

Indigenous Cultural Protocols and the **Arts**



Terri Janke and Company Pty Ltd
Lawyers and Consultants

Indigenous Cultural Protocols and the Arts

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Terri Janke and Company Pty Ltd acknowledge those people who assisted developing these materials and the individuals/ organisations for kindly providing permission to reproduce the trade marks, and information.

WARNING

The document contains names of deceased persons of Aboriginal and Torres Strait Islander; it also contains some language that might be considered offensive.

Important legal notice

The laws and policies cited in this book are current as at June 2016. They are generally discussed for the purposes of providing this report. No person should rely on the contents of this report for a specific legal matter but should obtain professional legal advice from a qualified legal practitioner.



Australian Government



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Part 1: Introduction

Indigenous cultures are steeped in thousands of years of heritage and continuing practice. Using and reproducing traditional cultural expression within new works requires consideration of Indigenous cultural protocols.

The Australia Council for the Arts ('Council') published five Indigenous cultural protocols in 2003 to provide protection for Indigenous Cultural and Intellectual Property (ICIP), which remain unrecognised under Australian law. A second edition was produced in 2007.

The five guides were produced to explain, in an accessible way, the legal, ethical and moral issues that should be taken into account when artists draw on Indigenous cultural material in their works.¹ Each guide is written on a different art form so that collectively, they regulate the use of ICIP in relation to all areas of the arts.² These art forms are: media arts; music; performing arts; visual arts; and writing. The protocols in the guides are organised around nine fundamental principles and suggest an appropriate means of adhering to them in the course of producing a creative work. They serve as a first point of call for Indigenous artists seeking to draw on or incorporate Indigenous cultural expression into their works.

The protocols advocate the observance of ethical principles that set standards for recognising Indigenous ownership of Indigenous cultural expression as stated in the *Declaration on the Rights of Indigenous Peoples*.³ It is a condition for receiving a grant from the Council that the recipient follows the protocols.⁴ They must submit evidence of how they will implement the protocols in their project.

The protocols booklets were written by Terri Janke and Company in Sydney and peer-reviewed by five practising artists.⁵

Terri Janke and Company have compiled this resources guide, with the assistance of the Council's Aboriginal and Torres Strait Islander Arts Board, in order to guide funding applicants and others in their implementation of the principles outlined in the guides when creating and collaborating on Indigenous arts projects.

¹ Australia Council for the Arts, *Protocols for producing Indigenous Australian writing: Writing* (2nd ed, 2007) 2-10; Australia Council for the Arts, *Protocols for producing Indigenous Australian music: Music* (2nd ed, 2007) 2-9; Australia Council for the Arts, *Protocols for producing Indigenous Australian performing arts: Performing arts* (2nd ed, 2007) 3-9; Australia Council for the Arts, *Protocols for producing Indigenous Australian media arts: Media arts* (2nd ed, 2007) 2-9; Australia Council for the Arts, *Protocols for producing Indigenous Australian visual arts: Visual arts* (2nd ed, 2007) 2-8.

² Terri Janke, *More than words – Writing, Indigenous culture & Copyright in Australia* (Terri Janke and Company, 2009) 8.

³ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (2008)

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁴ Australia Council for the Arts, *Indigenous Protocols* (2012)

http://www.austliacouncil.gov.au/grants-2012/information-for-applicants/indigenous_protocols

⁵ These five practising artists were: Dr Anita Heiss (Writing); Jenny Fraser (Media arts); Doreen Mellor and NAVA using Doreen Mellor and Terri Janke, *Valuing Art, Respecting Culture* (2001), National Association for the Visual Arts (Visual Arts); Wesley Enoch (Performing Arts); and David Milroy (Music).

Principles: Snapshot

When implementing the protocols, arts practitioners should follow the principles outlined in the five protocols booklets. The following are examples of questions that the practitioner should consider when developing the project methodology:

Principle 1 Respect

- Have you considered why your organisation is undertaking the project, why you are incorporating Indigenous material, and the perspective you bring to it?
- How will the project acknowledge the Indigenous groups where the project is located?
- In what ways should your project respect Indigenous worldviews, lifestyles and customary laws?
- Does your project encourage or promote diversity of Indigenous cultures?
- Will your project involve a public event such as a launch, exhibition, album release, performance, book release or event of local, state or national significance?
- What representatives of the traditional owners will attend and give a welcome to country?

Principle 2 Indigenous control

- How can your project set up systems for Indigenous control over ICIP material? For example, are Indigenous people in key creative roles; setting up an advisory committee?
- How will you consider who can represent particular language groups?
 - Did you consider who can give cultural clearances to use traditionally and collectively owned material?
 - Did you identify the Indigenous people in authority for specific stories, geographic locations, styles, songs, knowledge and imagery?
- Did you involve Indigenous people in all stages of the project? Including Indigenous artists, knowledge holders, curators, musicians and communities?
- Does your project involve a visit to Aboriginal lands or outer Torres Strait Islands? If so, did you obtain permission from the local land council/trust/the relevant community council?

Principle 3 Communication, consultation and consent

- Does your project deal with communally owned material (e.g. ritual knowledge, creation stories, songs, or traditional or tribal communal designs)?
- If so, how will you seek consent from the traditional owners or other relevant Indigenous people/groups? Consider the following:
 - How will you inform the relevant Indigenous person about the implications of consent?
 - Did you ask the Indigenous contributor whether he/she requires an interpreter? If so, did you ask them to identify a suitable person to translate?
 - Did you engage the services of an interpreter? If so, did you pay them for their services?

- How much time will you allow for obtaining cultural clearance and are you prepared for the possibility that approval will be denied or conditional on substantial changes to your project, music or book?
- Did you make sure that consent comes from the right person or faction(s) within a community?
- Does more than one Indigenous group have custodianship of an image or other heritage item? If so, did you seek consent from every group?
- Does your project contain secret and sacred material or gender-based works? If so, did you check whether special communication procedures are required to obtain consent?
- Is your project collaborative?
 - If so, did you obtain the consent of the Indigenous contributor and their communities in the initial development phase of the project?
 - Did you discuss the long-term control and use of the works (including copyright ownership of the works produced) in the initial development phase of the project?

Principle 4 Interpretation, integrity and authenticity

- Does your work reflect the cultural value of the subject matter?
- Does it expose confidential, personal or sensitive material?
- Does it reinforce negative stereotypes?
- Do you use inappropriate or outdated perspectives and terminology?
- If you reproduced any Indigenous images, symbols, songs, stories or knowledge, did you discuss and gain consent for any material alterations? Who was consulted for that consent? Were you prepared to change your proposed use if the Indigenous language group or community did not agree with the proposed alteration/use?
- Was the authenticity of a work checked and verified by an appropriate authority?
 - Did the Indigenous contributor draw on their own particular cultural heritage when contributing to the project, rather than that of Indigenous regional groups to which he/she has no attachment?
- In marketing the project, have all the Indigenous participants and stakeholders agreed to the use of their knowledge, songs or designs, including reproductions and the use of biographical material and text?
- Were Indigenous stakeholders involved in the project given the opportunity to give feedback on drafts of the project before it was made publically available? Are they attributed or credited?
- Did you hold a project launch, album release, book release, performance or exhibition?
 - Did you involve Indigenous people in the development and management of the exhibitions, album release, book release, project launch or performance?
 - Did you promote *both* the Indigenous cultural values of the work *and* the Indigenous contributors and his/her Indigenous community?
 - Was the Indigenous contributor and/or relevant community present at the exhibitions, album release, book release, project launch or performance? If so, did you acknowledge them publicly and offer them hospitality?
 - Did you discuss the labelling and promotion of the project and each Indigenous contributor with those individuals and their community, including written material

about the exhibitions, album release, book release, project launch or performance in any catalogues?

Principle 5 Secrecy and confidentiality

- Does your project contain secret or sacred material? Have you discussed any restrictions on use with the relevant Indigenous groups?
- Does your project or accompanying material contain any reference to personal/confidential information about individual Indigenous people? If so, did you seek consent from anyone who might be affected by the disclosure (the individual themselves, their community/relatives) prior to publishing the information?
- Does your project feature any deceased Indigenous person? If so, did you obtain clearance from their family/community prior to publication?

Principle 6 Attribution and copyright

- Did you attribute Indigenous custodians, Elders, communities or other Indigenous individuals for any contribution which they may have made to the development of the project or use of their cultural material (e.g. providing cultural clearance, telling their stories, providing expert advice on aspects of Indigenous culture)? If so, *how* did you attribute their assistance?
- Does an image, song, performance or story originate from a particular cultural group? If so, did you attribute the group as the cultural source? E.g. an image originating from a particular language group should be attributed in each and every publication illustrating the art work.
- Did you ask the Indigenous person or community *how* they wish to be attributed with ownership of the artwork or cultural material?
- Are there any works of joint authorship in the project (e.g. more than 1 artist who would have copyright interest in the work)? If so, did you obtain the consent of the other artist before exercising their rights under copyright law (e.g. right to licence reproduction of the work)?
- Licensing the use of copyright material such as artwork/photography/traditional knowledge/music:
 - Have you negotiated a written contract with the artist?
 - Did you give the artist the opportunity to obtain proper legal advice?
 - Did you explain the contract to the Indigenous artist? Did you ask the artist whether they require a translator to explain the major issues of the contract?
 - Are the exhibitions, album release, book release, project launch or performance to be altered or adapted for mass production? If so, artists should be given the opportunity to approve or reject the alteration/adaptation.
 - Did you ensure that the agreement does not assign the copyright of the artist rather than license its use?
 - Did you seek advice on copyright licensing issues?
- Did you reproduce any artwork, songs, traditional knowledge, or traditional dance? If so, did you obtain copyright clearance from the artist? Was a written agreement used? Did you keep records of the rights granted? Did you ask for copies of the reproductions?
- Do you have any arrangements with educational institutions (e.g. schools and universities) for reproduction of the exhibitions, album, book, project or performance?

If so, did you check to see whether the artist is entitled to any royalties for use of their exhibitions, album, book, project or performance in books and films? Note that artists need to join agencies such as Viscopy, Copyright Agency and Screenrights in order to receive payment.

Principle 7 Proper returns and royalties

- Did artists and contributors in the project receive royalties? Does anyone else receive royalties?
- Were fees paid for the commission of work at appropriate industry rates?
- Were written agreements used to govern the payment of royalties?
- Was copyright ownership and contributions discussed upfront?
- Are any of the Indigenous artists or contributors registered with a copyright collecting society?
- Did you arrange for non-pecuniary benefits to be provided to any Indigenous people or communities for their contribution to the development of your project (e.g. launch hosted in the Indigenous community)?
- Do the Indigenous contributors share in the benefits of any commercialisation of the project?
- When arranging speaking engagements and interviews, were issues such as payment, childcare and other services discussed?
- Have the artworks, books, albums, performances or other stories or knowledge been reproduced on the internet? If so, was consent obtained to use it in this way prior to publication? Were measures taken to limit the ease of copying? Did the website producer discuss how the work would be reproduced and ensure that proper attribution was given?

Principle 8 Continuing cultures

- Have you maintained relationships with other Indigenous contributors and communities in order to facilitate future consultation?
- Did you consider and discuss future uses of the contributions in the project that you may not have envisaged at the initial consultation?
- Have you negotiated ways that the cultural protocols could be included in future plans for the project (e.g. included on user terms and conditions or on other contracts)?

Principle 9 Recognition and protection

- Have you used written agreements and contracts to make sure that rights are cleared for proposed and intended uses? Did you seek independent legal advice on written releases and contracts?
- Do you require traditional custodian notices or any other special acknowledgements for Indigenous cultural and intellectual property?

Part 2: Case Studies

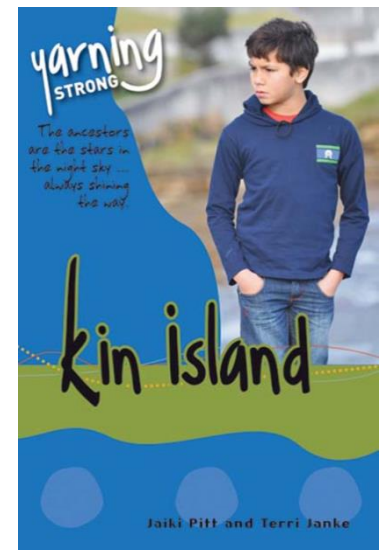
This section includes case studies for each of the five art forms illustrating the way in which the project applied the cultural protocols. Each case study is organised under nine headings, which correspond to the nine major principles underpinning the protocols. The information under each heading summarises the principle and explains how the project put the principles into practice.

Writing

Kin Island by Terri Janke and Jaiki Pitt

Introduction

Kin Island is a children's book written by Terri Janke and her son Jaiki Pitt. Laguna Bay Publishing commissioned the Indigenous education series *Yarning Strong*, which aims to foster an understanding amongst both Indigenous and non-Indigenous Australians of the reality of life as a young Aboriginal or Torres Strait Islander person in present-day Australia.⁶ The series is published by Oxford University Press. The story recalls a trip to the Torres Strait Islands that a young, Sydney-based boy with Indigenous heritage takes with his family, and the change in perspective this inspires towards his family background. As a result of visiting the home of his ancestors, he develops a sense of belonging to his family and Indigenous culture and gains an appreciation of the connection between family, place and personal identity. The process undertaken by the authors of *Kin Island* in recognition of Indigenous Cultural and Intellectual Property (ICIP) provides a model for implementing the writing protocols, as the publishers explicitly stated that they would seek to follow them.⁷



1. Respect⁸

Respect is an overarching obligation that people using ICIP in their writing must implement in every aspect of their projects.

⁶ Oxford University Press, *Yarning Strong* (2014) http://www.oup.com.au/primary/literacy/yarning_strong; Laguna Bay Publishing; Series 10-14 year olds: *Yarning Strong* (2009) <http://www.lagunabaypublishing.com/book.php?id=39>.

⁷ Laguna Bay Publishing, *Indigenous Education Series: Author Brief 3*.

⁸ Australia Council for the Arts, *Protocols for producing Indigenous Australian writing: Writing* (2nd ed 2007) 11-12, 34.

The novel itself encapsulates the very notion of 'living cultures' because it relates the experiences of an Indigenous kid living in modern-day urban Australia, directly addressing the author's brief provided by Laguna Bay Publishing to the prospective writers of the *Yarning Strong* series.⁹ In this way, it reinforces the validity of contemporary stories of Indigenous lives and contributes to dispelling the widespread misconception that Indigenous people and culture are 'stuck in the past'.

2. Indigenous control

This principle refers to the right of Indigenous people to control the use and expression of their cultural heritage.¹⁰ It should be implemented at every stage of the development of a literary work.¹¹

Indigenous control of the development of the *Yarning Strong* series was facilitated right at the outset because the idea for the series was conceived by an Indigenous advisory group, set up by Laguna Bay Publishing.

The publishers ensured that a high degree of control of the series would remain in Indigenous hands by stipulating that its authors and illustrators must be Indigenous. Furthermore, the National Indigenous Consultative Committee - a team of Indigenous education consultants - was commissioned to oversee the editorial process.¹² Both Terri Janke and her son Jaiki Pitt identify as Torres Strait Islander.

The editor of Kin Island, Nicola Robinson, explained that when working with Indigenous people there must be a lot of consultation. This is because there is some information that is inside a cultural no-go zone. She also said that the project introduced her to a whole new way of knowing the world. She explains:

A key moment for me was when, during our second National Indigenous Consultative Committee meeting, one of the consultants expressed surprise (and pleasure!) that we had actually acted on their recommendations from the first meeting. I realised that this smart and experienced Indigenous educator was used to being consulted – and then ignored.

*Indigenous consultation may throw up inconvenient truths, but if a project is to have any integrity, these truths have to be acted on. It just means working a little harder, a little longer. Step one is to shut up and listen. Step two is to be brave and ask questions, and then listen again. Step three is to get on with it.*¹³

⁹ Laguna Bay Publishing, *Author Brief*, above n 9.

¹⁰ Australia Council for the Arts, Writing, above n 1, 34.

¹¹ Ibid 13.

¹² Laguna Bay Publishing, *Author Brief*, above n 9, 3.

¹³ Email correspondence between Sarah Grant and Nicola Robinson 14May2015.

3. Communication, consultation and consent

Writers should communicate and consult with the Indigenous people in authority on the representation and use of their cultural expression, and obtain their consent for projects.¹⁴

The *Yarning Strong* series was the product of extensive consultation with the Indigenous community. During the early stages of the project, Laguna Bay Publishing consulted with a large number of Indigenous people from all over Australia, including the Indigenous education community. A key part of this was attending several Indigenous conferences including the World Indigenous People's Conference on Education in Melbourne in December 2008.¹⁵

In addition, on the advice of the National Indigenous Consultative Committee, Laguna Bay Publishing requested that all authors of the series obtain community approval for culturally sensitive material in their manuscripts, as well as written consent for any use of it from the relevant community representative.

Terri Janke complied with this requirement by seeking cultural consent from appropriate Indigenous people and organisations, using the publisher's standard 'community approval form'. These included Thelma Quartey of the Lagaw Kodo Mir Torres Strait Islander Corporation Resource and Culture Centre NSW, Ron Day of the Murray Island Council, and Vanessa Seekee of the Torres Strait Heritage Museum and Art Gallery. Part of the consent process also included attending Indigenous community meetings in order to raise the issue of consent for the cultural content of the book as a discussion point.

4. Interpretation, integrity and authenticity

This principle entails consultation with Indigenous people to ensure the integrity and authenticity of the literary representation of their Indigenous heritage.¹⁶

Terri Janke implemented this requirement by asking for approval from the Gab Titui Cultural Centre regarding the cultural accuracy of its depiction in the *Kin Island* manuscript. Ms Janke also employed Dana Ober, a Torres Strait Islander linguist, to check the cultural references and Indigenous language words in the story. Furthermore, committee members of the Lagaw Kodo Mir Torres Strait Islander Corporation Resource and Culture Centre NSW provided some points on interpretation which were taken into account on the final edit. For example, the proper spelling for Kulaps and the Welcome to Country reference were improvised from consultations with Torres Strait Islanders.

In addition, Indigenous interpretation of culture was promoted by ensuring that the National Indigenous Consultative Committee (commissioned by the publishers) approved and advised on the cultural content of the book during the drafting stage. Ms Janke respected the Indigenous consultants' feedback by removing a reference that they flagged as potentially offensive to members of the Indigenous community.

¹⁴ Australia Council for the Arts, *Writing*, above n 1, 13, 34.

¹⁶ Australia Council for the Arts, *Writing*, above n 1, 20-2, 17.

The writing projects aimed to showcase the diversity of Indigenous people from urban areas all over Australia. *Kin Island* introduces nine Indigenous words taken from four different languages. In the glossary of words included at the end of the book, the authors specified the language from which each word originates. This emphasises the fact that there is more than one Aboriginal and Torres Strait Islander language, thereby acknowledging the diversity of Indigenous culture. The book's cover was also photographed by an Aboriginal photographer named Wayne Quilliam.

5. Secrecy and confidentiality

Indigenous people's personal privacy should be respected. One way of complying with this obligation is to seek permission from all Indigenous people that could potentially be affected by the publication of personal and/or confidential information.¹⁷

Terri Janke consulted her father, John Francis Janke, concerning the references, and sought written permission from her Auntie Patty Lees to refer to their ancestor Victor Blanco in *Kin Island*, thereby demonstrating respect for their family's personal privacy.

6. Attribution and copyright

Indigenous people should be credited accordingly for their contribution to the literary work - whether this be for providing cultural information or ascertaining its accuracy, or for the use of their cultural heritage material in general.¹⁸ *Kin Island* fulfilled this protocol by including an 'Acknowledgments' section at the end of the book. This section expressed their gratitude to the individuals and groups who were consulted during the writing process, and specifies the role that each individual and group played. They also included a general acknowledgment that 'the traditional knowledge and cultural expression referred to' in the book 'belongs to Torres Strait Islander people'.¹⁹

Copyright refers to legal protection under the *Copyright Act*²⁰ which gives the author of a literary work the right to use it and stop other people from financially benefiting from it without permission.²¹ As the authors of *Kin Island*, Terri Janke and Jaiki Pitt automatically own the copyright in it.²² Nonetheless, they included a copyright notice on the publication details page.²³

Moreover, the publisher of literary works must have permission from the writer in order to publish. The authors of *Kin Island* provided Laguna Bay Publishing with the right to reproduce and publish the novel by signing a written contract with them. This contract governs their business relationship and includes clauses providing for the payment of royalties, breach of copyright and dispute resolution.

¹⁷ Australia Council for the Arts, *Writing*, above n 1, 20-2, 36.

¹⁸ *Ibid* 22, 36.

¹⁹ Jaiki Pitt and Terri Janke, *Kin Island* (Oxford University Press, 2011) 62-3.

²⁰ *Copyright Act 1968* (Cth).

²¹ Australia Council for the Arts, *Writing*, above n 1, 22.

²² *Ibid* 37.

²³ 'Copyright © Jaiki Pitt and Terri Janke 2011'. Taken from: Pitt and Janke, above n 20, 2.

One of the rights that copyright owners have is to control the reproduction of their work. Jaiki Pitt and Terri Janke signed a publishing agreement with Oxford University Press for publication of an audiobook version of *Kin Island*, for which royalties were payable. They also signed a form permitting the Koori Radio to play this audio version for no fee.

Although it is considered an infringement of copyright to publish, adapt, reproduce or communicate to the public a copyright-protected literary work without permission from the copyright owner,²⁴ educational institutions can do so for educational purposes on the condition that they pay statutory licence fees.²⁵ The authors of *Kin Island* granted the Queensland Department of Education a licence to use an excerpt of their novel and the book cover exclusively for educational purposes, on the condition that the Department pay a licencing fee and that the licence last no more than five years.

7. Proper returns and royalties

Indigenous people should share in the benefits and receive proper returns for their contribution to literary works and for the use of their cultural material, including royalties.²⁶ The *Yarning Strong* series generates royalties for the Indigenous authors. The authors of *Kin Island* followed this principle by paying several of the Indigenous people and groups who gave up their time to review and provide cultural input into the book.

8. Continuing cultures²⁷

This principle recognises that cultural practices continue and artists and writers can be a part of this process.²⁸

The authors followed this principle by making copies of the book available to all those consulting (including in key libraries). The authors were also mindful of keeping connections as new requests for the book will arise. In exercising their copyright, the authors aim to follow the writing protocols and continue to consult with relevant Indigenous people if the spirit or context of the proposed use of the Indigenous content changes.²⁹

9. Recognition and protection

The written story conveyed through *Kin Island* is recognised and protected through copyright laws³⁰ and the protocols on consent and recognition of ICIP.

Due to the fact that the novel is in material form (i.e. it has been written down), the copyright is vested in Terri Janke and Jaiki Pitt. This gives them the right to control the reproduction and dissemination of the novel.³¹

²⁴ Australia Council for the Arts, *Writing*, above n 1, 28.

²⁵ Ibid 29.

²⁶ Ibid 30, 37.

²⁷ Ibid 33, 38.

²⁸ Ibid 32.

²⁹ Ibid 38.

³⁰ *Copyright Act 1968* (Cth).

The novel properly references ICIP and consent for the use of such ICIP was obtained.

Key Lessons

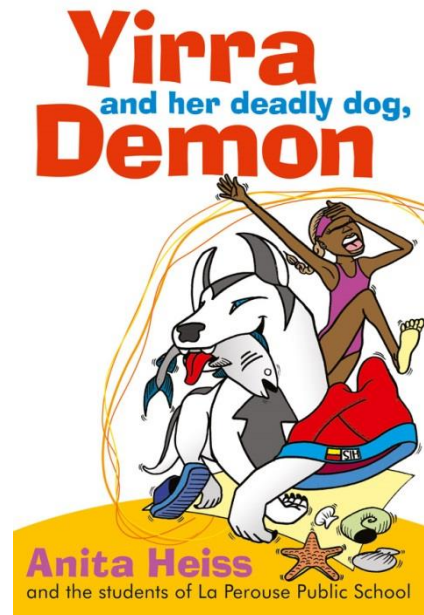
1. Represents living cultures by dispelling widespread misconceptions and stereotypes.
2. Expresses gratitude to the Indigenous Australians that helped during the project, and acknowledges that ICIP belongs to the relevant Indigenous people.
3. Ensure that control over the project and its future users is given to the authors.

³¹ Australia Council for the Arts, *Writing*, above n 1, 38.

Yirra and her deadly dog, Demon by Anita Heiss

Introduction

*Yirra and her deadly dog, Demon*³² ('Yirra') is a children's book written by high-profile Aboriginal author Dr Anita Heiss (working in conjunction with students from La Perouse Public School). The novel is premised on the comic situations flowing from the struggles of a young Aboriginal girl living in South Sydney who tries to keep her mischievous dog in check. The conscious measures taken by Dr Heiss to comply with the writing protocols demonstrate how Indigenous authors can ensure that they support the recognition and protection of Indigenous Cultural and Intellectual Property (ICIP).



1. Respect³³

This basic principle encompasses respectful use of ICIP such as stories, traditional knowledge and information about life experience. It is reflected in the entire process undertaken by the author in her composition of the novel, which upholds the value of communal responsibility and accountability.

When launching books containing ICIP, respect should be paid to the Indigenous community by inviting a representative of the traditional owners to attend and give a Welcome to Country.

The launch of *Yirra* occurred as part of the 2007 Sydney Writers' Festival and was attended by the entire La Perouse Public School community. It was given local and international media coverage. The book was launched by the Governor of NSW Her Excellency Marie Bashir. Importantly, Aboriginal Elders from the area were invited to attend, and the La Perouse Public School dance group performed a Welcome to Country dance to begin the event.

One specific way in which Dr Heiss implemented the principle of respect was by writing about an Aboriginal family in a modern, urban context. In this way, she demonstrates that contemporary stories of Indigenous lives are worth telling as much as traditional ones - promoting awareness of the fact that Indigenous cultures are living and ever evolving. They do not exist only in the past.

³² Anita Heiss and La Perouse Public School, *Yirra and her deadly dog, Demon* (Australian Broadcasting Corporation, 2007).

³³ Australia Council for the Arts, *Protocols for producing Indigenous Australian writing: Writing* (2nd ed 2007) 11-12, 34.

2. Indigenous control

Control of the use and expression of ICIP by Indigenous people is a fundamental right that should be facilitated at every stage of the development and production of writing projects.³⁴

Dr Heiss gave effect to this principle by allowing the students of La Perouse Public School (most of whom are local community members with generational ties to the area) to provide substantial input into the novel. The students conceived the bulk of the storyline.

3. Communication, consultation and consent

It is necessary to communicate and consult with the relevant Indigenous people in authority to seek consent for the use of ICIP in the writing project, and inform them of the implications of giving it.³⁵ This obligation is particularly imperative if the author intends to include a creation story in the book as they hold special significance for Indigenous cultures.³⁶

As *Yirra* does not contain creation stories and the story was based on the lives of young Aboriginal children from the school, cultural clearances were not especially relevant to implementing the writing protocols in the development of this novel. The student co-authors implicitly approved the story by offering ideas based on their personal experiences.

Elders Aunty Gloria Martin and the late Aunty Beryl Belleair-Timbery, however, advised Dr Heiss and the students on matters pertaining to Indigenous cultural expression in the novel by reading and commenting on a draft, and by working directly with the students alongside Dr Heiss. They also helped to check the accuracy of the historical information contained in the draft.

