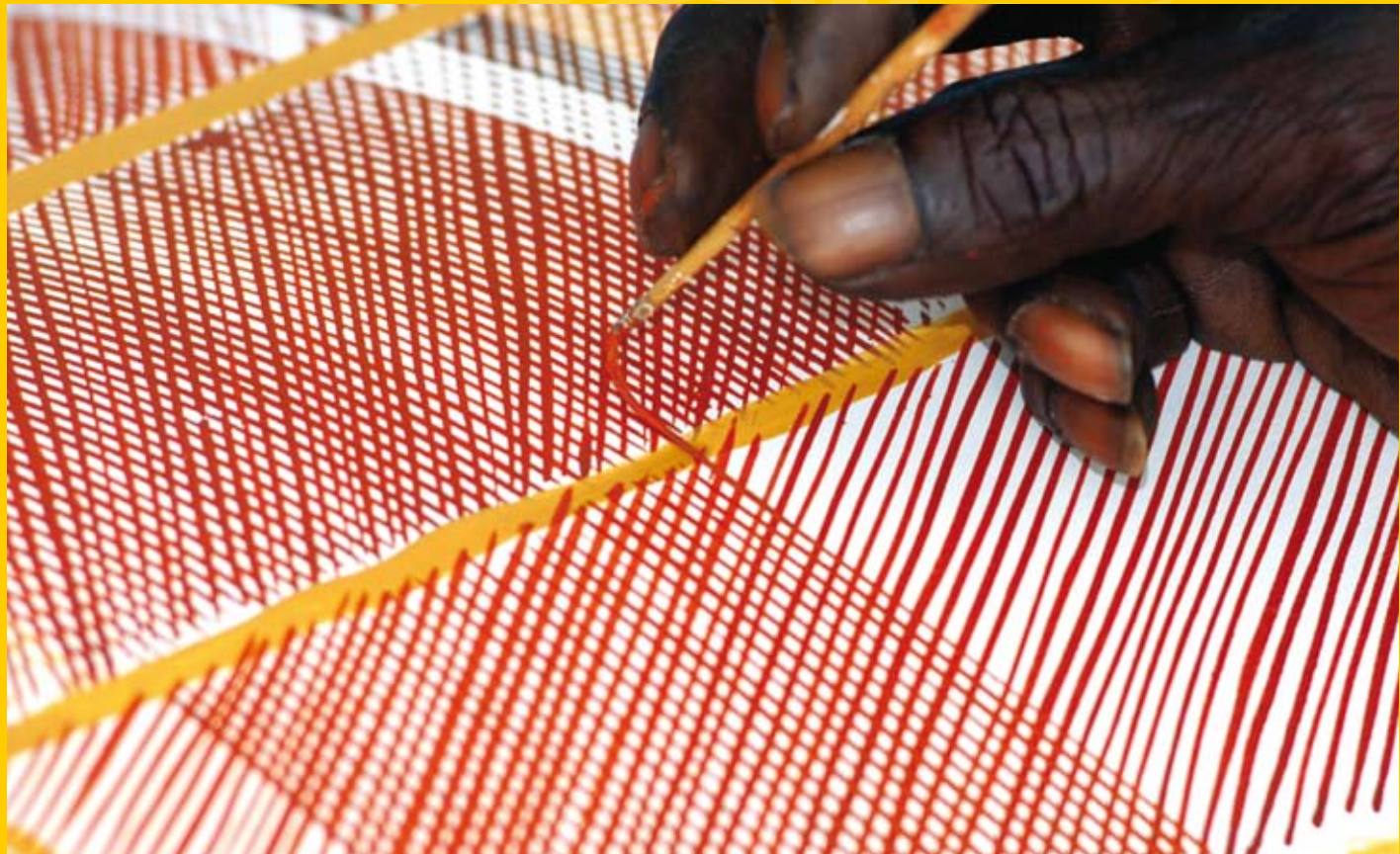


Protocols for producing Indigenous Australian visual arts

# Visual arts

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The Australia Council respects Indigenous communities and culture. Readers should be aware that this protocol guide may contain references to members of the Indigenous community who have passed away.

### IMPORTANT NOTICE

The information included in this guide is current as at September 2007. This document was first published under the title 'Visual Arts' in 2002. This 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.

## Visual arts

### Contents

01

|   |           |  |           |
|---|-----------|--|-----------|
| <b>Introduction</b>   | 2         | What happens when artists sell their paintings?      | 23        |
| Using this guide  | 3         | Collaborative works                                  | 23        |
| What are protocols?   | 3         | Communal ownership vs. joint ownership               | 24        |
| What are the Indigenous visual arts?                                  | 4         | Commissioned photographs                             | 24        |
| Special nature of Indigenous visual arts                              | 5         | What are moral rights?                               | 24        |
| Indigenous heritage   | 6         | Licensing use of artworks                            | 25        |
| Current protection of heritage  | 6         | Managing copyright to protect your interests         | 25        |
|   |           | When is copyright infringed?                         | 26        |
|   |           | The Myer report                                      | 27        |
|   |           | Publishing and reproduction of Indigenous art        | 27        |
|   |           | Indigenous communal moral rights                     | 28        |
|   |           | Further copyright information                        | 29        |
| <b>Principles and protocols</b>                                       |           | <b>Continuing cultures</b>                           | <b>33</b> |
| <b>Respect</b>  | <b>9</b>  | <b>Recognition and protection</b>                    | <b>33</b> |
| Acknowledgment of country   | 9         |  |           |
| Public art – acknowledging land                                       | 10        |  |           |
| Accepting diversity   | 10        |  |           |
| <b>Indigenous control</b>   | <b>10</b> |  |           |
| <b>Communication, consultation &amp; consent</b>                      | <b>12</b> |  |           |
| Traditional & communally owned images                                 | 12        |  |           |
| Interpreters and translators  | 13        |  |           |
| Sensitivity of content  | 13        |  |           |
| Geographic diversity  | 13        |  |           |
| Gender  | 13        |  |           |
| Photography of Indigenous people                                      | 13        |  |           |
| Collaborating with Indigenous artists                                 | 13        |  |           |
| <b>Interpretation, integrity and authenticity</b>                     | <b>13</b> |  |           |
| Interpretation  | 14        |  |           |
| Integrity   | 14        |  |           |
| Authenticity  | 14        |  |           |
| Using Indigenous cultural material                                    | 15        |  |           |
| Marketing with integrity  | 16        |  |           |
| Exhibiting Indigenous art   | 19        |  |           |
| <b>Secrecy and confidentiality</b>                                    | <b>20</b> |  |           |
| Representation of deceased people                                     | 21        |  |           |
| Secret and sacred material  | 21        |  |           |
| Personal privacy  | 21        |  |           |
| Attribution and copyright   | 21        |  |           |
| Copyright   | 21        |  |           |
| What is copyright?  | 22        |  |           |
| Who owns copyright?   | 22        |  |           |
| What rights do copyright owners have?                                 | 22        |  |           |
| Do artists need to register their art for copyright protection?       | 22        |  |           |
| How long does copyright last?   | 22        |  |           |
| Does copyright protect ceremonial styles of art and creation figures? | 23        |  |           |
|   |           | <b>Implementation</b>                                |           |
|   |           | <b>1. Respect</b>                                    | <b>35</b> |
|   |           | <b>2. Indigenous control</b>                         | <b>35</b> |
|   |           | <b>3. Communication, consultation &amp; consent</b>  | <b>35</b> |
|   |           | <b>4. Interpretation, integrity and authenticity</b> | <b>36</b> |
|   |           | Marketing with integrity                             | 36        |
|   |           | Exhibition of art                                    | 36        |
|   |           | <b>5. Secrecy and confidentiality</b>                | <b>37</b> |
|   |           | <b>6. Attribution and copyright</b>                  | <b>37</b> |
|   |           | <b>7. Proper returns and royalties</b>               | <b>38</b> |
|   |           | <b>8. Continuing cultures</b>                        | <b>38</b> |
|   |           | <b>9. Recognition and protection</b>                 | <b>38</b> |
|   |           | <b>References</b>                                    | <b>39</b> |
|   |           | <b>Bibliography</b>                                  | <b>45</b> |
|   |           | <b>Contacts</b>                                      | <b>47</b> |
|   |           | <b>Acknowledgments</b>                               | <b>48</b> |

## Introduction

Australia's unique Indigenous artistic and cultural expression is rooted in thousands of years of heritage and continuing practice.

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 art works, including special landmark commissions on the ceilings and façade by eight of Australia's best known Indigenous contemporary artists. More recently Emily Kngwarreye's *Earth's Creation* sold at auction for more than \$1 million, the highest price ever for a painting by a female artist 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 the Australia Council for the Arts' protocol guides come in. The five guides in the suite spell out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material. They can help people do the right thing. These guides recognise that in Indigenous Australian communities the artist is a custodian of culture, with obligations as well as privileges.

The five guides in the suite are:

- Media arts
- Music
- Performing arts
- Visual arts
- Writing.

They are relevant to anyone working in or with the Indigenous arts sector, including:

- Indigenous and non-Indigenous artists
- people working within related fields of Indigenous artform practice
- federal and state/territory government agencies
- industry agencies and peak organisations
- galleries, museums and arts centres
- educational and training institutions
- Indigenous and targeted mainstream media.

The protocol guides endorse Indigenous cultural and intellectual property rights – the rights of Indigenous people to own and control their cultural heritage. These rights are confirmed in the 2006 *United Nations Declaration of the Rights of Indigenous Peoples*,<sup>1</sup> which says Indigenous people 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.'

In *Our culture: our future*,<sup>2</sup> Terri Janke recommended significant changes to laws, policy and procedures to protect Indigenous cultural knowledge and expression. The Australian Government has yet to make a determination on this matter.

In Australia, Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people have a living heritage. Their connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, music, performing arts, visual arts and media arts, are some of the mediums for transmitting Indigenous cultural heritage.

As primary guardians and interpreters of their cultures, Indigenous people have well-established protocols for interacting with their cultural material. New situations also require cultural protocols.

Although each guide in the suite addresses cultural protocols specific to an artform, the same underlying principles are common to each.

We hope Indigenous people, and those working with them, will be inspired and encouraged to use these principles as a framework for developing protocols appropriate to their specific projects, regions, language groups and communities.

We also hope the guides will spark debate and that additional protocols will be developed across artforms.

Send any comments about this guide or any suggestions for improvement to the Australia Council for the Arts:

**Executive Director**  
**Aboriginal and Torres Strait Islander arts**  
**Australia Council for the Arts**  
**PO Box 788 Strawberry Hills NSW 2012**  
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### Using this guide

This guide is designed to be an initial point of reference in planning a work with Indigenous visual arts<sup>3</sup> practitioners, or using Indigenous cultural material. When you need specific advice on the cultural issues of a particular group, we recommend you speak to people in authority, or engage an Indigenous cultural consultant with relevant knowledge and experience.

