

Cultural Institutions, Law and  
Indigenous Knowledge:  
A Legal Primer on the  
Management of Australian  
Indigenous Collections

Emily Hudson



2006

*Indigenous Australians reading this Primer are warned that  
it contains the names of deceased people.*

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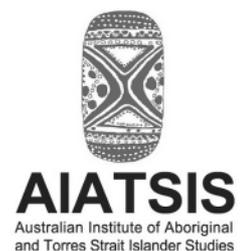
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# Preface

This Primer is one of the products of a collaborative research project conducted by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Intellectual Property Research Institute of Australia (IPRIA). This project examined intellectual property and other legal issues in the access, ownership and control of Indigenous cultural materials.

As part of this project, empirical fieldwork was performed by Jane Anderson of AIATSIS with Indigenous individuals and communities. This fieldwork included consultative research in relation to questions such as: Indigenous community attitudes to terms like 'Indigenous intellectual property'; Indigenous attitudes to the creation and exploitation of knowledge by individuals and communities, and towards the accessibility, ownership and reproduction of cultural materials; individual and community expectations and needs in relation to intellectual property; the use of intellectual property to advance economic interests of Indigenous people; and the development of practical tools to improve the relationship between Indigenous communities and cultural institutions.

In parallel with this, the project has included consultation with staff of cultural institutions in relation to the issues they are experiencing in the management of Indigenous collections. Research has been undertaken regarding the legal principles that are relevant to the acquisition, use and reproduction of collection items, the content of existing policies in relation to Indigenous collections, and the types of additional procedures or considerations that might

be relevant when dealing with Indigenous collections. This Primer is the major practical output of this work. While it is primarily directed to cultural institutions, it contains discussion of legal and ethical principles that are relevant to other holders of Indigenous cultural materials.

Please note that the information in this Primer is not intended to constitute legal advice, and readers should obtain the advice of a lawyer in relation to any specific questions regarding their legal policies and practices. The law discussed is current to June 2006.

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The content of this Primer owes much to the input and assistance of people at AIATSIS, including Di Hosking, Peter Veth and, of course, Jane Anderson. Thank you all for collaborating with us on this project.

This Primer is available in electronic form from IPRIA: [www.ipria.org](http://www.ipria.org).

Emily Hudson  
Melbourne  
June 2006



# Chapter 1: Introduction

This Primer explores some of the legal issues that arise for cultural institutions and other bodies in the acquisition, use and reproduction of Aboriginal and Torres Strait Islander cultural material. The term 'cultural material' is used broadly to refer to collection items that reproduce, record or depict Indigenous people, cultures, knowledge and experiences: in some cases, this is highly sensitive or restricted information. It includes artistic outputs, and archival and research material.

Given that the focus of this Primer is on materials that have been created through human effort - print materials, photographs, artistic works, artefacts, audio recordings, moving image, multimedia and oral history recordings - it does not discuss specific issues in relation to human remains and genetic resources.

This Primer is the result of a research project being jointly conducted by the Intellectual Property Research Institute of Australia (IPRIA) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The project was initiated

due to problems being experienced by AIATSIS in relation to the management of cultural material in its library and archives.<sup>1</sup> These problems revolve around themes of **ownership**: who holds rights in physical, intangible and informational aspects of collection items? How do these rights interact? And how do the laws, cultures and knowledge structures of Indigenous people sit within this legal framework? These questions manifest themselves in issues of **accessibility and control**: of Indigenous people being unable to locate, access and reproduce materials relating to themselves and their families, while in other circumstances, being unable to prevent culturally insensitive uses of materials.

These issues are not unique to AIATSIS, but are being experienced by other cultural institutions and holders of Indigenous cultural materials. A growing awareness of the special issues surrounding Indigenous collections has led peak bodies and individual institutions to produce policies and guidelines for the management of cultural materials: see Table 1.1.

## Relevance to other collections

While this Primer is directed to Indigenous cultural materials, the legal principles apply more generally, making it a useful document for all institution staff who are interested in learning more about law and collection management.



These documents seek to recalibrate institution practice in relation to Indigenous collections, and cover matters including classification of materials, improving Indigenous input into the management of collections, treatment of secret and sacred information, repatriation of original and copy materials, education and training of staff, and development of digital archives and outreach programs.

A key aim of this Primer is to assist institutions implement these guidelines and policies by examining legal principles relevant to the acquisition, access and use, and reproduction of collection items.

For example, many institutions are using digitisation to preserve collection items and enhance their accessibility. This obviously raises issues in relation to compliance with **copyright law** (see Chapter 5). However, for some materials - including Indigenous cultural materials - issues of **privacy and confidential information** may also arise (see Chapter 4). Furthermore, in some instances, digitisation may be contrary to a stipulation attached to a **gift**, leading to questions about when those stipulations are legally enforceable conditions (see Chapter 3). Thus, a simple policy to 'enhance digital access' can potentially raise a multitude of legal issues in relation to physical, intangible and information rights.

Another key aim is to explore the relationship between law, Indigenous knowledge and ethical

practice in collection management. This Primer does not, therefore, discuss legal principles in the abstract, but by reference to best practice for Indigenous collections. For instance, in the discussion on acquisition in Chapter 3, in addition to exploring the legal formalities for donating or lending property, the Primer discusses the sort of **additional steps** that might be taken when acquiring Indigenous cultural materials. In general, these are not required by law. Instead, the aim is to find meaningful ways to implement the guidelines and policies on Indigenous collections referred to above.

Furthermore, the Primer dedicates a separate chapter to practices such as subject and community consents, cultural clearances, and other devices that **formalise the consultation process** between the cultural institution and Indigenous owners or representatives. While many cultural institutions are increasingly obtaining cultural clearances for a broad range of activities, there is some uncertainty regarding the process for obtaining such clearances, their wording, legal effect, and so on. Not all of these questions have definitive answers. However, this Primer aims to provide some thoughts and suggestions to assist institutions in setting up these procedures.

This introductory chapter deals with two questions:

- What makes Indigenous collections different from other collection types?
- How is this Primer organised?

Table 1.1: Some policies, guidelines and protocols in relation to Indigenous cultural materials.

Directed to Indigenous collections	More general materials
Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services, available at <a href="http://www.cdu.edu.au/library/protocol.html">http://www.cdu.edu.au/library/protocol.html</a> .	Doreen Mellor and Terri Janke, <i>Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector</i> (National Association for the Visual Arts, 2001).
Janey Dolan, <i>Continuous Cultures, Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage</i> (Museums Australia, 2005): <a href="http://www.museumsaustralia.org.au">http://www.museumsaustralia.org.au</a> .	Australian Institute of Aboriginal and Torres Strait Islander Studies, <i>Guidelines for Ethical Research in Indigenous Studies</i> (May 2000), available at <a href="http://www.aiatsis.gov.au">http://www.aiatsis.gov.au</a> .
The International Federation of Library Associations and Institutions, <i>IFLA Statement on Indigenous Traditional Knowledge</i> (2002), available at: <a href="http://www.ifla.org/III/eb/sitk03.html">http://www.ifla.org/III/eb/sitk03.html</a> .	Terri Janke, <i>Writing Cultures: Protocols for Producing Indigenous Australian Literature</i> (Australia Council, 2002): <a href="http://www.ozco.gov.au/artsResources.aspx">http://www.ozco.gov.au/artsResources.aspx</a> .
Ann Baillie, <i>Taking the Time: museums and galleries, cultural protocols and communities: A Resource Guide</i> (Museums Australia (Qld), 1998).	Jim Everett, <i>Respecting Cultures: Working with the Tasmanian Aboriginal Community and Aboriginal Artists</i> (Arts Tasmania, 2004): available at: <a href="http://www.arts.tas.gov.au/publications/respectingcultures/">http://www.arts.tas.gov.au/publications/respectingcultures/</a> .

## Why are Indigenous collections different?

The management of Indigenous collections raises unique issues for cultural institutions because of qualities that make them **fundamentally different** from other collections. This means developing new procedures and policies for those collections, some of which may contain substantial differences from existing approaches to collection management. For example, Martin Nakata and Marcia Langton have written that:

‘we would suggest that developing understanding of complexities requires the profession to do more than understand Indigenous concerns and perspectives on the issues. It requires, as much, an unsettling of established practice, and the questioning of some of the assumptions on which accepted practice rests. This is not to suggest that professionals should undermine or abandon their codes and standards of practice. Quite the opposite, we would argue. It is important for professionals to be clear on why the tenets of the profession are so important and central to their practice. Then perhaps it can be more fully appreciated just why Indigenous cultural principles are so important when it comes to restoring and continuing the principles of Indigenous knowledge management.’<sup>2</sup>

This Primer identifies three qualities, as discussed in this section, that makes Indigenous collections different from other collections.

### 1. *History of creation and collection*

One key difference arises from the **history of creation and collection** of Indigenous cultural materials. As noted by Jane Anderson, the issues facing cultural institutions in relation to Indigenous collections:

‘exist because of the historical power dynamics that meant that Indigenous people were studied and documented in unprecedented ways. Tensions do not just revolve around providing access to the material, but also inevitably engage with politics addressing the historical conditions under which such material was collected.’<sup>3</sup>

Much ethnographic material in the possession of cultural institutions was made by non-Indigenous

researchers, often without any (or adequate) procedures for informed consent or ethical research practices. In some instances, sensitive and personal knowledge was disclosed on the understanding that it would not be published or otherwise made publicly available. Furthermore, the Indigenous people whose lives and cultures were shared with researchers often never received copies of research outputs (manuscripts, photographs, sound recordings and films), and may have no knowledge of their current location.

### 2. *Informational content of Indigenous cultural materials*

A second and related difference relates to the **informational content** of Indigenous cultural materials.

First, and most obviously, some of this information is restricted in its use and disclosure under Indigenous laws and customs. These laws vary between different clans and communities, but include gender-restricted knowledge, secret/sacred information, restrictions on depicting or referring to people who are deceased, and so forth. The very fact that such information has been *recorded* may be contrary to Indigenous laws, making the placing of such material in the public domain of a cultural institution a highly sensitive act.

Second, many Indigenous laws and practices are not accommodated well by the Australian legal regime, meaning that Indigenous people cannot always rely on the law to protect or recognise restricted information and knowledge structures.<sup>4</sup>

For example, Mick Dodson has written that:

‘It is clear that our laws and customs do not fit neatly into the pre-existing categories of the Western system. The legal system does not even know precisely what it is in our societies that is in need of protection. It is a long way from being able to provide for such protection. The existing legal system cannot properly embrace what it cannot even define and that is what lies at the heart of the problem.’<sup>5</sup>

Much sensitive and personal information is documented in materials held by cultural institutions. Some examples include: papers setting out birth and death rates and employment statistics; records on the forced removal of children from their families and other policies of assimilation; and documentation of massacres of Indigenous people. Much of this

material uses offensive language and distressing images, such as photographs of Indigenous people in humiliating positions. There is debate in relation to whether, and if so how, this material should be publicly available:

‘One side of the argument runs along the lines that making the material even more accessible (through the web for instance) is in the interests of the public good: that we should know how Aboriginal people were treated. The counter argument is that this material is offensive to families involved who do not want pictures of their nameless family members again ‘paraded’ for other peoples’ benefit. The debates are intensely political and can seldom be separated from emotions and experiences of Australia’s colonial past.’<sup>6</sup>

### 3. *Lack of information regarding existence and location of collection items*

As noted earlier, there is a real problem surrounding the **lack of information** for Indigenous people and communities regarding the existence and location of collection items that relate to themselves.

At the same time, there has been a heightened interest in the collections of cultural institutions *by Indigenous people*. For example, in the early 1990s, only 1% of the clientele of the AIATSIS library were Indigenous - by 2004, this figure was approximately 75%.<sup>7</sup> A variety of factors appear to have led to this, including developments in native title, a rise in projects directed towards the revival of Indigenous languages, and the recognition of the impact of the stolen generations.

The position of cultural institutions was discussed in some detail in the Human Rights and Equal Opportunity Commission’s *Bringing them Home* report from 1997, in relation to the stolen generations.<sup>8</sup> Many issues were covered in that report, including a chapter describing the difficulties faced by Indigenous people in accessing personal and family records held by archives and other governmental bodies. Reasons for this included: destruction of documents; lack of centralised databases; lack of indexing of individual documents; and, in many cases, the lack of any legally enforceable right of access (especially for family and third party information). These factors prevented Indigenous people from locating and accessing basic information about their own lives and genealogy.

## Structure of Primer

This Primer is divided into three parts.

Chapter 2 is a context-setting chapter that briefly describes the different rights and legal interests that subsist in collection items. As will be seen, this Primer divides these rights and interests into three broad types: those that relate to the physical embodiment (personal property rights); those in relation to the informational content (such as private and confidential information); and finally copyright and other intangible rights. Chapter 2 explores how these different types of rights interact, and who typically holds these rights.

A substantive discussion of the law is provided in Chapters 3 to 5 and the Case Study, with each chapter dealing with legal issues relevant to the following key areas of institution activity:

- **acquisition** of collection items (Chapter 3);
- permitting access to, and **use of**, collections items (Chapter 4);
- **reproducing** collection items (Chapter 5); and
- creating an electronic **database** of new and existing Indigenous cultural material (Case Study).

As noted earlier, this Primer does not discuss these legal principles in the abstract, but incorporates discussion of possible additional steps that might be considered in relation to Indigenous collections.

The third part of the Primer is the discussion in Chapter 6, which focuses on **formalised ‘ethical’ practices** in relation to Indigenous collections, such as family and community consultation, and cultural clearances. This will draw together some of the suggestions discussed in Chapter 3 to 5. Themes that are discussed include strategies for obtaining permissions, common difficulties in this process, and how they should be formalised or recorded. This discussion is not intended to be (and, indeed, cannot be) prescriptive, but to make suggestions and comments in relation to **process**.

It is hoped that this Primer will form part of broader discussions in relation to cultural institutions and Indigenous knowledge. As noted by Nakata and Langton, this requires understanding across ‘issues of knowledge, culture, history, heritage, law, disciplines, technologies and so forth.’<sup>9</sup> This Primer focuses on management from a legal perspective. This is important, because an understanding of law

is crucial for the development and implementation of new policies and ways of thinking in relation to the ownership, control and reproduction of cultural materials.

In conclusion, the words of Nakata and Langton are apt:

‘And so, when we consider the challenges associated with Indigenous knowledge and libraries and archives, we are not talking solely about the liberal project of equality and inclusion. It is patronising to take the view that changing practice is limited to ensuring libraries adjust practice to include Indigenous people so we can access our own materials. More fundamentally, it must be about recognition of and respect for continuing but still distinct knowledge traditions. It must be about developing a set of practices that recognise the entanglement of the two traditions as they move forward together in a somewhat problematic tension. It must be about understanding the intentions and purposes of Indigenous information activity and why, when, and which aspects of these remain quite distinct from other types of information activity. It must be about the authority of Indigenous people to determine how and under what conditions they want to manage their knowledge and cultural materials in the new millennium. At every level it must be about developing trust and good working relationships between Indigenous people and collecting institutions.’<sup>10</sup>

*Australian Indigenous Cultural and Intellectual Property Rights* (1998), chapter 5.

5 Michael Dodson, ‘Indigenous peoples and intellectual property rights’ in *Ecopolitics IX: Conference Papers and Resolutions* (1996), 32.

6 See Jane Anderson’s ‘Access and Control’ paper, above n 3, 16.

7 Discussion between Emily Hudson and Barbara Lewincamp, Director, AIATSIS Library, on 31 August 2004.

8 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), available at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>.

9 Nakata and Langton, above n 2, 3.

10 *Ibid* 4-5.

## Endnotes

1 Discussed in Jane Anderson, ‘Indigenous Knowledge, Intellectual Property, Libraries and Archives: Crises of Access, Control and Future Utility’ in Martin Nakata and Marcia Langton (eds), *Australian Indigenous Knowledge and Libraries* (2005).

2 Martin Nakata and Marcia Langton, introduction to Martin Nakata and Marcia Langton (eds), *Australian Indigenous Knowledge and Libraries* (2005), 3.

3 Jane Anderson, ‘Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use’, paper presented at ‘Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena’, Columbia University, New York, 5-7 May 2005, available at [http://correctingcourse.columbia.edu/paper\\_anderson.pdf](http://correctingcourse.columbia.edu/paper_anderson.pdf).

4 For a discussion of this, see Terri Janke, *Our Culture: Our Future. Report on*



# Chapter 2:

## Law and Ownership: An Overview

### Introduction

The following three chapters of this Primer discuss legal principles relevant to:

- the **acquisition** of Indigenous cultural materials by cultural institutions (Chapter 3);
- their **accessibility** and **use** by staff, researchers and patrons (Chapter 4); and
- the **reproduction** of materials, including by or for provision to patrons, for internal administrative or preservation purposes, and as part of digitisation and digital archive projects (Chapter 5; a separate discussion on databases is in the Case Study).

Certain areas of law are particularly relevant to these activities, including personal property, contract, 'bailment' (for loaned works), confidential information, privacy and copyright. There is also **specific legislation** that may impact upon the acquisition and use of Indigenous cultural materials, such as cultural heritage and archives legislation. Finally, the fact that many public cultural institutions are also **charities** is relevant to how they accept gifts and use property.

For ease of use, this Primer discusses each of these areas of law in the chapter to which they most relate, as set out in Table 2.1. This is not to suggest that each area of law is *only* relevant to that chapter. For example, decision-making about copyright is relevant at acquisition (if a licence or assignment is sought when the item is acquired) and is relevant to any forms of access or use that involve reproduction - such as digitising works so they can be browsed or auditioned electronically. In order to facilitate understanding, each legal principle is

discussed in total and, if relevant to other chapters, cross-references are used.