4. Interpretation, integrity and authenticity

Indigenous people should be consulted on the representation of their Indigenous heritage in order to ensure that the interpretation, integrity and authenticity of a story is preserved.³⁷

Interpretation pertains to how ICIP is presented - it encompasses the perspective provided and the terminology used to speak about cultural heritage.³⁸

Dr Heiss's awareness of these concerns is clear from the following:

- The development and publication of *Yirra* was designed to break down negative Aboriginal stereotypes and provide a positive and honest portrayal of the lives and experiences of the young Aboriginal children who helped to write the novel. It also aimed to empower the children by placing them on the Australian literary radar.
- Accuracy in the representation of Aboriginal culture in the novel was achieved by consulting with the student co-authors, and with research sourced from the local

³⁴ Ibid 12.

³⁵ Ibid 13, 34.

³⁶ Ibid 14.

³⁷ Ibid 17.

³⁸ Ibid.

history section at the Bowen Library. The novel also incorporates feedback from Elders Aunty Gloria Martin and the late Aunty Beryl Belleair-Timbery.

- Artist, Adam Hill of the Dhungutti people was commissioned by the publishers to illustrate the novel. This helped to ensure that the illustrations were authentic.

It is prudent to consult with the author and other relevant people when choosing artistic works for book covers in order to ensure that the cover image is culturally appropriate and not exploitative.³⁹

The cover image was checked for cultural appropriateness by Dr Heiss, who commented as follows:

Thankfully, I was sent a draft of the cover before the book went to print, because the original cover had dots acting as an anchor to the main illustrations. I explained to the editor that dot paintings were not traditionally part of the local cultural practice (nor were they part of [the illustrator's] general style). The dots were replaced with flowing lines that did the same job in terms of anchoring the picture.

5. Secrecy and confidentiality

Indigenous people have the right to prevent publication of secret and sacred knowledge which may be a transgression of Indigenous customary law. They are also entitled to keep personal and confidential information private.⁴⁰

Yirra does not contain secret or sacred material, or confidential information about individual Indigenous people.

If the author intends to include the name or likeness of any deceased Indigenous person in his or her book, it is vital to obtain clearance from the deceased person's family or community prior to publication, because the reproduction of a deceased person's name and image is offensive in many Indigenous communities. This process will ensure that the author and/or publisher complies with the appropriate protocols, which may include the use of special warnings.⁴¹

Yirra mentions the late Joe Timbery, who was famous for boomerang throwing. Aunty Beryl Beller-Timbery, who checked drafts of the novel, was related to him and was therefore able to consent to his inclusion.

6. Attribution and copyright

Indigenous people should be accorded proper acknowledgment for their contribution to the development of a literary work.⁴²

³⁹ Ibid 20.

⁴⁰ Ibid 36.

⁴¹ Ibid 20-1, 36.

⁴² Ibid 22.

Both Auntie Gloria Martin and the late Auntie Beryl Beller-Timbery were thanked in the Acknowledgments section of the novel for taking the time to check drafts of the novel and provide feedback on its Indigenous cultural content.

Copyright refers to legal protection of a work which allows the author to use it and prevent others from profiting from it without his/her permission. Although authors are not legally required to register for copyright protection (as copyright exists as soon as a work is created) it is advisable to include a copyright notice to deter potential infringers, and notify people how to contact the copyright owner in order to copy the work.⁴³ *Yirra* contains the following copyright notices:

Copyright© text Anita Heiss and the Children of La Perouse Public School 2007

Copyright© illustrations Adam Hill 2007

Furthermore, writers and publishers are encouraged to use written agreements. Written agreements are better than oral agreements because the parties have a document outlining their obligations. This means the arrangement is better understood. Dr Heiss signed a written contract with the publishers - ABC Books (now HarperCollins) - to govern the publication of *Yirra*.

7. Proper returns and royalties

Indigenous people are entitled to receive proper returns for their contribution and the use of their cultural material. If an Indigenous writer is commissioned, they should be paid fees at an appropriate industry rate.⁴⁴

This obligation to provide proper returns was met by the publishers by including a clause in the contract stating that the royalties for the novel (including the advances) would be split 50:50 between Dr Heiss and La Perouse Public School(as the representative of the local students who co-wrote *Yirra*). Dr Heiss also registered *Yirra* with Copyright Agency, Public Lending Right (PLR) and Educational Lending Right (ELR). These government schemes provide compensation to authors when a book is used for educational purposes free of charge..⁴⁵

The provision of non-pecuniary benefits to Indigenous people or groups is another respectful way of allowing Indigenous people to share the benefits for use of their ICIP.⁴⁶ This was implemented in regards to *Yirra* by giving every child at La Perouse Public School a complimentary copy of the book on the day of the launch.

⁴³ Ibid 22-3, 27, 37.

⁴⁴ Ibid 30, 37.

⁴⁵ Ibid 30.

⁴⁶ Ibid.

8. Continuing cultures

As Indigenous cultures are dynamic and evolving, the protocols within each distinct group and community will change over time, as the community itself changes. Consultation is therefore an ongoing process and it is advisable to consult with Indigenous people or communities for future uses of the work that may not have been envisaged at the date of publication.⁴⁷

Although Dr Heiss did not explicitly arrange a future consultation with the Indigenous people with whom she consulted in the process of writing *Yirra*, she believes that it would not be difficult to negotiate with La Perouse Public School (as representatives of the community of students) if it is necessary to do so in the future.

9. Recognition and protection

Indigenous people are entitled to the protection of their Indigenous heritage. This can be achieved by giving Indigenous authors copyright in their literary work, as it gives control over the reproduction and dissemination of work.⁴⁸ This is all the more important in light of increasing non-Indigenous appropriation of Indigenous works by non-Indigenous people.⁴⁹

Copyright in *Yirra* is jointly owned by Dr Heiss and La Perouse Public School. This means that Dr Heiss must obtain the consent of the school if she wishes to exercise any of her rights under copyright (e.g. the right to licence the reproduction rights to a third party), and vice versa.⁵⁰

Key lessons

1. To recognise the collaborative and community nature of an Indigenous writing project, authors can share copyright with collaborators, however assignment must be in writing.
2. Where possible, Indigenous illustrators should be commissioned to enhance the level of Indigenous involvement and facilitate Indigenous interpretation of their cultural material.
3. Writers and publishers should negotiate a written publishing contract.

⁴⁷ Ibid 32.

⁴⁸ Ibid 38.

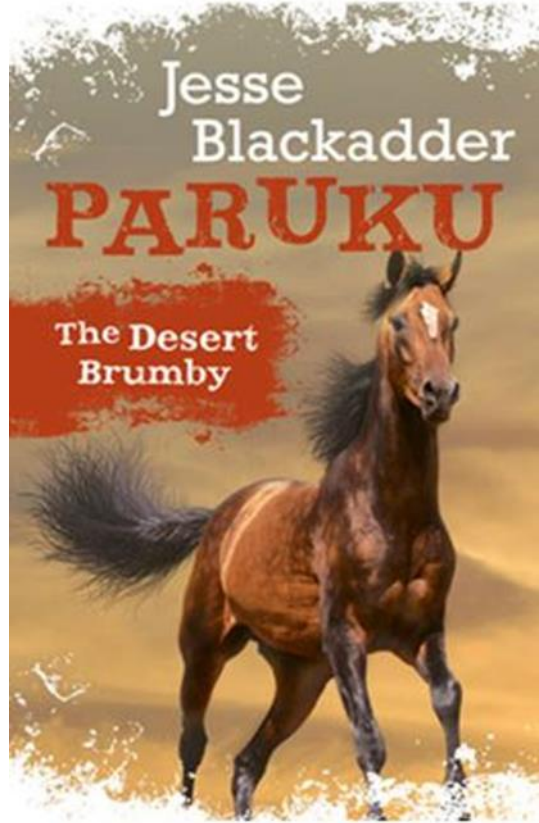
⁴⁹ Ibid 32.

⁵⁰ Ibid 23-4.

Paruku: The Desert Brumby by Jesse Blackadder

Introduction

*Paruku: The Desert Brumby*⁵¹ is a novel written for 8-12 year-olds by Jesse Blackadder - published by the ABC Books imprint of Harper Collins Australia in 2014. It tells the story of a 12-year-old non-Indigenous girl who travels to the remote Kimberley desert with her father (an equine horse vet who has been employed by the Sheik of Dubai to capture wild brumbies for his endurance stables). As the novel progresses, the girl develops a strong attachment to a young, majestic stallion called Paruku and must confront the consequences of depriving him of his freedom. The book is based on the true story of the Kimberley brumbies' journey to Dubai.⁵² The author is non-Indigenous but the novel contains substantial Indigenous content - for instance, the word 'Paruku' in the title of the book is the Indigenous name for Lake Gregory (the place where the brumbies live in the story). There are also three to four Indigenous characters featured. The approach to consultation with the Indigenous community adopted by Ms Blackadder demonstrates successful implementation of the writing protocols by a non-Indigenous author and provides guidance to other non-Indigenous writers wishing to make use of Indigenous ICIP in their works.



1. Respect⁵³

Respect is a fundamental tenet that must inform any use of Indigenous cultural material.

Jesse Blackadder showed respect for Indigenous people and cultures throughout the process of writing her novel. She consulted with Indigenous people about the authenticity of her representation of Indigenous people and attributed and sought to remunerate them for their contribution.

⁵¹ Jesse Blackadder, *Paruku: The Desert Brumby*, Harper Collins, 2014.

⁵² HarperCollins Publishers, *About the Book: Paruku the Desert Brumby* by Jesse Blackadder (2014) HarperCollins Australia <<http://www.harpercollins.com.au/books/Paruku-Jesse-Blackadder/?isbn=9781743098219>>; Jesse Blackadder, *Paruku The Desert Brumby* (2014) <<http://www.jesseblackadder.com/books-for-kids/paruku-the-desert-brumby/>>

⁵³ Australia Council for the Arts, *Protocols for producing Indigenous Australian writing: Writing* (2nd ed, 2007) 11-12, 34.

Ms Blackadder displayed awareness of the great diversity of Indigenous culture by recognising the fact that even within the Indigenous community of Mulan (which she contacted to review her manuscript) there was a divergence in views about the most appropriate ways to manage the brumbies.

2. Indigenous control

This principle acknowledges Indigenous people's right to self-determination in their cultural affairs and the expression of their cultural material.⁵⁴

Ms Blackadder aimed to facilitate Indigenous involvement in the book by consulting with Indigenous people in authority in the relevant Indigenous community, both while she was researching the book and completing the manuscript.

3. Communication, consultation and consent⁵⁵

Non-Indigenous writers should consult with the relevant Indigenous people in authority if they intend to utilise Indigenous cultural material and histories. Issues to be discussed include use and representation, as well as seeking consent for the written project.

Upon making contact with a Broome-based environmentalist who was working with the brumbies in the Kimberley desert, Ms Blackadder became aware that Indigenous people's interests were intertwined with consideration of solutions to the over-population of brumbies. As a result, she decided that it would be necessary to consult the Indigenous community in order to gain a holistic and deeper appreciation of the issues at play. Through contacts provided by the environmentalist, Ms Blackadder contacted the ranger centre at the Indigenous Protected Areas (IPA) office, who arranged for her to talk to the traditional owners from the area.

If consultation necessitates visiting Aboriginal lands or outer Torres Strait Islands, the author must obtain permission from the local land council or trust, or the relevant community council.⁵⁶ Ms Blackadder needed to travel to the remote Mulan community in the Kimberley region in order to consult with traditional owners regarding the issue with the brumbies which was the subject of her novel. She applied for a permit from the Kimberley Land Council in line with the protocols. Once there, she was able to consult several times with Jamie Brown, the Head Ranger and a traditional owner, regarding the Indigenous content of her proposed novel. Jamie Brown also agreed to review the manuscript on behalf of the community and arranged for Ms Blackadder to speak with another traditional owner.

The writing protocols recommend asking the Indigenous people originally consulted for approval to review the first draft.⁵⁷ Ms Blackadder complied with this obligation by asking Jamie Brown to review the component of the manuscript (approximately one third of the total length) that was set near Mulan. The author also asked for feedback from writer and

⁵⁴ Ibid 12.

⁵⁵ Ibid 13-14, 34-5.

⁵⁶ Ibid 12.

⁵⁷ Ibid 14.

researcher, Kim Mahood. Despite being non-Indigenous, Ms Mahood grew up near the Mulan community and remained closely connected to it, spending some months of every year in the community. Ms Mahood assisted in the review process through discussions with Jamie. Ms Blackadder also showed the manuscript to a non-Indigenous friend who was living at Yuendumu and has connections with that community stretching back many years.

Ms Blackadder observes that the consultative process that she undertook (although costly as she funded her own trip to the Mulan community using her author advance) engendered in her a more profound understanding and knowledge of the community about which she was writing, and ultimately resulted in a more informed novel than she would have written had she decided not to consult.

4. Interpretation, integrity and authenticity⁵⁸

Indigenous individuals and communities should be consulted on how their cultural material is presented in order to maintain its integrity.

Given that the story of the brumbies was closely linked to the Mulan community, Ms Blackadder ensured that its members had some input into the representation of their cultural heritage in the novel by showing the draft manuscript to Jamie Brown. This process also served to enhance the cultural significance of her book.

One piece of constructive criticism that she received as a result of this wider consultation (via the friend at Yuendumu) was that she had failed to capture the 'language and humour' of the community. Whilst Ms Blackadder attempted to redress this perceived shortcoming, it proved unrealistic for her as she did not feel close enough to the daily reality of community life, and could only ever write from the perspective of a non-Indigenous person. Nevertheless, Ms Blackadder attempted to accommodate this limitation by writing about the Indigenous characters in her novel from the point of view of the non-Indigenous protagonist.

Another way that the author attempted to improve the integrity of her representation of Indigenous culture was by participating in a workshop run by Indigenous author Melissa Lucashenko on writing Indigenous characters prior to starting the novel. This guided her approach in writing the novel and helped her identify the appropriate Indigenous people and groups for consultation.

Despite the fact that Ms Blackadder is an environmentalist and horse lover, she presented the controversial issues in the novel in a balanced and fair manner. This demonstrates respect for the range of views that different people hold on how to deal with the problems generated by the over-population of the brumbies in the area and helped to convey the complexities inherent in such a debate.

⁵⁸ Ibid 17-18, 35.

5. Secrecy and confidentiality

Secret and sacred material refers to information or material that is available only to those who have been initiated. Under customary Indigenous law, publication of such material is prohibited. Indigenous people's right to maintain restrictions on dissemination of their cultural knowledge should be facilitated.⁵⁹

Ms Blackadder respected this obligation by being careful not to include any secret or sacred material in the story. She referenced Indigenous stories of the local area by including some material that was publicly displayed on signs in the camping grounds.

Similarly, the personal privacy of Indigenous people should be respected by excluding their personal and confidential information from publication except with the express permission of all those who may be adversely impacted by its disclosure.⁶⁰ The author ensured that Indigenous people's privacy was not infringed by avoiding writing about real Indigenous people. Instead, she gave the characters general (but considered) personas - for example, one fictional character was an Indigenous media student from Batchelor Institute who was making a film about the brumbies.

6. Attribution and copyright

Under the moral rights provisions of the *Copyright Act 1968* (Cth), the right of attribution for authors is protected. Indigenous individuals and community members should also be attributed for their role in the development of a literary work and for use of their Indigenous cultural material in stories.⁶¹

Ms Blackadder gave the Indigenous people with whom she had consulted proper credit by including a 'Thank you' section at the end of the book thanking the people who reviewed her manuscript and acknowledging the traditional owners. She also wrote an 'After you read this book', highlighting that Paruku rangers are real and recognising their work. Furthermore, she placed a note at the front of the book which states that 'Before you read this book', it should be noted that it was inspired by the true story of the Kimberley brumbies and provides a link to information about them.

7. Proper returns and royalties

In addition to the right to receive appropriate attribution for use of their cultural heritage material, Indigenous people should be given proper returns in the form of fees or non-pecuniary benefits.⁶²

Ms Blackadder respected this obligation by offering to pay Jamie Brown for time spent providing discussion, advice and suggestions during her visit - however, she was told that the ranger service would not charge in this instance. The author has also made a donation to

⁵⁹ Ibid 20-1, 36.

⁶⁰ Ibid 21, 36.

⁶¹ Ibid 22, 36.

⁶² Ibid 30, 37.

the Indigenous Literacy Foundation, which provides books and literacy resources to Indigenous children and families in remote communities.⁶³ In terms of non-pecuniary benefits, Ms Blackadder sent signed copies of the book to Jamie Brown and to members of the community. However, she notes that it was difficult to know how many books to send and to whom to send them. She overcame this problem by finding a point of contact in the community (in this case, a non-Indigenous woman who worked in the Kapululangu Women's Law and Culture Centre in nearby Balgo community) who was able to guide her in regards to these logistical issues.

8. Continuing cultures⁶⁴

This principle refers to the fact that consultation with Indigenous people and communities is a continuous process that should not end with the publication of the literary work. As Indigenous cultures are ever evolving, the protocols within each community and group will also undergo change over time. Hence, the author has an obligation to provide for re-consultation at a later date for future uses of the work that may not have been considered at the time of the initial consultation.

Melissa Lucashenko picked up on this obligation by asking Ms Blackadder to consider how she would maintain contact with the people in the community with whom she had consulted for the purpose of future consultations.

9. Recognition and Protection

In the acknowledgements page of the book Ms Blackadder recognises and thanks the Indigenous people who helped her through the development of the story. As the story is fiction however, it falls under the copyright of Ms Blackadder.

Key Lessons

1. Research before you travel to a place which is the setting of your novel. If you visit Indigenous lands or outer Torres Strait Islands, obtain permission from the local land council or trust, or the relevant community council.
2. Give drafts of your work to Indigenous people to review prior to finalising the manuscript. Offer payment to Indigenous people for their time and expertise.
3. Acknowledge the contribution of Indigenous people and organisations as well as their link to culture, land and seas in a forward or afterword in the novel.

⁶³ Blackadder, above n 2.

⁶⁴ Australia Council for the Arts, above n 3, 32, 38.

Calypso Summer by Jared Thomas

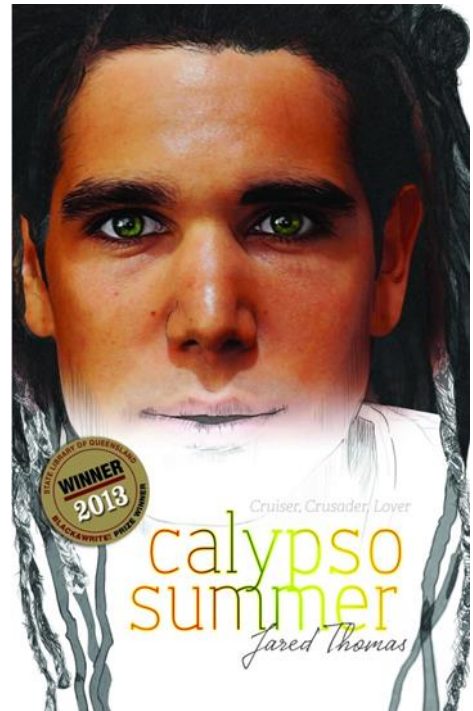
Introduction

Calypso Summer is a young adult novel, written by Jared Thomas. It tells the story of Calypso – a fictional 20-year old Nukunu man who keeps a Rastafarian guise. When he begins working at Henley Beach Health Food and Products, his boss pressures him to gather Indigenous medicinal plants for the store. This sets Calypso on a journey of self-discovery which leads him to his family, Nukunu culture and consideration of his Rastafarian guise.⁶⁵

1. Respect⁶⁶

When writing about Indigenous cultural material it is important to be respectful that it is a living culture.

The Writing Protocols encourage authors to be mindful about whether representations reflect Indigenous values. Jared Thomas states that the best thing to do is ask for permission from appropriate Indigenous knowledge holders if one wants to use Indigenous cultural material. Thomas explains that before he began writing *Calypso Summer* he sought permission from Elders, explained to them the story and discussed ways of dealing with Indigenous plant medicinal knowledge sensitivities.⁶⁷



2. Indigenous Control

Indigenous people have the right to own and control their ICIP.⁶⁸

Thomas affirmed Indigenous control by asking his Elders for suggestions and respecting the suggestions they made.⁶⁹ Thomas made clear that if anything in the story was deemed inappropriate then it would be removed or they would discuss alternative representations. Thomas explained that he is privileged enough to know who to ask permission from as some traditional and collectively owned Indigenous knowledge is under the protection of specific people and he was able to go to them to seek permission.

Although Thomas is a Nukunu person, he explains that he should always go to the knowledge holders to ask permission.⁷⁰

⁶⁵ Jared Thomas, 'Calypso Summers', *Journal of Australian Indigenous Issues*, 2007, 7.

⁶⁶ Australia Council for the Arts, *Protocols for producing Indigenous Australian writing: Writing* (2nd ed, 2007) 11.

⁶⁷ Jared Thomas, *Above n*, 8.

⁶⁸ Australia Council for the Arts, *Writing*, *Above n* 12-13

⁶⁹ Jared Thomas, *Above n* 8.

⁷⁰ *Ibid* 8.

3. Communication, Consultation and Consent

Communication, consultation and consent involves communicating with the right traditional Indigenous owners to gain permission.

Thomas states that encapsulating Nukunu life in fiction could have an effect on his interactions with his family and culture. Therefore, when he began writing he ensured that he explained the idea for the novel to everyone concerned. He was considerate of people, knowing that they may have little time and when he asked them to read through his drafts of *Calypso Summer* he was appreciative. When his family read through the drafts Thomas mentions that if there was anything that they were unhappy with he would remove those sections of information.

Before submitting the draft, all Nukunu people had the opportunity to read the book and comment.⁷¹

4. Interpretation, Integrity and Authenticity

It is important for Indigenous culture that the interpretation, integrity and authenticity of a story is maintained.⁷²

Calypso Summer was written as a fictional story but explores issues that real Indigenous people face. The book examines the impact of negative stereotypes and how they affect the Indigenous community and individuals. For this reason, the author wanted to ensure an authentic interpretation drawn from his own perspective and experience.

The book did not reproduce any images, symbols, stories or knowledge. This is because Thomas created the book for a younger audience. The issues discussed in the book are meant to give the reader a general view of Indigenous culture and knowledge.

Members of the community were given the opportunity to sign off on the project before it was printed. Although a lot of the story was written from Thomas' own cultural heritage, he wanted to let his family and community know about the book and what information was going to be made public.

Thomas used an image of his cousin on the front cover of the book and for marketing the project. He discussed this with his cousin to make sure that he agreed with the wide dissemination of his image. To secure the image rights, his cousin was given a written contract. The contract was discussed in detail so that the terms were understood.

The book acknowledges Thomas' family for their help in providing information and support. Although, the book is a fictional work, it drew from family stories, and Thomas wanted to honour this connection by ensuring that the family was comfortable with how the shared experience was adapted creatively.

⁷¹ Jared Thomas, Above n 8.

⁷² Australia Council for the Arts, *Writing*, Above n 17.

When the book was released there was a book launch. Thomas' family was invited and his Uncle spoke.

5. Secrecy and Confidentiality

Some ICIP may be secret or confidential.⁷³

When writing a novel about Nukunu cultural knowledge there may be a breach in some secret or confidential information. Therefore, when Thomas started writing *Calypso Summer* he made sure to seek the right permission and questioned whether what he was writing was allowed to be written down.

Thomas explains that if there was a process he had to undertake to gain permission to use Indigenous knowledge then he went through the right channels. He was able to identify these channels because he had worked in various Nukunu council roles. He explains that the biggest challenge was figuring out which plant knowledge fell into the secret and confidential realm and which did not. Thomas explained to his family that if they did not agree with anything that went into the book about Indigenous plant knowledge, it would be removed. He decided that putting the plants into the novel was not necessary due to consultation with his Uncle. He wrote the novel in a way that would not expose this sensitive information - Calypso would discover what the plants were but the readers would only read that Calypso had learned something about Indigenous cultural knowledge.⁷⁴

6. Attribution and Copyright

Attribution and copyright should be given to the relevant Indigenous people.⁷⁵

Thomas holds the copyright for *Calypso Summer* because the book is a work of fiction that he wrote. He explains that if he was writing a dreaming story or a community story he would recognise the community that held the ownership, but as, it is a work of fiction, he is the recipient of the copyright.

Attribution through acknowledgements in the book is given to Thomas' family because they offered advice on specific parts of the book.

7. Proper Returns and Royalties

Indigenous people should share in the benefits and receive proper returns for their cultural heritage material.⁷⁶

⁷³ Ibid 20.

⁷⁴ Jared Thomas, Above n, p. 11.

⁷⁵ Australia Council for the Arts, *Writing*, Above n 22-30.

⁷⁶ Ibid 30.

Proper returns and royalties for Thomas were discussed with his publisher. There was also payment available for those who were involved in reading drafts, and Thomas' cousin received payment for his photo being on the cover of the book.

8. Continuing Cultures

Cultures are dynamic and evolving, and the protocols within each group and community will also change.⁷⁷

Calypso Summer is an example of continuing cultures because it shows the development and growth of fictional individuals in the Nukunu Indigenous community. This creates a record for future generations.

If the book were to be developed into a film (which has been discussed) then there are certain things that Thomas would change. This would involve discussing with family members again and essentially re-writing the story for a new media form.

9. Recognition and Protection

Indigenous people have the right to the protection of their Indigenous heritage.⁷⁸ Thomas, as author owns the copyright in his literary work.

Thomas also recognises the contributions that his family offered through acknowledgements in the book.

In terms of protection, throughout the development of the book Thomas participated in a BBC radio documentary. This involved participants discussing their views on the production of the book and enabled Thomas to give evidence of support. This becomes a record of the process which further gives recognition to the family as cultural custodians.

Key Lessons:

1. Even if you are an accepted member of your Indigenous community it is always respectful to ask permission before using any ICIP.
2. If there is interpretation of ICIP that an Indigenous person is unhappy with, then it is respectful to either remove or revise that section.
3. Keeping track of the people who have consulted or helped during a project is always a good idea. People change their minds and if someone does this after the release of a project it is always better to give evidence of their previous acceptance.

⁷⁷ Ibid 32.

⁷⁸ Ibid 32.

Performing Arts

ILBIJERRI CORRANDERK

Introduction

CORRANDERK is a theatre production that tells the true story of the 1881 Victorian parliamentary inquiry into the running of Corranderk Aboriginal station. Developed over time and performed in different towns and cities across Australia, the show uses dramatised readings of the transcripts of the inquiry to tell the stories of the people of Corranderk. The theatre production has been staged across Australia at the Sydney Opera House, Belvoir Theatre, Northcote Town Hall, and local productions in and around the original Corranderk station.

CORRANDERK was developed as a result of an Australian Research Council Linkage funded co-production between the ILBIJERRI Theatre Company, Arts Victoria, Deakin University, The Department of Education and Early Childhood Development, ILBIJERRI Theatre Company, The Koorie Heritage Trust, La Mama Theatre, Regional Arts Victoria, Royal Holloway University of London (UK), The State Library of Victoria, The University of Melbourne, The University of Sussex (UK), The Victoria Health Promotion Foundation (VicHealth), Victorian Aboriginal Education Association Inc (VAEAI). The funding went not only to the development of the theatre production, but also to educational materials and research into the story of Corranderk. This case study examines the way consultation and protocols were used in the development of the theatre production of CORRANDERK, as told by the ILBIJERRI Theatre Company.

1. Respect

Respectful use of Indigenous cultural material and life experience is a basic principle.⁷⁹

ILBIJERRI Theatre Company and its producing partners wanted to respect the rights of Aboriginal people to own, control and maintain their cultural histories and stories in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*.⁸⁰ Even though the work is based on publically publicly available historical records, the story is an Aboriginal story and Aboriginal people should be consulted about interpretations of their history.

In 1863 the Victorian government established an Aboriginal station called Corranderk, to provide land for dispossessed Aboriginal people. The station was on the traditional lands of the Wurundjeri and became home to Aboriginal people from Wurundjeri, Taungurong and Ban Warrung nations across Victoria, who ran a successful enterprise on the lands growing

⁷⁹ Australian Council for the Arts, *Protocols for Producing Indigenous Australian Performing Arts: Performing Arts*, (2nd ed, 2007) 10.

