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cultures

: PERFORMING : : : : :

Protocols for Producing Indigenous Australian
Performing Arts



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IMPORTANT NOTICE - The information included in this guide is current as at Sydney, May 2002. This guide provides general advice only. It is not intended to be legal advice. If you have a particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner.

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introduction

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original owners and inhabitants of Australia.

In Indigenous cultures the artist is a custodian of culture, with obligations as well as privileges.

Indigenous people's right to own and control their cultural heritage is known as 'Indigenous cultural and intellectual property rights'. The term is used in *Our Culture: Our Future*¹ to refer to those rights as they are developing within international law. Since 1998, when *Our Culture: Our Future* was first published, the term 'Indigenous heritage rights' has gained more favour in the international arena. In the *Performing Cultures* guide we use 'Indigenous heritage' to refer to these rights.

Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people's heritage is a living heritage. An Indigenous person's connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, song, the visual arts and more recently, new media, are ways of transmitting Indigenous cultural heritage.

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

Performing Cultures guides the reader through many of these protocols.

Performing Cultures is one in a series of five Indigenous protocol guides published by the Australia Council's Aboriginal and Torres Strait Islander Arts Board. The guides reflect the complexity of Indigenous Australian culture, and provide information and advice on respecting Indigenous cultural heritage. Although each of the guides address cultural protocols specific to an Indigenous artform, they are shaped by the same underlying principles – the backbone of the protocols. The five guides in the series are:

- Writing Cultures
- Performing Cultures (Drama/Dance)
- Visual Cultures
- Song Cultures
- New Media Cultures

The Indigenous protocol guides will have relevance for everyone working in or with the Indigenous arts sector, including:

- Indigenous and non-Indigenous artists
- People working within related fields of Indigenous artform practice
- Federal and state government departments
- Industry agencies and peak organisations
- Galleries, museums and arts centres
- Educational and training institutions
- Indigenous media and targeted mainstream media

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

We also hope the guides will spark debate and that additional protocols will be developed across artforms. Your comments and ideas can be forwarded to atsia@ozco.gov.au or Director, Aboriginal and Torres Strait Islander Arts, Australia Council, PO Box 788, Strawberry Hills NSW 2012.

Using the *Performing Cultures* guide

Performing Cultures is written as a first point of reference in the planning of a work with Indigenous practitioners or using Indigenous cultural material. When you need specific advice on the cultural issues of a particular group, we recommend that you either speak to people in authority, or engage an Indigenous cultural consultant with relevant knowledge and experience.

The **Introduction** defines protocols as used in this guide, and looks at the special nature of Indigenous performing arts.

The next section, **Indigenous Heritage**, is an important overview of the issues that inform the development of Indigenous protocols. It looks at the complex web of relationships in Indigenous Australia, and how this might impact on the planning of a drama or dance project. It also charts international initiatives for the protection of Indigenous cultural and intellectual property rights. The key sections, **Drama Principles and Protocols** and **Dance Principles and Protocols**, present nine principles we have developed to support the protection of Indigenous cultural heritage.

There is valuable information on protocols specific to the use of cultural heritage material in drama and dance practice. A number of case studies and commentaries from Indigenous performing arts practitioners identify pitfalls and offer advice.

A further section, **Common Issues**, covers fees and employment conditions, festival performances and the 'welcome to country' protocol which are common to both dance and drama. You will also find information here on a number of other protocol documents produced in recent years.

The **Copyright** section contains general information and advice on the main law in Australia governing the use and reproduction of the performing arts and cultural expression.

Follow up provides a checklist of key points to consider when developing protocols for a performing arts project. It offers different and more specific information than the preceding sections. We therefore suggest you use the points outlined here in the context of the dance or drama and copyright sections before developing a checklist for your own project or practice.

We have also included a list of **Contacts** to be used as starting points for accessing relevant people and information.

What are protocols?

It's easy to get caught up in following the path of least resistance. We have to go with what's important, not what's easy.²

Wesley Enoch, Indigenous theatre director

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

Indigenous protocols arise from value systems and cultural principles developed within and across communities over time.

It is important to note the diversity and complexity of the many different Indigenous cultures in Australia. Ways of dealing with issues and cultural material may differ from community to community. There are also many different protocols across the diversity of urban, rural and remote communities.

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

The protocols outlined in *Performing Cultures* are shaped by nine principles. The protocols are, by definition, ways of actioning these principles. For example, a cultural protocol to action the underlying principle of respect is to acknowledge the Indigenous custodians of country at the site of each performance or event.

Performing Cultures identifies many specific protocols which can be applied or adapted by writers, producers, directors, choreographers, dramaturgs, dancers, performers, designers, event managers, arts organisations and others working in the performing arts.

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

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

What is Indigenous performance?

Indigenous performance is an important part of Indigenous culture – ceremony, storytelling, celebration, mourning, coming together and telling of events in Indigenous people's lives, both past and present.

Indigenous performance is not easily divided into categories of traditional and contemporary. In this guide 'traditional' refers to works that are drawn from a pre-existing cultural base.

Indigenous performance refers to

- acting
- dancing
- dramaturgy
- directing

that is carried out primarily by Indigenous Australian people, or is based on the cultural expression of Indigenous Australian people.

Indigenous performance draws on and embraces a full range of dramatic styles and forms including:

- street theatre
- improvisation
- readings
- ceremony
- dance performance
- dramatic performance
- festivals

Indigenous performance is generally a collaborative process with Indigenous and non-Indigenous performers, writers, directors, dramaturgs and production specialists working together.

A performance may incorporate many different artforms. Some of these artforms, including music, design and the published version of a play, are covered in other protocol guides in this series.

Special nature of Indigenous performance

Indigenous performance has an important place in the transmission of Indigenous culture. It has been a primary means of:

- renewing and teaching law and culture
- ceremony
- storytelling
- preserving language
- entertainment
- recording and expressing personal experiences
- recording and expressing common Indigenous Australian experiences
- telling Indigenous experience to the wider community
- celebrating
- showcasing and sharing Indigenous experiences

Performing Cultures outlines the current legal framework in relation to performing arts. While protocols for Indigenous performing arts differ from legal obligations, it is important to include both legal and cultural obligations in an effort to guide the reader towards developing best practice.

Performance is essentially a collaborative process. Only a few dramatic works are completely solo productions. This raises many issues for Indigenous performers in the use of cultural heritage and appropriate production of their work. Some issues of concern include:

- Who has the right to use Indigenous cultural material?
- Who has the right to speak for the owners of Indigenous cultural material?
- What is proper treatment of Indigenous cultural material including creation stories, ceremonial dances and other forms?
- How is Indigenous performance properly attributed?
- Should sensitive material be referred to and if so, how?
- How should real people and real events be dealt with in performance?

Many other important issues are dealt with in subsequent chapters.



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

Indigenous heritage, enshrined in Indigenous cultural and intellectual rights, is discussed at length in *Our Culture: Our Future*.³

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

All Indigenous artists are responsible for safeguarding cultural knowledge and expression. They need to ensure that Indigenous cultures, both in the past and today, are protected and maintained in their works. In this way these cultures can be passed on to future generations.

There is not one, but many Aboriginal or Torres Strait Islander cultures. These cultures have developed over thousands of years and have been passed down from generation to generation. Despite the enormous impact of the invasion in 1788, Indigenous cultures have continued to develop. A person's connection to Indigenous heritage is expressed in contemporary

life through his or her relationship with land, waterways, animals and plants, and his or her relationships with other people.

Aboriginal and Torres Strait Islander people have a well developed and complex web of relationships based on family ties, clan belonging, language group affiliations and community, organisation and government structures. A range of authority structures exists across urban, regional and remote communities. It is important to acknowledge the complexity of Indigenous Australia when negotiating the use of Indigenous heritage for a performing arts project.

Indigenous Australians are concerned that there is no respect for their Indigenous cultural knowledge, stories and other cultural expression in the wider Australian cultural landscape. Concerns include the current legal framework that does not promote or protect the rights of Indigenous people – particularly to own and control representation and dissemination of their stories, knowledge and other cultural expression.⁴

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

Our Culture: Our Future

Indigenous cultural and intellectual property rights refers to Indigenous people's cultural heritage.

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

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

Indigenous cultural and intellectual property rights includes 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 customary law
- maintain the secrecy of Indigenous knowledge and other cultural practices
- full and proper attribution

- control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill, and teaching of culture.

For a full list of rights see *Our Culture: Our Future*⁵

Current protection of heritage

Australia's current legal framework provides limited recognition and protection of these rights. *Our Culture: Our Future* recommended significant changes to legislation, policy and procedures. As yet there has been no formal response to these recommendations from the Australian government. Much of the rights recognition has been done at an industry and practitioner level, through the development of protocols and use of contracts to support the cultural rights of Indigenous people.

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

The Draft Declaration on the Rights of Indigenous Peoples states, in Article 29:

*Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.*⁶

The Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights, in Article 8, urges Indigenous people to 'develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge'.⁷

Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (1993) were adopted by ATSIC's Indigenous Reference Group in 1997.⁸ Article 39 states:

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

In January 2002, the World Intellectual Property Organisation's International Forum, *Intellectual Property and Traditional Knowledge: Our Identity, Our Future*, held in Muscat, Oman, adopted a Declaration recognising that 'traditional knowledge plays a vital role in building bridges between civilizations and cultures, in creating wealth and in promoting the human dignity and cultural identity of traditional communities'.⁹

Internationally, the World Intellectual Property Organisation has established an intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore to discuss intellectual property issues that arise in the context of:

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

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.¹¹ The prior and informed consent of the traditional owners is required to:

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

drama principles and protocols



Indigenous drama takes many forms, including plays, storytelling and musicals. It can be performed in all sorts of venues from theatres to the street.

Indigenous drama might include cultural heritage such as traditional songs or dances, tell a traditional story belonging to a particular clan, or tell the story of a person or community.

The production of a dramatic work requires the collaboration of many people including the writer, director, actors, dramaturg, technical crew and people who provide promotion and distribution services.

The principles outlined below are a framework for respecting Indigenous heritage.

- Respect
- Indigenous control
- Communication, consultation and consent
- Interpretation, integrity and authenticity
- Secrecy and confidentiality
- Attribution
- Proper returns
- Continuing cultures

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

Respect

It is important that anyone working with Indigenous works recognise Indigenous ownership of the material and provide acknowledgment of the Indigenous owners. They must also follow the principles of respect and consultation.¹²

Acknowledgment of country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.

