

# Indigenous Cultural and Intellectual Property (ICIP) and Intellectual Property (IP) Protocol

## This Protocol aims:

- a. To inform researchers, academics, participants and filmmakers of Indigenous Cultural and Intellectual Property (ICIP) rights and Intellectual Property (IP) rights (**Section A**).
- b. To provide guidelines and resources for researchers, academics, participants and filmmakers involved in the 'Deepening Histories' project in relation to:
  - Intellectual property, consent protocols and clearance forms (**Section B**); and
  - Working with ICIP (**Section C**).

## Resources:

For more information please refer to the following resources:

- NFSA Indigenous Collections Management Protocols and Guidelines
- NFSA Culturally Restricted Materials Management Strategy
- NFSA Collection Policy – Indigenous Collections Policy
- Pathways and Protocols: A filmmaker's guide to working with Indigenous people, culture and concepts by Terri Janke, [http://www.screenaustralia.gov.au/documents/SA\\_publications/Indig\\_Protocols.pdf](http://www.screenaustralia.gov.au/documents/SA_publications/Indig_Protocols.pdf)
- Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Guidelines for Ethical Research in Indigenous Studies', <http://www.aiatsis.gov.au/research/docs/GERAISjune2011.pdf>
- Uluru-Kata Tjuta National Park *Film and Photography: A Matter of Respect for the Park and Its People* Uluru, 2002

### Deepening Histories, Indigenous Cultural and Intellectual Property (ICIP) and Intellectual Property (IP) Protocol

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# A. Introduction

## I. Background and Context

The ARC-linkage project 'Deepening Histories of Place: Exploring Indigenous Landscapes of National and International Significance' (**the Project**) is a large Australian Research Council and Industry funded research project bringing together a unique interdisciplinary and industry team of people, publications, archive resources and history to deepen the understanding of three internationally significant Australian landscapes: Sydney/Blue Mountains, Central Australia and Arnhem Land/Kakadu.

In accordance with Article 31 of the United Nations' *Declaration on the Rights of Indigenous Peoples* and the AIATSIS 'Guidelines for Ethical Research in Indigenous Studies', the Project recognises the importance of respecting, protecting and upholding Aboriginal and Torres Strait Islander peoples' rights to their cultural and intellectual property.

## II. Scope

This Protocol is designed to encourage best practice in the recognition and treatment of Indigenous Cultural and Intellectual Property (ICIP) Rights in research projects. It applies to all Researchers and Partner Organisations (including employees and affiliates of those organisations) involved in the Project. The Researchers and Partner Organisations are referred to collectively in this Protocol as the '**Project Partners**'.

**Researcher** refers to any student or employee of any of the Partner Organisations who is responsible for collecting research materials and Recordings from participants and areas involved in the Project.

**Partner Organisations** refers to the organisations involved in the Deepening Histories Project, including:

- a. Australian National University (ANU);
- b. Director of National Parks;
- c. Office of Environment and Heritage NSW;
- d. National Film and Sound Archive (NFSA);
- e. University of Sydney;
- f. Ronin Films;
- g. Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
- h. Northern Territory Department of Lands, Planning and Environment.

Researchers will seek permission when making film footage, videotapes, sound recordings, transcripts and photographs of the name, voice, image, biographic information and performances of Indigenous individuals, Community and Community lands for the Project. (**the Recordings**). The Recordings include all edited versions made by the Researchers.

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The Recordings may be used in student papers (Thesis) or research reports which will be published online. Some of the Recordings may also be used by Partner Organisations for a range of online projects and for promotion of the Project in various media. The projects may include websites, electronic books and journal articles, down-loadable self-guided tour podcasts and other educational resources.

Copies of the Recordings and copyright in the Recordings will be assigned or licensed to the participants and communities for their use.

### III. Purpose

In Australia, IP (Intellectual Property) is protected under federal legislation. Indigenous Cultural and Intellectual Property (ICIP) is not adequately protected in this intellectual property legal framework. However work is underway in Australia and overseas for greater protection of ICIP. Many forms of IP, such as copyright, plant breeder's rights, confidential information, trade marks, designs and patents can provide limited protection to ICIP material.

While the law catches up, Protocols such as this are used to ensure that ICIP is protected.<sup>1</sup> Protocols provide rules and guidelines for material which may not otherwise be subject to legal protection

Even where copyright material protects ICIP, that protection does not cover works after the duration of copyright protection, nor does it protect works that have been passed down through generations. For example, many rock artworks cannot be attributed to an individual author, and are old and out of copyright. Yet photographs and filming of those artworks can be protected by copyright. Similarly, many traditional stories have been handed down from generation to generation without being written down or published. The cultural owners of these oral stories do not own copyright in them because copyright law only protects written, recorded or published stories. See the diagram at **Attachment B**.

All Project affiliated organisations and individuals involved in the Deepening Histories project are committed in their support and acknowledgement of ICIP material. This support is formalised in the principles and protocols found in this Protocol.

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<sup>1</sup> See <http://www.wipo.int/tk/en/> for more information

## IV. Protocols for Indigenous Research

Engaging in research on Indigenous lands and with Indigenous people requires specific considerations and clearances. This Protocol provides guidelines for working within communities which can be adapted to adhere to each community's specific protocols.