This section sets out some key principles from personal property law that will assist readers in understanding the meaning of 'ownership', and the nature of, and relationship between, different types of interest in property. It also explains the tripartite division used in this Primer between physical, information and intangible aspects of property.

### Understanding ownership and its limits

Much discussion in this Primer draws on legal notions of **ownership**. Many of us understand what ownership means by reference to our personal effects: that we have the right to use, loan, consume, sell and destroy our own things - and to **exclude others** from exercising those rights.

However, the situation is not so simple. Sometimes, other property rights subsist in a physical item, such as the copyright protection given to the *intangible* aspects of a book, painting or sound recording. Furthermore, it is not uncommon for statutes and regulations to govern and restrict how property rights are exercised. This means that ownership of physical property does not result in unfettered discretion regarding how it is used.

For simplicity, this Primer divides relevant ownership rights - and limits on those rights - into three categories. This is represented schematically in Figure 2.2.

First, there are rights that relate to ownership of the **tangible, moveable** collection item: the 'personal property' rights. These are discussed in Chapter 3, which deals with acquisition. These are

the rights that we commonly equate with ‘ownership’, as discussed above.

There are also legal rights in relation to **other intangible** aspects of property. These can be further divided into two parts.

There may be rights in relation to the **information that is recorded** in the collection item. In particular, the law gives some protection to the owner of ‘confidential information’. This area of law is often used in commercial settings in relation to customer lists, business plans and secret formulae, but has also been applied, on occasion, to Indigenous secret/sacred knowledge.

A related area is the legal protection given to **private information**. Overseas, some jurisdictions protect private information using a ‘tort of invasion of privacy’, while in other places, a modified breach of confidence action has been used to protect

private information. The Australian law has not developed this far; nor is there a general ‘right to privacy’ that is legally recognised. However, at the state and federal level, legislation has been passed that sets up rules for the collection, accessibility, correction and use of **personal information** held by agencies and organisations in the public and private sectors. It would be misleading to suggest that this gives people ‘ownership’ of their personal information. However, the legislation limits the way in which personal information can be used, and – in combination with freedom of information legislation – gives a statutory right of access.

The operation of these laws in the cultural institution sector is considered in Chapter 4 of this Primer.

Finally, the third ownership category used in this Primer is the intangible rights granted under the *Copyright Act 1968* (Cth): copyright, moral rights

Table 2.1: Organisation of this Primer.

Chapter title	Topics discussed	Areas of law
3. Law and Acquisition	<ul style="list-style-type: none"> <li>Ways in which cultural institutions acquire items (including Indigenous cultural materials), both permanently (gift and purchase) and non-permanently (loan).</li> <li>The formalities for each mode of acquisition.</li> <li>Strategies for dealing with ‘long-term loans’ and ‘conditional gifts’.</li> <li>The relevance of the law of charities to cultural institutions.</li> </ul>	<ul style="list-style-type: none"> <li>Personal property law.</li> <li>The law of ‘bailment’: special rules for loaned property.</li> <li>Relevant principles from the laws of charities and charitable trusts.</li> </ul>
4. Law and Access	<ul style="list-style-type: none"> <li>Legal principles that may restrict the use and accessibility of Indigenous cultural materials (confidential information, privacy).</li> <li>Legal principles that may provide a legally-mandated right of access (freedom of information, archives legislation).</li> </ul>	<ul style="list-style-type: none"> <li>Confidential information: in ‘equity’ and under contract.</li> <li>Privacy law.</li> <li>Freedom of Information.</li> <li>Archives legislation.</li> </ul>
5. Law and Reproduction	<ul style="list-style-type: none"> <li>An outline of copyright law: works protected, ownership, duration and exclusive rights.</li> <li>How provisions of the <i>Copyright Act</i> impact upon the reproduction of collection items, and the accessibility and use of those reproductions.</li> <li>Case Study (in separate section): Strategies for creating digital repositories and archives.</li> </ul>	<ul style="list-style-type: none"> <li>Copyright law.</li> <li>Moral rights.</li> <li>Performers’ rights.</li> </ul>

and performers' rights. An extensive consideration of these rights can be found in the publication '*Copyright and Cultural Institutions: Guidelines for Digitisation*' by Emily Hudson and Andrew T Kenyon, available at [www.law.unimelb.edu.au/cmcl](http://www.law.unimelb.edu.au/cmcl). This Primer summarises some key points in relation to copyright, and focuses on topical questions relevant to Indigenous collections, including, in the Case Study, rights management in digital archive projects.

A summary of each legal interest mentioned in this section is set out in Table 2.3.

## How do legal rights interrelate?

Property rights in the physical, intangible and informational components of a collection item are often owned by different people.<sup>1</sup> Some examples include where:

- a manuscript is owned by a prospective donor, but the copyright in the 'literary work' it embodies is owned by the manuscript's author, and the secret information it discusses was disclosed in confidence by members of an Indigenous community; and
- a print of a documentary is purchased by a

cultural institution, but the copyright and moral rights in the 'cinematograph film' are retained by the film-maker.

This means that a cultural institution may need to negotiate with a number of individuals to obtain the necessary rights and permissions to manage, use and reproduce collection items.

A simplified model might identify five key owners and other rights holders (or *potential* rights holders) in the context of Indigenous collections:

- (1) the institution itself;
- (2) the person who donated, lent or otherwise transferred the item to the institution (the 'transferor');
- (3) the copyright owner;
- (4) patrons and other users of the institution; and
- (5) the Indigenous person, family, community or clan whose image, knowledge or information is contained in the item.

The relationships between these five groups are mapped in Figure 2.4.

The purpose of this diagram is to show that some relationships are strongly regulated by law (the thick, continuous lines), some relationships are less regulated (the thin, continuous lines) and some are

Figure 2.2: Types of legally-recognised rights and interests in collection items.

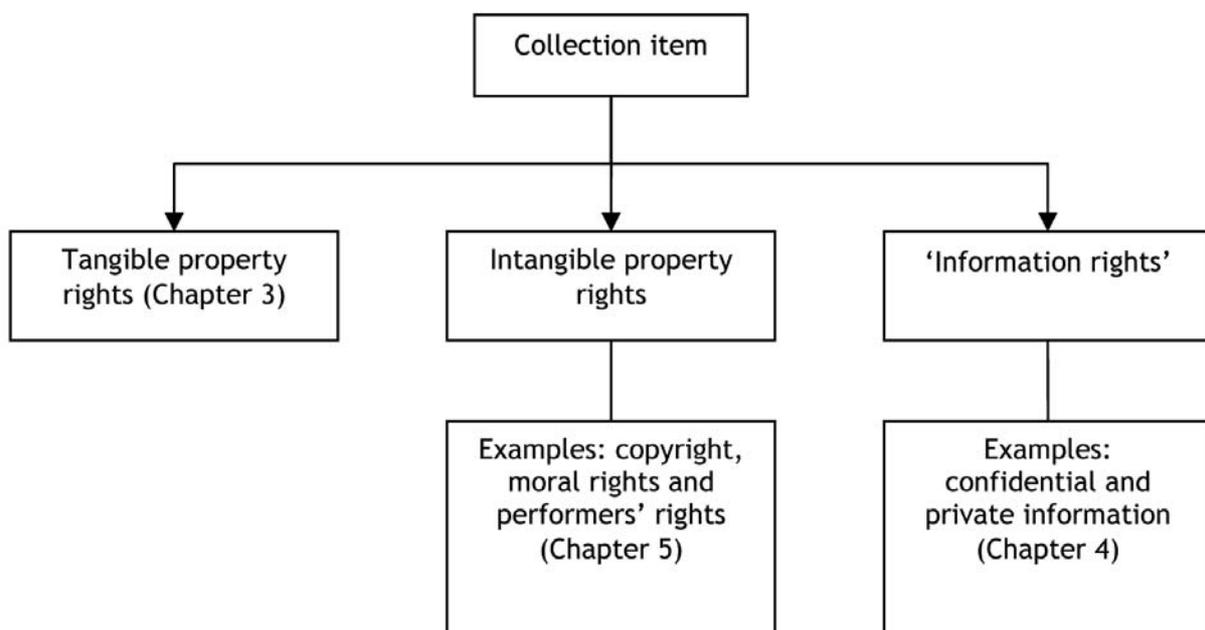


Table 2.3: Some legal interests that subsist in personal property.

Legal interest	Held by	Rights enjoyed	Methods of transfer
Personal property: see Chapter 2.	<ul style="list-style-type: none"> <li>The owner: the person who has title to the item.</li> <li>Note: possession and ownership can be split, for instance where property is loaned.</li> </ul>	Bundle of rights, including the right to use and dispose of property, and to exclude others from doing so.	Gift, sale or bequest.
Confidential information: see Chapter 3.	The confider or source of information.	Expressed in the negative: the unauthorised disclosure or use of confidential information by a recipient may give rise to a cause of action.	There is no 'right' that can be transferred, although the confider can disclose information to others under an obligation of confidence.
Private information: see Chapter 4.	The person the subject of the information (that is, to whom the information relates).	<ul style="list-style-type: none"> <li>Legislation governs how private information is collected and used by public and private sector organisations.</li> <li>People about whom private information relates are able to access and correct information under relevant legislation</li> <li>There is no general 'right to privacy' in Australia.</li> </ul>	There is no 'right' that can be transferred, although the subject of personal information can consent to various uses of that information.
Copyright: see Chapter 5.	The default rule is that the author or maker is the owner of copyright. There are exceptions (for instance, for employee-created works, some commissioned works, and sound recordings of live performances).	<ul style="list-style-type: none"> <li>Varies with the type of copyright work.</li> <li>Typically includes the right to reproduce or copy the work, and the right to communicate the work to the public (for instance, by publishing material on the Internet).</li> </ul>	<ul style="list-style-type: none"> <li>Assignment, bequest and operation of law.</li> <li>The copyright owner can provide a licence to a third party to perform a right in copyright. This does not transfer copyright to that person.</li> </ul>
Moral rights: see Chapter 5.	The author or authors. The term 'author' is defined as: <ul style="list-style-type: none"> <li>the author of a literary, dramatic, musical or artistic work; and</li> <li>the director, producer and screenwriter of a film.</li> </ul>	There are three rights: <ul style="list-style-type: none"> <li>to be attributed as author;</li> <li>not to have authorship attributed to someone else; and</li> <li>the right of integrity (which prevents 'derogatory treatment' that is prejudicial to the honour or reputation of the author).</li> </ul>	<ul style="list-style-type: none"> <li>Cannot be transferred ('inalienable').</li> <li>After death, administered by the owner's 'legal personal representative'.</li> <li>The owner of moral rights can provide a consent to conduct that would otherwise amount to an infringement.</li> </ul>
Performers' rights: see Chapter 5.	A performer in a live performance (which includes 'a performance of an expression of	<ul style="list-style-type: none"> <li>The 'anti-bootlegging' rights give performers the right to bring an action for the</li> </ul>	<ul style="list-style-type: none"> <li>Anti-bootlegging rights cannot be transferred.</li> </ul>

	folklore’).	unauthorised reproduction and use of their performances. <ul style="list-style-type: none"> <li>• New economic rights make performers owners of sound recordings of live performances.</li> </ul>	<ul style="list-style-type: none"> <li>• The rules in relation to economic rights can be modified by agreement.</li> </ul>
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not legally regulated at all (the dashed lines).

For example, the relationship between the cultural institution and the transferor is regulated by the laws of personal property and bailment. These laws are relatively well established. If the transferor makes an absolute gift, he or she transfers all his or her personal property rights. In contrast, if the transferor makes a legally effective ‘conditional gift’ or loans the item (whether on short or long-term basis), he or she retains power to control how the item is used.

Separate to this, the copyright owner has a relationship with everybody by virtue of the *Copyright Act*. Copyright law has become increasingly relevant to cultural institutions and their users due to the use of digital technologies that inherently involve the exercise of reproduction and communication rights.<sup>2</sup> This raises questions in relation to copyright compliance (for instance, using licensing or assignment), the operation of copyright exceptions, and risk management.

Where the collection item is the product of interviews or fieldwork conducted with Indigenous people or communities, there may be some contract or equitable obligation of confidence that regulates the use and disclosure of the information that is recorded or embodied (see text box on the case

*Foster v Mountford*). However, this obligation is less certain and frequent in its current application, and is therefore represented by a thinner line.

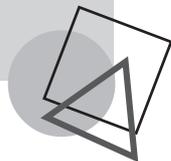
For other combinations, there is no legal relationship, or a highly uncertain one. For example, there is no recognition of some special, ‘fiduciary’ obligation owed by the government or the public to Indigenous people in relation to cultural materials.<sup>3</sup> Similarly, current laws in relation to privacy and freedom of information may be of limited relevance to cultural institutions, although some key phrases in the relevant legislation remain undefined; hence these areas are shown as a dotted line.

The aim of Figure 2.4 is to highlight where *legal rights* typically reside: with the copyright owner, the cultural institution and, in some cases, the transferor. The Indigenous people whose families, words, images and knowledge are recorded may have limited or no *legal* rights to control how that information is used and accessed.

Furthermore, to the extent that such rights are legally recognised, *it is within Western constructs of knowledge and law*. For instance, Maori filmmaker Barry Barclay, whose groundbreaking work has led to revision of practices at the New Zealand Film Archive (discussed later in this Primer) has

### Key point

Multiple rights can exist simultaneously in relation to the same collection item. These guidelines divide these rights into three categories: tangible property rights; intangible property rights; and information rights. These rights may be held by different people.



written with concern that:

‘whatever has been won by Indigenous peoples abroad [has] been won within existing copyright and intellectual property rights law, so, important though the gains have been, they were limited. ...’<sup>4</sup> ...

‘It is my suggestion that we look not to modern law (copyright, intellectual property rights) or some yet-to-be-born hybrid law (Indigenous intellectual property rights law) but to our own law, which is both ancient and modern - tikanga.’<sup>5</sup>

As indicated in this quote, it may be that in the future, greater legal recognition will be given to Indigenous cultural rights through expansion of existing causes of action, or through a new, *sui generis* right. There is substantial work being

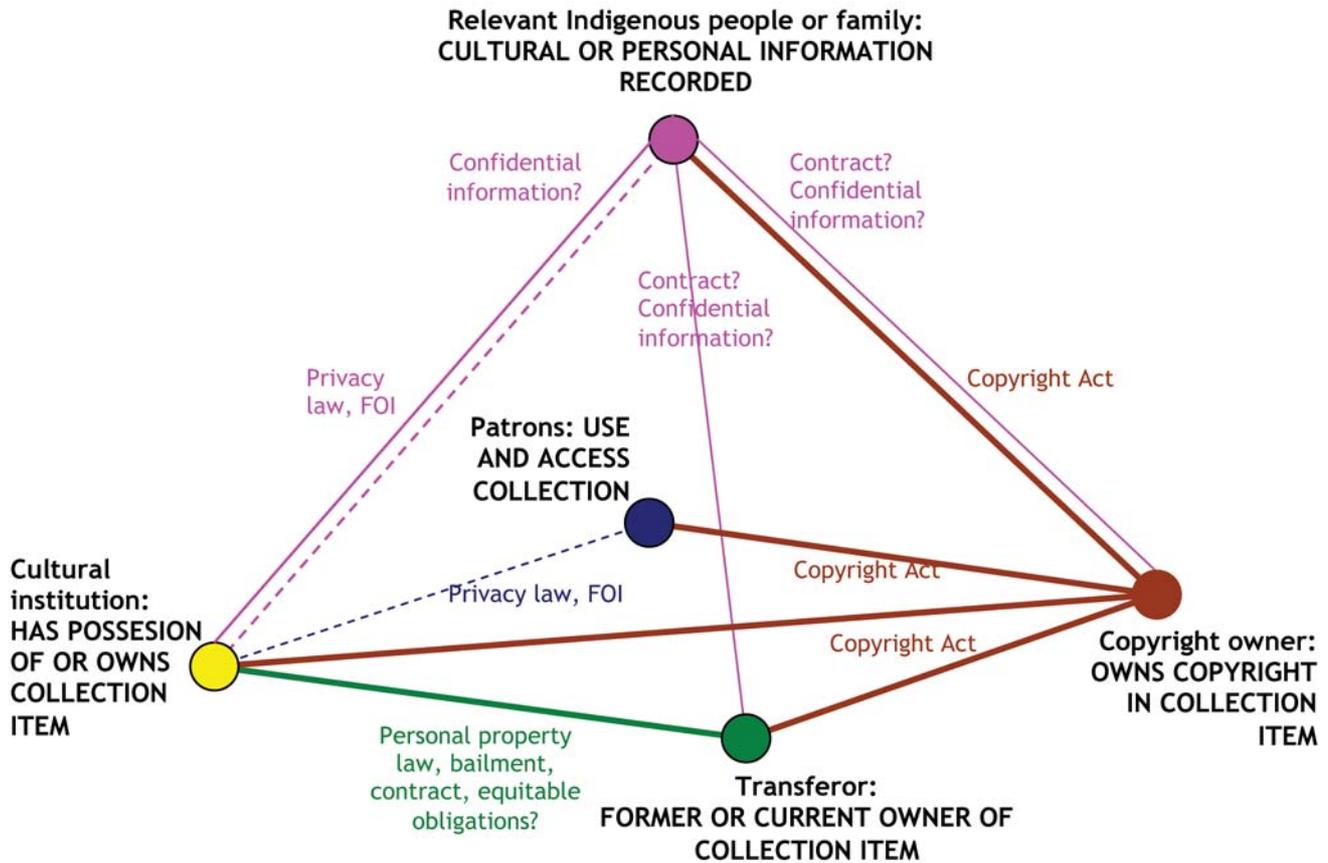
undertaken on this at a national and international level,<sup>6</sup> along with debate as to whether various reforms are workable and desirable. It may be many years before any reform is seen in Australian law - if at all.