⁸⁰ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (2008) http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

produce and making crafts that were then traded in Melbourne. In 1886, the *Aborigines Protection Act* was enacted which required 'half-castes' under the age of 35 to leave the station. As a result, all farming and trading enterprise ceased because too many of the Aboriginal residents were forced off the station. The Corranderk station was eventually closed in 1924.

CORRANDERK is based on the true story of 19th century events at the Corranderk Aboriginal Station which lead to the 1881 Victorian Parliamentary Inquiry. It was important for the production to tell the Aboriginal stories behind the history, which meant referring both to the historical records of the story, as well as the records kept by Aboriginal families on the station, and their descendants.

2. Indigenous Control

Aboriginal people have the right to self-determination in their cultural affairs, and expression of their cultural material.⁸¹

The producers of CORRANDERK recognised the right of Corranderk descendants to be involved in the retelling of their story. CORRANDERK is at its heart an Aboriginal story, and ILBIJERRI and its producing partners wanted to acknowledge this by developing its production in conjunction with the descendants of the people and communities of Corranderk.

3. Communication, Consultation and Consent

It is essential that a dance which draws from ICIP is the product of the informed consent of Indigenous owners.⁸²

The right of Aboriginal people to be consulted about the use of their cultural heritage was recognised at each stage of the development of CORRANDERK – from planning to development and staging. The process started by identifying the relevant Aboriginal communities and people to consult. While Corranderk station was on Wurundjeri lands, many Aboriginal people came to live on the station from other communities.

The partner organisations working on the development of the CORRANDERK theatre production worked together to identify the appropriate people to consult with about the show. Each partner utilised their networks and skills to benefit the consultation. The Koorie Heritage Trust had connections within the communities, and had conversations with Aboriginal people about the production. Newsletters were distributed through those networks with information about the intentions of the project. ILBIJERRI contacted their artistic and community network and sent information on the production. The Victorian Aboriginal Education Association Inc. utilised their education networks to spread the word.

After the initial information campaign, a series of events and lunches were held at Healesville and at the Koorie Heritage Trust in Melbourne. These events gave the partner

⁸¹ Australian Council for the Arts, *Performing Arts*, above n p. 12.

⁸² Ibid 13.

organisations an opportunity to explain the project in more detail and for community members in attendance to ask questions and give their feedback.

As the script was developed for the production, readings were held at Healesville to get community feedback on the way in which the story was being told. The production features several actors playing more than one character. Feedback was received during script development that it would be inappropriate for Jack Charles, who played the lead role of William Barak, to play a second character in the show. This feedback was taken aboard and the casting was changed so Charles would only play the central character.

Community consents were recorded throughout development by the project partners using email, forms and comments books. As well as the community consultations, several Aboriginal Elders worked with the producers to give their consent for the project. These included Aunty Joy Murphy and Aunty Di Kerr, who were consulted at each stage of the project and expanded to include the Ngurungaeta (Wurundjeri leader).

4. Interpretation, integrity and authenticity

Choreographers and performers should respect cultural protocols in the development and performance of dance in order to ensure that their representations of Indigenous cultures are authentic and made with integrity.⁸³

It was important to the producers to accurately and authentically relate the Aboriginal story of Corranderk. The foundation of the script is the public record of events, including archived transcripts and inquiry documentation, and recorded photos and histories. Consent was sought from the community for the use of archival images even though these were in the public domain. Archival material was supplemented by stories and knowledge handed down by Corranderk residents and their descendants who were able to provide nuance and additional information on the public records. For example, one resident testified that she was given earrings as payment for services to her employer when in fact community knowledge indicated that they were in fact engaged.

One of the issues faced in script development was the use of historical slurs which were part of the transcript of the inquiry. This issue was discussed at the consultation meetings held with community to seek guidance and feedback. Ultimately it was decided with the consent of the community that these slurs should remain in the script because the context and presentation of the story of Corranderk would illustrate the offensiveness of the language used in the inquiry.

CORRANDERK is an Aboriginal story, and it was important to ensure that it was told by Aboriginal people. The majority of the creative team behind the staging of the show were Indigenous. The Director, Isaac Drandic, an Aboriginal actor and director from Perth is also the Associate Director at ILBIJERRI and made his directorial debut with CORRANDERK. The script was written by Andrea James, a Yorta Yorta and Kurnai woman and Artistic Associate at Carriageworks and Giordano Nanni a non-Aboriginal writer and editor at Juice

⁸³ Ibid 17.

Media. All Aboriginal characters in the production were portrayed by Aboriginal actors, with over 50% of the cast being Aboriginal, including renowned actor Jack Charles.

5. Secrecy and confidentiality

The personal privacy of Indigenous people should be respected by seeking permission from those that might be impacted by the disclosure of personal and/or confidential information.⁸⁴

Some Aboriginal content may not be suitable for wide dissemination on the grounds of secrecy and confidentiality. CORRANDERK is based on a story which was already in the public domain through government records and transcripts. While the records may have been public, it was not a guarantee that the information found in the records was culturally appropriate for widespread use. As part of the consultation process, ILBIJERRI and the project partners made sure that it was culturally appropriate for the story to be told, and that nothing in the records were secret or sacred.

A warning was displayed in both the foyer and in the show program to alert audiences to the fact that images and names of deceased persons were used in the show.

6. Attribution

Attribution should be given to Indigenous people for their contribution to the development of the performance and use of their Indigenous cultural material.⁸⁵

The producers recognised the rights of the Aboriginal people involved in the history of Corranderk to be recognised. The families and characters whose stories are told in the production are named in the theatre programs for the show. The programs also acknowledge the people, groups and organisations who worked with the producers on consultations and development of CORRANDERK.

7. Proper Returns and Royalties

Indigenous people are entitled to payment for their input into performances and use of their cultural heritage.⁸⁶

The producers recognise the right of Aboriginal people to benefit from the sharing of their cultural heritage. Benefits were made available to the consultees for the project, and the community and descendants of Corranderk. People participating in the consultation process for the development of CORRANDERK were subsidised for the costs of their involvement – travel allowances were paid, and meals were provided at meetings.

As well as the Melbourne and Sydney productions of Corranderk, regional shows were staged around the Corranderk station for members of the local community. This included the premiere of CORRANDERK which was attended by over 80 local community members, and

⁸⁴ Ibid 20.

⁸⁵ Ibid 21.

⁸⁶ Ibid 21.

several subsequent performances. These events were staged at a hotel near the homestead on the original station, as well as another production at the Healesville Memorial Hall performing arts centre. These productions were open to all community members free of charge.

The producing partners wanted the community to share in the box office takings from the staging of CORRANDERK, recognising their rights in the story. A community royalty payment scheme was set up so that the community could benefit from the sharing of their culture. Discussions were held with the community as to who the appropriate recipient of royalties should be - this was determined to be the Corranderk Cemetery Association for the upkeep of the Corranderk Cemetery.

8. Continuing Cultures

Indigenous people are responsible for ensuring that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.⁸⁷

CORRANDERK was developed with the aim of sharing and retelling an important moment in modern Aboriginal history. The producers wanted to ensure that Aboriginal stories find a place in mainstream Australian theatre. By developing and staging CORRANDERK, the producers also wanted to work with the descendants of Corranderk station and communities to rediscover their own history and be actively involved in how that history is shared. The script to CORRANDERK is already being taught in schools to children of all cultural backgrounds in Victoria.

9. Recognition and Protection

Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights.⁸⁸

CORRANDERK respected heritage rights through the inclusion of Indigenous people in the play. Since more than 50% of the production was Indigenous (and both the director and writers were Indigenous) culture and heritage rights were in the forefront of their minds.

Key lessons

1. It is important to have cultural protocols in place even in broad multi-partner projects. Sometimes developing your own standards and protocols for your part of the project is the best solution.
2. It is just as important to consult with Aboriginal and Torres Strait Islander communities when using historical stories which are on public records. Identifying the right groups and communities is a key step.
3. Negotiating recipients of royalties for use of stories should be respectful and not cause any additional tension in communities. It can be a good idea to negotiate beneficiaries before discussing amounts.

⁸⁷ Ibid 22.

⁸⁸ Ibid 23.

Moorambilla Voices

Introduction

Moorambilla Voices is a performing arts program for primary and secondary school children from the North-West region of NSW. The program was named for the historic parish of Moorambilla in the county of Leichhardt in that region. Now in its 10th year, the program covers over 1,400 students from over 70 schools across that region, covering an area of 260,000 km². Up to 200 of the students are selected each year to attend an artistic development camp in August and a regional gala concert in September. In 2014, 4 students of Moorambilla Voices were the subject of the ABC documentary 'the Outback Choir'.

Moorambilla Voices comprises the Moorambilla boys and girls choirs for primary aged children, and MAXed OUT (the combined secondary school choir). Moorambilla Voices participants come from both Indigenous and non-Indigenous backgrounds. The children have the opportunity to work with local Aboriginal artists and Elders, as well as with artistic partners from arts organisations such as the Sydney Symphony Orchestra, the Song Company and TaikOz.



Moorambilla Voices was founded in 2006 by Artistic Director Michelle Leonard. A conductor with extensive educational experience, Leonard wanted to give back to her home region in a way that fostered development of the arts. The relationship between Indigenous and non-Indigenous students and community members was vital to the success of the program. Moorambilla Voices uses the arts as a developmental tool to empower children and deliver meaningful educational outcomes.

1. Respect

It is essential that a dance which draws from ICIP is the product of the informed consent of Indigenous owners.⁸⁹

⁸⁹ Australian Council for the Arts, *Protocols for Producing Indigenous Australian Performing Arts: Performing Arts*, (2nd ed, 2007) 13.

Creating and maintaining a respectful relationship between Moorambilla Voices and its Indigenous contributors is vital to the ongoing success of the program. That relationship has been built on personal trust and respect for the cultural role that Indigenous partners bring to Moorambilla Voices.

Over its 10 year history, the program has worked with a number of Indigenous artists and Elders to develop an artistic program which tells the stories of regional North-West NSW. That story includes the Aboriginal cultures and communities which have lived on that land for many thousands of years.

Schools within the region often lack the opportunity for musical education, and for Indigenous-led cultural histories. Moorambilla Voices provides a rare opportunity for school children to learn local Aboriginal stories and arts within a respectful and safe space.

I think the most important word you could ever teach a child is respect. Respect everyone no matter what colour or race they are. Whether they are woman or man. If you want the respect you give it. That's how I see it. That's what I am trying to teach every day.

Frank Wright, Gamilaroi artist with Moorambilla Voices

To create that safe space, Moorambilla Voices works with Indigenous children, contributors and artists in all aspects of the program. Since 2013 there has been an Indigenous Youth Leader - a graduate of the Moorambilla Voices program who comes back to the camp to supervise and work with younger students. Aunty Brenda McBride has been involved as both a camp supervisor and as an artistic and cultural Elder and advisor to the program for several years. Over its history, Moorambilla Voices have worked with a number of Aboriginal artists and Elders in the communities in its region to incorporate Indigenous culture within the artistic program.

2. Indigenous Control

Aboriginal people have the right to self-determination in their cultural affairs and expression of their cultural material.⁹⁰

Moorambilla Voices respects the right of Indigenous people to control the sharing and use of their cultural heritage. Indigenous led artistic development is part of the core of the artistic component of the program.

During the 2013 and 2014 Moorambilla Voices programs, the Moorambilla Voices children and artists in residence worked with local Gamilaroi visual artist, Frank Wright, to create concepts and artworks for the gala performance. This was done at a hands on level, with Frank sharing his cultural stories and background, and instructing the children in the program. This opportunity for Indigenous led education is rare in the region and provides an example of alternative educational opportunities to engage young Indigenous and non-

⁹⁰ Ibid 12.

Indigenous people. By learning from and working with artists and Elders from the local community, the Indigenous participants have the opportunity to re-engage with their culture in a way that is part of their everyday educational opportunities.

Moorambilla Voices provides opportunities for regional school children to continue their education in a meaningful way by providing strong and positive Indigenous role models to support their education. It also reinforces the rights of the local Aboriginal community to control how their stories, knowledge and culture are shared, and to be involved in projects related to their heritage.

3. Communication, consultation and consent

Respectful use of Indigenous cultural material and life experience is a basic principle.⁹¹

Communication, consultation and consent with Aboriginal contributors and the local Aboriginal communities has been vital to Moorambilla Voices' ongoing success.

Moorambilla Voices engages with local Indigenous artists, communities and art centres to integrate Indigenous knowledge, art and traditions into our educational program. For example in 2011 the MAXed OUT program worked with the women of the Ngemba Wailan artist collective to develop and create new music and artworks used in Moorambilla Voices performances. This was done as a collaborative creative effort between the children and the artists. The group created artwork inspired by the ancient tribe of the Ngemba Wailwan and the artists produced 25 totem poles and the dramatic back-drop for the Saturday evening gala performance.

4. Interpretation, integrity and authenticity

Choreographers and performers should respect cultural protocols in the development and performance of dance in order to ensure that their representations of Indigenous cultures are authentic and made with integrity.⁹²

Opportunities for Indigenous artists in North-West regional NSW are rare. Moorambilla Voices is a platform which enables Aboriginal communities, Elders and artists to interpret and share their own cultural history. The right of Indigenous people to be the interpreters of their story is vital to continuing authentic Indigenous culture in the region.

Aunty Brenda McBride is an Elder and knowledge-holder from the Kamilaroi (Gamilaroi) and Yuwaalaaray (Euahlayi) language groups in north-western NSW (Brewarrina, Walgett and Lightning Ridge). She has been working with Moorambilla Voices for three years. She spends time with the artistic partners and children as part of the camps:

I tell them stories from our culture and what I used to do with my aunts as a child. They get really into it...I learnt from my aunts about bush food and bush medicine – I used to go fishing and

⁹¹ Ibid 10.

⁹² Ibid 17.

walking in the scrub with my aunties and they would tell me stories. That's what I like to do with the kids here at Moorambilla. We talk about what animals do and what they represent and whose totem is what. For example, Frank Wright and my totems are emus –that means we can't eat one another.

Aunty Brenda McBride

In 2014, the MAXed Out choir performed the original composition 'Sky Earth Bird'. This piece was developed by composer Andrew Batt-Rawden from a story shared by Aunty Brenda McBride and Frank Wright at the Moorambilla Voices camp. The MAXed Out Choir performed the final piece at a gala concert in Coonamble, which was attended by both Aunty Brenda and Frank, and their extended families. The generosity of both Frank and Aunty Brenda in sharing their cultural stories with the children of Moorambilla was the lynchpin in the success of this performance. The shared interpretation of the story, under the control and direction of Aunty Brenda, made the piece an authentic and collaborative artistic work.

Also in 2014 the Moorambilla Voices girls and boys choir performed 'Pallah Pallah' - an original composition by Alice Chance, based on two Indigenous stories. 'Pallah Pallah' is a story from Lightning Ridge in NSW, and was shared with Moorambilla Voices by the daughter of Aunty June Barker (a Yorta Yorta woman from Cummagunya) in conjunction with the story of 'How the Opal Came to Be' from Aunty Rose Fernando (a Kamilaroi [Gamilaroi] and Yuwaalaaray [Euahlayi] woman).

The development of the commissioned work based on the 'Pallah Pallah' story took over 18 months, starting with meetings between the Moorambilla Voices Artistic Director and the traditional owners of the stories. This was facilitated by local Elder Aunty Brenda. A year later, the full story was shared with Moorambilla Voices to be interpreted for the choirs. This interpretation took place with full permission as a collaboration between the Composer, the original text of the story and the children of the Moorambilla Voices choirs. Some of the Indigenous children in the choir from Lightning Ridge knew of the 'Pallah Pallah' story and helped to interpret the story for performance. This helped to create an intercultural understanding between the choristers. By the time the work was finished it encompassed lyrics (developed with the Moorambilla Voices choirs based on the original text), original score (by Alice Chance) and dance (by choreographer Jacob Williams from the Queensland Ballet Company). The work was performed at Coonamble Pavilion in 2013 in front of an audience of around 8780 people.

5. Secrecy and confidentiality

The personal privacy of Indigenous people should be respected by seeking permission from those that might be impacted by the disclosure of personal and/or confidential information.⁹³ Some Indigenous stories and knowledge are not appropriate to be shared widely, and Moorambilla Voices respects the rights of Indigenous people to restrict access to cultural knowledge on the grounds of secrecy and confidentiality.

⁹³ Ibid 20.

Moorambilla does not ask its Indigenous partners to share anything that is secret or sacred. Artistic partners and Elders share their stories and culture on their terms. Moorambilla Voices respects the rights of all of its Indigenous artists and contributors to keep confidential their cultural knowledge and histories.

6. Attribution

Attribution should be given to Indigenous people for their contribution to the development of the performance and use of their Indigenous cultural material.⁹⁴

Moorambilla Voices supports the right of Indigenous people to be credited for the use of their cultural heritage.

The Indigenous knowledge holders and artists that work with Moorambilla Voices are credited for their involvement in the program. For example, the program for the 2014 Moorambilla Voices program names Aunty June and Aunty Rose, and publishes their stories that form the basis of the new works developed and performed by Moorambilla Voices. There is also a feature article on Frank Wright and his development of the emu artwork for the project.

Moorambilla Voices also runs a website and a blog with information on the program. The blog features updates from the camps and the festival, and gives Moorambilla an opportunity to share the story of its Indigenous participants with more detail and nuance. For example, interviews with Frank and Aunty Brenda were posted on the Moorambilla blog in 2014 so that they could share their experiences of working with Moorambilla Voices.

7. Proper Royalties and Returns

Indigenous people are entitled to payment for their input into performances and use of their cultural heritage.⁹⁵

Moorambilla Voices provides benefits to the Indigenous partners in the program, as well as to the broader community.

Moorambilla Voices is one of the few programs which has continuously operated in and provided opportunities for Indigenous artists in regional North-West NSW. These opportunities provide artists with a platform to showcase their skills, knowledge and abilities within the region. *The Outback Choir* (a documentary set during the 2013 Moorambilla Voices festival) showcases those abilities on a national level, reaching over 600 000 Australian viewers. This exposure provides opportunities for further work. For example, after his involvement in Moorambilla Voices, artist Frank Wright has had the opportunity to showcase his work in galleries, and to teach workshops to primary and secondary-aged students.

⁹⁴ Ibid 21.

⁹⁵ Ibid 21.

These benefits are in addition to the direct benefits that Indigenous artists receive from their participation in Moorambilla Voices. The artists all receive payment for the skills and services to the program. They also receive complimentary tickets for themselves and their extended family to the Moorambilla Voices performances, as well as the opportunity to attend additional events across the country to promote Moorambilla Voices.

8. Continuing cultures

Indigenous people are responsible for ensuring that the practice and transmission of Indigenous cultural expression continues for the benefit of future generations.⁹⁶

Moorambilla Voices works to promote and strengthen regional understanding of local Aboriginal cultures through its work with Aboriginal contributors and artists. It does this by acknowledging that Indigenous culture is a living thing that develops and changes over time. By working in a trusting collaboration with Elders and artists from the region, Moorambilla Voices can work with the local Aboriginal people and communities to assist in maintaining Aboriginal culture in North-West NSW.

A lot of kids don't know about their own culture or their own region's stories – even though our story line has been passed down over 40-50,000 years. They don't know who they are or where they come from. It's vital to understand the long trail of history behind you, to find out who you are.

Aunty Brenda McBride

The commission and performance of new artistic and performing arts pieces is key to the artistic program of Moorambilla Voices program. These pieces usually feature work or stories of local Aboriginal artists, Elders and community members. As a result of Moorambilla Voices artistic collaborations, new works by (or inspired by) Aboriginal stories and culture have been created and shared.

In 2014, Frank collaborated with Fiona Fagan to create large scale artworks as part of the set design for the Moorambilla Voices September gala performance. These works were based on Frank's totem, the Dhinawan (Emu). The Emu is a figure of significance to the region, and to Aboriginal astronomy in the 'Emu in the Sky'. The final art incorporated imagery of water and the environment from the region. These artworks were 14 x 7 metres and took Frank and Fiona many days to paint. The artworks were hung and displayed as part of the gala performance. Reproductions of the works were printed onto t-shirts which all Moorambilla Voices children wore during the performance, as well as on the program for the show. In many ways, Frank's work represented the artistic center of the performance, as the symbol from which all other stories and compositions emanated.

⁹⁶ Ibid 22.

A documentary recently released on the subject of the Outback Choir, called '*Sky Wide Open*' and was also shown at Sydney Film Festival. It was voted Foxtel Movies Audience Award for best documentary feature. The kids attended the showing.

9. Recognition and Protection

Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights.⁹⁷

Throughout the process and creation of Mooramilla Voices there was constant consultation to ensure that the right recognition and protection was being offered to the participants as well as those that offered cultural knowledge.

Key Lessons

1. Build and maintain trust and relationships between Aboriginal partners and artistic partners over time.
2. Work with Indigenous artists to interpret traditional stories in new mediums whilst respecting and acknowledging the cultural heritage in the original stories.
3. Ensure Indigenous representation in all aspects of the program – from youth leader, to students, to artists and supervisors.

⁹⁷ Ibid 23.

NAISDA Aboriginal and Torres Strait Islander Cultural Protocols

Introduction

NAISDA is the national college that trains Aboriginal and Torres Strait Islander Australians in



(Photo by elgazzar.com.au from NAISDA End of year Show Your Skin My Skin 2014)

dance. NAISDA has been training Aboriginal and Torres Strait Islander performers since 1976. The college is located on Darkinjung land on the Central Coast of NSW and offers world class training and accredited training that is rich in cultural learning and practice. NAISDA also follows a set of Aboriginal and Torres Strait Islander Protocols when engaging with Aboriginal and Torres Strait Islander

communities and with every performance that they do. These protocols enable the protection of

Aboriginal and Torres Strait Islander Cultural and Intellectual Property.⁹⁸

1. Respect

Respectful use of Aboriginal and Torres Strait Islander cultural and traditional knowledge is a basic principle.⁹⁹

NAISDA has developed protocols that they follow when engaging with Aboriginal and Torres Strait Islander communities as well as each performance undertaken. NAISDA's cultural protocols can be found on their website.

When explaining the use of respect in the performances that NAISDA produces one must look to the protocols. The protocol that falls under respect explains that NAISDA upholds the importance of kinship and traditional knowledge by promoting an inclusion of Aboriginal and Torres Strait Islanders throughout the organisation. They also respect the right that Aboriginal and Torres Strait Islanders have to their cultural



(Photo by elgazzar.com.au from NAISDA End of year Show Your Skin My Skin 2014)

⁹⁸ NAISDA: Who We Are, <http://www.naisda.com.au/about-naisda/who-we-are/>, accessed 4 May 2015.

⁹⁹ Australian Council for the Arts, *Protocols for Producing Indigenous Australian Performing Arts: Performing Arts*, (2nd ed, 2007) 10.

and intellectual property and understand that some of that knowledge may be secret or confidential. Therefore, they follow any restrictions that may be put forward by the Aboriginal or Torres Strait Islander community. They also use their best efforts to enforce the cultural mourning practices that apply when a person from the Aboriginal and/or Torres Strait Islander community passes.¹⁰⁰

2. Indigenous Control

Aboriginal and Torres Strait Islanders have the right to control their own cultural knowledge and intellectual property. There are many ways in which these rights can be respected.¹⁰¹

When NAISDA engages with Aboriginal and Torres Strait islander communities they envisage this relationship to be maintained over a period of years, if not a lifetime. NAISDA endeavors to create an environment where the relationship benefits the communities culturally and financially through the implementation of Cultural Protocols. Some examples of this include:



(Photo by elgazzar.com.au from NAISDA End of year Show Your Skin My Skin 2014)

- NAISDA has maintained an eight year relationship with the Ganambarr Family of the Datiwuy clan NE Arnhem Land Annual Cultural residency.
- NAISDA has reconnected with Moa Island Torres Strait, through NAISDA Graduate Dennis Newie who has established a Cultural dance group ('Arpaka') working out of the North Queensland region.

Kim Walker (CEO of NAISDA) explains that NAISDA first approaches a community to build a relationship. From here, tutors from the community visit NAISDA and in turn NAISDA and its students visit the community - this forms a relationship between the community and NAISDA. NAISDA does not seek to learn and perform dances from a community without forming a relationship. The dances taught to NAISDA and its students always remain the intellectual property of the community and NAISDA only performs the dances with the community or clans permission. The Aboriginal and Torres Strait Islander community or clan is able to say yes or no and NAISDA will respect their wishes.

3. Communication, Consultation and Consent

Aboriginal and Torres Strait Islander communities should be informed of the use and representations of their Aboriginal and Torres Strait Islander Cultural and Intellectual Property. They should also be aware of the implications of the consent.¹⁰²

¹⁰⁰ NAISDA Cultural Protocols, above n.

¹⁰¹ Australia Council for the Arts, above n 11.

¹⁰² Ibid 13-17.

The NAISDA protocols recognise the importance of gaining consent and consulting with the relevant Aboriginal and Torres Strait Islander communities. They also recognise that this is because Aboriginal and Torres Strait Islanders have the rights to their heritage and cultural knowledge. NAISDA's protocols explain that they only use traditional knowledge and cultural expression when the correct Aboriginal and Torres Strait Islander communities or clans give permission. Once this permission has been gained they do not seek cultural rights over the knowledge or expressions.¹⁰³

A performance that is an example of this was choreographed by Dennis Newie. NAISDA went and stayed in Wug Village. During their time there they were able to share stories of culture. The cultural Moa Island Dance was then performed with the permission of Dennis Newie and the village.

4. Interpretation, Integrity and Authenticity

Indigenous musicians and their communities should have control over how their cultural heritage is presented. This presentation includes interpretation, integrity and authenticity.¹⁰⁴

The majority of performances done by NAISDA are a collaboration of Aboriginal or Torres Strait Islander communities and NAISDA. Therefore, NAISDA recognises that culture, history, material and customs must all be represented with integrity and authenticity. By doing this, NAISDA can continue to build strong and committed relationships with the Aboriginal and Torres Strait Islander communities. NAISDA recognises that without the help of Aboriginal and Torres Strait Islander communities it would not continue evolving. The Aboriginal and Torres Strait Islander community is recognised as having the cultural authority and contribution to the performances that involve cultural and intellectual property done by NAISDA.¹⁰⁵

5. Secrecy and Confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality.¹⁰⁶

NAISDA understands that a lot of Aboriginal and Torres Strait Islander cultural and intellectual property is either secret or confidential. Therefore, when NAISDA is using Aboriginal or Torres Strait Islander cultural or Intellectual property they make sure that they either, approach the Aboriginal and Torres Strait Islander community or clan and seek permission to use the cultural and intellectual property, or they work with the community or clan to ensure that it does not breach any topics that may be considered confidential or secret.

¹⁰³ NAISDA Cultural Protocols, above n.

¹⁰⁴ Australia Council for the Arts, *Performing Arts*, above n 17.

¹⁰⁵ NAISDA Cultural Protocols, above n.

¹⁰⁶ Australia Council for the Arts, *Performing Arts*, above n 18.

6. Attribution and Copyright

Indigenous people should be attributed for the use of their cultural material in musical works.¹⁰⁷

NAISDA works with specific communities to build a relationship before they start working on performances. An example of this is the cultural residency of 2013 that took place at Wug Village, on Moa Island in the Torres Strait. NAISDA Dance College spent some time there to share stories and culture. During their stay they also learned traditional song and dance from the Arpaka Dance Group. This group was started in 2003 by Dennis Newie and some of his other family members.