Reading this guide from cover to cover is an important and highly recommended first step.

The introduction defines protocols as used in this guide, and looks at the special characteristics of Australia's Indigenous visual arts.

The Indigenous heritage section gives an overview of the issues that inform the development of Indigenous protocols. It explores the complexity of Indigenous Australia and charts international initiatives for the protection of Indigenous cultural and intellectual property rights.

The principles and protocols section examines the nine principles that support the protection of Indigenous cultural heritage. It includes valuable information on protocols specific to the use of cultural heritage material in visual arts practice. A number of case studies and commentaries from Indigenous visual arts practitioners identify pitfalls and offer readers valuable advice.

The guide also contains general information and advice on the main laws in Australia governing the use and reproduction of arts and cultural expression. For this second edition, we have integrated copyright, licensing and royalty information into the principles and protocols section. So one section deals with attribution and copyright and another with proper returns and royalties.

The implementation summarises some of the key points and provides a checklist for applying protocols for a visual project.

There is also a list of contacts and references to use as starting points for accessing relevant people and information.

### What are protocols?

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

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.

Indigenous protocols arise from value systems and cultural principles developed within and across communities over time. Agreeing to comply with the accepted protocols of other cultural groups promotes interaction based on good faith and mutual respect, thus encouraging ethical conduct.<sup>4</sup>

While it is not possible to prescribe universal rules for engaging with Indigenous people and their communities, there are some fundamental principles within which to conduct respectful work.

The protocols outlined in this guide are shaped by nine 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, installation and event launch as well as on inscriptions that accompany public art on permanent or temporary display.

This 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 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 visual arts.

These protocols are accepted and used by many Indigenous artists. They have also been used for many Indigenous visual arts projects. They have been adapted for specific institutions, for example, the Australian National Maritime Museum developed *Connections* based on the protocols guides, and Arts Tasmania developed *Respecting cultures*, using the principles framework.

### What are the Indigenous visual arts?

For Indigenous cultures, visual arts are central to identity, place and belonging. They are an expression of a unique and continuing tradition and have an important place in the continuing survival of Indigenous cultures.

In an Australian context, the term 'Indigenous visual arts' refers to art created primarily by Aboriginal and Torres Strait Islander people, or based on the cultural expression of Indigenous Australian people. Indigenous visual arts cover a range of genres including:

- painting
- printmaking (including etching and other intaglio processes, screen print, linocut)
- craft (including fibre and textile arts, ceramics, glass, wood, bead and shell work)
- photography
- sculpture
- multimedia and media.

Indigenous art is not just art produced by artists living in remote parts of Australia; neither is remote Aboriginal art solely 'traditional' in that it is anthropological or ethnographic art. There are many forms of Indigenous art, which are also contemporary. There are also many Indigenous artists living in urban areas.

There have been a number of reports concerning fakes and frauds. Some instances have involved non-Indigenous artists passing off their works as 'Indigenous art' or 'stylised

Indigenous art'. It is important to clarify that the artist is an Indigenous Australian if there is any cause for doubt.

Most Indigenous organisations use the Australian Government's definition of Aboriginal and Torres Strait Islander identity as a guide. The Australia Council's Aboriginal and Torres Strait Islander Arts board requires grant applicants to sign a confirmation of Aboriginal/Torres Strait Islander identity. Applicants must provide:

- Confirmation of identity from an organisation registered under the *Aboriginal Councils and Associations Act 1976* or since July 2007, registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, or other relevant legislation; and
- A declaration that:
  - a. they are of Aboriginal or Torres Strait Islander descent
  - b. identify as an Aboriginal or Torres Strait Islander
  - c. are accepted as such in the community in which they live.

Doreen Mellor comments on the issue of challenging identity:

*How should a challenge to an artist's Aboriginal or Torres Strait Islander identity be dealt with? The circumstances of Indigenous life, which mean that many artists live in communities far away from their heritage origin, or may not even know their place of cultural origin, means that artists may be challenged about their identity. The ATSIC definition of Aboriginality requires:*

- *the person identify as an Aboriginal or Torres Strait Islander*
- *the person is of Aboriginal or Torres Strait Islander descent*
- *the community of origin or the community in which he/she resides accepts the person as Aboriginal or Torres Strait Islander.*

*Organisations dealing with a challenge to an artist's Aboriginality will be required to ask the artist in question to provide evidence that they meet these three criteria.<sup>5</sup>*

### Special nature of Indigenous visual arts

Indigenous visual arts are a primary means of transmitting Indigenous culture and communicating identity, place and belonging.

Indigenous knowledge, history and other cultural information have been and continue to be transmitted orally over many generations.

Indigenous visual artists record knowledge, landscape and ideas. Their messages are often political and social as well as cultural, for a variety of reasons. These include:

- facilitating the ongoing transmission of information
- recording community knowledge
- recording oral histories/life stories
- political commentary
- establishing and demonstrating community ownership of stories
- engaging with cultural reclamation and maintenance
- entertainment
- offering a form of personal and community healing (e.g. stories of the Stolen Generations)
- educating the broader community about Indigenous issues
- educating Indigenous communities on local and national Indigenous issues.

There is great diversity in the geographic representation, medium and subject matter of Indigenous visual arts, so the development of creative expression and diversity should be encouraged.

## Indigenous heritage

Indigenous visual arts are an important means of expressing Indigenous cultural heritage – past, present and future.

Indigenous heritage, enshrined in Indigenous cultural and intellectual rights, is discussed at length in *Our culture: our future*.<sup>6</sup>

The visual 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 visual 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>7</sup>

The process of following the protocols not only supports Indigenous heritage rights, but also promotes diversity and new initiatives in Indigenous visual arts, and culturally appropriate outcomes.

## Current protection of heritage

Australia’s current legal framework provides limited recognition and protection of these rights. *Our culture: our future* recommended significant changes to legislation, policy and procedures. As yet there has been no formal response to these recommendations from the Australian Government. However, there are proposals to amend the *Copyright Act 1968* (Cth) to recognise Indigenous communal moral rights.

In the absence of legislation, many of the rights have been recognised at industry and practitioner level, through the development of protocols and use of contracts to support the cultural rights of Indigenous people.

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 people’s cultural heritage is respected and protected.

In mid-2006 they were given international recognition when the *United Nations Declaration of the Rights of Indigenous Peoples*.<sup>8</sup> was passed. Article 31 states:

1. *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.*
2. *In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.*<sup>9</sup>

The Mataatua Declaration on Indigenous cultural and intellectual property rights urges Indigenous people to ‘develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge’.<sup>10</sup>

The former Aboriginal and Torres Strait Islander Commission’s Indigenous Reference Group adopted Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (1993)<sup>11</sup> in 1997. Article 39 states:

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

## Our culture: our future

Indigenous cultural and intellectual property rights refer to Indigenous people’s rights to their cultural heritage. 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 its territory.

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

Indigenous cultural and intellectual property rights include the right to:

- own and control Indigenous cultural and intellectual property
- ensure that any means of protecting Indigenous cultural and intellectual property 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 Indigenous cultural and intellectual property, 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, as the particular language may be intrinsic to cultural identity, knowledge, skill and teaching of the culture.

For a full list of rights, see *Our culture: our future*.<sup>12</sup>

Internationally, 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>13</sup>

Based on its extensive international, regional and national experience and on input from different countries, the WIPO intergovernmental committee 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 objectives and principles<sup>14</sup>
- (ii) The protection of traditional knowledge: Draft objectives and principles.<sup>15</sup>

The latest WIPO provisions for the protection of traditional cultural expressions (TCEs) suggest three layers of protection tailored to different forms of cultural expression. It says TCEs of particular religious and cultural significance should be noted in a public register so there is certainty as to which are protected and for whose benefit. The items in the register would be afforded a form of protection similar to that given by intellectual property rights legislation.

It recommends in Article 3, that when TCEs have been registered or notified, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent certain acts taking place without its free, prior and informed consent. With TCEs other than words, signs and names, these acts include:

- the reproduction, publication, adaptation and communication to the public of the traditional cultural expressions
- any use of traditional cultural expression which does not acknowledge in an appropriate way the community as the source
- any distortion, mutilation or other modification of or inappropriate action in relation to the traditional cultural expression
- the acquisition or exercise of intellectual property rights over the traditional cultural expression adaptations of them.<sup>16</sup>

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.<sup>17</sup> The prior and informed consent of the traditional owners is required to:

- reproduce or publish the traditional knowledge or expressions of culture
- perform or display the traditional knowledge or expressions of culture in public
- make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expression of culture
- use the traditional knowledge or expression of culture in any other form.

## Principles and Protocols

In the following pages, under each of these principles, we have suggested protocols for using Indigenous cultural material, and interacting with Indigenous artists and Indigenous communities.

The principles outlined are a framework for respecting indigenous heritage.

- 1. Respect**
- 2. Indigenous control**
- 3. Communication, consultation and consent**
- 4. Interpretation, integrity and authenticity**
- 5. Secrecy and confidentiality**
- 6. Attribution and copyright**
- 7. Proper returns and royalties**
- 8. Continuing cultures**
- 9. Recognition and protection.**

### 1. Respect

The rights of Indigenous people to own and control their heritage, including Indigenous images, designs, stories and other cultural expressions, should be respected.

Customs and protocols for respect vary widely across the many and diverse communities of Indigenous Australian people. Respecting Indigenous rights to cultural heritage includes the following protocols.

#### Acknowledgment of country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.<sup>18</sup> 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.

In *Nourishing Terrains*, Deborah Bird Rose says:

*Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way*

*that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like 'spending a day in the country' or 'going up the country'. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart's ease.<sup>19</sup>*

When organising an exhibition, installation 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' is an address 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, an Indigenous person of prominence 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.

It is respectful for others speaking officially to also acknowledge country and custodians at the site of the event. The master of ceremonies could do this by making an introductory acknowledgment to the traditional owners of the land.<sup>20</sup>

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

Museums and Galleries of NSW has a written 'welcome to country' protocol available at <[www.mgns.wa.gov.au](http://www.mgns.wa.gov.au)>. This is a useful guide to assist artists and galleries with preparation for launches and events.

### Public art – acknowledging land

It is common practice for Indigenous artists to seek approval from the Indigenous community for public art-based projects in any particular 'country' within Australia. For example, the Metropolitan Land Council (MLC) in Sydney notes that it was consulted by Fiona Foley of Badtjala heritage in Queensland when she was developing a public artwork to be installed in Gadigal country, Sydney. This ensured it would not be offensive to the local community. The MLC's Allen Madden reported that Bronwyn Bancroft, a Bandjulong artist, did the same thing when she was in the process of installing her work, *Dreaming*, at the Royal Botanical Gardens.<sup>21</sup>

### Accepting diversity

There is great diversity of experience and cultural context within Indigenous communities. Indigenous visual arts reflect this diversity in the medium, subject matter and cultural setting the Indigenous artist might choose.