### Filming On Country

There are many different Aboriginal and Torres Strait Islander cultures and communities within Australia. Each of these communities will have rules and protocols relating to use of their cultural knowledge and for working within the community. All researchers must seek Free Prior Informed Consent for filming and research relating to Indigenous people and their communities.

It is important for all researchers, academics and filmmakers involved in the project to ensure that the information and materials relied upon in the Project are relevant to the Indigenous community involved.

### Location Permits

Aboriginal Land Rights legislation requires filmmakers to have a permit when working on Aboriginal lands. These permits must be sought from the relevant land council:

- Northern Land Council - <http://www.nlc.org.au/> in accordance with the *Land Rights Act* (NT)
- Central Land Council - <http://www.clc.org.au/>
- For Blue Mountains, see City Council for filming in the city - <http://www.bmcc.nsw.gov.au/sustainableliving/filmingpermit>

Federal and State legislation require permits for any filming or research to be undertaken in national parks.

- For Kakadu and Uluru Kata Tjuta National Park, permits are granted by the Department of Sustainability, Environment, Water Population and Communities <http://www.environment.gov.au/parks/uluru/visitor-information/permits.html>.
- For all other Northern Territory parks, permission must be sought from the NT Department for Natural Resources, Environment, The Arts and Sport at <http://www.nt.gov.au/nreta/parks/permits/filming.html>
- For Western Australia, permission must be sought from the Western Australia Department of Environment and Conservation at <http://www.dec.wa.gov.au/content/view/30/941/>
- For NSW National Parks, including Sydney and Blue Mountains areas, permission must be sought from the NSW Office of Environment and Heritage at <http://www.environment.nsw.gov.au/commercial/Film-makingAndPhotographyLicences.htm>

(Refer to the NSW government index of contacts for national parks, available at <http://www.environment.nsw.gov.au/parkinfo/> for more information)

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# Death Protocols and Deceased Warnings

In many Indigenous communities, the use of an image or the name of a deceased person can offend cultural mourning practices. Customary law regarding mourning practices will differ between communities. As such, it is best to consult with each community when discussing how the image and name of deceased community members will be treated in the research project. For the Deepening Histories project, the following protocol will be followed:

- (1) If a person dies during the course of the project, before the final publication, the relevant Project Partner will consult the family to discuss options for concealing that person’s image or use of alternative names.
- (2) If a person is dead and the Project Partners wish to use and publish his or her image in the Project, the family will be consulted if known, but if a family member is not known, the relevant Project Partner will consult an Aboriginal organisation either from the region the deceased comes from, or from an Indigenous organisation such as a land council or national organisation.
- (3) If a person dies after publication, the Project Partners may not be able to make any changes to the film as included in the published website and materials, but a notice will be placed on all publications warning of the inclusion of an image of the deceased person.

## V. An Introduction to ICIP Rights

Indigenous Cultural and Intellectual Property (ICIP) Rights refer to all aspects of Indigenous peoples' cultural heritage.

This cultural heritage includes traditional knowledge, sacred sites, object and ancestral remains, literary, performing and artistic works, cultural knowledge, and documentation of Indigenous heritage. This heritage is a living heritage, transmitted from generation to generation, and regarded as pertaining to a particular Indigenous group or its lands and seas. Many generations may contribute to the development of ICIP. In this way, Indigenous cultural heritage is communally owned.

In accordance with ICIP Rights, Indigenous people have the right to:

- Own and control Indigenous Cultural and Intellectual Property;
- Ensure that any means of protecting Indigenous Cultural and Intellectual Property is based on the principle of self-determination;
- Be recognised as the primary guardians and interpreters of their cultures;
- Authorise or refuse to authorise the commercial use of Indigenous Cultural and Intellectual Property according to Indigenous customary laws;
- Maintain the secrecy of Indigenous knowledge and other cultural practices;
- Guard the cultural integrity of their Indigenous Cultural and Intellectual Property;
- Be given full and proper attribution for sharing their heritage; and
- Control the recording of cultural customs and expressions, and the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

These rights form the basis of **Section C: Principles and Protocols of Working with ICIP** of this Protocol.

## VI. Copyright

The *Copyright Act 1968* gives exclusive rights to the copyright owner of protected material. This means that any use of copyright material without the permission of the copyright owner may infringe copyright. Copyright protects 'original' works, meaning the work must be new, and not copied. It protects the expression of ideas, not the ideas themselves. Copyright may only be owned by a person or a company – there are challenges for copyright to be held by an unincorporated collective community. Copyright will usually belong to the creator or author of a work unless varied by written agreement. There are also specific laws which deal with copyright ownership in relation to performances, broadcasts, published editions and film and sound recordings.

Copyright protection in Australia is automatic, meaning that there is no registration process – original material will be protected from the time it is written or recorded. This means that copyright will protect works still in draft format, such as film rushes, draft research reports, and sketches.

Performers have rights to control the use of their Recordings, and may exercise such control by saying who can record them, and in what ways that recording may be used. A release or clearance form is best practice to ensure that the rights given to the filmmaker are clearly understood by the performer. Performers include interviewees and performers of folklore.

The moral or reputation rights of authors, creators, performers and filmmakers are also protected under the *Copyright Act*. These rights ensure that the creator is always acknowledged, and that their works may not be treated in a derogatory manner.

Some copyright owners choose to waive some or all of their copyright rights and publish their content as open source material (for e.g. under a Creative Commons licence<sup>2</sup>). Use of that material may still be restricted in some ways, and the rights granted by the copyright owner must always be confirmed before using open source material.

