (giran)* were each publicly acknowledged for their roles. This list of acknowledgments is part of the artwork and will always be displayed on the artwork label. It is also listed in the exhibition catalogue and within any other material relating to the project.

Those who contributed knowledges and created objects for the project were paid for their time and contribution. This was specified in the funding application budget, and although payment was not the reason for people contributing to the project, it was an important way of recognising their role.

Beyond monetary benefits, the project enabled community members to play a role in the revitalisation of Wiradjuri cultural knowledge. To further acknowledge the extraordinary effort and participation of these participants, Jonathan is making a unique A4 printed artwork to send to everyone as a gift. This not only acknowledges their contributions but continues the goodwill and reciprocal relationships within *untitled (giran)*.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>146</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

*untitled (giran)* acknowledges and is active in the maintenance and revival of both language and cultural practices, highlighting and celebrating Wiradjuri knowledges. As well as contributing to language revitalisation, the project contributes to the continuation and re-establishment of cultural practices such as carving and weaving in the south-east region where culture has been severely impacted by colonisation.

Art and major installations such as *untitled (giran)* can play a key role in maintaining and celebrating these practices. Giran can be seen as the winds of change: people in the south-east region are able, for the first time in generations, to practise culture in what can be described as a period of cultural renaissance. It is hoped that this work will inspire other Wiradjuri artists to embrace the cultural knowledge embedded within their ICIP.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

*untitled (giran)* will always remain the work of both Jonathan Jones and Dr Uncle Stan Grant Snr who, along with the contributing participants, will always be acknowledged for their roles in its making. Beyond the artists and participants, the language and knowledge within the work will always remain part of Wiradjuri knowledges and worldviews.

This project and its success form part of a long-term collaboration between Jonathan and Uncle Stan which will see the development of future artworks that build on the concept of Wiradjuri gulbanha (philosophies). Embedding these philosophies in contemporary artworks means they have a degree of protection through copyright laws and protocols.

Image credit: see page 70.



## *ii. Caught in the Net by Erub Arts*

This case study was developed by Diann Lui and edited by Maiko Sentina and Gabriela Dounis.

*Caught in the Net* is an innovative ghost net (abandoned fishing nets) exhibition, hosted by JGM Gallery in London over June and July 2019. Fifteen Indigenous artists from Erub Arts Centre have worked in collaboration with artists Lynnette Griffiths and Marion Gaemers to produce work that is leading the global ghost net environmental and artistic movement. The exhibition links Torres Strait Islander perspectives on environmental and marine life issues with international audiences to draw attention to the growing crisis of plastic pollution in Earth's oceans.

Erub (or Darnley Island) is an island located in the Torres Strait. Erub artists have been working with reclaimed fishing nets since 2010 when GhostNets Australia (GNA) conducted a workshop on the island, inviting local artists to apply their knowledge of traditional weaving techniques to the new medium of ghost nets.<sup>147</sup> Erub artists with their collaborators have since played a significant role in the global Ghost Net movement by developing shared weaving and stitching techniques appropriate for this new medium. They deconstruct the abandoned nets and repurpose them in artistic and cultural contexts. Their works and largescale installations are in major collections around the world and have featured in many national and international exhibitions, including through significant commissions for the Sydney Biennale, Australian Museum, Tarnanthi festival and more.

Erub Ladies with their giant Squid at Seu Cay.  
Credit: Erub Arts.







## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>148</sup>**

*Caught in the Net* recognises and respects Torres Strait Islander and Erub custodianship of their lands and waters and their right to protect this for future generations. It honours the cultural expressions and knowledges of the Erub artists that are conveyed through the ghost net medium. The respectful exchange between Indigenous and non-Indigenous skills and knowledge is supported by the long and committed associations of artists Lynnette and Marion with Erub Arts Centre.<sup>149</sup>

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>150</sup>**

Self-determination is central to the business and management structure of Erub Arts Centre and this is embedded in *Caught in the Net*. The artworks in the exhibition were created by Erub artists Ethel Charlie, Solomon Charlie, Rachel Emma Gela, Florence Gutchen, Lavinia Ketchell, Nancy Naawi, Robert Oui, Racy Oui Pitt, Ellarose Savage, Jimmy John Thaiday and Jimmy Kenny Thaiday; and artists Lynnette Griffiths (Artistic Director of Erub Arts) and Marion Gaemers. These 13 artists worked together to create several largescale collaborative works. These works are on show alongside individually created works that honour and reveal the distinctive styles of each artist.

This team of artists, supported by Erub Arts manager Diann Lui, worked collaboratively from the exhibition conception and development through to the installation process. The artists collectively installed the show at JGM Gallery in London with guidance from the exhibition curators Jennifer Guerrini Maraldi (Director, JGM Gallery), Lynnette Griffiths and the team at JGM Gallery.

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

The Erub artists are the custodians of the totems and traditional weaving techniques – the ICIP – they draw from in making the ghost net artworks. Their own cultural authority and links to fellow Erub community members ensures that the relevant communication, consultation and consent procedures around engagement with this ICIP takes place during the development of exhibitions such as *Caught in the Net*.

In terms of language use, Erub Arts Centre facilitates communication and consultation processes with Elders to reach consensus around spelling, interpretation and meanings of traditional language words that are publicly shared for the exhibition in artwork titles and descriptions.

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>151</sup>**

To create a cohesive story and strong curatorial focus, the artists researched and explored closely connected subjects through a series of coordinated workshops and museum visits. However, the exhibition is multifaceted as it includes the work and expressions of so many different artists within this themed approach. The individual expressions of the artists and their unique connections to sea country are conveyed through the works.

The artists are using their art for environmental activism too. *Caught in the Net* generates awareness in new audiences concerning conservation issues related to commercial fishing debris that harms marine life and communities in the Torres Strait Islands. These issues are framed through their unique cultural perspectives and connections to their land and seas, as well as relating to wider global understandings of marine pollution. Artist-led workshops and talks at TATE Modern, British Museum and Cambridge University also contribute to interpretation, engaging new audiences and developing new markets.

#### 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>152</sup>**

Erub Arts demonstrates a model of community practice where creation, exhibition, research and education are intertwined activities. *Caught in the Net* honours the rights of the Erub artists to maintain the cultural integrity and authenticity of their cultural heritage. The artworks that are shared with national and international audiences have deep cultural significance such as in the Erub artists' engagement with totems. Erub artists also adapt their knowledge of traditional weaving techniques and innovate this in the ghost net artworks.

A big part of the project involves environmental engagement: being on country and collecting the ghost nets. The works in the exhibition are thus also an authentic expression of the Erub artists' connection to and care of country. Their seafaring heritage means they have directly experienced the destructive impacts of modern fishing practices. Ghost nets restrict the movement of many sea creatures including sea turtles, fish, dolphins, sharks and seabirds, causing starvation, laceration, infection and suffocation.<sup>153</sup>

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

For this project, issues around secrecy and confidentiality relate to the Erub artists' interaction with Torres Strait Islander archival materials in London as part of their research program related to the exhibition. The artists were aware they may encounter materials that are sensitive in nature and if so, would follow cultural protocols around sharing this information. No secret or confidential information is shared in the exhibition at the discretion of the Erub artists.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

The 13 artists are acknowledged in the JGM Gallery *Caught in the Net* exhibition catalogue with individual profiles that detail their cultural and language connections along with personal artist statements. All other contributors to the exhibition are also credited in the catalogue. Artists are also attributed in the exhibition artwork descriptors and any other collateral related to the exhibition.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities**

The Erub artists and Elders were paid for their contributions to the project. This was specified in the budget of the project funding application.

The project also brings community members and youth together to support Erub culture and community action related to environmental restoration. Having an exhibition in London showcases their works in a new international and contemporary art context. It also provided artists with opportunities to access and connect with Torres Strait Islander archival materials through a one-week research residency in London. This helps deepen historical and cultural knowledge and understandings which they can then apply to their art practice.

On a broader scale, *Caught in the Net* promotes public awareness of the dangers of pollution affecting the life of the ocean, and the opportunities for regeneration, especially in relation to the Torres Strait region of the Great Barrier Reef. An exhibition catalogue, film documentation and a series of lectures, workshops and educational opportunities that took place in satellite locations such as the TATE Modern and Cambridge University led to more exposure and audience engagement for the project.



## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>154</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

*Caught in the Net* highlights the importance of Indigenous/non-Indigenous collaborations and cross-cultural exchange to share Erub art and perspectives to the global community. Erub artists are empowered to unite their art with environmental activism. This is done in a way that celebrate motifs and totems related to their culture, lands and seas such as turtles, sharks, fish, rays, crayfish and jellyfish. The project significantly contributes to deepening cultural belonging and practices despite the confronting environmental issues the works address.

*Caught in the Net* forms parts of Erub Art Centre's ongoing collection-based research about culture and the environment, reflecting local views from the Torres Strait that relate to global worldviews.<sup>155</sup> The opportunity to exhibit in London makes economic and timing sense for Erub Arts to undertake archival research that can only be conducted in England. They spent five additional days in the city to examine the Haddon Collection, Cambridge, British Museum and British Library for relevant diaries and artefacts relating to pre-contact rituals, life and the arrival of the London Missionary Society in the Torres Strait in 1871.

The strong research component provides Erub community members with access to more accurate information regarding the history of missionary culture in the Torres Strait Islands. It allows them to share this with other Torres Strait Islander organisations that are interested and uncover the possibilities of further research. This research process is foundational to the development of new work planned for 2021, the 150th anniversary of the 1871 Coming of the Light (arrival of the London Missionary Society in Erub).

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

The project recognises the Erub people as the custodians of their lands and seas, recognising their rights around caring for country and continuing cultural practices. The Erub artists are the custodians of the totems they engage with in the artworks.

The artists in *Caught in the Net*, both Indigenous and non-Indigenous, own the copyright for their respective ghost net artworks.

## 2.1.2 Music

### *i. Mission Songs Project by Jessie Lloyd*

This case study was developed in consultation with Jessie Lloyd.

The *Mission Songs Project* was founded by Indigenous composer and musician Jessie Lloyd as an initiative to revive contemporary Australian Indigenous mission songs from 1900 to 1999. It began in 2015 and involved approximately two years of research, an accolade music album, a Songbook and a national tour. The project aspired to bring light to the daily lives of Indigenous Australians who lived on Christian missions, reserves and state-run settlements.<sup>156</sup> It was a partnership with APRA AMCOS, Creative Victoria and the Australia Council for the Arts.

The Stolen Generations and the forced removal of Indigenous children from their families is an issue which too often goes unspoken. The *Mission Songs Project* provides a space for Indigenous Australians who lived on missions and settlements to re-claim their identity and stories, sharing expressions of loss, longing and love. It reveals the continuum of cultural practices and song traditions in the contemporary context.<sup>157</sup>

The project culminated with the music album *The Songs Back Home* (2017), and an accompanying Choir Songbook, that conveys the realities of the Stolen Generation, exploring sorrow, hurt and dispossession. Jessie aspires to promote these mission songs as important Australian relics that reflect and celebrate Indigenous resilience, resistance and survival. In some regards the project promotes the healing of Indigenous peoples by nurturing the voices of people whose lives are important to the story and identity of the nation.

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>158</sup>**

Throughout the project, Jessie travelled to Indigenous communities across Australia to consult with families and senior Indigenous song men and women.<sup>159</sup> Taking a cultural approach<sup>160</sup> to the research process enabled elders to share their different experiences of living on missions and settlements in a culturally safe and respectful space. This approach also acknowledges the story tellers as the knowledge holders.

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>161</sup>**

The project was led by Jessie Lloyd in collaboration with many other Indigenous contributors from a variety of communities across Australia – vocalists, musicians, community members. These contributors had a significant influence in creative and decision-making processes. Although Jessie lead the research, production and performances of songs, she took on advice from senior Indigenous song men and women to help direct the initiative and inform that final shape of the album. This means that the ICIP is shared to the rest of the world in a way that incorporates the self determination of those it belongs to.

Uncle Archie Roach and Professor Marcia Langton, Indigenous experts in their respective fields, were patrons and senior advisors to the project,<sup>162</sup> providing guidance through their insight and networks. Uncle Archie has a long history of music and activism for Indigenous people and Professor Langton has an extensive career in Indigenous studies and anthropology.

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

The *Mission Songs Project* involved two years of research and consultation with Indigenous communities. Lloyd was guided by Uncle Archie Roach and Prof. Marcia Langton from the start of the project. The focus of Lloyd's approach was face to face consultations with senior Indigenous song men and women who shared stories about their past and the songs they had listened to and sung when they were young.<sup>163</sup> Many of these songs had never been recorded or written down, having only been passed down orally through the generations.

Consultations were personal, informal and organic and included Jessie reciprocating the process by also sharing and teaching her own family's songs.<sup>164</sup> Preceding these consultations, Jessie sought her family's permission to share her family's songs and undertake the project.<sup>165</sup> It is about the bigger picture of cultural exchange, an essential part of the project, so that when consulting with elders and artists for their input into the project, it is done with a foundation of familial communication and consent.<sup>166</sup>

#### 4. Interpretation

##### **Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>167</sup>**

To Jessie, the project is not about her personally – it is about the bigger picture and the process.<sup>168</sup> Some examples of the processes put in place to ensure proper interpretation of Indigenous culture in *Mission Songs* include the following:

- *The Songs Back Home* album is accompanied by an information booklet which includes a synopsis, framing the cultural significance and meaning of each song. This tells the story behind each song – the origins, composers, the history it embodies as well as the Indigenous song men and women who contributed<sup>169</sup>
- a Choir Songbook for the album to guide choirs and vocal groups on the song arrangements as per the album<sup>170</sup>
- jessie explained that storytelling and the acknowledgement of contributors are core parts of *Mission Songs* performances<sup>171</sup>
- *Mission Songs* has a website dedicated to the project that provides detailed information about the project's story and research process. It credits the contributing Indigenous musicians, advisors and supporters.<sup>172</sup>

*Mission Songs* brings a newfound awareness and dialogue around the mission era through the revitalisation of songs that had not been sung for decades, or shared in the public realm. The project provides Indigenous people, families and communities a platform to share their stories through song. It allowed them to develop their own contemporary narratives and reclaim personal and cultural identities that are important to the history of Indigenous Australia.

## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>173</sup>**

In *Mission Songs*, culture is kept strong and authentic as the songs and stories shared were the personal perspectives of those who lived in missions. The song lyrics are in English or broken English, reflecting the truth of the history of these songs – they were originally sung just like this as the reality is that Indigenous people were forbidden to use their traditional languages in the missions and settlements.<sup>174</sup>

For Indigenous communities, songs and stories are passed down orally through the generations. The documentation of mission songs in a contemporary public forum ensures the stories of the Stolen Generation were not forgotten. The project provided a glimpse of lived and musical traditions of Indigenous peoples.<sup>175</sup> The *Mission Songs Project* assisted with documenting and recording traditions through historical songs which illustrated the reality of living on missions and settlements for Indigenous peoples.<sup>176</sup> In this way the project enabled a continuum of the rich oral history of Aboriginal people by sharing traditions through songs and music.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

*Mission Songs* respects the cultural protocols regarding secrecy and confidentiality by empowering Indigenous peoples to choose what stories are shared with the public through their own contribution of songs. Jessie made sure that any secret, sacred or confidential material is not shared. The contributors were made aware of the public nature of the project and that it will be shared with wide audiences, and so only stories and songs that were fit for this purpose were included.<sup>177</sup>

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

Each of the contributors to the songs are clearly attributed for their various roles during performances, on the website and in the music album. The *Mission Songs Project* website clearly credits the song men and women, cultural advisors, vocalists and musical contributors to the music album, the song book and the performances.<sup>178</sup> Contributors also have profiles on the website where their biographies, community connections and professional information is shared.

Jessie has a strong intention to make sure that people are acknowledged during performances, especially as the songs each have different backgrounds and stories attached to them. If people or groups approach her to ask for consent and guidelines for performing *Mission Songs* works themselves, she highlights the importance of proper attribution and directs them to engage with the Choir Songbook.<sup>179</sup>

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Indigenous communities have always been rich with oral traditions and this project assisted with the documentation and recording of stories through songs.<sup>180</sup> In doing so, the project raises social awareness of the Stolen Generations, publicly acknowledging the resilience of Indigenous communities and the ongoing significance of their songs and stories. The project provides Indigenous communities with a culturally safe platform to reflect on and re-claim their narratives.

Monetary benefits also resulted from the project in that performers are financially remunerated for touring *Mission Songs* with Jessie. Songs from the *Mission Songs* project are registered with APRA AMCOS and the royalties received are re-invested in the project in continued research and community engagement.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>181</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

The project preserves and nurtures the stories of Indigenous peoples so future generations can understand the histories and struggles of their ancestors and draw strength from the survival of their cultures. The consultation processes and development of the final album provided opportunities for trauma to be acknowledged and healing to flourish. Jessie explains that the songs are living and breathing things.<sup>182</sup>

The materials developed as a result of the project also allow for Indigenous cultural heritage to be shared and learnt. Further, a key part of the project involves the continued sharing of stories and culture through live performances of the album. Audiences can listen and learn about the continuing connections between the past and present regarding mission life, from Indigenous perspectives.

For example, in 2017, for the 60th Anniversary of the *Palm Island Strike of 1957*, Jessie took the *Mission Songs* live tour to Palm Island, the place where a song from the album, 'The Irex', originates from.<sup>183</sup> Significantly, it is also the place of her ancestors. This strengthened the connection between the past and the present – personally for Jessie, but also for the project as a whole.

The project has led to collaborations and partnerships around Australia to share and tour *Mission Songs*, including with arts organisations, production companies, music festivals and local councils. It has even been recognised overseas and allowed for connections with Indigenous communities in other countries like Canada and Mexico. In 2018, *the Songs Back Home* album was nominated for the Best International Indigenous Artist award at the Canadian Indigenous Music Awards.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

Copyright in *The Songs Back Home* album and the Choir Songbook vest in Jessie. In recognition of Indigenous cultural heritage rights in the stories shared, the contributing Indigenous people and communities are attributed in all *Mission Songs* project materials as well as in performances.



### 2.1.3 Writing and literature

#### *i. The Yield by Tara June Winch*

This case study was developed in consultation with Tara June Winch.

Tara June Winch is a Wiradjuri author currently based in France. Her novel *The Yield* (2019) explores dispossession and the effects of invasion on Indigenous culture, land and familial connections. It is a reclaiming of Wiradjuri language, storytelling and identity,<sup>184</sup> spanning 200 years of Wiradjuri history.

Tara June Winch is the 2020 NSW Premiers Award winner for Book of the Year and the Christina Stead Prize for Fiction and the People's Choice award. In 2020 she also won the Miles Franklin award for her book *The Yield*.

*The Yield* contains several narrative strands, including the story of Albert 'Poppy' Gondiwindi who is determined to pass on the Wiradjuri language and stories of his people as he approaches his death. It also follows the story of August Gondiwindi who, upon learning of her grandfather's death, returns to Australia after a decade in Europe. Throughout the novel, Tara retraces the Wiradjuri language to resurrect it and reclaim its significance.<sup>185</sup>

Her first novel *Swallow the Air* (2003) heralded a host of awards such as the David Unaipon Award (2004), the Victorian Premier's Literary Award for Indigenous Writing (2006) and the Sydney

Morning Herald Best Young Australian Novelist (2007).