When organising a performance or festival, it is respectful to seek the consent of the Indigenous custodians of the country where the work is performed.

If consent is given, it is important to acknowledge country and custodians at the site of each public performance or festival. Seek advice from the Indigenous community on the preferred manner of acknowledgment.

Representation

Indigenous cultures should be represented in terms of Indigenous cultural values. It is important to avoid derogatory or outdated perspectives and terminology. When a non-Indigenous group collaborates with Indigenous performers and the community, it is best to designate an Indigenous person to liaise between the groups, and ensure that cultural protocols are followed.¹³

Accepting diversity

The Indigenous dramatic arts reflect the diversity of experience and cultural context within Indigenous communities. It is important for those working in the dramatic arts and their audiences to respect the diversity of contributions of Indigenous performers, writers, directors, dramaturgs and other Indigenous contributors.

Living cultures

Indigenous cultures are living and evolving entities, not simply historical phenomena.

Developing a dramatic work often involves adapting or reinterpreting traditional or contemporary works. Extensive consultation is important to identify who has authority to speak for a work¹⁴ and who can authorise any adaptation.

Indigenous control

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

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

Speaking to the right people is very important. Indigenous communities, whether regional, urban or remote, have an infrastructure of organisations and individuals who can advise on a range of issues – including guidance about locating Indigenous people with authority to speak for specific Indigenous cultural material.

For initial contacts we recommend the following directories.

- *The Black Book Directory 2000 – Indigenous Arts & Media Directory*. Published by Blackfella Films and available from Publication Sales, AIATSIS on (02) 6261 4200 or www.aiatsis.gov.au

- *National Directory of Aboriginal and Torres Strait Islander Organisations*. Published for ATSIC and available from Crown Content on (03) 9329 9800 or www.crowncontent.com

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, permission must be obtained from the local Land Council or Trust, or the Community Council concerned. For a list of relevant authorities consult the *National Directory of Aboriginal and Torres Strait Islander Organisations*.

Some other useful starting points for inquiries include:

- Aboriginal Land Councils
- Aboriginal and Torres Strait Islander Commission
- Torres Strait Regional Authority
- Island Coordinating Council
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- Indigenous Unit of the Australian Film Commission
- Indigenous theatre companies
- Indigenous language centres
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries
- relevant individuals or family members
- elders and custodians of relevant Indigenous clans and groups

Communication, consultation and consent

The process of communication, consultation and consent may include:

- Identifying community members who have authority to speak for the Indigenous cultural heritage in the dramatic work.
- Discussions with community members, providing information about the proposed project, seeking consent to use the Indigenous material, seeking guidance on use, and feedback on proposals.

- Accepting that the community may not consent to the project.
- Ongoing discussions about the way in which the work will be developed, performed and presented.

An increasingly popular addition to this kind of consultation is the hire of an Indigenous cultural consultant or advisor to work with the cast and crew. This is an important part of the production of dramatic works for both Indigenous and non-Indigenous performers.

A cultural advisor will provide important information on the protocols relevant to the particular dramatic work.

case study

Marrugeku Company

'Marrugeku have worked in this Indigenous community for five years. And through working here for that time we have developed a set of ethics. So when we worked on *Crying Baby* we could go through a process that was very explorative. This would be very inappropriate in another community or at another time in this community. Collaborations are very culturally specific and [are] based on the history and the amount of time taken between the company and the community.

Different communities will require different ways of working, so the most important part is to have strong ethics and consultation.

The most important issues to consider are consultation, cultural specificity of the collaboration, the relationship with the community and we also think very carefully about the context the work is later toured in'.¹⁵

The following case studies are examples of consultation by Indigenous artists and directors with community.

case study

The Dreamers

In the 2002 season of *The Dreamers*, directed by Wesley Enoch, the theatre company Company B employed Lynette Narkle, Associate Director at Yirra Yaakin Noongar Theatre, as cultural advisor. Enoch worked closely with the family of the playwright, the late Jack Davis. The play involved references to Western Australian Indigenous cultural material, and Lynette was contracted to ensure that the proper cultural protocols were followed.¹⁶

case study

Kooemba Jdarra Indigenous Performing Arts

Using a cultural consultant

The play, *Luck of the Draw*, tells the story of some members and family of the Stolen Generation. When Kooemba Jdarra, an Indigenous theatre company based in Brisbane performed the play, the company hired an elder from Cherbourg to advise the cast and crew on cultural issues.¹⁷

Consulting with community

When Kooemba Jdarra presented *Going to the Island*, about the Minjerribah community on Stradbroke Island, consultations with the community commenced at the writing stage.

A non-Indigenous writer based at Kooemba Jdarra initiated consultation with the Stradbroke Island community through the Indigenous theatre group members. Drafts of the play were sent to the community to be checked for accuracy and to seek the community's creative contributions to the work.

Although the process of production was more time consuming, it resulted in a production which everyone was happy with. The Stradbroke community felt a great sense of ownership of the work and supported it enthusiastically during the performance.

Kooemba Jdarra have developed strong community consultation protocols for production of their work, and *Going to the Island* was a great example of the successful operation of their cultural protocols.¹⁸

case study

Yirra Yaakin Noongar Theatre Individuals

'In some instances our work has focused on telling the life story of an individual person. After consultation with the broader community, we usually find the individual is the best person to do the consultation and we leave the community consultation to that individual. The contract, in those cases, gives royalties to the individual and to the family members who were consulted.

Communities

In 1999, we wanted to develop work based on the traditional stories about waterways in the south-west of Western Australia. We knew families from that area who had those stories, so we went and talked to them. They in turn, advised we talk to others – and this of course unearthed more stories.

We spent about 6–8 months talking to the owners of those stories. The work we produced in 2000 was called *Djildjit*. It's not unusual for any of our works to be developed over an eighteen to twenty month period before production starts.

Advising non-Indigenous organisations on consultation protocols

We were asked by a non-Indigenous festival organiser on how to conduct consultation for a performance in a remote area. We told them the names of the families who were responsible for that area. They consulted with a few families, but stopped when they had a majority in agreement. We advised them that they needed to talk to all the families, not just a majority.¹⁹

Time frames for consultation and consent

Effective consultation is rarely achieved in a single meeting. The quality of the process of consultation will be crucial to the development of a respectful, authentic work.

Consultation should be undertaken within the time frames of the Indigenous community or individual. This may require that funding bodies or other groups working on the project are alerted to the importance of the process and time frames.

*Non-Indigenous funding bodies need to realise that the process is the most important thing. Funding bodies say: 'Product! Product! Product! It's Indigenous Australian theatre! Yes, well it is, but the process has to be done the right way.'*²⁰

Complexity of the consultation process

Consultation can be very straightforward, but frequently it is more complex. It is not enough to find just one person who will agree to the project or a particular interpretation of a work. It will generally be necessary to discuss the project widely with clan or family members, and to get advice from several people to establish the custodian of material. It is also important to remember that consultation and consent processes include the option for Indigenous people to say 'no'.

The consultation process is ongoing over a period of time. It is often not a 'one off' consent. It may be a continuing process of working with the traditional owners as the production develops.

It may take two years to develop a work because people have to meet their cultural obligations. There may be a death in the family and people have to attend.

*For example, when Dallas Winmar was writing Aliwa, Aunty Dot Collard got sick, and the process had to wait until she got better. When they were in Adelaide and Jack Davis passed away, they had to wait again.*²¹

Rachael Swain of Marrugeku Company describes the nature of consultation.

*It's a lot about time, and some of the old men were working with, like Thompson (Yulidjirri), last time we worked together he said, 'Well, what's really important is that we work really slowly. If we do the wrong thing some of us might get sick. We have to work so slowly that we can find out if that happens while we're working, and then we know we've gone the wrong way and [can] start going a different way. We have to work so slowly that we keep in touch with each other as we go ...'*²²

Paul MacPhail of Yirra Yaakin Noongar Theatre talks about developing productions with community input.

Yirra Yaakin ensures that all dramatic works are performed in the community first. For example, One Day in 67 by Michelle Torres is based on events in Broome. Consultation was conducted with Michelle and the community. The work was performed in Broome four months before its Festival of Perth season.

*The play Solid, which is about Aboriginal people from the Kimberley and the south-west of Western Australia, was first performed in the Kimberley, then toured the south-west before its Festival of Perth season. We leave about four months between performances in the community the work is from, and the performances in Perth or other locations, so we can work with the input we get from the community.*²³

Consultation issues for contemporary creators

Contemporary Indigenous actors, dancers, directors, choreographers and those who collaborate with them are creators of Indigenous culture. Creation of culture has many aspects. One role of society's creators is to value ongoing cultural obligations and to keep culture active and vibrant through practice. Another widely accepted role of creators is to observe and comment on society's ways and directions.

Comment might include depicting sensitive issues, practices or trends in the community. Indigenous director Wesley Enoch regards this as an important role:

*One of the roles of theatre is to confront and question the status quo, otherwise we risk confining the role of theatre to 'celebration' only.*²⁴

Another role of creators is to interpret works in the contemporary context. Existing works are increasingly developed and reinterpreted in the contemporary context, according to the style of particular artists. Issues such as whether a work is to be reinterpreted or reproduced close to its original form have legal, artistic and cultural implications. Copyright owners of a work should be consulted for permission to perform or adapt a work. Artistic and cultural issues need to be determined in consultation with the people associated with the work.

Indigenous creators in the performing arts often consider their responsibilities to their communities and cultures. It is important to consider how a work might be received by the particular community depicted in the work, and also by the wider community. The impact on any identifiable individuals, communities and Indigenous people in general are essential considerations for responsible performing arts creators.

Interpretation, integrity and authenticity

Interpretation

Development of a dramatic work

During collaborative projects it is important to recognise, remunerate and acknowledge Indigenous participants who contribute to the cultural authenticity and integrity of a work.

It is common practice to require actors to take on the role of cultural advisors in the development of authentic and appropriate dialogue and themes.

Indigenous actors get used as cultural consultants all the time. They are told: 'You know about your community'. In effect they are asked to double as consultants. For instance, if they see faults in the script or set design, if they feel that it's not authentic or the scene makes them feel uncomfortable, they tend to come up with suggestions to make it more 'culturally appropriate'.