Once copyright has expired, the work or other type of material becomes public domain. Public domain content may be used freely and without restriction. Where public domain content contains ICIP, this Protocol will still apply, regardless of the copyright status of the material.

**Attachment A** lists some of the more common kinds of material protected by copyright, and the duration of that copyright protection.

## Compilations

Some publications include many forms of copyright material. For example a recording of a song will include the underlying copyright works of the song lyrics and the sheet music, the copyright in the actual sound recording and in the arrangement.

Websites publish a range of copyright content. The website created for the Deepening Histories project is intended to be a 360 degree research approach which combines film and sound recordings, artistic works (including maps and photographs), and literary (texts and extracts from other people’s reports and papers) and dramatic works (plays and dance performances) as well as other ICIP material. When compiling such a complex website it is necessary to get permission from copyright owners in each work published on the site. For example permission will need to be sought from the producer or a director of a film for use on the website. In addition, the film may feature underlying copyright material – there may be poetry read in the film, an artwork in the background or a song playing. Every single one of these materials must be cleared for the intended use. These obligations are in addition to the requirements under Section **C. Principles and Protocols of Working with ICIP**.

Please refer to the table in **Attachment B** for more information.

<sup>2</sup> For more information on Creative Commons licenses please refer to <http://creativecommons.org.au/>

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## B. IP Ownership and Clearance Forms

### I. Ownership of ICIP and IP in the Project

This protocol has been prepared for the researchers, academics, participants and filmmakers involved in the Deepening Histories Project (the Project Partners). The work done by these individuals for this Project will be subject to the following conditions.

#### Basic Principle:

Subject to the exceptions below, the owner of the copyright in any material created or used in the Deepening Histories Project will be the material's author or maker.

#### Who is the author of a copyright work?

- For a **literary work**, the author or writer
- For an **artistic work**, the artist/photographer/sculptor
- For a **musical work**, the composer of the music
- For a **dramatic work**, the writer or choreographer

#### Who is the maker of copyright material?

- For a **sound recording**, the producer (the person who commissions the recording)
- For a **film**, the producer (the person who commissions the film), or the director where the film has not been commissioned<sup>3</sup>
- For a **broadcast** the maker of the broadcast

#### Exceptions:

##### 1. ICIP Material

Please refer to **Part B Principles and Protocols of Working with ICIP** in relation to the ownership of ICIP material, in particular Principles 1, 6, 7 and 8.

##### 2. Performers (without ICIP)

Where there is no ICIP Material used, performers of musical, dramatic or literary performances will own the copyright in their performance, and in any Recordings or transcripts made from that performance.

<sup>3</sup> This is in addition to the other copyright owners whose material has been used in the film – for example, a scriptwriter or sound track composer.

### 3. **Performers (including ICIP)**

The relevant Indigenous community will advise who owns the copyright in a performance, and in any Recordings or transcripts of the performance which uses ICIP Material.

Performers of folklore or other ICIP material will have the right to elect ownership of the copyright in their performance, and in any Recordings or transcripts made from that performance. The copyright may be owned by the performer, another community representative or other community organisation.

### 4. **Material created under commission or contract**

Where material has been created by an individual under a commission or contract from a Partner Organisation, the ownership of copyright will be subject to the terms of the relevant contract. This exception does not apply to student Researchers at any participating University.

### 5. **Material published on the Deepening Histories website**

For material published on the Deepening Histories website, the following conditions will apply:

- The Deepening Histories website will be hosted and published by the ANU. Terms and conditions for use of material on the website will be developed for the Project and will be independent of the ANU's website terms of use.
- The copyright owners in the material published on the Deepening Histories website will retain all rights in their content, granting to the Project a non-exclusive licence to publish the material on the website.
- The following copyright notice will be published on the Project website: "© Deepening Histories Project [year of publication]". This notice will be published for information only and is in no way assigning or transferring rights in any material published on the Project website by the Project Partners to the Deepening Histories Project.

## II. Clearance Forms

Five clearance forms have been developed for use by researchers, academics, participants and filmmakers in conjunction with the Deepening Histories project and form part of the **NFSA Indigenous Audio-Visual Intellectual Property Toolkit**. They reflect the obligations found under **Part B IP Ownership** and **Part C Principles and Protocols of Working with ICIP**.

Different forms must be used for different occasions (sometimes multiple forms will be required). Refer to the guide at **Attachment C** for more information.

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## C. Principles and Protocols of Working with ICIP

The following 10 Principles and Protocols must be adhered to by all Project Partners involved in the Deepening Histories Project.

### 1. Upholding the value of ICIP

***Principle:*** The Project Partners respect and acknowledge the value of ICIP, and the contributions by Aboriginal and Torres Strait Islander people. They understand that Aboriginal and Torres Strait Islander research is not possible without the contribution of Aboriginal and Torres Strait Islander people.