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>186</sup>**

Respect for Wiradjuri culture and language is embedded into the narrative and themes of *The Yield*. As a Wiradjuri woman, Tara's cultural and personal connections to the Wiradjuri language is the platform for her to respectfully explore ICIP in consultation with fellow language custodians and knowledge holders. By doing so she respects their cultural authority as knowledge holders, authorities and educators in the Wiradjuri community.

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>187</sup>**

Writing *The Yield* is a form of self-determination for Tara as she reclaims the use and relevance of the Wiradjuri language to which she is a custodian. Her Wiradjuri heritage and creative agency as a writer are two key components that inform her use of ICIP in a contemporary narrative form, allowing her creative expression in the context of Wiradjuri culture. Drawing from lived experiences, she is empowered to make unique social and environmental comments and reflections in *The Yield* that are connected to the Wiradjuri language.

*The Yield* also supports self-determination of the Wiradjuri community more broadly, including key community members, as it speaks to shared understandings and experiences of cultural belonging. Tara's work forms part of the bigger picture of language revitalisation and the ongoing vitality of Wiradjuri cultural connections.

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

As Tara includes Wiradjuri language in *The Yield* it was important for Tara that her writing and research process was informed by consultation and communication with Wiradjuri knowledge holders and custodians.

In *The Yield*, the character Albert Gondiwindi is compiling a Wiradjuri Dictionary that is interspersed throughout the novel and compiled in full at the end. In including this, Tara consulted with Wiradjuri elder and language expert Dr Uncle Stan Grant Snr and linguist Dr John Rudder who have worked together for

many years on Wiradjuri language revitalisation. Both figures have played highly significant roles in its reconstruction and revival and have compiled the leading *A New Wiradjuri Dictionary*.<sup>188</sup> Tara also consulted with language practitioners Aaron Ellis (Wiradjuri man and educator) and Geoff Anderson (a Wiradjuri man who is a member of the Wiradjuri Council of Elders and a co-ordinator of the Parkes Wiradjuri Language Group).

Tara's family stories and knowledge embedded in the narrative was included with consent, through close consultation with family members.<sup>189</sup>

Consulting with, and receiving advice and consent from, these key Wiradjuri custodians and knowledge holders ensured that Tara's use of the Wiradjuri language and her family's histories is consistent with broader interests of the Wiradjuri community. In this way, *The Yield* supports and forms part of Wiradjuri community efforts; both in language revitalisation and in preserving and sharing cultural histories.

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.**<sup>190</sup>

Wiradjuri language words and meanings are central to the narrative in *The Yield*. They appear throughout the text and in *The Dictionary of Albert Gondiwindi* compiled at the end of the novel. To ensure correct grammar, spellings and definitions, Tara consulted with and referred to the Wiradjuri Dictionary App<sup>191</sup> and *A New Wiradjuri Dictionary*,<sup>192</sup> compiled by Dr Uncle Stan Grant Snr and Dr John Rudder. This is the most recent edition to the first Wiradjuri dictionary they had developed earlier.

Tara's interpretation and use of ICIP is supported by leading language experts in the Wiradjuri community such as Uncle Stan who is a respected member of the Wiradjuri Council of Elders. He read *The Yield* and provided Tara with feedback on the use of Wiradjuri language and its interpretation.<sup>193</sup> This helps ensure that language interpretation in the novel is up to date and accepted by the broader community of which Uncle Stan is a highly respected leader. Tara then includes this statement in the Author's Note: *If there are any errors, they rest solely with my interpretation.*<sup>194</sup>

Indigenous cultures are living – they develop and change over time with new interpretations and expressions of cultural heritage being created within communities. Albert Gondiwindi's dictionary in *The Yield* is subtitled 'A work in progress.' This reflects and acknowledges how Wiradjuri language and cultural

heritage is alive and moving with the times – as is evident in Uncle Stan and others’ work over the years and fictionalised in Albert’s story.

## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>195</sup>**

Research is a significant part of Tara’s writing process – she draws from cultural, historical and personal sources. Wiradjuri language in *The Yield* relates to the bigger picture of Wiradjuri culture and history, despite it being a work of fiction. It is important to Tara that Wiradjuri culture and knowledge is embedded in the novel in a way that reflects culturally appropriate and authentic connections to country, place and people.<sup>196</sup>

In doing this, Tara extensively researched the Wiradjuri language and the history of Wagga Wagga (a region of Wiradjuri country where the narrative is set) dating back to the 1880s. This involved talking with Wiradjuri community members, family members and looking through local archives.<sup>197</sup> Drawing from this material and her own experiences as a Wiradjuri woman, she writes with an awareness of the complexities of contemporary Indigeneity. In conducting research, Tara was in regular communication and consultation with key language practitioners. This means that the integrity and authenticity of the Wiradjuri language in the novel is maintained.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples’ personal and cultural affairs should be respected.**

No secret or confidential content regarding Wiradjuri language and culture is included in *The Yield*.<sup>198</sup> Any cultural and historical material that informed the text is publicly available in various non-fiction publications that readers are referred to at the end of the novel.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as traditional owners and custodians of their lands, waters and ICIP through attribution.**

Tara acknowledges Wiradjuri custodianship and ownership of the Wiradjuri language in the Author’s Note and Acknowledgements at the end of the novel. She acknowledges Elders, language experts, consultative groups, mentors and texts that assisted her research and writing process. Dr Uncle Stan and Dr John Rudder’s roles in Wiradjuri language revitalisation are attributed to highlight

how their work informs the spellings and pronunciation of words in *The Yield*. Late 19th and early 20th century historical records that Tara used for historical spellings in the book are also specifically attributed.

The Author's Note frames the Wiradjuri knowledge explored in the novel within the broader context of Indigenous languages, cultures and issues in Australia. Tara directs readers to an extensive list of non-fiction publications and specific historical accounts that informed the themes and issues in the novel. The real-life sources of fictional elements in the narrative such as place names and geographical features are highlighted.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their culture, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Tara ensures benefit sharing with the Wiradjuri community through her work as a writer. A portion of royalties from the first 1000 copies of *The Yield* goes to the Parkes Wiradjuri Language Group through the Parkes Shire Aboriginal Educational Consultative Group.<sup>199</sup> This contributes to funds for Wiradjuri language workshops and cultural education programs. Copies of *The Yield* are provided to the Wiradjuri Council of Elders through Dr Uncle Stan Grant Snr.<sup>200</sup>

For the past 10 years, Tara has engaged with high schools in the Wiradjuri region with free talks related to her first novel *Swallow the Air* which also contains some Wiradjuri words. This novel was part of High School Certificate English curriculum since 2009 in the 'Discovery' and 'Belonging' modules. Tara said, 'I hope to always engage with any education providers and students in the Wiradjuri region to talk about the importance of the native language of the land.'<sup>201</sup>

For the release of *The Yield* in 2019, Tara delivered author's talks at various venues in Australia (Sydney, Melbourne, Canberra, Wollongong and Brisbane) to share her process with the wider Australian community. Some of the ticket proceeds go towards the Indigenous Literary Foundation. She is also active on social media, using this as a platform to promote the 2019 *International Year of Indigenous Languages* that coincides with the launch of *The Yield*.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>202</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

Languages are place-based and linked to living communities and cultural histories. Wiradjuri language has been revitalised and taught in the community due to the work of key elders and custodians such as Dr Uncle Stan Grant Snr, Aaron Ellis, Geoff Anderson and more.

*The Yield* contributes to this language revitalisation movement and raises public awareness of Wiradjuri culture with respect to the ongoing connections this heritage has to people living today. This sense of cultural value and reclamation reaches both Indigenous and non-Indigenous readers.

**‘I think as a nation there is an opportunity for we, all of us, as Australians, new and old, to embrace the mother tongue of where we live – whether it be by supporting local language centres and linguists or lobbying for first nation language programs to be taught in our local schools and early childhood curriculums – feeling proud of our cultural history as a nation, acknowledging the horrors openly and giving all of us a real fighting chance to be so proud of our country’s future and the resilience of our first people.’<sup>203</sup>**

Tara June Winch

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

*The Yield* is an original work of literary fiction. Original literary works are protected under the *Copyright Act 1968* (Cth). As the author, Tara is the copyright owner of *The Yield*. This means that Tara has the rights to control the reproduction and use of the work.<sup>204</sup>

The Wiradjuri language included in the novel will remain the under the custodianship and ownership of the Wiradjuri people whose ICIP rights to this heritage continues indefinitely.



## *ii. Indigenous-led storytelling and writing collaborations by Magabala Books*

This case study was written by Anna Moulton and Rachel Bin Salleh, and edited by Maiko Sentina and Gabriela Dounis.

Magabala Books is Australia's leading and only independent Indigenous publishing house working across a wide range of genres including children's books, non-fiction, social history, poetry and memoir. More than a publishing house, Magabala's unique cultural, developmental and advocacy role sets it apart. Magabala has a range of professional development, cultural programs and educational strategies that complement its trade publishing activities.

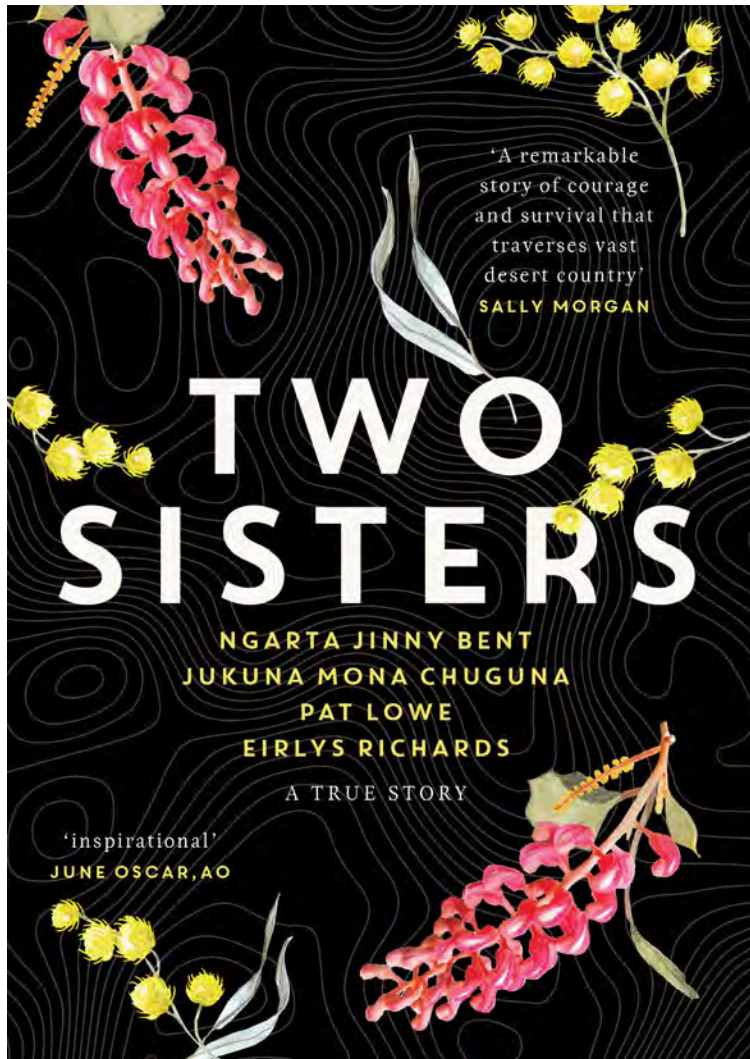
When Magabala was first established by Kimberley Elders in the 1980s, it was partly in response to the increasing number of non-Indigenous writers and PhD candidates recording Indigenous stories in the Kimberley region. Elders were particularly concerned about poor practices regarding copyright, royalties and failure to return resulting publications and storyteller materials back to communities. They decided to establish their own publishing house, Magabala Books, to take control of their stories.

Magabala publishes work by Aboriginal and Torres Strait Islander creators including authors, storytellers, illustrators, artists and editors. It also publishes a range of collaborations, in non-fiction, fiction and poetry.

This case study refers to one particular form of collaboration: between an Indigenous storyteller(s) and a non-Indigenous writer to produce a work of non-fiction that tells the individual or community/collective story of the storyteller(s). Magabala receives numerous requests each year for advice and support in relation to these kinds of collaborations and publishes approximately one per year or every two years. This is a very complex area and each collaboration gives rise to a range of different considerations.

This case study shares how Magabala Books addresses this type of collaboration to ensure best practice. Their methodology recognises and protects Indigenous peoples' rights to their cultural heritage in line with cultural protocols.





*Two Sisters* by Ngarta, Jukuna, Lowe & Richards.

Courtesy of Magabala Books.

## 1. Respect

Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>205</sup>

Magabala respects the cultural heritage rights of Indigenous storytellers by putting these rights at the forefront of projects, including those which involve Indigenous and non-Indigenous collaboration. Magabala's Publishing Policy includes criteria to assess whether the manuscript fulfils their objectives as an Aboriginal and Torres Strait Islander publisher.<sup>206</sup> One of the objectives in its Constitution is:

**To promote acknowledgement of and respect for Aboriginal and Torres Strait Islander culture through the use of various printed and electronic media and through published works.**<sup>207</sup>

As such, Magabala is guided by the wishes of the Indigenous storyteller first and foremost.

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>208</sup>**

A key objective of Magabala Books is *recording, promoting and publishing a body of Aboriginal and Torres Strait Islander voices*.<sup>209</sup> To fulfil this, Magabala currently publishes between 10–15 new releases each year across all genres and to date has published the creative talents of more than 270 Aboriginal and Torres Strait Islander authors, illustrators and storytellers in more than 200 books. In the case of collaborative titles between Indigenous and non-Indigenous authors, their publishing policy states ‘there must be a minimum of 50% contribution by the Indigenous collaborator(s), from the inception of the project. When assessing collaborative submissions, we examine the process and relationships behind the collaboration carefully.’

Working in this framework, Magabala considers it crucial that collaborative projects are Indigenous-led: it is the Indigenous storyteller who is determining the story they want to tell and how it is told. Magabala suggests it is important to be clear from the outset about the purpose for recording the story – for example it could be for family, community and/or publication purposes. Magabala also advises that the writer must ensure they do not insert themselves into the narrative unless approved to do so by the Indigenous storyteller.

As an organisation, Magabala supports the self-determination of Indigenous peoples by providing employment and training for Aboriginal and Torres Strait Islander peoples, for example, they have an Indigenous publisher and an all Indigenous Board of Directors. They also work within a national network of affiliated organisations who provide further support for handling Indigenous-led collaborations. Some organisations include Arts Law Centre of Australia, Kimberley Aboriginal Law and Cultural Centre (KALACC), Artsource and the Australian Publishers Association (APA).

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

If a story is to be published, it is important that the storyteller(s) have a complete understanding of what this entails, including sales and distribution. The question of consent also comes back to the threshold question of who has the right to give consent for publication. For example, in the writing of *Raparapa: Stories from the Fitzroy River Drovers* (1989) by collected authors, edited by Paul Marshall, Elders were consulted intensively. This involved vigorous discussion and debate around the inclusion of certain cultural and historical material and also the approval of the final text after it was delivered in full to them.

Magabala advises collaborators to do the necessary research to understand what is involved in successful collaborations. This includes understanding the vital need to allow for realistic timeframes in projects. Timeframes should be developed to suit the needs of the Indigenous parties to ensure that communication, consultation and consent procedures are properly followed according to cultural and community protocols. Where projects involve cultural or historical knowledge, the non-Indigenous collaborator/writer needs to know the right questions to ask to ensure the appropriate approvals for use of stories, material, language are in place. Projects must allow for sufficient time to ensure the right people are identified, engaged, and paid the correct remuneration

#### 4. Interpretation

##### **Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>210</sup>**

It is important that collaborations prioritise the interpretation (e.g. voice and perspectives) of the Indigenous storyteller. Many collaborations begin informally. They may be based upon an existing friendship or other relationship with the storyteller, but sometimes may have no relation to the writing skills of the non-Indigenous collaborator. It is common that the collaborator has good intentions, but little or no experience in transcription and writing that adequately captures the storyteller's voice. They may also have a lack of cultural and contextual understanding which may lead to incorrect interpretation.

Magabala advises all parties in a collaboration that the raw materials (tapes or transcriptions) must be submitted with a manuscript and should be retained by the storyteller(s) and the writer. This ensures that, if the work is unpublishable for any reason, all is not lost, and the project can be resumed in the future. This also applies to cases where there is a formal or professional arrangement where the writer is paid for the job of recording, transcribing and writing the story.

Where possible, consideration should also be given (after publication) to submit the raw materials to AIATSIS, or another library/archival depository institution with instructions on future use.

For the purposes of interpretation of texts in an educational/school context, Magabala has developed a teaching resource called *Teaching Indigenous content with Magabala Books*. This provides practical advice to support and maximise the learning opportunities provided by the books within the context of the Australian Curriculum.<sup>211</sup> Magabala also provides more comprehensive teacher resources for selected book titles across foundation, primary and secondary years to further assist in integrating and contextualising Magabala publications.<sup>212</sup>

## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>213</sup>**

When it comes to representations of cultural and historical matters it is important to maintain the integrity and authenticity of the cultural material that is published, as the written record gains power and legitimacy. Research and strong relationships between collaborators are required to ensure that material included in a storyteller collaboration is handled appropriately and with integrity.

Magabala only publishes works that are underpinned by these factors to ensure cultural integrity and authenticity is upheld. Magabala assesses the process as much as it does the final submission: every submission is evaluated on its own merit and if the final product is excellent, but the process is left wanting, then Magabala Books does not engage or publish.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

Issues around secret and confidential material in collaborations should be addressed through communication and consultation, including clarity around community consultation processes that might be required when including cultural material in a publication. For example, if it is a question of Men's or Women's Law, a person(s) of the appropriate gender and standing in the community should be engaged to advise. This is an area that requires a high-level cultural expertise, as the potential consequences of a breach are significant.

Magabala also receives many requests from people in various sectors (e.g. educators, counsellors and business) seeking permission to reproduce significant cultural material from Magabala's existing publications in the context of presentations or other publications. Aside from financial considerations, if for cultural reasons, or by reason of the context, the usage is deemed inappropriate or disrespectful, permission will be refused. Many people seeking the permission do not realise their (unintended) disrespect. Magabala's advice to those seeking permission is to fill out the permission forms requested, and seek to understand and accept if permission is refused.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

In the case of the storyteller collaborations explored here, Magabala ensures that the storyteller is always recognised as the primary ‘author’.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities and/or the individuals involved in the storytelling process.**

In publishing, royalties are most commonly paid to the copyright holders. Magabala ensures that royalties remain with the storyteller and/or their community as appropriate. Magabala advises potential non-Indigenous collaborators to be aware that determining what is most appropriate/who has authority to tell a story requires a high level of expertise and sensitive investigation, as breaches of cultural protocols can have serious consequences, including giving rise to community conflict.

Considerations of who should receive royalties depends on the circumstances. For example, if it is a social history or book containing cultural material, royalties may be paid to/administered by a community organisation. In this situation, fees need to be paid to informants/storyteller(s) if they do not receive royalties. Magabala also seeks to maintain ongoing relationships with the custodians of the stories to ensure that heirs are located and continue to receive benefits from the sale or use of the material.