Indigenous visual artists come from a diversity of backgrounds. Some learn their craft from their cultural teachers, others are self-taught, and a growing number have completed university and college courses.

Remember that Indigenous cultures are living and evolving entities, not simply historical phenomena. Avoid inappropriate or outdated perspectives and terminology when dealing with any cultural groups.

## 2. Indigenous control

Indigenous people have the right to self-determination in their cultural affairs and the expression of their cultural material. There are many ways in which this right can be respected in the creation, production and exhibition of art.

One significant way is to discuss how Indigenous control over a project will be exercised. This raises the issue of who can represent language groups and who can give clearances of traditionally and collectively owned material.

To consult effectively and gain consent for use of Indigenous cultural material in a particular project, the Indigenous people with authority for specific stories, geographic locations, styles and imagery need to be identified.

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.

For initial contacts we recommend the following sources:

- Association of Northern and Kimberley Aboriginal Artists of Australia (ANKAAA): [www.ankaaa.org.au](http://www.ankaaa.org.au) – ANKAAA is the peak advocacy and support agency for Aboriginal artists and Aboriginal-owned arts centres located in the Top End, including the Tiwi Islands, Kimberley, Arnhem Land and Darwin/Katherine regions. Information and contact details of arts centres in these regions are available at <[www.aboriginalart.org](http://www.aboriginalart.org)>.
- Desart: [www.desart.com.au](http://www.desart.com.au) – for contact details of Central Australian Aboriginal arts centres.
- UMI Arts: Represents Queensland's Cape York art producing communities. Tel: (07) 4041 6152. Fax: (07) 4041 6542. Email: [umiarts@bigpond.net.au](mailto:umiarts@bigpond.net.au)
- Ananguku Arts and Culture Aboriginal Corporation: [www.ananguku.com.au](http://www.ananguku.com.au) – the lead agency for visual and performing arts development in Anangu Pitjantjatjara Yankunytjatjara Lands, South Australia.

- Torres Strait Regional Authority: [www.tsra.gov.au](http://www.tsra.gov.au) – for contact information regarding the Torres Strait Islands.
- Boomalli Aboriginal Artists Co-operative: [www.boomalli.org.au](http://www.boomalli.org.au) – based in Leichhardt, Sydney, Boomalli is an Aboriginal-owned and operated art gallery and co-operative. Call (02) 9560 2541.
- *The Black Book Directory 2005 – Indigenous Arts & Media Directory*. Published by Blackfella Films and Australian Film Commission, available online at <[www.blackbook.afc.gov.au](http://www.blackbook.afc.gov.au)>.
- Australian Institute of Aboriginal and Torres Strait Islander Studies has links to a list of Aboriginal and Torres Strait Islander organisations available online at <[www.aiatsis.gov.au/library/links/atsi\\_links](http://www.aiatsis.gov.au/library/links/atsi_links)>.
- Department of Communication, IT and the Arts, *Indigenous Visual Arts and Craft Resource Directory 2006*, Commonwealth of Australia, Canberra, 2006, available online at [www.dcita.gov.au/indigenous\\_programs/funding\\_programs\\_and\\_support/national\\_arts\\_and\\_crafts\\_industry\\_support/indigenous\\_art\\_centres\\_directory\\_2006](http://www.dcita.gov.au/indigenous_programs/funding_programs_and_support/national_arts_and_crafts_industry_support/indigenous_art_centres_directory_2006)

Indigenous arts and craft centres in the area where the artist is located, or the image or heritage material originates, may also be a good starting point to initiate inquiries for consultation and consent.<sup>22</sup> Doreen Mellor notes:

*Within Australia there is an extensive network of Indigenous arts and craft centres. These are Indigenous run associations directed by an Indigenous committee. Working with these centres directly ensures authenticity and provides a direct link back to the artist. It is also an assurance that the community and the artist are supported by the sale of artworks.*<sup>23</sup>

For a list of Indigenous arts and craft centres see *Valuing art, respecting culture: Protocols*

*for working with the Australian Indigenous visual arts and crafts sector.*<sup>24</sup>

Many Indigenous arts and craft centres in remote areas are on Indigenous land. If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, you must obtain permission 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.

Some other useful starting points for initial inquiries include:

- elders and custodians of relevant Indigenous language groups
- relevant individuals or family members
- Aboriginal land councils
- Office of Indigenous Policy Coordination
- Torres Strait Regional Authority
- Island Coordinating Council
- relevant individuals or family members
- elders and custodians of relevant Indigenous language groups
- Indigenous language centres and the Federation of Aboriginal and Torres Strait Islander Languages
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries
- state and territory government arts agencies in New South Wales, Western Australia, Queensland, South Australia, Tasmania and Northern Territory which have staff dedicated to Indigenous arts programs.

Indigenous people have formed organisations and companies to represent their interests in the visual arts sector. See the contact section of this guide for further information.

Some examples of arts projects promoting Indigenous control and involvement include:

- a community arts project initiated and managed by an Indigenous arts organisation
- the commission of new work from Indigenous artists
- an exhibition developed and managed by an Indigenous curator
- a large-scale visual arts conference steered by an Indigenous reference group
- an Indigenous elders' committee appointed to oversee and interpret an art collection at a gallery, museum or cultural centre.

### 3. Communication, consultation and consent

Communication and consultation are important in Indigenous visual arts projects. Consent is necessary for the reproduction of Indigenous visual arts, and if traditional communal designs are included, consent may be required from traditional owners.

Communication is most effective if each group:

- is aware of the way in which their own culture affects how they see an issue
- endeavours to understand and build awareness of the other culture
- patiently unravels misunderstandings which arise out of cultural differences
- finds the right people within a community to consult.<sup>25</sup>

Consent must be informed. This means that people must be given time and information to consider the requests made of them.

As Doreen Mellor notes:

*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, before consulting the Indigenous group or person involved, that the activity is to proceed, or that its structure or format is established. 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 that 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 decisions 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 don't 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>26</sup>

Consultation and communication processes will differ for each community.

#### Traditional and communally owned images

There may be requirements to consult with the traditional custodians and community members, as well as the artist, for material that is communally owned ritual knowledge. This includes depiction of creation beings or images. There may also be one or more groups that have custodianship of an image or other heritage items. Consultation with and consent from each identified group should be sought. Be prepared to reconsider your project if consensus cannot be reached.

The artist or the local Aboriginal arts and craft centre can assist in identifying any third party from whom you require consent.

Aboriginal artist Julie Dowling advises that people 'seek eldership permission for any tribal or traditional designs, or creation stories'.<sup>27</sup>

#### Interpreters and translators

Indigenous artists in remote communities may require interpreters. Ask the artist if they require an interpreter. If so, ask them to identify a suitable person to translate. The local Aboriginal arts and craft centre or a local community organisation might be able to assist if the artist cannot identify an interpreter. Interpreters should be paid for their services.

#### Sensitivity of content

Sensitive content, such as secret and sacred 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.

#### Geographic diversity

Indigenous groups vary from community to community. They differ in cultural practices and language. It is important to note geographic differences and the different ways people refer to each other. It is also necessary to get consent from the relevant geographic group. For example, a language group from Tasmania cannot speak for cultural and artistic material relating to the Northern Territory.

#### Gender

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

#### Photography of Indigenous people

Many Indigenous people have expressed concern about the use of their images in photographs without permission. It is courteous to ask an artist's permission to photograph them at events, and to use their image, especially for wide promotions and on the internet. Care should also be taken as, in some communities, photographs of the deceased may cause distress. See the 'representation of deceased people' in the secrecy and confidentiality section of this guide.

#### Collaborating with Indigenous artists

There are many situations where an Indigenous artist is approached to collaborate with another artist, a group of artists or a community group – for instance, in large-scale works such as murals and other community landscape projects. It is important that communication and consultation with Indigenous artists and their communities takes place in the initial development phase of the project. Consent should be obtained before going ahead.

It is also important to discuss copyright ownership at the outset where more than one artist or a community is involved.

#### Case study: Community mural

In 1987, Banduk Marika, an artist from Yirrkala, worked on a collaboration project with David Humphries and Rodney Monk of the Public Art Squad. The project involved the transfer of Marika's work into a terrazzo artwork for the floor of the Harbourside Festival Marketplace.

Marika had previously worked on an artwork for a Public Art Squad community mural at Sydney's Central railway station. Marika says the two men, who are skilled community muralists, chose one of her artworks for reproduction in terrazzo. 'We discussed the transfer of the work in detail, and we had a contract which outlined the terms.'<sup>28</sup> Humphries said, 'We let Marika have pretty good control over how her work was interpreted and presented. We had a lot of fun working together'.<sup>29</sup>

#### 4. Interpretation, integrity and authenticity

Indigenous artists and their communities should have control over how their cultural heritage is presented. The presentation of a work includes its interpretation, integrity and authenticity.

### Interpretation

Interpretation refers to how cultural material is interpreted and represented. This includes the perspective given, the language used and the medium in which cultural heritage material is reproduced. In the past, Indigenous cultural material has been subject to interpretation by non-Indigenous people.

Today, as Indigenous people seek to re-assert and reclaim control over their cultural heritage material, Indigenous interpretation of the material is a way of enhancing the cultural significance of the work. The artist should be given the opportunity to interpret and present his or her own works.

Consider interpretation and context when using Indigenous cultural material:

- Does the work reflect the cultural value of the subject matter?
- Does it expose confidential, personal or sensitive material?
- Does it reinforce negative stereotypes?

### Integrity

Integrity refers to the treatment of the original work and copies made of that work. 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. It is also important to note that with Indigenous cultural material, maintaining the integrity of the work is important for the source communities as well.

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.

### Authenticity

Authenticity refers to the cultural provenance of an artwork. This is often a complex inquiry. In this guide, authenticity may involve reference to whether an Indigenous person produced the artwork; and whether it was produced with proper regard to Indigenous customary law. 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 is a major concern in the Indigenous arts 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.

There are also concerns regarding appropriation of imagery. As Doreen Mellor states:

*Public representation of copied designs or images as original images has long, hard and serious implications under most Western law. There are additional issues at stake in Indigenous cultures, involving ceremony, custodianship and the sites relating to*

*specific designs. The use of such designs or their appropriation without permission is not acceptable. If the inclusion of Indigenous designs in a project or publication is desired, the use must be negotiated with the artist or the community involved. Usage may be subject to royalties and copyright fees.<sup>30</sup>*

The authenticity of a work should be checked and verified by an appropriate authority.

It may not always be obvious whether the proposed use of an artwork raises issues of interpretation, integrity and authenticity. The following situations are some common areas where misunderstandings arise.

### Using Indigenous cultural material Styles and imagery

Certain styles of ceremonial painting originate from particular regions. For instance, rarkk (cross-hatching) is recognised as art from Arnhem Land, and has origins as ceremonial art. Arnhem Land artists find it offensive to see their ceremonial styles copied by other Indigenous artists, or non-Indigenous artists, with no attachment or belonging to these styles. It is also offensive to copy images of creation beings such as Wandjinas and Mimis without proper claim under Indigenous laws.