***Protocol:***

- a. People and communities who contribute information which contains ICIP will be consulted about the use of that ICIP by the relevant Project Partner.
- b. Aboriginal and Torres Strait Islander contributors will own the copyright when their spoken words are written down, recorded or filmed for the Project. Clearance Forms 1, 2/3 and 4 will be used.
- c. Knowledge and information about traditional medicines and healing practices should only be used in the Project when Clearance Form 1 – Community Consent is granted. People should be advised that there is no legal stand-alone protection for Traditional Knowledge and that IP laws have limitations. The risks of making this information available to a wide audience (such as online piracy and re-sharing) should be explained the contributors.
- d. All types of ICIP should be valued for its cultural significance to its custodians, with reference to the laws, customs and beliefs of the relevant Aboriginal and Torres Strait Islander community, as communicated to the relevant Project Partner by that community or as contained in any local community protocols provided to the Project Partner.
- e. Where possible, Aboriginal and Torres Strait Islander people who have contributed to the Project will be invited to participate in conferences, presentations and other events arising out of the Project.

## 2. Respect for Indigenous Laws, Customs and Protocols

***Principle:*** The Project Partners recognise and respect the locally specific laws, customs and protocols governing the transfer and use of ICIP by Indigenous communities. They will ensure the respectful collection, use and archiving of Aboriginal and Torres Strait Islander knowledge including sacred, secret or sensitive information and knowledge, as well as access to and use of cultural sites, materials, languages and names.

### ***Protocol:***

- a. Aboriginal and Torres Strait Islander communities involved in or the subject of the project should be given an opportunity to identify the ICIP that will be collected or recorded in the project and inform the relevant Project Partner of any laws, customs and protocols that govern its use. Given the nature of the project, it is likely that there may be a lot of ICIP involved. This should be done at the beginning of a project. Clearance Form 1 and 2/3 will be used.
- b. Communities that are the subject of research should be encouraged to develop protocols surrounding the use of ICIP at the earliest stage of the project in accordance with Clearance Form 1. Where it is impossible or impracticable for a community to inform the relevant Project Partner of local laws, customs and protocols, the following actions should be taken:
  - Project Partners should avoid making a record of secret or sacred material or knowledge in any form (including written notes, films, sound recordings and any other media) unless:
    - i. the person providing the Secret/Sacred ICIP has been made fully aware of how the ICIP will be stored, used, published or otherwise utilised; and
    - ii. both the Project Partner and the person providing the Secret/Sacred ICIP are satisfied that such storage, use, publication, or utilisation will not breach the laws, customs or protocols of the relevant Aboriginal or Torres Strait Islander community.
  - Secret/Sacred Knowledge or Material should not be released, displayed or disseminated without the signing of relevant Clearance Forms.

## 3. Involvement and participation

***Principle:*** The Project Partners recognise that Aboriginal and Torres Strait Islander people and communities have the right to determine and develop priorities and strategies in research that involves or affects them and to be actively involved in the research. They also acknowledge the importance of providing opportunities for Aboriginal and Torres Strait Islander people to develop research skills and to author papers.

**Protocol:**

- a. The Project Partners will give Aboriginal and Torres Strait Islander people and communities the opportunity to participate in projects that involve the collection, use, publication and archiving of their ICIP.
- b. Aboriginal and Torres Strait Islander people and communities have a right to be actively involved in the collection of ICIP and will be given the opportunity to be actively involved in the use, interpretation and dissemination of their ICIP.
- c. The Project Partners recognise that Indigenous people’s involvement and participation is on-going, and continues after publication of the website and its future uses and decisions relating to the longer term management of the project’s results.

**4. Free, Prior, Informed consent**

**Principle:** The Project Partners recognise that ICIP should not be collected or used in any way without the Free, Prior, Informed Consent of the Aboriginal and Torres Strait Islander person or community. Under this principle, Aboriginal and Torres Strait Islander people who are the subject of research, or whose ICIP is to be collected or used in any way, have the right to be consulted and to negotiate to reach mutually agreed terms for the collection and use of ICIP. This process should include the execution of formal written agreements on mutually agreed terms that have been reached in good faith.

**Protocol:**

- a. Project Partners will seek Free, Prior, Informed Consent from Indigenous persons and communities that are involved in or affected by any research.

This will include:

- Representatives (whether community organisations or persons of authority) of traditional owners of land or heritage referenced in research materials; and
  - Any persons who contribute to or appear in the Recordings or whose ancestors appear in the Recordings or archival materials used, where those persons can be identified.
- b. To obtain Free, Prior, Informed Consent, the relevant Project Partner will meet with community organisations which represent the communities, lands, cultures or heritage appearing in or referred to in the project.
  - c. The relevant Project Partner will provide a rough copy of the research (such as a thesis, paper, film or recording) to the community representative and individual participant 30 days prior to publication for comment and feedback by representative community organisations.
  - d. To obtain Free, Prior, Informed Consent, the Project Partners will give as much information about the research project as possible, so that the Indigenous participant and the community can make an informed decision about whether they are happy to contribute to the research. The Project Partners will provide the following information:

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- A general overview of the research project;
  - Timeline for the research;
  - Which people from specific communities will be asked to participate in the making of the research;
  - Details of any sites and locations that will be documented;
  - Where, when and by who the research will be seen and heard;
  - Any areas of cultural sensitivity that will arise during the research;
  - Any government departments involved and their intended use of the information;
  - Where the intended use of the information is not known at the time of initial consultations, the Researcher will re-consult with the participant when the use is known.
- e. The information listed above will be provided to community organisations in writing in a way they can understand (this may involve translations and/or the use of interpreters).
- f. Free, Prior, Informed Consent will be taken to have been given:
- By performers or interviewees when the person has signed Clearance Form 2/3 and 4;
  - By communities when Clearance Form 1 is signed, or where a permission letter has been signed by its representative community organisation or, if there is no representative community organisation, by a person in authority.
- g. Once Free, Prior, Informed Consent has been given, the Project Partners will assume it is continuous unless a communication is lodged with the Project Partners by the representative community organisation or individual participant revoking such consent. The relevant Project Partner will use its best endeavours to resolve the issue. However, should the matter remain in dispute it will be forwarded to a mutually acceptable independent party for resolution. In some situations it may not be possible to withdraw material entirely – for example, after publication or broadcast has occurred