In the case of memoirs, as a general rule, royalties remain with the storyteller. However, where the writer of a memoir is a volunteer, there may be some royalty sharing up to a certain number of units sold, or after a certain number of units have been sold. Overall, what is appropriate will depend on the wishes of the storyteller and is decided on a case by case basis.

Magabala Books is a not for profit organisation, and as such all the proceeds of sales are reinvested back into publishing, professional development and cultural programs.



## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>214</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

*'Assisting and encouraging people to pass on their history'* is one of Magabala Books' founding objectives. Magabala's titles are also expressions of contemporary identity and culture. While most of Magabala's publications are written by Aboriginal and Torres Strait Islander people, ethical storyteller collaborations on works of non-fiction also have a valuable role to play in ensuring that Indigenous stories and histories continue to be told.

As a publisher of literature for the trade, as opposed to a scholarly market, Magabala Books strongly discourages non-Indigenous writers from telling Indigenous stories in the absence of a genuine and meaningful collaboration that acknowledges an Indigenous storyteller(s) as author or co-author. To do so denies Indigenous people their voice and denies them the economic and social benefits of their ICIP. For example, it might restrict the ability of a future custodian of the ICIP to publish their own stories, if the non-Indigenous writer's version has taken up that place in the book market. It also risks repeating mistakes of old, of publishing an incorrect, non-Indigenous interpretation of an Indigenous story. Magabala notes that in the development of scholarly works on Indigenous themes, other considerations may apply and guidelines are available, for example those provided by Aboriginal Studies Press.

Publications help keep important cultural, historical, personal and educational stories alive for the custodians of the stories and their descendants and communities, but also help raise awareness and knowledge in the general Australian and international public. Magabala maintains relationships with the custodians of the stories and ICIP within publications to extend this support of cultural legacy into the future.



## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

Given that Australian copyright law does not normally favour storytellers, it is vital that good contractual arrangements are in place to ensure that copyright is vested in the storyteller or appropriate person/organisation. Therefore, while the story may be written in collaboration between an oral storyteller and a non-Indigenous writer, copyright in the story must, as a general rule, reside with the storyteller and/or their community, as appropriate. This arrangement must be recorded contractually – otherwise Australian copyright law will prevail and the copyright will reside with the person who has recorded it in material form.

In addressing these issues of recognition and protection, Magabala ensures that expectations and agreements are documented in writing. This agreement includes, among other things:

- payment, if any
- copyright and ownership of any material (written and recorded)
- the need to provide copies of the raw material and transcripts to the storyteller
- agreement about the stages of work and approvals (e.g. chapter by chapter).

In the case of a storyteller collaboration involving cultural material or traditional stories, some investigation is required to ascertain who has the right to share that material, and who is the appropriate copyright holder. It may be communally held by an appropriate corporation. In the case of a memoir, while a non-Indigenous writer may be acknowledged on the cover of a book, contractually copyright will remain with the storyteller whose memoir it is. This is critical in terms of future copyright permission requests, and has long term ramifications, particularly once a storyteller passes away and rights pass to their heir(s).

In rare circumstances, shared copyright will be approved after a careful vetting process, to ensure the conditions for equal collaboration and decision-making processes are in place.

## 2.1.4 Dance

### *i. Djurra by Northern Rivers Performing Arts (NORPA)*

This case study was developed in consultation with Kirk Page and Patrick Healy.

**Warning: This case study contains the names of deceased Indigenous people.**

*Djurra* is a dance theatre production by Northern Rivers Performing Arts (NORPA), a Lismore-based performing arts company. NORPA was established in 1993 and is renowned for its work with Indigenous people and communities, leading the way in providing meaningful and respectful platforms to share Indigenous stories. *Djurra* is directed by Kirk Page and premiered as part of NORPA's 2017 season and was their highest selling show in that year.

*Djurra* tells the Bundjalung creation story of three brothers who leave the shoreline to journey away from home. While away, each of the men experience conflict. Their Gami (mother or grandmother – versions of the story vary) calls out for them across the sea, conjuring their return.<sup>215</sup> Told through a series of interwoven vignettes, the production uses dance, monologue, physical theatre and video to bridge the creation story with contemporary domestic reality.<sup>216</sup>

*Djurra* reflects a positive implementation of each of the principles to recognise and protect Indigenous Cultural and Intellectual Property (ICIP).

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>217</sup>**

Respect underpinned the creative process and production development of *Djurra*. It tells a complex ancestral story that includes themes of conflict, listening to country and returning home. It is a living story that is simultaneously generations old and very current, and as such it was important that its contemporary representation and expression respects the cultural heritage. Director Kirk Page, a descendant of the Mulandjali people with connections to Badu Island of the Torres Strait Islands, was mindful of these connections and worked to maintain them through collaborative processes that involved key cultural consultants and a focus on storytelling to respect the ICIP and its ongoing connection to history and the land.

Preceding the performance, Indigenous culture was acknowledged and respected through a dance performance by local Indigenous girls' dance group, Nini Ngari-Gali. Following this was a Welcome to Country ceremony in English and Bundjalung Widjabul language by Bundjalung Elder, Uncle Roy Gordon, who was part of the *Djurra* creative team as a cultural consultant.<sup>218</sup>

Sarah Bolt in *Djurra* – a NORPA Production.  
Credit: Kate Holmes.



## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>219</sup>**

*Djurra* was Indigenous led under the leadership of director Kirk Page who brings over 20 years of performance and directing experience to his role. Forming part of the production's creative crew, NORPA engaged with two cultural consultants from the local area – Bundjalung woman Rhoda Roberts and Bundjalung Elder Uncle Roy Gordon.<sup>220</sup> This is important as the production was inspired by a creation story from the Bundjalung nation. Engaging cultural authorities ensures that cultural protocols are properly followed, and that Indigenous voices and perspectives guide the project.

The performers and production crew come from various cultural backgrounds, reflecting the diversity of Indigenous communities. This includes strong representation from the local area, with dancer Sarah Bolt and contributing artist Mitch King who are both of the Bundjalung nation. Dancer Joel Bray is a Wiradjuri man, and actor James Slee is originally from Kuku Yalanji and Goa group lands.<sup>221</sup> By engaging local cultural consultants and involving Indigenous cast and crew members, NORPRA ensured that Indigenous people, particularly people with cultural links to the land where the creation story comes from, were involved in the development of the project.

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

The engagement of local Bundjalung cultural consultants as part of the project team was a fundamental aspect of communication, consultation and consent. As highly respected and experienced cultural leaders in the Bundjalung nation and the wider Australian community, their roles in *Djurra* enabled ongoing consultation regarding the use of the ICIP. Uncle Roy Gordon has written plays for local productions, held educational camps and toured cultural shows. Rhoda Roberts is Head of First Nations Programming at the Sydney Opera House, and Festival Director of the Boomerang Festival and Creative Curator Parrtjima Festival, Alice Springs.<sup>222</sup>

Beyond the production's creative team, NORPA also partnered with local Indigenous community organisations such as the Ngulingah Local Aboriginal Land Council and the Bundjalung Elders Council.<sup>223</sup> Involving local land councils and Elders ensures that projects have open and ongoing discussions around the content of the work. It ensures that the project team is speaking with the knowledge holders and cultural authorities within the relevant community for the use of ICIP in projects. Kirk was able to provide regular and ongoing updates about the project at Elders meetings throughout the development of *Djurra*. He was also welcomed into Elders' monthly meetings, sometimes accompanied by a NORPA staff member. This relationship between Bundjalung Elders and NORPA has built over the last three years of developing the idea for *Djurra* until its final staging in 2018.<sup>224</sup>

#### 4. Interpretation

**The right to interpretation requires that Indigenous communities have a leading role when Indigenous stories are being told. This project is a good illustration that while consultation is valuable, it is also important that custodians are directly involved in the storytelling process.**

As *Djurra* tells a creation story belonging to the Bundjalung nation of north-eastern NSW,<sup>225</sup> the land on which NORPA operates and where *Djurra* was performed, it was important that the representation of the story was sensitive and relevant to members of the local Indigenous community.

Consultants Ms Roberts and Uncle Roy provided valuable insight for the collaborative process involving the inclusion of Bundjalung people in the cast and crew. Bundjalung community members were directly involved and represented in several different roles in the production. Their participation meant that the telling of the Bundjalung story was influenced by Bundjalung people on their own land. Importantly, *Djurra* means 'lore' in the Bundjalung language. Each performer was credited for their contributions to the project and the storytelling.

As part of the production, there was a community showing for *Djurra*'s first dress preview. This preview was almost a full house and Kirk received positive feedback from community members who were thrilled to see their stories on the stage. For some in the audience, it was the first time that they had seen a theatre show.<sup>226</sup>



## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>227</sup>**

Being able to draw from the personal cultural experiences of Bundjalung community members meant that the research, interpretative process, and use of innovative performance technique lead to an authentic, positive and strong representation of contemporary Bundjalung culture.

In line with this principle, traditional woven artefacts made by local weavers were also commissioned and displayed at the Lismore City Hall outside the theatre during the performance. The artefacts interpreted the *Djurra* dreaming story and one of the weavers spoke prior to the performance. This complements the story as told through NORPA's performance and provides greater context to the audience on the local Indigenous community's interpretation of the story.<sup>228</sup>

Representation of authentic experience through the production was clearly a specific intention for Kirk Page who expressed a desire for non-Indigenous audiences to:

**“walk away with some insights and understanding about the day to day lives of Aboriginal people... And to also experience the beauty of these stories and our culture and who we are as people.”<sup>229</sup>**

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

It is important in projects to remember that Indigenous communities have certain cultural protocols that need to be respected and adhered to when there is a death in a community. When producing projects which incorporate ICIP, secrecy and confidentiality are elements of much importance of Indigenous peoples, particularly during mourning periods.







The principle of secrecy and confidentiality was very important to this project. *Djurra* was initially known as the 2013–2016 NORPA project called *Three Brothers*. The passing of the production's lead Indigenous creative member, David Page, was a significant loss to the community and to NORPA. What followed were big conversations at NORPA around paying proper respects and the future of the project.<sup>230</sup> This led to NORPA redeveloping the production in a new direction out of respect for David's legacy and family, and in adherence to cultural protocols regarding sorry business.<sup>231</sup> *Djurra* was then born out of this, led by Kirk Page, the late David Page's cousin.

NORPA's webpage on *Djurra* includes an acknowledgement and tribute to David Page and his contributions to NORPA's work. Kirk Page explained that some of David's music was used in *Djurra* as a way of honouring his investment to the project; to have a small part of David to be present in the work.<sup>232</sup>

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

*Djurra* clearly attributes this creation story to the Bundjalung people. This is prominent across NORPA's website, along with acknowledging the cultural diversity and contributions of each collaborator. The production page also includes profiles for all the contributors, detailing their professional experience and diverse cultural backgrounds and connections. Cultural custodians and contributions are both attributed and celebrated.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Each performer and creative who worked on *Djurra*, including during the three-year development, were paid in accordance with the Live Performance Award 2010.<sup>233</sup> This includes the musicians, writers, directors and movement consultants engaged for the production. Cultural consultants played key roles throughout the production's creative development process, rehearsal and performance period and were also remunerated by NORPA. Through the Bundjalung Elders Council and Ngulingah Local Aboriginal Land Council, Elders were engaged to provide advice and input into creative decisions, either as employees or consultants to NORPA.<sup>234</sup>

Joel Bray, James Slee and Damion Hunter in *Djurra* – a NORPA Production.  
Credit: Kate Holmes.



Beyond *Djurra*, NORPA also contributes by providing opportunities for Indigenous artists in NSW. One of NORPA's initiatives, the Indigenous Makers' Studio, is an intensive residency program to develop the creative practice of Indigenous performing artists originating from or residing in NSW.<sup>235</sup> As part of their participation, artists are supported to develop their skills, paid a wage, provided with financial support and documentation of their work during the residency.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>236</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

Through self-determination and the collaboration in *Djurra*, cultural links to the Bundjalung creation story were not only maintained but revitalised and strengthened for future generations. Engaging local Indigenous community members as part of the production team mean that the project contributed to the handing down of ICIP through culturally appropriate and respectful storytelling. Thus, the telling of the creation story and its interpretation into contemporary experience supported the continuation of culture and knowledge in a way that is relevant to the present day and generation of cultural custodians.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

The Indigenous leadership, guidance of Elders, having Indigenous performers and members of the production team, as well as consultation with and involvement of the local Indigenous community ensured the recognition and protection of ICIP. This was done so in a way that the contributing Indigenous people and communities receive proper attribution and benefits from their respective contributions.



## ii. *Burrbgaja Yalirra (Dancing Forwards) by Marrugeku*

This case study was developed in consultation with Dalisa Pigram and Rachael Swain.

*Burrbgaja Yalirra (Dancing Forwards)* is a three year program to support the next generation of change makers in contemporary intercultural and trans-Indigenous dance.<sup>237</sup> It includes three creative works led by Marrugeku's artistic directors Dalisa Pigram and Rachael Swain who invited key artists to develop each piece. Each work explores reciprocity and creative understandings of non-Indigenous and Indigenous Australian perceptions and relationships to history and the land.<sup>238</sup> The work was commissioned by Perth Institute of Contemporary Arts (PICA) and Carriageworks with performances in Broome, Perth, Sydney and regional and remote Western Australia in 2018-19.<sup>239</sup>

The first piece, *Ngarlimbah (You are as much a part of me as I am of you)*, is a spoken word and animated video work by Walmajarri/Nyikina painter, poet and traditional dancer Edwin Lee Mulligan in collaboration with animator and media artist Sohan Ariel Hayes.<sup>240</sup> It tells the stories of two dingoes of the Kimberley region who visit Edwin in his dreams. The second piece, *Miranda*, is a solo dance work performed by Miranda Wheen, choreographed with and directed by Serge Aimé Coulibaly (Burkina Faso and Belgium). It explores the uncertain position of settler Australians grappling with understanding Indigenous Australian experiences and perceptions of land. The third piece, *Dancing with Strangers*, is a performance by dancer and violinist Eric Avery (Ngiyampaa, Yuin, Bandjalang and Gumbangirr man) in collaboration with choreographer Koen Augustijnen (Belgium). It imaginatively explores the potential for artistic and cultural exchange during the first colonial contact period.

Funding is provided by the Australia Council for the Arts; the Government of Western Australian; Create NSW; the Regional Arts Fund, an Australian Government initiative, administered by Country Arts WA; the Australian Government through the Indigenous Language and Arts Program and Marrugeku's private donor program.<sup>241</sup>

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>242</sup>**

Marrugeku is based in the traditional homelands of the Yawuru people in the remote Kimberley region of Western Australia. They are dedicated to contemporary intercultural and trans-Indigenous dance in a way that values and respects the diversity and intricacies of Indigenous communities and cultural expressions. This involves collaborative approaches that bridge urban and remote Australia as well as conveying Indigenous and non-Indigenous perspectives.

The artistic co-directors, Dalisa and Rachael, recognise and respect the rights of the Indigenous contributors to *Burrbgaja Yalirra* by honouring each of their distinctive cultural backgrounds and supporting their creative agency in the development of each work.

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>243</sup>**

The process behind *Burrbgaja Yalirra* stems from the shared Indigenous and non-Indigenous leadership of Marrugeku co-directors Dalisa Pigram, a Yawuru/Bardi woman and choreographer, and dramaturg Rachael Swain, who each bring over 20 years of collaborative experience in intercultural and trans-Indigenous dance.

Each work was informed by this shared leadership in conjunction with the creative input and decision-making of the artists and collaborators. *Burrbgaja Yalirra* artists and collaborators were carefully selected by the co-directors on the grounds of cultural understandings and their past creative and collaborative experience.

Self-determination of the Indigenous artists is upheld throughout the project as they were empowered to explore their own ICIP and develop self-driven concepts. They worked with the collaborators and co-directors to balance their ideas and bring the works to fruition.

Marrugeku also has an Advisory Board with significant Indigenous representation that provides cultural guidance on projects.<sup>244</sup> A key member of this board is Marrugeku's Patron and Cultural Advisor Patrick Dodson who is a Yawuru law man and national reconciliation advocate.<sup>245</sup> He contributes important cultural and creative input to projects at the outset for the big picture ideas, and also during project development and rehearsals.<sup>246</sup> Participation and support of Indigenous leaders in decision-making processes means *Burrbgaja Yalirra* respects Indigenous worldviews, lifestyles and realities.



### 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

Rachael and Dalisa ensure that rigorous processes of communication, consultation and consent take place between each Indigenous artist and the communities to which their ICIP relates to. A key strategy for consultation in *Burrbgaja Yalirra* was to take a long-term approach to communication and idea development with the artists.<sup>247</sup> For example, Edwin Lee Mulligan's piece was informed by his family's story and knowledge. Marrugeku respected Edwin as the 'boss of his own story',<sup>248</sup> with Edwin leading consultations and obtaining cultural permission from his family to use the stories and knowledge for the project.

In addition, Marrugeku also informed relevant traditional owner groups about the project and obtained Letters of Support that outline community support for the use of the ICIP in *Burrbgaja Yalirra*.<sup>249</sup> Marrugeku also invited those who showed support to see the performance.

Consultation was embedded in the project, with Marrugeku checking in with the artists at every stage of the project to ensure that they are happy with its progression. Projects should remember that consultation and consent are dynamic and ongoing processes, revisited throughout the production of the work. This includes re-establishing consents during the pre-performance phase.

Collaborators should also remember the need to consult for and obtain consents where existing materials are used as part of projects, including archival materials. Consents to use these materials should be cleared by the appropriate rightsholders and by the cultural custodians of the ICIP that may be contained in the material.

In sharing his family stories in *Burrbgaja Yalirra*, Eric conducted research using the Australian Institute of Aboriginal and Torres Strait Islander Studies' (AIATSIS) archives, for materials such as his family's traditional language and archival recordings. AIATSIS released copies of recordings to Eric and he consulted and received cultural permission from his family on what he could and couldn't do with the materials in line with cultural protocols.<sup>250</sup>

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>251</sup>**

Interpretation of ICIP in *Burrbgaja Yalirra* was principally informed by the cultural authority and creative vision of the knowledge holders – Walmajarri/Nyikina man Edwin Lee Mulligan in the first piece and Eric Avery in the third. Marrugeku gave Edwin and Eric the creative space and freedom to explore, imagine and lead the interpretations of their stories in the production.

Idea development and exchange between the project collaborators was non-prescriptive and involved the interplay of cultural knowledge and imagination.<sup>252</sup> As a result, intercultural understandings and culturally informed interpretations are able to emerge.

Further, Marrugeku ensures that *Burrbgaja Yalirra* performances take place in urban, rural remote locations to reach diverse audiences. The artists then deliver artist talks to the public as part of the tour to discuss the origins of the work, the stories shared and the creative development of ideas. Not only does this provide audiences with a deeper insight into the process behind the production, but it also aids audiences with understanding and interpreting cultural meanings in the works.