After visiting the village there was a collaboration between NAISDA and Dennis Newie. Performances were choreographed and performed. In the EOYS program, which was distributed at the EOYS performance night, there was information about the village stay and attribution was also given to the community.

7. Proper Returns and Royalties

Indigenous people should receive the correct returns and royalties.¹⁰⁸

When NAISDA is working on Aboriginal or Torres Strait Islander performances it is with the knowledge and support of specific Community or Clan. Therefore, when they are working on performances where the dances or knowledge is used they ensure that the communities receive the correct compensation for their help. Fair payments and other benefits are offered to the Aboriginal or Torres Strait Islander communities that are involved with the project. NAISDA also helps the communities with any cultural development or maintenance that they might need.¹⁰⁹

8. Continuing Cultures

Indigenous people are responsible for ensuring the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.¹¹⁰

Through the training of Aboriginal and Torres Strait Islanders in dance, NAISDA encourages Aboriginal and Torres Strait Islanders to impart their cultural knowledge into performance. By doing this, Aboriginal and Torres Strait Islanders are able to continue their culture by constantly training and performing Aboriginal and Torres Strait Islander culture and dance. NAISDA also works with the communities and clans to promote further development of other employment opportunities for cultural tutors through NAISDA. An example of this is the touring show *Datiwuy Dreaming* that was created with NAISDA cultural tutors from the *Datiwuy* Clan of North East Arnhem, NAISDA and *Musica Viva*. This show tours schools around Australia on a regular basis.

¹⁰⁷ Ibid 19.

¹⁰⁸ Ibid 21.

¹⁰⁹ NAISDA Cultural Protocols, above n.

¹¹⁰ Australia Council for the Arts, *Performing Arts*, above n 37.

9. Recognition and Protection

Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights.¹¹¹

When Aboriginal and Torres Strait Islander communities work with NAISDA to help develop performances in relation to cultural and intellectual property, NAISDA ensures that the communities receive proper recognition. Some ways they do this include: giving an Acknowledgement to Country at performances; recognising where the cultural knowledge was gathered from and the people that helped and influenced the performance; and acknowledging the cultural tutors in the program guide. Protection of rights is important to NAISDA who uses copyright, contracts and protocols to manage the relationships between the College and the custodians.

Key Lessons

1. Setting up company protocols that your employees should follow when working with Indigenous Australians is a respectful way of showing the Indigenous community that you care about their ICIP
2. Ensure that you build relationships with communities before you ask to use their cultural knowledge and intellectual property.
3. Ensure that communities receive the correct acknowledgements and payments if they are working with you to teach you about their ICIP.

¹¹¹ Ibid 37.

Media Arts

Feral Arts' PlaceStories and Community Cultural Development

Introduction

This case study focuses on PlaceStories - a digital storytelling software system originally developed by Feral Arts in Indigenous communities and now widely used by Indigenous people and the wider community. Feral Arts is a leading community arts and cultural development organisation based in Queensland. In their 24 year history they have worked on social and community issues with a focus on outreach through the arts, and working collaboratively with communities to develop new and innovative tools to share culture.

Feral Arts was founded in 1990 by current Executive Directors Sarah Moynihan and Norm Horton. Sarah, Norm and the team at Feral Arts have worked to create PlaceStories - a unique social media website designed to store, share and maintain culture. PlaceStories is an online sharing system that is freely available at www.placestories.com. PlaceStories was originally developed as Placeworks, a digital museum or 'keeping place' for personal and communal histories. It came out of work that Sarah and Norm did in their arts practice and community cultural development work with the Dajarra region in North-West Queensland. An old railhead for the cattle industry, the town of Dajarra has a significant Indigenous population, with the majority of its residents identifying as Aboriginal. The original Placeworks used maps of local places to interface with database material gathered through oral storytelling. That system operated on a local area network within the Dajarra community. Since 2001 PlaceStories has been available as a web-based system, and currently has over 7,000 users. The platform enables users to upload video, photographs, written material and audio recordings. It combines culture with technology in a way which has from the very beginning, been structured around cultural protocols and restrictions. With the support of the Australia Council for the Arts, the PlaceStories system continues to be developed and improved as an ongoing part of Feral Arts' program of work. The development of the software continues to be driven by the needs and interests of the communities and individuals who use the system. Currently, a key development focus is on leveraging new online video hosting and management services to digitise, archive and share larger video files. This work includes digitising video created with the community in Dajarra.

1. Respect

The *United Nations Declaration on the Rights of Indigenous People* recognises that Indigenous people have the right to own, control and maintain their cultural heritage.¹¹²

¹¹² Australian Council for the Arts, *Protocols for Producing Indigenous Australian Media Arts: Media Arts*, (2nd ed, 2007) 10.

PlaceStories is being built on this fundamental principle. Feral Arts was initially invited to the Dajarra community to provide arts workshops for young Aboriginal people. Based on the success of that work and in consultation with community Elders it was decided to develop a holistic cultural program aimed at reinvigorating the sharing of culture. The first test version of the PlaceStories system was built around a collaborative design with community members exploring how they wanted to use and control their cultural heritage. By creating the key architecture of the program the system has been developed to match the needs of Indigenous people. It incorporated both social aspects of sharing by creating groups, and restrictions on access to content – all at the control of the user. Feral Arts listened to the community, and designed a system around their needs. That system has since been upgraded and tailored to reflect the demand for the program – from early days as a PC and local area network design, to online accessibility.

Feral Arts have continued to listen and respond to user feedback over the years in their efforts to create a culturally respectful and responsive system. For example, when one community member passed away and images of that person were available on PlaceStories, several people contacted Feral Arts to advise that those images should be removed. Sarah and Norm acted quickly to respond to the request of the community to respect the cultural mourning practices.

Right from the outset the whole process of developing PlaceStories has been driven by feedback and guidance from community and from the users of the systems we have created. Indigenous people in particular have played key roles over the years, especially in the early days helping us to better understand and interpret community needs and cultural protocols in a digital realm. The whole architecture of PlaceStories is built around the ownership, privacy and sharing requirements of Indigenous families and communities. As the use of the system has grown those core principles of [sic] have proven to be just as valuable and relevant in the broader community.

Sarah and Norm, Feral Arts

The system is now being adapted and utilised by other organisations which recognise PlaceStories as a platform for recognition of Indigenous systems of managing knowledge and sharing of culture. For example, Bangarra Dance Theatre Australia Limited, Australia's premier Indigenous dance company, is using PlaceStories as part of its 'Rekindling' program. Rekindling is an intensive program for young Aboriginal and Torres Strait Islander people to inspire and develop the next generation of Indigenous storytellers. Exploring 'who you are' and 'where you come from', young people will research and gather stories from within their communities, and develop performance and creative skills to produce dance theatre. Rekindling is led by one of Bangarra's most acclaimed artists, Sidney Saltner (Youth Program Director). PlaceStories provides Rekindling with a private online community and knowledgebase to gather and share stories for future generations. The Rekindling work is still in its early days but there are exciting opportunities to connect young people and support communities in ways that are contemporary and responsive whilst still being culturally respectful and appropriate.

There are many complexities when working in and around Aboriginal and Torres Strait Island communities. Extensive protocols, sensitivities and customs need to be followed to build the necessary trust to deliver a meaningful program. It's the same in relation to a digital platform like place stories. We needed to create a safe space where the communities have control over what and how content is shared within their own community, and then when and how the same content is allowed in to an open arena. To create a private but shared platform we created a 'back yard' for each community and a 'front yard' for all communities to share. This enables the community to share freely with each other in a safe space made just for them.

Sarah and Norm, Feral Arts

2. Indigenous Control

Indigenous people have the right to self-determination in their cultural affairs, and expression of their cultural material.¹¹³

Norm and Sarah described PlaceStories as a bit like an 'anti-Facebook', in that it respects ownership of content and places full control in the hands of the user.

All users of PlaceStories sign up to terms and conditions of access to the system. While it is free to use, it is important that users understand their rights and obligations while using PlaceStories. Those terms and conditions only take a very limited licence from its users – to reproduce the content uploaded within the PlaceStories system. Feral Arts (as the operator of PlaceStories) takes no ownership of the material or the copyright, nor any other rights outside what it requires to operate the system. This gives the Indigenous users full control over how their cultural content is used (or re-used).

For example, users can choose to share content that they have uploaded, or to restrict access on a private level or by groups (or lists) of friends. This means that users control who else has access to their content. PlaceStories avoids most of the risks of publically available social media by giving users this autonomy of control.

3. Communication, consultation and consent

Communication, consultation and consent is an important first step when developing and planning media projects and when reproducing and including existing cultural material.¹¹⁴

Communication, consultation and consent is vital to the nature of PlaceStories and has been integral from development through to running the system.

¹¹³ Ibid 11.

¹¹⁴ Ibid 13.

PlaceStories was established with the Dajarra community to try and ensure the survival of oral and community histories. This knowledge has been under threat since colonisation dispersed Indigenous peoples from their traditional lands. The Dajarra community led the development of PlaceStories to recapture that knowledge by using new and emerging technologies. The consultation process continued as the system developed - these systems included screenings of videos in community and a two week arts residency in the community.

It was only through ongoing partnership and collaboration at a community level that PlaceStories is developing into a successful platform today. This partnership required strong interpersonal bonds between Feral Arts and the Dajarra community which continue to this day.

Consultation and communication are key to the ongoing success of PlaceStories as well. When adapting the program for new purposes similar consultation processes are followed. When making changes to the system, or updating the terms of use, Feral Arts make sure to always notify their users of a change.

Because PlaceStories is a platform which is user controlled and operated, they control or consent to use of their content. By allowing this autonomy Feral Arts has found that its users trust PlaceStories to be a safe place where they can share, restrict and control the use of their cultural stories, videos and content.

The Rekindling Digital Platform based on the Place Stories model gave us the security, flexibility, and control needed to create a safe space for the Rekindling communities we have been delivering the program to.

Sidney Saltner – Youth Program Director – Bangarra Dance

4. Interpretation, integrity and authenticity

Today, as Indigenous people seek to reassert and claim control over their cultural heritage material, Indigenous interpretation of cultural heritage is a means of giving power to the cultural significance of the work.¹¹⁵

PlaceStories is an online platform which gives users the control over interpretation and use of cultural stories and knowledge. The platform has been adapted by the users to suit their needs. Some of the ways Indigenous people have used the program include:

- The PlaceStories system has been used to document Indigenous work histories and support family claims for payment of stolen wages.
- The system has been used to capture and share family and community histories and place-based associations to support cultural maintenance.

¹¹⁵ Ibid 14-20.

- The system has been used to document and share Indigenous Landcare practice to profile the work of Indigenous custodians and to build understanding and awareness in the broader community.
- The flexibility of PlaceStories means that Aboriginal users can – and have – used the system in ways which reflect their needs.

When Feral Arts first started developing PlaceStories in the early 90's there was not a lot in the way of guidelines for this work. The concept of an enduring digital record of someone's life story or family history was only just becoming a technical possibility - what it meant for oral cultures had yet to really be explored. There was the strong desire and a sense of urgency for communities to capture stories for future generations, particularly of older people. Digital technology was evolving fast and our work involved a lot of trial and error with the guidance and support of people locally. We couldn't have even begun that work without strong relationships based on trust and respect. Those relationships remain a fundamental part of our ongoing work.

Sarah and Norm – Feral Arts

5. Secrecy and confidentiality

Some Indigenous content may not be suitable for wide dissemination on the grounds of secrecy and confidentiality.¹¹⁶

PlaceStories respects the right of Indigenous people to keep their knowledge secret or confidential. The system permits different levels of sharing or restriction of uploaded content at the control and discretion of the user. Access is managed via individual user profiles that require a secure user name and password. Private content is only accessible by the user who uploaded the content and only when they are logged into the system. Projects enable members to share content within a secure group. Project members need to be logged in to view content in a private project. Whole communities can also be 'private' to enable secure sharing at a broader level – for example, Bangarra's Rekindling project uses community level privacy options to enable local communities to communicate and collaborate appropriately and safely. Public content is viewable by any member of the public visiting the PlaceStories system. This means that when appropriate, the system is also able to promote and share content online if the owner of the content so wishes. PlaceStories provides tools to enable public content to be embedded as a content feed into external websites and social media pages. This is controlled by each user and uploader of content at their discretion. Users also sign up to the privacy terms of the site when registering to use PlaceStories. Those privacy terms set out exactly how PlaceStories will use the personal information of its users (including private content). Feral Arts only uses that information to run and manage PlaceStories, and does not sell or share the private information of its users with any third parties (including advertisers). Users are also invited to make requests to Feral Arts around

¹¹⁶ Ibid 21.

the use of their private information if they are particularly concerned about its use. Reasonable requests will be managed as effectively as possible.

6. Attribution and copyright

Copyright law can affect the rights of Indigenous people to access and use their cultural heritage.¹¹⁷

For example, when a photograph is taken of a dance ceremony, the photographer will own the legal rights in the photograph as the copyright owner, and the dancers or community that the dance comes from are not recognised under law.

It is important for projects like PlaceStories to develop better practices which acknowledge cultural rights and do not take copyright ownership unnecessarily. Under the terms and conditions of PlaceStories, a very limited licence is granted to PlaceStories to ensure the system can reproduce and function. No further use of cultural content is permitted.

7. Proper Royalties and Returns

Proper royalties and returns are not necessary in terms of the PlaceStories project. This is because the information uploaded to the site can be split into either personal sharing or communal sharing, giving the uploader the choice as to how their content will be viewed. PlaceStories is also free to use and therefore it does not generate a profit.

8. Continuing Cultures

Indigenous people have the right to benefit from the use of their culture. It is also imperative to ensure Indigenous culture is preserved for future generations of Aboriginal and Torres Strait Islanders.¹¹⁸

PlaceStories is free to use and provides a range of benefits for its users – from the ability to connect with culture, to sharing and creating new and emerging interpretations of culture. Indigenous culture is a living culture that develops and changes over time. PlaceStories is just one way in which culture is given a safe space to develop.

The combination of new and emerging technologies and the sharing of culture means that younger people are using PlaceStories to find ways to connect with their Indigenous heritage. Re-engaging the digital generation is just one of the benefits of PlaceStories – providing a long-term safe and secure repository of cultural heritage is another.

¹¹⁷ Ibid 22-30.

¹¹⁸ Ibid 33.

9. Recognition and Protection

The Indigenous artist owns the copyright in his or her media work and can control its reproduction and dissemination.¹¹⁹

The system is controlled by the users and uploaders. Uploaders are those who upload content to the site. Therefore, uploaders have full control over how their private information is used with the ability to terminate their account, or remove content from the system at any time. They are also able to have the proper recognition and protection thanks to the privacy that the site allows the uploaders.

Key lessons

1. PlaceStories is a great example of a project which has successfully grown and adapted to reflect the needs and wants of Aboriginal people wanting to share their cultural heritage. Embracing the concepts of control, privacy and consultation has been key to that success.
2. The relationship between copyright and cultural rights has been successfully managed by adapting copyright tools. By using clear terms and conditions on the site, Indigenous users are able to control their cultural content. Unlike other social media sites, PlaceStories does not take a broad licence to use uploaded content so its users can feel secure in what they are uploading and sharing on the platform.
3. Feral Arts maintains its relationship with Aboriginal communities and consults on a regular basis about the development of PlaceStories. As the platform was adapted and developed, Feral Arts re-consulted to ensure that it was the best possible platform for community to re-engage with their cultural heritage. Going back and consulting for any new use of Aboriginal culture is key to continuing relationships and best practice in the management of Aboriginal cultural heritage.

¹¹⁹ Ibid 33.

FORM's Canning Stock Route Project

Introduction

The Canning Stock Route Project – Ngurra Kuju Walya: One Country One People (the 'Project') was a major interdisciplinary undertaking which showcased Aboriginal paintings, oral histories, cultural artefacts, film, new media and photography of Indigenous artists who originate from the country intersected by the Canning Stock Route. It was initiated in 2006 by FORM (a small, not-for-profit arts and cultural organisation based in Perth). In 2008, the National Museum of Australia (NMA) permanently acquired works from the Canning Stock Route Collection to develop Yiwarra Kuju: The Canning Stock Route exhibition, (the 'Exhibition') in collaboration with FORM. It aimed to allow both Indigenous and non-Indigenous people to learn about the history of the Canning Stock Route from the perspective of Aboriginal people, told in their own words, and through art. This exhibition, which ran from July 2010 until June 2011, went on to become the most well-attended exhibition ever held at the NMA.



Boys dancing,
Nyarna, Lake
Stretch.
Photograph by
Tim Acker,
2007. FORM
Canning Stock
Route Project.

In order to manage the ICIP rights arising from the Canning Stock Route Project, a Protocol for the Management of Indigenous Cultural and Intellectual Property (Contract between FORM and NMA) ('FORM/NMA ICIP Protocol') was produced. The terms of this contract guaranteed that the principles embodied in the Visual Arts Protocols would be observed, as demonstrated by the fact that the 'Principles' clause states that the management of the Project would be guided by a range of relevant best practice standards, including the Visual Arts Protocols. Moreover, the clause pertaining to the treatment of ICIP explicitly states that both parties intend that the FORM/NMA ICIP Protocol will direct the access, use and disclosure of ICIP arising throughout the course of the Exhibition Project and the NMA's ongoing management of the Collection.

1. Respect

Indigenous people are fundamentally entitled to own and control their own cultural heritage.¹²⁰

Respect for this overarching right was demonstrated by the very premise of the Project, which is the cultural significance of Indigenous visual arts, as well as through the provisions of the FORM/NMA ICIP Protocol. An Exhibition was launched at the NMA in Canberra in July 2010. The fact that it was held in Australia's capital city and was attended by fifty-four artists, five arts centre managers, twelve volunteers and nine project team members from remote communities rendered it an event of national significance, thereby demonstrating reverence for Indigenous culture and heritage.

The diversity of Indigenous cultures should not only be acknowledged, but actively encouraged. This diversity is reflected in the backgrounds of Indigenous visual artists, and ultimately in the medium, subject matter and cultural setting in which they situate their art works.

The Project displayed awareness of this aspect of the principle of Respect by touting as one of its aims the exploration of "cultural diversity of Aboriginal communities and their interconnections with each other and their Country and their part in a greater Australian story". Furthermore, the oral histories component of the Project was comprised of the stories, told in traditional languages, of more than 100 different Indigenous people from 12 language groups and 17 remote communities. It is also significant that a major consideration for the curators when selecting art works for inclusion in the Project was to ensure that the works in the final collection were representative of the many different regional groups intersecting the region.



Artists Nora Wompi, Bugai Whyllouter, Kumpaya Girgaba, and Nyangapa Nora Nangapa in front of the Kunkun windmill. Photograph by Morika Biljabu, 2008. FORM Canning Stock Route Project.

2. Indigenous Control

Indigenous people have the right to decide how their ICIP will be used. This right should be respected at each stage of the creation, production and exhibition of art.¹²¹

¹²⁰ Australian Council for the Arts, *Protocols for Producing Indigenous Australian Media Arts: Media Arts*, (2nd ed, 2007) 10.

¹²¹ Ibid 11.

In order to ensure that the artists and Elders retained full control over their Indigenous Knowledge, content approval workshops were conducted in 17 communities across the Kimberley, Pilbara and Midwest from 2009-2010.

In addition, Indigenous people should be involved in all aspects of the development of a project. The Project gave effect to this requirement on an extremely large scale, by involving over 110 Aboriginal artists and contributors, three Aboriginal curators and four Aboriginal filmmakers.

3. Communication, consultation and consent

It is imperative to obtain informed consent for the reproduction of Indigenous visual arts.¹²²

The FORM/NMA ICIP Protocol shows compliance with this principle in Clause 4, which states that the NMA and FORM have agreed that any ICIP will only be used in the Exhibition or accessed generally in the Collection if appropriate consent has been obtained, using the relevant consent form attached in the Schedule to the agreement. The 'Definitions of terms used in this Protocol' section defines 'consent' to mean providing: full and relevant information to Indigenous people or their representatives about the purpose of collecting their knowledge, information or material, in order to allow Indigenous people or their representatives to make informed decisions about whether to agree to the proposed collection, use or disclosure.

FORM obtained consent from Indigenous people for the use of their oral histories in the exhibition in a three-stage process in order to ensure that they fully understood the implications of giving consent.

- The first stage consisted of asking people from various Indigenous communities whether they agreed to allow recording of their story.
- This was followed by the second stage, during which the same people were asked whether they would agree to their story being included in the Canning Stock Route Project's exhibition, books, pictures, school kids program and multimedia. Permission was also sought for the stories to be kept at the National Museum of Australia in Canberra and to lend them to other arts centres so that other people could listen to them. Standard written consent forms were used for this purpose, examples of which are attached to the Schedule of the FORM/NMA ICIP Protocol.
- The consent forms used by FORM ensured that the consent obtained was informed. For example, the 'Permission for the use of specific oral history material' divided the stories provided by Indigenous people into numbered segments, which gave them the option to consent to FORM's use of only some parts of the story in the Project. Furthermore, consent was sought separately in relation to each proposed use of the story so that only the specific proposed uses of the story consented to would be used.
- Informed consent was also facilitated through the consent forms by the inclusion of a 'Risks' clause. For instance, in the 'Permission for the use of specific oral history

¹²² Ibid 13.

material' consent form, this clause highlighted the potential concerns that Indigenous people might have regarding publication of their story, such as a person wanting anyone to hear the stories provided. Such a statement serves to give effect to the requirement of consent as defined in the 'Definitions of terms used in this Protocol' section of the FORM/NMA ICIP Protocol that "full and relevant information" be provided. The 'Risks' clause also states that the Indigenous person can renege on consenting to FORM's use of his/her story in the Project at a later time.

- The third stage functioned to ensure that the Indigenous people consulted were comfortable with the manner in which the Project presented their stories.

4. Interpretation, integrity and authenticity

Interpretation refers to the representation of Indigenous Cultural and Traditional Knowledge. When working with Indigenous Australians it is respectful to include an authentic view of the information and to also show integrity in the information that is being presented.¹²³

When working on the Canning Stock Route exhibition FORM wanted to represent the trials that were faced in an authentic way. Many of the Aboriginal people involved in the Canning Stock Route development during the early 1900s were abused and forced to find resources for the white men. Therefore, when the exhibition started it showed the true history and treatment of the Aboriginal men and women and how they were forced to work on the development.

5. Secrecy and confidentiality

Indigenous people's personal or private information or knowledge must not be divulged unless permission is granted by all of the Indigenous people who may be impacted by the disclosure.¹²⁴

Disclosure of information regarding a deceased person, in particular, will be sensitive. Clause 9 of the FORM/NMA ICIP Protocol specifically addresses this concern as it binds both parties to observing the privacy and confidentiality of any personal information (including that provided pursuant to the Consent Forms attached in the Schedule) and information designated 'confidential' which is comprised in this Protocol.

Furthermore, it also warrants that privacy and confidentiality will not be breached by a use or disclosure of such personal or confidential information made in the course of monitoring, reporting or implementing the FORM/NMA ICIP Protocol.

6. Attribution and copyright

Indigenous custodians and individual storytellers should be properly acknowledged and credited for their role in developing visual art works and for the use of their ICIP.¹²⁵

¹²³ Ibid 14.

¹²⁴ Ibid 22-30.

¹²⁵ Ibid 31.

Clause 7 of the FORM/NMA ICIP Protocol implements this principle by providing that 'Artists and/or their Art Centres shall be acknowledged in any use of the Collection'.

7. Proper returns and royalties

Appropriate returns should be given to Indigenous people for their contribution to a visual art work and use of their ICIP, including royalties and copyright ownership.

Proper returns for Indigenous people who contributed to the Project was written into the consent forms. For example, the 'Permission for the use of specific oral history material' guaranteed that 'Everyone who tells their story ... will be paid for their time'.

Indigenous people are entitled to share in the benefits of any commercialisation of their cultural material. Clause 7 of the FORM/NMA ICIP Protocol explicitly ensures that a license for any party to commercialise any ICIP associated with the Exhibition must be negotiated on a case-by-case basis with the owner and that if any commercialisation is agreed, the starting position for negotiations would be for an equitable sharing of net benefits.

Additionally, it is recommended that benefits (even non-pecuniary) for the language group to which communally-owned material belongs, be arranged in the event that this material is used for commercial purposes. This suggestion was taken up by FORM as the consent forms state that the profit made from sale of Canning Stock Route Project books or DVDs will be used in other Indigenous programs run by FORM or by the NMA.

8. Continuing cultures

Along with their rights, Indigenous people also have a responsibility to take steps to promote the practice and transmission of Indigenous culture so that it is continued for the benefit of future generations.¹²⁶

One of the aims of the FORM/NMA Protocol is to facilitate this aim. This is demonstrated by the statement in the 'Purpose' clause that 'Responsible use of Indigenous Knowledge will ensure that Indigenous cultures are maintained and protected so they can be passed on to future generations.'

The NMA's purchase of the entire Project from FORM facilitated this aim as it will be the custodian of the ICIP in perpetuity, thereby providing for safe storage of the material for future generations.

Moreover, as Indigenous cultures evolve and change over time, the protocols for consent within each group and community will change along with them. Hence, consultation should be an ongoing process. This was recognised by FORM, since the consent forms attached to the Schedule of the FORM/NMA ICIP Protocol made provision for re-consultation in the future. For instance, the 'Permission for the use of specific oral history material' states that if the story of the Indigenous person in question is selected for inclusion into the Project,

¹²⁶ Ibid 31.

FORM will return to his/her community in order to show him/her the story as it is written or depicted in context, prior to publication.

9. Recognition and protection

It is advisable to have written agreements and contracts drafted to ensure that rights are cleared for all proposed and intended uses.¹²⁷ Although the Arts Law Centre provides template agreements for its members, independent legal advice on written releases and contracts should be sought.

FORM and the NMA complied with this suggestion by commissioning the FORM/NMA ICIP Protocol in order to “record their joint understanding and agreement regarding the management of Indigenous Knowledge and [ICIP] related to the [Exhibition]”.

Key Lessons

1. Ensure that consent is obtained for each proposed use of ICIP. Some uses of ICIP may be different, therefore, creating specific contracts that are clear and specific ensures that Indigenous contributors can control the use of their ICIP.
2. Use written agreements to manage intellectual property rights arising from visual arts projects.
3. Make provisions for the ongoing management of a major visual arts project. Therefore, if an Indigenous person passes away or changes their mind the exhibition can be rearranged.

¹²⁷ Ibid 33.

Deepening Histories of Place: Exploring Indigenous Landscapes of National and International Significance

Introduction

Deepening Histories of Place was a multi-partner project which investigated the Indigenous social and environmental links that create historical 'highways' of understanding. These 'highways' include song-lines, tracks, exploration, trade, pastoral and tourism routes. The aim of Deepening Histories was to gather together publications, archive resources and history relating to three different Australian landscapes to deepen the layers of Australian history. Those landscapes were the Sydney Blue Mountains, Central Australia and Arnhem Land Kakadu.¹²⁸ Initiated and led by Ann McGrath, a Professor of History at the Australian National University, the project was funded by the Australian Research Council's Linkage scheme, which aims to link scholarly expertise with outside organisations for national benefit. The industry partners included the National Film and Sound Archive, the Australian Institute of Aboriginal and Torres Strait Islander Studies, Office of Environment and Heritage New South Wales, Ronin Films, Australian Government Research Council, Australian National University, University of Sydney and Australian Government Director of National Parks/Parks Australia, with additional support from the Northern Territory Government, University of Western Sydney and the Office of Environment and Heritage. More information about Deepening Histories of Place can be found at <http://www.deepeninghistories.anu.edu.au/>.