In the meantime, there are many things that cultural institutions can do to help recalibrate this imbalance, particularly by moving towards best practice: practice that is consistent with existing law, but which also recognises and incorporates other legitimate interests.

## Conclusion

Legal rights in Indigenous collection items are often held by non-Indigenous people. Indigenous people often have no legally-recognised right to access those materials themselves, let alone restrict access or use by other people.

Figure 2.4 Map of relations between cultural institutions, transferors, copyright owners, patrons and relevant Indigenous people.



## Case Study 1: Using confidential information to protect Indigenous knowledge: the *Foster v Mountford* case

This case provides an example of the use of confidential information to prohibit the publication of a book containing secret information disclosed, in confidence, to a researcher.

Dr Mountford had performed research with Pitjantjatjara people in 1940. Some 35 years later, he published a book, *Nomads of the Australian Desert*, which included information and photographs deriving from this research.

The plaintiffs, members of the Pitjantjatjara Council, applied to the Supreme Court of the Northern Territory for an 'interim injunction' restraining further publication of the book. They argued that the book published, without authorisation, 'confidential information' of the Pitjantjatjara people.

An 'interim injunction' is an order made to restrain a defendant from engaging in specified conduct until a further court order is made. They are often used to prohibit damaging conduct from taking place between the commencement of court proceedings and the actual trial or hearing – which can sometimes be months or even years away.

The application was heard 'ex parte' – that is, without the defendants present – by Justice Muirhead in December 1976.<sup>7</sup>

Justice Muirhead accepted that in the course of this research, much secret information was revealed to Dr Mountford in confidence.

Justice Muirhead also accepted that secret information – which, from statements in the judgment, appears to be gender-restricted information – was disclosed in the book:

'I find a number of the photographs, drawings and descriptions of persons, places and ceremonies have deep religious and cultural significance to the plaintiff Foster, and to the other plaintiffs.'<sup>8</sup>

Finally, Justice Muirhead accepted that if publication of the book continued, secret information could be revealed to people who were never intended to receive it, causing social damage to the Pitjantjatjara people of a type not compensated by monetary damages. An interim injunction restraining publication of the book in the Northern Territory was therefore granted.

A number of lessons can be learned from this case.

First, Justice Muirhead did not require detailed evidence of the *circumstances* of disclosure of information by Pitjantjatjara people. His Honour accepted that information about sacred objects and spiritual information 'could only have been supplied and exposed in confidence',<sup>9</sup> and that this was implicitly acknowledged by Dr Mountford in the acknowledgement in the book. Thus, it was not fatal that there was no specific evidence of some conversation, document or legal relationship pursuant to which the confidence was reposed.

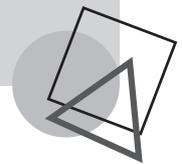
This approach needs to be viewed in its context: an *ex parte* application for an interim injunction. It may be that a higher standard of evidence would be required in a full trial of the merits of the case.

However, it demonstrates that formalised arrangements are not necessary for an obligation of confidence to arise.

Second, the case demonstrates that the plaintiff need not be the original confider, but can be a custodian body which represents the affected people or community.

Finally, the injunction was obtained not just against Dr Mountford (the first defendant), but also the publisher of the book (the second defendant). This demonstrates that third party recipients of confidential information can have an 'indirect' obligation of confidence. That is, a person who receives information as a result of another's breach of confidence may be liable for using or disclosing it once they have knowledge of the breach, even if he or she originally received the information innocently.

This case is discussed in further detail in Chapter 4.



## Case Study 2: Using copyright to protect Indigenous art: *Milpururru v Indofurn*

This case was brought by three Aboriginal artists and the Public Trustee (representing the estates of five deceased Aboriginal artists) against the respondent company and its directors.<sup>10</sup> The company had imported carpets into Australia. Reproduced on those carpets were designs derived from the artworks created by the Aboriginal artists. The applicants argued that these activities infringed copyright, and were also contrary to provisions in the *Trade Practices Act 1974* (Cth).

The applicants led evidence that:<sup>11</sup>

- the stories represented in the artworks are of 'deep significance', often only known to selected members of the clan;
- the use of certain painting techniques and depiction of certain images and symbols is controlled by Aboriginal law and custom;
- the right to create artworks depicting creation stories and to use pre-existing designs and totems resides in the traditional owners (or custodians) of the stories or images;
- if there is an unauthorised reproduction of a story or image, the artist is considered responsible for that use, even if it was by a third party, beyond the artist's control; and
- the artist may be punished for this, for instance by withdrawal of permission to produce artworks, preclusion from the right to participate in ceremonies, or being outcast from the community.

For example, Ms Marika, one of the applicants, said in an affidavit (a written statement of a person's evidence):

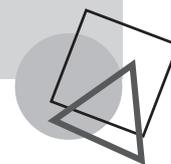
'As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story.'<sup>12</sup>

Justice von Doussa held that while only *part* of some of the artworks was reproduced in the designs on the carpets, these were all 'substantial parts' of the artworks, meaning that the incorporation of the designs constituted an infringement of copyright.

The applicants were also successful in claims under the *Trade Practices Act* due to a misleading swing tag attached to carpets.

The judge awarded the following remedies: orders prohibiting further infringing conduct; an order for the delivery up of certain carpets; and damages (including additional damages due to the flagrancy of infringement). These remedies applied to the company and its directors.

(Note: the case was appealed in relation to the liability of the third and fourth respondents, both directors of the respondent company. The trial judge's rulings were overturned on this point.<sup>13</sup>)



Cultural institutions have recognised that, as custodians of various embodiments of Indigenous knowledge and information, that they have an obligation to implement policies and procedures that are culturally sensitive, and designed and implemented with ongoing input and cooperation with Indigenous creators, families, communities and representatives.

As discussed in Chapter 1, this Primer considers legal issues in relation to this process.

## Endnotes

1 Eg, *Re Dickens; Dickens v Hawksley* [1935] Ch 267 (ownership of physical manuscripts separate to ownership of copyright in those manuscripts).

2 See discussion in Andrew T Kenyon and Emily Hudson, 'Copyright, Digitisation and Cultural Institutions' (2004) 31(1) *Australian Journal of Communication* 89.

3 In Canada, the courts have recognised fiduciary obligations between government and Indigenous peoples in *Guerin v R* [1984] 2 SCR 335 and *R v Sparrow* [1990] 1 SCR 1075. For a discussion of Australian law and recognition of a fiduciary relationship between the Commonwealth and Aboriginal people, see *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677 (Kirby J).

4 Barry Barclay, *Mana Tūturū: Māori Treasures and Intellectual Property Rights* (2005), 114-115.

5 *Ibid* 248.

6 For an overview, see Terri Janke, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property' in Martin Nakata and Marcia Langton, *Australian Indigenous Knowledge and Libraries* (2005), 102-104.

7 *Foster v Mountford & Rigby Ltd* (1976) 14 ALR 71.

8 *Ibid* 73.

9 *Ibid* 72.

10 *Milpururru & Ors v Indofurn & Ors* (1994) 30 IPR 209.

11 *Ibid* 214-215.

12 *Ibid* 215.

13 (1996) 34 IPR 11.



# Chapter 3: Law and Acquisition

## Introduction

This chapter describes the various methods by which cultural institutions can acquire collection items. For the purpose of this chapter, these methods are divided into the following categories:

- those in which ownership is transferred to the cultural institution, such as **gift** (eg, donation and bequest) and **purchase**; and
- those in which the cultural institution obtains possession of an item that someone else owns, such as short- and long-term loan (termed '**bailment**' in the law).

A key aim of this discussion is to determine what property rights the cultural institution obtains by each acquisition method, and what rights (if any) are retained by the person transferring the property (the 'transferor' or 'source'). This issue can be particularly relevant if the transferor places **conditions** on the use of property, such as restrictions on access, exhibition or reproduction. When are these statements legally binding, and when do they reflect mere preferences in relation to how collection items should be managed?

This chapter also explores additional considerations that might be relevant to the acquisition of Indigenous cultural materials. For example, acquisition provides an opportunity to **gather information** regarding the circumstances of creation of the item, the nature of its content, and so forth.

A checklist for acquisition is contained in Table 3.1. As indicated in that checklist, there are certain questions that arise for *all* acquisitions, whether for loan or for accession into the collection. There are legal, ethical and practical aspects to these questions, such as: whether acquisition accords with the institution's goals and missions; whether an object

can be appropriately cared for; how it can be used; whether the transferor has sufficient title to make the transfer; and so forth. These matters will commonly be articulated in a **collection management policy**: see discussion in the text box. As will be noted in this chapter and discussed in more detail in Chapter 6, the matters that are relevant for acquisition and use of Indigenous collections are different when compared with other collection types.

Once an institution has decided to acquire an item, the next stage is to identify the **mode of acquisition** and to identify the documentation and other steps that will be necessary to complete the transaction. This chapter assists in this process by providing substantive discussion of three common modes of acquisition: **gift** (including bequest), **sale** and **bailment** (ie, loan). This includes identification of the formalities for each mode of acquisition to be legally effective, and description of the rights the cultural institution receives.

This chapter also includes discussion of the use and desirability of '**conditional gifts**' and **long-term loans** as acquisition methods, the special duties that cultural institutions have as **bailees** of property, an outline of the content of **cultural heritage legislation**, as well as a description of the special rules that apply to cultural institutions in their status as **charitable organisations**.

## Primer on personal property law

As a matter of law, property can be categorised as either 'real' or 'personal' property. The former term refers to land, while the latter refers to everything else. The definition of 'personal property' is therefore broader than mere personal effects.

Table 3.1: Checklist for acquisition of Indigenous cultural material.

Step	Key questions	Notes
<input checked="" type="checkbox"/> Decide whether to acquire material.	Does acquisition of: (1) this <i>type</i> of object; and (2) this <i>particular</i> object, accord with the institution's collection management policy?	A collection management policy might include statements in relation to: <ul style="list-style-type: none"> <li>• the goals of the institution and its collection;</li> <li>• the types of works that are suitable for acquisition;</li> <li>• procedures for assessing whether to acquire particular objects;</li> <li>• any limitations on acquisition arising from the institution's constitution; and</li> <li>• who is responsible for making decisions about acquisition, and how these should be documented.</li> </ul>
	(Where relevant): Is acquisition consistent with the institution's charitable objects?	Some cultural institutions are also 'charities' under the law. The nature and terms of acquisition must be consistent with their charitable objects.
	Has adequate research been undertaken in relation to the provenance and authenticity of the object? Does this research suggest that this object is appropriate for acquisition?	For instance, for Indigenous ethnographic material, this might include questions about: <ul style="list-style-type: none"> <li>• whether true informed consent was given by Indigenous participants in research;</li> <li>• whether research was performed in accordance with protocols or ethical oversight; and</li> <li>• the views of relevant Indigenous people as to whether the item should be acquired, and/or how it should be managed.</li> </ul>
	Does acquisition accord with cultural heritage legislation, and other similar statutes?	There is legislation at the state and federal level governing the export, import and use of cultural heritage, including Indigenous artefacts.
	Does the transferor have title to make the gift, sale or loan?	A basic rule of personal property law is that a person is unable to transfer better title than they enjoy: the 'nemo dat' rule. For instance, a person who has a mere <i>possessory</i> interest in property cannot pass <i>good ownership</i> .

<input checked="" type="checkbox"/> Identify mode of acquisition.	Is it intended that ownership be transferred to the institution?	If so - options: <ul style="list-style-type: none"> <li>• gift (including bequest);</li> <li>• purchase; and</li> <li>• other (eg, field collection, exchange - not separately considered in this Primer).</li> </ul>
	Is it intended that the institution have only possession of the item?	If so - options: <ul style="list-style-type: none"> <li>• short-term loan; and</li> <li>• long-term loan.</li> </ul>
<input checked="" type="checkbox"/> Ensure that the terms of acquisition are documented appropriately.	Have the terms of acquisition been documented in writing?	Some matters to think about: <ul style="list-style-type: none"> <li>• Does the documentation expressly state the mode of transfer (gift, loan)?</li> <li>• Does it include a warranty as to title by the transferor?</li> <li>• For loans: has the duration of the loan been specified? Does the agreement provide for what happens if the lender cannot be contacted, or fails to collect property at the end of the loan?</li> <li>• Have intellectual property issues been considered?</li> </ul>
	Have any 'conditions' been appropriately drafted?	The use of conditions raises issues in relation to long-term management of collections. If legally binding, then breach can result in an institution losing title or possession. Relevant questions include: <ul style="list-style-type: none"> <li>• Are conditions reasonable?</li> <li>• Should they be drafted as binding conditions, or non-binding statements of preference?</li> <li>• What happens if they are no longer capable of being fulfilled?</li> <li>• Does the constitution limit the circumstances in which a conditional gift can be accepted?</li> </ul>
<input checked="" type="checkbox"/> Develop strategies for ongoing consultation and collaboration with relevant Indigenous people.	What further consultation or clearances are required from relevant Indigenous people?	This is discussed in detail in Chapter 6. Other suggestions are made in the course of this chapter. The 'relevant Indigenous people' may range from an Indigenous creator, through to the people who participated in research (or their families or descendants), through to community elders or representatives. Multiple consents may be required for one work.

Within the category of personal property, a distinction can be made between **physical, moveable things** ('choses in possession') and intangible property ('choses in action'). Thus, books, manuscripts, audio recordings, photographs, artefacts, clothing, VHS tapes and paintings are all choses in possession. In contrast, the copyright that may subsist in these items is separate, and an example of a 'chose in action'. As noted in Chapter 2, the physical and intangible aspects of property may be owned by different people. This chapter focuses on rights in the physical item.

The 'greatest possible interest' that a person may have in a chose in possession is **ownership**. The owner of property obtains a '**bundle of rights**' which includes the ability to use, display, loan, sell and destroy property - and, importantly, to exclude others from performing those acts.

In some instances, a person has **possession** of an object, but not ultimate ownership of it. An example of this is a cultural institution that has an item on

loan. The law describes *any* situation in which ownership and possession is split as a '**bailment**'. There are special rules that apply to bailment, as will be discussed further below.

Two key points arise for this primer.

1. *Rights are not absolute.* The rights of the owner of property (or someone in possession of it) are not absolute. For example, the ability of an owner to destroy an artistic work may be subject to moral rights provisions in the *Copyright Act* (see Chapter 5), and the ability to export cultural materials controlled by cultural heritage legislation - see text box. One of the key aims of this Primer is to understand the interaction of these various rights and interests.
2. *Transfer of ownership is limited by the 'nemo dat' rule.* The '**nemo dat**' rule provides that, with some specific exceptions, a person cannot transfer a better title than they themselves have.<sup>3</sup> An example is where a person has

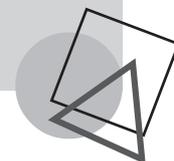
## Collection management policies

Marie Malaro, in her book on law and museum management, provides the following definition of a 'collection management policy': 'a detailed written statement that explains why a museum is in operation and how it goes about its business. The policy articulates the museum's professional standards regarding objects left in its care and serves as a guide for the staff and as a source of information for the public.'<sup>1</sup>

Collection management policies often draw together ethical, legal, practical, financial and technological aspects of collection management. Ideally, they should articulate procedures that guide staff through issues that arise in relation to collection development, storage, maintenance, use and disposal.

The content and level of details will depend on the institution's own preferences. For example, Shane Simpson suggests that a good collection management policy should cover: 'the intended scope of the collection; what the museum intends to collect; the criteria to be applied when acquiring collection material; the process by which such decisions are made; how that material may be used; how it will be managed, maintained, conserved, protected; how it will be stored; whether it may be deaccessioned; and the circumstances in which and the means by which, the disposal of collection items is permitted.'<sup>2</sup>

As alluded to earlier, ethical considerations play an important role in informing collection management policies. Consideration of the circumstances of the creation or collection of material, and the history of treatment of particular populations (such as Aboriginal people and Torres Strait Islanders), are important in deciding whether to acquire new materials, and how to manage existing collections.



possession of stolen goods: he or she cannot pass full title to those goods, but only the lower, possessory interest. The recipient in those circumstances does not receive good title, and may be required to return property to the true owner. It is irrelevant for this analysis that the recipient acts in good faith, pays for the object, and has no knowledge of the transferor's defective title.

## Methods of acquisition:

### Gift

#### *Definition*

The law defines 'gift' as a gratuitous conveyance of property performed with an intention by the donor to vest property in the donee. The gratuitous nature

of gift means that property is transferred in the absence of any payment or reward. A cultural institution that receives a gift enjoys all the rights and incidents of property ownership. Obviously, these rights must be exercised consistently with institution policies, enacting legislation and other legal regimes (such as copyright and privacy law), meaning that the institution's discretion is not unfettered. However, as noted earlier, ownership represents the strongest set of rights in property law.

#### *Formalities*

The legal formalities to effect a gift are that: (1) a donor, (2) with the intention to transfer legal title immediately, (3) either delivers property or agrees to transfer it by deed.