*Indigenous actors are paid and credited with acting, but they are doing the job of actor/ scriptwriter cultural and community consultant.*²⁵

The collaborative nature of performance means that many people contribute to the work. Performers may have strong ideas on character development and styles of performance. In a practical sense, it may be too difficult to accommodate all suggestions.

Wesley Enoch says:

*It is still the writer who has to choose what to take on and what to reject in their pursuit of a better script/performance ... As a course of action, the employment of a cultural consultant as a single focus point is the best option.*²⁶

Performance of a dramatic work

The context in which a dramatic work is performed is very important to the authenticity and integrity of the work. For instance, when performing a song or other cultural material in an Indigenous language, it is important to establish the nature of the song, know what it is about and perform it in its correct context.

Helen Anu says:

*Performing a song in the wrong context can ridicule that work. There are many songs that are not appropriate to be performed at a political venue or meeting, for instance.*²⁷

case study

Marrugeku

Impact of context on a performance

'We think very carefully about the ways our work is presented also. We turn down a lot of touring work we get offered if the context for presenting the work is not appropriate. We have found that particularly in Europe there is an 'exotifying' of Indigenous culture. We don't go unless we feel that the presenter has enough understanding to contextualise the work properly. We feel that is a big part of our responsibility. We take on how the work is seen and toured, how it is contextualised, when it is shown and where it is shown'.²⁸

Integrity

comment

Yirra Yaakin

When a non-Indigenous company licenses production of a work developed by an Indigenous theatre company, it is very important that protocols are put in place for the use of the work. For instance, our first performance of a new work is for the Indigenous people the work is about.

When a new company subsequently performs the work, the same Indigenous people should be shown the work and invited to make suggestions about the new production. This is essential to ensure that the authenticity and integrity of the work is maintained.

The protocols need to recognise that when a non-Indigenous company licenses the use of an Indigenous work, they are not just buying the performance rights; they are required to engage with the Aboriginal community. The theatre company that originally developed the work needs recognition for their role in facilitating the engagement.²⁹

Authenticity

Giving proper consideration to authenticity and integrity means respecting any customary law or cultural obligations associated with the work. These include gender, correct language, sensitivity to the context the work's performance, and respecting cultural norms in promotional material (such as posters). Proper regard to these factors will help protect the Indigenous cultural property from misuse or exploitation.

In the Torres Strait, for instance, phrases or accents are distinctive among certain Island clans. Respect for authenticity and integrity would require acknowledgement and consultation on the form to be adopted in performance.³⁰ The use of the Dhari, the Torres Strait Island traditional headdress, would require permission, proper consultation, and respect for authentic use in any performance.³¹

case study

Marrugeku

Development

Marrugeku develops their work within the Indigenous community.

'The works are devised and performed in the remote community. They are shaped by that community's sense of humour. We create them for that Indigenous audience and then later we adapt them for an urban audience.

This is not the way it is normally done. Normally a work is developed in an urban environment and adapted to the remote community. We do it the other way around.

We find that urban audiences will often struggle to understand the dramaturgical and dramatic motifs from the country in which the work was developed and we often provide material to help them understand'.³²

Development of authentic work with respect for cultural integrity can sometimes mean that the process is time consuming and labour intensive. 'As an Indigenous theatre company, we can't just pick a play off the library shelf. We have to develop new Indigenous writers and that can be a long process.'³³

Secrecy and confidentiality

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

Representation of deceased people

Some film makers include a warning at the beginning of a film to alert viewers that the film contains people who have passed away. While dramatic works are not permanent and fixed in the same way as films, representation of deceased people may arise, and warnings could be used in programs, published editions of plays and announcements prior to a performance.

Secret and sacred material

Another important issue is access to and use of secret and sacred material.

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

'Secret and sacred' refers to information or material that, under customary laws, is:

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

Anyone proposing use of material that might be restricted according to Aboriginal law or custom should find out and obey rules relating to that cultural material.

Personal privacy

The personal privacy of Indigenous people should be respected. Personal or confidential information must not be disclosed without permission from the people who would be affected by the disclosure. Ask the individual, community or relatives of the individual for permission. Observe close consultation processes.

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

There are a few guiding principles for creative development of contemporary works and responsible representation of Indigenous culture.

- How will your work affect the Indigenous person or group it is based on?
- Does it empower them?
- Does it expose confidential material?
- Does it reinforce negative stereotypes?

Attribution

It is very important to acknowledge Indigenous contributions to dramatic works.

Attribution can include:

- credit for the custodians of traditional stories or motifs used in the work
- attribution of the community or individuals who contributed through the consultation process
- attribution of Indigenous cultural consultants and others who have participated or contributed cultural information during the development and performance of the work

In the Kooemba Jdarra's production of *Going to the Island*, the participation of the community was an important part of the publicity for the production, and the community was acknowledged in the program.³⁴

Proper returns

Wages and conditions

Apart from the usual wages and allowances for travel and accommodation, Indigenous writers, performers and directors may have specific cultural requirements which must be met if they are to participate in a work. For instance, some Indigenous participants may have particular dietary or medical requirements that must be met if they are to spend extended periods away from home – touring for example.³⁵

Performers are also familiar with the seasonal nature of their work, and it is an important factor when negotiating wages and conditions. 'A cheque has to go a long way!'³⁶

Royalties

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

Royalties may be negotiated by individuals and included in contracts. In some cases royalties are paid to the community which has participated in the work.³⁷

Royalties are also paid to the originating theatre company when it licenses the performance rights to the work. Generally a small Indigenous theatre company will license to a larger non-Indigenous theatre company. At present there is no recognition in the royalty structure for the effort, time and cost to Indigenous theatre companies of consultation and adherence to cultural protocols in the development phase.³⁸

Continuing cultures

If a company licenses use of work to be presented by another group – for example, re-staging a play, the agreement should be clear on any protocols to be followed during the re-staging process. For instance, the company which originally developed the work may require that the source community or particular contributors view the work prior to public performance, or be credited at each performance. In addition to these protocols, the ownership of the material should be clarified.

Recognition and protection

Yirra Yaakin Noongar Theatre is developing the concept of 'branding' for their dramatic works. While Yirra Yaakin invests the time, effort and financial resources in proper consultation, frequently they are not attributed when the dramatic work reaches the national or international stage. Effective branding of a Yirra Yaakin work will increase recognition of the company when a work is licensed and toured by a larger company. It will also indirectly increase returns to the company.³⁹

dance principles and protocols



Indigenous dance takes many forms including storytelling, ritual and entertainment, and may combine with other artforms such as drama and visual arts.

Dance productions are generally collaborative works involving the expertise of dancers, choreographers, artistic directors, production crew and others.

Respect

While Indigenous customs and practices may vary across Australia there are some fundamental principles of respect.

Acknowledgment of country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.

When organising a dance performance or festival, it is respectful to seek the consent of the Indigenous custodians of the country where the work is performed.

If consent is given, it is important to acknowledge country and custodians at the site of each public performance or festival. Seek advice from the Indigenous community on the preferred manner of acknowledgment.

Representation

Indigenous cultures should be represented in a manner preferred by those cultures. Avoid derogatory or outdated perspectives and terminology. Where development of a dance production requires non-Indigenous collaboration on the work, it is best to designate an Indigenous person to liaise between the groups, and ensure that cultural protocols are followed.⁴⁰

Australia's premier Indigenous dance company, Bangarra Dance Theatre, has a strong commitment to cultural protocols in the development of dance. For instance, Bangarra developed a formal agreement with the Munyarryun clan of north-east Arnhem Land for permission to perform and adapt the clan's dances.

When we went into creative development for our full length piece in 1997, Fish, we drew up a formal agreement which stated that the Munyarryun clan give their consent for use of their traditional dance and song (which uses the Yirriija language in its raw form) and [that] these materials would used by Bangarra.

We've been in a very fortunate position because Djakapurra (Munyarryun clan member) and his sister Janet, are actually working with us – so we don't have the problems of going back and forth, checking the way material is being used and isn't distorting any of its true meanings or transgressing any protocols. They are constantly overseeing this through their very presence.⁴¹

Kooemba Jdarra Indigenous Performing Arts has followed the Indigenous protocol in the local Brisbane area, where it is located, and does not teach or perform dance as part of its repertoire.⁴²

Accepting diversity

There is great diversity of Indigenous dance forms and styles among Indigenous communities. Inspiration for new dance forms includes personal experience and observations, new ways of telling the story of an individual, family or community, and research and revival of Indigenous dance styles. Acceptance by audiences of this diversity is an important contribution to fostering creative endeavour and cultural development.

Living cultures

Indigenous cultures are living and evolving entities, not historical phenomena. Where a dance is to be interpreted or adapted from traditional or contemporary dance forms, it is important to identify the person with authority to speak for that dance. This may take extensive preliminary consultation.

Indigenous control

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

One significant way in which this right can be respected is to discuss how Indigenous control over a project will be exercised. This raises the issue of who can represent clans and who can give clearances of traditionally and collectively owned material.

Most Indigenous dance steps and combinations of dance forms belong to particular clan groups. Permission from clan owners is required to perform those steps and dances.

Peter Cleary from Woomera Aboriginal Corporation in Mornington Island states:

The community would strongly declare their right to the exclusive use of all songs and dance steps that derive from their homeland, and do object strongly to exploitation by any outside people. At the same time they are not isolationists and have freely engaged in

promoting that culture through dance performance, film and recordings.⁴³

Speaking to the right people is very important. Indigenous communities, whether regional, urban or remote, have an infrastructure of organisations and individuals who can advise on a range of issues – including guidance about locating Indigenous people with authority to speak for specific Indigenous cultural material.

For initial contacts we recommend the following directories.

- *The Black Book Directory 2000 – Indigenous Arts & Media Directory* and published by Blackfella Films. Available from Publication Sales, AIATSIS on (02) 6261 4200 or www.aiatsis.gov.au
- *National Directory of Aboriginal and Torres Strait Islander Organisations*. Published for ATSIC and available from Crown Content on (03) 9329 9800 or www.crowncontent.com

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, permission must be obtained from the local Land Council or Trust, or the Community Council concerned. For a list of relevant authorities consult the *National Directory of Aboriginal and Torres Strait Islander Organisations*.