#### 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>253</sup>**

The co-directors honour the cultural authority of the Indigenous artists in the representation of their ICIP. Marrugeku recognises that it is the artists' unique knowledges and cultural expressions – their ICIP – that guide the collaborative process and give credence to the subject matter. Part of keeping culture strong in the project was research conducted by the artists. For example, Eric Avery drew from archival and traditional language materials related to his family story.<sup>254</sup>

Indigenous cultures are diverse. The project embraced and kept this diversity strong by respecting the distinctive cultural backgrounds and perspectives of the artists – various Indigenous language groups, non-Indigenous Australian and international. This allowed for the intercultural complexities involved in understanding history, cultures and the land in contemporary Australia to surface.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

Cultural protocols must be observed when representing or showing the names, image or likeness of Indigenous people who have passed. The project, in Eric's piece for example, involved reviving dormant practices and drawing from repatriated songs and archival materials which featured voices of deceased people. Eric himself consulted and sought permissions from his family about what versions of songs could be heard or sung as part of *Burrbgaja Yalirra* to ensure that cultural protocols and sensitivities are followed before proceeding to include them in the project.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

Each artist and collaborator involved in the project have the top credit for each piece which outlines their specific role(s) in the work. Indigenous artists' language groups and connections to country are also acknowledged. This information is included across all public and published materials such as programs, catalogues and on the website. This ensures audiences are aware of the diversity of cultural perspectives involved in the project and the distinctive origins of each piece.

More broadly, Marrugeku also include an Acknowledgement of Country on their website that pays respects to Indigenous peoples across Australia as well as the specific lands the company have developed work on – Kunwinjku, Yawuru, Bunuba and Gadigal.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

The artists employed by Marrugeku for *Burrbgaja Yalirra* were remunerated for their contributions. Royalties from the performances are also shared between the artists.

Project benefits can be both monetary and non-monetary. Along with financial benefits, the project contributes to the artistic and professional development of each artist, building their skillset and empowering them to carry their culture forward.

Wider benefits of the project also include raising public awareness around the diversity of perspectives behind Indigenous Australian experiences of culture, dispossession and the land. As part of the tour program, Marrugeku holds skills sharing workshops for the community to share insights and details about the intercultural process behind making the work. This attracts a variety of members from the public and is popular with youth. Opportunities for feedback and discussions between community members and the artists take place during artist talks that also accompany the performances.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>255</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

Marrugeku empowers the Indigenous contributors in *Burrbgaja Yalirra* to creatively explore and expand their stories and knowledges within a culturally safe framework. In particular, the project provides Indigenous artists with tools for future intercultural collaborations, to maintain and share culture as custodians of their family's stories. In delivering performances around Australia, their insights and creative practices can be shared and celebrated with fellow community members and the broader public.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

Respecting the Indigenous artists' custodianship over their ICIP was at the forefront of the project's framework. Intellectual property rights were also respected, with contracts being used to ensure that the artists own intellectual property rights in works they create through the project, with a licence given to Marrugeku to use for the project's performances.

## 2.1.5 Theatre

### *i. The Noongar Shakespeare Project by Yirra Yaakin*

This case study was developed in consultation with Kylie Bracknell [Kaarljilba Kaardn].

The *Noongar Shakespeare Project* is a long-term educational and creative endeavour by Yirra Yaakin which aspires to contribute to the growth of the number of people who understand Noongar language and culture.<sup>256</sup> Noongar people have lived in the south-west of Western Australia for over 45,000 years and in recent times the Noongar language is considered to be endangered with less than 400 fluent speakers.<sup>257</sup> Yirra Yaakin seeks to contribute to language revitalisation through this cultural project that involves performance, language-training and school workshops.

The project began in 2012 when Shakespeare's Globe Theatre in London invited Yirra Yaakin to present *Shakespeare's Sonnets* in the Noongar language as part of the international 2012 Cultural Olympiad.<sup>258</sup> The years following this involved further Noongar Shakespeare performances, a Language Training Program for Yirra Yaakin artists, school workshops and a Junior Sonneteers Program.

Since 2017, Yirra Yaakin have been in partnership with Australian theatre company Bell Shakespeare to develop a full-length adaptation and translation of *Macbeth* in Noongar language.<sup>259</sup>

This will see Australia's first full-scale Indigenous retelling of a major Shakespearean work hit theatre stages.<sup>260</sup> Yirra Yaakin is also in partnership with Wesfarmers Arts and the Australia Council for the Arts.



## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>261</sup>**

Yirra Yaakin is a significant Aboriginal-led theatre company established in 1993. With origins in the Noongar community of WA, it has since expanded its cultural leadership and artistic influence to involve Indigenous peoples from across Australia and worldwide. Their projects respect the ongoing relevance and power of Indigenous stories and cultural expressions, including upholding the rights of the custodians of this heritage to control and share this with diverse audiences.

The *Noongar Shakespeare Project* is an artistic project and a significant language revitalisation initiative that deeply respects the ICIP involved (the Noongar language) and the rights of its inheritors to protect and maintain this. It is Indigenous led by Noongar woman Kylie Bracknell [Kaarljilba Kaardn] and involves members of the Noongar community in both educational and artistic contexts. For performances and school workshops, Kylie recommends that a senior community member is invited to present an Acknowledgement of Country.<sup>262</sup>

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>263</sup>**

Yirra Yaakin is committed to Aboriginal leadership and aspires to '*provide the Aboriginal community with an artistic outlet for positive self-determination*'.<sup>264</sup> In line with this, the *Noongar Shakespeare Project* is Indigenous led by Kylie who is a Noongar custodian and fluent speaker of the Noongar language. Her cultural heritage and knowledge, coupled with her prolific performing arts experience, supports her role as Director. She leads the translation and adaptation of the Shakespeare sonnets in close consultation with Elder Aunty Roma Winmar and Wirlomin Noongar man Dr Clint Bracknell who play key leadership roles in the editing process alongside Kylie.

Kylie also facilitates the Noongar Shakespeare Language Training Program that cultivates language knowledge and Indigenous leadership for performers Irma Woods, Ebony McGuire, Ian Wilkes, Maitland Schnaars, Della Rae Morrison and Karla Hart, amongst others.<sup>265</sup> Participants are empowered with ongoing support and training to develop their skills in the workshop facilitation and delivery of Noongar language.<sup>266</sup>

The partnership with Bell Shakespeare as part of the major project to translate *Macbeth* into Noongar language is strongly driven by Kylie and the team, with Bell Shakespeare providing valuable support, insight and resources.<sup>267</sup>

### 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

Noongar language custodian and expert Kylie Bracknell is at the forefront of the project and is entrusted by Yirra Yaakin and her community to lead the translation and adaptation of the Shakespeare sonnets into the Noongar language. The editing process involves consultation with Aunty Roma Winmar, a Noongar knowledge holder, elder and artist. Over long-term time frames, Bracknell works closely with Aunty Roma who has the cultural authority to advise on and review the use of the ICIP (the Noongar Language) in the project.

The editing process also involves consultation with Dr Clint Bracknell whose expertise in Noongar song, music composition and language revitalisation inform the language structure and grammar system. These three Noongar language experts work closely together to edit the sonnets and ensure the correct language structure and grammatical system is followed.<sup>268</sup>

### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>269</sup>**

Interpretation is a highly significant element of this project as it involves the translation of Shakespeare sonnets from old English to Noongar language. The primacy of the English language is suspended as the Noongar language becomes the vehicle for the art of Shakespeare. The project speaks to the adaptive nature of culture in the contemporary world and exemplifies the strength and resilience of Noongar culture and language.

Appropriate use and interpretation of the Noongar language is ensured by Kylie Bracknell, Aunty Roma Winmar and Dr Clint Bracknell whose knowledges ensure culturally appropriate translation, correct grammar and spelling. The sonnets chosen to be translated in the early part of the project were chosen for their relevance to the Noongar community, reflecting themes of belonging, country and love.<sup>270</sup> However, the performances speak to all levels of the company's diverse audience,<sup>271</sup> so on a broader level, the interpretation of ICIP in the project also highlights universal elements of human experience.

## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>272</sup>**

The integrity of the Noongar language is maintained in the project as it involves key custodians and language experts from the local community. Kylie, Aunty Roma and Dr Clint Bracknell each have the knowledge and authority to ensure that the integrity of the language is maintained. As a fluent Noongar speaker and experienced theatre performer and director, Kylie has the expertise required to tie the content – ICIP and Shakespeare – together in a way that is culturally appropriate.

Dr Clint Bracknell's extensive knowledge of Noongar song and music informs composition and sound design in the project. The intention behind the use of song is to ensure that the performances stay true to the history of Noongar culture which involves song use in the transmission of stories and knowledges.<sup>273</sup>

For the school workshops that form part of the project, Kylie carefully constructs the lesson plans and ensures that there is always a male and female facilitator who are empowered to share their personal connections to Noongar culture. She ensures that engagement with the basics of Noongar language is not surface level. For example, when they visited Swan View Senior High School in 2016, they taught the sonnets over a minimum of five classroom periods and shared information about the translation process behind the finished pieces.<sup>274</sup>

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

The project does not involve any secret or confidential material relating to Noongar culture. However, Kylie takes precautions to ensure that draft scripts containing the Noongar language are not circulated beyond the rehearsal rooms. She ensures that all material is signed off and finalised to its full capacity before it is performed and shared with the wider community.<sup>275</sup>

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

The *Noongar Shakespeare Project* team members and artists are attributed on the Yirra Yaakin website with each of their names clearly listed beside their specific role. Any related collateral for performances also includes this attribution.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Through contracts facilitated by Yirra Yaakin, Kylie Bracknell, Aunty Roma, Dr Clint Bracknell and the other contributors are remunerated for their work in the project. The language training program for Yirra Yaakin artists allows them to advance their performing careers and strengthen their connection to culture. Yirra Yaakin performer and Bibbulman Noongar woman Della Rae Morrison said, *'I'm very happy to be learning my language, it makes me feel like a whole person.'*<sup>276</sup>

The school workshops provide Indigenous and non-Indigenous students with a meaningful introduction and engagement with Noongar language. The Junior Sonneteers program provides a useful training platform for young creatives (Indigenous and non-Indigenous) seeking to build their performance skills and access professional pathways. Yirra Yaakin creatives act as mentors who inspire and instil cultural pride and awareness into teaching environments.

Noongar Shakespeare performances contribute to raising public awareness of Noongar culture and the current wave of language revitalisation in the south-west WA region. Due to Yirra Yaakin's national and international stature, the performances reach diverse audiences who are provided with the opportunity to experience Noongar culture.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>277</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

Yirra Yaakin plays a significant role in the continuation of culture in Australia as Indigenous language is embedded in their shows, work and office culture.<sup>278</sup> This drive for cultural engagement and language revitalisation forms the core of the Noongar Shakespeare Project that extends its influence beyond the performers to involve community members, youth and the general public. Kylie Bracknell says, *'We can use art ... to reawaken a lot of the vocabulary that has been dormant for a while.'*<sup>279</sup>

The language training program supports local actors in strengthening their language and cultural knowledge, building their skills and confidence to teach Noongar to future generations.<sup>280</sup> Another significant aspect of the project involves rehearsal sessions in which a language speaker or Elder from the community is invited to participate in a session during which only the Noongar language is spoken. This provides a culturally safe environment that empowers Elders and participants to reclaim vocal phrasing, communication and listening tools.<sup>281</sup>

Youth engagement is a key aspect of the project due to the long-term vision around encouraging and supporting future generations of Noongar speakers. The school workshops generate a sense of pride and connection within the younger community to strengthen cultural belonging and understanding. The Junior Sonneteers Program provides young performers and creatives with intensive training and performance opportunities to develop capacity and embed Indigenous and non-Indigenous youth into the future of Yirra Yaakin.<sup>282</sup>

Overall, the project cultivates one of the oldest languages in the world, contributing to cultural awareness, reconciliation and a greater sense of connection within the Noongar Aboriginal community.<sup>283</sup>

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

Yirra Yaakin, the *Noongar Shakespeare Project* and Kylie Bracknell recognise and protect Noongar custodianship of language and culture. Kylie Bracknell owns the copyright to the material created in the project and it is licensed by Yirra Yaakin for the purpose of performances and education.<sup>284</sup>



## 2.1.6 Multi-art forms

### *i. Badu Gili at the Sydney Opera House*

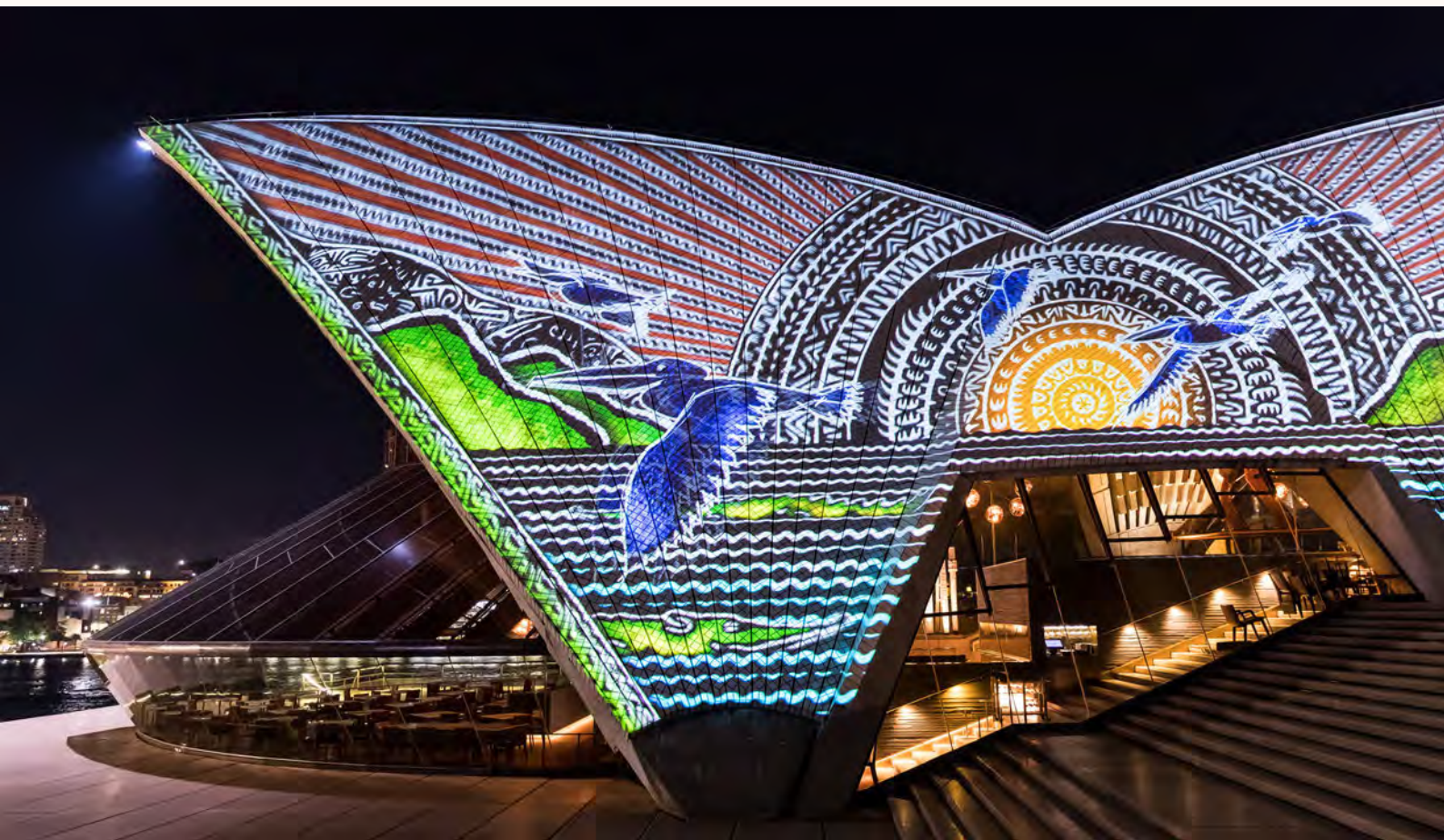
This case study was developed in consultation with Rhoda Roberts.

**Warning: This case study contains the names of deceased Indigenous people.**

*Badu Gili* is a seven-minute large-scale art, sound and light installation on the eastern Bennelong sail of the Sydney Opera House, featuring the work of selected First Nations artists from around Australia. These innovative projections highlight the role of digital technologies in sharing the rich diversity of Indigenous cultural expressions and stories which span centuries. It is curated by Rhoda Roberts AO, the Head of First Nations programming at the Opera House.

The project originated as *Songlines* which was shown for Vivid LIVE 2016.<sup>285</sup> It was then relaunched in June 2017 as *Badu Gili* to become a permanent exhibit that appears every day at sunset and 7pm on the sails of the Sydney Opera House. It attracts local and international audiences through impressive visual and aural storytelling, conveying the distinctive stories and connections to country of each artwork. The project is enabled by the Opera House, its Idealist donors and the Australia Council for the Arts.<sup>286</sup>

Badu Gili, Sydney Opera House. Artist: Alick Tipoti.  
Credit: Daniel Boud.



## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>287</sup>**

*Badu Gili* acknowledges that the site of the Sydney Opera House – Bennelong Point, or Tubowgule (‘where the knowledge waters meet’) – has been a gathering place for community, ceremony and storytelling for thousands of years.<sup>288</sup> On this platform, the project encourages a sense of respect for the ancient stories, cultural expressions and knowledges that continue to be expressed and passed on by artists working today. By showcasing the work of artists from different regions across Australia, *Badu Gili* recognises and respects the cultural and linguistic diversity of Indigenous Australian art.

The opening of *Badu Gili* involved a Calling Country ceremony to recognise the sovereignty of the Gadigal people, the traditional custodians of Tubowgule. This involved a call and response with the artists and a Welcome to Country.<sup>289</sup> *Badu Gili* strongly respects the ICIP – the artworks and the stories, cultural symbols and knowledges within them – of each artist by celebrating and communicating their ongoing custodianship over these cultural expressions in the animations and commentary. The project forms part of Sydney Opera House’s Reconciliation Action Plan which was first launched in 2011.

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>290</sup>**

*Badu Gili* is led by Rhoda Roberts AO, a Bundjalung, Widjabul and Gidabul woman.<sup>291</sup> Her curatorial decisions and leadership honours the diversity of Indigenous arts and culture in Australia.

The artists worked closely with Rhoda to choose from their existing works for the display. Vital to the project is the empowerment of the artists – development of the project is collaborative, with the artists informing the artwork selection process. The artists are also deeply involved in the animation production process. Artist Pat Ansell Dodds (Arrernte and Mudburra Elder) said that *Badu Gili* gives artists like herself the opportunity to share Indigenous culture with others.<sup>292</sup>

In 2017, *Badu Gili* featured the artwork of Jenuarrie Judith Warrie, Koinjmal woman; Frances Belle Parker, Yaegl woman; Alick Tipoti, Argan and Wakaydh man; and the late Lin Onus, Yorta Yorta man and Minnie Pwerle, Anmatyerre/ Alyawarre woman. In 2018, the *Badu Gili* project involved collaborations with six Indigenous artists – Gija painter and Gija woman Mabel Juli; printmaker Aiona Tala Gaidan from Badu Island in the Torres Strait; ceramicist and Gamilaraay woman Penny Evans; watercolour painter and Japanangka woman Mervyn Rubuntja; and Central Arrernte and Mudburra Elder Patricia Ansell Dodds.<sup>293</sup>

### 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

Communication, consultation and consent is fundamental to *Badu Gili* as it involves the transformation of artworks into large-scale visual animations. The artworks included in *Badu Gili* for 2017 were brought to life in the digital realm by creative projects company Artists in Motion.<sup>294</sup> In 2018, the collaboration involved Sydney-based creative agency Yakkazoo. The animators work closely with the commissioned artists to understand each of their creative practices. This ensures that the stories and techniques behind each work inform the tools and methods employed to create the animations.<sup>295</sup> Regular reviews of project development and reporting between the parties mean the artists are aware of and consent to how their ICIP is incorporated into the final display.