The project partners wanted to ensure that the collection and use of Indigenous knowledge in the project was handled ethically and according to best practice. This was important on a number of levels. The project involved the collection of Indigenous people's stories and experiences about connections and histories to place. The project also included filming on traditional Indigenous lands, as well as national park land. The records and information collected would be used by both researchers and the project partners for publications, documentaries, archival and tourism purposes. In order to achieve best practice, the project partners sought to consult with and obtain consent from Indigenous people and communities affected by the project. To deal with this, the National Film and Sound Archive (a project partner) engaged Terri Janke and Company to develop protocols and clearance forms for consent.

1. Respect

Indigenous people are fundamentally entitled to own and control their own cultural heritage.¹²⁹

The Project Partners observed the principle of respect for ICIP by understanding that the collections of Indigenous people's stories and connections to country should be subject to

¹²⁸ Deepening Histories of Place, <http://www.deepeninghistories.anu.edu.au/>, accessed 1 May 2015. This was funded by the Australian Research Council, ARC Linkage Project LP100100427, in combination with the listed Industry Partners.

¹²⁹ Australian Council for the Arts, *Protocols for Producing Indigenous Australian Media Arts: Media Arts*, (2nd ed, 2007) 10.

cultural protocols.¹³⁰ They were mindful that the project would create recordings of Indigenous cultural knowledge and life experience which would be adapted into different formats made widely available.

When the National Film and Sound Archive (NFSA) began working on ANU's Deepening Histories project, they engaged Terri Janke and Company to create protocols. This enabled the Deepening Histories Project to inform academics, filmmakers, researchers and participants about the protocols that were to be followed when working with Indigenous Cultural and Intellectual Property (ICIP).

Development of those protocols demonstrated respect for the cultural heritage of Indigenous Australians in accordance with Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) 'Guidelines for Ethical Research in Australian Indigenous Studies'.

The respect for culture continued throughout the project to the launch of the Deepening Histories website at the Australian National University where a welcome to country by the local Indigenous Elders was an integral part of the event.

2. Indigenous Control

Indigenous people have the right to self-determination of their cultural affairs and the expression of their cultural material. Deepening Histories recognised that Indigenous people had control over their ICIP by seeking permission from them to be in the project (and be recorded) and by then granting the copyright in the recordings and films to the Indigenous participants.

The Deepening Histories protocols were modelled on the Australia Council for the Arts standards and guidelines.¹³¹ The Deepening Histories protocols explain that researchers must advise participants of the nature of the project when making film footage, videotapes, sound recordings, transcripts and photographs of the name, voice, image, biographical information and performances of Indigenous individuals, Community and Community lands. This acknowledged not just the community's individual right to control their story, but the right to control how their country was filmed and presented.

Under the individual clearance forms, copyright in the recordings taken of individuals sharing their knowledge would be owned by the knowledge holder. This means that individuals could control the use of the recordings under copyright law.

The protocols also set out the rights of Indigenous people to their cultural heritage – both under Australian and international law, and through protocols. The protocols acknowledge that Indigenous people are the guardians and interpreters of their cultural heritage and have the right to control their cultural heritage.

¹³⁰ Deepening Histories of Place, above n.

¹³¹ AIATSIS guidelines were also useful for developing these protocols. Terri Janke and Co worked with a protocols steering group of Dr Luke Taylor from AIATSIS, a NFSA staff member and historian and project manager Dr Mary Anne Jebb.

3. Communication, Consultation and Consent

It is important to communicate and consult with the relevant Indigenous people in a project which uses ICIP so that project partners can be better informed about the use of knowledge before seeking formal consent.¹³²

When the protocols were established for the Deepening Histories project, the researchers met with Indigenous people and communities to discuss the project before any filming commenced. It was important to acknowledge cultural mourning protocols in the project. This meant that there were protocols in place in case an Indigenous person had previously died and was mentioned, or died during or after the release of the recordings.

The protocols that were to be followed included:

- If a person was to die during the course of the project then the relevant Project Partner was to consult with the family as to the recommendations that might be put in place in order to respect the Indigenous person.
- If a person is dead and the Project Partners wish to publish something about the Indigenous person the family must be consulted. If the family is unknown the relevant Partner will consult an Indigenous organisation that resides in the region that person came from.
- If a person dies after the publication, the Project Partners may not be able to do anything, but a warning will be placed on the film in order to inform viewers of the inclusion of the deceased person.¹³³

A copy of the Deepening Histories Cultural Protocols were given to participants in the project so they understood the nature and size of the project. This was particularly important because the recordings of ICIP were intended for use in commercial and tourism industries which would be seen and viewed by people across the world.¹³⁴

Consent was given in the form of clearance forms. There were five different clearance forms offered in the Deepening Histories project. They were:

- On-Country and Communal Knowledge;
- Individual Consent;
- Individual Consent (Under 18);
- Copyright Clearance; and
- Archival Material.

The On-Country and Communal Knowledge clearance form aimed to gain community consent for filming on country and use of ICIP, maintain cultural integrity in the editing stage and attribute the relevant community or individual.

The Individual Consent form sought permission from the individual to be filmed, photographed and recorded for the project and to clear any ICIP and third party copyright

¹³² Ibid 13.

¹³³ Ibid.

¹³⁴ Ibid.

material used by the individual. It also contains instructions for if the participant passes away. The form also contains next of kin information – if the next of kin produces a will or last testament that conflicts with the individual's consent form then the partners will discuss the matter with the next of kin and come to an agreement on the actions that need to be taken.

The Individual Consent form for those under the age of 18 is the same as the Individual Consent form, although it must be signed by a parent or guardian.

The Copyright Clearance form is a non-exclusive licence to use the copyright material for the use of the research project.

The Archival Material form means that cultural clearance of old photographs, footage and recordings can be used if the family of the person/people is unknown.¹³⁵

4. Interpretation, Integrity and Authenticity

Interpretation refers to the representation of Indigenous Cultural and Traditional Knowledge. When working with Indigenous Australians it is respectful to include an authentic view of the information and to also show integrity in the information that is being presented.

Authenticity was gained through seeking out the correct person in the community to share knowledge. This meant that before a project started, consultation with a community was encouraged. Therefore, relationships and trust needed to be built to determine who had the cultural authority to share this knowledge.

The individual consent forms that were signed during the project ensured that the individual would warrant that they had the cultural authority to share such cultural knowledge. The community clearance form also ensured that a community representative would clear the filming of the project on Indigenous country.

This was an important aspect of the project because it ensured that authenticity and interpretation were guaranteed and that only culturally appropriate sites were being filmed. This means that no secret sites were to be shown.

When the Deepening Histories website was being put together, a lot of permissions were needed from copyright owners. Therefore, before inclusion on the website, permissions were sought from the directors, producers, performers and ICIP knowledge holders. These people were required to watch over (or listen to) the footage and then approve or disapprove the release onto the site. This was not only for copyright purposes but also to ensure that the information being released had integrity.¹³⁶

A digital data asset management system was developed by Dr Jason Ensor with a password-protected research commons. Materials placed on the commons were tagged according to privacy and access levels in the agreements. Only items tagged 'public' could

¹³⁵ Ibid.

¹³⁶ Deepening Histories of Place, above n.

appear on the website. When the aggregated materials are archived each item retains its privacy tagging within the metadata.¹³⁷

5. Secrecy and Confidentiality

Some ICIP is either secret or confidential and only those who have gone through the right proceedings are allowed to hear it. Therefore, the proper Indigenous Elders must be consulted before any ICIP is used.¹³⁸

The Deepening History partners did not want to use any secret or sacred knowledge in their materials. This was because the results of the project would be made widely available to the public. The researchers who collected knowledge from Indigenous knowledge holders discussed this before recording to ensure no secret, sacred or culturally-restricted knowledge was shared at the time of recording.

The protocols also respected the privacy of the individuals and communities working with the project partners. The privacy of Indigenous people was put as the highest importance before, during and after the project.¹³⁹ The protocols gave participants flexibility when sharing their private information. The forms explained the rights that the Indigenous participants had, which allowed them to make the decision as to what would be protected and what would be freely allowed.

6. Attribution and Copyright

When working with Indigenous Australians it is respectful to attribute the copyright of any ICIP to them.¹⁴⁰

The Deepening Histories protocol gave information about copyright laws in Australia. Under the *Copyright Act 1968* (Cth), copyright exists in a recording taken of knowledge being shared. This can be in the form of a sound recording, cinematograph film or notes taken for an original literary work. In addition, performers have rights in their performance. Performers include interviewees and performers of folklore.¹⁴¹

Copyright law is complex, but the Deepening Histories protocol attempted to create some simple tools for informed project participants about how copyright may affect the project. Since copyright belongs to different people for different reasons (and there may sometimes be confusion as to who the copyright of a work belongs to) the Deepening Histories protocols discussed the framework that copyright may fall under and therefore who it belongs to.

The protocols recognised the right of Indigenous people and communities to be attributed for

¹³⁷ Email discussion between Sarah Grant and Mary Anne Jebb

¹³⁸ Australian Council for the Arts, *Media Arts*, above n 21.

¹³⁹ Deepening Histories of Place, above n.

¹⁴⁰ Australian Council for the Arts, *Media Arts*, above n 22-30.

¹⁴¹ Deepening Histories of Place, above n.

the use of their ICIP. This is in addition to any moral rights that a person may have under the *Copyright Act 1968* (Cth).

7. Proper Returns and Royalties

Indigenous people are able to seek benefits based on their ICIP contributions to the project. The benefits would be discussed in an open negotiation between the community and the Project Partners. The benefits available for participation in Deepening Histories included financial payments, education and training, employment and development, improved infrastructure, access to research materials and footage (including raw and edited footage), assignment of copyright in (or a license to use) the recordings and repatriation of pre-existing archive collections relevant to an Indigenous community involved in the Project.¹⁴² People that were involved in the project were also invited to conferences, events and presentations that might arise out of the project. On the website, those who were involved in film recordings, sound recordings, transcripts or performances were recognised.¹⁴³

8. Continuing Cultures

Cultures are dynamic and evolving, and the protocols within each group and community also change.¹⁴⁴ The Deepening Histories project was designed to deepen knowledge of ICIP. Through this deepening of knowledge, recognition for Indigenous people's ICIP is a step closer. It also encouraged researchers and academics to research and understand ICIP.

9. Recognition and Protection

The project partners and the Deepening Histories project acknowledged the rights of Indigenous people to their cultural heritage. The protocol for the project supported the ambitions of the *Declaration on the Rights of Indigenous People*, and went further to implement contractually binding obligations on the partners to respect those ideals. The aim of the project and partners was not only to create best practice for the Deepening Histories project, but to leave a framework for other researchers and future projects to build upon. To do this, the project made its protocol (and all associated clearance forms and contracts) publically available on its website. This builds upon the success of the Australian Council industry protocols to develop more examples of how organisations work to respect the rights of Indigenous people to control their cultural heritage.

Key Lessons

1. When working with Indigenous Australians, writing up consent forms offers a comprehensive and helpful way of letting Indigenous people know their rights and gain their permission.
2. Copyright should be non-exclusive unless other circumstances have been discussed and understood by the Indigenous participant.
3. The acknowledgement of ICIP Property helps build a society that better understands Indigenous culture.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Australian Council for the Arts, *Media Arts*, above n 33.

Visual Arts

Musée du Quai Branly Australian Indigenous Art Commission

The 2006 Musée du Quai Branly Australian Indigenous Art Commission (the 'Commission') was part of a joint endeavour by the Australia Council for the Arts (the 'Council'), the Musée du Quai Branly in Paris (the 'Musée'), the Harold Mitchell Foundation and the Governments of France and Australia to showcase the work of eight contemporary leading Indigenous artists on a large scale. It consisted of a permanent installation of details of their works on the external and internal walls and ceilings of four levels of one of the Musée's buildings which contain the public bookshop, library, curatorial division and reception area and boardrooms. As the works are lit at night, they are effectively on display to the public around the clock.

The Council commissioned the services of prominent Indigenous curators, Brenda L Croft (Senior Curator, Aboriginal and Torres Strait Islander Art, National Gallery of Australia) and Hetti Perkins (Curator, Aboriginal and Torres Strait Islander Art, Art Gallery of NSW) for the Commission. It also engaged the services of Terri Janke and Company to provide legal advice regarding the Commission and develop contracts in order to set out the rights and obligations of the parties towards one another. Three major agreements were written:

- Artist's Licence Deed between the Council and each of the artists to secure their preliminary consent for their artwork to be used in the concept developed by the curators.
- Formal Letter of Intent, granting approval to proceed with further development of the artists' artwork for use in the Commission, and with development of an Artist's Agreement.
- Artist Agreement between the individual artists, the Musée and the Council, including a schedule agreement with terms specific to each artist relating to the selected work and its placement. The agreement set out the role and obligations of each of the parties and included common terms covering the Commission brief, intellectual property arrangements, moral rights and maintenance.

The provisions of these contracts helped to ensure compliance with the visual arts protocols.

1. Respect¹⁴⁵

The fundamental principle of respect informed the entire Commission, from the inception stage, through to its development, and the manner in which rights in the artwork were transferred to the Musée.

¹⁴⁵ Australia Council for the Arts, *Protocols for producing Indigenous Australian visual arts: Visual arts* (2nd ed, 2007) 9-10, 35.

The very idea for the Commission demonstrated great respect for Indigenous cultural heritage by seeking to showcase Indigenous achievements in the visual arts in such a prominent manner, in this way highlighting its cultural significance.¹⁴⁶ As the Musée is located on the banks of the Seine near the Eiffel Tower, the artwork is guaranteed a high level of exposure to an international and Parisian audience. This deference for the cultural significance of Indigenous visual arts was reflected throughout the contracts in its respectful references to the Artist. For example, the Preamble to the Artist's Agreement includes a statement that, 'The Artist's participation makes this project prestigious'. Respect was also shown through the hosting of a well-attended launch of the Commission at the Musée, for which the artists and one nominated companion each were flown to Paris.

The Commission also acknowledges that Indigenous cultures are living and evolving entities, as opposed to historical phenomena,¹⁴⁷ by its deliberate decision to display a *contemporary* Indigenous artwork. The nature of the Commission, involving the application of Indigenous artworks to 2500 square metres of the walls and ceilings of a museum from where they could be viewed by visitors to the museum itself and the Paris public, is an entirely original concept. In this way, it serves to illustrate to a wide international audience the 'vitality of contemporary Aboriginal creativity'.¹⁴⁸

The Musée also created a curatorial guide that suggests protocols that should be followed when working with Indigenous Australians. They show significant respect through the recognition of Indigenous Australians as the oldest living culture. They also suggest that when working with Indigenous Australians, one should not assume that specific cultural knowledge is consistent throughout all of Indigenous Australia.¹⁴⁹

The Curatorial guide also recognised that when visiting Indigenous cultures it is courteous to recognise the part of country you are in and seek the correct Indigenous permission. They also encourage the use of an Indigenous artist's language group, country and current home when recognising their artworks.¹⁵⁰

The Commission includes work by artists of the Gija people of the East Kimberley in Western Australia (Paddy Bedford and Lena Nyadbi), the Kuninjku people of Western Arnhem Land in the Northern Territory (John Mawurndjul), the Pintupi people of the Western desert in the Northern Territory/Western Australia (Ningura Napurrula), the Wiradjuri/Kamilaroi people of North-west NSW (Michael Riley), the Waanyi people of North-west Queensland (Judy Watson), the Pitjantjatjara people of the Gibson Desert in Western Australia (Tommy Watson) and the Gumatji people of North-east Arnhem Land in the Northern Territory (Gulumbu Yunupingu). This was a deliberate choice by the curators to represent the incredible diversity in the geographic representation, medium and subject matter of Indigenous art.¹⁵¹

¹⁴⁶ Ibid 35.

¹⁴⁷ Ibid 10.

¹⁴⁸ Musée du Quai Branly, *Inauguration of a monumental Aboriginal work by the artist Lena Nyadbi on the roof of the musée du quai Branly* (6 June 2013)

<http://www.quaibrany.fr/uploads/tx_gayafeespacepresse/MQB_CP_Toit_aborigene-EN.pdf>

¹⁴⁹ Ibid 9.

¹⁵⁰ Ibid. 11.

¹⁵¹ Australia Council for the Arts, *Visual arts*, above n 1, 10, 35.

2. Indigenous control¹⁵²

Indigenous control refers to the right of Indigenous people to decide the way in which their Indigenous Cultural and Intellectual Property (ICIP) is to be used.¹⁵³

Indigenous control of the Commission was enabled where possible by engaging Indigenous personnel to oversee its development. For instance, two prominent Indigenous curators, Brenda L Croft (Senior Curator, Aboriginal and Torres Strait Islander Art, National Gallery of Australia) and Hetti Perkins (Curator, Aboriginal and Torres Strait Islander Art, Art Gallery of NSW) were responsible for:

- Selecting the artists to be involved in the Commission;
- Preparing detailed artistic concept proposals for the museum in consultation with the project manager architectural firm, Cracknell and Lonergan Architects; and
- Acting in an artistic advisory capacity during the implementation and installation phase.

These appointments were instrumental in warranting that a deep understanding and knowledge of Indigenous cultural protocols informed the entire Commission. In addition, aided by French lawyer Alexia Moissonnie-Emmerson, Indigenous lawyer Terri Janke was engaged to draft the contracts (see above) to help ensure that the artist's rights and interests in relation to the Commission were adequately protected. To this end, Terri Janke liaised with the artists' legal representatives in the development of the Artist Agreement and in the contractual negotiations.

Importantly, the obligation to consult with each artist throughout each stage of the Project was written into the Artist's Agreement, thereby guaranteeing their ability to exercise a minimum level of control over the installation.

Furthermore, clauses in the Artist's Agreement stipulating that the Musée and the Council will refrain from using the artwork in ways not mentioned in the contract reinforce the artists' control over their artwork by ensuring that they only consent to the proposed usages (i.e. the installation of the artwork on the Musée building and use by the Musée in accordance with its statutory objects).

Additionally, to assist the MQB understand cultural protocols specific to the works, a curatorial guide was created which, under the contract, the MQB agreed to follow. The Guide was written by Cracknell & Lonergan with guidance from the curator Hetti Perkins. For instance, the Curatorial guide covers advice to MQB staff about meeting with artists and appropriate conduct. Such points include:

Many Indigenous people and some members of remote area communities in particular are very reserved and many feel uncomfortable in the presence of people outside their community. While Indigenous visitors of the Museum will of course be shown

¹⁵² Australia Council for the Arts, *Visual arts*, above n 1, 10-12, 35.

¹⁵³ Ibid 35.

*every courtesy, it is advised that quite frequently people will be shy and therefore uncommunicative. Some will not wish to make close physical contact, other than a handshake, and also may avoid eye contact. Museum staff should not be offended by such behaviour which is considered a mark of respect in some areas.*¹⁵⁴

3. Communication, consultation and consent¹⁵⁵

It is vital that consent is obtained when reproducing Indigenous visual artworks and that this consent is informed.¹⁵⁶

Each artist's consent for the Commission was acquired at both the development stage and the implementation stage through his/her signature to the Letter of Intent and later the Artist Agreement. For example, the Agreement provides that the artist consents to the alteration of his/her artwork when it is reproduced in the proposed form on the building of the Musée. Moreover, to warrant that their signatures were procured as a result of *informed* consent, Terri Janke attended an artist's briefing session with the curators and the project team held by the Council, and advised the artists on the legal rights and obligations that the Artist Agreement would entail. For the same reason, Terri Janke wrote the schedule to each Artist Agreement on the instruction of each individual artist, aided by Indigenous Arts Centres.

Furthermore, the non-Indigenous architectural firm, Cracknell and Lonergan Architects, in conjunction with the leading French architect who designed the Musée, Jean Nouvel, consulted extensively with Indigenous people during the installations of the artworks onto the surfaces of the Musée.

It was also necessary for the Indigenous artist to obtain consent from traditional custodians or community members if his/her artwork was to contain traditional cultural expression such as the depiction of creation beings or images.¹⁵⁷ The Artist's Licence Deed provides for this through a clause stating: 'To the extent that the work involves Indigenous communally-owned designs, the artist shall consult with and obtain permission from the relevant Indigenous community to include the Indigenous communally-owned designs and shall advise the Australia Council on: - (a) the attribution to be given to the Indigenous community; (b) any cultural protocols to be specifically addressed.' This process was facilitated by the significant involvement of Indigenous Arts Centres, who represented all of the artists except two (Judy Watson was self-represented and the late Michael Riley was represented by the Michael Riley Foundation in their negotiations with the Council).

The Musée also ensured that the Indigenous artists were consulted on what would happen to their artwork upon their death. In many Indigenous communities, there are special cultural protocols which require the image and representation of an Indigenous artist, and sometimes, his or her work, to be suppressed during the mourning period. It would be difficult for the Musée to suppress the artists' work and this practicality was clearly spelled

¹⁵⁴ Musée du Quai Branly Curatorial Guide, Paris, above n 15.

¹⁵⁵ Australia Council for the Arts, *Visual arts*, above n 12-13, 35-6.

¹⁵⁶ Ibid 12.

¹⁵⁷ Ibid 12.

out to the artists and their representatives. The Musée agreed to be mindful of use of the artists' images after death, and a protocol for communication and respect was developed. It was agreed that upon the artist's death the family or a listed cultural organisation would be contacted by the Musée and recommendations on recognising the artist's death would be taken into consideration in order to honour the artist.¹⁵⁸

4. Interpretation, integrity and authenticity

This principle aims to facilitate Indigenous control over the presentation of their cultural heritage in artworks. This encompasses the artwork's interpretation, integrity and authenticity.¹⁵⁹

In this context, integrity refers to the respectful treatment of the original artwork and any reproductions of it. Integrity is a moral right that is protected under the *Copyright Act 1968* (Cth).

The Commission and Licensing Agreement displays concern for the integrity of the artists' work by providing that the Council and the Musée must consult the artist directly if they intend to make any major changes to the Commission. Once finalised and consented to by the artist, no further changes are permitted to be made. These provisions ensure that the original intention of the work is not substantially altered and therefore does not infringe the artist's moral rights.¹⁶⁰ The curators' stated attempt to reproduce as much of the surface of the original artworks as possible on the Musée building is also directed to maintaining the integrity of the works, and strikes a balance between the rights of the artist and the rights of the Musée as the owner of the building.

Authenticity incorporates everything from ascertaining the Indigenous heritage of the artist, to ensuring that the artist adhered to Indigenous customary law in the process of creating the work.

The inappropriate use or copying by Indigenous artists of distinctive styles of ceremonial painting and images of creation beings from regional groups to which they have no affiliation is a common problem. Lena Nyadbi's commissioned artwork, *Jimbirla and gemerre*, is a prime example of an artwork created by an Indigenous artist drawing on his/her own particular cultural heritage.¹⁶¹ The focus of her work is traditional motifs of the Gija people of the East Kimberley region of Western Australia, the lozenge-shaped jimbirla (spearheads) and gemerre (scarification marks). Ms Nyadbi has strong family ties to this territory.

¹⁵⁸ Musée du Quai Branly Curatorial Guide, Paris, above n 13.

¹⁵⁹ Australia Council for the Arts, *Visual arts*, above n 13.

¹⁶⁰ Ibid 14.

¹⁶¹ Ibid 15.

5. Secrecy and confidentiality

Secret and sacred material refers to information and objects which, under customary Indigenous law, should only be available to those who have been initiated. It must not be widely disseminated.¹⁶²

The curators ensured that no secret and sacred material would be included in the artworks selected by making the artists aware of the highly public nature of the Commission.

Indigenous people have the right to keep their personal information and knowledge private.¹⁶³ This right was respected as permission from the artists to use such personal information was obtained by including provisions in the Artist's Licence Deed granting the Council a non-exclusive right to reproduce and publish the artist's biographical information, likeness and the image of their artwork for media, promotion and PR briefings. Thus, the information would only have been disclosed if the artist agreed to it by signing the Deed.

6. Attribution and copyright

Indigenous people have the right to be given proper credit and acknowledgment both for their part in the development of artworks, and for the use of their ICIP.¹⁶⁴

The Artist's Agreement gives effect to this important right by providing that the copyright in the design for application to the building will belong to the artist and that this will protect the artist for 70 years from his/her death. In order to permit the Musée to undertake the Commission, the Agreement granted only specifically enumerated rights to the Musée relating to the art installation to ensure that the Musée did not become, for practical purposes, the copyright owner.

Although the physical art installation belongs to the Musée, the Artist's Agreement explicitly states that this will not impact the moral rights of the artist, which are recognised under French law. These include the right to be attributed as the artist and to take legal action against parties who treat their artwork in a derogatory manner.¹⁶⁵ To this end, the Agreement mandates that the Musée must display a copyright notice approved by the artist in all advertising and promotional activities. An official plaque was also made for each artist containing this information. Moreover, not only were the artists given attribution as individuals, but the Agreement also requires that the relevant Indigenous community be attributed as the owner of the traditional Aboriginal cultural expression.

7. Proper returns and royalties

In order to adhere to the principle that Indigenous people should share in the benefits for the use of their cultural heritage material,¹⁶⁶ the Artist Agreement provides for a fee to be paid to

¹⁶² Ibid 20-21.

¹⁶³ Ibid 20, 37.

¹⁶⁴ Ibid 37.

¹⁶⁵ Ibid 24.

¹⁶⁶ Ibid 29, 38.

each of the artists in return for the grant of licence rights to the Council and the Musée that was required to adapt the original artwork to the medium of the art installation and apply it to the Musée building permanently.

Under the Agreement, the artists are also entitled to payment of royalties for any commercial uses that the Musée decides to make of the art installation. Like the rights granted to the Musée, these are limited to those that are explicitly listed in the Agreement.

8. Continuing cultures¹⁶⁷

This principle recognises that Indigenous cultures are not static, but rather continuously evolving as the Indigenous communities themselves change over time. In light of this, consultation should be an ongoing process that extends beyond completion of a visual arts project.¹⁶⁸ This obligation was given effect in the Artist Agreement in the subclause which requires that the Musée report to the artist regarding the display and conservation conditions of the works each year. There is also a subclause stipulating that the Musée must consult with the artist prior to undertaking any major conservation or maintenance on it.

9. Recognition and protection

Although under the *Copyright Act 1968* (Cth), it is undoubtedly the Indigenous visual artist who owns the copyright in his/her artwork,¹⁶⁹ the Commission was governed by French law. In order to ensure that the same standards of protection under Australia law would be accorded to the artists, the clauses in the Artist's Agreement dealing with copyright and attribution (see above) were included.

Auteurs Dans les Arts Graphiques et Plastiques (ADAGP) was the collecting society that was named to collect the royalties for commercial use.

The fact that the Council's Indigenous Visual Arts Protocols Guide was attached in the appendix to the Artist's Agreement also serves to show that the Commission was explicitly guided by them in their recognition and protection of ICIP.

Key Lessons

1. Before visiting Indigenous communities or land, seek permissions from the correct Indigenous cultural Elders.
2. Ensure that the correct processes are followed after the death of an Indigenous artist. In contracts, follow the protocols that were laid out and respect the wishes of the families or communities' representatives.
3. Ensure that Indigenous artists are using their own Indigenous heritage as inspiration for their artwork. It is disrespectful for Indigenous artists to use ICIP for artwork which does not relate to their ancestry. If this does occur, permission should be sought from the correct Indigenous community for the artwork's use.

¹⁶⁷ Ibid 33, 38.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid 33, 38.

YININMADYEMI: Thou didst let fall by Tony Albert

Introduction

YININMADYEMI Thou didst let fall is a national public sculpture unveiled in 2015 in Hyde Park, Sydney. The sculpture was created by Aboriginal artist Tony Albert, was initiated by the Coloured Diggers Group and was commissioned by the City of Sydney. It exists to honour all Aboriginal and Torres Strait Islander service men and women who have fought in the armed services, as well as to honour present and future service men and women. The sculpture depicts four standing bullets and three bullet shells. The representation was inspired by the trials of Tony Albert's grandfather, Eddie Albert.