Some other useful starting points for inquiries include:

- Aboriginal Land Councils
- Aboriginal and Torres Strait Islander Commission
- Torres Strait Regional Authority
- Island Coordinating Council
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- Indigenous Unit of the Australian Film Commission
- NAISDA Dance College
- National Aboriginal Dance Council of Australia (NADCA)
- Indigenous language centres
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries

Communication, consultation and consent

In the use of traditional dance, it is essential to obtain the informed consent of Indigenous owners of the traditional work prior to any performance or recording of a dance piece.

There are many examples of failure to consult and seek consent prior to use. The result is appropriation of dramatic works, including stories and dance steps.

case study

Woomera Aboriginal Corporation

The Mornington people have experienced appropriation of their work through recordings of their cultural property.

'Some members of our community are very wary of this and it inhibits their willingness to bring out their culture publicly outside the community.

We have in the last few years taken action against recording companies⁴⁴ which subcontracted recordings of our songs in composite CD releases overseas without any notification, authorisation or financial contract ... It has taken years to settle this matter, but it remains a potential problem because the world marketplace is so vast'.⁴⁵

Duration of consultation on performances

As with drama, consultation processes for use of Indigenous dance may take some time.

case study

Wik-Mungkan Dance

Ronne Arnold from the National Aboriginal Islander Skills Development Association (NAISDA) travelled to Arukun to learn and study the dances of the Wik-Mungkan people. He was a guest in their country for three weeks before they began to teach or show him their dances. He says, 'You must wait – you must not get impatient and you must wait'.⁴⁶

Caution with consultation

Consultation is not a guarantee of consent but it is an essential first step.

Consultation may be a complex process and may take considerable time. It may not be sufficient to talk to one person. It may be necessary to talk to many family or clan members in order to achieve proper consent from the custodian of the material.

Woomera Aboriginal Corporation has strong community consultation methods, but states that no system is without potential problems.

*We try to work through our committee and informally with families and elders. This however doesn't always happen when individuals may be away, working remote from the community. Another problem identified is that sometimes an individual can give consent and then it turns out not to be group consent.*⁴⁷

Interpretation, integrity and authenticity

Interpretation

It is important for performers and choreographers to respect the cultural protocols of the performers and the custodians of country in the development and performance of dance.

*...for example, we were dancing and Rachael (the artistic director) wanted us to try a traditional boy's move on the stilts. Because we weren't set characters like women spirits or men spirits or any spirits yet, I didn't want to do it because the old ladies were watching us and I thought it might be disrespectful to them, to see a woman doing their men's dance. I asked Rachael and she said you're not really anything yet: you're not a man or a woman in character style. But it felt wrong. She said if it felt wrong you don't do it. Even if you don't know what's right and you've got doubts you can talk to each other which I think is the best thing about our company because we all seem to get around the problems by sitting down and having a big meeting and talking.*⁴⁸

Integrity

The context of a dance performance must also be appropriate. In relation to Torres Strait dance Helen Anu says, 'Performing a dance in the wrong cultural context can ridicule the dance and its cultural meaning'.⁴⁹

Teaching Torres Strait Island dancing must be done with close regard to accuracy and context. For educating – you have to get it right.⁵⁰ It is not enough just to give an exhibition of the dance; it must be accompanied by the history and acknowledgment of the traditional custodians of the dance'.⁵¹

Authenticity

The important nature of dance in Indigenous culture means that where permission is given to perform, special regard must be given to authentic use of the steps and styles.

*We were participating in a workshop and there was a non-Indigenous person teaching us a dance step. We were being taught a particular way, and I knew that the style in that country was not that way. The women do not dance with a heel strike in that country. So we sat down and told the woman teaching that we would not dance that way, and that we would only dance the proper way.*⁵²

*In the Torres Strait, permission must be sought before performing a Torres Strait Island dance. It is important to show particular care when using traditional instruments, and respect for ownership of dances and music by clan groups on different islands.*⁵³

Interpretation, integrity and authenticity when recording

Indigenous dance is not always easily recorded using the usual methods, such as labanotation.⁵⁴

Ronne Arnold, dancer and teacher at NAISDA⁵⁵ described his experiences when he was taught the dances of the Wik-Mungkan people in northern Queensland. Ronne explained that labanotation is very useful for recording Indigenous dance, but proper notation of Indigenous dance utilises a particular aspect of the labanotation method.

'In general, Western dance is recorded by focusing mainly on the *steps*. Indigenous dance is most accurately recorded by focusing on the *actions* of the dance. Correct notation is important to protect the integrity of the dance'.⁵⁶

Film is also a very valuable method of recording dance. It is important to consider issues of copyright ownership, storage and administration of film access once the dance is recorded. As with all recordings of Indigenous cultural material, it is important to discuss these issues with custodians and dancers.

If a recording is made and stored, it is important to accurately label the recording with the names of the dances, the dancers, time and place so that future viewers of the film are aware of its content. This is an important aspect of respect for cultural practices. For example, if a dancer or other person depicted on the film passes away, family and community members can make informed decisions about future use of the film.⁵⁷

Secrecy and confidentiality

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

Representation of deceased people

In many Indigenous communities, the reproduction of names and images of deceased people is offensive to Indigenous beliefs. The deceased person's family or community should be consulted so that the appropriate protocols are observed.

Secret and sacred materials

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

'Secret and sacred' refers to information or material that, under customary laws, is:

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

Personal privacy

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

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

Attribution

Woomera Aboriginal Corporation have developed a policy for attribution of individuals contributing to performance of a traditional work.

As dancers and singers we have engaged in collaborative performance in which traditional works were integrated with contemporary pieces. This was under the supervision of elders, and was done on the understanding that the performance pieces were exclusive to the production and could only be performed with Mornington Island people. Choreography was attributed to the new choreographer and Lardil elders if it incorporated part of the traditional body of work. No dramaturg, choreographer or artistic director will be given separate rights where any traditional material is involved.⁵⁸

Proper returns

Resolving ways in which benefits will be shared is often made complex by the number of people and groups contributing to the final dance production.

It is important that proper returns be flexible and include, but not be restricted to royalties or fees.

comment

Mornington Island Dancers

'We wanted to get something back from working together with professional people in a theatre; learning about lighting, sound, discipline and doing yoga. There were amazing things happening in the process'.⁵⁹

Marrugeku Company

'Everyone in the Marrugeku Company gets the same wage, that's our way of acknowledging everyone's skills. The community receives a royalty of 3% when the show is sold. Sometimes the community has asked that its royalty be paid in particular things the member may feel [they] need rather than a cash payment'.⁶⁰

Continuing cultures

Cultures are dynamic and evolving, and the protocols within each group and community will change. It is important to consider how relationships with a community or individual can be maintained for future consultation. For instance, consultation may be needed if a production is to tour overseas, or to be filmed.

Recognition and protection

case study

Woomera Aboriginal Corporation

'Grappling with copyright legislation and having things in material form has urged the Mornington Island community to create material forms of songs.

In the last two years we've been evolving a Lardil Songs Register. This is only for notation of songs, nothing to do with ceremony. Ceremony stuff stays out of it completely; it's just for the songs that are performed in public. They've sat down, written it all down, and created recordings, so that when the lawyer comes to see us, it's all there – who dreamt the song, what country they're from, who's connected with it, thereby creating a structure of where the song belongs in the community'.⁶¹

Bangarra Dance Theatre has developed contractual arrangements recognising cultural contributions to their work. Bangarra contracted Djakapurra for the role of cultural advisor and teacher. The following outlines the structures developed by Bangarra.

case study

Bangarra Dance Theatre

'The intellectual property for the cultural knowledge and material which is being used obviously still resides with the Munyarryun community and the clan.

The contract we have with them is almost like a licence whereby we agree to use that material in certain ways in certain performances. Because most of the time the traditional material is being integrated into contemporary performance, or is being adapted in a contemporary way, the fee we pay to Djakapurra in his role as cultural consultant is almost like a 'cultural design' fee.

Apart from the specific dances and songs which are being used, there's an overall infusion of the Munyarryun clan's culture in the work. In terms of actual copyright, when we commission the broader choreographer and composer, we enter into a relationship with them as a sub-commission. The amount of contemporary choreography versus traditional movement, and the amount of synthesised contemporary music versus traditional song is something worked out during the creative processes between the choreographer and Dkakapurra, and the composer and Djakapurra. So we have contractual relationships with the clan for the overall work and then with the artists that we commission. They in turn have a relationship with any other collaborators, who, in this case, is Djakapurra'.⁶²

National Aboriginal Dance Council Australia (NADCA)

Cultural Protocols on Aboriginal Dance

The National Aboriginal Dance Council Australia (NADCA) is a collective voice for Indigenous dance in Australia. NADCA aims to provide and maintain a national network to support Indigenous dance in its many forms and to advocate and lobby on behalf of dancers nationwide. NADCA is committed to preserving and promoting awareness for Aboriginal dance both nationally and internationally.

At the 2nd National Aboriginal Dance Conference in Adelaide, 1997, the NADCA Steering Committee considered the following statement:

**The Law/The Dreaming
Kuarna word is "Munaintya"
'Munaintya' (the law/the dreaming)
is the base of
our core, of our being - spirit - life
Aboriginal Dance must come from
the 'Munaintya' and draw its
reasons - rationale - history
- roots - base
for being from the "Munaintya"**

After much discussion, NADCA then adopted the following Vision Statement:

Aboriginal dance comes from the well spring of law and the dreaming and is essentially connected to the core of our spiritual life and the renewal of our Mother Earth

NADCA/s Strategic Plan 1998-2002, NADCA states the following:

Priority 2. Cultural Maintenance and Protection

NADCA recommends that all Government and non-Government organisations promote and support the ideology of cultural maintenance, cultural protection and cultural development within all Aboriginal and Torres Strait Islander Dance policies and activities.

Aboriginal and Torres Strait Islander people have practiced and observed customs that have reflected their ecosystem. Dance has played a significant role in the development of community cultural life and education. It is the maintenance and protection of dance that will allow us to continue the sacred and spiritual binding link with our ancestors with future generations.

The teaching of dance to children and youth has been a key element in the maintenance and protection of a culture which ensures the survival, retention and development of dance within our communities.