The Opera House has a Memorandum of Understanding (MoU) with the Metropolitan Local Aboriginal Land Council. Rhoda works closely with this group to ensure that they review the cultural content of the project and are in support of it. The project is also peer reviewed through a peer group made up of senior leaders from across the arts industry.<sup>296</sup>

### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>297</sup>**

Indigenous peoples are responsible for maintaining their culture and the interpretation of their ICIP. Indigenous peoples have the right to maintain, protect and develop the past, present and future manifestations of their cultures, including in the visual arts.<sup>298</sup>

Indigenous rights to interpretation are upheld in *Badu Gili* through ongoing consultation with the artists that inform the digital recreation of their artworks. This ensures ICIP is shared in a form that aligns with their original purpose. To support audience interpretation, the projections are accompanied by spoken commentary by Rhoda that provides background context such as specific connections to country and stories the works embody. By providing the audience insight of the cultural stories and inspirations behind the display, the project and its significance can be understood in a manner intended by the artists.

*Badu Gili* means 'water light' in the language of the Gadigal people, the traditional owners of Bennelong Point.<sup>299</sup> The use of traditional language of the region is important to the project as it honours the history and cultural significance of the site, contributing to the interpretation of the work. This use of language was done in consultation with the Metropolitan Local Aboriginal Land Council to ensure correct spellings and definitions.<sup>300</sup>



The Sydney Opera House also has a podcast called *Deadly Voices from the House* that included a *Badu Gili* series where some of the artists were interviewed by Rhoda. This enabled the artists to share their perspectives and stories around the project to contribute to public interpretation of their ICIP in the project.

## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>301</sup>**

*Badu Gili* maintains the integrity of ICIP by ensuring that the artists were actively involved in the project implementation and informed the process of digitisation. Artist in Motion animators analysed the techniques, mediums and style of the artworks to digitally recreate them. To maintain the cultural integrity of the originals, they ensure that the translation into digital sequences reflects the techniques of the artists and honours their stories.<sup>302</sup>

The authenticity of the original artworks is also maintained through spoken commentary, both on-site and available online, that shares the specific cultural heritage and stories of each artwork. It explains their significance with respect to the language group of each artist and the distinctive lands, seas and stories they are connected to. This helps audiences understand the ICIP embedded in the projections and acknowledges the diversity of Indigenous cultures in Australia. The use of music also adds another layer to the work with a rich soundscape composed by Damian Robinson to be heard onsite with the projection. It features vocals from Djakapurra Munyarryun, Cecil Mcleod, Taryn Beatty, Honey Beatty and Travis De Vries.<sup>303</sup>

Although cultural, linguistic and artistic diversity is embraced, the works are unified through the motifs of water and light that are worked into the animations through movement. This is also conveyed through the title *Badu Gili* meaning 'water light' to acknowledge the cultural and historical significance of the site as a gathering place for the Gadigal people for centuries. This is built into the installation and communicated in artwork descriptors on the website to ensure audiences are aware of these underlying cultural connections.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

Indigenous artworks embody many kinds of cultural knowledges related to country, this includes secret or sacred content. As the artists played a key role in the artwork selection and animation process, they were in the position to ensure that personal and cultural protocols were followed regarding the use of their ICIP. As they determined how and what cultural expressions are shared with the public, no secret or confidential material makes up the display in *Badu Gili*.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

*Badu Gili* attributes each of its contributors and their respective language groups in the spoken commentary that accompanies the installation each night. This information is also on the Sydney Opera House website that has a profile of each artist and direct quotes from them. The project and the Opera House acknowledge the Gadigal people of the Eora Nation as the traditional custodians of the land on which the Sydney Opera House sits. This comes through strongly on their website and in their publications regarding *Badu Gili*.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

All artists and contributors were remunerated for their work in the project. *Badu Gili* provides the artists with a significant national and international stage to share their cultural expressions and stories with an unprecedented audience. Since its launch, an outstanding number of people have engaged with the display both in person and online. Rhoda says that it ‘creates a gateway to Australia’s First Nations history and culture for the 8.2 million people who visit the Opera House each year’.<sup>304</sup>

This exposure created new opportunities for the artists to reinvigorate their art careers as some of the artists were offered commissions separate to the project. The exposure afforded by public art also contributes to making a mark on public memory,<sup>305</sup> influencing the experience of those who visit and interact with this significant cultural site. It also serves as an educational platform to communicate unique cultural stories that demonstrate the multilayered and diverse nature of Indigenous art in Australia.



## 9. Continuing cultures

Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>306</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.

*Badu Gili* contributes to the continuation and celebration of Indigenous cultures by supporting the artists to share their cultural expressions and stories with the world. It allows thousands of people from Australia and abroad to experience artworks and hear stories connected to Indigenous cultures. Rhoda says, '*Today's technologies give new relevance and visibility to our ancient culture, allowing the world to understand and witness its power.*'<sup>307</sup> On a local level, it is a continuation and celebration of the Indigenous traditions at Bennelong Point which is known as Tubowgule ('where the knowledge waters meet').<sup>308</sup>

As a permanent fixture on an internationally recognised landmark, *Badu Gili* instils a sense of pride in the artists and their communities, acknowledging their cultural and artistic prowess. The project exemplifies the diverse and ever adapting nature of cultural expressions, encouraging the artists to continue and strengthen their artistic practices.<sup>309</sup> It contributes to the formation of an Australian identity that celebrates and reveres its First Nations peoples and knowledges, holding this at the centre of understanding country.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

The collaborative approach of *Badu Gili* demonstrates a successful framework for ICIP to be integrated into iconic Australian heritage sites in a way that is directly informed by the artists. Cultural values are embedded into the artist contracts to ensure that their copyright and ICIP is protected. The contracts acknowledge that the artists continue to own the rights to the work and cultural expressions that are included in the projections.<sup>310</sup>

## *ii. Broken Glass by Moogahlin Performing Arts and Blacktown Arts Centre*

This case study was developed in consultation with Lily Shearer, Liza-Mare Syron and Monir Rowshan.

**Warning: This case study contains the names of deceased Indigenous people.**

*Broken Glass* (2018) is a collaborative performance and installation work by First Nations performing arts company Moogahlin Performing Arts Inc in partnership with Blacktown Arts Centre, on the rituals of death and mourning in First Nations communities of New South Wales and Victoria.<sup>311</sup> This topic is explored through the perspectives of, and performed by, key First Nations women artists Lily Shearer, Liza-Mare Syron, Andrea James, Aroha Groves, Katie Leslie and Brenda Gifford. The work was shared with the public at St Bartholomew's Church and Cemetery on Darug country (Prospect, NSW) as part of Sydney Festival 2018. It was supported by Create NSW, Blacktown City Council, the Australia Council for the Arts, the Crown Resorts Foundation and Joseph Medcalf Funeral Services.

*Broken Glass* shares how First Nations knowledges and practices regarding death and ceremony have adapted in the post-invasion contemporary era.<sup>312</sup> It involved a series of seven visual and sound performances staged on installations and sites in and around the St Bartholomew's Church and Cemetery building complex. Audiences were immersed in these intimate experiences as they followed the artists around the site with a guide. The stories behind the performances were informed by Dhungutti man Robbie Dungay, the longest serving First Nations funeral director in Australia,<sup>313</sup> and other research undertaken by the artists.

## 1. Respect

**Projects must recognise and respect the custodianship of First Nations peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>314</sup>**

Moogahlin Performing Arts Inc aspires to create and share community-based and cross-cultural stories by First Nations people.<sup>315</sup> A core part of *Broken Glass* is how the women artists involved were able to maintain, control, protect and develop their cultural knowledges and stories around death and mourning. Contemporary performance and installation methods were used to honour personal stories and expressions that sprung from their distinctive connections to country.

The First Nations connections to country on the performance site were respected through a smoking ceremony held by local Elder Uncle Wes Marne before the performance commenced.<sup>316</sup> Following the performances, audiences were invited to express their respect by signing and writing comments in a Memorial Attendance Booklet that was made for the event.<sup>317</sup>

*Broken Glass* photo, Lily Shearer, Liza-Mare Syron and Katie Leslie.  
Credit: Joshua Morris.





## 2. Self-determination

**First Nations peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>318</sup>**

First Peoples presence and voices are strong in the production. Moogahlin performers developed *Broken Glass* as part of an Artists-in-Residence program with Blacktown Arts Centre. In following its First Nations protocols, Blacktown Arts provided a safe environment for the development of the initial ideas for the project through this residency. This development phase was supported through securing sites, staffing, infrastructure and financial resources towards the delivery of *Broken Glass* at St Barts Church.<sup>319</sup>

On this platform, the project was led, produced and performed by Moogahlin Co-Artistic Directors Lily Shearer of the Murrwarri Republic and Ngemba nation and Liza-Mare Syron, a Birripi woman. But it was built on the shared leadership of many, including Weilwan and Gomeroi artist Aroha Groves, Gomeroi and Mandandanji artist Katie Leslie, Yuin woman and composer Brenda Gifford, Yorta Yorta and Kurnai playwright Andrea James.<sup>320</sup>

Others include Henrietta Baird, Kuku Yalanji/Yidinji woman, who contributed to choreography, and Gomeroi woman Bronwyn Spearim who informed the use of Gomeroi song in the performance. Robbie Dungay was invited to share his stories which also informed the performances. Each contributor was empowered to make decisions regarding the use of their content to influence the creative development of *Broken Glass*. This shaped the final performance experience. Shared leadership was strong and is what underpins First Nations self-determination in this project.

## 3. Communication, consultation and consent

**Free prior informed consent for use of cultural, intellectual, religious and spiritual property should be sought from First Nations people.<sup>321</sup> This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

Moogahlin is highly consultative and creates projects that are built on meaningful relationships, reciprocity and collective benefit.<sup>322</sup> Moogahlin had applied for an artist's residency with Blacktown Arts Centre and this is how the relationship started for the project.<sup>323</sup>

Interviews between the artists and Robbie Dungay were an important part of the project as he shared stories connected to his experiences as a First Nations Funeral Director, mortician and undertaker. Ongoing communication and consultation with him informed way this material was incorporated into the final performances and installations. This engaged process of collaboration and consent underpinned how his voice was crafted into the script.<sup>324</sup>

Artists also had conversations with First Nations Elders and community members as part of the research behind the project. This communication centred around the participants' awareness of where and how the content shared was going to be used by the artists. For example, the Gomeroi song included in the performance was supported by consultation with Gomeroi woman Bronwyn Spearim.<sup>325</sup>

#### 4. Interpretation

**First Nations people are responsible for maintaining their culture and are the primary interpreters of their cultural heritage, including manifestations of culture through the creative arts.**<sup>326</sup>

Moogahlin emphasises the need to empower First Nations creatives to tell and share their own stories. *Broken Glass* was a production which allowed First Nations people to be the guardians and interpreters of their stories of death ceremonies through a variety of methods – performance, sound, light, installation. These creative expressions were personal to the artists and their specific connections to country, but the universality of the topic means it is relevant for First Nations communities across Australia. A Guide took audiences around the site during the performances to help with explanation and interpretation during the show.<sup>327</sup>

Co-artistic director Lily Shearer explained that the title references First Nations grave decoration practices in north-west New South Wales. In pre-invasion time mussel shells were popularly used for their light reflective qualities and this later changed to the use of glass. The sun light reflections on the shells and/or glass represent the ancestors and the releasing of deceased spirit.<sup>328</sup> The history of ceremonial rituals intertwine with collective and personal narratives in this performance.

#### 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to First Nations peoples.**<sup>329</sup>

The integrity of cultural heritage in *Broken Glass* was maintained as the creative process was led by First Nations people of diverse backgrounds. They were able to share unique insights into mourning rituals and dispel some of the myths regarding these practices. These insights were underpinned by research conducted by the artists in which everyone took a different approach based on their distinctive relationships and cultural connections with the subject matter.<sup>330</sup> Beside community consultations, research involved library resources, looking at historical documentation and visiting the Australian Museum collections.



Furthermore, the on-site performance approach, rather than a stage-bound theatre,<sup>331</sup> supports cultural integrity and authenticity as it reiterates how these expressions are connected to a living culture, people and the land. In this way, the history of First Nations mourning practices was connected to the present. The contrast between First Nations knowledges being played out in a Western church and cemetery site also contributes to this authentic representation of the present era. These features allow you to be aware that the culture being represented is alive and interconnected with various contexts that are both First Nations and non-First Nations.

## 6. Secrecy and confidentiality

**First Nations peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning First Nations peoples' personal and cultural affairs should be respected.**

Having an all First Nations cast assisted in maintaining cultural secrecy and customary knowledge in *Broken Glass*. The cast were able to develop and adopt a sensitive approach to conveying the narratives surrounding mourning and death for First Nations communities of New South Wales and Victoria. If secret or confidential material surfaced during the process of research over the duration of the residency, rigorous conversation between the artists and relevant community members followed. In line with cultural protocols and at the discretion of the artists, this secret and confidential information was not disclosed to the public as part of the performances.<sup>332</sup>

Promotional materials for *Broken Glass* included cultural sensitivity warnings, such as the following notice on Blacktown Arts Centre's webpage for the project as follows:

*Note: Images of deceased First Nations people are contained within this performance.*<sup>333</sup>

This is an important strategy as using the names or images of deceased First Nations people may be offensive to First Nations people. Cultural sensitivity notices alert First Nations audiences of the nature of the material and content that is shared in projects.

## 7. Attribution

**It is respectful to acknowledge First Nations peoples as custodians of their lands, waters and ICIP through attribution.**

The promotional materials produced by Moogahlin and the Blacktown Arts Centre for *Broken Glass* shared the community connections of each First Nations performer. The specific First Nations country – Darug country – was acknowledged as the site for project.<sup>334</sup>

## 8. Benefit sharing

**First Nations people have the right to share in the benefits from the use of their culture, especially if it is commercially applied. The economic benefits from use of their cultural heritage should flow back to the source communities.**

*Broken Glass* served as a platform for the artists themselves to share their experiences and stories surrounding death in the family and community, and how that impacts their cultures and lives. The performances provided opportunities for the artists to share these reflections to fellow community members and the wider public, raising awareness about the high number of deaths within First Nations communities. The performers employed by Moogahlin were remunerated for their work.

Blacktown Arts Centre consulted with Moogahlin to facilitate a strong community engagement component led by community member Cassandra Ebsworth. Her connections and rapport with the community ensured that local Elders were able to experience the performances – every show had at least ten First Nations community members present.<sup>335</sup> Ebsworth was remunerated for her work through Blacktown Arts Centre.

The project also included public programs hosted by the Blacktown Arts Centre such as talks on contemporary mourning practices; how to organise a funeral service with financial and environmental considerations; and how to support people and communities in mourning.<sup>336</sup> There was also a talk given by the artists on insights into the philosophy, research, protocols and processes behind the project.<sup>337</sup> In these ways, the project supported engagement and education on First Nations culture for the benefit of all communities.

## 9. Continuing cultures

**First Nations peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>338</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

*Broken Glass* contributes to the continuation of First Nations cultural practices through a respectful and immersive experience led by First Nations artists but inclusive of all audiences. In exploring both pre-colonial and contemporary expressions of mourning practices, the artists allow viewers to witness present-day adaptations of First Nations mourning rites. Following the final scene, the audience were invited to sit and speak with the cast and amongst each other. This created a space for further, perhaps more personal, engagement with the ICIP content through shared dialogue and reflection.

*Broken Glass* contributes to the process of healing for the artists and performers as it embodies their own personal journeys of grief and mourning. For example, as part of an installation, Lily Shearer included the booklets of orders of service for all the funerals she had attended in her life.<sup>339</sup> This raises awareness around issues that First Nations communities face such as life expectancy and suicide, highlighting its impact on individuals such as Shearer.

Furthermore, the location for *Broken Glass*, St Bartholomew's Church and Cemetery, was important to the local Darug community as it is the burial place of prominent Darug woman Maria Lock.<sup>340</sup> This affectionate tribute to Maria Lock and others like her brings their legacies back to life and affords them the celebration, respect and acknowledgement they may not have received in the past.<sup>341</sup> This added to the cultural value and significance of the work, informing the message of the project.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

*Broken Glass* showcases First Nations cultural heritage by allowing First Nations people to self-represent their practices and stories. Contracts were used between the artists and parties involved. Through the First Nations leadership of Moogahlin and the all-First Nations team, recognition and protection of First Nations cultures was an inherent focus of *Broken Glass*.

## 2.1.7 Emerging and experimental arts

### *i. Collisions by Lynette Wallworth*

This case study was developed in consultation with Lynette Wallworth.

*Collisions* is a live action virtual reality (VR) screen project directed by artist and filmmaker Lynette Wallworth. The work tells the story of Nyarri Nyarri Morgan, a Martu Elder, and his firsthand experience of the British atomic testing in the South Australian desert in the 1950s.<sup>342</sup>

Lynette explains that she first became aware of Nyarri's story when, during a trip to Martu country, Nyarri's wife, Ngalangka Nola Taylor, gave her 'what felt like an instruction' to speak to Nyarri.<sup>343</sup>

As a child in the 1950s, Nyarri was moving with family members through a hunting route in the South Australian desert when he witnessed one of the British atomic tests. This dramatic collision was Nyarri's first experience with Western culture and came with no context.<sup>344</sup>

*Collisions* premiered internationally as part of the 2016 Sundance Film Festival New Frontiers Program, and at the World Economic Forum in Davos, Switzerland. Its Australian premiere was at the ADL Film Fest's 2016 Rogue program.<sup>345</sup>

In 2016 *Collisions* received the Outstanding New Approaches to Documentary Emmy Award at the 38th Annual News and Documentary Emmy Awards.<sup>346</sup> Other awards include: the Sundance/Skoll Stories of Change Impact Award, the UNESCO City of Film Award, and the Byron Kennedy Award for Innovation and Excellence.<sup>347</sup> Wallworth was also named Foreign Policy Magazine's 100 Leading Global Thinkers of the Year in 2016.<sup>348</sup>

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>349</sup>**

Nyarri had not previously told this story beyond his family – it was his personal history, and it included cultural heritage of the Martu community.<sup>350</sup> Lynette understood the significance of Nyarri's decision to share his story at this well chosen moment, and from the beginning of the project her priority was to humbly respect Nyarri, his family and Martu traditions. It was also important to Lynette and her team to recognise and respect Nyarri's connection to his land:

**'Nyarri offers us a view to what he saw, and, reflecting on this extraordinary event, shares his perspective on the Martu way to care for the planet. *Collisions* focuses on the needs of future generations, as we dive head-long into the fourth industrial revolution'.<sup>351</sup>**

Based on the principle of respect, the *Collisions* VR experience brings the audience into close connection with Nyarri and it does so in a way that the viewer is aware that this is a privileged insight into an extraordinary man, his story, and his culture.

## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>352</sup>**

Nyarri himself leads the narrative in *Collisions*. Lynette describes herself and the viewers as merely visitors: 'The agency in *Collisions* belongs to Nyarri'.<sup>353</sup>

Months before shooting the VR, Lynette carried out audio interviews with Nyarri and other family members to help draft the shot list and storyboard for the work. Lynette then travelled with her team to the community for the shoot. On arrival in the community, Lynette and her team held a community meeting so that community members, including the young people, could see and test the equipment and understand its potential. Once Lynette showed Nyarri the camera, Nyarri became the decision-maker for what could be seen and what was not seen and especially what locations were used for shooting.<sup>354</sup>

This narrative agency mirrored the agency Nyarri had during the production of *Collisions*.



### 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

Free, prior and informed consent was a priority for Lynette, and formed part of an ongoing process of communication and collaboration for the project.

A key aspect to consultation is building real and trusting relationships. Lynette had built a relationship with the Martu community, having been invited to work with the Martu people on two previous projects, the first being the *We Don't need a Map* exhibition at Fremantle Arts Centre where Lynette was asked by community to create a new work that involved filming the women on a hunting trip. This resulted in the collaborative film piece, *Still Walking Country*, which was then followed by the installation *Always Walking Country: Parnngurr Yarrkalpa* as part of the Dark Heart Biennial at the Art Gallery of South Australia, and subsequently acquired by the National Museum of Australia's for the *Songlines: Tracking the Seven Sisters* exhibition.

These previous collaborations and the relationships built during them, in fact led to *Collisions*, as it was during one of these projects that Lynette first met painter and intercultural facilitator Ngalangka Nola Taylor, who referred Lynette to her husband, Nyarri.<sup>355</sup>

During the project, Lynette continued to work with Nola and well as Nyarri and Nola's grandson, Curtis Taylor. Nola was an Associate Producer for *Collisions*. Curtis was also involved in the project, assisting in *Collisions* as translator, co-narrator and director's attachment.<sup>356</sup>

Formal legal consents were obtained, both from Nyarri and from the community members, to ensure they consented to the *Collisions* VR film being created and consented to being filmed as part of the project. Consent was also obtained from Nyarri to show his own artworks as part of the *Collisions* VR film.

As part of the consultation process, Lynette discussed with the film contributors the plans for distributing and showing the work, including intentions to show the film at international events, film festivals and online. Lynette created a keynote presentation that showed specifically the World Economic Forum and its attendees, as well as Sundance Film Festival as an audience for *Collisions*. The keynote was shown to Nyarri months before shooting so he could affirm if in fact this was the desired audience for his story.<sup>357</sup>

During post-production, Lynette and *Collisions* producer Nicole Newnham flew Nyarri's grandson Curtis to Berkeley, California where the post-production work on the project was being conducted. Curtis facilitated conversations with Nyarri on final variations to the script, with files being sent to Nola and Nyarri in Parnngurr for checking.<sup>358</sup>

Consent is ongoing and often requires multiple discussions and meetings between project partners. This must be done so in a way that does not burden source communities and their resources, so it is important to plan consultations early. Lynette planned for consultations and legal agreements ahead of time, including the legal agreements as part of the project budget. In this way, there was no financial burden on Nyarri in ensuring that his culture and story were protected in the project.

The whole framework of the project and the relationship built between Lynette, Nyarri and the Martu community facilitated ongoing communication and allowed for a process of seeking consent at all stages of the project and beyond. *Collisions* was very much a collaboration between Lynette, Nyarri and his family and that continuing involvement built a cycle of free prior and informed consent, in which project decisions continually flowed through the family, allowing them to give meaningful consent to the directions it took.

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>359</sup>**

Traditionally, Indigenous stories are told orally, passed down from one generation to the next. The project not only involved telling Nyarri's story for the first time outside his family, but also for the first time through a new, very large-scale creative medium.

VR is an immersive digital experience, placing the viewer inside the film.

Lynette's previous works with the Martu community made it clear to her that the viewer's perspective needed to mirror the Martu approach to painting and creating art, from a layered, aerial perspective. This led to her engaging a drone operator who was familiar with the Martu community, so that aerial perspectives could be provided for the viewer.<sup>360</sup>

Further, as part of generating the approach to the animated scenes Lynette sought Nyarri's contribution and he created an initial drawing of what the atomic explosion looked like from his perspective. This then became Lynette's reference point for developing the work, and in guiding creative decisions in the animated sequence.<sup>361</sup> Nyarri's family members were also consulted and interviewed prior to developing the story board, to inform the representation of Martu practices of sustainable land management that are shown in the work.

## 5. Cultural integrity and authenticity

### **Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>362</sup>**

The production of *Collisions* was informed by cultural protocols, which Lynette chose to embed in the work as well as in the process, framing meetings and consultations. The role Nyarri played in the interpretation of his story inclusion of his ICIP, and the preservation of secret or confidential material meant that the integrity of Martu's ICIP was preserved during the production process.

Given that VR was a very new medium in 2015 when Lynette was developing the work, she insisted on building the same protocols into the experience that apply to her when she visits the community. This meant that the viewer did not have the sensation of simply arriving without proper context into the community. In the narrative of *Collisions*, to keep culture strong, the visitor is first told where they are travelling and why, who it is they will be meeting. Audiences are sung into the community by Nyarri, who then comes to meet and address them. As a way of preserving the authenticity of the story and the community's culture, this all takes place before the story unfolds that the viewer has followed the protocols of visiting even in the virtual meeting place of the work. To quote from Lynette's narration:

**'This is not my story, this is Nyarri's story. Nyarri was waiting for me before he even met me. He has a story that he wants to share and that is why we are travelling...'**<sup>363</sup>

Cultural integrity and authenticity was also present in Lynette's formal legal agreement with Nyarri. It included provisions for the protection of the integrity of the ICIP used, including the capacity for Nyarri to advise of special conditions for the use of ICIP material, and cultural mourning protocols.

## 6. Secrecy and confidentiality

### **Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

As a Martu elder, Nyarri has the necessary understanding of what cultural information should be kept secret or confidential as well as the conditions under which some disclosures may be permitted. Additionally, Nyarri knew he was addressing a broad audience – which means he understood the context of his disclosures and whether they were consistent with customary law.

For example, Nyarri and other senior Martu men tested the VR technology and equipment before Lynette and her team began shooting for *Collisions*, so that they could see what would be visible through the VR. With their knowledge of country, Nyarri and other senior community members gave Lynette specific

directions – such as drone height, so as not to reveal any secret or sacred land marks in the film as well as decisions about where certain shots would take place. Ultimately, Nyarri's determinative role in the interpretation of his story meant that he was empowered to withhold what should be kept confidential.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

Throughout the film and its promotional material, there is strong and consistent acknowledgment of Nyarri's contributions and the involvement of the Martu people.<sup>364</sup> This was something Lynette and Nicole insisted on – that the attributions in the work also acknowledge Nyarri's ownership of the story. In *Collisions*, the end credits honour Nyarri and read:

**'A film by Lynette Wallworth  
Featuring Nyarri Nyarri Morgan and his Story'**

Further, on the film overview page on the project's website, *Collisions* is introduced as a virtual reality journey into both Nyarri's experience, and the Martu experience as well; his experience is understood in the context of the Martu way to care for the planet.<sup>365</sup>

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Lynette's conscious engagement with the protocols, and readiness to incorporate legal protections into her arrangements with Nyarri, ensured that Nyarri received a fair benefit for his work and cultural contributions to *Collisions*.

Nyarri was paid a fee for his contributions as were Nola and Curtis. Nyarri was also given a copy of *Collisions* for his own, personal use and record of his story and culture preserved in a creative work. Nyarri and Curtis each also receive 25% of amounts received from screening of the work that has any form of reimbursement.

Other benefits of the project included 15 headsets and phones provided to Curtis, so that *Collisions* could be shared with the Martu community and other communities. Curtis travelled extensively with the work in 2016 and 2017, and continues to show the work and speak about it.

Nyarri, Nola and Curtis also travelled, with all their costs covered, to both Davos in the Swiss Alps and Park City, Utah for the *Collisions* premiere at the World Economic Forum and the Sundance Film Festival, respectively.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>366</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

*Collisions* was both a work of art and a piece of activism in which Nyarri took a leading role in advocating for the future of his country and maintaining his culture. The ultimate ambition for *Collisions*, held by both Lynette and Nyarri, was to impact public policy in relation to nuclear testing,<sup>367</sup> providing real, firsthand accounts to what would otherwise be abstract discussions.<sup>368</sup> This was evidenced by its immense international impact and its screening, not just at museums, galleries and art festivals, but to many of the world's most influential political figures.

To give a brief overview: it premiered at the World Economic Forum in Davos where it was viewed by over 600 world leaders. It was then shown at the Skoll World Forum, and the Comprehensive Test Ban Treaty Meetings at the United Nations in Vienna where it was watched by Hans Blix at the Closed Meeting of the Eminent Persons Group discussing the nuclear test ban treaty.<sup>369</sup> When Rose Gottemoeller, then US Under Secretary of State for Arms Control, now NATO Deputy Secretary saw it, she was so moved that she invited it to Washington where it was shown to the Timbie Forum on Arms Control at the State Department.<sup>370</sup> It was also shown to 500 Malaysian leaders at the Kahzanah Megatrends Forum, at which three keynote speakers referred to *Collisions* in their talks on equity within democracy.<sup>371</sup> It was then screened at the UN General Assembly First Committee on Disarmament Meetings after which the UN voted for the first time in favour of a global ban on nuclear weapons.<sup>372</sup>

In addition, and to Nyarri's great happiness, it was also shown at Parliament House Canberra ahead of a vote on the proposed UN nuclear weapons ban. In private presentations of *Collisions* Lynette was able to show the work to the Director General of Australia's Nuclear Security Agency and Curtis was able to show it to the advisor to cabinet who drafted the White Paper on Indigenous Land Use Agreements. The private conversations that followed may be amongst the most powerful examples of the impact for the work.<sup>373</sup>

In the trailer for *Collisions*, Lynette makes the observation that Nyarri had been waiting for this opportunity to tell his story, in this way. It seems then, that his involvement in *Collisions* formed part of his custodian duties to his country and his culture: he is telling his personal story as well as the story of the devastating social, environmental and health impacts of nuclear tests – he tells this story in order to create wider public awareness of this issue, and positively impact the way these issues are dealt with.



In this way, *Collisions* not only helps preserve story and culture, but also serves as an education and awareness raising tool on important global social issues. It provides a real, first-hand account to what would otherwise be abstract discussions.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

Throughout the development of *Collisions*, Lynette worked closely and consulted with Nyarri, his family and the Martu community. Agreements were also drafted to ensure that the agreed recognition and protection of ICIP, as well as following protocols in the project, was set out in legally binding obligations.

For Lynette, the widespread and international recognition of *Collisions* has made having formal legal agreements with Nyarri more important. Her agreement with Nyarri that recognises and protects ICIP, ensures Nyarri's attribution and for benefits to be shared with Nyarri has set the standard for her dealings and negotiations with other project partners and third parties for *Collisions*.<sup>374</sup>

### 2.1.8 Events-based projects

#### *i. kanalaritja: An Unbroken String by Tasmanian Museum and Art Gallery*

This case study was developed in consultation with Zoe Rimmer and Liz Tew.

*kanalaritja: An Unbroken String* is a Tasmanian Museum and Art Gallery (TMAG) national touring exhibition that showcases and celebrates the continuation of Pakana (Tasmanian Aboriginal) shell stringing practice. This unique and significant cultural tradition has a long history of over 2,000 years.<sup>375</sup> The exhibition forms part of an ongoing collaborative, community-driven, cultural renewal project.<sup>376</sup>

**‘Shell stringing is my whole cultural being ... I could not exist properly without making shellwork.’<sup>377</sup>**

**Lola Greeno (Palawa Elder and Senior Shell Stringer)**

The exhibition features shell necklaces by Pakana ancestors from the 1800s, works by acclaimed contemporary shell stringers, and works by newly established makers who emerged out of the successful *luna tunapri* (women’s knowledge) project that began in 2010. *Luna tunapri*, facilitated by TMAG, involved shell stringing workshops led by senior shell stringers in response to concerns from Elders regarding the continuation of the practice for new generations.<sup>378</sup>

The show moves through 12 locations around Australia from 2016 to 2020.<sup>379</sup> It won the Indigenous Project award at the 2017 Museums and Galleries National Awards and has been assisted by the Australian Government’s Visions of Australia program. The tour is accompanied by a series of Indigenous-only workshops, general public programs and a significant collection of resources, including:

- exhibition Catalogue (a major publication featuring essays, poetry and family oral histories by Pakana women writers)
- teacher’s Guide
- website
- documentary film produced in partnership with Tasmanian production company Roar Film and Screen Tasmania
- media kit
- digital application for making a virtual shell bracelet.

The processes and respectful approach taken by TMAG demonstrates how Elders can be supported to lead projects that share and revitalise cultural practices in a way that recognises and protects their rights around Indigenous Cultural and Intellectual Property (ICIP).

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>380</sup>**

In respecting shell stringing as an Aboriginal cultural practice, the idea and development of *kanalaritja: An Unbroken String* was led by members of the Tasmanian Aboriginal community. The project is built on respect for the cultural authority and resilience of senior shell stringers and it is through this lens that the ongoing significance of ICIP is acknowledged. Non-Indigenous audiences and Indigenous workshop participants alike can then share in this sense of respect for the ICIP and knowledge holders who are driving the project.

Shell necklace by Ashlee Murray, king marina shells.  
Image: Tasmanian Museum and Art Gallery.



## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.<sup>381</sup>**

TMAG upholds Indigenous rights to self-determination regarding their ICIP by acknowledging and supporting the women's roles as the leaders and primary knowledge holders throughout the entire project. It was Indigenous-led from the outset – senior shell stringer Auntie Lola Greeno instigated the project following consultation with her peers.<sup>382</sup> In this way, TMAG supports the community-driven revitalisation of cultural heritage; the wider vision being to maintain, celebrate and strengthen the cultural practice at the hands of those who are its inheritors.

**‘With only a small number of women holding the knowledge of shell stringing, we were concerned about the continuation of the practice. It was my dream to enable other Aboriginal women from around Tasmania to learn and revive this important cultural practice within their families.’<sup>383</sup>**

**Lola Greeno**

The women who attended the *luna tunapri* workshops were encouraged to practice shell stringing in their local areas and develop their own distinctive styles to extend and innovate the tradition. Many of the necklaces featured in *kanalaritja* are by these participants.

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

The project started with preliminary discussions between the Elder shell stringers regarding permission for the project to go ahead. A key process was ongoing consultation with TMAG's Tasmanian Aboriginal Advisory Council (TAAC). TAAC is an independent advisory body comprised of Tasmanian Aboriginal community members and experts who provide advice to TMAG and its board on issues concerning Aboriginal cultural heritage.<sup>384</sup>

Due to the cultural specificity of this project, a *kanalaritja* Aboriginal Steering Committee was also established, comprising local Elders and shell stringers who advised on issues throughout the project development.<sup>385</sup> Communication and consultation here led to an understanding that the purpose of the workshops was to educate and work with families who have cultural ties to the practice.<sup>386</sup> It also ensured that the custodians contribute to decision making processes. For example, the touring exhibition layout and curation was approved by each of the Elders.<sup>387</sup>

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>388</sup>**

The exhibition was curated by Indigenous curators Zoe Rimmer and Liz Tew who each come from a long line of Tasmanian Aboriginal women.

In the exhibition displays, new necklaces mingle with older ones, including significant ancestral objects that trace the early history of the tradition – meaning they are all shown to be of equal importance and prestige. The objects are presented with quotes from each maker to allow audiences to understand the cultural practice from their individual perspectives. These quotes also appear in the Exhibition Catalogue, on TMAG’s website dedicated to the project, and in the Media Kit.

**‘Stringing shells has been handed down through my family. It’s hard work. Mum and I would go for the day collecting and you might only come back with a small jar of shells.’<sup>389</sup>**

**June Brown**

The variety of resources that were developed as part of the project also play a significant role in interpreting the ICIP. For example, the Teacher’s Guide assists with educational interpretation of shell stringing and Tasmanian Aboriginal cultural heritage in school curricula.<sup>390</sup>

The *kanalaritja* documentary provides viewers with a multifaceted picture of the shell stringing tradition as it stands today. It enables the general public to perceive the ICIP in terms of its specific connections to country and ancestry, as well as understand the value it holds for the current custodians. Interviews with senior shell stringers and emerging artists are combined with shots of Tasmanian country that are accompanied by traditional language place names. The use of palawa kani (Tasmanian Aboriginal language) was done in consultation with Pakana linguist Theresa Sainty, with respect to the Tasmanian Aboriginal Centre’s language revival program and with input by members of the *kanalaritja* Aboriginal Steering Committee.<sup>391</sup>

#### 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.<sup>392</sup>**

An important focus area of the project was to preserve the Indigenous oral tradition of passing on knowledge and sharing stories. The integrity and authenticity of ICIP is maintained as the project empowered the Elders and makers to tell and share their own stories.



Examples of how the project exhibition ensured an authentic voice include featuring the voices of the makers as part of the exhibition; showcasing first person quotes from the makers; using the local and community names for the different shells; and curating the exhibition in a way that acknowledges the past and present relevance of the shell stringing tradition. For example, the shell necklaces were displayed in groups based on familial connections. In this way, the necklaces are not viewed in isolation, nor are they arranged purely aesthetically, but with respect to their ancestry. Photographs, illustrations and other historical materials shown also pay respect to the custodianship of Elders.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

As a closely guarded tradition, certain aspects of the practice such as the collecting areas and methodologies are not disclosed to audiences. Further, in respect of cultural protocols, the workshops that accompanied the touring exhibition were made available only to Indigenous women. To engage the wider public, it was decided that a digital software application would be included in the show. The App allows users to make a virtual bracelet using a certain pattern that was approved by Elder Lola Greeno.<sup>393</sup>

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

The makers who contributed to the project are attributed in the exhibition through labels showing their names accompanied by first person quotes to share their experiences. Ancestral objects with unknown makers are respectfully labelled as *Ancestor* to acknowledge continued community ownership of the cultural heritage.

In the Media Kit, Exhibition Catalogue and documentary film, each of the sources of the material including images of ICIP are properly attributed; and producers, makers, mentors, and the *kanalaritja* Aboriginal Steering Committee members are acknowledged.