YININMADYEMI Thou didst let fall is positioned in one of the most loved and visited places of Sydney. It is also right near the ANZAC memorial in an area which was once an Aboriginal ritual contest ground, the cross-road of traditional walking trails and a significant site for Aboriginal ceremonies.¹⁷⁰

Tony Albert was born in 1981 in Townsville, Queensland. Albert is a contemporary artist who draws from his Indigenous heritage. He has exhibited in many international venues such as Musée d'Aquitaine in Bordeaux (France), the Singapore Art Museum, the National Museum of China and the Tel Aviv Museum of Art in Israel. Many of his artworks are also displayed across Australia, including in the National Gallery of Australia, the Australian War Memorial in Canberra, the Art Gallery of New South Wales, the Art Gallery of Western Australia and the Gallery of Modern Art in Brisbane.

In 2014 Albert won the \$100,000 Basil Sellers Art Prize and the \$50,000 Telstra National Aboriginal and Torres Strait Islander Art Award.

The City of Sydney commissioned the work as part of the Eora Journey: Recognition in the Public Domain – a project celebrating the living Aboriginal and Torres Strait Islander communities in Sydney.

This case study examines the way that Tony Albert implemented the protocols when creating a public artwork.

1. Respect

Indigenous people have the right to own and control their heritage. Control over images, designs, stories and other cultural expressions should be respected.¹⁷¹

¹⁷⁰ Clover Moore, Sod-turning Ceremony: *YININMADYEMI Thou didst let fall* Artwork, <http://clovermoore.com.au/sod-turning-ceremony-yininmadyemi-artwork/>, 15 October 2014; City of Sydney, *Barani Barabagu: Yesterday Tomorrow*, (2nd edn) May 2013.

¹⁷¹ Australia Council for the Arts, *Protocols for producing Indigenous Australian Visual Arts: Visual Arts* (2nd ed, 2007) 11-12, 09.

Albert recognised and respected the gravity of the task of creating a sculpture that was representative of the national Indigenous Australian war service. To acknowledge and respect the reverence of the subject matter, Albert and the City of Sydney conducted the first ever ground turning and cleansing ceremony to take place for a Sydney public art project. This set the tone for respect throughout the construction of the work.

YININMADYEMI Thou didst let fall was publically launched in March 2015. The launch acknowledged the important role of Aboriginal culture and people in Sydney. The event was MC'd by the City of Sydney Eora Journey Curatorial Advisor Hetti Perkins. At the unveiling of the sculpture, Uncle Chicka Madden (an Elder from the Gadigal people of the Eora nation) gave a warm Welcome to Country. The event commenced with a traditional smoking ceremony from Clarence Slockee and Matthew Doyle, and a performance from Bangarra Dance Theatre. Speakers included the Lord Mayor of Sydney Clover Moore, His Excellency General the Honorable David Hurley AC DSC (Ret'd) Governor of NSW, and the artist's Aunt, Trish Albert. Trish Albert spoke about the story behind her nephew's artwork.

Albert wanted to commemorate the Aboriginal and Torres Strait Islander servicemen and women. This sculpture depicts a subject matter that is about a collective Indigenous experience. Albert was able to represent this sculpture because he was also informed by his Grandfather who was a World War Two veteran.

Eddie Albert enlisted in World War Two. During his service he was captured by German soldiers and held as a prisoner of war. He was able to escape and pass into Italy with 6 fellow soldiers. Once they entered Italy, however, they were captured by Italian soldiers and 3 were executed. Before Eddie and his fellow soldiers were executed, the Italian soldiers realised their mistake and they were sent back to Germany. At the end of the war, Eddie was released and returned to Australia. The other servicemen were given land for their efforts but Eddie did not receive anything due to his Indigenous ancestry. The three bullet shells on the ground depict the soldiers that lost their life during that encounter and the four standing bullets depict those who escaped with their lives, including Eddie.

The sculpture is situated in Hyde Park right near the ANZAC memorial that was built in 1926. The latter does not recognise the contribution of Aboriginal and Torres Strait Islander servicemen and women. Albert's sculpture is the first public artwork in the city to depict the complex experience of recognition.

2. Indigenous Control and Consultation

Indigenous control refers to the right of Indigenous people to decide the way in which their Indigenous Cultural and Intellectual Property (ICIP) is to be used.¹⁷²

In creating a work of national significance, Albert was cognisant that the placement of the work be in a specific site, so it was therefore important to get the local Aboriginal community involved. As Albert was not from Sydney, he identified local key organisations, Elders and advisers for consultation and to seek their participation and support. Since Albert and his

¹⁷² Ibid 35.

Grandfather are not from Eora lands it was important for them to consult with both the Eora nation's people and also his own family.

Albert consulted with Babana, an Aboriginal Men's Group that helps Indigenous communities. Babana also leads the Coloured Diggers Project which honours Aboriginal and Torres Strait Islanders and their families. Each year Babana organises the Coloured Diggers March to raise awareness and remember the sacrifice that the Aboriginal and Torres Strait Islander men made for Australia. One of Babana's goals was to have a sculpture erected for the Aboriginal and Torres Strait Islander soldiers – Albert's sculpture accomplished this goal.

The City of Sydney also has Aboriginal and Torres Strait Islander Protocols that were adopted in 2005 and reviewed again in 2011. The purpose of these protocols is to provide Councilors, Council Officers, Staff and Volunteers at the City of Sydney with an understanding of some of the important protocols of the Aboriginal and Torres Strait Islander community. The protocols are available [here](#).

3. Communication, consultation and consent

It is vital that informed consent is obtained when reproducing Indigenous visual artworks.¹⁷³

Albert approached his own family for use of the story, since each member would have to decide if it could be used. When the family gave their approval he brought his Aunt, Trish Albert, in as a consultant. Trish Albert was paid for her consultation.

Albert also worked alongside Hetti Perkins who is the curator of Eora Journey (and former Senior Curator of Aboriginal and Torres Strait Islander Art at the Art Gallery of New South Wales). The Eora Journey celebrates the living culture of Aboriginal and Torres Strait Islanders and is currently undertaking 4 projects.¹⁷⁴ Ebony Allen (former City of Sydney worker) also made significant contributions to the project. Both women helped with consultation and communication.

4. Interpretation, Integrity and Authenticity

This principle aims to facilitate Indigenous control over the presentation of cultural heritage in artworks. This encompasses the artwork's interpretation, integrity and authenticity.¹⁷⁵

Albert presented the concept for the artwork to the Aboriginal and Torres Strait Islander Advisory Panel and to the Eora Journey Public Art Working Group throughout the development of the artwork. As part of this engagement process, two members of the Aboriginal and Torres Strait Islander Panel raised concern for the bullets. Their concern was

¹⁷³ Australia Council for the Arts, *Visual arts*, above n 12-13, 35-6.

¹⁷⁴ City of Sydney, EORA journey, <http://www.cityofsydney.nsw.gov.au/vision/towards-2030/communities-and-culture/eora-journey>, accessed 27 April 2015; Eora journey: Recognition in the Public Domain contains 7 public art projects in total - two of which have been delivered with two more under way. The Eora Journey itself has four pillars, Eora Journey: Recognition in the Public Domain, A key Cultural Event, Advocacy for a National Cultural Centre and delivery of a local one and implementation of an Economic Development Strategy.

¹⁷⁵ Australia Council for the Arts, *Visual arts*, above n 13.

that the bullets were too harsh. Once Albert explained the bullets in relation to the story of his Grandfather, the bullet's symbolism became clear. It was decided that because the story plays such a strong part in the sculpture, a video of Albert explaining the story would be made available on the City Art website, an audio version of the story would be added to the City's Culture Walks App and the story would also be told through a mini-mag about the artwork.¹⁷⁶

It was important to Albert to represent the story of his grandfather appropriately and correctly. When researching the history of the project he was able to gather information from his Aunt, who wrote a book on her father, Eddie Albert, called *Unsung Hero*.¹⁷⁷ When creating the sculpture he also consulted the community as to whether the sculpture would be seen as offensive or otherwise. The community and his family agreed that the sculpture presented a significant step forward in the recognition of Aboriginal and Torres Strait Islander service men and women.

It is also important to present an authenticity to an Indigenous artwork. Therefore, any Indigenous artistic imagery should be created by an Indigenous person.

Cracknell & Lonergan (the architects for the project) researched the site that the sculpture would be placed on. When settlers first arrived, Hyde Park was actually an Aboriginal contest ground. Albert drew from this knowledge when creating his sculpture.

5. Secrecy and Confidentiality

Secret and sacred material refers to information and objects which, under customary Indigenous law, should only be available to those who have been initiated. It must not be widely disseminated.¹⁷⁸

Indigenous knowledge may sometimes be restricted by secrecy and confidentiality. The use of culturally-restricted information is not appropriate for a public artwork. In this case, no secret or sacred knowledge was needed, given the contemporary history of the sculpture. None of the family information was regarded as secret or sacred. Albert's Aunty had publicly released the story and it was widely available.¹⁷⁹

6. Attribution and Copyright

Indigenous people have the right to be given proper credit and acknowledgment both for their part in the development of artworks, and for the use of their ICIP.¹⁸⁰

YININMADYEMI Thou didst let fall was built to recognise the contributions of Aboriginal and Torres Strait Islander service men and women. As such, it was vital to attribute both the service people, as well as the artist.

¹⁷⁶ Email correspondence between Sarah Grant and Ebony Allen on 28 April 2015.

¹⁷⁷ Trish Albert, *First Australians Upper Primary: Unsung Hero*, Pearson Australia, 2009.

¹⁷⁸ Ibid 20-21.

¹⁷⁹ Email correspondence between Sarah Grant and Liz Nowell on 11 May 2015.

¹⁸⁰ Ibid 37.

Anita Heiss was commissioned to write an inscription on the artwork. She was paid for her contribution, which is also protected under copyright. Both Heiss and Albert hold the copyright to the sculpture and inscription, and it can only be used in association with an education kit, any press release or media release, or any essays written about the artwork or inscription.

Albert retains ownership of the copyright in his artwork, giving him control of reproduction and dissemination of the work.¹⁸¹ As this piece is a public sculpture, however, there is no infringement for photographing or filming it.¹⁸²

7. Proper Returns and Royalties

In order to adhere to the principle that Indigenous people should share in the benefits for the use of their cultural heritage material,¹⁸³ Albert was paid a fee by the City of Sydney for his work on the sculpture. Trish Albert was also paid a fee for her consultation help on the project.

The Eora Journey project was designed to celebrate Indigenous culture. This was rectified through cultural projects that enabled the celebration of Indigenous culture to be recognised. *YININMADYEMI Thou didst let fall* provides a public statement on the importance of Indigenous service people.

Since the aim of the project was non-monetary it allowed for benefits to be awarded to educational institutions and also allowed for changing community perspectives.

8. Continuing Cultures

This principle recognises that Indigenous cultures are not static, but rather continuously evolving as the Indigenous communities themselves change over time.¹⁸⁴

It is important to ensure that your project has some lasting benefits for continuing Indigenous cultural practice. Albert reinforced this idea of continuing cultures by creating a sculpture that recognises past and future Aboriginal and Torres Strait Islander service to their country. It also allows the country to reflect on the racism of the past and try to encourage a more inclusive community.

There are still Aboriginal and Torres Strait Islander men and women in Australia's armed forces today. This sculpture provides the opportunity for them to reflect on their role and see the steps that are being taken to make our country a more inclusive place.

¹⁸¹ Australia Council for the Arts, *Protocols for producing Indigenous Australian Visual Arts: Visual Arts* (2nd ed, 2007) 11-12, 09.

¹⁸² 65 of the Copyright Act

¹⁸³ Ibid 29, 38.

¹⁸⁴ Ibid.

9. Recognition and Protection

Under the *Copyright Act 1968* (Cth), it is undoubtedly the Indigenous visual artist who owns the copyright in his/her artwork.¹⁸⁵

The City of Sydney's use of the Eora Journey: Recognition in the Public Domain Project allows for all Indigenous people living in Sydney and any Indigenous people working in the armed forces to be recognised for their culture and duty.

Further, Clover Moore (speaking at the Coloured Diggers March in 2015) said that *YININMADYEMI Thou didst let fall* recognises the significance of the Indigenous community, and that it was important to place it in a position of prominence alongside the larger ANZAC memorial.¹⁸⁶

Tony Albert's recognition of the rights of community was demonstrated by involving the community and giving recognition to Aboriginal and Torres Strait Islander service men and women.

Key Lessons

1. Bringing in a wide range of consultants shows dedication to ensuring the depiction of Indigenous culture and history is represented correctly.
2. Before you launch a project, ensure that it does not contain secret or confidential information that the Indigenous community is unhappy about sharing.
3. Ensure that the Indigenous artist is being paid the same that any other artist would be paid for the same project.

¹⁸⁵ Ibid 33, 38.

¹⁸⁶ Clover Moore, Coloured Diggers ANZAC day march, <http://clovermoore.com.au/coloured-diggers-anzac-day-march/>, accessed 15 May 2015.

Carriageworks Exhibition of Ken Thaiday

Introduction

Carriageworks is the largest and most significant contemporary multi-arts centre of its kind in Australia. Carriageworks aims to engage artists and audience with ideas and issues. The programs are artist-led and aim to reflect the commitment to cultural and social diversity.¹⁸⁷

Ken Thaiday was commissioned by Carriageworks and Performance Space to present a new body of sculptural work, as well as a number of performances, with his music and dance troupe, *Erub Kebile*. In an explanation of the event on the Carriageworks website, Thaiday's dance combines installation and sculpture with cultural customs and modern materials to create his unique choreography.¹⁸⁸



Portrait of Ken Thaiday taken during his performance with *Erub Kebile* at the opening of the *Ken Thaiday* exhibition, Carriageworks, 3 October, 2014. Image Zan Wimberley.

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.¹⁸⁹

Beatrice Gralton, Visual Arts Curator, Carriageworks, was the curator from Carriageworks and Jeff Khan, Artistic Director, Performance Space, was the curator from Performance Space. Beatrice Gralton advised that there were two Indigenous project officers – Andrea James was the Indigenous project officer from Carriageworks and Ali Murphy-Oates was the Indigenous project officer from Performance Space. Both liaised with the communities and the cultural liaison. When working with Indigenous people, there will be different cultural approaches so it is always better to consider working with an Indigenous project officer to ensure that a project is being controlled in a respectful manner.

An exhibition was held of Ken Thaiday's works at Carriageworks from 3 October – 23 November 2014. At the exhibition opening reception there was a Welcome to Country given by Aunty Donna Ingram.

¹⁸⁷ Carriageworks, <http://www.carriageworks.com.au/?page=About-Carriageworks>, accessed 28 April 2015.

¹⁸⁸ Carriageworks on Ken Thaiday, <http://www.carriageworks.com.au/?page=Event&event=Ken-Thaiday>, accessed 28 April 2015.

¹⁸⁹ Australia Council for the Arts, *Visuals Arts: Protocols for Producing Indigenous Australian Visual Arts*, Australia Council, (2nd ed, 2007) 9.

Ken Thaiday also gave permission to be photographed at the event and have his photographs used for promotional marketing and advertising.

The exhibition itself promotes diversity because it was created by Ken Thaiday Senior who is from the Torres Strait Islands of Erub. The exhibition also included a performance by Erub Kebile (a Torres Strait Islander dance troop based in Cairns and Townsville).

2. Indigenous Control

Indigenous people have the right to self-determination of their cultural affairs and the expression of their cultural material.¹⁹⁰

During the course of the exhibition's development and during the exhibition itself, Indigenous control was exercised in many different ways. Carriageworks and Performance Space were able to discuss with Ken Thaiday about the control that he would have over the project. Since Ken Thaiday was the artist of the work and the patriarch of his family, he was able to directly advise on the stories and dances that were to be used in the exhibition. Indigenous people were involved in all stages of the exhibition's development.

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.¹⁹¹



Installation view of the exhibition *Ken Thaiday with Erub/Darnley Island Dhari*, Carriageworks, October 2014.
Imane Zan Wimherlev

was comfortable with each part of the project.

Ken Thaiday did not need an interpreter for the exhibition, although the curators of the project worked closely with Michael Kershaw. Michael is a long term friend of Ken Thaiday and is based in Sydney. He assisted Beatrice with the communications, negotiation of contracts and travel arrangements, and ensured that Ken

Some of the project contained sacred material, however permission was sought from Ken Thaiday for its use. Since Ken Thaiday was the artist for the exhibition he was able to represent this material in a correct and respectful way.

¹⁹⁰ Ibid 10.

¹⁹¹ Ibid 12.

4. Interpretation, Integrity and Authenticity

Indigenous artists and their community should have control over how their cultural heritage is presented. The presentation of works includes interpretation, integrity and authenticity.¹⁹²

The cultural context of the work was positioned by Ken Thaiday himself (as the artist, and one of Australia's most important contemporary artists). Beatrice Gralton said "It was a great opportunity for Sydney audiences to learn about the history and culture of the Torres Strait", as well as the contemporary practice that Ken Thaiday adds to the culture.¹⁹³

The work was authentic because it was entirely created by Ken Thaiday, who drew from his own cultural knowledge of the Torres Strait. Three works were also borrowed from Artbank for the exhibition. The inclusion of the three Artbank works was discussed with Ken Thaiday before they were allowed in the exhibition. After the exhibition, a full media report (including photographs) was sent to Ken. A publication about the exhibition has also been completed. Ken Thaiday also discussed (and agreed to) the remarketing of the Indigenous art.



Erub Kebile dance troupe performing at the opening of Ken Thaiday exhibition, Carriageworks, 3 October, 2014. Image Zan Wimberley.

5. Secrecy and Confidentiality

Some Indigenous cultural material is not acceptable for wide dissemination on the grounds of secrecy and confidentiality. Those putting together arts projects must first discuss any restrictions with the relevant Indigenous people.¹⁹⁴ The secret and sacred material that was presented during the exhibition was put together by Ken Thaiday. Since Ken Thaiday is a respected member of his Torres Strait community he was able to use his contemporary appropriation of cultural knowledge and intellectual property.

6. Attribution and Copyright

Relevant Indigenous language groups or communities should be attributed for the use of their cultural heritage material in artworks.¹⁹⁵

Ken Thaiday acknowledges his father, Tat Thaiday, as an important teacher and cultural Elder in the exhibition texts. He also spoke about Tat during his public talk. Since the story originated from a particular Indigenous cultural group they were also attributed at the exhibition. The majority of the cultural material is from the Erub Island in the Eastern Torres

¹⁹² Ibid 13.

¹⁹³ Email correspondence between Beatrice Gralton and Sarah Grant, 24 May 2015.

¹⁹⁴ Australia Council for the Arts, *Visuals Arts*, above n 20.

¹⁹⁵ Ibid 21.

Strait Islands, which is where Ken Thaiday is from. Ken Thaiday is also acknowledged as the artist of the project. Since Ken Thaiday was the creator of the art in the exhibition he was issued with a contract – this is standard practice for artists who are working with Carriageworks. The contract was discussed with Ken Thaiday (Michael Kershaw was also included in these discussions). Since the exhibition was photographed extensively by Carriageworks, the artist was provided with all the relevant documentation.

7. Proper Returns and Royalties

Indigenous people should share in benefits and receive proper royalties and returns for the use of their cultural material.¹⁹⁶

Ken Thaiday was paid a commission fee for the development and production of the exhibition, as well as a materials fee for the completion of new works. The use of images and copyright issues were discussed upfront. In addition to the formal opening reception, which included a Welcome to Country and performance by *Erub Kebile*, there was also an informal welcome morning tea at the beginning of the exhibition installation which was attended by Carriageworks and Performance Space staff, as well as the artist and his family. Both the artist and the relevant family members were present at the exhibition and there was discussion about payments, childcare and other services. The artist also participated in media interviews.

8. Continuing Cultures

Consultation is an ongoing process. Cultures are dynamic and evolving, and the protocols within each group will change.¹⁹⁷ Carriageworks and Performance Space ensured that relationships were maintained with Indigenous artists and communities to enable future consultation. The exhibition also encouraged a contemporary view of Indigenous culture. Ken Thaiday was able to present the audience with a new and respectful understanding of Indigenous culture by mixing his traditional cultural understandings with a contemporary twist.

9. Recognition and Protection

The recognition and protection of the artist's work was discussed between Ken Thaiday, Carriageworks and Performance Space. Contracts were signed to protect Ken Thaiday.

Key Lessons

1. Encouraging a contemporary and changing view of Indigenous people allows for stereotypes to be dispelled and a more inclusive view of Indigenous people to be adopted.
2. Including people that the artist wants in discussions is respectful.
3. Ensure that the artist is a respected part of the relevant community if secret and sacred information is in an exhibition.

¹⁹⁶ Ibid 29.

¹⁹⁷ Ibid 33.

Music

Kaiwalagal Wakai: Music and Dance from the Inner Western Islands of Torres Strait

Introduction

Kaiwalagal Wakai is a Music and Dance CD and DVD celebrating culture from the Inner Western Islands of the Torres Strait. The filming and recording on the CD were initiatives of the Torres Strait Regional Authority (TSRA), who has to date completed similar projects with fourteen communities in the region. Karl Neuenfeldt, a music researcher who has recorded many Torres Strait Islander musicians including Uncle Seaman Dan, worked in collaboration with TSRA and co-producers Nigel Pegrum and Will Kepa. The project aimed to improve the lifestyle and wellbeing of Torres Strait Islanders and Aboriginal people living in the Torres Strait. Through doing this it hopes to gain recognition of Torres Strait Islander and Aboriginal rights, customs, and identity.

The CD and DVD have a variety of cultural activities which all play a role in cultural wellbeing for Torres Strait Islanders and Aboriginal people. The CD has a total of 18 songs and the DVD includes dances, interviews about music and cultural comments by traditional owners. The creation of the CD and DVD required the involvement of many members of diverse communities in the Inner Western cluster of Torres Strait Islands.

1. Respect

When working with Indigenous Australians it is respectful to correctly represent cultural material and information about life experiences.¹⁹⁸

The involvement of the TSRA, as the peak body for Torres Strait Islanders set the foundation for the cultural engagement required to undertake the project.

Karl Neuenfeldt explained that when he was working with Torres Strait Islanders on Kaiwalagal Wakai (meaning the voices of the people of the Inner Western Islands) those who worked on the project were invited to the CD and DVD launch. They were then able to decide who they wanted to represent them. Karl Neuenfeldt also ensured that he asked their permission before photographing or filming them at the event.

When holding a launch it is respectful to acknowledge the Indigenous land that the event is taking place on. This was done at the Kaiwalagal Wakai release. Karl Neuenfeldt also explained that during the Kaiwalagal Wakai project he tried to respect Indigenous worldviews, lifestyles and customary laws as much as he could. He did this through working with the TSRA to identify the correct Indigenous groups that were to be involved and

¹⁹⁸ Australian Council for the Arts, *Music: Protocols for Producing Indigenous Australian Music*, (2nd ed, 2007) 10.

informed about the project. Before the project was released he also ensured that the communities signed off on the material.

The funding body (which was the TSRA) selected Kaiwalagal Wakai because it promoted the diversity that exists in Torres Strait Islander and Aboriginal cultures. When selecting artists to perform or to provide art works Karl Neuenfeldt tried to select an equal number of male and female musicians, dancers and artists from various communities.

2. Indigenous Control

Indigenous control must be maintained throughout a project that involves Indigenous Australians.¹⁹⁹

Ensuring the correct representation of certain language groups is a part of this Indigenous control. When writing the orthography (a methodology of writing a language) for the booklet's songs' texts certain Torres Strait Islanders were consulted for the correct use of languages. Different Torres Strait Islander communities use different spelling for the same words and therefore some of the words in the orthographies were spelt differently. Karl Neuenfeldt explained that this was a challenge because there have been recent drives to standardise spelling – but out of respect for Indigenous control Karl Neuenfeldt ensured that spelling was corrected by the Torres Strait Islander communities. Karl gave the communities' spellings priority.

Cultural clearance is another part of Indigenous control. This means that the acknowledgements must be given to the relevant Indigenous communities or individuals. Karl Neuenfeldt ensured that the authorship of community music was acknowledged if it was known. If the authorship was not known or out of living memory, then the song was listed as 'Unknown'. If an author is deceased then, where possible, permission was obtained from a senior family member or community. In this way, that person acted as a custodian for the song.

An essential part of the project for Karl Neuenfeldt was including Indigenous people throughout all stages. He visited different Torres Strait Islander and Aboriginal communities after obtaining permission from the local community councils to enter the community.

3. Communication, Consultation and Consent

Communication, consultation and consent should be applied when working with Indigenous Australians.²⁰⁰

The relevant Indigenous people were identified through the funding body, and consulted about the implications of consent – this was done via an information sheet and signing of a release form prior to any involvement. Children were also involved in the recording and filming stages of the project, and their clearance and release sheets were done through their local schools. All of the production crew also had Queensland Blue Cards – prevention and

¹⁹⁹ Ibid 11.

²⁰⁰ Ibid 13.

monitoring system for people working with children and young people – this ensures a safe environment for children involved in the project.

If translation was required for a song's text then payment was provided to the translator. Karl Neuenfeldt explained that they always tried to seek consent from the correct person for that community or language group by asking the TSRA (who had all the contact information in the communities). The project was collaborative and therefore they ensured that consent was gained from each of the Indigenous contributors or communities involved. They also explained the long term control that the communities and individuals held.

4. Interpretation, Integrity and Authenticity

Indigenous musicians should have control over how their cultural heritage is being presented.²⁰¹

Karl Neuenfeldt explained that the project aimed to reflect the cultural value of the communities by allowing the Torres Strait Islander and Aboriginal people to select the songs, perform them and provide details of their interpretation for the orthography. The project is a celebration of culture, and promotes positive cultural messages.

Cultural consultants were also asked about the use of cultural images, sounds, stories or knowledge that went into the recordings, filming and CD and DVD design. If a Torres Strait Islander language group or community did not approve an alteration or use, then Karl was prepared to alter or remove the material. However, this situation was very rare as people were mostly pleased to see the material being used for the project. The important thing was that the material was checked by the correct Indigenous people.

The input into the project was very localized, so the communities involved made decisions about involvement of particular people or knowledge. Karl Neuenfeldt gave two examples:

- The first consisted of the involvement of a Torres Strait Islander teacher from another island, who was a temporary resident during the filming and recording project. He was not selected to participate because he was not considered a permanent part of that Island's community. The community selected other participants who had knowledge and connection to that Island's culture.
- The second was when an artist wanted to include a Papua New Guinean song on the CD. The community decided against it despite the close geographical connection between Papua New Guinea and the Torres Strait Islands and the fact that there is sometimes sharing of culture.

All the Indigenous art workers and photographers were paid a non-exclusive fee for their work before the CD and DVD were manufactured. The Indigenous stakeholders and participants were also sent an mp3 of the CD, a draft of the booklet and a draft of the DVD to sign off on before manufacture. If someone did not consent to the project then it was halted until the issues were rectified.

²⁰¹ Ibid 17.

It was important to get Torres Strait Islanders involved in the project. Therefore, one out of the three producers, Will Kepa, was a Torres Strait Islander. Most of the recording and filming of the project was of Indigenous origin and participated in by Indigenous people.

Death and its attendant rituals and cultural protocols play significant roles in the Indigenous Australian community. Specific decisions should be discussed. Karl Neuenfeldt explained that a process was developed to deal with the future management of the recording. Under this process, if someone from the community passes away after production, the recording and film would be checked by a cultural consultant rather than the whole community. If requested, deceased contributors would be denoted as 'Late'.

Promotional information was also included in discussions with Indigenous communities so they understood that the CD and DVD would be sent to national archives such as the National Library, National Museum, National Film and Sound Archives, State Libraries and local keeping places. The CD and DVD package was also sent to media outlets such as SBS Radio and TV, ABC Radio and TV and other local news outlets.