Priority 2 from NADCA's Strategic Plan 1998-2002, highlights the critical importance of the need for accuracy in developing documents pertaining to Cultural Protocols and in NADCA's case, specifically Cultural Protocols on Aboriginal Dance.

During NADCA's existence and presenting of a number of conferences and forums, in particular the bi-annual National Aboriginal Dance Conference, Cultural Protocols on Dance has been a major topic for discussion. From these discussions, NADCA have noted a number of Cultural Protocols relating to dance in reports from past National Aboriginal Dance Conferences.

NADCA are currently in the process of developing a pilot program to formulate a document on 'Cultural Protocols on

Aboriginal Dance'. The pilot program will take place in the Western Sydney Region and involves participation from NSW NADCA members, Aboriginal Cultural Dance teachers, Department of Education representation, Aboriginal Education Assistant's (AEAS) and other Aboriginal Community elder representatives who will workshop and have input to the formulation of this document.

Initially, the document will be used within the school system, and NADCA will continue to consult various elders, cultural dance teachers and community members in each state, and add to and amend the working document 'Cultural Protocols on Dance' until it can be recognised by NADCA as being accurately relevant to Aboriginal Dance on a National level.

NADCA are committed to the development of a 'Cultural Protocols on Aboriginal Dance' document as it will ultimately contribute to NADCA fulfilling its Primary Objective, which is the **maintenance, preservation and promotion** of Aboriginal dance, as stated in NADCA's Mission Statement below:

*In Australia, dance and music play a significant role in Aboriginal community cultural life and education. The National Aboriginal Dance Council (NADCA) is committed to promoting awareness and respect for Aboriginal dance both nationally and internationally. NADCA aims to assist and support Aboriginal individuals, communities, professional and non-professional groups and organisations, government and non-government institutions and organisations in the **maintenance preservation and promotion of Aboriginal dance.***

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common issues

Welcome to country

Recognition of Indigenous protocol, acknowledging another clan's ownership and seeking permission to be in another's country, has become widely recognised over the last few years. This recognition includes acknowledgment and adherence to the cultural protocols of the traditional owners. It may be expressed in a Welcome to Country given by a respected community member or elder, or other ceremony preceding an event or function.

It is important to correctly identify the recognised community representative for the occasion. In some areas, dislocation of Indigenous communities has led to discussions over traditional boundaries and ownership. In such cases a cultural advisor or cultural liaison project officer can advise on the community, community representative and protocols to be followed.

In some instances, Indigenous organisations are offering contemporary alternatives to the Welcome to Country. In the urban area of Brisbane, Indigenous performers are providing a Contemporary Celebration⁶⁵ which includes Indigenous performers such as the Indigenous Women's Choir, Indigenous rap performers, an opera singer and three dancers. The Celebration includes acknowledgment of traditional owners and Indigenous ancestors.

Fees and employment conditions

Industry standards for performances can be obtained from the Media, Entertainment and Arts Alliance (MEAA). The MEAA also provides information on GST for performers, industry safety guidelines, choosing an agent and other useful information.

Industry bodies generally negotiate standard conditions for different categories of performers.

- Actors Equity has recently negotiated standard rates for repeat broadcasts of performances.
- The Entertainment and Broadcasting Industry – Dance Company Awards set out awards for different ages, rates for rehearsals, touring allowances, penalty rates, and superannuation for dancers.
- The Performers' Certified Agreement 2000 – 2002 sets out rates of pay for categories of theatre, variety, different ages, rehearsal rates, meal allowances, superannuation, travelling allowances, and rates of pay for special attendance at publicity events.

Negotiating appropriate conditions for performance of Indigenous works can be difficult. Waiata Telfer, event coordinator notes:

I had an ordeal in negotiating the rate of pay for people performing their traditional dance. The assumption was that Aboriginal people performing traditional dances did not rely on this as their mode of employment (bread and butter) and wouldn't have to go through high level training to attain the knowledge to dance, and therefore weren't deemed as important to pay as say an opera singer for the same amount of time.⁶³

Not all performers wish to be paid at the award rate. Some Indigenous people suggest that the award rate does not include recognition of the nature of Indigenous performance. It was suggested that rates of pay should include an amount which recognises the additional cultural element in Indigenous performance.⁶⁴

Festival performances

The rights to record performances at festivals, and to use that recording later, is another important issue for Indigenous performers.

Copyright in the recording will generally belong to the company or individual who makes the recording. Performers whose work is recorded do not share in the copyright, but the owner is required to gain permission from the performer for any future use of the recording. For example, the performer will generally be given a contract which provides for a set portion of the performance to be recorded and used once for a fee.

case study

Marrugeku Company

'Get all the paperwork before you let them put a camera on you. We very seldom let anyone record and when we do, we are very careful about it. Our contract says our performance can only be recorded for under three minutes and the recording can only be used once. This is pretty standard.

Mostly we don't let people take their own photos of the performance either. We will give them our own photos.

We are very careful and we have a reputation for being quite tough when we negotiate performing at festivals. We don't agree to work at a festival unless we know there is a resonance between the vision of festival and the vision of our work. It can get really bad really fast, so generally we are very tough because we have been burned. We have a name for being tough but we put in a lot of time trying to get everyone to understand what the issues are'.⁶⁶

case study

Mornington Island Dancers

'In contracts with festivals we are often asked to assign limited recording and broadcast rights to our performances for promotion and other purposes closely related to the festival event. This has not been abused to our knowledge, but seems not to recognise the special care and attention warranted by traditional owners ... Often contracts need additional qualifications in this area so that control is not lost on traditional dance and song items'.⁶⁷

Issues of authenticity and integrity also arise in festival performances.

We had problems negotiating the numbers of people to invite, because the dances and songs needed a particular amount of people for the presentation to maintain its cultural integrity. The festival budget couldn't cater for the cultural needs of the groups, therefore the artistic and cultural integrity of the overall event was compromised on a daily basis.⁶⁸

Resources

A number of protocol documents have been produced in recent years to meet the needs of particular communities, organisations, industry and situations. The following are selected as useful guides for people working in the performing arts sector:

- Lester Bostock, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities*, Special Broadcasting Services, 2nd edn, Sydney, 1997.
- *Indigenous Arts Protocol: A Guide*, developed by the Indigenous Arts Reference Group, NSW Ministry for the Arts, 1998.⁶⁹
- Terri Janke, *Doing It Our Way: Contemporary Indigenous Cultural Expression in New South Wales*, NSW Ministry for the Arts, Sydney, 2002.
- The National Aboriginal Dance Council of Australia (NADCA) is developing a pilot program to formulate a document about cultural protocols on Aboriginal dance. Initially the document will be used within the school system, and NADCA will continue to consult until the document is considered relevant to Aboriginal dance on a national level.⁷⁰
- Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, Solicitors, for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1998.
- *Taking the Time – Museums and Galleries, Cultural Protocols and Communities, A Resource Guide*, Museums Australia (Old), 1998.
- *Previous Possessions, New Obligations*, a policy document produced by Museums Australia in 1994 provides a way for museums to approach Indigenous cultures. A plain English version with case studies has been published.
- *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, compiled by Alex Byrne, Alana Garwood, Heather Moorcroft and Alan Barries for the Aboriginal and Torres Strait Islander Library and Information Resources Network.



copyright

What is copyright?

The *Copyright Act 1968 (Cth)* provides that the author of a work is the copyright owner.⁷¹

The author of a dramatic work may be the writer, or authorship may be shared between the writer(s), cultural advisors, and the custodians of any Indigenous material used in the work.

This means that the creator has the rights over use and development of the work. Anyone seeking to use, copy or develop adaptations of the work must have the creator's permission.

The Copyright Act is the main law in Australia that governs the use, production and dissemination of literary, artistic, dramatic and musical works. There are no special laws for the protection of Indigenous heritage.

How does copyright protect performance?

Copyright is a legal protection that aims to provide the author of a work with the right to exploit or use the work, and to prevent others from exploiting it without the author's permission.

In the case of performing arts, copyright protection exists in the dramatic work. It may also exist in any literary work such as the text of the play, any musical work which is part of the performance, a recording of the work and any adaptation of the work.

It is important for people working in the performing arts to develop an understanding of copyright so they can negotiate their rights. This can include the right to license the use of their work.

Copyright in a dramatic work lasts for 50 years after the death of the author of the work.

Copyright in a recording of a work lasts for 50 years after the recording was made. A writer, director, choreographer or other copyright owner may enter into agreement to license the use of the work. The agreement will include the fee, term of the licence, purpose and nature of rights granted.

Copyright owners might need to consider who they want to control the copyright and who will benefit from any royalties after the author's death.

Performers should also be familiar with their legal rights to recordings of their performances.

This section provides some general copyright information for indigenous artists and is intended as a guide only. For specific legal advice we recommend consulting a lawyer.

A dramatic work is a work that is intended to be performed. The Copyright Act defines a dramatic work as a choreographic show, or other dumb show (mime for example), or a scenario, a script for a film, but not the film itself.⁷² Film is protected under a separate part of the Act.

The Copyright Act provides for copyright in works to be held jointly. The contributors to a work can be listed next to the © symbol and the year the work was produced. In this way, copyright ownership by a number of people can be recognised and enforced if there is an infringement or dispute.

The Copyright Act also provides that in some cases, where the author of a dramatic work is employed, the copyright in dramatic works will be owned by the author's employer. These are works that are produced under a contract of employment. It is possible to modify this arrangement by contract between the employer and the author, prior to the writing of the work.⁷³

Authors who are commissioned to write a work should exercise care when negotiating an agreement to ensure they retain copyright in the completed work.

If performance or dance companies enter agreements with a funding body for development of a work, the company is advised to check the contract and be certain about who owns the intellectual property in the work.

Originality

Copyright protects works that are original. In the past, it was thought that Indigenous works reproducing pre-existing themes were not 'original' because they were handed down through the generations. In the *Carpets Case*,⁷⁴ the judge recognised that each artist contributed his or her own skill, labour and effort to bring originality to his or her artwork. Hence, the artworks were protected

by copyright. There is scope for this reasoning to be applied to dances and songs.

Copyright protects the expression of the idea

Copyright protects the expression of an idea but not the underlying idea.

Although copyright does not protect ideas, sometimes the difference between a mere 'idea' and the 'written expression' of the idea is not always clear-cut.