## 5. Confidentiality and Privacy

***Principle:*** Indigenous people have the right to keep their information confidential – including information about their communities, their culture, traditions and beliefs. Project Partners must respect Indigenous people’s right to withhold information from publication. Project Partners must also show their respect by seeking Free, Prior, Informed Consent before taking a photograph or filming Aboriginal and Torres Strait Islander people for the project. Aboriginal and Torres Strait Islander should also have the right to change their mind or seek the return of information prior to publication.

### ***Protocol:***

- a. The Project Partners will comply with the obligations under the *National Privacy Act 1988*. National privacy laws affect the treatment of personal information. The Information Privacy Principles (IPPs) and the National Privacy Principles (NPPs) contain obligations for different organisations:

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- IPPs will apply to Project Partners which are government bodies or agencies:
  - NPPs will apply to Project Partners which are private sector organisations.
- b. The Project Partners will be bound by the set of principles which reflects their organisation. For more information on Australian privacy laws and relevant obligations, visit the website of the Office of the Australian Information Commissioner<sup>4</sup>.
- c. The following additional requirements for privacy and confidentiality must be met when collecting or using ICIP material:
- Where an Aboriginal or Torres Strait Islander person or community contributes to the research and identifies ICIP material, the Project Partners should act in accordance with the express wishes of that person or community. This may result in stopping the recording of the ICIP or the recording continuing subject to conditions and appropriate consultations regarding the cultural sensitivities around the use of that ICIP material.
  - Privacy for Indigenous people shall be given a high importance before, during, and after completion of the research.

## 6. Integrity and interpretation

***Principle:*** This principle recognises that Aboriginal and Torres Strait Islander people have a right to maintain the integrity of their arts, cultural expression information and knowledge and that, by virtue of this right, Aboriginal and Torres Strait Islander people should be the primary interpreters of their cultural and intellectual property.

***Protocol:***

- a. The research methodology and timelines will allow for Indigenous consultation at the following stages:
- Research and data collection stage; and
  - Drafting of reporting and/or editing of footage; and
  - Finalising research; and
  - Archiving of research.
- b. The Project Partners will provide the opportunity for ICIP rights holders and relevant Aboriginal and Torres Strait Islander communities and organisations to review the research at least 30 days prior to publication. The Project Partners will take into account any feedback provided by the rights holder or community and will use its best endeavours to make any changes to the project as required.

<sup>4</sup><http://www.privacy.gov.au>

- c. Consideration should be given to delivering the research in a format that allows for review by the Aboriginal and Torres Strait Islander people. For example, presentations at meetings or plain English summaries are more culturally friendly ways of reporting back information.
- d. Copies of the Recordings will be given to the participants.

## 7. Attribution and acknowledgement

***Principle:*** The Project Partners recognise that Aboriginal and Torres Strait Islander people have the right to be acknowledged and attributed for their contributions of ICIP material and their participation in research. This includes individuals and communal groups.

***Protocol:***

- a. The Project Partners will attribute the Aboriginal and Torres Strait Islander participants in the Project in accordance with their wishes and the wishes of the community, taking into account:
  - The names or identity of the participant;
  - The time and date of recording;
  - The location of filming(including Aboriginal clan group associations or language groups);
  - the name of the landscapes, in Aboriginal and Torres Strait Islander languages;
  - The sequence in which the footage is used, and the proximity to other footage; and
  - The names of consulted organisations.
- b. If an Indigenous participant does not wish to be named or identified, the Project Partners agree to edit the participants name, image or sound from the Project in accordance with their wishes.
- c. The use of ICIP material will be subject to the attribution and ownership conditions in Clearance Forms 1 and 2/3.
- d. Clearance Forms 1 and 2/3 will be used to clarify the ownership of each record created with the Indigenous person or communities involved.
- e. Making a record as part of research activities will generate copyright in reports, films, sound recordings and data, and the Project Partners agree to exercise the copyright and ICIP in the resulting work according to this Protocol.
- f. The attribution of authorship in the research will be given in accordance with **Section B Ownership of ICIP and IP in the Project** of this Protocol.
- g. Aboriginal and Torres Strait Islander communities, individuals and organisations should be acknowledged for their participation and assistance.

## 8. On-going obligations and future use

***Principle:*** The Project Partners recognise that there is an on-going obligation to work in collaboration with Aboriginal and Torres Strait Islander people and communities regarding the use, access to, publication, dissemination, utilisation, promotion and commercialisation of material collected for research and results of research. Free, Prior, Informed Consent is a continuing obligation.

***Protocol:***

- a. All known uses of the research should be negotiated with the relevant Aboriginal and Torres Strait Islander group in the early stages of research.
- b. If a Project Partner wishes to use ICIP material for a purpose that was not originally contemplated by the project and cleared by the community, permission for the new use must be sought in accordance with this Protocol. This will require re-consultation with the community or individual, the written consent (via the relevant Clearance Form) for the new use, and any additional ICIP clearances.