## The importance of verifying title

As noted in the discussion on the 'nemo dat' rule, a person cannot, in general, transfer better title than they themselves possess. The recipient will only receive what the transferor is able to give. It does not matter that the recipient paid for the property, or acted in good faith in the transaction.

It is important for cultural institutions to have appropriate procedures to verify the title of the transferor of property. These steps will vary depending on the nature and value of the material being acquired; they may include one or more of the following:

- *Discuss provenance with the transferor.* Find out how the transferor came to own the object that they wish to transfer to the institution. Does this story (and any corroborating documentation) suggest that they have good title to effect the transfer? Where original Indigenous artefacts are being donated: was collection lawful? Does cultural heritage legislation impact on the *legal* ability for the transfer to be made? (Obviously, ethical consideration may also arise.)
- *Include a warrant as to title in acquisition forms.* Include a statement on acquisition forms under which the transferor warrants that he or she is the owner of the property (or their agent) and is able to pass good title. While this does not have the legal effect of rectifying bad title, it: (1) acts to raise the issue of ownership, so that any uncertainties can be discussed prior to acquisition; and (2) when accompanied with an indemnity, *may* help the institution recover costs incurred because of the defect in title.<sup>4</sup>
- *Where appropriate, search registers of lost or stolen cultural materials.*
- *Keep records of your efforts.* Documenting efforts to verify title may be useful if there is subsequently a dispute as to ownership.



## Cultural heritage legislation

There is legislation at the state and territory level that is relevant to the collection, transfer and use of various forms of cultural heritage; this sometimes (but not always) includes Aboriginal cultural heritage.<sup>5</sup> The precise details vary from state to state, but common aspects include: making it an offence to damage or destroy a heritage object; making it an offence to remove a heritage object from a state; and setting up a register for heritage objects.

In addition to this general legislation, there are other statutes that are specifically directed towards Aboriginal cultural heritage.<sup>6</sup> Again, the details vary between each piece of legislation. For example, the Queensland Act provides that it is an offence to 'harm' Aboriginal cultural heritage (s 24(1)); the definition of 'cultural heritage' includes 'a significant Aboriginal object': s 8. However, there will be no offence if (amongst other things) a person acted in accordance with an approved 'cultural heritage management plan', a native title agreement, or the person owns the relevant object: s 24(2). Further, the Act provides that Aboriginal people who have a 'traditional or familial link' with a secret or sacred object that is 'in the custody of an entity that represents or is the state' become the owners of that object: s 19 (there is a similar provision for human remains: s 15). The Aboriginal owners may, at any time, ask the institution to continue as the custodian, or to return the object to them. An example provided in the legislation is that 'the owners could ask for the Queensland Museum to continue its custody of an object while they make suitable arrangements for dealing with the object, at which time they could ask for the object to be returned to them'.

An example of the application of cultural heritage legislation came in the case of *Sainty v Allen*, which concerned the removal of Aboriginal heritage objects from Tasmania.<sup>7</sup> The Tasmanian Aboriginal Land Council brought legal action in the Federal Court to regain control of 130,000 Aboriginal artefacts and remains that had been held at the Archaeology Department at La Trobe University, in Melbourne. The objects had been excavated by two archaeologists from various locations in Tasmania, pursuant to permits that had since expired. In a hearing before Justice Olney, orders were made that the objects be delivered to the Museum of Victoria for safekeeping during the course of the court action. In his reasons for making these orders, Justice Olney encouraged the Minister responsible for administering the *Aboriginal Relics Act 1975* (Tas) to intervene. The Minister directed that the objects be returned to Tasmania; this removed the need to continue the litigation.

State and territory legislation is supplemented by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which acts as a 'safety net' when state and territory legislation does not protect Aboriginal cultural heritage.<sup>8</sup> If there is a belief that a 'significant' Aboriginal object is going to be 'injured' or 'desecrated', an application can be made to the Minister by or on behalf of an Aboriginal person or group: s 12. 'Significant' Aboriginal objects are those of 'particular significance to Aboriginals in accordance with Aboriginal tradition': s 3(1). An object is 'injured' or 'desecrated' if 'it is used or treated in a manner inconsistent with Aboriginal tradition' (s 3(2)); this could include sale or exhibition.

The exportation and importation of culturally significant material is covered by the *Protection of Moveable Cultural Heritage Act 1986* (Cth). This legislation regulates the export of Australia's significant cultural heritage objects and provides for the return of objects illegally imported into Australia and other nations.



Where a gift is effected through delivery, there is no *legal* need for any accompanying written instrument or special words, although documenting the terms of a gift may be important to prove the nature of a transaction. For instance, the Museum of Contemporary Art in Madrid was forced to return 61 works of art by Picasso because it was unable to provide documentary evidence that the works had been donated rather than loaned.<sup>9</sup>

Dealing with each of the formalities to make a gift in turn:

- *'Donor.'* The *nemo dat* rule applies to gifts, meaning that a valid gift can only be made by a person whose ownership interest allows such a transfer. In short, a person cannot give away what they do not own. Some acquisition documents reflect this by including a statement that the donor is the owner of property, free from any encumbrances.
- *'Intention to transfer legal title immediately.'* The donor must have an intention to benefit the recipient immediately. Donation forms typically provide that the donor is transferring all their rights, title and interest in property to the cultural institution.<sup>10</sup>
- *'Delivery or deed.'* In many cases, the cultural institution receives the donated property immediately, thus satisfying the delivery requirement. The requirement is also satisfied where a gift is made of property already in possession of the institution. A gift can also be effected by deed: a written, legal agreement that is signed and sealed by the parties. Because a deed may specify when property will pass, it is possible to make a promise to give (a **future gift**) by way of deed. If not made by deed, a bare promise to give is unenforceable in contract law due to want of *'consideration'* (ie, an exchange of benefits between the parties).<sup>11</sup>

If any of these formalities is not satisfied, the gift will fail, and property will not pass.

A checklist for useful content in donation forms is included in Table 3.2.

## *Acquiring Indigenous collections*

This section considers possible additional steps that

might be taken when an institution is acquiring Indigenous collection items - whether through gift, loan, purchase, or some other acquisition method.

### *(a) Build information about the collection*

There is considerable value in obtaining information about, amongst other things:

- (1) the circumstances of creation or collection of the work;
- (2) any characteristics of the work that may influence its management, exhibition or use, such as secret/sacred or gender-restricted information, or images of deceased people;
- (3) particularly for Indigenous records and ethnographic material being supplied by non-Indigenous transferors: the identities of individuals, families or communities whose information or knowledge is embodied in the material, and (if known to the transferor) any views of those people in relation to the accessibility or use of those works; and
- (4) for cultural materials acquired direct from Indigenous creators: in addition to discussion of cultural sensitivities as per paragraph (2), formation of long-term procedures for discussion and collaboration with the creator, and/or their community or family, in relation to management of the item.

Two important caveats must be made.

First, this sort of procedure should not be seen as fulfilling the need for consultation with the relevant Indigenous owners, either initially or on an ongoing basis. The aim of this process is to build information about collections, a key problem for institutions and Indigenous people alike in changing practices in relation to Indigenous collections. There is the possibility that the transferor's understanding of the work may be incorrect or incomplete. Furthermore, the sensitivity of information, and any restrictions under Indigenous laws, may change over time, meaning that ongoing collaboration with Indigenous creators and owners is crucial.

Second, for some cultural institutions, this sort of information gathering process will need to be conducted in a manner consistent with legislation governing the collection of *'personal information'*: see the discussion on privacy in Chapter 4.

*(b) Consider whether material obtained with consent or ethical oversight*

As noted in Chapter 1, there is a long history of research being performed with Indigenous people without true informed consent, or any form of ethical oversight or clearance.

As part of any discussion in relation to the circumstances of collection or creation, institutions may wish to obtain more detailed information about whether any protocols, ethical clearances or memoranda of understanding were applicable to the creation or removal of the item. This may include obtaining copies of relevant documents, subject, of course, to those materials containing any confidential information.

When framing policies for Indigenous collection management, institutions may wish to consider how the level of consent or ethical oversight is relevant to: (1) the decision of whether to acquire new collection items; and (2) the management of new and existing items.

It is beyond the scope of this Primer to advise on the precise approach that should be taken: this is a matter for the institutions, working with the relevant Indigenous people or representatives, to determine. That said, relevant considerations would appear to include: what is the impact (for preservation of items, and their accessibility by Indigenous people) if material is *not* acquired? What sort of additional

procedures may be necessary for collection items that were created or collected without consent? And in what circumstances should collection items be repatriated or loaned by the institution to an Indigenous family, community or organisation? For a broader discussion in relation to 'formalised' ethical practices, see Chapter 6.

## *Conditional gifts*

### *What are conditional gifts?*

It is not uncommon for donors to include stipulations regarding the use of their gift. Examples include:

- restrictions on the accessibility of a manuscript because it contains sensitive information;
- requirements that footage only be viewed, exhibited or copied with the permission of the donor; and
- limits on the circumstances in which a photograph can be reproduced.

This section considers the benefits and disadvantages of conditional gifts, makes suggestions for dealing with existing conditions - including analysis of when they are legally binding - and discusses how to draft them to avoid some of their pitfalls.

### *Benefits and disadvantages of conditional gifts*

Acceptance of conditional gifts produces

## Bequests

A bequest is a gift that is made by a person under a **will**. There is special wording that must be used for such transactions to be legally effective, and it is therefore important that a lawyer assist in the drafting their terms. Before accepting a gift via bequest, a cultural institution should inspect the gift, and obtain a copy of the will in order to: (1) verify that the disposition is legally effective, and that the deceased person was able to transfer title; and (2) ascertain whether any conditions have been placed on use of the bequeathed property. A beneficiary under a will is not forced to accept the bequest under a will, but may reject ('disclaim') it, in whole or in part.



Table 3.2: Checklist of items to be included in donation forms.

<b>General matters</b>	
<input checked="" type="checkbox"/>	Sets out the name and contact details of the donor.
<input checked="" type="checkbox"/>	Includes the title and a description of the item being donated (including a photograph, if appropriate).
<input checked="" type="checkbox"/>	For future gifts: Is made by way of deed. (Note: an alternative is for a bequest to be made under a will.) A deed of gift may provide that <i>possession</i> is given to the institution immediately, with transfer of <i>ownership</i> to occur at a later date. Alternatively, it may provide for <i>ownership</i> to transfer immediately, and <i>possession</i> to follow in the future. The deed should clearly state the date or event upon which the property will vest in the institution. (Note: a deed of gift may constitute a ‘bill of sale’ under the relevant legislation; a lawyer can advise on the consequences of this and whether the deed should, therefore, be registered.)
	Where property is being delivered immediately: A deed or other written instrument is not legally necessary for the gift to be effective. However, it is wise to record all gifts in writing, preferably through a signed donation form or deed of gift.
<input checked="" type="checkbox"/>	Sets out any conditions on donation using appropriate wording and language (see discussion on conditional gifts, below).
<b>Matters for the donor</b>	
<input checked="" type="checkbox"/>	Includes a warranty by the donor that he or she is the owner of property, and that the property is not encumbered in any way. Some forms also include an indemnity if this warranty turns out to be false.
<input checked="" type="checkbox"/>	Explicitly states that the donor is making a gift. There is no special wording that must be used; what is important is that the instrument makes it clear that the donor’s rights, title and interest in property are being transferred to the cultural institution.
<input checked="" type="checkbox"/>	Where the donor is the copyright owner: Gives the donor the ability to grant an assignment or licence in relation to copyright (discussed in depth in Chapter 5).
<input checked="" type="checkbox"/>	Where the donor is the moral rights holder: Sets out the preferred attribution of the creator and work, and any other relevant moral rights matters (see Chapter 5).
<b>Special issues for Indigenous cultural materials</b> (note: it may be preferable to include this in separate documentation, so that it is clear that no legal rights are being transferred)	
<input checked="" type="checkbox"/>	Sets out any important background information in relation to the nature, origins or history of the material, such as: <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> Characteristics that may influence the storage and accessibility of the material, such as secret or sacred information, gender restrictions, images or recordings of deceased people, sensitive genealogical information, and so forth.</li> <li><input checked="" type="checkbox"/> The identity of individuals, families or communities whose image, information or knowledge is reproduced or embodied in the item (including contact details, if available); and</li> <li><input checked="" type="checkbox"/> The donor’s understanding of any views or preferences of the Indigenous people identified above as to the accessibility, use or reproduction of the item.</li> </ul>
<input checked="" type="checkbox"/>	Contains a prompt to discuss the circumstances of creation, making or discovery of property, including whether research was performed in accordance with appropriate ethical clearances.
<b>Other terms</b>	
<input checked="" type="checkbox"/>	Longer agreements often include ‘recitals’: statements at the beginning of the document that set out its background and main terms. They are not legally binding.
<input checked="" type="checkbox"/>	Ancillary terms, such as: definitions of key words; dispute resolution processes; severance of terms; and governing law. Which (if any) are included will depend on how legalistic the instrument is to appear.
<input checked="" type="checkbox"/>	For deeds: contains the appropriate execution clause (where the parties sign and seal the document) and is properly witnessed by third parties.

administrative and management difficulties for cultural institutions. In short, by reducing the discretion of institutions to exercise their proprietary rights, conditional gifts can hamper the ability of institutions to preserve and provide access to items, and to plan for future acquisitions and collection management. Furthermore, as time passes, conditions may become increasingly difficult to comply with, particularly where they involve obtaining consents from donors. This has led Malero to write that 'if experience is the best teacher, few museums would need to be cautioned about the perils of accepting collection objects with strings attached.'<sup>12</sup> One of her arguments is that:

'The beneficiaries of the material held by a museum are the members of the general public; therefore, the museum must use its best efforts to mold and use its collection for the good of the public. It is difficult to reconcile prudent trusteeship with the acceptance of restrictive conditions that can limit the future usefulness of collection objects or limit the exercise of good judgment by subsequent museum administrators.'<sup>13</sup>

That said, accepting a gift subject to conditions can permit the acquisition of items that may not otherwise be donated through outright gift.<sup>14</sup> It is for this reason that Malero writes that, while it is wise to have a policy against acceptance of conditional gifts, it is also advisable to have a procedure for authorising exceptions to this general rule.<sup>15</sup>

For Indigenous collections, additional considerations are relevant. For example, difficulties can arise if a non-Indigenous donor insists on conditions that limit the ability of Indigenous families and communities to access their own records and information. Further issues can arise where needs change over time; for instance, if *binding* conditions are made, this may limit the ability of the descendants or family members to develop new models of collection management in the future.

That said, Indigenous creators and other donors of Indigenous cultural materials may want some certainty that cultural sensitivities will be respected in the ongoing use and management of donated material. Indeed, conditions may alert institution staff to cultural issues that they might not otherwise be aware of, thus improving practice in relation those items. Finally, the quote from Malero speaks of the beneficiaries of museum collections being 'members of the general public': for some Indigenous collections, this statement is problematic, as general public availability is contrary to Indigenous laws and

customs. That is, in thinking about Indigenous collections, it is important to consider the interests of Indigenous families and communities *separate* to that of the 'general public'.

The question then becomes: what policies can be developed so that the benefits of conditions can be experienced without some of the disadvantages.

#### *Dealing with conditional gifts*

Where an item has been acquired subject to 'conditions' that later prove to be problematic, the first step in dealing with those conditions is to determine whether they are legally binding.

As noted in the text box, conditions are not always legally binding. An example of a non-binding condition is where a stipulation merely reflects the preferences of the donor, or the reason for making the gift. In contrast, where a condition was essential for the gift to be effected, or for property to be retained, it may be binding as a **common law condition**. In those instances, if the cultural institution fails to comply with the condition, it might be liable to return the donated property to the donor. Other instances where conditions can be binding is where they form part of a **contract** or a **charitable trust** (discussed separately below).

If it is concluded that a condition is legally binding, a number of options are open. If the donor is known and contactable, then it may be possible to **renegotiate** the terms of the gift to remove or vary the condition. Another option is to apply to a court for an **order** varying the terms of the gift: a lawyer can give advice in relation to the nature of such an application. Finally, it may be appropriate to **override** the conditions of a gift under a **risk management strategy**. At a general level, relevant considerations include: What steps have been taken to identify and locate the donor? Are there further steps that could realistically be taken to renegotiate the conditions? What were the circumstances or factors leading to the condition? Are they current? What are the viewpoints of the relevant Indigenous families or communities? If a condition is to be varied, must this be approved by senior institution staff? What are the possible consequences in terms of return of the item, or other remedies?

Even if conditions are not legally binding, this does not mean that institutions should feel free to ignore them. This is a matter of integrity and public confidence: regardless of the legal ramifications, there are ethical and pragmatic reasons against accepting a gift subject to stipulations, and then disregarding them. It may therefore be necessary to

## When are conditions legally binding?

- *Stipulations that reflect mere preferences of the donor, or set out the motives for making the gift, are not legally binding.*

Mere statements of preference regarding how a gift is used, or the reasons for its making, are not legally binding. These stipulations are sometimes called '**precatory conditions**' under the law.

- *A stipulation is binding as a 'common law condition' if it was essential for passage or retention of the gift.*

Some stipulations are '**common law conditions**': they qualify the circumstances in which property is transferred to, or retained by, a recipient. A stipulation is a **condition precedent** if it must be fulfilled in order for ownership to be transferred. In contrast, a **condition subsequent** arises where the recipient obtains ownership immediately, but may lose it if specified events occur.