Courts have considered a number of cases where a party alleges that their dramatic work has been copied. In deciding this question, the courts have considered evidence relating to the creation of the works and the question of originality of the work, particularly the 'combination of the principal situations, singular events and basic characters'.⁷⁵

The court has held that: 'In general there is no copyright in the central idea or theme of a story or play, however original it may be; copyright subsists in the combination of situations, events and scenes which constitute the particular working out or expression of the idea or theme. If these are totally different, the taking of the idea or theme does not constitute an infringement of copyright'.⁷⁶

How is performance reduced to material form

In general, copyright protects works that are recorded in some way. The work must be in a permanent and tangible form.⁷⁷ This may be in the written word, notation, sound recordings, video or other film recording. This is described as being 'reduced to a material form'.

Issues can arise in Indigenous traditional knowledge, dance, designs and stories that are orally or ephemerally transferred. These are not in material form and are not automatically protected under copyright laws.

Who owns copyright?

The owner of the copyright in a dramatic work is generally the author.⁷⁸

Indigenous cultural material is frequently owned communally, rather than by individual authors.

As Peter Cleary explains:

*A song may be dreamt by one person but others may have strong associated rights according to the subject matter of the song or country, story or place associated with the dreaming. Individual ownership is not practically carried on beyond the death of the originator but songmen of the clan group may have a strong say over the songs of their forebears. There seems to be acceptance of old songs as belonging to a form of collective Lardil ownership.*⁷⁹

Copyright exceptions

Although rights granted under copyright generally belong to the author of the work, there are some significant exceptions.

- Where the work is produced under a contract of employment, copyright will belong to the employer.⁸⁰
- Where a work is produced under the direction or control of the Crown, copyright may belong to the Crown.⁸¹
- Where copyright has been assigned under a written agreement, the agreement may specify who owns copyright.

Collaborative works

Another issue impacting on the ownership of dramatic works is the collaborative nature of performing arts. A dramatic work such as a play is often workshopped by writers, actors, directors, dramaturgs and others. Copyright will protect the work of the author, who is generally the playwright, but will not allocate any rights to other people whose ideas were drawn upon.

Under the Copyright Act, a 'work of joint ownership' refers to a work produced by the collaboration of two or more creators, where each creator's collaboration is not separate from the contribution of the other creator(s).

The creator must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions. The custodians of cultural images are generally not recognised as the legal copyright owners of an Indigenous artwork which depicts clan cultural images.

Each creator in a work of joint ownership owns copyright in the resulting work. This means that each creator must obtain the consent of the others before exercising any of their rights under copyright.

Where more than one person collaborates and contributes to a work, copyright may be held by these people jointly, as tenants in common. This means that if one of the contributing creators dies, his or her interest passes to his or her beneficiaries rather than to the other collaborator(s). One collaborating creator cannot authorise use of a jointly produced work without the permission of the co-owner(s).

In the performing arts, there are often many collaborators on a particular work. To avoid any future disagreements, the participating creators should discuss copyright and proposed use of the work prior to commencement of the project.

Where there is a dispute over the rights in a work, legal actions other than copyright, such as breach of confidence and passing-off laws, may provide some protection from copying of elements depicted in a work.

Communal ownership vs. joint ownership

In *Bulun Bulun v R & T Textiles*,⁸² the court considered that traditional Indigenous works containing 'traditional ritual knowledge', handed down through generations and governed by Aboriginal laws, are not works of joint ownership. Under Aboriginal laws the entire community may have an interest in the particular work and its knowledge and expression, but copyright does not recognise the group as the owners.

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

What rights do copyright owners have?

The copyright owner of a work has the exclusive right to make decisions about the copyright. The copyright owner also has the exclusive right to earn money from the use, reproduction and publication of the work. The copyright owner of a dramatic work such as the playwright, can do all or any of the following acts:

- (i) reproduce the work in a material form
- (ii) publish the work
- (iii) perform the work in public
- (iv) communicate the work to the public (this includes broadcasting and the Internet)

- (v) make an adaptation of the work
- (vi) make an adaptation of the original dramatic work and then reproduce, publish, perform in public, or communicate to the public this adaptation.⁸³

An important exercise of these rights is the right of copyright owners to negotiate a licence agreement allowing others to use the work in one or more of these ways. For instance, a theatre company may negotiate a licence with a producer for the exclusive right to perform a dramatic work for a number of years. Performers have a more limited set of rights as detailed below.

How long does copyright last?

Copyright protects works for a limited period. Copyright in a script or labotation⁸⁴ of a dance, for example, lasts for fifty years after the death of the writer.⁸⁵ After that time, the work is considered to be in the public domain.

Copyright in a recording of a work generally lasts for fifty years from the date of the recording.⁸⁶

What is the public domain?

Once copyright lapses, a work is said to be in the public domain. The law no longer provides rights to the copyright owners to prevent others from exploiting their work. Indigenous customary law generally provides that rights to culture exist forever, and according to customary law, it may be necessary to get permission from the Indigenous owners even though legally, the dramatic work is in the public domain.

The operation of the Copyright Act creates a number of problems when it comes to protecting Indigenous performance.

One example is recordings of Indigenous dance made by early anthropologists, and which are now stored in archives and libraries. Fifty years after a recording is made, copyright expires and the work is in the public domain. It no longer has any copyright protection. For example, recordings made before 1952 are now in the public domain.

It should not be assumed that all rights of Indigenous people to the recorded performance have lapsed just because one recording of it is in the public domain. More recent recordings of traditional performances by Indigenous actors or dancers, and recordings of adaptations of Indigenous performance will be protected by copyright, and reproduction may infringe copyright.

Woomera Aboriginal Corporation in Mornington Island are in the process of recording versions of their cultural material so they will hold contemporary versions in material form.⁸⁷

Rights of performers

The Copyright Act⁸⁸ provides rights for performers in their live performances. Performers' rights are different to copyright. Performers' rights are generally the right to consent to the recording, or broadcast of any recording, of a performer's work. The right applies in the following categories:

- A performance (including an improvisation) or part of a performance of a dramatic work, including a performance using puppets. An example of this kind of performance is acting in a play.
- A performance or part of a performance, including an improvisation of a musical work. This includes singing and playing a musical instrument.

- Reading, reciting or delivering a literary work, or part of a literary work, or improvising a literary work. An example of this kind of performance could be storytelling.
- Performance of a dance.
- Performance of a circus act or variety show.⁸⁹

The following types of performance are exceptions to the above-mentioned protection:⁹⁰

- Performances of works for educational purposes. This means performance by a teacher or student where no box office fee is charged.⁹¹
- Reading, reciting or delivering the news.
- Performing a sporting activity.
- Participation as part of an audience.

Performers have the right to authorise the recording or broadcast or re-broadcast of their performances. In practice this means that performers are required to sign clearance forms or agreements which authorise the owner of the recording to use of the work.

This right to authorise use gives performers some bargaining power in setting their rates of pay and conditions or work.

Recording performances

It is important to have and check agreements for recordings of dramatic and dance works. It is advisable for performers, prior to signing any clearance agreements for the recording, to consider any limits they may want to put on the use of recordings of their work. If performers fail to specify limits on use, they will not be able to prevent unlimited broadcast and changes to the recording being made.

If a performer only wants the recording to be broadcast once, or only to a particular audience they must specify those terms in the agreement.

It is advisable for individuals and performance companies to check their entitlement to royalties under the agreement to record, and to check whether there are any protocols they wish to be respected for recording or broadcast.

The following issues should be considered prior to making a recording:

- If recording communally owned performance advise traditional custodians and other people in authority and seek permission for recording.
- It should not be assumed that traditional Indigenous music or performance is in the public domain. It is necessary to consult with relevant Indigenous people for permission to use or distribute recordings. Royalties should be paid.
- Performers, writers, choreographers, directors and traditional custodians should be attributed at all stages, including use of the copyright notice and attribution of a clan group.
- Indigenous performers should be provided an opportunity to consider any cultural obligations before negotiating a contract or entering into agreements relating to the performance. For example, website publication of a performance may expose the expression to greater appropriation.
- Where possible, cultural obligations should be included in an agreement.
- When entering into an arrangement for the commercial recording of Indigenous performance, it is recommended that there be a written contract outlining the terms of the arrangement and obligations of the parties. Indigenous performers should be given the opportunity to consider contracts and obtain proper legal advice.

- When selecting illustrations or photos for promotional material, consult with the writer, choreographer, performer or director and other Indigenous people to check cultural appropriateness of the image.

What are moral rights?

In December 2000, moral rights were introduced into the Copyright Act.

These new laws provide the following rights to individual creators of dramatic works:

- **The right to proper attribution** for the author of the performance.⁹²
- **The right not to have authorship falsely attributed.**⁹³ For example, if someone other than the author is attributed as the author, the true author may take action for infringement of moral rights.
- **The right of the author to integrity of authorship.**⁹⁴ This is the right to bring a legal action if a work is treated in a 'derogatory manner', resulting in a material alteration of the work which prejudices the author's reputation.⁹⁵
For example, if a dance or other dramatic work is performed without permission, in a manner that is harmful to the reputation of the creators or authors of the dance, the creator may have an action for infringement of his or her moral right of integrity. It is important to note that if the author of the dramatic work consents to the use of the work, they cannot bring an action.⁹⁶ Also, if the person who subjected the work to derogatory treatment can show that the treatment was reasonable in all the circumstances, then it is not an infringement.⁹⁷

Moral rights are only held by individuals. There is still no legal recognition of communal ownership of Indigenous cultural material.

The potential of moral rights to increase copyright protection for Indigenous performance has not been fully explored, but it is hoped that it may provide some additional protection.

Managing copyright to protect your interests

As copyright exists as soon as a script is written down, it is not a legal requirement to register copyright. However, certain precautionary practices can provide good warning to potential infringers and notify them of where to get prior permission to copy.

It is important to keep good records of your works. For example, if producing a play, write down your script or record it by film.

Label all reproductions of the work clearly with the following information:

- title of the script
- writer
- date created
- copyright owners
- if applicable, cultural group or clan

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

Copyright notice

You should also include a copyright notice.

A copyright notice provides information about uses that are acceptable and includes details about contacting the copyright owner for consent to use in other material.

Some works use the words 'All Rights Reserved'. This is not necessary but if you are publishing in some South American countries it may be advisable. If you think that your work will be first published overseas seek advice from a suitable practitioner on appropriate wording.