Indigenous artists are encouraged to develop their own distinctive artistic expressions and draw on their particular cultural heritage.

Rosie Barkus, a Torres Strait textile designer, advises artists to examine their own cultural heritage to find their own forms of cultural expression. She says:

*If I'm going to do a cultural design, I draw from my mum's island (Murray Island) or my father's island (St Paul and Mabuiag Island). I do not draw from other areas [to] which I have no claim or connection. If I do I would have to get permission from the elders. But I have enough inspiration from my own cultural heritage to inform my design work.*

*To protect their works, some Indigenous artists embed hidden images in their work so that the artist and their family know what they have done. This is their cultural protection as well as their signature. The public can't see it but it's used as a trademark. It is proper cultural practice to ask for permission when they are working with cultural designs, especially really traditional ones, of stories from islands that they do not have a direct link. Proper permission from elders is sought.<sup>31</sup>*

The Australia Council's Aboriginal and Torres Strait Islander arts board statement on visual arts encourages Indigenous artists to examine their own styles of art, rather than copying the styles or images from other regional groups. The Arts NSW Indigenous Arts Reference Group has developed a guide, *Doing it our way: contemporary Indigenous cultural expression in New South Wales*, to encourage respect for the diversity of Indigenous visual arts practice.

### Stories

The Indigenous artist may include a 'story' about his or her work. Appropriate use of stories must be observed. When text descriptions of the artistic work are written on the basis of oral narration by the artist, the artist should be consulted and given drafts to approve before publication, especially if personal information of the artist is included. Further, the artist has the right to be attributed as the copyright owner of the text. If traditional knowledge or a traditional story is included, the storyteller or language group should be referred to.

### Sensitive subject matter

Find out if the subject matter of the work 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 reproduction of particular images.

### Biographical information

Indigenous artists should also be given the opportunity to clear the content and use of their biographical information. Up-to-date biographies should be used.

### Marketing with integrity

In the marketing of Indigenous arts, respecting authenticity and integrity of works is a priority. It is important for the artist to be fully informed about the use of his or her works, including reproductions and use of biographical material and text.

### Aboriginal arts centres

Aboriginal arts centres are owned and managed by Aboriginal artists. They represent the interests of the artists and provide materials, promotion and documentation for artists. The Australian Government's Indigenous art centres strategy and action plan notes that strong arts centres play a role in maintaining and strengthening cultural values by operating as meeting centres as well as facilitating training, education and enterprise.<sup>31</sup> Sourcing work from these Aboriginal arts centres is a means of ensuring the purpose of authentic artwork. Arts centres also provide certificates of authenticity that confirm the origin of the work. In *A guide to Aboriginal art*, the Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA) notes:

*All Aboriginal art should include a certificate of authenticity to establish the origin of the work. Provenance may come in the form of an official Art Centre or gallery label or swing tag in the case of small artefacts, or a certificate of authenticity in the case of fine art items.*<sup>32</sup>

### Commercial galleries

Certain commercial galleries and dealers have developed expertise in Indigenous visual arts, and will often support the career path of an artist by promoting exposure of the artist's works in appropriate circles. Such arrangements can become mutually beneficial if both parties

understand the nature of the relationship between them.

As Doreen Mellor notes:

*It is up to the artist to decide whether they wish the gallery to be the sole representative of their work or whether they wish to establish a relationship with a number of galleries.*<sup>33</sup>

There are a great number of dealers and galleries in Australia, and many are members of the following industry associations:

- Australian Commercial Galleries Association
- Australian Indigenous Art Trade Association
- Association of Western Australian Art Galleries.

There is scope for protocols to be developed in this context and already the Australian Indigenous Art Trade Association has developed protocols for its membership

#### Case study: City of Melbourne's 'Code of Practice' to monitor Indigenous art galleries and retailers

In 2004, the City of Melbourne Council, through its Indigenous Arts Advisory Panel, became concerned about reports of unethical practices relating to the sale of Aboriginal art within its jurisdiction. This included:

- paying artists unfairly for their works or in alcohol or drugs
- operating sweat shops
- selling fakes or frauds
- painting Indigenous style art and passing it off as painted by Indigenous artists.

In 2006, to combat this type of activity and to promote the diversity of Aboriginal art, the City of Melbourne developed a *Code of Practice for Galleries and Retailers of Indigenous Art*<sup>34</sup>, the first of its kind in Australia.

The code aims to promote best practice for Melbourne city galleries and retailers

who sell Indigenous art by recommending appropriate ways to sell and display Indigenous art. It promotes the sale of authentic Indigenous art, and proper labelling of arts and craft. It also recommends the use of written agreements between galleries and artists.

Galleries and retailers sign the voluntary code and in exchange the City of Melbourne promotes the accredited galleries and retailers on its website, through its visitor information centres and through information sheets aimed at buyers and Indigenous artists. The accredited gallery or retailer will be able use the City of Melbourne branding to advertise that it subscribes to the code.

To monitor compliance, the code agreement is renewed annually. Accredited galleries or retailers need to provide evidence of their compliance each year. If the City of Melbourne considers that the accredited gallery or retailer has not provided sufficient evidence of compliance, the gallery or retailer will be removed from the accredited gallery or retailer list, and if applicable, the relevant authorities, such as consumer affairs or the police, will be notified.

The City of Melbourne aims to establish an award for ethics in the sale of Indigenous art, annually, as part of the Melbourne Awards, to a gallery or retailer in the city.

#### Case study: National Indigenous Art Commercial Code of Conduct

The National Association of the Visual Arts (NAVA) has been funded by the Australia Council's Aboriginal and Torres Strait Islander arts board to develop a National Indigenous Art Commercial Code of Conduct and Associated Ethical Trade Strategies.

The project is a joint initiative of NAVA, Desart and ANKAAA.

The project aims to bring about changes in conduct in the Indigenous arts sector in an effort to protect the commercial interests of Indigenous artists and their communities, whether living and/or selling in urban or regional areas. The code will be a basis from which artists and the industry can promote ethical practices in commercial relationships. It will not be prescriptive, but rather will identify and acknowledge a number of commercial models and highlight best practice under those models. In 2006, a discussion paper was released online at <[www.visualarts.net.au](http://www.visualarts.net.au)>. Among the sections are respecting community and culture, authenticity, imports and exports and the Indigenous art industry, tourism operators and tourists.<sup>35</sup>

### Retail outlets

There is a growing number of Indigenous galleries and retailers. Contacts can be found in the *Indigenous Visual Arts and Craft Resource Directory 2006*. Indigenous artists should look for reputable outlets and ask questions about the galleries' or retailers' sales and commissions policy. Issues relating to copyright should also be discussed.

Retailers are encouraged to consult with Indigenous artists concerning the nine protocols in this guide.

### Museums and public galleries

These institutions hold collections of Indigenous art and may provide opportunities for artists' work to be purchased for their collections.

Many museums have developed policies for the acquisition and display of their Indigenous art collections. Some, like the National Museum of Australia, follow protocols when deciding what products are sold through their museum shops.<sup>36</sup>

### Case study: Australian National Maritime Museum – Connections

The Australian National Maritime Museum (ANMM) developed procedures for the museum to display and understand Indigenous cultures authentically and respectfully.<sup>37</sup> These guidelines are published in *Connections – Indigenous cultures and the Australian National Maritime Museum*.<sup>38</sup> In the management of Indigenous cultural material:

*ANMM is sensitive to Indigenous Aboriginal and Torres Strait Islander customs in the purchase and display of their material. In accordance with various policy documents and guidelines, advice is sought from relevant communities and specialists in the acquisition and display of Aboriginal and Torres Strait Islander material. The museum does not intend to acquire secret or sacred objects and supports the principle of repatriation wherever relevant.*

*ANMM acknowledges that collections of objects and stories form part of the cultural traditions of Indigenous communities, and therefore must take into account the views of these communities in matters relating to the collection, care, return or removal of the items and who may access them.*<sup>39</sup>

### Indigenous cultural centres

Indigenous cultural centres or 'keeping places' promote the work of Indigenous artists through arts projects, commissions, exhibitions, displays and sales. Cultural centres can also take on board protocols for the commission of projects, and exhibition and sale of artwork.

### Case study: Gab Titui Cultural Centre

The Gab Titui Cultural Centre in the Torres Strait involves Torres Strait Islander communities in the planning of its future projects and directions in visual arts. In 2004, a visual arts forum was held. Representatives from the Islands convened to discuss future strategies for visual arts development including arts projects, training and intellectual property. A strategy for the next five years was developed.<sup>40</sup>

### Indigenous owned galleries/cooperatives

There is a growing number of Indigenous owned galleries and cooperatives that sell and produce Indigenous art. Information on these entities is in the *Indigenous Visual Arts and Craft Resource Directory 2006*.

### Case study: Boomalli

Ten Aboriginal and Torres Strait Islander artists whose common goal was to exhibit and promote Aboriginal art on their own terms established Boomalli Aboriginal Artists Co-operative in 1987. A statement on the Boomalli website points out the impetus for the co-operative:

*The social inequities and unsympathetic representation of Aboriginal and Torres Strait Islander culture by non-Aboriginal and Torres Strait Islander artists and curators throughout Australian history is one of the driving forces for the desire of Aboriginal and Torres Strait Islander 'artists representing themselves and their own artistic perspective'.*<sup>41</sup>

Boomalli artists have excelled nationally and internationally, and have extended the boundaries of Indigenous art beyond the ethnographic definitions that were common in the 1980s.

### Internet sale of art

Opportunities for the sale of artworks via websites, email and internet marketing are increasing. Many Indigenous artists and organisations have noted a large number of fake works sold over the internet on auction sites. It is difficult to police all internet sales of Indigenous art because of the anonymity and the international nature of the online environment. Buyers should exercise caution when buying work over the internet. There have been reports from Aboriginal arts centres that their logos and information (including artists' biographies and photographs) are copied from legitimate websites and used on bogus sites to sell fake works.

It is important for website producers to adopt practices that will not expose the artist's work to exploitation. The artist should be aware of how their work will be displayed on the website, and there should be proper attribution and copyright notices.

### Case study: Best practice guidelines for visual arts on the internet

In 2006, Art Network Australia Pty Ltd and Arts Law Centre of Australia developed the *Best Practice Guidelines: Displaying Visual Art on the Internet* for people who reproduce and communicate visual arts online.<sup>42</sup>

For artwork that embodies Indigenous cultural and intellectual property, the guidelines state:

6.3 *Indigenous Cultural and Intellectual Property (ICIP)* is separate from copyright and does not legally require a 'clearance'. However, if an artist or gallery, exhibitor or publisher intends to reproduce or communicate a work that includes or refers to Indigenous objects, knowledge or works, then there should be an acknowledgement of ICIP by ensuring:

- 6.3.1 the appropriate attribution is given to Indigenous groups; and
- 6.3.2 the integrity of the work is respected by observing relevant Indigenous cultural protocols.