## 9. Equitable sharing of benefits

***Principle:*** Aboriginal and Torres Strait Islander people and communities have the right to an equitable share of the benefits derived from or based upon their ICIP and their contributions to research.

***Protocol:***

- a. Benefits will be agreed between the Project Partners and the community in an open and informed negotiation, and will be finalised before the research commences.
- b. Benefits may include:
  - monetary benefits such as financial payments;
  - education and training;
  - employment and community development;
  - improved infrastructure (such as equipment and computers);
  - access to research materials and footage, including raw and edited footage;
  - assignment of copyright in, or a licence to use the Recordings;
  - repatriation of pre-existing archive collections relevant to an Indigenous community involved in the Project.

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- c. Benefits should always be shared in a culturally appropriate manner, taking into account the wishes of the relevant people and/or community.

## 10. Cultural Maintenance and Access

***Principle:*** The Project Partners understand that the cultures of Aboriginal and Torres Strait Islander people are not static and that measures need to be taken so that Aboriginal and Torres Strait Islander people can maintain, revitalise and advance their cultures. Provision should be made so that current and future generations are given long-term access to any ICIP, data, research results and materials that are collected or created by the Project Partners.

***Protocol:***

- a. The Project Partners will give plain English copies of reports and findings to the Aboriginal and Torres Strait Islander research participants and communities.
- b. One copy of the Recordings will be offered to the relevant participant and to the Indigenous community involved in the research.
- c. During the Project the Project Partners will safely and securely store the Recordings.
- d. On completion of the Project, the Recordings, research reports, and other material will be offered to the NFSA/AIATSIS which will be responsible for archiving the material in accordance with its own protocols and policies. These organisations respect cultural sensitivities relating to collections held by the organisation on behalf of Aboriginal and Torres Strait Islander communities. AIATSIS and the NFSA are required to abide by the conditions placed on the access and use of collections by depositors and will require those wishing to use the Recordings to seek participant or community clearances as required.

## Complaints and Disputes Procedure

The Partner Organisations acknowledge that disputes may arise from time to time over the use of the Recordings and the IP and ICIP rights of contributors in the Project.

Where disputes arise, the Partner Organisations involved in the dispute agree to resolve the issues in a prompt and co-operative manner in accordance with the principles found within this ICIP and IP Protocol. Partner Organisations with a pre-existing complaints and disputes policy may utilise those policies to attempt to resolve the dispute.

- Being mindful of the principles upon which this Protocol is founded, the Partner Organisations are responsible for ensuring that the Protocol is followed by monitoring all Researcher, filmmaker and academic compliance with this Protocol;
- managing the resolution of disputes and complaints relating to the use of IP and ICIP in the Deepening Histories project;
- referring disputes to an independent third party where the dispute is not able to be resolved between the disputing parties and the Partner Organisation. Independent third parties will be qualified mediators or dispute resolution service providers (for example, the Arts Law Centre of Australia or LEADR).

A copy of this Protocol will be held by the NFSA, ANU and AIATSIS for future long term reference.

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## Attachment A<sup>5</sup>

### Copyright Material

Artistic works including:

- fine art
- photographs
- sketches
- works of artistic craftsmanship

Literary works including:

- published writings
- fiction and non-fiction
- poems
- theses
- transcripts and song lyrics

Musical works including:

- the music
- arrangements or remixes

Dramatic works including:

- plays
- dance
- film scripts

Unpublished works:

- archival rushes, field notes etc

Films including:

- The recording of moving images and accompanying sounds

Sound Recordings

Broadcasts

Government works and films:

- Any copyright material that is created under the control or direction of the Crown

### Duration of Copyright Protection

70 years after the death of the artist

70 years after the death of the author

70 years after the death of the author

70 years after the death of the creator

70 years from the year of first creation

70 years from the year film is first published

70 years from the year the recording is first published

50 years from the year the broadcast is made

50 years from the year the material is first published

Sound recordings, actuality films and photographs made before 1 May 1969<sup>6</sup>