## 8. Benefit Sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

The exhibition allows the senior shell stringers and new practitioners alike to be recognised and celebrated nationally and even internationally. Those who contributed to the project were remunerated for their contributions.<sup>394</sup> Copies of the Exhibition Catalogue and documentary were distributed to local libraries and schools in Tasmania.<sup>395</sup> Significantly, the workshops resulted in a new wave of cultural practitioners who can now continue the tradition and pass it on to future generations. Participants also received copies of any photographs that were taken of them and their work.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>396</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

*kanalaritja: An Unbroken String* has played a large role in continuing Tasmanian Aboriginal culture through the revitalisation of the shell stringing practice. The long-term collaborative nature of the project empowered the Elders to share their practice and empower the future generation. The workshops supported the continuation of the practice for Tasmanian Aboriginal women by cultivating spaces for sharing knowledge and storytelling. The project also resulted in ancestral objects being returned to their homeland for exhibition.<sup>397</sup>

The touring exhibition serves as an educational platform for the wider public, establishing the important place this cultural practice has in the national identity of Australia. The tour has also enabled cross cultural networks between Pakana women and other Indigenous communities and was developed to coincide with significant events such as the Darwin Aboriginal Art Fair (DAAF). This created the opportunity to launch a Tasmanian Aboriginal presence at DAAF for the first time. Furthermore, the documentary was selected to play at international film festivals such as the Red Nation Film Festival and Tribal Film Festival in the USA, Barcelona Planet Film Festival in Spain and the Eurasia Film Festival in Russia.<sup>398</sup>

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

The contracts with galleries or museums signed for the touring exhibition included specific requirements such as for a Welcome to Country to be held as part of the exhibition launch.<sup>399</sup> Legal and cultural notices were also strategies used to recognise and protect ICIP. For example, the Teacher's Guide, App and documentary include a notice stating:

**The shells used in these necklaces can only be collected by Tasmanian Aboriginal people. They are protected under the Living Marine Resources Act 1995.<sup>400</sup>**

This informs viewers and readers of the cultural custodianship of Tasmanian Aboriginal people and alerts audiences to the legal requirements and cultural protocols to be followed with regards to the shell stringing practice.

## *ii. Tarnanthi by Art Gallery of South Australia*

This case study was written by Art Gallery of South Australia (AGSA) in consultation with Nici Cumpston, Lisa Slade, Mimi Crowe and Barry Patton.

Tarnanthi is an important national celebration of contemporary Aboriginal and Torres Strait Islander art and a flagship program of the AGSA in Adelaide. Its artistic vision is to showcase the breadth, diversity and excellence of contemporary Aboriginal and Torres Strait Islander art. It works directly with artists, art centres and communities across the country to facilitate and support the development of major projects, providing opportunities for artists to create significant new works of art and extend their practices. Tarnanthi is led by Artistic Director Nici Cumpston, AGSA's Curator of Aboriginal and Torres Strait Islander Art.

'Tarnanthi', a word from the Kaurna People, the Traditional Owners of the Adelaide Plains, means to come forth, like the first light of day or a seed sprouting, and signifies new beginnings. Tarnanthi is presented by AGSA in partnership with principal partner BHP and support from the Government of South Australia. It began as a one-off festival in Adelaide in 2015 and became an annual event from 2017. It presents an expansive city-wide festival biennially, involving exhibitions and events at AGSA and numerous partner venues in and around Adelaide, and an annual exhibition at AGSA focusing on the work of an exceptional artist or group. Each year it also stages a major three-day Art Fair, held over the opening weekend, which presents ethically sourced and produced works for sale from hundreds of established and emerging artists working at art centres across the country. Tarnanthi also incorporates a wide public program that includes artist workshops, expert talks and educational activities targeted at all ages.

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.<sup>401</sup>**

Early in its formative stages, Tarnanthi's leadership team established a set of four core values that have guided the event's thinking and practice ever since. These values are 'Ethics', to ensure best-practice engagement with Aboriginal and Torres Strait Islander artists and communities; 'Generosity', to ensure time and commitment to listening to artists and their communities; 'Respect', to understand differences between cultures and to acknowledge and support the social, emotional and cultural wellbeing of whole communities; and 'Excellence', to support exemplary art practice. All four values define separate dimensions of Tarnanthi's respectful approach to artists, their communities and their Indigenous cultural and intellectual property (ICIP).

As well as being formed around four core values, Tarnanthi adheres to five 'guiding principles' which, in direct and practical ways, shape its respectful engagement with Aboriginal and Torres Strait Islander artists and communities. These are '*let the artist's voice shine*', to allow artists to best tell their stories through works of art; '*open mind and open heart*', for meaningful consultation with and deep listening to artists and their communities; '*challenge perceptions*', to highlight the breadth and diversity of talent among Aboriginal and Torres Strait Islander artists; '*artistic excellence*', to showcase that talent locally, nationally and internationally; and crucially '*grow, share, respect*', to support cultural strength among cultural custodians and cultural appreciation within the broader community.

Tarnanthi takes place on the land of the Kurna People, with whom Tarnanthi has respectful, friendly and highly positive relations. All public Tarnanthi events begin with an acknowledgment of the Kurna People's traditional and enduring connection to country. The selection of the name 'Tarnanthi' involved extensive discussions and consultation over several months with Kurna Warra Karrpanthi Aboriginal Corporation (KWK), and its use has been licensed through KWK. All subsequent uses of Kurna language have also followed discussion with KWK. AGSA also engages Kurna representatives to provide regular cultural advice and support as well as cultural awareness training for staff. Each year at the celebratory public launch of Tarnanthi, leading Kurna representatives perform a traditional smoking ceremony and give a Welcome to Country – an important greeting for Aboriginal and Torres Strait Islander artists visiting from other lands across Australia.



## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be encouraged and empowered in decision-making processes that affect their ICIP.<sup>402</sup>**

The practical application of Tarnanthi's respectful approach is most clearly exemplified in its commitment to artist-led projects. The approach recognises that Aboriginal and Torres Strait Islander artists and their communities have absolute authority in the creation of their works of art, culture and cultural knowledge and must retain unmediated control of this. It positions artists and their communities in full control of their artistic projects and outcomes for Tarnanthi. This practical expression of self-determination is possible through the existence of mutual trust and understanding built over years between AGSA, the artists and the art centres it works with.

Based on her longstanding relationships with art centres across the country, Artistic Director Nici Cumpston regularly speaks with artists about their current practice and asks if they want to expand in more ambitious ways; in many cases, artists and art centres approach her with project ideas. Nici Cumpston and her team then offer support to meet the specific needs for their artistic projects – ranging from covering material costs to facilitating technical support for complex work or arranging skill development training and mentoring. This respectful approach of building relationships and trust, listening to the aspirations of artists and communities, and gentle support tailored to individual requirements ensures self-determination and fosters empowerment. With the artist in total control, it also builds self-assurance as artists consistently deliver works of art of greater complexity and daring.

### 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

Tarnanthi understands that consultation and deep listening cannot be rushed. By following its principle of *'open mind and open heart'* for meaningful consultation, Tarnanthi allows time and allocates resources to ensure that communication with artists, their communities and representatives is comprehensive and ongoing.

Tarnanthi's approach to consultation is exemplified by its commitment to 'continuous consent' in relation to the management of artists' copyright and moral rights. Artists who participate in Tarnanthi will typically sign a broad copyright licence for the use of images of their works of art, such as in the exhibition catalogue. However, beyond this legal agreement, Tarnanthi adds its own ethical practice of continual liaison with artists and/or their representatives to show them in advance the proposed use of these images – for example, in catalogues, programs, marketing collateral and signage. This ensures that artists are happy with and approve the reproduction of their work in any specific context and helps to avoid potential sensitivities relating to its use in that context.

### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.<sup>403</sup>**

The guiding principle of *'grow, share, respect'* encompasses Tarnanthi's strong commitment to sharing and broadening understanding and appreciation of Aboriginal and Torres Strait Islander art and culture among a wide audience. When describing works of art in exhibition wall texts, Tarnanthi relies principally on information supplied and approved by the artist, their art centre and community, and avoids elaboration and interpretation of what the work may mean or represent.

As well as through the display of visual art, cultural authority and connections to country are articulated through the artists' own voices, in person and in print. The popular Panpa-panpalya ideas forum, held on the opening weekend, and numerous artist talks allow Aboriginal and Torres Strait Islander artists and curators to share their perspectives, experiences and cultural knowledge directly with a general audience. Exhibition wall texts frequently include artists' own voices, often in their own languages, as do several essays in Tarnanthi exhibition catalogues.

Tarnanthi has also developed an extensive array of education resources for students and teachers that reveal the depth and diversity of contemporary Aboriginal and Torres Strait Islander art and culture. These include an online guide for educators, *The Essential Introduction to Aboriginal Art (25 Facts)*,<sup>404</sup> as well as detailed online information resources about specific artists and their work shown at Tarnanthi and AGSA. A workshop for educators entitled 'How to Teach Aboriginal Art', held during Tarnanthi 2017, demonstrated an enormous unmet need among teachers for greater understanding of Aboriginal and Torres Strait Islander art and of how to teach students about it in a culturally sensitive and respectful manner. This has led to more such workshops being held regularly at AGSA, engaging more than 300 teachers and influencing a generation of young learners. It has also led to AGSA producing a comprehensive guidebook of tips for the culturally sensitive and respectful teaching of Aboriginal and Torres Strait Islander art, available to educators nationwide from September/October 2019.

## 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.**<sup>405</sup>

The immense diversity of art and artists at Tarnanthi, representing peoples and cultures from across the nation, ensures a genuine reflection of the breadth of First Nations cultures within Australia and of First Nations' enduring connections to country throughout the continent.

Tarnanthi's first guiding principle, to '*let the artist's voice shine*', is an affirmation both of artistic self-determination and of cultural integrity. Creative projects are entirely directed by the artists, their communities and their cultural imperatives and are not commissioned by AGSA, although artists frequently make new works with support from Tarnanthi. Without influence on the artist or mediation of their vision, Tarnanthi can support works of art that maintain cultural integrity and convey authentic cultural and historical narratives.

APY Arts Centre Collective general manager Skye O'Meara has said of Tarnanthi: '*... APY [Anangu Pitjantjatjara Yankunytjatjara] Elders and artists have achieved so much over the years whilst working with the Art Gallery of South Australia because it's a safe and trusted relationship where art will be celebrated, as good art without pressure or cultural intrusion.*'<sup>406</sup>

For image reproduction of works of art in catalogues and elsewhere, Tarnanthi seeks to ensure as much as is possible that the full work is shown uncropped and without any overlaid print, to maintain its artistic and cultural integrity, or ensures that artist approval is sought for any detail (cropped) images.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

Tarnanthi recognises that Aboriginal and Torres Strait Islander artworks embody cultural expressions and knowledges (ICIP) that may include sacred and culturally sensitive content. To ensure ethical management, respect and protection of this cultural heritage, Tarnanthi relies principally on information supplied and approved by the artist, their art centre and community when describing their works of art. Exhibition catalogue essays are written in close consultation with the artists and with their approval. Tarnanthi's contractual agreements extend the same respect and protection of any culturally sensitive or confidential content to its partner organisations.

In addition, Tarnanthi has developed an induction document so that new staff and volunteers at AGSA are aware of the need to respect and protect the ICIP of First Peoples. Gallery Guides also receive ongoing instruction to ensure they make visitors aware that a work's full meaning may be restricted by sacred and culturally sensitive knowledge. This is summarised in the words of master bark painter John Mawurndjul, the focus artist of Tarnanthi 2018, who said of people outside his Kuninjku culture: *'They can enjoy the paintings but buried inside are secret meanings they don't need to know.'*<sup>407</sup>

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as traditional owners and custodians of their lands, waters and ICIP through attribution.**

All artists receive full and clear attribution when their works are presented at Tarnanthi. This includes in wall labels alongside the displayed work and beside images of works in an exhibition catalogue or program, online, in marketing material or other uses. All attributions include the name and cultural affiliation of the artist(s), including situations when many artists are involved in a collaborative work. For example, at Tarnanthi 2017, the accompanying credit line for the painting *Kungkarangkalpa – Seven sisters* (2016) individually lists all 24 artists involved and their cultural affiliations, rather than applying the much simpler and commonly used name of the 'APY Women's Collaborative.'<sup>408</sup> Similarly, the credit line for the installation work *Kulata Tjuta* (2017) individually lists 59 artists and their cultural affiliations.<sup>409</sup>

Tarnanthi's strong relationships with art centres and communities also help to ensure that AGSA is informed when an artist has passed away and what their community has decided should be the appropriate 'sorry name' to use when referring to them. This is then instated in current and future attributions.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their culture, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Through the many components of Tarnanthi, artists, communities, partner organisations and art lovers are all its beneficiaries.

Tarnanthi projects empower artists and their communities through the artist-led approach that supports self-determination. Artists share a sense of affirmation and value when their significant cultural and historical stories are presented and celebrated at this major national art event and appreciated by its vast audience (some 750,000 people have attended Tarnanthi events up to the end of 2018). A significant number of artists also develop their practices through skill-development programs and mentorships, while others can create and present works of ambition or scale that may not have been achievable without Tarnanthi's support. In numerous cases, the substantial increase in their skills, assurance and exposure has advanced their careers nationally and internationally.

In addition, artists and their communities gain significant economic benefits from sales of works through the annual Art Fair – it generated \$900,000 of sales in 2018 alone, and an overall total of more than \$2.2 million from 2015 to 2018, which went directly to artists and their communities. In 2017 an art auction also raised substantial funds for the Purple House Foundation's renal dialysis unit in Pukatja (Ernabella), in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands of South Australia.

For partner organisations, benefit sharing has created its own momentum. Several partners have developed and maintained respectful and trusting relationships with artists and communities that originated through Tarnanthi, leading to their own initiation of collaborative and skill-development projects outside Tarnanthi. At Adelaide's JamFactory craft and design centre, for example, CEO Brian Parkes says of its experience through Tarnanthi: *'Many cross-cultural, personal relationships involving genuine two-way learning have been created ... a number of Aboriginal artists and art centres have since sought to independently engage with JamFactory.'* Many employees from resources company BHP, Tarnanthi's principal partner, go beyond their employer's financial support to Tarnanthi and corporate commitment to reconciliation<sup>410</sup> by offering their own voluntary support, appreciating the benefits of direct engagement with community members by attending Tarnanthi events, including to serve meals at Tarnanthi's annual artist lunch.



Audiences, of course, are major beneficiaries. Through Tarnanthi, they have the opportunity to experience first-hand the vigour and variety of Aboriginal and Torres Strait Islander art and cultures, to see and hear perspectives that they may not normally be exposed to, and as a result to develop a greater appreciation of the immense diversity of culture, narratives and worldviews that form part of our nation's story. Tarnanthi Artistic Director Nici Cumpston has said, *'I believe that this expands our understanding of who we are as a nation, empowering us to grow as a nation.'*<sup>411</sup>

Further, the impact of Tarnanthi within AGSA cannot be understated. This is evident in improved cultural awareness among staff and management, greater Aboriginal and Torres Strait Islander representation among staff and changes to administrative processes. In addition to a team dedicated to creating and overseeing Tarnanthi each year (which includes a producer, education officer and public programs officer), the whole of AGSA staff are committed to delivering the program through their various roles, which increases cultural awareness widely across the organisation. This has led to initiatives such as the introduction of staff-wide cultural awareness training sessions and to the launch of AGSA's Reconciliation Action Plan, which sets a framework for AGSA to help advance reconciliation and a timeline for delivery of actions focused on reconciliation objectives. Tarnanthi's employment opportunities have seen the number of full-time AGSA staff who identify as being Aboriginal increase to 6 per cent of total staff (as of mid-2019).

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations.<sup>412</sup> It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

Tarnanthi's key guiding principle of *'grow, share, respect'* expresses its aim of encouraging cultural strength within First Nations communities and appreciation of First Nations cultures within the broader community. Tarnanthi supports the continuation and strengthening of Aboriginal and Torres Strait Islander cultures in both practical and intangible ways.

As a flagship program of AGSA, Tarnanthi carries significant authoritative weight by being part of the state's leading cultural institution. Its support for the telling of Aboriginal and Torres Strait Islander cultural and historical stories through art affirms their importance and assures artists and custodians that their cultural expressions and knowledges are valued by the state.

By championing and exhibiting the artistic creativity of diverse communities, Tarnanthi fosters established and emerging artists and supports community-administered art centres, which are the cultural hubs of many communities. To expand artists' practice and their means of cultural expression, Tarnanthi frequently facilitates skill-development opportunities and mentorships with other First Nations artists. It also supports communities and art centres in the development and continuation of cultural maintenance projects that have artistic outcomes.

Such was the case with *Kulata Tjuta* ('Many Spears'), which began in 2010 as a spear-making and intergenerational storytelling project among Anangu men at Amata, in north-western South Australia. With Tarnanthi's support in 2015 and 2017, it developed dramatic large-scale art installations that told of the Anangu struggle for land rights and the effects of atomic bomb testing on Anangu land. The high profile of these works on a national stage and the immensely positive response to them affirmed the power of traditional culture expressed through a contemporary art medium. The project has since created a major installation for a European institution, taking Anangu stories to an international audience, while the cultural maintenance project has spread across the APY Lands and now includes women as well as men.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights in projects. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

Tarnanthi recognises and protects ICIP rights through strict observance of its guiding principles. It also extends that recognition and protection to all partner organisations through contractual agreements. By accepting the agreements, partners acknowledge that the ICIP within all works of art exhibited by them as part of Tarnanthi belong to the artist and their cultural group(s) and that they will not reuse, republish or rebroadcast the material without the artist's express permission.

### ***iii. Milnjiya, Milky Way – River of Stars by NT Dance Company and West Australian Ballet***

This case study was written in consultation with Jessica Machin (Executive Director, West Australian Ballet).

*Milnjiya, Milky Way – River of Stars* is a collaborative ballet and opera piece choreographed by Larrakia man Gary Lang. It involved Lang's NT Dance Company, the WA Ballet, Yorta Yorta soprano Deborah Cheetham and artists from Yirrkala (East Arnhem Land). The work uses contemporary ballet to convey the Milky Way creation story belonging to Lang's ancestors, the Yolngu people. It is one of four pieces produced by West Australian Ballet for their project *Milky Way: Ballet at the Quarry* performed at Perth Festival in 2018.

Lang's adopted mother Naminapu Maymuru-White – a respected Mangalili artist from Yirrkala, North East Arnhem Land – described the Yolngu Milky Way creation story as two fisherman who drowned after their canoe was tossed by a big wave when they were out at sea. In the sea these fishermen received offers from different objects which they declined because they knew their spirit was going somewhere beautiful. This place is called Milnjiya, meaning river of stars or the milky way. Their spirits floated from the sea to the sky and joined the rest of the stars which represent spirits which had gone before.

## 1. Respect

**Projects must recognise and respect the custodianship of Indigenous peoples over their lands and waters and the right to maintain, control, protect and benefit from their ICIP.**

From a stance of respect, the project embraced diversity amongst the performers and encouraged Indigenous contributors to partake in the collaborative production process. When the performers gathered in Western Australia, WA Ballet engaged Nyungar cultural elder Walter McGuire to present a Welcome to Country, welcoming Lang and his company's dancers to the local land. Lang and his team reciprocated this act of respect by responding with Yolngu dance in acknowledging and thanking the Nyungar people and land.

Lang has said that his grandfather was a story teller, his mother would write them down and that he would dance them. *Milnjiya* is a performance that is an act of respect for Lang's right to interpret and express the creation story of his Yolngu people. In accordance with Article 31, Lang and other Indigenous performers were able to maintain, control, protect and develop their ICIP throughout the planning and implementation stages of the project.

Polly Hilton, Darren Edwards, Claire Voss, Christian Luck, Catherine Young and Oliver Edwardson in *Milnjiya, Milky Way - River of Stars*.

Image courtesy of West Australian Ballet.

Credit: Sergey Pevnev.