A full copy of the guidelines is available from <[www.artslaw.com.au](http://www.artslaw.com.au)>.

### Exhibition of Indigenous art Preparation

When preparing an Indigenous art exhibition, Doreen Mellor recommends full consideration of the underlying rationale and cultural implications of the exhibition. She emphasises the need to take into account the cultural investment by Indigenous artists and their generosity in sharing their art with audiences, especially in a commercial situation.

When curating exhibitions of Indigenous artists' work, it is important to involve an Indigenous curator, consultant or reference group. Most large public galleries and museums employ Indigenous curators. When this is not possible, extensive consultation usually takes place to augment the expertise of non-Indigenous curators.<sup>43</sup>

### Displaying art

When curating an exhibition, it is important to display Indigenous artwork appropriately. To gain a working knowledge of what is appropriate, consultation with the artist, the local community or an Indigenous curator is recommended. See the representation of deceased people in the secrecy and confidentiality section of this guide for information relevant to the display of artwork by a deceased artist. The artist's family or community must be consulted so that the appropriate protocols are observed.<sup>44</sup>

### Acknowledging the artist

If the Indigenous artist is present at an exhibition of their works, it is an essential courtesy to acknowledge them publicly, and to offer them hospitality and support. This is particularly so if they have travelled to the exhibition and are in an unfamiliar environment. Allow the Indigenous artist and/or a relevant community representative to interpret and present their own stories, texts and biographies.

### Using works from collections

Works of art are often borrowed from public or private collections for inclusion in an exhibition. If borrowing artists' works from public or private collectors to include in an exhibition, it is courteous to inform the artist of the inclusion of their work, and to forward copies of reviews, catalogues or other publications that feature their work.

Doreen Mellor advises:

*When work is on loan to an exhibition, the artist's permission is necessary before images can be used in catalogues or for promotional purposes, such as invitations or the accompanying reviews in newspapers or magazines. Large galleries will sometimes arrange licence rights to reproduce images, which may be assigned for use in catalogues – but it is currently accepted practice to also request permission from the artist involved. If the catalogue designer wishes to use images in other than their complete form – that is, if cropping of the images, or other changes are desired – it is mandatory for the artist to be involved in negotiations, and that permission be obtained.<sup>45</sup>*

### Exhibition fees

The *Code of practice for the Australian visual arts and craft sector* recommends payment of a fee to the artist for works they submit to exhibitions.

The code states:

*Exhibition fees should be regarded as payment solely for a work's inclusion in an*

*exhibition. They should be a separate and distinct payment from artist's fees (the time spent creating a work), travel, per diems and payments to cover material costs.<sup>46</sup>*

### Documenting the exhibition

It is courteous to consult with the artist or his or her representative, or Indigenous reference group, and/or with an Indigenous curator concerning the wall text and labelling. Doreen Mellor notes there are conventions for label and caption texts within the museum and gallery sector. Information on these can be found in gallery or museum guides.

Doreen Mellor also recommends including essays by Indigenous curators in catalogues. This provides an Indigenous curatorial perspective on the exhibition and the way each work relates to the exhibition theme. For more information about the display of Indigenous works of art, see *Valuing art: respecting culture*.<sup>47</sup>

## 5. Secrecy and confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality. Those putting together arts projects must first discuss any restrictions on use with the relevant Indigenous groups.

Under Indigenous beliefs, some Indigenous cultural material may not be disclosed, particularly if it relates to initiation practices. To respect Indigenous religious practices, discuss any restrictions with the relevant Indigenous groups.

Personal information or knowledge may be confidential and the people to whom it refers may not want it written, depicted or discussed. It is common courtesy to consider an individual's privacy before publishing material; the same courtesy should be extended to Indigenous people.

### Representation of deceased people

In many Indigenous communities, the reproduction of names and photographs of deceased Indigenous people is not permitted. Doreen Mellor notes some communities will request that an artwork by a deceased artist not be displayed for some time after the artist's death. They may also not want the artist's name to be used or image displayed. The artist's family or community need to be consulted so that the appropriate protocols are observed.<sup>48</sup> There is a growing number of cases where, after consultation, the deceased artist's family has allowed the name and image to be used in certain circumstances. This permission should be acknowledged formally.

### Secret and sacred material

The reproduction of secret and sacred images may be a transgression of Indigenous law.

'Secret and sacred' 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 language group members (such as men or women or people with certain knowledge).

### Personal privacy

If you plan to depict an identifiable individual or community, first ask the individual, community or relatives of the person for permission. Observe close consultation and consent throughout the process.

Confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure. Disclosure about a deceased person will be very sensitive.

## 6. Attribution and copyright

*Many people think that copyright is a complicated issue, but understanding it and increasing your knowledge about it [is] as easy as putting paint to canvas.<sup>49</sup>*

Relevant Indigenous language groups or communities should be attributed for the use of their cultural heritage material in artworks. 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 acknowledgment than being recognised as mere informants. They seek the right to be acknowledged as owners of this knowledge and information. They also seek to have a greater share in any benefits generated from the use of their cultural stories.

Under the moral rights provisions of the *Copyright Act*, the right of attribution is recognised for individual creators. There are proposed amendments to the *Copyright Act* to introduce Indigenous communal moral rights. While these are not yet law, we recommend that individual storytellers or custodians also be attributed for their role in the development of a visual work.

It is also important to attribute the cultural source of an image or story. For example, an image originating from a particular language group should be attributed in each and every publication illustrating the artwork.

### Copyright

It is important for Indigenous artists to develop an understanding of copyright so they can negotiate rights to their artworks under licence. This means that an artist can give someone else the rights to reproduce his or her work, under agreed terms. This requires coming to an agreement with the other party on the fee, term, purpose and nature of the rights granted.

This section provides some general copyright information for Indigenous artists. For specific legal advice we recommend consulting a lawyer.

### What is copyright?

Copyright is a form of legal protection that provides the creator or author of a work with the right to use or capitalise on the work and prevent others from using it without his or her permission.

The *Copyright Act* is the main law in Australia that governs the use, production and dissemination of original artistic works. Copyright protects literary, artistic, dramatic and musical works, sound recordings and films.

Indigenous artists have rights to their artistic works as the creators, under the *Copyright Act*. However, there are no special provisions for the protection of Indigenous heritage under the *Copyright Act*.

Copyright protects 'artistic works' including:

- painting, sculpture, drawing, engraving or photographs
- a building or model of a building
- a work of artistic craftsmanship.<sup>50</sup>

### Who owns copyright?

As the person who creates the work in a material form, the artist is generally recognised as the copyright owner.

There are some significant exceptions to this general rule of ownership:

- Where the work is produced under a contract of employment, copyright will belong to the employer.<sup>51</sup>
- Where a work is produced under the direction or control of the Crown, copyright may belong to the Crown.<sup>52</sup>
- Where copyright has been assigned under a written agreement, the agreement may specify who owns copyright.

### What rights do copyright owners have?

Copyright owners have the exclusive right to authorise use and copying of their artistic works, and to earn money from the use, reproduction

and publication of their work. The copyright owner of an artistic work has the exclusive right to do all or any of the following:

- reproduce the work in a material form
- publish the work
- communicate the work to the public.<sup>53</sup>

Some examples of copyright applications of artistic works include:

- reproduction on the cover of a book
- reproduction on a T-shirt
- broadcast on television (both free-to-air and pay) and the internet.

### Do artists need to register their art for copyright protection?

There is no requirement for an artistic work to be registered in order to receive protection. Artworks are protected as soon as they are created, so long as the work meets the requirements of the *Copyright Act*.

The requirements for protection are:

- A work must be original in that it is not copied and has originated from the artist. The artist must have expended some skill and labour in making the work.
- A work must be in a permanent and 'tangible form'.<sup>54</sup>
- A work must be created by a qualified person, which in the copyright interpretation means an Australian citizen.

### How long does copyright last?

Before 2006, the duration of copyright in artistic works was 50 years after the death of the author. From 1 January 2006, the copyright term was extended, but only for those works still in copyright on 1 January 2006. Generally, artistic works in copyright after 1 January 2006 are now protected for 70 years after the death of the author – the term used in the Act for the creator of the work.<sup>55</sup>

Photographs are protected under copyright for 70 years after the year in which the photograph was first published. 'Published' means reproductions of the work that have been released to the public in either a book, magazine or on the internet.

After the period of copyright has expired, the artistic work is said to be in the public domain. Once in the public domain, the law no longer prevents anyone from accessing or exploiting the material.

Exceptions to the general rule of copyright include anonymous and pseudonymous works<sup>56</sup> and work commissioned by the government.<sup>57</sup> Copyright in unpublished works continues to subsist so long as the work remains unpublished.

Artists should consider who would control their copyright after their death. Family members can benefit from royalties for 70 years after the death of the artist and can also guard copyright in the artist's works.

Indigenous people's right to culture exists in perpetuity. To respect Indigenous cultural heritage, it may be necessary to get permission to use Indigenous stories, designs and themes even though legally, they are in the public domain.

### Does copyright protect ceremonial styles of art and creation figures?

Some Indigenous art comprises certain ceremonial styles like rarrk/cross-hatching, and depicts particular creation figures like the Wandjina from the Kimberley Aboriginal language group. Unless copying from a particular copyright protected artwork, it is not an infringement of copyright to paint in these styles or to paint creation figures. However, it should be emphasised that it is against traditional Aboriginal law to paint ceremonial styles and creation beings without permission from

relevant people in the communities where these styles and figures originate.

In the past, Indigenous people's art images and language group motifs have been copied in artworks, dress fabric, souvenirs and on T-shirts, without the proper permission being sought. This type of copying is one area where the copyright laws do not recognise Indigenous rights to control cultural material.

Internationally, the United Nations *Principles and guidelines for the protection of Indigenous people's heritage* recommends:<sup>58</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.*<sup>59</sup>

### What happens when artists sell their paintings?

When an artist sells a painting they are selling the physical painting. The copyright remains with the copyright owner (unless of course there is a written agreement otherwise). If someone wants to reproduce the artwork on T-shirts, then they must obtain permission to reproduce from the copyright owner who can control access to make the reproduction possible.

For instance, galleries or museums which own works may ask for a fee to allow a person to photograph a work, or to make use of its transparencies.

### Collaborative works

Under the *Copyright Act* a 'work of joint ownership' refers to a work resulting from the collaboration of two or more artists, where each contribution is equal to the contribution(s) of the other artist(s).<sup>60</sup>

The artist must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions. In this interpretation 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 artist of a work of joint authorship owns copyright in the resulting work.<sup>61</sup> This means that each artist must obtain the consent of the others before exercising any of their rights under copyright. For example, if an artist wants to license the rights to reproduce a collaborative painting, he or she must get the consent of all the artists who participated in the collaboration.