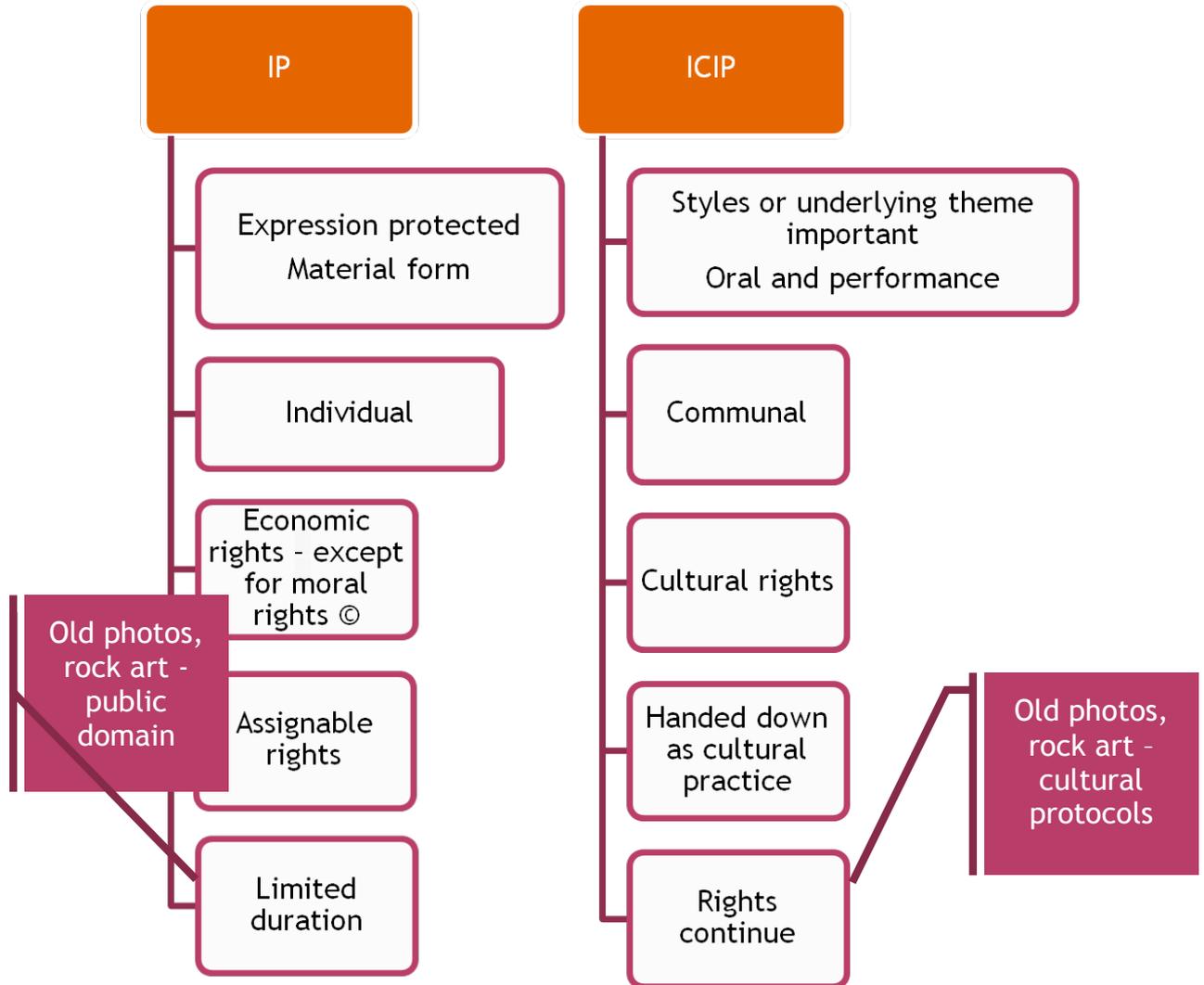
- (these rules apply because of the 2005 Australia/US Free Trade Agreement)

50 years from the year the film or recording was made (some materials may now be out of copyright).

<sup>5</sup>For more detailed information on copyright duration visit the Copyright Council of Australia's website at <http://www.copyright.org.au>.

<sup>6</sup>Note: films made before 1 May 1969 were protected as a combination of photographs, dramatic works and sound recordings (at that time, there was no independent protection for films).

**Attachment B**



### Collection of research materials - Checklist

Material	Copyright rights	Underlying Copyright	ICIP Rights
Written materials (refer to Attachment A, Literary Works, Dramatic Works)	<ul style="list-style-type: none"> <li>Original literary works are protected by copyright</li> <li>You need to get permission from the copyright owner to use the written material before you publish or archive – permission should be granted at the collection stage</li> <li>Moral rights – you have to attribute the copyright owner in each piece of written material</li> </ul>	<ul style="list-style-type: none"> <li>Sometimes other people’s written material contains copyright material belonging to other people. You need to get permission from this third person if you wish to use any part of their copyright material.</li> <li>Written materials may include quotes or extracts from other works (including poems, speeches) or even photos and images. If you are using a substantial part of those underlying works, you need to seek clearance from the copyright owner. The writer of the original text will usually provide a reference or a name which will assist in locating the other copyright owners.</li> </ul>	<ul style="list-style-type: none"> <li>It is important to check all written material for ICIP material. Where there is ICIP material, you will need the permission of the relevant community (or authorised representative) to use the ICIP in the Project.</li> </ul>
Film (refer to Attachment A)	<ul style="list-style-type: none"> <li>Films are protected by copyright.</li> <li>If using someone else’s film footage, you need to get permission from the copyright owner of the film beforehand.</li> <li>Moral rights – you have to attribute the copyright owner of the film</li> <li>Special rules apply to the filming of children. Parental consent must always be sought before filming children.</li> </ul>	<p>Film Footage will include other material which is subject to copyright protection, and must also be cleared. This includes films that you are using created by someone else and films that you create. For example:</p> <ul style="list-style-type: none"> <li>Dramatic or literary works which are read aloud or performed;</li> <li>All sounds and sound recordings (including music)</li> <li>Artistic works featured in the film (you do not require clearance if the artwork is only</li> </ul>	<ul style="list-style-type: none"> <li>It is important to check all film material for ICIP material. Where there is ICIP material, you will need the permission of the relevant community (or authorised representative) to use the ICIP in the Project.</li> </ul>