5. Secrecy and Confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality.²⁰²

The CD and DVD did not contain any secret or sacred information. However, there were times when people in the community passed away during or after production and release of the CD and DVD. This was discussed with the community and families and terms were developed as to what would happen with the recordings and information. It was sensitively approached, but in reality, it is not always possible to easily edit a film and recording after someone passes away. The culturally appropriate approach followed was to pay respect for mourning practices of family and community and to seek informed consent from family representatives.

6. Attribution and Copyright

Indigenous people should be attributed for use of their cultural heritage in musical works.²⁰³

Different permissions were obtained from each specific individual and community for use of their cultural heritage in such musical works. The local clan, totem and language group are always referenced in the booklet. Karl Neuenfeldt also explained that the attribution was discussed with the communities and usually attribution was placed in alphabetical order unless Elders were noted first.

The contract given to Indigenous individuals or communities was explained to them by the project funder, and the TSRA explained the copyright and licencing issues. It was important that the copyright vested in the artist and any rights granted to the project were clearly stated in a written contract.

²⁰² Ibid 18.

²⁰³ Ibid 19.

7. Proper Returns and Royalties

Participation in the album was gratis because it was a community arts project with a limited budget and it involved a lot of people. Each participant received a free copy of the CD and DVD. If a song from the CD or a dance from the DVD is to be used in a documentary or a television show then the TSRA would work with the community or individual to grant a licence. The producers do not claim or receive any fees. The producers advised that the copyright owners of the songs could join APRA in order to control the music rights and receive any benefits from public performance royalties or other commercial exploitation.

In some instances it was difficult to explain the copyright ownership of the CD and DVD content due to distrust or dislike of governmental bodies.

8. Continuing Cultures

Indigenous people are responsible for ensuring the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.²⁰⁴

The CD and DVD allow for Indigenous culture and knowledge to be understood and learnt. The relationships formed with the communities during the production have been maintained and artists or groups from each community often apply for grants to do full CDs or other arts-based projects.

9. Recognition and Protection

Often it is too expensive and complex for low budget community projects to give all participants individual legal advice. A way to deal with it is to develop a single rights agreement and give advice about it to the community and participants.

To provide recognition of ICIP, the Indigenous individuals and communities were recognised in the CD and DVD booklet.

The copyright in the album was vested in the TSRA who was recognised as the publisher of the CD and DVD.

Key Lessons:

1. It is important to try and include Indigenous people throughout all stages of a project in which Indigenous Intellectual Property and Cultural Expression is being used.
2. Ensure that the Indigenous people involved in the project understand any legal information they must sign.
3. Ensure Indigenous control through giving Indigenous contributors the opportunity to select the Indigenous Intellectual Property and Cultural Expression that they want to use.

²⁰⁴ Ibid 37.

Yabun Festival

Introduction

The Yabun Festival is the largest one-day Indigenous festival in Australia. It is a free community event held annually in Victoria Park, Camperdown on the 26th of January to celebrate the survival of Australia's Indigenous cultures and peoples. Yabun is run by the Gadigal Information Service Aboriginal Corporation, which also operates Koori Radio. It features an extensive line-up of both well-established and up-and-coming Indigenous musicians as well as leading artists, performers and community figures. Yabun has become a hallmark celebration of Indigenous cultures and talent since its inception in 2002 and now attracts between 15 000 to 20 000 people annually.

As a regular and very popular annual event involving numerous Indigenous artists and performers, Yabun serves as an important case study for its presentation of various Indigenous performances and cultural activities.

1. Respect

When working with Indigenous Australians it is respectful to correctly represent cultural material and information about life experiences.²⁰⁵

As a prominent Indigenous festival, respect for Indigenous peoples, cultures and protocols is a very important aspect of Yabun's success. The festival opens in the morning with a smoking ceremony which cleanses the area and welcomes festivalgoers to Gadigal Country. Following that, a corroboree is performed, welcoming visitors through dance and emphasising the Indigenous cultures within New South Wales where the festival is held. After these acknowledgements and welcomes, cultural performances from all over Australia are held to celebrate the vast range of culture present across the nation.

A particularly noteworthy inclusion at the event is an Elders' tent. This is an area for Elders to relax and rest in the shade, with plenty of water available. The inclusion of this service demonstrates respect and thoughtfulness towards the Elders who attend Yabun – it reflects the respect for Elders that is embedded within Indigenous communities, and makes the event accessible and attentive to cultural practices.

2. Indigenous control

Indigenous control must be maintained throughout a project that involves Indigenous Australians.²⁰⁶

Yabun Festival is an initiative of the Aboriginal corporation, Gadigal Information Service ("Gadigal"). It is managed and planned by Indigenous staff and Yabun Festival Manager

²⁰⁵ Australian Council for the Arts, *Music: Protocols for Producing Indigenous Australian Music*, (2nd ed, 2007) 10.

²⁰⁶ Ibid 11.

Kieran Satour. This enables the festival as a whole to be controlled by Indigenous people and be mindful of Indigenous needs.

All featured artists and performers are Indigenous. This means the event operates as an Indigenous celebration of Indigenous cultures, and a culturally safe and accessible festival for the entire community to enjoy.

3. Communication, consultation and consent

Communication, consultation and consent should be applied when working with Indigenous Australians.²⁰⁷

Yabun requires all performers to sign an Artist's Agreement to ensure they are informed about their rights and responsibilities in relation to their performance. This enables the performers to be aware of the conditions surrounding the nature of their performance and its broadcast, so they can make an informed decision about whether or not to consent.

As part of these agreements, performers are required to have appropriate consent to perform community-owned cultural materials. This ensures that Yabun does not feature or broadcast any culturally-significant material without the knowledge and consent of the traditional owners.

Gadigal has a long history in the local Indigenous community. In order to maintain its positive relationship with the community, it seeks to operate Yabun in accordance with the community's wishes and in a way that can benefit the local community. Using the Corroboree Ground to acknowledge and welcome people to Gadigal Country reflects Yabun's consultation with the community. The Corroboree Ground was a response to comments from community members calling for a stronger dance component of Yabun. Its implementation addressed these comments, created the opportunity for broader participation by Indigenous communities and strengthened the Yabun Festival's perception as a gathering ground similar to a traditional corroboree.

4. Interpretation, integrity and authenticity

Indigenous musicians should have control over how their cultural heritage is being presented.²⁰⁸

Yabun is organised by Indigenous people to be an Indigenous event for the celebration of Indigenous cultures. This means musicians and performers get to perform within a culturally-supportive and appropriate setting. All performers at Yabun are Indigenous. Along with the culturally-appropriate atmosphere, this allows the performances to be interpreted within an Indigenous context.

Yabun's Artist Agreement requires the performer to obtain appropriate consent for the performance of cultural knowledge and traditional dances or songs at Yabun. This helps to

²⁰⁷ Ibid 13.

²⁰⁸ Ibid 17.

ensure the performances are appropriate for public display. A further clause requests that the performer inform Gadigal of any cultural protocols which should be taken into account for “the staging, filming and broadcast including any attribution that should be given to Indigenous clans or communities”. By acting in accordance with these protocols where possible, Gadigal can help to further ensure the integrity and authenticity of the performances.

5. Secrecy and confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality.²⁰⁹

To ensure this principle is met, Yabun engages Indigenous performers who have control over what they present to the public in terms of cultural knowledge. Gadigal has no desire for sacred material to be performed at Yabun. The new Artist Agreement requires performers to ensure that their performance contains no such material and is “suitable to be performed and broadcast to a general audience”. It also states that the performance must not cause offence to Indigenous people.

Furthermore, the Artist Agreement states that in the event of a performer’s death, the family may contact Gadigal to request any restrictions upon the continued circulation of the performer’s image (as recorded at Yabun).

6. Attribution and copyright

Indigenous people should be attributed for the use of their cultural heritage in musical works.²¹⁰

Gadigal attributes all of Yabun’s Indigenous performers through the Festival’s written program which is published for the public. The MCs are also informed on the day of the identity of the performers and what they are performing so that the artist can be acknowledged in front of the audience. The requirement for the performer to inform Gadigal of any cultural protocols for the performance also gives Gadigal the opportunity to make an appropriate cultural attribution where necessary.

As well as acknowledging the artists themselves, Yabun acknowledges the Country of the artist – both at the festival and in its printed program.

7. Proper Returns and Royalties

Royalties are a vital form of income for musicians. Copyright owners are entitled to receive royalties as payment for radio broadcasts, television and internet use of their music and public performances.²¹¹

²⁰⁹ Ibid 18.

²¹⁰ Ibid 19.

²¹¹ Ibid 34.

There are two levels of benefit-sharing through Yabun:

- Firstly, artists are remunerated for their performances and royalties are paid for the public performance of copyright material. In order to allow royalties to be appropriately paid to all artists, the set-lists of performers (as well as the list of songs played by the DJ between performances) are submitted to the Australasian Performing Right Association (APRA). This enables all artists and songwriters to receive the royalties they are entitled to from the public performance of their music.
- Secondly, Gadigal seeks to maximise the cultural and economic returns to the local Indigenous community by allowing community members and organisations to set up stalls at Yabun Festival to sell their cultural works to the public. These stalls are priced so that the lowest fees are paid by charitable/not-for-profit organisations and Indigenous people/businesses selling handmade works, while other businesses and corporations pay higher fees. This enables the wider community to participate in this celebration of Indigenous cultures by making it accessible for them to sell their cultural works to the public.

8. Continuing cultures

Indigenous people are responsible for ensuring the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.²¹²

The continuation and celebration of Indigenous cultures lies at the heart of Yabun Festival. It was established to celebrate the survival of Indigenous peoples and their cultures, and is designed to be a positive, empowering celebration for Indigenous artists, performers and community members. As Yabun features different Indigenous performers each year (and does not limit itself to those who are already well-established) it gives numerous Indigenous people a platform to showcase their talents and culture. The live broadcast of these performances over Koori Radio enables an even larger audience to hear the performer and increase their exposure.

9. Recognition and protection

Gadigal's Artist Agreement stipulates that Indigenous performers retain all copyright over their musical work. Gadigal is only given the right to record a performance and broadcast that recording.

In order to protect Yabun itself, Gadigal has registered "Yabun" as a trademark protected under the *Trade Marks Act 1995* (classes 9 and 41). A registered trade mark provides legal rights to words, logos and other branding devices and is valuable registered intellectual property. Gadigal registered their trade mark in 2006. The registered trade mark ensures the Yabun brand is exclusive to Gadigal in relation to the reproduction of music through CDs and DVDs, as well as live music events, entertainment services, events relating to Indigenous arts or crafts, etc. This protects the Yabun brand from misuse or appropriation.

²¹² Ibid 37.

Key Lessons

1. When holding an event, consult with the local community about how best to acknowledge their Country.
2. Use written agreements with your performers to outline the terms of their payment and protection of their copyright.
3. To protect your business register a trade mark for your festival name and brand.

Ngambala Wiji li-Wunungu – Together We Are Strong

Introduction

The album *Ngambala Wiji li-Wunungu – Together We Are Strong* was made by Shellie Morris and the Borroloola Songwomen, Barkly Regional Arts and was distributed by the ABC. The album contains 9 contemporary songs in Yanyuwa language, 1 contemporary song in Gudanji language, and 58 traditional songs from the Yanyuwa, Garra, Gudanji and Marra languages.²¹³

Barkly Regional Arts (from the Barkly Region of the Northern Territory) exists as the central hub for the arts in that region. It delivers arts programs and initiatives, and provides an interface between mainstream and Indigenous culture.²¹⁴

Shellie has spent more than 12 years working with as many as 60 Aboriginal communities and learning 17 languages and dialects.²¹⁵ She has worked to create albums that represent Indigenous music and culture. Shellie was a key part of the project. Her grandmother, who had passed away, was Stolen Generation from Borroloola and therefore, the healing process for her family was a big part of Shellie's return. She was able to meet her extended Yanyuwa family and (as Patrick McCloskey, the project manager explains) they welcomed her with open arms and were proud of her ability to sing the Yanyuwa language after spending time with the community.²¹⁶

1. Respect

Respectful use of Indigenous cultural material and information about life experience is a basic principle.²¹⁷

The album celebrates Indigenous languages. This is important because of the contribution that Indigenous languages make to Australia's identity, as well as being a tool to promote intergenerational language transfer amongst local peoples. Patrick McCloskey explained that the album encouraged "a wider mainstream Australian public appreciation of the immense value of the intangible and tangible cultural heritage contained in Indigenous language songs."

The development of the songs, for these reasons, shows an enormous amount of respect for Indigenous Australians.

²¹³ Shellie Morris and the Borroloola Songwomen, *Together We Are Strong: Ngambala Wiji Li-Wunungu – The Song Peoples Sessions*, 2013.

²¹⁴ Barkly Regional Arts, *About*, <http://barklyarts.com.au/sample-page/>, accessed 14 August 2015.

²¹⁵ The Music Trust, *Shellie Morris and the Borroloola Songwomen*, Review by Peter Winkler, <http://musictrust.com.au/2014/04/ngambala-wiji-li-wunungu-together-we-are-strong-the-song-peoples-sessions/>, accessed 16 July 2015.

²¹⁶ Email Correspondence between Patrick McCloskey and Sarah Grant 14 August 2015.

²¹⁷ Australia Council for the Arts, *Music: Protocols for Producing Indigenous Australian Music*, (2nd ed, 2007,) 10.

2. Indigenous Control

Indigenous people have the right to control their own cultural knowledge and intellectual property. There are many ways in which these rights can be respected.²¹⁸

The Indigenous people of the Borroloola region developed 'open' public history songs that emerged as a form of cultural resistance and survival in the face of colonisation. These songs are referred to as 'a-kurija'. The structure is similar to the Borroloola ceremonial songs known as 'kujika' although these songs contain secret and sacred cultural knowledge and are therefore not contained in the album.²¹⁹

3. Communication, Consultation and Contest

Indigenous people should be consulted on the use and representation of their Indigenous heritage, and be fully informed about the implications of consent. Consultation should address the communal nature of Indigenous cultural expression.²²⁰

Four different language groups were recorded on the album, 9 collaborated songs were in Yanyuwa and 1 song was in Gudanji language – the traditional songs were recorded in; Yanyuwa, Garrwa, Gudanji and Marra.

The lead singer of each of the language groups was able to instruct the producers as to the songs they wanted to sing. This was determined between the women. Once the songs were recorded, the women were able to determine if they were still happy with the selection of songs.

Patrick McCloskey explained that there were many more songs that could not be included on the album so the women were able to choose their favourites. There was a lot of discussion with the women as to which songs were to be included on the album.

4. Interpretation, Integrity and Authenticity

Indigenous musicians and their communities should have control over how their cultural heritage is presented.²²¹

Indigenous people were involved throughout all aspects of the development of the project. Therefore, they were able to control the representation of their cultural heritage. The project included 4 phases: pre-recording, recording, post production, and translation and interpretation.

Patrick McCloskey met with the Borroloola singers on a number of occasions to seek their consent to be engaged in the project. Once consent was issued, meetings were conducted

²¹⁸ Above n.,11.

²¹⁹ Email Correspondence between Patrick McCloskey and Sarah Grant 14 August 2015.

²²⁰ Australia Council for the Arts, *Music*, above n 13.

²²¹ Ibid 17.

prior to recording to brief the singers on the project. They were also allowed time to discuss the content they wanted or did not want on the album.

During the production stage, the permission to use the songs was constantly reiterated. One of the reasons that the Elders wanted the songs recorded was so that the children of the future generations would be able to listen to them. After each recording session the recordings were played back to the women and they were able to decide if they were happy.

The singers, translators, interpreters, musicians, instrumentalists and vocalists involved in the language content of the album were all Indigenous. Training programs were also delivered to local musicians and media enthusiasts about how to set up a live studio and how to shoot field recordings during pre-production and production stages.

The translation and interpretation phase of the album, coordinated by the Language Coordinator for the project, Karin Riederer, meant that there were many hours spent listening to the recordings and working with singers to notate and collate the language contained in the songs. The narrative of the song was also another important aspect to be in the album booklet.

The singers were also supported to perform the songs in public on a number of occasions at events to launch and promote the project. These included the Deadly Awards, the Darwin Festival, the Woodford folk Festival, the Desert Harmony Festival and the Walking with Spirits Festival.

The album was awarded the National Indigenous Music Award for Traditional Music in 2012 and in 2013 won the National Indigenous Music Award for Song of the Year for the title track, 'Ngambala Wiji Li-Wunungu'.²²² It was also a finalist for the ARIA World Music Category in 2013 and Shellie Morris also won an award for her work in the community at the 2013 Deadlys.²²³

5. Secrecy and Confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality.²²⁴

There was no known secret or sacred cultural knowledge on the album.²²⁵

The representation of deceased peoples was an aspect that the project coordinators ensured they discussed with the community. In Indigenous communities, when a person passes on, there are cultural practices that should be respected. Emily Murphy, Shellie Morris' manager, explained that in the past year one of the Borroloola Songwomen passed on. This meant that consultation in the community was initiated again so that the integrity of the album was maintained and the correct respects were paid to the community. The

²²² Email Correspondence between Patrick McCloskey and Sarah Grant 14 August 2015.

²²³ Email Correspondence between Emily Murphy and Sarah Grant 1 October 2015.

²²⁴ Above n.,18.

²²⁵ Email Correspondence between Patrick McCloskey and Sarah Grant 14 August 2015.

consultations involved contacting the family members of the Borroloola Songwomen to determine whether the song could be performed in public, and also, contacting Darwin Aboriginal Art Fair to ensure that they did not play any of the songs or show any footage after the passing of one of the women.²²⁶

Emily Murphy explained:

I think this practice is something that needs to be incorporated in best practice, not because we did it but because when you go into a community and create work, there is a longevity to that which should be respected and that needs to be benchmarked so that the exploitation that currently occurs by some operators is not tolerated, is exposed and is stopped.

6. Attribution and Copyright

Indigenous people should be attributed for the use of their cultural material in musical works.²²⁷

The album booklet contains a custodian's notice explaining that the information contained on the album is associated with traditional language, images of people and country, songs and knowledge of the Yanyuwa, Garrwa, Gudanji and Marra peoples from the Borroloola and McArther Regions of the Northern Territory of Australia. A custodian's notice pays respect to the Indigenous regions involved, and acknowledges that the album contains traditional Indigenous content.

There is also a copyright notice at the end of the booklet explaining that Shellie Morris and the Borroloola Songwomen and Barkly Regional Arts hold copyright to the album.

7. Proper Returns and Royalties

Indigenous people should receive the correct returns and royalties.²²⁸

The women recorded in each of the different language groups advised the producers how the APRA royalties for each recorded language song were to be split. This was determined through a split in percentages and depended upon whether the singer had a relation with the original composer of the song and how prominent that relationship was.

Patrick McCloskey explains that if there were 5 singers but only one of them was directly related to the original composer, then the group would deliberate amongst themselves before informing them how the song would be registered. The relative of the original composer would receive a larger percentage of the royalties.²²⁹

²²⁶ Email Correspondence between Emily Murphy and Sarah Grant 1 October 2015.

²²⁷ Above n., 19.

²²⁸ Ibid 21.

²²⁹ Email Correspondence between Patrick McCloskey and Sarah Grant 14 August 2015.

8. Continuing Cultures

Indigenous people are responsible for ensuring the practice and transmission of Indigenous cultural expression continues for the benefit of future generations.²³⁰

Continuing cultures is shown through the development of this album because it allows songs to be passed down from generation to generation. The a-kurija social history songs that were on the album also offer another perspective of the effect of colonialism had on Indigenous Australians and how they responded through composing new songs in language.

9. Recognition and Protection

Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights.²³¹

Shellie Morris and the Borroloola Songwomen are recognised in the album booklet by being introduced to the reader. Shellie and the Borroloola Songwomen are also recognised and protected under the *Copyright Act 1968* as the copyright holders of the album (along with Barkly Regional Arts).

Key Lessons

1. Ensure that Indigenous people understand the contracts that they are entering into.
2. Offer Indigenous people the Cultural and Intellectual Property protection they deserve by adding them to IP organisations such as APRA.
3. Ensure that after working with a community communication is maintained. This enables best practice is maintained even after the completion of the project.

²³⁰ Above n 37.

²³¹ Ibid 37.

Conclusion

A National Indigenous Cultural Authority could establish and safeguard national expectations surrounding the use of Indigenous Cultural and Intellectual Property.²³² By safeguarding the use of ICIP, the National Indigenous Cultural Authority would also be able to protect Indigenous traditional heritage and cultural knowledge. The National Indigenous Cultural Authority would be established as an organisation.

The organisation would develop policies and protocols within various industries, authorise Indigenous cultural consent through a permission system, monitor the exploitation of cultures, create strategies to educate and raise awareness of ICIP among the public, and advance ICIP nationally and internationally.²³³

Should a National Indigenous Cultural Authority create protocols such as the ones reviewed in this guide, they would become essential when working with Indigenous ICIP. This would have the effect of reducing the exploitation of Indigenous cultures.

²³² Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority*, (2009), http://terrijanke.com.au/wp-content/uploads/2014/11/Beyond_guarding_ground_17Jun09.pdf.

²³³ Ibid, 15.

Part 3: Other Resources

Traditional Custodian Notice Examples

Veronica Arbon, Arlathirnda Ngurkarnda Being-Knowing-Doing: Traditional Custodians Notice

This publication contains Indigenous knowledge of the Arabana people, in particular the Strangways, Hull, Hodgson and Arbon families, informed by Arabana language, stories and art. All rights reserved. Dealing with any part of this knowledge for any purpose that has not been authorised by the custodians may breach the Copyright Act 1968 (Cth) and amendments.

Batchelor Press: Traditional Custodian Notice for ‘A-Wanybi, A-Muying i A-Vilimindji’ (The Mud Crab, the Magpie Goose and the Pied Cormorant), Storyteller: Palibu Patrick Nudjulu, Ancestral Knowledge of the Magati Ke Rak Naninh People

The stories and images in this publication contain Traditional Knowledge of the Magati Ke Rak Naninh people and have been published with the consent of the custodians of the story. Dealing with any part of the story/knowledge for any purpose that has not been authorised by the custodians may breach the customary laws of the Magati Ke Rak Naninh people and may also breach the Copyright Act 1968 (Cth) and moral rights. For enquiries regarding permitted reproduction of any part of this publication contact Batchelor Press.

Arts Law: Traditional Custodian Notice

The images in this artwork embody traditional vital 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 customary law of the (name) community, and may also breach the Copyright Act 1968 (Cth). For enquires about permitted reproduction of these images contact (community name).

Checklist

Stage 1: Initial Research and Project Development	Yes	No	Why?	Notes
Do I need permission/consent?				
Has my traditional design been checked by the relevant custodians?				
Has my traditional story been checked by the relevant custodians?				
Has my traditional dance been checked by the relevant custodians?				
Have I checked with the relevant family about the use of any materials, photographs or film?				
Have I checked with the relevant Indigenous subjects or descendants involved in the history of my project?				
Have I checked with the relevant Indigenous subjects or descendants involved in the experiences or private lives of my project?				
Am I using archival material in my project?				
Have I checked with the family or community representatives related to an image of a deceased person I use in my project?				
Does my project involve a visit to Aboriginal lands or outer Torres Strait Islands?				If so, you must obtain permission from the local land council/trust/the relevant community council.
How did I obtain permission?				
Stage 2: Producing the Work				
Have I initiated consultation with the correct Indigenous communities or individuals?				
Has permission been obtained?				If the answer is no, reconsider your project
Have I paid people for reviewing my work?				
Does my work empower Indigenous people?				If not reconsider project
Have I gained permission from the correct community or individual involving				

any secret, sacred, gender-based or personal information? Are special communication procedures required to obtain consent?				
Does my project reinforce negative stereotypes?				If so consider altering your project.
Is the language appropriate?				If not consider consulting a language expert.
Have I involved Indigenous people in all stages of the project (including in key creative roles)?				
Stage 3: Post Creation				
Have you re-consulted the relevant Indigenous groups/individuals?				
Have you allowed the Indigenous subjects to view the project before release?				If yes, account for the changes or suggestions they make. If no consider the impact you may make.
Have you discussed the use of the project in terms of the subject's death?				
Did you discuss the labelling and promotion of the project and each Indigenous contributor with those individuals and their community?				
Stage 4: Publication				
Have you acknowledged Indigenous contributors?				
Have you attributed the correct Indigenous people? Have you asked <i>how</i> they wish to be attributed?				
Has significant credit been attributed to the Indigenous subject/community?				
Is the Indigenous individual/community receiving royalties? Were written agreements used to govern the payment of royalties?				
Has a deceased persons warning been placed on the project?				
Have the Indigenous participants been invited to participate in the project launch and/or public event?				
Where they present at the event? If so, did you acknowledge them publicly and				

offer them hospitality?				
What representatives of the traditional owners will attend and give a Welcome to Country?				
In marketing the project, have all the Indigenous participants and stakeholders agreed to the use of their knowledge, songs or designs, including reproductions and the use of biographical material and text?				
Have I arranged for non-pecuniary benefits to be provided to any Indigenous people or communities for their contribution to the development of the project (e.g. launch hosted in the Indigenous community)?				
Do the Indigenous contributors share in the benefits of any commercialisation of the project?				
When arranging speaking engagements and interviews, were issues such as payment, childcare and other services discussed?				
Has the work been reproduced on the internet?				If so, consent to use it in this way must have been obtained prior to publication, and measures must be taken to limit the ease of copying.
Have you maintained relationships with other Indigenous contributors and communities in order to facilitate future consultation?				

Deepening Histories of Place Community Consent

Deepening Histories of Place

On-Country and Communal Knowledge

Clearance Form 1

DEED OF RELEASE

(Form 1)

GIVEN BY: [Insert name of COMMUNITY] (“**the Community**”)

TO: [insert name of RESEARCHER] (“**the Researcher**”)

THE PROJECT: ‘Deepening Histories of Place’ (“**the Project**”)

I understand that the Researcher wishes to record the Community for a research project called ‘Deepening Histories of Place: Exploring Indigenous Landscapes of National and International Significance’ (the Project). The Project will bring together research on three important Australian landscapes: Sydney and the Blue Mountains, Central Australia, and Arnhem Land and Kakadu. It involves seven Partner Organisations: Australian National University; Director of National Parks; NSW Office of Environment and Heritage; National Film and Sound Archive; University of Sydney; Ronin Films; Northern Territory Department of Lands, Planning and Environment; Australian Institute of Aboriginal and Torres Strait Islander Studies.

1) I understand that the Researcher is a student or employee of one of the seven Partner Organisations involved in the research project.

2) The researcher has given me a copy of the Deepening Histories ICIP and IP Protocol. I understand that the Researcher will follow the Protocol when dealing with the Community and any Indigenous Cultural and Intellectual Property on the Project.

Permission to record

3) On behalf of the Community, I give the Researcher permission to film, videotape, record, photograph or otherwise make a record of the Community. This includes making film footage, videotapes, sound recordings, transcripts and photographs of the Community including recording the names, voices, images, biographic information and performances of Community members (**the Recordings**). The Recordings include all edited versions made by the Researcher.

4) I understand that the copyright in the Recordings will belong to Researcher.

5) I understand that the Community will retain rights to any communal knowledge or ICIP material used or referred to in the Recordings.

This document forms part of a set of ICIP Protocols and associated forms. They were developed by Terri Janke and Company for the National Film and Sound Archive of Australia for use by the ARC Linkage Project *Deepening Histories of Place* (ANU) 2013. The documents are published exclusively for information purposes and do not constitute any form of advice



- I am an authorised representative of the Community and am voluntarily entering into this agreement on behalf of the Community. (An authorised representative can be a person appointed by an organisation which represents the Community, a Community elder or any person with the authority to speak on behalf of the Community and to enter into an agreement on behalf of the Community. It is the Researcher's role to identify the appropriate authorised representative).
- I understand that the Recordings will be made available and visible to a large number of people on the internet and in published materials and archives.
- I give consent on behalf of the Community for the use of the Recordings in accordance with this Deed.
- I am over 18 years of age.