### Communal ownership versus joint ownership

In *Bulun Bulun & M\* v R & T Textiles*,<sup>62</sup> the court decided 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 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 ways that are consistent with Indigenous law. Depending on the circumstances, this obligation may be enforceable in the courts.

### Commissioned photographs

The general rule is that the photographer is the first owner of copyright. However, there are some exceptions including photographs taken in the course of employment, and commissioned photographs.

For photographs taken before 30 July 1998, the commissioning client is the first owner of copyright in the photograph, unless the photographer and client agree otherwise.

For photographs taken after 30 July 1998, the photographer is the first owner of copyright

unless the photograph is commissioned for private or domestic purposes, such as a portrait of a family. In the case of private and domestic commissioned work, the person who commissions the photograph owns the copyright – unless the parties agree otherwise.

### What are moral rights?

The Moral Rights Amendments to the *Copyright Act* were introduced in December 2000 and provide some new ways to challenge inappropriate treatment of Indigenous artworks. These new laws provide the following rights to artists:

1. The right to be attributed as the artist – Artists can require their names be clearly and prominently reproduced alongside all reproductions of their works.<sup>63</sup>
2. The right not to have work falsely attributed to another artist – Artists can take action against parties who falsely attribute others as the creators of their works.
3. The right of integrity – Artists can take action against parties who subject their works to inappropriate treatment. Inappropriate treatment includes:
  - doing anything that results in the material distortion of, the destruction or mutilation of, or material alteration to, the work that causes harm to the artist's reputation<sup>64</sup>
  - exhibition of the work in public in a manner or place that causes harm to the artist's reputation.<sup>65</sup>

Inappropriate treatment might also include cutting or destroying a physical artistic work or cropping a reproduction of it when reproducing it in a magazine, or reproducing it in poor quality.

Whether or not the work has been treated in an inappropriate way is subject to reasonable defence.

When dealing with artworks where it is likely that the integrity might be compromised,

it is important to discuss any material changes of artwork, and get the consent of the artist in writing.

### Licensing use of artworks

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. For example, you could license the rights to reproduce your artwork on T-shirts for a period of two years. The copyright in the artwork remains with the copyright owner.

It should not be assumed that traditional Indigenous art is in the public domain. It is necessary to consult with relevant Indigenous people for permission and if agreed, there should be scope for negotiating appropriate royalties for use.

Some other points are:

- Written contracts are preferred to oral agreements.
- Indigenous artists should be given the opportunity to consider contracts and obtain proper legal advice.
- The contract should be explained to the Indigenous artist and if necessary, a translator be used to explain the major issues of the contract.
- If the work is to be altered or adapted for mass production, artists should be given opportunity to approve or reject the alteration or adaptation their work.

### Assigning copyright versus licensing

Copyright can also be assigned. This means that you can give the copyright in your work to someone else. As the new copyright owner, they could authorise others to reproduce your artwork. When possible, Indigenous artists should retain copyright in their works to maintain control over reproductions.

Copyright is usually assigned under written agreement. Once assigned, the artist relinquishes copyright in his or her artwork.

It is important for Indigenous artists to check agreements and make sure they are not assigning away their rights away instead of licensing use of their work. It is also a good idea to seek legal advice on copyright licensing issues.

### Managing copyright to protect your interests

As copyright exists when a work is created, it is not a legal requirement to include a copyright notice alongside your work. However, certain precautionary practices can show copyright belongs to you should there be a contest or case relating to infringement of your work.

Because copyright belongs to you even after you sell your work, it is important to keep good records and clearly label reproductions of your works.

It is a good idea to take quality photographs of your artworks and catalogue information, including:

- media and size
- date created
- purchaser of the work
- rights given under copyright.

Some art centres use stock numbers, which they mark on the back of artworks.

A copyright notice provides information about acceptable uses and the name of the copyright owner, should consent for use in other material be required. Here is an example:

© Terri Janke, 2002. This work is copyright. Apart from the uses permitted under the *Copyright Act 1968*, no reproduction of this work is authorised without the consent of the Artist.

The following is an example of labelling an artwork that includes language group-owned designs:

© Banduk Marika, 1998. This work and the accompanying story is the copyright of the artist and may not be reproduced in any form without the permission of the artist and the language group concerned.

For more information on recommended copyright wording for publications, see the *Style manual for authors, editors and printers*.<sup>66</sup>

When authorising others to reproduce your works, make sure that you use written agreements and keep records of the rights you have granted. Ask for copies of the reproductions.

### When is copyright infringed?

It is an infringement of copyright to copy an artistic work directly.

A person will infringe copyright in an artistic work if he or she reproduces the work in material form, or publishes or communicates the work to the public without permission from the copyright owner.<sup>67</sup>

It is also an infringement to copy a substantial part of an artwork. A substantial part of a work does not necessarily refer to a large part of the work. The court will look for striking similarities between the original artwork and the infringing copy, and assess the quality of what was taken.

People who import an article that infringes copyright into Australia for sale or hire are also contravening the law.

Some exceptions to infringement are detailed below.

### Sculptures on permanent public display

The copyright in a sculpture or work of artistic craftsmanship placed permanently in a public place, or premises open to the public, is not infringed if it is reproduced in:

- a painting, drawing, engraving or photograph of the sculpture or work
- a film or television broadcast.<sup>68</sup>

Although there is no legal requirement to gain permission from, or pay an artist for such reproduction, some artists have understandably complained about the use of their artworks in advertising and postcards without their prior permission and without any payment of royalties.

### Incidental filming

The copyright in an artistic work is not infringed by the inclusion of the work in a film or television broadcast if its inclusion is incidental to the principal matters represented in the film or broadcast.<sup>69</sup> What is 'incidental' is a question of degree.<sup>70</sup>

### Fair dealing provisions

The argument of 'fair dealing' can be a defence to allegations of copyright infringement.

A 'dealing' with copyright material means using it in a way that is the exclusive right of the copyright owner. The use is 'fair' if the material is used for:

- research and private study<sup>71</sup>
- criticism or review, where sufficient acknowledgment of the work is made<sup>72</sup>
- reporting of news in a newspaper or magazine, where sufficient acknowledgment of the work is made; or for the purpose of, or associated with, the reporting of news by means of broadcasting or in a cinematograph film<sup>73</sup>
- judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.<sup>74</sup>

What is 'fair' will depend on the circumstances. Generally, the person must be genuinely using the material for one of the above purposes, and use of it is fair in that context.

### Crown use of artworks

The Crown may use a copyright work without permission of the copyright owner where it is used 'for the services of the Crown'. The artist is still entitled to payment for use and the government must contact him or her as soon as possible to negotiate this.

### Library copying

Libraries and archives can make copies of copyright works under certain circumstances in accordance with statutory procedures.<sup>75</sup>

### Educational copying

Education institutions such as schools and universities can make multiple copies of print material and can copy television and radio programs for education purposes. They must however pay statutory licence fees to the relevant collecting societies. Artists should be aware of these schemes, as there may be royalties payable in certain circumstances. Contact Viscopy, Copyright Agency Limited or Screenrights if you know royalties should be paid on your work. Artists need to join these agencies to receive payment.

### The Myer report

The *Report of the contemporary visual arts and craft inquiry*<sup>76</sup> recommended sweeping legislative changes to copyright and intellectual property, including the introduction of a resale royalty right as Australian law. The 2002 report was produced under the chairmanship of Rupert Myer AM, with a four-member Indigenous reference group,<sup>77</sup> and undertaken for the Department of Communications, Information Technology and the Arts.

Most significantly, the report recommended that the Australian Government take action on Indigenous copyright and Indigenous intellectual property issues<sup>78</sup> including:

- extension of moral rights to Indigenous groups
- misappropriation of cultural imagery and iconography
- importation of works purported to be of Indigenous origin
- exportation of Indigenous art under the cultural heritage provisions.<sup>79</sup>

### Publishing and reproduction of Indigenous art

As the copyright owner, the artist has a legal right under copyright law to control reproduction of his or her artwork. This includes digital copies.

Prior permission for reproduction is necessary and the artist is entitled to be paid a fee for the reproduction of his or her artwork. Chris Bonney gives the following advice to visual artists:

*Often people will approach an artist to gain permission to reproduce an artwork in a publication, or on a poster, and say that they don't have money in the budget to pay you, but the marketing opportunity for you will be enormous. When faced with this, always remember that you should be recognised for your work and that your art is an integral part of the product and as such, is integral to the marketing of it.<sup>80</sup>*

Artists do have the right to ask for a fee for the reproduction of their work. If the proposed work is to have wide dissemination, then it is even more appropriate that the artist be paid a fee. Artists can, however, waive their fees and many do so for charitable and fund-raising purposes.

Doreen Mellor recommends Viscopy as the first point of contact for permission to reproduce Indigenous artworks in catalogues or other publications. Viscopy currently represents more than 2500 Indigenous artists.

For Indigenous artists who are not registered members of Viscopy, permission to use their works will need to be obtained directly from the artists, arts centre or agency (such as the Aboriginal Artists Agency) controlling the reproduction right.

When reproducing artwork, remember that under the moral rights provisions of the *Copyright Act*, artists have the rights of integrity and attribution, and the right against false attribution.

The moral right of integrity means that the artist can take action against inappropriate treatment of their artwork. It is a good idea for artists to check design proofs of their work carefully prior to reproduction or publication.

The moral right of attribution means that the artist has the right to have his or her name reproduced alongside each reproduction of his or her work. Industry practice also includes the media, year, dimension, source of the licence and image, as in the following example.

Banduk Marika  
*Djanda and the Sacred Waterhole*, 1988  
6 colour linocuts, ink on paper  
53 cm x 29.5 cm  
Collection of the National Gallery of Australia  
Licence courtesy of the artist

The artist has the right against false attribution of his or her artworks. Some people think that if an artistic work is altered by 10 per cent, they can claim authorship of the resulting work. This is not correct. The artist who created the original work is entitled to attribution as author of the whole or part of the work that is reproduced.

### Case study

In 1995, an Indigenous artist complained that a manufacturer with whom she had entered into a T-shirt manufacturing licence had significantly altered her artistic work. The image was changed but her name and biographical details were still attached to the product for marketing purposes.

Under her licence agreement the artist had no recourse. She had signed the licence without understanding that she was assigning her copyright. She was no longer the copyright owner, having relinquished her rights, and had no copyright remedy.<sup>60</sup>

However, the new moral rights law, that has subsequently been introduced, would have enabled the artist to claim an action against false attribution because the altered works were reproduced as her original works.

She may have also been able to claim infringement of her right of integrity.<sup>61</sup>

### Indigenous communal moral rights

Existing moral rights are individual rights only. The communal nature of Indigenous cultural material and the right of an Indigenous language group to protect and guard against issues of misinformed source or integrity are not recognised.