The question of whether a stipulation constitutes a common law condition will depend on the intention of the parties and the wording of the donation form. The simplest case is where the donation form expressly sets out the consequences of non-compliance or the non-happening of the condition. Difficulties arise where no such consequences are set out. In that case, the relevant question is whether the stipulation is so fundamental to the gift that the gift was made *only if* the condition was complied with (binding), or whether the stipulation is ancillary to the primary motive of gift-making (non-binding).<sup>16</sup>

There are legal limits on the permissible conditions that can be placed on a gift. Conditions have been struck down where they unduly interfere with recipients' lives, are contrary to public policy, or offend the rule against '**perpetuities**'. This rule (sometimes known as the rule against remoteness of vesting) limits the ability of a settlor or testator to control the use of gifted property following the passage of a certain period of time from the disposition. The content of the rule against perpetuities varies from state to state.

- *A stipulation is binding as a contractual term if property was transferred pursuant to a contract, rather than as an outright gift.*

As noted above, the law defines gift as a gratuitous transfer of property. However, it is also possible for property to be transferred pursuant to the terms of a contract. A contract requires '**consideration**': some *quid pro quo* or exchange of benefits, responsibilities or promises by the contracting parties.<sup>17</sup> Where a cultural institution pays money in return for transfer of property, the contract is for the **sale of goods**, which is governed by specialist legislation (discussed below). Where no money is paid, the agreement must be analysed in the light of ordinary contract principles: did the institution make a promise or provide some benefit that would constitute 'consideration'. In those cases, failure to comply with contractual terms may give rise to an action for **breach of contract**. The typical remedy for breach of contract is **damages** (a monetary payment). Some contracts also specify the consequences of non-compliance.



go through some of the analysis identified above - looking at the reasons for making a condition, and the motivations for making the gift - in deciding how to manage a particular item.

Of course, much of this can be avoided for future acquisitions by: (1) developing a policy setting out the circumstances in which the institution accept gifts subject to conditions; and (2) drafting conditions so that they can, where necessary and with appropriate consultation, be varied. Some ideas are contained in Table 3.3.

## Methods of acquisition: Sale

### *Definition*

The term 'sale of goods' refers to situations in which 'goods' are transferred by one person (the seller) in return for the payment of money by another (the purchaser). 'Goods' is defined broadly, and refers to tangible, movable property (ie, choses in possession).

The law surrounding sale of goods has developed as a specialised area within the general law of contract. The extensive case law has been codified and supplemented in all Australian states and territories by sale of goods legislation.<sup>18</sup> Although each piece of legislation contains slight variations, the overall structure and effect is very similar. Key points are discussed in this section. References to legislation are from the *Sale of Goods Act 1954* (ACT).

### *The contract of sale of goods*

A 'contract of sale of goods' is 'a contract by which the seller transfers or agrees to transfer property in goods to the buyer for a money consideration, called the price': s 6(1). Property means 'the general property in goods and not merely a special property': s 5(1). Neither 'general property' nor 'special property' are defined in the legislation, but commentators have interpreted the former to mean ownership, rather than a mere possessory interest. For instance, a contract will not be one for sale where goods are hired or the seller otherwise reserves part of his or her interest unconditionally.

Table 3.3: Benefits and disadvantages of conditional gifts, and possible solutions.

Benefits of conditional gifts	Disadvantages of conditional gifts	Possible solutions
<ul style="list-style-type: none"> <li>• May permit acquisition of items that would not be transferred by outright gift.</li> <li>• For Indigenous collections, can be used to expressly set out culturally appropriate use of collection items.</li> <li>• Reflect that Indigenous people may have interests not subsumed within - and perhaps contrary to - those of the 'general public'.</li> </ul>	<ul style="list-style-type: none"> <li>• May limit cultural institutions in their capacity to manage and provide access to collections.</li> <li>• Conditions may become more difficult to comply with over time, particularly if the donor dies or becomes uncontactable.</li> <li>• For Indigenous collections, may restrict the ability of the institution to respond to the views and needs of Indigenous patrons - particularly where the sensitivity of information has changed over time.</li> </ul>	<ul style="list-style-type: none"> <li>• Make any 'conditions' statements of preference, for instance by permitting the institution to lift or vary conditions if adherence becomes impossible or impractical.</li> <li>• Place a time limit on the operation of any conditions.</li> <li>• Require that the donor keep their contact details up-to-date, with an option to vary conditions if they do not.</li> <li>• Where a gift has been accepted subjected to conditions: act with integrity in relation to those conditions. If they can no longer be complied with, attempt to renegotiate with the donor. If the donor cannot be located, seek legal advice and act in accordance with a risk management policy.</li> </ul>

## Formalities

A contract of sale may be in writing, oral, or implied from the conduct of the parties: s 8(1). That said, it is wise for contemporaneous written evidence to be obtained to document the terms of a sale; this may include executed sale contracts, correspondence and receipts. Basic terms that the parties should agree to include: the goods being sold; the purchase price (including any special requirements for manner of payment); and arrangements for the delivery of property.<sup>19</sup> Certain other terms are implied by sale of goods legislation (unless the circumstances show a different intention). For instance, there is an implied condition that the seller has the right to sell goods, and an implied warranty that goods shall be free from any encumbrance: s 17. For a discussion of the desirability of including *other* express conditions in relation to the use of property by the purchaser, refer to the discussion on conditional gifts, above.

## Operation of the nemo dat rule

If the seller has full, unencumbered title to an item, then the purchaser will acquire that title, and be able to enjoy all the usual incidents of ownership. In contrast, if the seller does not have good title, the purchaser will not obtain good title due to the operation of the *nemo dat* rule (unless an exception applies). It will be recalled that the good faith of the purchaser is irrelevant to the *nemo dat* rule. Therefore, if a purchaser has any doubts as to the validity of a seller's title, it is advisable that a proper investigation of title be made prior to purchase.

## Methods of acquisition: Bailment

### Definition

A relationship termed a **bailment** arises whenever one person owns property, but another has possession of it.<sup>20</sup> There are many different types of bailment, and the short- or long-term **loan** of an object to a cultural institution will clearly raise a bailment between the lender (the 'bailor') and the institution (the 'bailee').<sup>21</sup>

### Classification of bailments

Bailments can be classified into two types. Some bailments are **gratuitous**, meaning that one party receives a benefit from the bailment, but the other

does not. An example is you borrowing my car: you have the benefit of using my car, but I don't receive any benefit from our arrangement. Other bailments are performed for **reward**. An example is the hire of goods: the bailee benefits from the use of the chattel, while the bailor receives some reward for granting his or her permission for such use. The 'reward' need not be monetary, and can be quite small and insignificant. For example, it has been held that a bailment for reward arises when a supermarket provides customers with free trolleys to use while shopping.<sup>22</sup>

Norman Palmer, a leading academic in the law of bailment, argues that many loans to cultural institutions can be construed as being for the mutual advantage of the lender and institution, and are therefore performed for reward. He identifies possible benefits as: 'social prestige, academic fulfilment, enhancement of value, restoration or conservation of the object, publicity, respectability, activation of some limitation period, a share of "gate money", a trial or approval period before purchase, the prospect of a reciprocal loan, diplomatic leverage, settlement of a dispute, free storage and insurance, or general relief from the burdens of ownership.'<sup>23</sup>

If the exchange of benefits constitutes good 'consideration', then the arrangements may give rise to a **contract**. There are a number of pre-requisites for contract formation, including a *quid pro quo*, or exchange of promises, benefits or burdens, between the contracting parties. 'Reward' and 'consideration' are distinct concepts, and an advantage that constitutes a reward may be insufficient to amount to consideration.

The classification of a transaction as producing a gratuitous bailment, bailment for reward and/or contract has implications for the scope of the obligations of the bailee and the terms of the bailment.

## Obligations of the cultural institution as bailee

Under the common law rules of bailment, the cultural institution, as bailee, has certain **duties** in relation to the bailed property, including the following.

- (1) *Duty to take reasonable care of the property.* Under older statements of the law, the standard of the bailee's duty of care was said to vary according to the *type* of bailment, with a higher standard the more

the bailee benefited from the bailment. More recent decisions have departed from this analysis, and have held that the standard of care is that which is reasonable in the circumstance of the particular case.<sup>24</sup>

- (2) *Duty not to 'convert' the property.* The tort of conversion arises when a person intentionally deals with goods in a manner that is 'seriously inconsistent with the possession or right to immediate possession of another person.'<sup>25</sup> Destroying property, or giving it to someone else, are two examples of acts of 'conversion'.

It is possible to add to, vary or exclude common law duties by contract. In the case of loan agreements involving cultural institutions, it is not uncommon for the contracts to so thoroughly set out the rights and obligations of each party that the common law of bailment is, in all practical purposes, displaced. For example, a loan agreement may include terms in relation to the duration of the loan, the level of care of the loaned object, insurance, intellectual property, and procedures for the return of the loaned object (or retention or disposal, in the case of uncollected items). In contrast, other loan documents may be so rudimentary that the law of bailment is the strongest source of the parties' obligations.

There is mixed authority as to whether promises made by an unrewarded bailor or bailee - that is, promises made under a gratuitous bailment - are enforceable. (These are sometimes called 'superadded promises'). Some argue that they are not enforceable.<sup>26</sup> Say, for example, I loan you my car for two weeks. These commentators would argue that if I demand the car back after one week, you would not have any legal ability to resist my claim. Other commentators disagree, and argue that the 'special nature of bailment' may mean that it is 'preferable to hold that a lender becomes bound by any promise to grant the borrower a set term of possession once the borrower receives possession of the object'.<sup>27</sup> If this analysis is correct, then superadded promise can add to the obligations of the cultural institutions. Of course, if a promise creates a contract between the bailor and bailee, then such promises will be binding as contractual terms.

The doctrine of deviation should also be noted at this stage. A bailee deviates from the bailment by performing his or her obligations in a way that substantially departs from the permitted use, transport, location or management of bailed property.<sup>28</sup> There are a number of consequences of a deviation, including that the right of possession of the bailee terminates, and the bailor becomes entitled to demand the return of his or her property.<sup>29</sup> The doctrine of deviation applies to all bailments,

Table 3.4. Characteristics of gratuitous loans and loan for reward.

Characteristic	Gratuitous loan	Loan for reward
Reward to the lender	Absent.	Present.
Obligations of the cultural institution	Common law obligations of the bailee, including: (1) duty to take reasonable care of the property; and (2) duty not to 'convert' property. Debate as to whether 'superadded promises' binding.	Common law obligations of the bailee (see opposite). If the loan is made under a contract, terms in the contract may supplement or displace these common law obligations.
Contract between the bailor and bailee.	Absent.	A loan for reward is not necessarily a contract. A contract may arise if there is an exchange of 'consideration' between the parties, and other pre-requisites for contract formation are met.
Doctrine of deviation.	Applicable.	Applicable. A contractual loan may displace this doctrine through provisions that set out the ramifications of non-compliance.

whether gratuitous or for reward. It is therefore possible that a cultural institution that deviates from significant stipulations made by a lender in relation to the terms of the loan may be required to return that property, as well as being strictly liable for any loss or damage that occurs following deviation.

A summary of the characteristics of gratuitous loans and those performed for reward is set out in Table 3.4. This table also sets out the obligations of the cultural institution as recipient of property, under the principles of bailment and contract law.

## Documenting loans

Developing good loan documentation is important for cultural institutions; there are numerous examples of cultural institutions in a quandary over how to deal with loaned or (possibly) abandoned property for which there is **no or inadequate documentation** that sets out the terms of a loan. Some terms that may be desirable in standard loan documentation include:<sup>30</sup>

- *Identification of parties to the loan, and the loaned material.* Note that where the loan relates to Indigenous cultural materials, it may be useful to obtain additional information in relation to cultural matters, as discussed in the section on 'acquiring Indigenous collections', above.
- *The period of the loan.* The loan documentation should identify the precise term of the loan. This is strongly advisable *even if* a long-term loan is contemplated. If no duration is specified, the lender will be able to terminate the loan 'at will': this means that the institution must return loaned material within a reasonable time from demand. A discussion of long-term loans is contained in the text box.
- *Arrangements for transfer of loaned property.* When and how will loaned property be delivered to the borrower? Who is responsible for arranging delivery? Who will bear its cost? Similarly, what are the arrangements for return of loaned property, or its transfer to another recipient? What happens if the lender fails to reclaim property, or is uncontactable?

- *Fees.* Is a payment being made in return for the loan?
- *Management and use.* Are there any special requirements in relation to how the loaned item will be cared for or stored, or how it will be exhibited or accessed by the public? What are the ramifications if these requirements are not complied with? What happens if conservation work or repair is required?
- *Insurance.* What insurance must be obtained in relation to the loaned material? Will the borrower or lender have responsibility for arranging this insurance?
- *Intellectual property.* What, if any, permission does the borrower have to reproduce the work (for instance, for an exhibition catalogue)? Is there a particular form of attribution that must be used?

What happens if a cultural institution has material in its collection for which there is no documentation, or which remains uncollected by the owner? This is discussed in the text box on long term loans.

## Long term loans: the good and the bad

There are many benefits to cultural institutions and their patrons from lending collection items. For instance, loan allows materials to be exhibited or viewed in new locations, and may permit access to works that would not otherwise be donated or sold to the institution. Loan can be particularly important for Indigenous cultural materials because of Australia's disperse population: relevant collection items for a family or community might be held in multiple institutions throughout the country. Loan provides an opportunity for those items to be transferred to local galleries, museums or knowledge centres; this may be for an extended period.

Some institutions acquire items as long-term loans; these are sometimes referred to as 'permanent loans'. That said, the word 'permanent' can be misleading: unless the duration is agreed to, the loan can be recalled at any time by the owner.

The long-term loan presents disadvantages and difficulties when compared with outright ownership, particularly where the borrowing institution's services remain unremunerated or the terms of the loan have not been documented. For instance, the institution may bear the costs of storage, conservation and insurance, with no certainty as to possession. This lack of certainty may also hamper collection development: the institution may refrain from collecting similar items, only to have long-term loans recalled. The institution may also require the owner's consent to loan the item to another institution, or undertake certain preservation activities. Obtaining these consents may be costly or impossible.

If long-term loans are contemplated, these problems need to be dealt with in the loan documentation.<sup>31</sup> The parties should agree on the duration of the loan (or a timeframe for it to be reviewed), and procedures for termination of the loan before this (either by the lender or borrower). If the lender is a private individual, it is particularly desirable that they be under an obligation to keep their contact details up-to-date: many problems in long-term loans arise from difficult to locate owners. Most importantly, agreement should be reached on what happens if, at the end of the loan or termination by the borrower, the borrower does not collect items, or cannot be located.

If existing long-term loans are of concern because of uncertain terms in the loan documentation, the simplest (and preferable) approach is to contact the owner and request that the loan be re-negotiated, or property in the item transferred to the cultural institution.

What happens if the owner cannot be identified or located? Legislation in relation to the disposal of uncollected goods may have relevance,<sup>32</sup> and the doctrine of 'agency of necessity' may permit certain activities without the lender's consent.<sup>33</sup> In the end, this may come down to a risk management policy that has been drafted with appropriate legal advice. This policy might consider questions including:

- *What steps must be taken to identify and locate the owner?* In some instances, the identity of the lender is known: the key question will be how much effort should be given to locating them. If the identity of the owner is not known because there is no or only

rudimentary documentation, an initial question may be whether there are ancillary materials or evidence from which an identity can be guessed. Other steps that might be contemplated include placing a statement on the institution's website inviting certain lenders to contact the institution, or placing advertisements in relevant newspapers or journals to the same effect.

*How long has the property been held by the institution?* A general rule may be that the longer property has been held by the institution, the more generous the risk management strategy can be. Obviously, this will depend on the nature of the property being considered. However, if considerable time has transpired since the original delivery of property, this *may* be evidence that: (1) the true nature of the transfer was a gift, not a loan; or (2) the owner has abandoned the property (see brief discussion, below). Furthermore, it may indicate that the owner is not interested in exercising their property rights, meaning that the chance of any dispute or litigation is low (note that the owner's *heirs* might take a different approach).

*What uses of loaned property are acceptable?* The key question is whether the institution will, in effect, treat the property as its own, or whether it might limit uses when compared with other collection items. As noted above, all bailees of property are bound by the duties to take reasonable care of property and not to convert it. Some activities that an institution may wish to undertake – such as loaning property to other institutions, disposing of it, or even major conservation work – may be contrary to these obligations. A further question is whether additional procedures are required (such as sign-off by senior staff) before certain activities are undertaken.

*Are any statements in the constitution or enacting legislation relevant?*

*Have procedures been developed if an owner contacts the institution?* A strategy for handling disputed ownership may also be important.

The status of 'abandonment' was considered by the New South Wales Court of Appeal in *Moorhouse v Angus and Robertson (No 1)*.<sup>34</sup> In that case, a well-known author submitted a number of hard-copy manuscripts to the defendant for the purposes of publication. Some years later, he requested the return of the manuscripts. The defendant was unable to locate all the manuscripts, and an action was commenced by the author seeking, amongst other things, their return and payment of damages. One of the defendant's arguments was that the author had abandoned the manuscripts. The defence was not accepted. First, the judges questioned whether property rights in chattels could be lost or extinguished by abandonment.<sup>35</sup> However, assuming that this was the case, some 'unequivocal intention to abandon' would be required.<sup>36</sup> On the facts before the court, no such intention was present, as the mere failure to seek to recover the manuscripts or make inquiries about them did not constitute the requisite intention to abandon the manuscripts.<sup>37</sup>



## The Cultural Institution as Charitable Recipient

There are special rules, in addition to those described in the chapter, when a gift, loan or contract is made with a charitable entity. These rules address the ability of the entity to participate in such a transaction, the uses to which gifted or loaned property can be put, and so forth.