Benefits

6) The Community will receive the following benefits for participating in the Project:

- a) Individual participants may be entitled to the payment of a fee;
- b) A copy of the Recordings free of charge;
- c) A free of charge, world-wide, perpetual and non-exclusive licence to use the recordings for the purposes decided by the Community (on the condition that the researcher and the project are credited when using the Recordings);
- d) Archival deposit of the Recordings in a community keeping place, as agreed by the parties;
- e) Indigenous-led and approved history tellings for the Community;
- f) Historical and multi-media training for Indigenous people in the Community;
- g) Access to historical educational tools and access to Indigenous historical resources.

Use of the Recordings

7) On behalf of the Community, I agree to the following uses of the Recordings:

- a) I give permission to the Researcher to:
 - i. Edit and adapt the Recordings (subject to my approval of the final version) for the Project;
 - ii. Copy, publish and communicate the Recordings in a student paper (Thesis) and journal articles and conference papers (Research Reports);
 - iii. Make copies of the Recordings in the Thesis and Research Reports available to the public, including online;
 - iv. Ensure the safe and secure storage the Recordings during the life of the Project;
 - v. When the project is finished, offer a copy of the Recordings to the National Film and Sound Archive and/or the Australian Institute of Aboriginal and Torres Strait Islander Studies for long term safe keeping.

- b) I give the Australian National University permission to upload and communicate the Recordings on to the Project website;
- c) I give the National Film and Sound Archive permission to store a copy of all or some of the Recordings in their archives. I understand that it may choose not to store any of the Recordings;
- d) I give the Australian Institute of Aboriginal and Torres Strait Islander Studies permission to store a copy of all or some of the Recordings in their archives. I understand that may choose not to store any of the Recordings;
- e) I give the Partner Organisations permission to use extracts of the Recordings for promotion of the Project.

Separate Permission for Additional Use of the Recordings

8) I understand that the Researcher and Partner Organisations intend to use some Recordings to create an additional, publically available, downloadable Landscape History and an associated Landscape History Booklet.

9) I understand that if the Researcher or Partner Organisations wish to use Recordings of the Community to create the downloadable Landscape History and the associated Landscape History Booklet, they must secure the Community's written permission and that this Deed does not constitute an agreement or permission to use the Recordings for this purpose.

Indigenous Cultural and Intellectual Property

10) I will identify any Indigenous Cultural and Intellectual Property (ICIP) included or referred to in the Recordings to the Researcher.

11) I agree to give the Researcher a non-exclusive licence to use the ICIP in the Recordings for the purposes listed in clause 7.

12) I promise that I am authorised by the traditional owners of the ICIP to use the ICIP in the Recordings and grant the Researcher the licence.

13) I understand that my interpretation of the ICIP in the Recordings may differ from the interpretation of other participants in the Project.

14) I understand and agree that my Community will be shown a final draft of the Recordings and Thesis, and other published results for the Project before it is finalised. At that stage, the Community may ask the Researcher to make any edits including editing any images or names appearing in the Project of persons (including me) who have passed away since the time of recording. This may involve removing the person's image from the film, blurring the person's image, or removing the person's name from the Project, to be decided by the Researcher in consultation with me and/or the Community. I may also make such other reasonable requests regarding the presentation of the Project which the Researcher will endeavour to comply with.

EXECUTED AS A DEED:

SIGNED by me in the presence of:

.....
Authorised Representative Signature

Name of witness.....

.....
Witness Signature Date

SIGNED by the Researcher for and on behalf of Partner Organisation

.....in the presence of:

.....
Researcher Signature

Name of witness.....

.....
Witness Signature Date

COMMUNITY REPRESENTATIVE DETAILS

Name of Community Representative:

Community Name:

Community Organisation:

Postal Address:

Telephone/email:

RESEARCHER DETAILS

Name:

Title: [eg: PhD Student]

Partner Organisation:

Postal Address:

Telephone/email:

Indigenous Cultural and Intellectual Property Material (ICIP Material)

Indigenous Cultural and Intellectual Property Material means material which is the subject of Indigenous cultural and intellectual property rights (ICIP Rights). ICIP Rights refer to the rights of Indigenous peoples 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. The heritage of Indigenous people is a living heritage, and includes:

- a) Literary, performing, musical and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs);
- b) Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and phenotypes of flora and fauna);
- c) All items of moveable cultural property;
- d) Human tissues and remains;
- e) Immovable cultural property (including sacred and historically significant sites and burial grounds);
- f) Documentation of Indigenous peoples' heritage in archives, film, photographs, videotape, audiotape of all forms of media.

Please identify any ICIP provided or shown by you, associated cultural protocols and name and contact details of the ICIP rights holders in the space provided below.

Other Material

Other Material includes personal photographs, papers, memorabilia, footage or musical works provided by you to the Researcher for use in the Project. You should only provide this material to the Researcher if you created the material or inherited the material and have the rights to deal with the material.

Please identify any Other Material provided by you and details of the rights holders (if not you) in the space provided below.

Kin Island Community Approval Form



Community approval form

Re the book manuscript _____ (book title)

This document confirms that _____ (authorising person)

of _____ (community name)

has approved of the use of any sensitive cultural material or traditional stories within the manuscript, and gives the author _____ (author name)

their approval to tell this story in printed form.

Signature:

Printed name:

Date:

Tagai State College Community Consent



Consent Form 1a – Community Consent for the Language

GIVEN BY: _____ (“the Community Representative”)
 _____ (“the Community”)
 Speakers of _____ (“the Language”)

TO: Tagai State College ABN 89 794 972 592

With the support of the Torres Strait Islanders Regional Education Council (TSIREC), Tagai State College (TSC) is the central educational institution in the Torres Strait, providing educational programs for students across the Torres Strait from Prep to Year 12.

TSC is working on a project to revitalise language in the region, and to ensure that its students have access to their own traditional languages in their education. This project will be conducted with the full consultation of communities in the region, and the co-operation of local language experts.

You have been identified as the representative of the Community. Your Community has knowledge and information relating to the Community and the Language that TSC would like to record and use to develop language educational resources for its schools (“**the Language Resources**”).

This agreement sets out the terms under which cultural knowledge and the Language will be shared with TSC and the creation and use of the Language Resources.

As the Community Representative, you have been identified by TSC as a person who cultural authority to agree to the use of your Community's language and cultural knowledge. You are entering into this agreement with TSC on behalf of your community.

Torres Strait Islander Language and Cultural Protocol

1. TSC operates in accordance with the TSC and TSIREC Torres Strait Language and Cultural Protocol ("**the Protocol**"). The Protocol may also affect the Community.
2. TSC will give the Community Representative a copy of the Protocol for their reference.

Benefits the Community will receive

3. In return for sharing their cultural knowledge and Language so that TSC can create the Language Resources, the Community will be offered 5 copies of the Language Resources free of charge.

The Community Representative's role

4. On behalf of the Community, the Community Representative hereby gives permission for a member of TSC's language and culture team to meet with a language and culture expert from the Community to record the Language and cultural heritage which are communally owned by the Community.
5. The Community Representative understands that the Language and cultural heritage is being shared for the purpose of allowing TSC to create the Language Resources.

The Community Representative's Statement

6. The Community Representative agrees they are authorised by the traditional owners of the Language to consent to TSC using the Language under the terms of this agreement.
7. The Community Representative agrees to advise TSC if there are any restrictions under customary lore which affect the use of the Language in the form on Schedule 1 of this agreement.

How the Language will be used

8. The Community Representative understands that TSC may make any and all uses of the Language which are in accordance with the Protocol in order to make the Language Resources. However, the Community Representative understands that TSC is not obliged to use any of the Language or cultural knowledge taken in the Language Resources.
9. The Community Representative consents to the long term storage and archiving of the Recordings, the Linguist's Notes, the Language Resources and any other supporting information or material in accordance with the Protocol.
10. The Community Representative understands that TSC may, in the future, consider making the Language Resources available to other students across Australia or to other groups seeking access to language information of the Torres Strait. TSC will give the Community Representative written notification of these plans if and when they do occur, in accordance with the principles in the Protocol.

Attribution

11. TSC will attribute the Community in accordance with the information given on page 1 of this agreement. Attribution will be made in accordance with the Protocol.

12. The Community Representative must inform TSC if the Community does not wish to be attributed in any way.

Involvement and Consultation

13. TSC will consult with communities, groups and language and culture experts in accordance with the Protocol to allow feedback and suggestions for editing and amending the Language Resources.
14. TSC will use its best endeavours to consult with the Community Representative regarding the ongoing and future use of the Language Resources.

Copyright

15. The Community Representative understands that the Community will not be the copyright owner in Language Resources created by TSC, or any of the supporting documentation provided to TSC by persons other than the Community Representative.

Cultural Consent for TSC to use the Language

16. The Community Representative, on behalf of the Community, grants cultural consent for TSC to use the Language in any way that is in accordance with the Protocol, for the purpose of making the Language Resources

.....

Community Representative's Signature

Witness Signature

.....

Date

.....

Representative of TSC's name
Name and Position at TSC
and Position

Witness

.....

Representative of TSC's signature

.....

Witness' Signature

.....

Date

Schedule 1: Cultural restrictions on knowledge

The Community's language knowledge contains the following: (Please circle only one)

- (a) Open knowledge which is widely known and can be freely used
- (b) Knowledge which has some restrictions
- (c) Knowledge which is private or secret/sacred and which cannot be freely used

If you have selected options (b) and/or (c) you agree to identify the restrictions that apply to the
Language and knowledge owned by your Community in the box below.

Protocols and Resources

Australia Council for the Arts - *Media Arts: Protocols for Producing Indigenous Australian Media Arts*, These protocols were written as a guide to help bridge the gap between Indigenous Australians and the Media Arts industry. Using a search engine configured for Australian pages, search with the sequence: Media Arts Protocols.

Australia Council for the Arts - *Music: Protocols for Producing Indigenous Australian Performing Arts*, These protocols were written as a guide to help bridge the gap between Indigenous Australians and the Music industry. Using a search engine configured for Australian pages, search with the sequence: Music Protocols.

Australia Council for the Arts - *Performing Arts: Protocols for Producing Indigenous Australian Performing Arts*. These protocols were written as a guide to help bridge the gap between Indigenous Australians and the Performing Arts industry. Using a search engine configured for Australian pages, search with the sequence: Performing Arts Protocols.

Australia Council for the Arts - *Visual Arts: Protocols for Producing Indigenous Australian Visual Arts*, These protocols were written as a guide to help bridge the gap between Indigenous Australians and the Visual Arts industry protocols. Using a search engine configured for Australian pages, search with the sequence: Visual Arts Protocols.

Australia Council for the Arts - *Writing: Protocols for Producing Indigenous Writing*, These protocols were written as a guide to help bridge the gap between Indigenous Australians and the Writing industry. Using a search engine configured for Australian pages, search with the sequence: Writing Protocols.

Australian Institute of Aboriginal and Torres Strait Islander Studies - *Access Use and Policy AIATSIS Collection*. This guide was put together to show the ways in which the AIATSIS materials are accessed and used. Using a search engine configured to Australian pages, search with the sequence: AIATSIS Use and Policy.

Australian Institute of Aboriginal and Torres Strait Islander Studies - *Guidelines for Ethical Research in Australian Indigenous Studies*. This guide was created to guarantee that research involving Australian Aboriginal and Torres Strait Islander people follows a process of meaningful engagement and reciprocity between researcher and Indigenous Australians. Using a search engine configured to Australian pages, search with the sequence: AIATSIS GERAIS.

Board of Studies NSW - *Working with Aboriginal Communities: A Guide to Community Consultation and Protocols*. This guide was put together to ensure that Indigenous Australian communities are treated with respect when information is being collected. Using a search engine configured to Australian pages, search with the sequence: Working with Aboriginal Communities.

Community Cultural Development NSW - *Respect, Acknowledge, Listen: Practical protocols for working with the Indigenous Communities of Western Sydney*. This guide was put together to ensure that people working with Indigenous Australians understand the protocols

that they must follow. Using a search engine configured to Australian pages, search with the sequence: Respect Acknowledge Listen.

Drama Australia: Dr Maryrose Casey and Liza-Mare Syron – *Aboriginal and Torres Strait Islander Guidelines for Drama/Theatre Education*. Access and participation in learning are the priorities of these guidelines and they hope to seek the boarder context of Indigenous educational perspectives and re-evaluate their relevance in the study of Contemporary Indigenous Theatre in Australia for drama educators. Using a search engine configured to Australian pages, search with the sequence: Drama Australia Indigenous Guidelines.

Indigenous Art Code of Conduct. The code establishes a set of standards for commercial dealing with Indigenous visual artists and provides a benchmark for ethical behaviour. It also builds greater certainty for consumers that the artworks they buy come through ethical processes. Using a search engine configured to Australian pages, search with the sequence: Indigenous Art Code of Conduct.

National Association for the Visual Arts – *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*. These Protocols were introduced as a guide for the appropriate ways to work with Indigenous Australians in the visual arts and crafts sector. Using a search engine configured to Australian pages, search with the sequence: Valuing Art Respecting Culture.

National Gallery of Australia - Travelling Exhibitions, *Protocols for Indigenous Arts and Culture*. This guide is a protocols list that people should follow when working with Indigenous arts and culture. Using a search engine configured to Australian pages, search with the sequence: Arts and Culture Protocols.

Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols*. This guide aims to ensure that the staff and volunteers of Oxfam respect Aboriginal and Torres Strait Islander cultural beliefs and practices. Using a search engine configured to Australian pages, search with the sequence: Oxfam Cultural Protocols.

Rina Elster Pantalony: World Intellectual Property Organisation – *Managing Intellectual Property for Museums*. This guide addresses the identification of IP in relation to museums and the recommended practices to manage it. It also discusses existing and emerging business models that may exist in identifying opportunities for museums as a way of creating sustainable funding for their programs. Using a search engine configured to Australian pages, search with the sequence: WIPO Museum Guides.

Tasmanian Government, *Respecting Cultures: Working with the Tasmanian Aboriginal Community and Aboriginal Artists*. This guide seeks to ensure that Aboriginal and Torres Strait Islander artists are acknowledged and that their culture and intellectual property is respected. Using a search engine configured to Australian pages, search with the sequence: Respecting Cultures.

Terri Janke – Australian Society of Authors – *More than Words: Writing Indigenous Culture and Copyright in Australia*. This paper seeks to inform writers about Indigenous intellectual and cultural property and copyright and identify issues for the writers and publishers. Using a search engine configured to Australian pages, search with the sequence: ASA More than Words.

Terri Janke - City of Melbourne, *Code of Practice for Galleries and Retailers of Indigenous Art*. This guide explains the correct way to sell and display Indigenous art. Using a search engine configured to Australian pages, search with the sequence: Code of Practice Melbourne.

Terri Janke - Screen Australia, *Pathways and Protocols: A filmmaker's guide to working with Indigenous people, cultures and concepts*. This guide was produced in order to provide advice about the ethical and legal issues involved in transferring Indigenous cultural material to screen. Using a search engine configured to Australian pages, search with the sequence: Pathways and Protocols Screen Australia.

The University of Adelaide – *A Guide to Engaging with Arts Practices and Intellectual Property of Aboriginal and Torres Strait Islander People*. This guide provides students and academics with connecting with Indigenous Australians and gaining appropriate consents. Using a search engine configured to Australian pages, search with the sequence: University of Adelaide engaging arts practices.

World Intellectual Property Organisation – *The Protection of Traditional Knowledge: Draft Articles*. The policy objectives involve the protection of traditional knowledge and aim to: recognise value, promote respect, meet the actual rights and needs of holders of traditional knowledge, promote preservation of traditional knowledge, empower the holders or owners of traditional knowledge and acknowledge the distinctive nature of the traditional knowledge systems and more. Using a search engine configured to Australian pages, search with the sequence: WIPO draft articles TK.

World Intellectual Property Organisation: Terri Janke – *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*. The Case Studies provide factual and practical information, based on specific cases, on actual and attempted use of the existing intellectual property system by Indigenous Australians and legal and practical lessons learned therefrom. Using a search engine configure to Australian pages, search with the sequence: WIPO Minding Culture.

World Intellectual Property Organisation – *Intellectual Property and Folk, Arts and Cultural Festivals*. This guide is about the effective IP management of folk, art and cultural festivals and how it can help them promote their own IP interests. Using a search engine configured to Australian pages, search with the sequence: WIPO festivals guide.

Organisations

The Black Book

Blackfella Films
10 Cecil Street
Paddington NSW 2021
Ph: (02) 9380 4000
mail@theblackbook.com.au
www.theblackbook.com.au

The Black Book has two main sections which consist of the 'Black Book Directory' and the 'Black Book Library'. The Black Book Directory has more than 2,700 Indigenous Organisations and Individuals listed on it and they work across 95 professions. The Library contains 2,000 works from the late 1890s until now.

Writers Networks

Australian Writers Guild

National Office
5 Blackfriars Street
Chippendale NSW 2008
Ph: (02) 9319 0339
Fax: (02) 9319 0141
Toll Free: 1300 522 288
admin@awg.com.au

Western Australia
266 William St
Northbridge WA 6003
PO Box 527
Northbridge WA 6865
Ph: (08) 9227 9885
wa@awg.com.au

www.awg.com.au

Australian Society of Authors

Suite C1.06
22-36 Mountain Street
Ultimo NSW 2007
Ph: (02) 9211 1004
Fax: (02) 9211 0125
Toll Free: 1800 257 121
asa@asauthors.org
www.asauthors.org

The ASA mission statement explains that they aim to be the principle advocate for the professional and artistic interest of Australian authors by: protecting basic rights of freedom of expression; working to improve income and conditions; and promoting Australian writing and literary culture.

Media Law and Copyright

Terri Janke and Company

Suite 310
30-40 Harcourt Parade
Rosebery NSW 1445
PO Box 780
Rosebery NSW 1445
Ph: (02) 9693 2566
Fax: (02) 9693 2577
tjc@terrijanke.com.au
www.terrijanke.com.au

Terri Janke and Company's main goal is to build a culture of respect where knowledge and innovation work together. Terri Janke and Company focus on Indigenous Intellectual Property and Cultural Knowledge.

Copyright Agency - Viscopy

Level 15
233 Castlereagh St
Sydney NSW 2000
Ph: (02) 9394 7600
Fax: 9394 7601
Toll Free: 1800 066 844
info@copyright.com.au
www.viscopy.net.au

Viscopy is a not-for-profit rights management organisation that connects users with creators of content. They do this by providing licencing services on behalf of their Australian and New Zealand visual arts members. This means they can administer the reproduction of member's works in return for fair payment. Viscopy also employs an Indigenous Communications Officer.

Artists in the Black

Arts Law Centre of Australia
The Gunnery, 43-51 Cowper Wharf Road
Woolloomooloo NSW 2011
Ph: (02) 9356 2566
Fax: (02) 9358 6475
Toll Free: 1800 221 457
artslaw@artslaw.com.au
www.aitb.com.au

Artists in the Black is a legal service for Indigenous Artists, communities and arts organisations. It is operated by the Arts Law Centre of Australia.

World Intellectual Property Organisation (WIPO)

34 chemin des Colombettes
CH-1211 Geneva
20 Switzerland
www.wipo.org

The World Intellectual Property Organisation is an international organisation that helps to ensure the rights of the creators and owners of intellectual property are protected worldwide. WIPO also publishes and works on a range of International Traditional Knowledge and Cultural Expression materials.

Business Directory

Office of the Registrar of Indigenous Corporations (ORIC)

Level 1, Centraplaza
16 Bowes Place
Woden ACT 2606
PO Box 2029
Woden ACT 2606
Ph: 1800 622 431
Fax: 02 6133 8080
info@oric.gov.au
www.oric.gov.au

The Registrar supports and regulates the corporations that are regulated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. The Registrar advises the corporations on how to incorporate, it trains directors, members and key staff in good corporate governance and makes sure they comply with the law.

Arts Centres

Indigenous Arts Centre Alliance Inc. (IACA)

The Cairns Institute
James Cook University
PO Box 6811
Cairns QLD 4870
admin@iaca.com.au
www.iaca.com.au
Ph: (07) 4232 1894
Fax: (07) 4232 1880

IACA works to develop and progress the economic development of artists through their art centres and through building their profile of Queensland Indigenous Art. They also assist in the maintenance and celebration of culture.

Aboriginal Arts Centre Hub Western Australia

Level 1, King Street Arts Centre

357 Murray Street

Perth WA 6000

PO Box 7012

Cloisters Square

Perth WA 6850

Ph: (08) 9200 6200

Freecall: 1800 811 883

Fax: (08) 9200 6201

www.aachwa.com.au

The Aboriginal Arts Centre Hub WA helps to support the development and growth of WA's Aboriginal visual arts sector. Members of the WA Aboriginal arts centres can seek support for training, networking opportunities, communication with other arts centre, practice advice, marketing and promotion opportunities, among other things.

Girringun Aboriginal Art Centre

Davey "Backeroo" Lawrence Educations, Training and Cultural Centre

Bruce Highway

235 Victoria Street

Cardwell QLD 4849

Ph: (07) 4066 8300

artsmanager@girringun.com.au

www.art.girringun.com.au

The Girringun Aboriginal Art Centre represents artists from nine Traditional Owner Groups the Nywaigi, Gugu Badhun, Warrgamay, Warungnu, Bandjin, Girramay, Gulgnay, Jirrbal and Djiru people.

Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA)

Frog Hollow Centre for the Arts

56 McMinn Street

Darwin NT 0800

GPO Box 2152

Darwin NT 0801

Ph: (09) 7290 8655

Fax: (8) 8981 6048

info@ankaaa.org.au

www.ankaaa.org.au

ANKAAA is an advocacy and support agency for Aboriginal artists that work individually and throughout 48 remote Art Centres spread across a vast area.

Umi Arts

335 Sheridan Street

North Cairns QLD 4870

PO Box 1100

North Cairns QLD 4870

Ph: (07) 4041 6542

Fax: (07) 4041 6542

admin@umiarts.com.au

www.umiarts.com.au

UMI arts is the peak Indigenous arts and cultural organisation for Far North Queensland. It is a not-for-profit organisation that's mission is to operate an Indigenous organisation that assists Aboriginal and Torres Strait Islander peoples to participate in the maintenance, preservation and protection of cultural identity.

Desart

Desart Incorporated

11/54 Todd St Mall

PO Boc 9219

Alice Springs NT 0871

Ph: (08) 8953 4736

Fax: (08) 8953 4517

mail@desart.com.au

www.desart.com.au

Desart is a non-profit industry body that helps over forty Central Australian Aboriginal art centres.

Land Councils

New South Wales

New South Wales Aboriginal Land Council (NSWALC)

Head Office

33 Argyle Street

Parramatta NSW 2150

PO Box 1125

Parramatta NSW 2124

Ph: (02) 9689 4444

Fax: (02) 9687 1234

penwurru@alc.org.au

www.alc.org.au

The NSWALC is New South Wales' peak representative body in Indigenous affairs. It is made up of 13 regional land councils, contained within four zones. A map showing the zone regions is available on the NSWALC website.

Northern Territory

Central Land Council

Head Office

27 Stuart Highway

Alice Springs NT 0870

PO Box 3321
Alice Springs NT 0871
Ph: (08) 8951 6211
Fax: (08) 8953 4343
media@clc.org.au
www.clc.org.au

The Central Land Council region covers 771,747 square kilometres of remote, rugged and often inaccessible areas in the southern half of the Northern Territory.

Northern Land Council

Head Office
45 Mitchell Street
Darwin NT 0801
GPO Box 1222
Darwin NT 0810
Ph: (08) 8920 5100
Fax: (08) 8920 5255
www.nlc.org.au

The Northern Land Council represents traditional Aboriginal landowners and Aboriginal people in the Top End of the Northern Territory of Australia.

South Australia

Anangu Pitjantjatjara Yankunytjatjara (APY) Land Council

PMB Umuwa Via
Alice Springs NT 0872
Ph: (08) 8954 8111
Fax: (08) 8954 8110
www.waru.org

Anangu Pitjantjatjara Yankunytjatjara (APY) Council area covers more than 103,000 square kilometres of arid land in the far northwest of South Australia. Communities on the Lands include: Amata, Fregon, Indulkana, Mimili, Pipalyatjara and Pukatja (Ernabella).

Queensland

Cape York Land Council

Head Office
32 Florence Street
Cairns Qld 4870
PO Box 2496
Cairns Qld 4870
Ph: (07) 4053 9222
Toll Free: 1800 623 548
Fax: (07) 4051 0097
info@cylc.org.au
www.cylc.org.au

The Cape York Land Council was established in 1990 to serve the Aboriginal communities and traditional owners of Cape York Peninsula.

Torres Strait Regional Authority (TSRA)

1st Floor, Torres Strait Haus
46 Victoria Parade
Thursday Island Qld 4875
PO Box 261
Thursday Island Qld 4875
Ph: (07) 4069 0700
Toll Free: 1800 079 093
Fax: (07) 4069 1879
info@tsra.gov.au
www.tsra.gov.au

The TSRA region stretches 150 kilometres north from the tip of Cape York Peninsular in North Queensland to just south of the south west coast of Papua New Guinea.

Western Australia

Kimberly Aboriginal Law and Cultural Centre (KALACC)

Great Northern Highway
Fitzroy Crossing WA 6765
Ph: (08) 9191 5317
coordinator@kalacc.org.au
www.kalacc.org.au

KALACC support the traditional and cultural practices of the 30 language groups of the Kimberly region.

Kimberley Land Council (KLC)

36 Pembroke Street
Broome WA 6725
PO Box 2145
Broome WA 6725
Ph: (08) 9194 0100
Fax: (08) 9193 6279
klc@klc.org.au
www.klc.org.au

The Kimberley Land Council Aboriginal Corporation (KLC) is an association of Aboriginal people in the Kimberley region. It is a peak regional community organisation.

Ngaanyatjarra Council Aboriginal Corporation

6/58 Head Street
Alice Springs NT 0870
PO Box 644
Alice Springs NT 0871

Ph: (08) 8950 1711

ngcouncil@ngaanyatjarra.org.au

<http://www.ngaanyatjarra.org.au/>

The Ngaanyatjarra Council Aboriginal Corporation represents over 2,000 Pintupi, Ngaanyatjarra, Ngaatatjarra and Pitjantjatjara people living in the Central Desert region of Western Australia.

South West Aboriginal Land and Sea Council (SWALSC)

HomeTown Centre

1490 Albany Highway

Cannington WA 6107

Ph: (08) 9358 7400

Fax: (08) 9358 7499

reception1@noongar.org.au

www.noongar.org.au

SWALSC is the native title representative body for the Noongar people. They work with members to progress resolution of the Noongar native title claims, while also advancing and strengthening Noongar culture.

Goldfields Land and Sea Council (GLSC)

Kalgoorlie-Boulder Head Office

14 Throssell Street

Kalgoorlie WA

GPO Box 10006

Kalgoorlie WA 6430

Ph: (08) 9091 1661

Fax: (08) 9091 1662

Freecall: 1800 681 661

reception@qlc.com.au

Perth Office Branch

Lv 1, 63 Adelaide Terrace

East Perth WA

Po Box 3058

Adelaide Terrace, WA 6832

Ph: (08) 9263 8700

Fax: (08) 9218 9449

GLSC is the principal voice for Aboriginal people from the Goldfields-Esperance region on matters to do with land and waters, governance, social and economic development, heritage and other matters of justice