## 2. Self-determination

**Indigenous peoples have the right to self-determination in their cultural heritage and should be empowered in decision-making processes within projects that affect their ICIP.**

As the creation story of the Milky Way in *Milnjiya* belongs to the Yolngu people of East Arnhem Land, it was fundamental that the project was developed under the leadership of the custodians of this ICIP and their cultural protocols. WA Ballet's partnership with NT Dance Company, of which Lang is Artistic Director, upholds the principle of self-determination as he governs the use of the ICIP in the production to which he is a custodian. His contemporary choreography is renowned for embracing both classical ballet and traditional Aboriginal dance. Cheetham also played a key role in the artistic direction allowing the strength of Indigenous representation, perspectives and voices to be felt. Deborah said,

**'The game changer part is, it's not us [Indigenous people] being included in something else... it's us being inclusive of everyone else into the thing that truly makes Australia unique – Aboriginal culture.'**

When the *Milnjiya* production visited the Larrakia community to meet community elders and gain consent for the use of the ICIP, Lang and WA Ballet actively engaged Indigenous filmmakers to document the process and the visit. The filmmakers were known to the community and understood the cultural sensitivities around the elders and community members sharing cultural stories and knowledge. Documenting the process was crucial to the performance and Indigenous peoples had control of their portrayal of ICIP throughout the whole process.

## 3. Communication, consultation and consent

**Free prior informed consent for use of ICIP should be sought from Indigenous peoples. This involves ongoing consultation, negotiation and informing custodians about the implications of consent.**

The Milky Way project was unique in that it was WA Ballet's first collaboration with an Indigenous arts company. A Memorandum of Understanding (MoU) between NT Dance Company and WA Ballet was made specifically for the project to ensure clear understanding and mutual agreement around the intentions and responsibilities of the parties for the project. Having a MoU from the outset set the terms and requirements around consultation, the use of ICIP, acknowledgements and payments. It also allowed the Board of NT Dance Company to contribute to the collaboration and ensured that benefits flowed back to NT Dance Company for subsequent productions of *Milnjiya*.

As the production was an expression of a Yolngu creation story, as part of the process, Lang took WA Ballet's Director Aurelien Scannella and Executive Director Jessica Machin to meet his Yolngu family in Yirrkala, Northern Territory (NT). Whilst there, the production team were able to show their respect for



culture and formally ask the traditional custodians' for permission to share their creation story. In line with cultural protocols, Lang and WA Ballet consulted with Lang's cultural Elders, and were granted permission to tell the family's creation story in the production.

During this time, Lang showed his mother and cultural Elders a film clip of the project's creative development process which had begun in Darwin prior to visiting. Community consultation was continuous to ensure that Elders were kept up to date with the development of the production and able to provide feedback.

#### 4. Interpretation

**Indigenous peoples are responsible for maintaining their cultures and the ongoing interpretation of their ICIP.**

*Milnjiya* portrays the transition and release of spirits from the human to the spirit world following death. It explores concepts related to Indigenous ancestral connections and the loss of loved ones. Gary ensured that the ICIP holders, the Yolngu community, were influential in the interpretation of the story throughout the entire production process.

Gary utilised language and movements distinct to Yolngu, with appropriate attribution given. For the production he invited a traditional song man, a yidaki (digeridoo) player and a cultural consultant to Perth. Having community members present during the project development ensured that correct perspectives, contexts and cultural restrictions informed the interpretation of the ICIP.

Gary's mother Naminapu Maymuru-White was also brought to Perth during the production week to ensure interpretations of the *Milnjiya* story through the dance were correct. The interpretation of the Yolngu creation story by a Yolngu descendant was crucial and provided continual means of feedback to ensure the authentic expression of *Milnjiya* in the performance.

#### 5. Cultural integrity and authenticity

**Maintaining the cultural integrity and authenticity of ICIP is important to Indigenous peoples.**

Cultural integrity and authenticity are significant aspects of this project. Gary was aware that the representation of the ICIP, even if it is creatively interpreted through contemporary dance, must remain authentic and empowering for Indigenous people. Not only was it a collaboration between Indigenous and non-Indigenous creative teams, it was also a cross-cultural collaboration between Indigenous communities – encapsulating and celebrating Deborah's Yorta Yorta heritage alongside Gary's Larrakia heritage and Yolngu family.

Lang complied with the instructions of his elders to ensure the integrity and authenticity of the Yolngu creation story was maintained throughout *Milnjiya*. The close and ongoing collaboration between Cheetham, Lang and Yolngu community members also supported this.

## 6. Secrecy and confidentiality

**Indigenous peoples have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.**

Gary's family, Merrkiwuy Ganambarr Stubbs and Banbapuy Whitehead, recognised his name right to share their stories with the wider public, and bestowed their trust in him to do so in a way which would pay honour to the sensitives involved with sharing ICIP of this nature.

## 7. Attribution

**It is respectful to acknowledge Indigenous peoples as custodians of their lands, waters and ICIP through attribution.**

*Milnjiya* identifies and acknowledges the custodianship of Gary regarding the story that is explored in the production. The distinctive cultural connections and Indigenous nations of the key participants involved in the production are acknowledged in publications such as programs and related material and also online.

## 8. Benefit sharing

**Indigenous peoples have the right to share in the benefits from the use of their cultures, especially if it is being commercially applied. The economic benefits from use of their ICIP should flow back to the source communities.**

Gary received payments for his engagement as artistic director and cultural advisor to the project. Partnering with Gary Lang NT Dancing Company, an Indigenous-owned business, also provided Indigenous performers with financial benefits through salaries for their performance. The Indigenous contributors also had a safe space where they were able to control, direct and execute the sharing of their cultural knowledge.

Moreover, as requested by the community, WA Ballet have also provided CD and DVD packages of *Milnjiya* to community members. Traditional custodians of the Yolngu people have had their creation story captured in contemporary ballet through *Milnjiya*, documented and preserved for future generations.

## 9. Continuing cultures

**Indigenous peoples have the right to revitalise, use, develop and transmit their cultures, histories, languages and oral traditions to future generations. It is important to consider how a proposed use of ICIP might affect future use by others who are entitled to inherit the cultural heritage.**

Aurelien Scannella, the artistic director of WA Ballet perceived *Milnjiya* as a national project; one which highlighted Australian history from the unique Aboriginal perspective. Deborah also explained that the work had the potential to ‘fast track our understanding of what it is to have a shared future’, through recognising an Australian history which often goes unacknowledged. Hence *Milnjiya* assists with conservation of the ICIP associated to it through sharing it with the wider society, as well as celebrating and highlighting the diverse interpretations of the Milky Way.

## 10. Recognition and protection

**Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure ICIP recognition and protection.**

*Milnjiya* recognised and protected ICIP rights through the leadership of the Indigenous partners involved in the project. *Milnjiya* was received as an opportunity to further embrace Indigenous people and their culture within WA Ballet. Adding to WA Ballet’s Indigenous engagement efforts, WA Ballet engaged their principal partner Woodside to run cultural awareness training for its dancers and other staff on the project. Also resulting from the project was masterclasses conducted by Gary in Perth, to share culture and dance with the wider community.

Following the 18-month *Milnjiya* project, WA Ballet continues to build long-term relationships with the local Noongar community of Perth, as well as regional communities in WA and NT on further projects. WA Ballet has also recognised the importance of ongoing efforts, implementing Acknowledgement of Country ceremonies as common practice for events and meetings and the development of a Reconciliation Action Plan.

The *Milnjiya* project was an innovative production for WA Ballet and sets the frameworks for future collaborations and engagements with Indigenous contributors, people and communities.

## 2.2 Project resources

### 2.2.1 Project checklist

#### Stage 1:

#### Initial research and project development

Question	Yes/No	Why?	Notes
Do I need permission/consent?			
Has my traditional design been checked by the relevant custodians?			
Has my traditional story been checked by the relevant custodians?			
Has my traditional dance been checked by the relevant custodians?			
Have I checked with the relevant family about the use of any materials, photographs or film?			
Have I checked with the relevant Indigenous subjects or descendants involved in the history of my project?			
Have I checked with the relevant Indigenous subjects or descendants involved in the experiences or private lives of my project?			
Am I using archival material in my project?			
Have I checked with the family or community representatives related to an image of a deceased person I use in my project?			
Does my project involve a visit to an Aboriginal or Torres Strait Islands community?			<i>If so, you must obtain permission from the local land council/trust /the relevant community council.</i>
How did I obtain permission?			

**Stage 2:**  
**Producing the work**

Question	Yes/No	Why?	Notes
Have I initiated consultation with the correct Indigenous communities or individuals?			
Has permission been obtained?			<i>If the answer is no, reconsider your project.</i>
Have I paid people for reviewing my work?			
Does my work empower Indigenous people?			<i>If not, reconsider project.</i>
Have I gained permission from the correct community or individual involving any secret, sacred, gender-based or personal information? Are special communication procedures required to obtain consent?			
Does my project reinforce negative stereotypes?			<i>If so, consider altering your project.</i>
Is the language appropriate?			<i>If not, consider consulting a language expert.</i>
Have I involved Indigenous people in all stages of the project (including in key creative roles)?			



**Stage 3:**

**Post creation**

Question	Yes/No	Why?	Notes
Have I re-consulted the relevant Indigenous groups/individuals?			
Have I allowed the Indigenous subjects to view the project before release?			<i>If yes, account for the changes or suggestions they make. If no consider the impact you may make.</i>
Have I discussed the use of the project in terms of the subject's death?			
Did I discuss the labelling and promotion of the project and each Indigenous contributor with those individuals and their community?			

**Stage 4:**  
**Publication**

Question	Yes/No	Why?	Notes
Have I acknowledged Indigenous contributors?			
Have I attributed the correct Indigenous people? Have you asked how they wish to be attributed?			
Has significant credit been attributed to the Indigenous subject/community?			
Is the Indigenous individual/community receiving royalties? Were written agreements used to govern the payment of royalties?			
Has a deceased persons warning been placed on the project?			
Have the Indigenous participants been invited to participate in the project launch and/or public event?  Were they present at the event? If so, did you acknowledge them publicly and offer them hospitality?			
What representatives of the traditional owners will attend and give a Welcome to Country?			
In marketing the project, have all the Indigenous participants and stakeholders agreed to the use of their knowledge, songs or designs, including reproductions and the use of biographical material and text?			
Have I arranged for non-pecuniary benefits to be provided to any Indigenous people or communities for their contribution to the development of the project (e.g. launch hosted in the Indigenous community)?			

#### Stage 4:

#### Publication *(continued from p. 179)*

Question	Yes/No	Why?	Notes
Do the Indigenous contributors share in the benefits of any commercialisation of the project?			
When arranging speaking engagements and interviews, were issues such as payment, childcare and other services discussed?			
Has the work been reproduced on the internet?			<i>If so, consent to use it in this way must have been obtained prior to publication, and measures must be taken to limit the ease of copying.</i>
Have I maintained relationships with other Indigenous contributors and communities in order to facilitate future consultation?			

## 2.2.2 Templates

### i. Sample cultural sensitivity warning

WARNING: This [work/document/artwork/installation] contains the [names/images/voices] of deceased Aboriginal and Torres Strait Islander people.

### ii. Sample traditional custodians notice

NOTICE OF CUSTODIAL INTEREST OF THE [NAME] COMMUNITY<sup>413</sup>

The images in this artwork embody ritual knowledge of the [name] community. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the [name] community, and may breach the *Copyright Act 1968* (Cth). For enquiries regarding the permitted reproduction of these images, contact [name] community.

### iii. Sample next-of-kin clause

[Name] respects Indigenous peoples and communities' cultural death protocols and agree that in the event of death or incapacitation of the [Creator/Contributor/Knowledge Holder] during the Term, [name] will discuss the ongoing use of [Creator/Contributor/Knowledge Holder's] name, any approved likeness and any approved biography in connection with [Project/Program/Work] with the [Creator/Contributor/Knowledge Holder's] next of kin as follows:

- a. Name: [insert details]
- b. Relation: [insert details]
- c. Address: [insert details]
- d. Contact number: [insert details]

or such other representative of the [Creator/Contributor/Knowledge Holder] who will have the required legal capacity to perform the [Creator/Contributor/Knowledge Holder's] obligations under this agreement.

### 2.2.3 Additional resources

#### i. Indigenous peoples' rights

##### ICIP Rights

United Nations Global Compact, *United Nations Declaration on the Rights of Indigenous Peoples: A Business Guide* [unglobalcompact.org/docs/issues\\_doc/human\\_rights/IndigenousPeoples/BusinessGuide.pdf](https://unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf)

World Intellectual Property Organisation, *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore* [wipo.int/tk/en](https://wipo.int/tk/en)

World Intellectual Property Organisation, *Draft Provisions for the Protection of Traditional Cultural Expressions/Folklore (TCEs) and for the protection of Traditional Knowledge (TK) against misappropriation and misuse* [wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](https://wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html)  
[wipo.int/tk/en/igc/draft\\_provisions.html](https://wipo.int/tk/en/igc/draft_provisions.html)

World Intellectual Property Organization, *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* [wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1048.pdf](https://wipo.int/edocs/pubdocs/en/wipo_pub_1048.pdf)

Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Prepared for AIATSIS and ATSIC, 1998) [terrijanke.com.au/our-culture-our-future](https://terrijanke.com.au/our-culture-our-future)

Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for protection and management*, (Discussion Paper, IP Australia & Department of Industry, Innovation and Science, 2018) [ipaustia.gov.au/sites/default/files/ipaust\\_ikdiscussionpaper\\_28march2018.pdf](https://ipaustia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf)

Terri Janke, *Who Owns Story* (2010) [aiatsis.gov.au/sites/default/files/docs/asp/who-owns-story.pdf](https://aiatsis.gov.au/sites/default/files/docs/asp/who-owns-story.pdf)

Terri Janke, *Writing Up Indigenous Research: Authorship, Copyright and Indigenous Knowledge Systems* (2009) [docs.wixstatic.com/ugd/7bf9b4\\_a05f0ce9808346daa4601f975b652f0b.pdf](https://docs.wixstatic.com/ugd/7bf9b4_a05f0ce9808346daa4601f975b652f0b.pdf)

##### Free Prior Informed Consent

United Nations Human Rights Office of the High Commissioner 2013, *Free, Prior and Informed Consent of Indigenous Peoples* [ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf](https://ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf)

Ninti One 2012, *What is Free Prior Informed Consent?* [nintione.com.au/resource/BP7\\_Free-Prior-Informed-Consent.pdf](https://nintione.com.au/resource/BP7_Free-Prior-Informed-Consent.pdf)



## Benefit sharing

United Nations, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2011* [cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf](http://cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf)

## ii. Protocols

### Film

Special Broadcasting Service, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* [wipo.int/export/sites/www/tk/en/databases/creative\\_heritage/docs/lester\\_bostock\\_film.pdf](http://wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/lester_bostock_film.pdf)

Terri Janke, *Pathways & Protocols: A filmmaker's guide to working with Indigenous people, culture and concepts* (Screen Australia, 2009) [screenaustralia.gov.au/getmedia/16e5ade3-bbca-4db2-a433-94bcd4c45434/Pathways-and-Protocols](http://screenaustralia.gov.au/getmedia/16e5ade3-bbca-4db2-a433-94bcd4c45434/Pathways-and-Protocols)

### Writing, literature and publishing

Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for the ethical publishing of Aboriginal and Torres Strait Islander authors and research from those communities* (Aboriginal Studies Press, 2015) [aiatsis.gov.au/sites/default/files/docs/asp/ethical-publishing-guidelines.pdf](http://aiatsis.gov.au/sites/default/files/docs/asp/ethical-publishing-guidelines.pdf)

First Nations Australia Writers Network: Guidelines for writing First Nations content.

### Museums and galleries

Terri Janke and Company, *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries* (Australian Museums and Galleries Association, 2019) [docs.wixstatic.com/ugd/f76062\\_c67539d5b2e2433181f66b15ec499d89.pdf](http://docs.wixstatic.com/ugd/f76062_c67539d5b2e2433181f66b15ec499d89.pdf)

Museum of Applied Arts and Sciences, *Australian Indigenous Cultural and Intellectual Property Protocol* [maas.museum/app/uploads/2016/08/Australian-Indigenous-Cultural-and-Intellectual-Cultural-Property-Protocol-v1.0.pdf](http://maas.museum/app/uploads/2016/08/Australian-Indigenous-Cultural-and-Intellectual-Cultural-Property-Protocol-v1.0.pdf)

## Visual arts

Doreen Mellor and Terri Janke, *Valuing Art, Respecting Culture – Protocols for Working with the Indigenous Visual Arts and Craft Sector* (NAVA, 2001)

**[visualarts.net.au/media/uploads/files/Valuing\\_Art\\_Respecting\\_Culture\\_2.pdf](http://visualarts.net.au/media/uploads/files/Valuing_Art_Respecting_Culture_2.pdf)**

National Association for the Visual Arts, *Code of Practice Chapter 9: Issues and Protocols Specific to Indigenous Practitioners*, **[visualarts.net.au/media/uploads/files/CHAPTER\\_9.pdf](http://visualarts.net.au/media/uploads/files/CHAPTER_9.pdf)**

## Libraries and archives

Aboriginal and Torres Strait Islander Library, Information and Resource Network Inc, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services* 1995 (revised 2010) **[atsilirn.aiatsis.gov.au/protocols.php](http://atsilirn.aiatsis.gov.au/protocols.php)**

## Research

Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (2<sup>nd</sup> ed, Aboriginal Studies Press, 2012) **[aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf](http://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf)**

National Health and Medical Research Council, *Ethical Conduct in Research with Aboriginal and Torres Strait Islander Peoples and Communities* (2018) **[nhmrc.gov.au/about-us/publications/ethical-conduct-research-aboriginal-and-torres-strait-islander-peoples-and-communities](http://nhmrc.gov.au/about-us/publications/ethical-conduct-research-aboriginal-and-torres-strait-islander-peoples-and-communities)**

## Other

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- <sup>17</sup> *Copyright Act 1968* (Cth) s 35(6) states that where the work is 'made by the author in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship, that other person is the owner of any copyright subsisting in the work'.
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- <sup>20</sup> Changes to the *Copyright Act 1968* (Cth) by virtue of the *Copyright Amendment (Disability Access and Other Measures) Act 2017* which changed the copyright term for unpublished works. See current Section 33(3) Item 1 of the *Copyright Act 1968* (Cth).
- <sup>21</sup> *Copyright Act 1968* (Cth) s 180.
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- <sup>25</sup> El Daes, *Final report on the protection of the heritage of Indigenous peoples*, United Nations Document E/CN.4/Sub.2/1995/26. The full text, as adopted and elaborated on by ATSIC's Indigenous Reference Group, is cited in T Janke, *Our culture: our future*, 273-277. See also El Daes, *Study of the protection of the cultural and intellectual property of Indigenous peoples* (United Nations Economic and Social Council, Geneva, 1993).
- <sup>26</sup> These exclusive rights of copyright owners depend on the nature of the copyright work. For literary, dramatic and musical works, it is the right to reproduce the work in a material form, publish the work, perform the work in public, communicate the work to the public, make an adaptation of the work. For artistic works, it is the right to reproduce the work in a material form, publish the work and communicate the work to the public. Different exclusive rights also attach to sound recordings and films. See section 31 of the *Copyright Act 1968* (Cth).
- <sup>27</sup> *Copyright Act 1968* (Cth) s 31(1)(a).
- <sup>28</sup> This refers to the broadcasting of both sound and visual images on television.
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