The legal definition of 'charity' is somewhat different from its popular usage,<sup>38</sup> and cultural institutions have been held to fall within this definition. Some cultural institutions have been created pursuant to **charitable trusts**, for instance through a bequest in a will. In other instances, institutions are **charitable corporations** created by statute or registered under the relevant corporations law.

Where a charitable trust exists, the body administering the trust has a duty to execute it in accordance with its terms. There are only two ways in which the terms of a charitable trust may be varied: firstly, if the express terms of the trust allow variation, and secondly, upon application to the court. A lawyer can provide advice on these options, which can be quite technical. A variation in the trust cannot be effected by the mere agreement of the creator of the trust and the cultural institution.

As alluded to above, it is not uncommon for charitable organisations to be created using a corporate structure.<sup>39</sup> Charitable corporations are restricted in their objects: for instance, it is common that income and property can *only* be applied for the objects set out in the company's constitution (which objects must be *exclusively* charitable). The requirement that a charitable incorporated body must act within the objects enumerated in its constitution (or, for a statutory corporation, enacting legislation) means that the body may be required to disclaim gifts whose objects or conditions fall outside its objects.

There is mixed authority regarding whether a **general gift** to a charitable corporation *creates* a charitable trust.<sup>40</sup> If so, this has important ramifications for how the corporation can apply the gift. Thus, if a trust forms, conditions may be incorporated as terms of the trust, and a body will be in breach of trust if it uses the property outside those conditions (unless that use is permitted under a lawful variation of the trust terms). Note that if this analysis is correct, it is not the donor who would sue for breach of trust, but the Attorney-General, in his or her capacity as *parens patriae* to ensure that charitable trusts are properly administered and property used for charitable purposes.<sup>41</sup>

In summary, some public cultural institutions, in their capacity as 'charities', must ensure that gifts are consistent with their charitable objects. In most cases of acquisition of collection items, this will



## Endnotes

- 1 Marie C Malaro, *A Legal Primer on Managing Museum Collections* (2nd edition, 1998), 46.
- 2 Shane Simpson, 'Introduction to Collection Policies', draft chapter for *Museum Law* (2nd edition), 2, available at <http://www.simpsons.com.au>.
- 3 Sarah Worthington, *Personal Property Law: Text, Cases and Materials* (2000), 220. The term 'nemo dat' comes from the latin maxim 'nemo dat quod non habet'.
- 4 See discussion in Shane Simpson, *Museums and Galleries a practical legal guide* (1989), 26-28.
- 5 Eg, *Heritage Act 2004* (ACT); *Heritage Act 1977* (NSW); *Heritage Conservation Act* (NT); *Queensland Heritage Act 1992* (Qld); *Heritage Places Act 1993* (SA); *Historical Cultural Heritage Act 1995* (Tas); *Heritage Act 1995* (Vic); *Heritage of Western Australia Act 1990* (WA).
- 6 Eg, *National Parks and Wildlife Act 1974* (NSW); *Northern Territory Aboriginal Sacred Sites Act* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Relics Act 1975* (Tas); *Archaeological and Aboriginal Relics Preservation Act 1972* (Victoria) (note: Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) specifically relates to Victoria); *Aboriginal Heritage Act 1972* (WA). Other legislation (including, in some cases, establishing legislation for individual cultural institutions) is also relevant.
- 7 *Sainty v Allen* (Unreported, No. VG 643/1995 (Melbourne)), discussed in Kate Auty, 'Aboriginal Cultural Heritage: Tasmania and La Trobe University' [1995] *Indigenous Law Bulletin* 2.
- 8 *Tickner v Bropho* (1993) 114 ALR 409.
- 9 Simpson, above n 4, 32.
- 10 See discussion in M L Eutick and A J Cordato, *The Problem of Obtaining Proper Legal Title to Objects Acquired by Museums, Historical Societies, Art Galleries and Archives* (1983), 16-17.
- 11 Tyler and Palmer, *Crossley Vaines' Personal Property* (5th edition, 1973), 310.
- 12 Malaro, above n 1, 135.
- 13 Ibid 136.
- 14 See discussion in Stephen E Weil, *Beauty and the Beasts: On Museums, Art, the Law, and the Market* (1983) 151.
- 15 Malaro, above n 1, 137.
- 16 See discussion in Eutick and Cordato, above n 10, 19.
- 17 See, eg, *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 82 CLR 424; *Beaton v McDivitt* (1987) 13 NSWLR 162.
- 18 See *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1923* (NSW); *Sale of Goods Act* (NT); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Goods Act 1958* (Vic); and *Sale of Goods Act 1895* (WA).
- 19 See discussion in Simpson, above n 4, 29-30.
- 20 See Norman Palmer, *Bailment* (2nd edition, 1991), 2.
- 21 Summarised in Norman Palmer, 'Art Loans' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edition, 1998).
- 22 *Cottee v Franklins Self-Serve Pty Ltd* [1997] 1 Qd R 469.
- 23 Norman Palmer, *Art Loans* (1997), 22.
- 24 See, eg, *Nibali v Sweeting and Denney (WA) Pty Ltd* (Western Australia Full Court, Malcolm CJ, Brinsden and Rowland JJ, 4 May 1989); *Tottenham Investments Pty Ltd v Carburettor Services Pty Ltd* (New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 1 July 1994).
- 25 Balkin and Davis, *The Law of Torts* (1996, 2nd edition), 64.
- 26 See discussion in *Parastatidis v Kotardis* [1978] VR 449.
- 27 Palmer, above n 20, 91. In Australia, unilateral representations by one party may also be enforceable under the doctrine of estoppel, where the other party relies on those representations to his or her detriment, and the first party seeks to resile from the representations in a way that is unconscionable: see, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394.
- 28 See the discussion in G W Paton, *Bailment in the Common Law* (1952) 149-150.
- 29 It is possible for the common law position to be displaced by a contract that sets out the ramifications for non-compliance with the terms of possession: Palmer, above n 23, 192.
- 30 For further discussion, see Palmer, 'Art loans', above n 21, 534-544.
- 31 Shane Simpson, 'Loans', fact sheet available at <http://www.simpsons.com.au>.
- 32 Eg, *Uncollected Goods Act 1996* (ACT); *Uncollected Goods Act 1995* (NSW); *Disposal of Uncollected Goods Act* (NT); *Disposal of Uncollected Goods Act 1967* (Qld); *Unclaimed Goods Act 1987* (SA); *Disposal of Uncollected Goods Act 1968* (Tas); *Disposal of Uncollected Goods Act 1961* (Vic); *Disposal of Uncollected Goods Act 1970* (WA).
- 33 Discussed in Palmer, above n 23, 198-9, 32.
- 34 *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700. See, also, *Mucha v King* 792 F 2d 602 (1986).
- 35 Ibid, 702, 706. See, further, Anthony Hudson, 'Abandonment', in Palmer and McKendrick (eds), *Interests in Goods* (2nd edition, 1998), 595-619.
- 36 Ibid, 702, 706 (referring *Johnstone & Wilmot Pty Ltd v Kaine* (1928) 23 Tas LR 43, 56-7).
- 37 Ibid, 706-7.
- 38 Discussed in Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000), 8-13.
- 39 See *ibid*, 370-383.
- 40 Compare *Re Vernon's Will Trusts, Lloyds Bank Ltd v Group 20, Hospital Management Committee* (Coventry) [1972] Ch 300, 303 with *Sir Moses Montefiore Jewish Home v Howell and Co (No 7) Pty Ltd* [1984] 2 NSWLR 406, 416.
- 41 Discussed in Dal Pont, above n 36, 266-8.



# Chapter 4: Law and Access

## Introduction

As discussed in Chapters 2 and 3, under general principles of personal property law, a cultural institution that owns or has possession of an item of tangible property has discretion as to how it is managed and used - including whether it is accessible to third parties, and on what basis.

That said, this discretion is not unlimited. For example, Chapter 3 discussed the impact of contractual provisions of a loan, and other legally enforceable conditions, on a cultural institution's management of items in its possession. This chapter considers other legal rules that reduce this discretion.

In particular, some laws **limit** the use and disclosure of information, especially laws relating to confidential information and privacy. As will be seen, these areas of law are not particularly relevant to open collections, but may assume more prominence for items that are **restricted** - as is not uncommon in Indigenous collections.

Other laws provide that information **must be made available** to a requestor if certain procedures are followed, including freedom of information and archives legislation. Court processes (such as discovery and subpoena) can also compel the disclosure of documents in a cultural institution's possession, however these are not discussed in this Primer.

Cultural institutions also make decisions about the accessibility and use of Indigenous collections in accordance with community consultation and cultural clearances. This is discussed in Chapter 6.

This chapter discusses the following four areas:

- confidential information;
- privacy law;
- freedom of information; and

- legislation in relation to archives and public records.

## Confidential information

### *Generally*

In Australia, legal obligations of confidence can arise two ways.

One is when there is an **agreement** between the parties in relation to how specified information will be used: 'contractual' obligations of confidence.

The other is where confidential information is communicated to, or obtained by, a recipient in **circumstances** that suggest there is an obligation of confidence: 'equitable' obligations of confidence.

Where material is protected as confidential information (either in contract or equity), an action for **breach of confidence** will arise if there is any unauthorised use or disclosure of the information. Thus, an authorised recipient of confidential information must obtain the **consent** of the 'owner' of that information to make any unauthorised disclosures or uses.

The law of confidential information primarily developed in a commercial context, protecting things like customer lists, secret formulae, business plans and research results. However, it has also been used to protect personal information, as well as **secret / sacred information** communicated to researchers by Indigenous people.<sup>1</sup> This obligation of confidence limits the permissible uses that can be made of that information, and can also bind **third party recipients**, such as publishers and cultural institutions.

Two questions are considered in this section:

1. How to determine whether an obligation of confidence might apply to Indigenous

collection items; and

2. What to do if Indigenous collection items contain confidential information.

### 1. *Determining whether an obligation of confidence applies*

As noted earlier, there are two main sources of an obligation of confidence: equitable and contractual. These will be discussed in turn.

#### (a) *Equitable obligations of confidence*

An equitable obligation of confidence arises when confidential information 'belonging' to one person is communicated to, or obtained by, another, in circumstances importing an obligation of confidence. It is a breach of confidence for the recipient to use that information in an unauthorised manner.<sup>2</sup>

In determining whether an obligation of confidence arises, two questions should be considered.

- (i) *Does the relevant information have the necessary quality of confidence?*

In order for information to be considered 'confidential' information, it must have the 'necessary quality of confidence' about it. This does not require absolute secrecy, but rather that the information is not 'something which is public property and public knowledge':<sup>3</sup> ie, it has not fallen into the 'public domain.'

For example, where information has been included in a publicly-available document, it will generally lose any quality of confidence. Other disclosures of information in public - such as tendering documents in open court - may also put that information in the public domain.<sup>4</sup> It is not essential that the 'owner'

of that information consented or acquiesced in its publication.<sup>5</sup> That said, a limited disclosure or publication will not necessarily destroy any obligation of confidence - this will depend on how widespread the publication was.<sup>6</sup>

Secret Indigenous information has been protected as 'confidential information' in two Australian cases.

In *Foster v Mountford & Rigby Ltd* (discussed in detail in a case note in Chapter 2), a court order was sought by the Pitjantjatjara Council to prevent further publication of a book containing secret / sacred information disclosed by Pitjantjatjara people to the author, Dr Mountford, some 35 years earlier.<sup>7</sup> The order was granted. The judge accepted that the information was disclosed to Dr Mountford in confidence, and that continued publication might reveal restricted, sacred information to people who had never been intended to receive it.

A few years later, a separate order was obtained in the Victorian Supreme Court in relation to other research materials created by Dr Mountford.<sup>8</sup> In this case, an order was sought against the owner of lantern slides produced by Dr Mountford, some of which were of secret ceremonies. The owner intended to sell the slides at auction. However, the judge made orders requiring him to deliver any slides 'that related to or recorded any of the philosophical or religious traditions of the Pitjantjatjara people' to the Court. These slides were inspected by members of the Pitjantjatjara Council, who identified slides that contained secret / sacred information. Following this, a further set of orders were made vesting ownership of these slides in the Pitjantjatjara Council, on behalf of the Pitjantjatjara, Yankuntjatjara and Ngaanyatjara people.

## Key point

Certain information - such as secret / sacred information - may constitute 'confidential information' for the purposes of the law. If so, the unauthorised use or disclosure of that information will constitute a breach of confidence.



Cultural institutions collect a lot of material that is *already* in the public domain, as exemplified by published books and periodicals, and commercially-released films and sound recordings. As noted in the text box on 'Indigenous knowledge and the "public domain"', questions might arise as to whether some of this information *should* have been publicly disclosed. However, under current interpretation of the law, it will mean that any legally enforceable confidence has already been lost.

That said, cultural institutions also collect materials that may retain their confidential character, particularly for items that are included in restricted collections. Whether a particular item contains confidential information will depend on a number of factors, including the nature of the underlying information, and any restrictions on that information under Indigenous law and practices. As noted above, it is not necessary that information be *absolutely secret* for it to be confidential.

(ii) *Circumstances implying obligation of confidence*

If particular information constitutes 'confidential information', then an obligation of confidence will arise if it was received or acquired in circumstances importing an obligation of confidence. Case law has made it clear that a direct relationship or communication between the confider and recipient is not necessary for this. Instead, the key question is whether the recipient's conscience is bound - would a reasonable person have assumed an obligation of confidence, having regard to the nature of the information, the circumstances of its communication or acquisition, and so forth?<sup>11</sup>

The possibility of an independent third party being

bound by an obligation of confidence is illustrated by *Foster v Mountford & Rigby Ltd*: in that case, the defendants were both the author (the original recipient of the information) and his publisher.

Cultural institutions could come under a similar obligation. For example, a cultural institution that receives original, unpublished manuscripts and photographs from a researcher, that describe and depict information of a spiritual nature, may be alerted that the information may have been provided on an understanding that it would not be further disseminated. This may be the case *even if* the acquisition forms do not make any express statements about confidential information, so long as it is clear from the circumstances that the relevant information was confidential.

(b) *Contractual obligations of confidence*

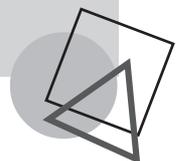
An obligation of confidence can also arise from **agreement** between the confider and recipient.

At the very least, the terms of the contract should contain a definition of the relevant confidential information, the nature of the recipient's obligations (including permitted uses of the information) and the consequences of failure to comply with those obligations. It is not necessary that a contract be in writing for it to be enforceable, although it is extremely useful in order to prove its terms. Furthermore, a contract can create an obligation of confidence in circumstances where there would be no equitable obligation.

In the context of Indigenous cultural materials, a contractual obligation of confidence may arise where an anthropologist performs research with an Indigenous community, and agrees to certain limitations on the use of his or her data - for instance,

## Key point

In order for material to constitute 'confidential information', it does not need to be absolutely secret, but cannot be in the 'public domain'. The publication or public disclosure of information will generally place it in the public domain. Care needs to be taken: publication or public disclosure by a cultural institution could place material in the public domain, to the detriment of Indigenous owners.



that certain information or photographs will not be published or publicly disclosed.

Similarly, there may be an obligation of confidence where an Indigenous elder contributes gender-restricted information to a digital archive on the basis that it not be accessible to those not able or initiated to receive it.

### *What to do if Indigenous collection items contain*

### *confidential information*

For an action in breach of confidence to arise, there must have been an unauthorised use or disclosure of confidential information. Thus, two issues arise:

- how to identify the ambit of authorised use and disclosure; and
- what to do if the proposed use of an item is unauthorised.

Where confidential information has been obtained surreptitiously, any use or disclosure will, by definition, be unauthorised. Where the information

## Indigenous knowledge and the 'public domain'

The 'public domain' has a number of different meanings in law. In the context of the equitable action for breach of confidence, it refers to information that is public property or knowledge: information that is not, therefore, 'confidential information'. It is not necessary that a large number of people know about the information for it to be in the public domain. Furthermore, a limited disclosure of information may not destroy its confidential character. However, 'once in the public domain, [information] can be freely used or disseminated.'<sup>9</sup>

There has been strong criticism of the application of the 'public domain' to forms of Indigenous knowledge.<sup>10</sup> One issue is that the notion of 'confidentiality' has been constructed in a western, commercial paradigm, in which there are established indicia of secrecy: limited communication of information, storing material under lock-and-key, and so on. Legal notions of 'confidential' do not necessarily accord with Indigenous laws about restricted or sensitive knowledge.

Furthermore, use of the phrase 'public domain' suggests that there are no relevant legal principles applicable to the accessibility of information. This ignores the application of Indigenous laws and customs.

Finally, the ability of third parties to destroy 'confidence' has particular relevance given the history of research about Indigenous people, described in Chapter 1. Much sensitive and secret Indigenous information has been published and publicly circulated by others. This may mean that, under existing principles in Australian law, it does not constitute confidential information – even if the relevant Indigenous confiders did not authorise or participate in this process.

All these factors tend to suggest that, in handling issues of accessibility of Indigenous collection items, it is appropriate to treat confidentiality more broadly than general law would require. As discussed in Chapter 6, this may include storing restricted material in a manner consistent with relevant Indigenous laws, through to repatriation of certain secret/sacred artefacts.