The following is an example of a copyright notice for a **script**:

© Wesley Enoch, 1999*.

* The date of creation or the date the work was first published.

If your performance includes songs, copyright notices should also be given on any written material. The following is an example of a copyright notice for a **song**:

All songs written and performed by Terri Janke.

© Terri Janke, 1999*.

* The date of creation or the date the song was first published.

Notice of creative contributors other than the scriptwriter may also be appropriate:

Directed by: Wesley Enoch

Produced by: Theatre Company

Choreography: Robynne Quiggin

The following is an example of a copyright notice for **clan owned traditional stories**:

Traditional story: Torres Strait Islands

This version: © A. Murray, 2002.

This performance is made with the permission of the clan. It may not be reproduced in any form without the permission of the writer and the clan concerned.

It may also be prudent to include warnings against filming in brochures and programs for example:

WARNING: Any unauthorised recording or broadcasting of this performance is prohibited.

Authorised recordings of performances often carry a warning such as:

WARNING: Copyright subsists in this recording. Any unauthorised sale, rental, hire, broadcasting, public performance or re-recording in any manner whatsoever will constitute an infringement of copyright.

For more information on recommended copyright wording for publications, see the *Style Manual for Authors, Editors and Printers*.⁹⁸

Moral rights notice

If your work is to be distributed in New Zealand and Britain, it is also a good idea to include a notice asserting your moral rights such as:

The creator(s) assert their moral rights.

When is copyright infringed?

It is an infringement of copyright to copy or deal with a copyright work without the consent of the copyright owner.

A person will infringe copyright in a musical, dramatic, artistic and literary work if he or she reproduces it in material form, publishes it, or communicates the work to the public, without permission from the copyright owner.⁹⁹

For musical, dramatic and artistic works, it is also an infringement to adapt the work.

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

It is also an infringement of copyright to import copies of a copyright infringing recording into Australia for sale or hire.

Exceptions to copyright infringement are detailed below.

Fair dealings provisions

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

- research or private study purposes¹⁰⁰
- criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made¹⁰¹
- the purpose of, or associated with, the reporting of news in a newspaper or magazine, and a sufficient acknowledgment of the work is made; or it is for the purpose of, or is associated with, the reporting of news by means of broadcasting or in a cinematograph film¹⁰²
- judicial proceedings or of a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner¹⁰³

Crown use of artworks

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

Library copying

Libraries and archives can make copies of copyright works under certain circumstances in accordance with statutory procedures.¹⁰⁴

Educational copying

Educational institutions such as schools and universities can make multiple copies of print material, and copy television and radio programs for education purposes. They must however pay statutory licence fees to the relevant collecting societies. Performing arts practitioners who are copyright owners should be aware of these schemes, as there may be royalties payable in certain circumstances. Contact APRA, AMCOS, CAL, Screenrights or Viscopy where applicable.

Further copyright information

For general information on copyright laws see the following websites:

- Australian Copyright Council
www.copyright.org.au
- Arts LawCentre of Australia
www.artslaw.com.au

Copyright collecting societies

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. Several collecting societies have been established in Australia to manage and administer the copyright of its members for a fee, or share of the royalties. Some of them such as CAL and Screenrights have a legislative basis for collecting royalties. Others are voluntary organisations which artists are required to join. APRA, AMCOS, CAL, Screenrights and Viscopy are the most relevant collecting societies for copyright owners in dramatic or dance works.

APRA – Performing rights for composers

The Australasian Performing Right Association (APRA) administers the performing rights in music of composers, songwriters and publishers in Australia and New Zealand.

These are the rights of performance in public and communication to the public.

The rights of performance in public occur mostly when music is played on radio, television, music venues, other venues that play music (including incidental music) and businesses (including online businesses) that use music.

The right of communication to the public includes any method of communicating music to the public including TV, radio, Internet, cable services and other media.

APRA also manages the reproduction rights licensing business of the Australasian Mechanical Copyright Owners Society (AMCOS).

For more information about APRA visit their website www.apra.com.au

AMCOS – Mechanical rights

The Australasian Mechanical Copyright Owners Society (AMCOS) can administer the mechanical rights (the right to record a sound onto record, CD or cassette) and the synchronisation right (the right to use your music on a video or film soundtrack).

AMCOS can administer the right to reproduce written music, for example the original notation or lyrics for a song. The rights are assigned to a music publisher and anyone who then wishes to copy the work must seek permission of the music publisher and pay royalties for that use. Exceptions include educational purposes.

When music is used in a film or television show, composers should ensure that the producer makes a cue sheet listing the music on the soundtrack, which should then be submitted to APRA for royalty payment.

APRA and AMCOS license people and companies who want to use music, and then distribute the licence fees to members.

For more information on AMCOS visit their website www.apra.com.au

CAL – Copyright Agency Limited

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

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

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

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

For more information on CAL visit their website www.copyright.com.au

Screenrights

Screenrights is a copyright collecting society for producers.

Screenrights manages rights on behalf of copyright owners in film and television, licensing the use of their work in circumstances where it is difficult or impossible to do so on an individual basis. Screenrights also administers the educational copying licence.

This allows educational institutions to copy from radio and television, provided they pay a fee to copyright owners. Screenrights monitors copying, collects money and distributes this income to the copyright owners.

In addition, Screenrights collects royalties being held by other societies administering rights in their territories. All money collected is distributed to the copyright owners after deduction of administrative overheads.

For more information on Screenrights visit their website www.screen.org

Screenrights has also established a website for educators at www.enhancetv.com.au

Enhancetv lets teachers know about upcoming programs relevant to their curriculum and provides teaching resources for using television and radio in educational contexts.

Viscopy

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

Viscopy has about 2000 Australian artist members, half of which are Indigenous artists and their estates.

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

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

For more information on Viscopy visit their website www.viscopy.com.au



follow up

Applying the protocols

*Protocols are about people's value systems and their cultural beliefs.*¹⁰⁵

The protocols in this guide are flexible. You can use them to develop protocols for your performing arts project, program or practice, and language group, region, clan or community.

It is important to read all the preceding sections of *Performing Cultures* before applying the protocols. **Follow up** can then be the main point of reference when returning to the guide at a later date, or in the planning stage of an Indigenous performing arts project or program.

Follow up provides a checklist of key points to consider when developing protocols for a performing arts project, or in your own performance practice. It offers different and more specific information than the preceding sections. We therefore suggest you use the points outlined here in the context of the dance or drama and copyright sections.

The following principles are a framework for respecting Indigenous cultural heritage:

- Respect
- Indigenous control
- Communication, consultation and consent
- Interpretation, integrity and authenticity

- Secrecy and confidentiality
- Attribution
- Proper returns
- Continuing cultures
- Recognition and protection

Respect

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

- Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.
- Indigenous world views, lifestyles and customary laws should be respected in contemporary artistic and cultural life.
- Indigenous cultures are living cultures.
- Indigenous culture is diverse. Culture varies from Indigenous country to country and from clan to clan.
- Indigenous people should be represented by the appropriate Indigenous people and in a manner they approve.
- The cultural contribution of Indigenous people to a performance should be valued, acknowledged and remunerated.
- Local cultural protocols and protocols associated with a work should always be respected and observed.

Indigenous control

Indigenous people have the right to self-determination in their arts and cultural affairs.

- Indigenous people have the right to own and control their heritage, including Indigenous body painting, stories, songs, dances, images, traditional knowledge and other forms of cultural expression.
- Identify appropriate Indigenous information and authority structures.
- Discuss your ideas for performances and project with Indigenous dance schools, associations, Indigenous theatre companies, Indigenous media organisations.
- The current practice of the Australia Council requires all Indigenous participants to provide a letter confirming their Aboriginal or Torres Strait Islander identity from an incorporated Indigenous organisation.
- When engaging Indigenous contributors to participate in a project, the Aboriginal and Torres Strait Islander Commission (ATSIC) definition of Aboriginal identity can be used as a guide.
- Keep appropriate/relevant Indigenous people informed and advised, and where possible, provide regular updates.

Communication, consultation and consent

Communication

Indigenous people should be consulted on the use and representation of their Indigenous heritage.

- Have you considered how the work might impact on or portray Indigenous people?
- Have the relevant Indigenous people been consulted on the proposed project? Is there one person or a clan who has authority to speak for a particular work? Have they been consulted?
- Is the particular story or music acceptable for public use, or is it subject to restrictions? If unsure, discuss with Indigenous custodians.

- Have you advised elders or people in authority of the perceived risks and benefits from the wider performance of their cultural material?
- Will the community or individual who is the subject of the play see it prior to public performance, and is there time allotted for incorporating their suggestions?

Consultation

- Consultation should address the communal nature of Indigenous cultural expression.
- Has sufficient time been allowed for consultation? Be flexible with time and understand that the consultation process may be lengthy. Do not expect to have a reply to a question in a day or a week. Each community will need a reasonable period of time to consider and consult within their communities.
- Are you planning to write a play that depicts an identifiable individual or community? If so ask the individual, community or relatives of the individual for permission, and observe close consultation and consent throughout the process.
- Are there plans to license the work to another company? Are there consultation processes built into any agreements for ongoing use?
- Consultation is as an ongoing process for the life of the performance, the work, and the company.

Consent

Seek the consent of the storytellers or writers (including next of kin if deceased) and the traditional custodians for use of their cultural material.

- Has the consent of the relevant Indigenous people been obtained on all issues raised in the communication and consultation process?
- Are you proposing to adapt or alter, record or license the work? Prior informed consent must be sought for all uses.
- It is important to avoid disclosing sensitive information without discussion and consent. Disclosure about a person who has passed away will be very sensitive.

- Confidential information must not be disclosed without permission from all the Indigenous people affected by the disclosure.
- Have you considered the possibility that there may be no consent to your proposal?

Interpretation, integrity and authenticity

Interpretation

Be responsible for your representations of Indigenous cultures.

- How will your work affect the Indigenous group it is based on?
- Does it empower Indigenous people?
- Does it depict or expose confidential, personal and/or sensitive material?
- Does it reinforce negative stereotypes?

Integrity

- Are you proposing to adapt or alter the cultural heritage material in any way?
- Have you discussed this and gained consent?
- Will the individual or community who is the subject of the work get an opportunity to see the work prior to public release? Have their suggestions been incorporated?