Material	Copyright rights	Underlying Copyright	ICIP Rights
		<p>interviewees) have rights to authorise their recordings and, in accordance with this Protocol, will own the copyright in their performance.</p> <ul style="list-style-type: none"> <li>• Moral rights – you need to attribute the copyright owners of all the underlying works featured in the film</li> </ul>	
Sound recordings	<ul style="list-style-type: none"> <li>• Copyright in the sound recording itself</li> </ul>	<ul style="list-style-type: none"> <li>• Sound recordings of interviewees speaking will mostly be of a live performance not based on an underlying work.</li> <li>• Sound recordings feature underlying works which can include music, poetry or literary works read aloud.</li> <li>• Moral rights – you will need to attribute the copyright owners of all the underlying works featured in the sound recording.</li> </ul>	<ul style="list-style-type: none"> <li>• Sounds recordings made for the project may include ICIP material. Where there is ICIP material, you will need the permission of the relevant community (or authorised representative) to use the ICIP in the Project.</li> </ul>
Images and photographs	<ul style="list-style-type: none"> <li>• Artistic works and photographs are protected by copyright</li> <li>• You need to get permission from the copyright owner in a photograph or artistic work before you use it</li> </ul>	<ul style="list-style-type: none"> <li>• Some photographs include other copyright material in the image – such as a photograph of a painting. Unless the underlying work is in a public place or is a building, permission must be sought from that copyright owner to use their work</li> </ul>	<ul style="list-style-type: none"> <li>• Images (including artworks, paintings, drawings) and photographs may contain ICIP material.</li> <li>• Where an image or photograph contains sacred sites or secret knowledge, special care should be taken when explaining to the community or authorised representative how the work will be used.</li> </ul>

## Publication of research materials

Material	Copyright rights	Underlying Copyright	ICIP Rights
Reports, journal articles, essays and theses	<p>Permission is required from all the copyright owners to publish their material in:</p> <ul style="list-style-type: none"> <li>The format being published (article, chapter, book etc)</li> <li>The territory being published (e.g. NSW, Australia, each overseas country)</li> </ul>	<p>Permission is required from all the underlying copyright owners to publish their material in:</p> <ul style="list-style-type: none"> <li>The format being published (article, chapter, book etc)</li> <li>The territory being published (e.g. NSW, Australia, each overseas country)</li> </ul>	<p>Where the Project contains ICIP material, permission is required from the relevant communities (or authorised representatives) to publish the ICIP in:</p> <ul style="list-style-type: none"> <li>The format being published (article, chapter, book etc)</li> <li>The territory being published (e.g. NSW, Australia, each overseas country)</li> <li>The period of time you are publishing for</li> <li>The intended audience</li> </ul>
Website	<p>(refer to Publication of research materials – reports for the required clearances)</p> <p>Publishing online offers access to material for people across the globe. When clearing rights for publishing online, you need to obtain a worldwide licence to copy and communicate all copyright works online. Be sure to list the websites that will carry the work when getting permission.</p>	<p>(refer to Publication of research materials – reports for the required clearances)</p> <p>Publishing online offers access to material for people across the globe. When clearing rights for publishing online, you need to obtain a worldwide licence to copy and communicate all copyright works online. Be sure to list the websites that will carry the work when getting permission.</p>	<p>(refer to Publication of research materials – reports for the required clearances)</p> <p>Extra care should be taken when publishing ICIP online because of the increase in audience size. Researchers should clearly explain the implications of publishing online to the community or representative. Be sure to list the websites that will carry the work when getting permission.</p>

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## Archiving of research materials and use of archival footage

Material	Copyright rights	Underlying Copyright	ICIP Rights
National Film and Sound Archive/AIATSIS	<ul style="list-style-type: none"> <li>Have you cleared the storage rights from all of the copyright owners? This must be done before archiving.</li> </ul>	<ul style="list-style-type: none"> <li>(refer to the Collection stage) Have you received clearance from all copyright owners in underlying works to archive the material?</li> </ul>	<ul style="list-style-type: none"> <li>Have you received clearance from all Indigenous participants and communities in the Project to store the materials containing ICIP material in the NFSA/AIATSIS archive?</li> <li>When using existing archival footage, have you received the clearance from the relevant community (or appointed representative) to archive the materials contained in the project? (this is different from the first requirement in that the archived footage or images will be archived alongside different material than in the original archive format)</li> </ul>
Community Archive	<ul style="list-style-type: none"> <li>Have you cleared the storage rights from all of the copyright owners? This must be done before archiving.</li> </ul>	(refer to the Collection stage) Have you received clearance from all copyright owners in underlying works to archive the material?	<ul style="list-style-type: none"> <li>Have you consulted with the community or appointed representative about which community archive may be the recipient of the research materials?</li> <li>Have you received clearance from the community (or appointed representative) to store the research materials in the community archive?</li> </ul>

### Future use of research materials

Material	Copyright rights	Underlying Copyright	ICIP Rights
All materials	If you decide to use any copyright material for a purpose that hasn't been cleared in any of the earlier stages of the project, you will need to contact the copyright owner for permission. Just because you have received permission for one type of use does not guarantee that the copyright owner is happy to have their work used for all purposes.	If you decide to use any copyright material for a purpose that hasn't been cleared in any of the earlier stages of the project, you will need to contact the copyright owner for permission. Just because you have received permission for one type of use does not guarantee that the copyright owner is happy to have their work used for all purposes.	If you decide to use any ICIP material for a purpose that hasn't been cleared in any of the earlier stages of the project, you will need to contact the relevant community or authorised representative for permission. Just because you have received permission for one type of use does not guarantee that the traditional owners are happy to have their work used for all purposes.

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