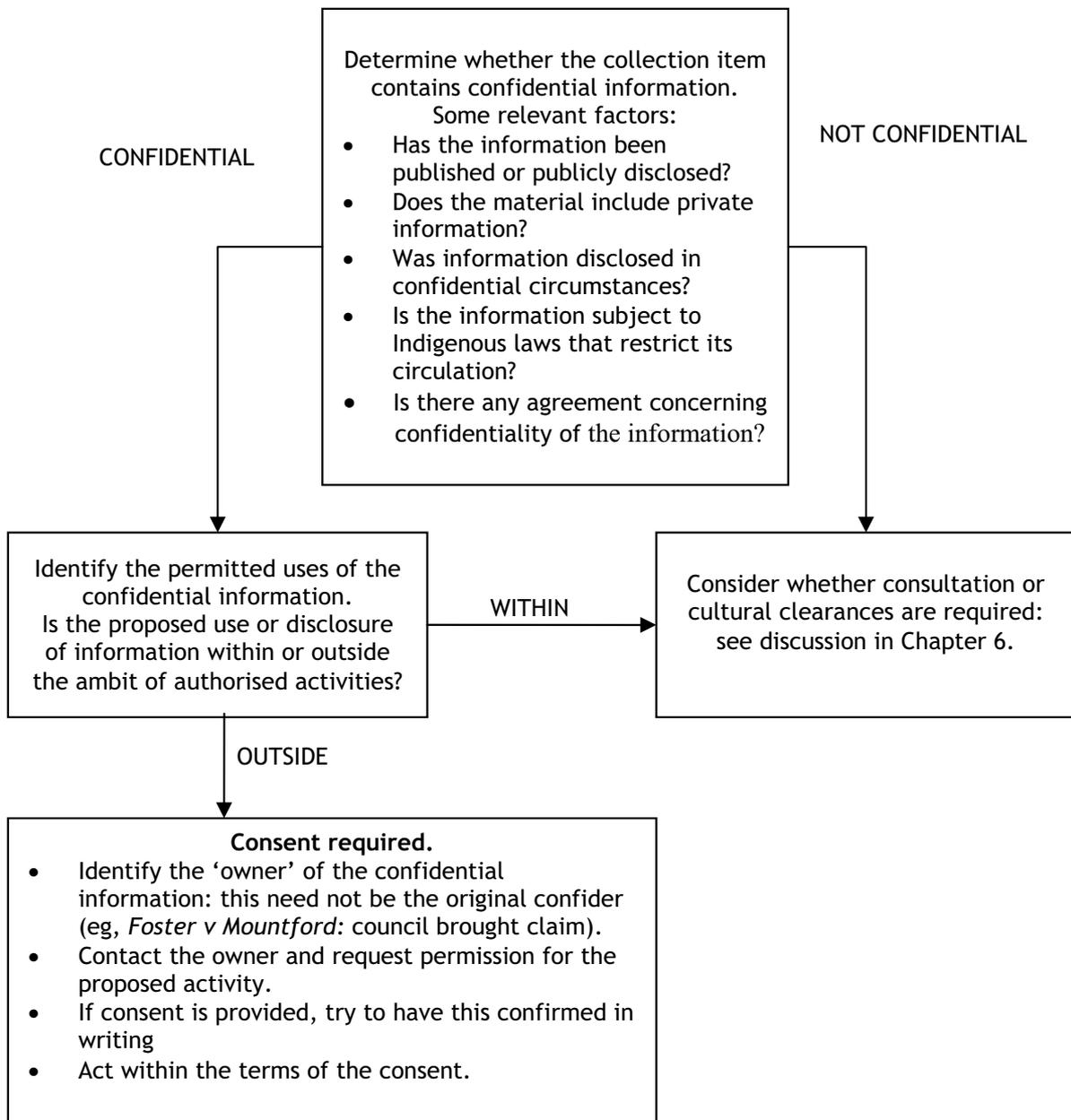
was obtained legitimately, the ambit of authorised conduct will depend on identification of the permitted uses of the information. For example, if a cultural institution receives gender-restricted information, the permitted uses may allow (say) male elders from the relevant community to view that material, but not its display in a public exhibition.

Another example: a non-Indigenous researcher takes photographs of sacred locations and objects on the basis that he or she will only use those photographs for his or her research, and no other purposes. In that instance, publishing those photographs in a book,

selling them to others, or, perhaps, donating them to a cultural institution, may constitute a breach of confidence.

Whether the cultural institution will *a/so* be liable in this example depends on whether, judged objectively and on reasonable grounds, it knew or ought to have known that the relevant material was confidential. Furthermore, even if an institution originally receives material unaware of a breach of confidence, once it has knowledge that the information was originally imparted in confidence, it may become liable. This might arise where an Indigenous community writes

Figure 4.1: Summary of principles in relation to confidential information



to an institution in relation to a breach of confidence by a researcher.<sup>12</sup>

If the proposed use of confidential information is unauthorised, there is, in general, only one way to avoid breaching confidence: obtain the **permission** of the confider to use or disclose the information as desired.

A process for dealing with confidential information is contained in Figure 4.1.

One final point to note is that issues of confidentiality may arise at the point where a collection item is **acquired**. Acquisition is dealt with in Chapter 3. It is sufficient to note here that one matter that institutions may wish to raise in their acquisition forms is whether any information is confidential, or of a secret/sacred nature, in which case the scope of their obligations may be able to be established through agreement at that time. (This does not preclude a later agreement with Indigenous owners in relation to confidential or secret/sacred information.)

## Privacy law

### *Background*

In Australia, there is no general, common law action for 'invasion of privacy'. However, privacy interests are afforded some protection by other actions (such as trespass and defamation), and there is legislation governing the collation, storage, use and accessibility of private information. This legislation will be the focus of this section, as it is of the most relevance for this discussion.

### *The legislation*

Information privacy legislation has been enacted at the state and federal level: see summary in Table 4.2. Where the legislation applies, it provides responsibilities in relation to the collection, management, use and disclosure of 'personal information'. These responsibilities are set out in a series of 'privacy principles' in each Act.

This legislation does not apply to everyone, but only to bodies that are specified in each Act. In order to determine whether privacy legislation is relevant to a particular cultural institution, two questions must be addressed:

1. Is the cultural institution covered by the operation of privacy legislation?

2. If so - does it hold records that contain 'personal information', as defined in the relevant legislation?

These questions are dealt with in turn. As will be seen, while many cultural institutions fall within the ambit of information privacy legislation, its impact on information in their *collections* is low, due to exclusions from the definition of 'personal information'. That said, because some key phrases are not defined, there remain some questions about the status of *closed or restricted collections* - of which Indigenous collections are a common example.

#### *(a) Bodies covered by the operation of the Privacy Act*

Each piece of legislation specifies the bodies to which it applies: see Table 4.2.

The state-based legislation applies to state-level public sector bodies. In contrast, the *Privacy Act 1988* (Cth) applies to private sector bodies (referred to as 'organisations') and federal public sector bodies ('agencies'). The categorisation of a body as an 'agency' or an 'organisation' is relevant to the question of which privacy principles apply. If the body is an agency, it must follow the Information Privacy Principles (IPPs) in section 14. In contrast, organisations must refer to the National Privacy Principles (NPPs) in Schedule 3.

Many cultural institutions are covered by privacy legislation because they are public sector bodies either created by statute or run by government (such as local councils). Private institutions may also be covered as 'organisations' under the federal scheme.

#### *(b) 'Personal information' and collections*

Information privacy legislation deals with the treatment of 'personal information' held by the relevant body. 'Personal information' is defined in broadly similar ways across privacy legislation, although there is some difference in the detail.

Thus, each piece of legislation contains a basic definition of 'personal information'.<sup>13</sup> The precise words vary, but the common element is information (or an opinion) from which an individual's identity is *apparent* or can be *reasonably ascertained*. A person's name does not need to be included on a record for it to contain personal information. Furthermore, the legislation applies not only to personal information in documents, but in images and photographs.

Without more, this definition of 'personal information' could extend to a vast amount of

Table 4.2 Information privacy legislation in force in Australia.

Jurisdiction	Legislation	Bodies covered	Privacy Principles
Cth	<i>Privacy Act 1988</i> (Cth)	'Agencies': includes the Commonwealth public sector and bodies established for a public purpose under a Commonwealth statute: s 6(1).	Information Privacy Principles, s 14.
		'Organisations': means an individual, a corporation, a partnership, any other unincorporated association, or a trust: s 6C(1). Note exceptions (eg, for small businesses).	National Privacy Principles, schedule 3.
Australian Capital Territory	N/A.	The ACT public sector falls under the ambit of the <i>Privacy Act 1988</i> (Cth) (with a few amendments: see <i>Australian Capital Territory Government Service (Consequential Provision) Act 1994</i> (ACT)).	N/A.
New South Wales	<i>Privacy and Personal Information Protection Act 1998</i> (NSW)	'Public sector agencies': defined in: s 3(1).	Information Privacy Principles, Part 2, Division 1.
Northern Territory	<i>Information Act</i> (NT)	'Public sector organisations': defined in s 5(1).	Information Privacy Principles, s 65 and Schedule.
Queensland	N/A.	There is no equivalent information privacy legislation in Queensland. The Queensland government has adopted a scheme for public sector agencies to protect privacy, based on the privacy principles in the federal <i>Privacy Act</i> .	N/A.
South Australia	N/A.	There is no equivalent information privacy legislation in South Australia. However, there is a Cabinet Administrative Instruction to the public sector to comply with a set of information privacy principles.	N/A.
Tasmania	<i>Personal Information Protection Act 2004</i> (Tas)	'Personal information custodians', as defined in s 3.	Personal information protection principles, s 16, Schedule.
Victoria	<i>Information Privacy Act 2000</i> (Vic)	'Public sector organisations': defined in s 9(1).	Information Privacy Principles, Schedule 1.
Western Australia	N/A.	There is no equivalent information privacy legislation in Western Australia, although the possibility of legislation has been discussed. <sup>1</sup> Some provisions of the <i>Freedom of Information Act 1992</i> (WA) are relevant (see below).	N/A.

Table 4.3 Some relevant privacy exemptions for cultural institutions.

Exemption	Examples	Legislation
(1) Generally-available publications and similar	Commonwealth: defined as ‘a magazine, book, newspaper or other publication (however published) that is or will be generally available to members of the public’.	<i>Privacy Act 1988</i> (Cth), s 6(1).
	New South Wales: The Act does not apply to ‘information about an individual that is contained in a publicly available publication’.	<i>Privacy and Personal Information Protection Act 1998</i> (NSW), s 4(3).
	Northern Territory: the IPPs (other than IPP 1 and 3) do not apply to information that ‘is published in a publication (which may be an electronic publication) generally available to members of the public’.	<i>Information Act</i> (NT), s 68(1)(a).
	Tasmania: the Act does not apply to ‘public information’. ‘Public information’ means personal information that is: ‘contained in a publicly available record or publication’; or ‘taken to be public information under any Act’.	<i>Personal Information Protection Act 2004</i> (Tas), ss 3, 8.
	Victoria: defined as ‘a publication (whether in paper or electronic form) that is generally available to members of the public and includes information held on a public register’: s 3;	<i>Information Privacy Act 2000</i> (Vic), ss 3, 11(1)(a).
(2) Collections of cultural institutions generally	Commonwealth: the term ‘record’ does not apply to ‘anything kept in a library, art gallery or museum for the purposes of reference, study or exhibition’.	<i>Privacy Act 1988</i> (Cth), s 6(1).
	Northern Territory: The IPPs (other than IPP 1 and 3) do not apply to information that ‘is in an archive available to the public under Part 9, Division 4 (Managing archives)’ or ‘in a collection of a library, art gallery or museum if the collection is on public exhibition or is available to the public for reference or study purposes.’	<i>Information Act</i> (NT), s 68(1)(c), (e).
	Victoria: the Act does not apply to records that are ‘kept in a library, art gallery or museum for the purposes of reference, study or exhibition’ and ‘Archives within the meaning of the Copyright Act 1968 of the Commonwealth’.	<i>Information Privacy Act 2000</i> (Vic), s 11(1)(b), (d).
	Note: there is no similar exception in the Tasmanian and New South Wales legislation, but the exceptions for publicly available documents (above) may be relevant.	See above.
(3) Collections of specified institutions	Commonwealth: the term ‘record’ does not apply to: ‘Commonwealth records’ (as defined by the <i>Archives Act 1983</i> (Cth), discussed below) in the open access period; and documents placed in the ‘memorial collection’ of the Australian War Memorial (defined as ‘all historical material that is owned by the Memorial from time to time: <i>Australian War Memorial Act 1980</i> (Cth), s 3).	<i>Privacy Act 1988</i> (Cth), s 6(1).
	The IPPs (other than IPP 1 and 3) do not apply to information that ‘is recorded information of permanent value that forms part of the Territory Archives but is not a record’.	<i>Information Act</i> (NT), s 68(1)(d).
	Victoria: the Act does not apply to ‘public records available for public inspection under the <i>Public Records Act 1973</i> ’.	<i>Information Privacy Act 2000</i> (Vic), s 11(1)(c).

(4) Information in relation to deceased people	Commonwealth: the Act only applies to people who are alive.	<i>Privacy Act 1988</i> (Cth), s 6(1).
	New South Wales: 'Personal information' does not include 'information about an individual who has been dead for more than 30 years'.	<i>Privacy and Personal Information Protection Act 1998</i> (NSW), s 4(3).
	Northern Territory: the definition of 'person' includes a deceased person within five years after death.	<i>Information Act</i> (NT), s 4.
	Tasmania: the definition of 'personal information' only applies where an individual has not been dead for more than 25 years.	<i>Personal Information Protection Act 2004</i> (Tas), s 3.
	Victoria: the Act only applies to people who are alive.	<i>Information Privacy Act 2000</i> (Vic), s 3.

material held by cultural institutions. However, there are also exclusions: information and records that are *exempt* from the provisions of each statute. Some of these exemptions are particularly relevant to cultural institutions, namely:

- (1) *Generally available publications.* All privacy legislation has some kind of exception for generally available information or publications. Thus, a cultural institution that merely *acquires* generally available publications does not need to comply with the relevant privacy principles. That said, if the institution uses publicly available sources to *create new records* (such as entering details on a database), it may need to comply with the relevant privacy legislation.
- (2) *Collections of cultural institutions generally.* Some statutes have exceptions that are directed towards the collections of cultural institutions: these are of particular relevance to manuscript and artistic collections, which may not fall within the ambit of generally available publications, above. Due to the language used in these provisions, questions remain as to whether they apply to *restricted* collections. This is discussed in detail, below, as it is of high relevance to some Indigenous cultural materials.
- (3) *Collections of specific institutions.* Certain specific collections are also exempt from the ambit of privacy legislation.
- (4) *Records in relation to deceased people.* Privacy legislation only applies to personal information in relation to living and (in some

cases) recently deceased people.

The relevant provisions are summarised in Table 4.3.

The second exemption requires more substantial analysis, as there is some uncertainty as to whether it extends to *restricted* collections, in addition to open collections. As noted above, this could be particularly significant for Indigenous cultural materials, many of which have limits on accessibility.

Thus, the federal, Victorian and Northern Territory information privacy statutes contain provisions that exempt collections of cultural institutions from their scope. Section 68(1) of the Northern Territory *Information Act* provides that:

'the Information Privacy Principles (other than IPP 1 (Collection) and IPP 3 (Data quality)) do not apply in relation to personal information that ...

(e) is in a collection of a library, art gallery or museum if the collection is on public exhibition or is available to the public for reference or study purposes.'

Similarly, the federal and Victorian privacy legislation both contain exceptions for material:

'kept in a library, art gallery or museum for the purposes of reference, study or exhibition'.

Broadly speaking, these provisions draw a distinction between items in the collection of a cultural institution (which are exempt from the privacy legislation) and other internal documents (which are not).

However, the actual language used raises the question of whether material in *closed or restricted collections*

(including some Indigenous collections) falls within the operation of this exemption. In short, the key question is whether *any* access, even if extremely limited and subject to vetting or clearances, is sufficient for the material to be 'available to the public', or 'kept ... for the purposes of', reference, study or exhibition. This comes down to statutory interpretation. Thus:

- *For the Northern Territory legislation:* the question is whether restricted material is nevertheless 'available to the public for reference or study purposes'. There is nothing in these words to suggest that material is *not* available to the public if an application procedure must be used to gain access. However, if material will only ever be released to a limited group of people, due to (say) gender-restrictions or the sensitivity of the information, it could be argued that it is not 'available to the public'. This depends on the interpretation of the word 'public': does it mean the public generally, or someone who is a member of the public?

- *For the federal and Victorian legislation:* the ambit of these provisions is different, as they refer not to the availability of material, but the *purposes* for which it is kept. For restricted collections, the main goals may relate to preservation of the material. If those circumstances, will the collection fall within the exception? The answer depends on two factors. The first is whether reference or study is, in fact, *a* purpose for keeping the materials. For example, if material is held on long-term loan, and external access only given with the consent of the owner, it may be that the sole goal is safe-keeping. The second factor is, assuming *a* goal of holding the collection is reference or study: does this need to be a significant (or even the dominant) purpose for which material is kept? This will depend on how the provisions are interpreted.

In general, where there is ambiguity about the effect of legislation, a *purposive* approach is used: that is, courts will look to the outcome or policy that the provision was trying to achieve in working out the

Table 4.4: Relevance of privacy legislation to various documents and records held by cultural institutions.