Authenticity

- Seek advice on the correct cultural context for the performance material and the correct cultural context for heritage material.
- Ask about any restrictions on the material, and the exact meaning of any language words if unsure.
- Are there any restrictions on performance such as where, when and by whom?

- Are you using heritage material such as imagery, music and language with proper regard to gender, clan affiliations and cultural restrictions?

Secrecy and confidentiality

Secrecy

Indigenous people have the right to maintain confidentiality about their personal and cultural affairs.

- The right of Indigenous people to keep secret and sacred their cultural knowledge should be respected. Secret and sacred refers to information that is restricted under customary law.

Confidentiality

- Does the performance expose confidential or sensitive material?
- Be aware that the inclusion of personal material may be sensitive. If it is objected to by family or clan representatives, leave it out.
- If depicting deceased people, seek permission from the family or clan representatives. Discuss issues of interpretation and authenticity.
- It is a good idea to speak to elders and/or other Indigenous people in authority to identify sensitivities, sacred material or religious issues in the depiction of images, stories and events.

Attribution

Indigenous people should be given proper credit and appropriate acknowledgment, including copyright and royalties, for their role in the development and use of their Indigenous cultural material.

- Be sure to attribute the performance to all Indigenous custodians, the source community, writers, actors, dancers, directors, designers, choreographers, technical personnel and cultural consultants who contributed to the work at all stages.

- Ask for correct wording of how the person or community wishes to be attributed with ownership or contribution.

Proper returns

Indigenous people have the right to be paid for their contribution and for use of their Indigenous heritage

- Have fees or other benefits been negotiated with the writers, performers, choreographers, directors, cultural advisors and traditional custodians?
- Is the cultural value of their work recognised in financial returns?
- Have Indigenous cultural advisors been acknowledged and properly remunerated for their contribution?
- Has registration with APRA been completed? Are all other holders of rights acknowledged in that registration?
- Will Indigenous custodians share in the benefits from any commercialisation of their cultural material?
- Check whether benefits other than royalties, such as branding of a work or sharing of skills, are also sought by Indigenous people.
- Recipients of Australia Council grants are encouraged to use written contracts and seek legal advice.

Continuing cultures

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

- Have cultural protocols been considered and included in any future licence agreements for use of a work?

Recognition and protection

Indigenous people have the right to protect their heritage.

- Has copyright protection for a work been sought?
- Have the owners of copyright in a work been identified?
- Has the Indigenous theatre or dance company considered ways of branding its work to ensure it is always recognised as the source company?
- Written releases and contracts are the best way of ensuring that rights are cleared for intended use. The Arts Law Centre of Australia has draft agreements available for members. It is a good idea to seek independent legal advice on written releases and contracts.

Common issues

Welcome to country

- Has this Indigenous protocol been followed?
- Has consultation included identifying the traditional country and traditional owners?
- Has the traditional owner been remunerated?

Fees and employment

- Are performers remunerated in accordance with industry standards?
- Are performers remunerated for the cultural element of their work?

Festival performances

- Is it appropriate to film, photograph or record the performance?

- Have performers been advised and consulted on uses of any recordings of a festival performance?
- Have written clearances from performers been sought?
- Are there any cultural considerations necessary for the scheduled performances?

Copyright

Copyright protects specific categories of material. For a performance this might include literary material, musical works, dramatic works and film. The material must be original and must be reduced to material form.

To be original, for the purpose of copyright protection, the author or authors must have applied sufficient skill, labour and judgment to create the work.

To be 'reduced to material form' means that the work must have been written or recorded.

When publishing or licensing a dramatic work it is necessary to get the copyright clearance from the copyright owners.

Dramatic and dance works

- Writers, composers, choreographers, dramaturgs and other contributors are referred to as 'authors' in a copyright context.
- The copyright owner is generally the author of the literary, musical or dramatic work. There are exceptions to this rule, including an author who is an employee under a contract of service.
- Authors do not need to register for copyright protection.
- Copyright in a literary, musical or dramatic work lasts for 50 years after the death of the author.

- The author of a literary, musical or dramatic work has the exclusive right to:
 - reproduce the work in a material form
 - publish the work
 - perform the work in public
 - communicate the work to the public
 - make an adaptation of the work
 - do any of the above in relation to an adapted work
- When any of these rights are exercised the copyright owner is generally entitled to a licence fee or royalties for the use of their work.
- Styles of drama and dance are not protected by copyright. It is the expression of the style in the dramatic or dance work that is protected.
- The author has moral rights to his or her work. This includes the right of integrity and attribution.
- In collaborative works, copyright may be shared with the collaborating authors. If company members collaborate to create a dramatic or dance work, the members will generally be the joint authors.
- The Indigenous author who incorporates traditional ritual knowledge in his or her dramatic or dance work has a special obligation to the clan when exercising the copyright in the work.
- There are special copyright provisions for commissioned photographs.

Recording dramatic and dance works

- When recording a dramatic or dance work it is necessary to secure copyright clearance from the copyright owner. In a performance work this may include separate copyright clearances for use of the dramatic work, the choreography, the musical work and the artwork.
- It is strongly recommended to use written agreements when licensing dramatic or dance works for commercial purposes.
- Broadcast and film companies should provide written agreements for copyright owners. Indigenous authors should be given the opportunity to consider contracts and obtain proper legal advice.
- Recipients of Australia Council grants are encouraged to seek legal advice on written contracts for recording.
- Have performers signed clearance forms if their work is to be recorded at a festival?
- Under the educational statutory licensing schemes, authors may be entitled to royalties for use of their works in books and films. The relevant collecting agencies – APRA, AMCOS, CAL, Screenrights and Viscopy – collect and distribute royalties to members.

Copyright infringement

- A person will infringe copyright in a work if he or she publishes the work, reproduces the work in material form, performs the work in public, communicates the work to the public, or makes an adaptation of the work without the permission of copyright owner.
- Statutory exceptions to copyright infringement include the purposes of criticism or review, and incidental filming.
- Public performance of a work can include any performance that is not domestic or private, even if no fee is charged. So, anyone intending to perform a work that is protected by copyright should seek advice to ensure they are not infringing copyright. Check the Contacts page in this guide for copyright advice referrals.



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- ⁴ Terri Janke, *Our Culture: Our Future*.
- ⁵ Terri Janke, *Our Culture: Our Future*.
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- ²³ Paul MacPhail, Yirra Yaakin Noongar Theatre, telephone consultation, 17 May 2002.
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- ²⁸ Rachael Swain, Marrugeku Company, telephone consultation, 4 April 2002.

- ²⁹ Paul MacPhail, Yirra Yaakin Noongar Theatre, telephone consultation, 17 May 2002.
- ³⁰ Helen Anu, consultation meeting, 14 August 2001.
- ³¹ *ibid.*
- ³² Rachael Swain, Marrugeku Company, telephone consultation, 4 April 2002.
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- ⁴¹ Jo Dyer, [then] general manager, Bangarra Dance Theatre, *Collaborations: Using Indigenous Cultural Material in Contemporary Performance*, seminar papers, Arts Law Centre, 1999, page 5.
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- ⁴⁴ Festival Records publicly apologised to Woomera Aboriginal Corporation for unauthorised use of material by Larrikin Records. Apology published by Festival which had taken over Larrikin by the time of resolution of the dispute.
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- ⁶⁷ Peter Cleary, Woomera Aboriginal Corporation, consultation response, 11 March 2002.
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- ⁷⁰ Submission received from National Aboriginal Dance Council Australia, 17 May 2002.
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- ⁷² Section 10, *Copyright Act 1968 (Cth)*.
- ⁷³ Section 35 (6), *Copyright Act 1968 (Cth)*.
- ⁷⁴ M Payunka, Marika & Others v Indofurn 30 IPR 209.
- ⁷⁵ Zeccola v Universal City Studios Inc (1982) 67 FLR 225.
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- ⁷⁷ Sections 31(1)(a)(i) and (b)(i), *Copyright Act 1968 (Cth)*.
- ⁷⁸ Section 35 (2), *Copyright Act 1968 (Cth)*.
- ⁷⁹ Peter Cleary, consultation response, 11 March 2002.

- ⁸⁰ Section 35(6) of the *Copyright Act 1968 (Cth)*, states that where the work is 'made by the author in pursuance of the terms of his or her employment by another person under contract of service of apprenticeship, that the other person is the owner of any copyright subsisting in the work'.
- ⁸¹ Section 176(1) of the *Copyright Act 1968 (Cth)*, Section 10, *Copyright Act 1968 (Cth)*, Section 35, *Copyright Act 1968 (Cth)*.
- ⁸² Section 41, *Intellectual Property Reports* 513.
- ⁸³ Section 31, *Copyright Act 1968 (Cth)* 31.
- ⁸⁴ Labotation is the diagrammatic written expression used to record dance.
- ⁸⁵ Section 33, *Copyright Act 1968 (Cth)*.
- ⁸⁶ Section 93, *Copyright Act 1968 (Cth)*.
- ⁸⁷ Peter Cleary, consultation response, 11 March 2002.
- ⁸⁸ Section 248A(1), *Copyright Act 1968 (Cth)*.
- ⁸⁹ The *Copyright Act 1968 (Cth)* requires that the work be performed in Australia, in the presence of an audience and by qualified persons.
- ⁹⁰ Section 248A(2)(a), *Copyright Act 1968 (Cth)*.
- ⁹¹ Section 28, *Copyright Act 1968 (Cth)*.
- ⁹² Section 193, *Copyright Act 1968 (Cth)*, An exception is where it was reasonable not to identify the author: section 195AR *Copyright Act 1968 (Cth)*.
- ⁹³ Section 195AC, *Copyright Act 1968 (Cth)*
- ⁹⁴ Section 195AI, *Copyright Act 1968 (Cth)*.
- ⁹⁵ Section 195AJ, *Copyright Act 1968 (Cth)*.
- ⁹⁶ Section 195AWA, *Copyright Act 1968 (Cth)*.
- ⁹⁷ Section 195AS, *Copyright Act 1968 (Cth)*.
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- ¹⁰² Section 42, *Copyright Act 1968 (Cth)*.
- ¹⁰³ Section 43, *Copyright Act 1968 (Cth)*.
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Australian Mechanical Copyright Owners Society – AMCOS

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