In December 2003, the Australian Government drafted proposed amendments to the *Copyright Act* for Indigenous Communal Moral Rights (ICMRs). The Exposure Draft proposes the introduction of Indigenous communal rights for copyright works and films.

The draft amendments would introduce ICMRs, which could be exercised independently of the individual author's moral rights. ICMRs would be recognised in works and films drawn from a traditional base,<sup>62</sup> if before the first dealing of the work or film, there is a voluntary agreement between the creator of the work or film, and the Indigenous community.<sup>63</sup> There must also be acknowledgement of the Indigenous community's association with the work.<sup>64</sup> Further, all interest holders in the work (i.e. copyright owners) need to have consented to the ICMRs existing in the work or film.

ICMRs endure for the term of the copyright period.

The draft amendments would allow a community to exercise Indigenous communal moral rights only through an individual who is the authorised representative of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to decision-making processes.<sup>65</sup>

The proposed regime incorporates a defence of reasonableness and consents. The ICMR regime is not yet law, and many commentators have criticised the model as being overly complex. Further consultation with Indigenous artists and communities has been recommended.

### Artists in the Black program

The Arts Law Centre of Australia gives advice to artists, writers and filmmakers on legal matters relating to arts practice. It publishes useful information sheets on copyright and the arts.

In 2004, the centre established the Indigenous program 'Artists in the Black' which employs an Indigenous legal officer and an Indigenous information officer, and is overseen by an Indigenous reference group, the chair of which is a board member of the Arts Law Centre.

The 'Artists in the Black' program goals include:

- providing legal service and information to Indigenous artists, arts organisations and communities
- providing informed advocacy work on issues relating to Indigenous cultural and intellectual property.

### Further copyright information

For information on copyright laws, visit the following websites:

- Australian Copyright Council  
[www.copyright.org.au](http://www.copyright.org.au)
- Arts Law Centre of Australia  
[www.artslaw.com.au](http://www.artslaw.com.au)
- Viscopy  
[www.viscopy.com.au](http://www.viscopy.com.au)
- Desart Inc.  
[www.desart.com.au/law\\_pages](http://www.desart.com.au/law_pages)

## 7. Proper returns and royalties

Indigenous people should share in the benefits and receive proper returns and royalties for the use of their cultural heritage material.

When using communally owned cultural material, especially for commercial purposes, it is important to consider ways in which the language group can benefit from the use of their material. For example, you could host an exhibition opening for the local community or conduct workshops for emerging Indigenous artists.

### Case study: Sharing benefits

An Indigenous artist consults the traditional elder/storyteller prior to depicting the story in his linocut works. The elder tells the artist the story and advises on the appropriate use of language for the title and written story to accompany the work.

The artist pays a percentage of the proceeds from the sale of his artwork to the elder/storyteller in recognition of the cultural knowledge and contribution he or she has given to the work.

### Royalties

As copyright owners of artistic work, artists 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 one of the ways artists make money from their works. Once an artwork has been created and sold, the artist can still control the copyright and receive income from it. An issue for the artist however, is the ability to monitor use. It is important to use written agreement and keep good records, so that the permitted use can be managed.

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. So special collecting societies have been established to monitor use, and collect and pay fees or royalties owing to copyright owners.

These collecting societies administer the rights of their members for a share, or fee of the royalties. Some of them, such as the Copyright Agency Limited and Screenrights, have a legislative basis for collecting royalties. Others are voluntary organisations which artists are required to join.

### Copyright collecting societies

Statutory royalties are collected and distributed by collecting agencies when an artistic work is photocopied, videotaped, retransmitted or communicated by the educational or government sector. These institutions hold licences given under the *Copyright Act* and are allowed to copy the work subject to payment of licences. The copyright owners of artistic work must be registered with collecting societies to collect these royalties and should remember to register each new artwork.

Details of the Australian collecting societies relevant to Indigenous artists are listed below.

### Viscopy

Viscopy is the copyright collecting society for visual artists in Australia and New Zealand. Established in 1995, Viscopy is the main point of contact for those wishing to clear copyright for the reproduction of artistic works.

Viscopy has about 2500 Australian artist members, half of whom are Indigenous artists and their estates.

It negotiates copyright-related transactions between the artist and the user for reproductions of artistic work in advertising, publications, newspapers and electronic media such as television, cinema, internet and CD-ROM.

Viscopy handles associated contracts, negotiations, legal requirements and the distribution of royalties. There is no membership fee to join Viscopy. However, an administrative charge applies to clearances. Payments are then made to artists half-yearly.

For more information about Viscopy visit its website <[www.viscopy.com.au](http://www.viscopy.com.au)>.

### Copyright Agency Limited

Copyright Agency Limited (CAL) is an Australian statutory collecting agency whose role is to provide a bridge between creators and users of copyright material.

CAL collects and distributes fees on behalf of authors, journalists, visual artists, photographers and publishers, operating as a non-exclusive agent to license the copying of works to the general community.

CAL administers licences for the copying of print material by educational institutions, government agencies, corporations, associations, places of worship and other organisations.

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

For more information about CAL, visit its website <[www.copyright.com.au](http://www.copyright.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 get the most out of their copying licence, Screenrights set up <[www.enhancetv.com.au](http://www.enhancetv.com.au)>. This site gives educators free resources for using television in the classroom, as well as a weekly email guide of TV highlights.

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

For more information about Screenrights, visit its website <[www.screenrights.com.au](http://www.screenrights.com.au)>.

### Resale royalty – Good practice for Indigenous art?

The *droit de suite*, or resale royalty,<sup>86</sup> was first introduced in 1920 in France. The *droit de suite* is the right of artists to be paid a percentage of the sale price when their artwork is resold. It is thought that the *droit de suite* was introduced as a way to financially support struggling artists and their families by providing them with a percentage of the increased resale price. This arrangement was based on the principle that the value of an artist's work usually increases over time, as their reputation grows. By the time an artist's reputation is established, he or she may have sold many original works for small amounts. The resale royalty allows artists to benefit from their market success when collectors resell their works.<sup>87</sup>

Approximately 70 countries have introduced some form of resale royalty in their laws.<sup>88</sup> Australia has no such laws.

The international copyright convention, the *Berne Convention for the Protection of Literary and Artistic Works*,<sup>89</sup> includes an Article that sets out the option for signatory countries to implement a *droit de suite*.<sup>90</sup> In June 2001, the European Parliament passed a directive to European Union member countries to

make resale royalty laws based on the Berne Convention. The Australian Government has not yet enacted laws to provide a resale royalty to artists.

The case for enacting the resale royalty is seen starkly in relation to Indigenous artists. There has been a great increase in the value of Indigenous artworks in the resale market, particularly at auctions. For example, Kumantjayi Tjupurrula's work, *Water Dreaming at Kalipinya*, which was first sold by the artist for \$150, is reported to have resold at auction in 1997 for \$206,000, and again in 2001 for \$486,500. The artist (and his family) received no share of the resale prices.

Another benefit of resale royalty to Indigenous artists is that it would provide an enduring link between the artist with their work as it moves through the market place. This would be possible through the royalty payment and the accurate record-keeping of artists and their works that are required to administer the kind of system set out in the Berne Convention. This link could be required by Indigenous artists because of their strong cultural connection with the subject matter of their works and the underlying cultural knowledge in a work. Indigenous artists seek the right to resale royalties not only for economic benefit, but also to acknowledge the intrinsic cultural and personal relationship which artists have with their works.

The *Report of the contemporary visual arts and craft inquiry*<sup>91</sup> delivered in September 2002, recommended the introduction of a resale royalty arrangement in Australia to further protect the rights of visual artists.<sup>92</sup> The report also recommended the establishment of a working group of representatives from government and the visual arts and craft sector to analyse the options. After a discussion paper was developed and distributed in 2004, the government invited submissions. In 2006, the

then Minister for the Arts and Sport Senator the Hon. Rod Kemp announced that the government would fund the strengthening of marketing and distribution support structures, and business training for artists rather than a legislated resale royalty.<sup>93</sup>

The government considered such a scheme in Australia would not be effective, quoting research that showed resale royalty schemes would be most beneficial to successful late career artists and the estates of deceased artists. A joint media release by the then Attorney General the Hon. Philip Ruddock and Minister for Arts and Sport the Hon. Rod Kemp said:

*It would bring little advantage to the majority of Australian artists whose work rarely reaches the secondary art market and would also adversely affect commercial galleries, art dealers, auction houses and investors.*

*One of the main arguments put forward in support of resale royalty was that Indigenous artists are particularly disadvantaged by the secondary sales market. Research shows, however, that a resale royalty scheme would not end disadvantage for Indigenous artists. Instead, a scheme to support arts centres was introduced.<sup>94</sup>*

Some galleries such as the Wayne Watters Gallery in Sydney have implemented a voluntary arrangement.

Other galleries have allocated a percentage of the resale price to trust funds for Aboriginal people. The Australian Indigenous Art Trade Association ('Art Trade') has such a system.

Art Trade is committed under its constitution to supporting a resale royalties system. Members of Art Trade in recent years have made substantial contributions to the Aboriginal Benefits Foundation.<sup>95</sup>

This voluntary approach helps share the benefits from the resale of art works with the artist and their descendants.

Indigenous lawyers Terri Janke and Robynne Quiggin support the introduction of a law consistent with the Berne Convention resale royalty, similar to that in Europe and the UK. Once a resale royalty system is enshrined in law, payment is compulsory and goes directly to the artist or their heirs.

### **Royalties and Indigenous cultural expression**

Royalties are generally paid to the copyright owner, usually the artist when it comes to visual art. One question is whether cultural heritage custodians are entitled to payment of a royalty when communally owned Indigenous cultural expression 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.

### **Engaging artists**

While art may be a leisure time activity for the general public, it is a professional activity for artists, and a fee should be offered for their services.<sup>96</sup>

When commissioning Indigenous artists, or reproducing their works, fees should be paid to artists at an appropriate industry rate.

### **Indigenous artists as public speakers**

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**

Doreen Mellor states it is important to understand that any information gained from interviewing Indigenous artists is the individual and cultural knowledge of the person interviewed.<sup>97</sup>

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

The artist 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.

### **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 work on the internet. The website developer should discuss the proposed format of reproduction with the artist, and measures 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 the issues will assist in identifying and addressing any concerns. For more information on internet publishing issues, see *Media cultures: protocols for producing Indigenous Australian media*<sup>98</sup> in this series.

Refer also to the Arts Law Centre of Australia's *Best Practice Guidelines: Displaying Visual Arts on the Internet 2006*.

## **8. Continuing cultures**

Consultation is an ongoing process. Cultures are dynamic and evolving, and the protocols within each group and community will also change. It is important to consider how you will maintain relationships for future consultations. This might include consultation, at a later date, for further uses of the work that were not initially envisaged.

## **9. Recognition and protection**

The Indigenous visual artist owns copyright in his or her artwork. This means that he or she can control the reproduction and dissemination of the artwork. Such rights apply to all artists and are granted under the *Copyright Act*.<sup>99</sup>

It is important to understand these laws and how cultural material might be protected under them. However, there are currently no special copyright laws dealing with Indigenous cultural material.

The *Copyright Act* has been criticised for not recognising the communal ownership of heritage material and the continuing right of heritage custodians to control use of this material. In 2004, the Attorney General drafted a proposal to amend the *Copyright Act* and introduce Indigenous communal moral rights. However, this is not yet law.

Sally McCausland recommends that Indigenous custodians give express and clear notice of their interest to third parties.<sup>100</sup> She suggests a draft form of notice as follows:

## NOTICE OF CUSTODIAL INTEREST OF THE [NAME] COMMUNITY

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*. For enquiries regarding the permitted reproduction of these images, contact [name] community.

## Implementation

*Protocols are about people's value systems and their cultural beliefs.<sup>101</sup>*

The protocols in this guide are flexible. You can use them to develop protocols for your visual arts project, program or practice, language group, region or community. This section tells you how to implement the protocols.

It provides a checklist of key points to consider when developing protocols for a visual arts project or program, or in your own arts practice. It summarises the preceding sections and also offers some different and more specific information.

1. Respect
2. Indigenous control
3. Communication, consultation and consent
4. Interpretation, integrity and authenticity
5. Secrecy and confidentiality
6. Attribution and copyright
7. Proper returns and royalties
8. Continuing cultures
9. Recognition and protection.

### 1. Respect

People working in the visual arts are encouraged to respect that:

- Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.
- Acknowledgment should be given to the Indigenous groups where projects are located.
- The rights of Indigenous people to own and control their culture should be respected.
- The cultural significance of Indigenous visual arts should be respected.
- Diversity of Indigenous cultures should be acknowledged and encouraged.

- Indigenous worldviews, lifestyles and customary laws should be respected in contemporary artistic and cultural life.
- Inappropriate or outdated perspectives and terminology should be avoided.
- There is great diversity in the geographic representation, medium and subject matter of Indigenous art. Diversity of creative expression is encouraged.
- Indigenous cultures are living cultures.

### 2. Indigenous control

Indigenous people have the right to determine how their cultural property will be used.

- Indigenous people have the right to own and control their heritage, including Indigenous body painting, images, motifs, stories and other forms of cultural expression.
- Involve Indigenous people, including Indigenous artists, curators and communities, in all stages of a project.
- Identify and speak to the relevant Indigenous people with authority for geographic locations and areas of practice by consulting widely with Indigenous artists and organisations.

### 3. Communication, consultation and consent

Some key areas to take into account when communicating, consulting and seeking consent are:

- Indigenous people should be consulted on the use and representation of their Indigenous heritage.
- Prior to use, Indigenous people should be informed about the implications of consent.
- Consent is necessary for the reproduction of Indigenous visual arts and craft, and if traditional communal designs are included, consent may be required from traditional owners.

- Communally owned material, including ritual knowledge and creation stories, may require special and wider consultation within one community or across a number of communities.
- Indigenous artists in remote communities may require interpreters.
- Sensitive content such as secret and sacred material or gender-based works may require special communication procedures that should be ascertained at the beginning of the project.
- Indigenous groups vary from community to community, and it is necessary to get consent from the relevant Indigenous group.
- Be aware of gender divisions of responsibility.
- With collaborative projects, discuss the long-term control and use of the works including copyright ownership of the works produced.

#### 4. Interpretation, integrity and authenticity

Consider interpretation, context and integrity:

- Does the work reflect the cultural value of the subject matter?
- Does it expose confidential, personal or sensitive material?
- Does it reinforce negative stereotypes?
- Respect the overall integrity of an Indigenous artwork.
- When reproducing Indigenous artworks, discuss and gain the consent of the artist for any material alterations.

Authenticity is a major concern to Indigenous artists. The rise in demand of Indigenous art has led to many rip-off practices that undermine the cultural integrity of the art. Such practices also take away potential income streams from Indigenous artists and their communities.

Some points to consider are:

- use of styles and imagery
- use of stories
- subject matter of works, for example, secret/sacred work or public work
- use of biographical material.

#### Marketing with integrity

There are various opportunities for marketing Indigenous artworks including:

- commercial galleries
- retail outlets
- museums/public galleries
- Indigenous cultural centres
- email and web marketing.

In the marketing of Indigenous art, respecting authenticity and integrity of works is a priority. It is important for the artist to be fully informed and agree to the use of their works, including the reproduction and use of biographical material and text.

The Arts Law Centre has drafted best practice guidelines for displaying visual art on the internet.

#### Exhibition of art

- Consider the cultural implications of an exhibition. Involve Indigenous people in the development and management of exhibitions.
- When displaying Indigenous art, promote both the Indigenous cultural values of the work and the Indigenous artist and community from which he or she originates.
- Allow the Indigenous artist and/or the relevant community to interpret and present their own stories. If they are present at the opening, acknowledge them publicly and offer them hospitality.
- Advise Indigenous artists on the use of their works that are held in private collections.
- The *Code of practice for the Australian visual arts and craft sector* recommends payment of a fee to the artist for works they submit to exhibitions.

- Discuss the labelling and promotion of the artwork with the artist and/or the community, including written material about the exhibition in any catalogues.

#### 5. Secrecy and confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality.

- Many Indigenous communities have restrictions on whether the name and photograph of a deceased Indigenous person can be made public.
- Secret and sacred objects are important to Indigenous religious practices. It may be a transgression of Indigenous law to reproduce these images.
- Indigenous people have the right to maintain confidentiality about aspects of their personal and cultural affairs.

It is the responsibility of those putting together arts projects to discuss any restrictions on use with the relevant Indigenous groups.

#### 6. Attribution and copyright

- Indigenous people should be given proper credit and appropriate acknowledgment for their role in the development of artworks, and use of their cultural material.
- If an image originates from a particular language group, it is important to attribute the group as the cultural source.
- Ask for correct wording of how the person or community wishes to be attributed with ownership of the artwork or cultural material.
- The copyright owner of an artwork has the exclusive right to:
  - (i) reproduce the work in a material form
  - (ii) publish the work
  - (iii) communicate the work to the public.
- Artists do not need to register for copyright protection.

- Styles of art are generally not protected. It is the *expression* that is protected.
- Artists retain their copyright, even after they sell the physical painting. The buyer owns the painting but does not have the right to authorise reproduction.
- In collaborative works, the collaborating artists share copyright.
- The Indigenous artist who incorporates traditional ritual knowledge in his or her artwork has a special obligation to the language group when exercising copyright in the artwork.
- There are special copyright provisions for commissioned photographs.
- Copyright in an artistic work exists as soon as the work is created and lasts for 70 years after the death of the artist.
- The artist has moral rights to his or her artwork. This includes the right of integrity and attribution. These rights are inalienable.
- When reproducing artworks it is necessary to get copyright clearance from the artist.
- Artists are encouraged to use written agreements when licensing artworks for commercial purposes.
- A person will infringe copyright in an artwork if he or she reproduces the work in material form, publishes or communicates the work to the public without permission of the copyright owner. Statutory exceptions include purposes of criticism or review, and incidental filming.
- Under the educational statutory licensing schemes, artists may be entitled to royalties for use of their artworks in books and films. Copyright Agency Limited and Screenrights collect and distribute royalties to artist members.

## 7. Proper returns and royalties

- Ensure Indigenous people receive proper returns, including copyright and royalties, for their contribution and use of their cultural material.
- When commissioning or reproducing Indigenous artworks, fees should be paid to artists at an appropriate industry rate.
- Discuss copyright ownership of the material form of cultural expression upfront.
- Indigenous people have the right to share in the benefits of any commercialisation of their cultural material.
- Indigenous artists are professionals. Discuss issues such as payment, transport, childcare and other services when arranging speaking engagements and interviews.
- The resale royalty (*droit de suite*) is the right of the artist to share a percentage of the resale price of an original work of art. The Australian Government has decided not to legislate on this, but some galleries give Aboriginal trust funds a portion of the resale price of Indigenous artworks.

## 8. Continuing cultures

Indigenous cultures are dynamic and evolving, and the protocols within each group and community will also change. Consultation should be an ongoing process. When working with Indigenous people:

- Maintain relationships with Indigenous artists and communities, which open the way for future consultation around their artworks.
- Consider and discuss future uses of the artwork, which were not envisaged at the initial consultation.
- Negotiate ways in which cultural protocols can be included in future plans for the artworks, including licence agreements.

- Indigenous people have a responsibility to ensure that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

## 9. Recognition and protection

- The Indigenous artist owns copyright in his or her artwork, giving him or her control of reproduction and dissemination of the work.
- Written agreements and contracts are the best way of ensuring that rights are cleared for proposed and intended uses. The Arts Law Centre of Australia has draft agreements available for members. It is a good idea to seek independent legal advice on written releases and contracts.
- Australian laws and policies should be developed and implemented to respect and protect rights of Indigenous people and communities to their cultural heritage.
- The *Copyright Act 1968* has been criticised for not recognising the communal ownership of heritage material and the continuing right of heritage custodians to control the use of images. Indigenous people have called for special legislation to recognise the communal nature of cultural heritage.

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## Contacts

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#### Association of Central Australian Aboriginal Art and Craft Centres (Desart)

PO Box 9219  
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Tel: (08) 8953 4736  
Fax: (08) 8953 4517  
Email: admin@desart.com.au  
Web: www.desart.com.au

#### National Association for the Visual Arts

PO Box 60  
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Email: nava@visualarts.net.au  
Web: www.visualarts.net.au/nava

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#### Australia Council for the Arts – Aboriginal and Torres Strait Islander arts board

PO Box 788  
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Tel: (02) 9215 9065  
Fax: (02) 9215 9061  
Toll free: 1800 226 912  
Email: atsia@australiacouncil.gov.au  
Web: www.australiacouncil.gov.au

### STATE AND TERRITORY ARTS AGENCIES

#### Arts NT (Darwin and the Top End)

GPO Box 1774  
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Tel: (08) 8999 8981  
Fax: (08) 8999 8949  
Toll free: 1800 678 237  
Email: arts.office@nt.gov.au  
Web: www.nt.gov.au

#### Arts NT (Central Australia and the Barkly)

PO Box 3521  
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Tel: (08) 8951 1190  
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#### Arts Queensland

GPO Box 1436  
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Web: www.arts.qld.gov.au

#### Arts SA

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#### Arts Tasmania (Hobart)

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Toll free (TAS) 1800 247 308  
Fax: (03) 6233 5555  
Email: arts.tasmania@arts.tas.gov.au  
Web: www.arts.tas.gov.au

#### Arts Tasmania (Launceston)

PO Box 1186  
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Web: www.arts.tas.gov.au

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Email: artsvic@dpc.vic.gov.au  
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#### Department of Culture and the Arts

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