Type of record	Status under privacy legislation
Internal documents, such as patron records, subscriber and contact lists, personal information given in audience surveys, and some online surveillance devices (such as identified clickstream data and cookies).	Privacy legislation applies - although note exception for information in relation to deceased people.
Forms and documentation completed about by or about donors, copyright licensors and other contributors to the collection.	Privacy legislation applies - although note exception for information in relation to deceased people.
Published library material, such as newspapers, journals, books, and the like.	Privacy legislation does not apply to mere acquisition due to exceptions for generally available publications. Legislation may be relevant if used as a source for the creation of new records.
Unpublished manuscripts, photographs and other artistic works in open collections.	Privacy legislation does not apply under exemptions in the Commonwealth, Victorian and Northern Territory legislation for cultural institution collections. Query whether exceptions in New South Wales and Tasmanian legislation for publicly available records and publications may include these collections.
Materials in restricted collections.	Unclear. On the one hand, the exemptions discussed immediately above appear to distinguish between collection and non-collection material; on the other, the reference to public study or exhibition seems to draw a distinction between open and restricted collections.

meaning of unclear language. In doing so, evidence from secondary materials (such as explanatory memoranda and speeches in parliament) may be relevant to ascertain the purpose of the provisions. This level of analysis may be best carried out with legal advice from a lawyer with expertise in privacy law.

Finally, the Victorian *Information Privacy Act* also has a unique exemption for 'archives within the meaning of the *Copyright Act 1968* of the Commonwealth': s 11(1)(d). The definition of 'archives' in the *Copyright Act* refers to archival material in specified institutions,<sup>14</sup> as well as collections of archives, museums and galleries more generally.<sup>15</sup> This would seem to have the effect of making the exception for institution collections, discussed above, redundant to the extent that it refers to records kept in galleries and museums. It would also avoid any questions in relation to the meaning of the phrase 'for the purposes of reference, study or exhibition', again, at least for galleries and museums. There appears to have been no case law interpretation of this provision.

For a summary of the types of records and documents for which the privacy principles apply (and those that do not, due to exemptions), see table 4.4.

### *The privacy principles*

Where both the cultural institution, and the particular record or information, fall within the scope of privacy legislation, the institution which collects or holds that information must comply with the 'privacy principles' provided in the relevant legislation. Around the country the privacy principles are broadly similar, and relate to how personal information is acquired, stored, accessed, used, disclosed and corrected. Table 4.5 provides a summary of the Information Privacy Principles that apply to public sector bodies under the federal *Privacy Act*. Privacy Commissioners at the state and federal level have produced detailed fact sheets in relation to compliance with each privacy principle, and it is recommended that readers consult them for detailed understanding of each principle.

With the exception of the *Information Act* (NT), the actual *process* under which an individual can access records or documents containing personal information is through separate freedom of information legislation – see below.

## Legally-Mandated Rights of Access

This final section of Chapter 4 deals with legally-mandated rights of access: circumstances in which, upon application, people may access materials held by public bodies, including cultural institutions.

This Primer considers two sets of legislation of relevant to cultural institutions:

- freedom of information legislation; and
- archives legislation.

### *Freedom of Information Legislation*

Freedom of information ('FOI') legislation permits certain 'documents' (or 'records') held by Ministers, government departments, local councils and other public agencies to be accessed by a requestor, and for incorrect or misleading information to be corrected or deleted.<sup>16</sup>

Given that FOI legislation is limited to government agencies, it does not apply to the cultural institution sector as a whole. That said, many institutions are either set up under statute or through local councils, and may fall within the ambit of FOI law: this will depend on the bodies caught within the relevant legislation. As with privacy legislation, even if an institution is bound by FOI legislation, the FOI procedures may have limited impact on the collections, due to exceptions for publicly available documents. (Note: a significant exception to this statement may arise for newer records held by archives that have not yet reached the open access period.)

A few points are worth considering. First, while the legislation refers to access to 'documents' or 'records', this term is defined broadly, and extends to print-based material, photographs, drawings, sound recordings, films, and so on.

Second, there are restrictions on the types of documents that can be accessed under FOI law. For example, the federal *Freedom of Information Act*:

- does not include 'library material maintained for reference purposes' in the definition of documents: s 4(1);
- should not be used to obtain documents in the open access period under the *Archives Act 1983* (Cth) (see below), unless the document

Table 4.5: The Information Privacy Principles in the *Privacy Act 1988* (Cth)

Principles	Topic	Summary of content
1 - 3	The collection of personal information	<ul style="list-style-type: none"> <li>• IPP1 deals with the manner and purpose of collection of personal information. In short, personal information should be collected for a lawful purpose, related to the functions or activities of the collector. Further, information should not be collected by unlawful or unfair means.</li> <li>• IPP2 deals with the solicitation of personal information from the individual concerned, and requires that the individual be informed of matters such as the reasons for collection and what will be stored.</li> <li>• IPP3 requires that information collected be complete and up to date, and collected by non-intrusive means.</li> </ul>
4	Storage and security	<ul style="list-style-type: none"> <li>• IPP4 requires that records containing personal information are protected by reasonable security safeguards against loss and misuse.</li> </ul>
5	Information relating to records kept by record-keeper	<ul style="list-style-type: none"> <li>• IPP5 provides that record-keepers must disclose the existence and nature of records containing personal information that are in their possession, the purpose for which that information is used, and steps to access those records.</li> </ul>
6 - 8	Access to and accuracy of records containing personal information	<ul style="list-style-type: none"> <li>• IPP6 provides that where a record-keeper has possession or control of a record that contains personal information, the individual concerned shall be entitled to have access to that record (except where such access can or must be refused under any law of the Commonwealth).</li> <li>• IPP7 requires that a record-keeper ensure that records are accurate and up-to-date.</li> <li>• IPP8 requires that a record-keeper take such steps as are reasonable (if any) to check the accuracy of personal information in a record before it is used.</li> </ul>
9 - 11	Use of information	<ul style="list-style-type: none"> <li>• IPP9 provides that personal information in a record shall not be used except for a purpose to which the information is relevant.</li> <li>• IPP10 states that where personal information was obtained for a particular purpose, it shall not be used for any other purpose unless (amongst others): the individual concerned consented to this use; or, the purpose for which the information is used is directly related to the purpose for which the information was obtained.</li> <li>• IPP11 limits the disclosure of personal information, and provides that such information will not be concerned to someone other than the individual concerned unless (amongst others): the individual concerned is reasonably likely to have been made aware that information is usually passed to that person or body; the individual concerned has consent to the disclosure; or disclosure is required or authorised by law.</li> </ul>
15	Application	<ul style="list-style-type: none"> <li>• IPP15 states that IPPs 1, 2, 3, 10 and 11 only apply to information collected after commencement of the Act. IPPs 4 to 9 apply to all information in the possession or control of an agency, whether collected before or after commencement.</li> </ul>
16	Compliance	<ul style="list-style-type: none"> <li>• IPP16 provides that an agency shall not do an act, or engage in a practice, that breaches an Information Privacy Principle.</li> </ul>

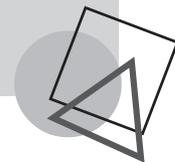
## Privacy law and Indigenous cultural information

In the last twenty years, there has been growth in the legal protection given to privacy interests in Australia and overseas. In Australia, this has primarily come through legislation: new statutes have been passed in relation to information privacy, health records and unsolicited emails (spam). Elsewhere, courts have crafted new causes of action – an extended breach of confidence action, or a tort of invasion of privacy – to protect privacy interests.

The legal recognition of privacy interests has been argued to be important for a number of reasons, including to promote personal autonomy and dignity, and to give people some control or say over the flow of information about themselves. Note that this focus is on individual development, rather than a familial or communal interest. This raises a number of issues, including for Indigenous cultural information.

Take the limit on disclosure of personal information. An issue may arise where information is being sought about an Indigenous individual by a relative, descendant or community member. In those cases, although this information may include shared familial or community knowledge, and may be particularly important for people who have been dislocated or forcibly removed from their families, a strict application of privacy law may limit such access. Privacy law may thus operate to prevent legitimate forms of access about Indigenous personal information by Indigenous people. On the other hand, privacy legislation in Australia does not impose absolute bars on disclosure or use of information. Rather, it requires processes to give the individual whom information concerns some say in its disclosure. Legitimate requests for information may in some cases be able to be accommodated through procedures which obtain consent prior to disclosure.

Furthermore, the focus on the privacy of living individuals makes existing Australian legislation irrelevant for the large body of information that exists in relation to now-deceased Indigenous people, some of which is of a private character, or depicts Indigenous people in degrading or humiliating ways. Here, there is no claim for a community privacy that transcends time; instead, Indigenous people must rely on other legal principles or the goodwill of the holders of that information to ensure that it is used and disclosed in culturally appropriate ways. Avoiding offence may require cultural institutions to make themselves aware of, and alert to, information which is of a private, personal or sensitive nature, and consider using some of the techniques discussed in Chapter 6 to seek familial or community input in management and use.



contains personal information: s 12(1)(a); and

- contains specific exceptions for collections of the Australian War Memorial, National Library of Australia, Museum of Australia and Australian Archives: s 13.

Similarly, the Western Australian legislation states that the access provision do not apply to 'documents that are already available' (s 6); this includes documents that are:

- available for purchase by, or freely distributed to, the public;
- state archives that can be accessed under the *State Records Act 2000* (WA);
- publicly available library material held for reference purposes; and
- made or acquired by a gallery, museum or library, and preserved for public reference and exhibition purposes.<sup>17</sup>

Finally, the Victorian legislation has a list of exempt documents in Part IV; these include documents affecting personal privacy: 'a document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating

to the personal affairs of any person (including a deceased person)': s 33(1).

Each piece of legislation sets out certain general requirements for requesting access: for instance, that the request be made in writing, provide adequate information of the document being requested, and be accompanied by any application fee payable. Where a request is successful, access may be granted in a number of ways, including inspection of the document (or the opportunity to hear and/or view an audiovisual item) and provision of a copy of the document. There are numerous government resources and websites that readers can consult if they are interested in these procedural questions.

### *Archives legislation*

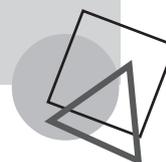
In Australia, large state and federal archives have been established to administer government records and other archival material. The legislation establishing each archive sets out the types of records the archive is required to collect, the management of those records, and their public accessibility. This Primer will focus on the *Archives Act 1983* (Cth),

## FOI: Views in the *Bringing them Home Report*

The *Bringing them Home Report* in relation to the stolen generations made a number of observations in relation to the limits of FOI applications for Indigenous searchers, including: the requestor must be able to describe the requested record with considerable specificity; the legislation does not apply to non-government organisations (although some have procedures for access); and there are limits on the ability of a searcher to obtain information about third parties.<sup>18</sup> The report also stated that:

'The responsibility of governments to provide this information to Indigenous people goes far beyond the standard justifications for FOI legislation, namely openness and accountability of governments and the individual's right to privacy. Indigenous people require personal, family and community information for even more fundamental reasons, namely to assist them to recover from a past marked by gross violation of their human and community rights by government.'

The report made a number of recommendations in relation to the retention, preservation and indexing of records, the development of minimum access standards, and the provision of services to assist Indigenous searchers locate information about themselves and their families.



which establishes the National Archives of Australia.<sup>19</sup>

The functions of the National Archives include to identify, collate, manage and preserve 'Commonwealth records' and other important Australian archival resources, and to make these materials available for public access, subject to restrictions in the Act. The term 'Commonwealth Records' includes (s 3(1)):

a 'record' that is the property of the Commonwealth or a Commonwealth institution, as well as other records deemed by regulation to constitute Commonwealth records.

The term 'record' covers a broad range of written, visual and audio-visual material: s 3(1).

The general rule is that once a Commonwealth institution no longer needs ready access to a Commonwealth record, or a record has been in existence for 25 years, that record should be transferred to the National Archives: s 27. The National Archives also has the power to require access to Commonwealth records in the custody of other institutions: s 28. Some records are exempt from these general rules. The *Archives Act* also prohibits the unauthorised destruction or alteration of Commonwealth records: ss 24, 26.

Relevantly for this Primer, the *Archives Act* sets our rules regarding the public accessibility of Commonwealth records.<sup>20</sup> Thus:

'Subject to this Part, the Archives shall cause all Commonwealth records in the open access period [ie, 30 years from the end of the year in which the record came into existence: s 3(7)] that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access': s 31(1).

Certain records are exempt from disclosure under section 33. This definition refers to numerous different types of confidential and sensitive material, such as information the disclosure of which:

- would constitute a breach of confidence (s 31(1)(d)) or disclose a trade secret (s 31(1)(h)); or
- would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person) (s 31(1)(g)).

According to statistics on the Archives' website,

around 97.5% of Commonwealth records over 30 years old are released in whole, while 2% are released with some information removed, and only 0.5% are totally withheld.<sup>21</sup>

If public access is refused, a written statement of reasons is provided. If a person does not agree with these reasons, he or she may apply for an internal review of the decision by the Archives. If, after this review, he or she is still dissatisfied with the decision, an appeal may be made to the Administrative Appeals Tribunal (AAT), which will review the decision on its merits. The decision of the AAT can be appealed in the Federal Court in relation to a point of law.<sup>22</sup>

## Endnotes

1 Discussed in *Coulthard v The State of South Australia; McKenzie v The State of South Australia; Champion v The State of South Australia* (unreported, Supreme Court of South Australia, King CJ, Perry and DeBelle JJ, 19 January 1995), BC9503032 at 10.

2 Eg, *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

3 *Saltman Engineering Co Ltd and Others v Campbell Engineering Co Ltd* [1963] 3 All ER 413, 415.

4 See *Johns v Australian Securities Commission and Others* (1993) 116 ALR 567 (per Brennan, Dawson and Toohy JJ).

5 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, 374.

6 *Coulthard v The State of South Australia; McKenzie v The State of South Australia; Champion v The State of South Australia* (unreported, Supreme Court of South Australia, King CJ, Perry and DeBelle JJ, 19 January 1995), BC9503032 at 12.

7 *Foster v Mountford & Rigby Ltd* (1976) 14 ALR 71.

8 *Pitjantjatjara Council Inc and Nganingu v Lowe and Bender* (unreported, Supreme Court of Victoria, 25 and 25 March 1982), discussed in [1982] Aboriginal Law Bulletin 30.

9 *Johns v Australian Securities Commission and Others* (1993) 116 ALR 567, 581 (Brennan J).

10 Eg, Barry Barclay, *Mana Tuturu: Maori Treasures and Intellectual Property Rights* (2005), 249.

11 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.

12 Eg, *Fraser v Evans* [1969] 1 QB 349, 361.

13 *Privacy Act 1988* (Cth), s 6(1); *Privacy and Personal Information Protection Act 1998* (NSW), s 4(1); *Information Act* (NT), s 4; *Personal Information Protection Act 2004* (Tas), s 3; *Information Privacy Act 2000* (Vic), s 3.

14 These institutions are the Australian Archives, the Archives Office of New South

Wales, the Public Record Office and the Archives Office: Copyright Act 1968 (Cth) s 10(1).

15 The collections of non-profit bodies that hold material of historical significance or public interest for the purpose of conserving or preserving those items also fall within the definition of 'archives': *ibid* s 10(4). The Copyright Act expressly notes that 'museums and galleries are examples of bodies that could have collections covered [within] the definition of archives'.

16 See: *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1989* (NSW); *Information Act* (NT); *Freedom of Information Act 1982* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA).

17 See also *Freedom of Information Act 1992* (WA), s 7 ('If Parts 2 and 4 apply to documents in a private collection that is held by an art gallery, museum, library or other prescribed agency, the application of those Parts is subject to any limitations on access imposed by the person who lodged the collection').

18 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), chapter 16.

19 *Archives Act 1983* (Cth).

20 *Ibid*, Part V, Division 3.

<sup>21</sup> See <http://www.naa.gov.au/fsheets/fs46.html>.

<sup>22</sup> See <http://www.naa.gov.au/fsheets/fs12.html>.

# Chapter 5: Law and Reproduction

## Introduction

Many creative and intellectual works found in cultural institutions are protected by copyright, such as books, manuscripts, letters, diaries, scripts, musical scores, sound recordings, actuality footage, news reels and feature films.

This copyright is commonly owned by a third party, such as the author of the work, or its publisher or producer. This raises the possibility of copyright infringement by the institution and its patrons, as many acts performed for the purposes of administration, preservation, research and public access are within the exclusive rights of the copyright owner.

Extensive guidelines in relation to copyright, digitisation and cultural institutions have previously been published by the Intellectual Property Research Institute of Australia and the Centre for Media and Communications Law: Emily Hudson and Andrew T Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (2005).<sup>1</sup>

This Primer therefore provides a synthesis of copyright issues in relation to the reproduction and communication of collection items held by cultural institutions, with a particular emphasis on Indigenous collections and users.

A separate case study addresses the application of the *Copyright Act* to the creation of databases and multimedia products, a relevant discussion given that many cultural institutions and Indigenous knowledge centres are creating databases of cultural materials to facilitate preservation and access.

## Copyright Flowchart

In Australia, copyright is governed by the *Copyright*

The *Copyright Act* is a lengthy and complex piece of legislation, and it can be difficult to know where to start in answering questions like: what sort of works are protected by copyright? What rights does the copyright owner have? And how do licences and assignments work?

There are certain key questions that can assist institutions in navigating their way through copyright law. These are set out in Figure 5.1. By answering each question in turn, readers will be able to determine whether a proposed use (by the institution or a patron) infringes copyright, and develop strategies for copyright compliance and risk management.

This flowchart is adapted from the one used on page 3 of *Copyright and Cultural Institutions: Guidelines for Digitisation*. It refers to chapter numbers in that publication.

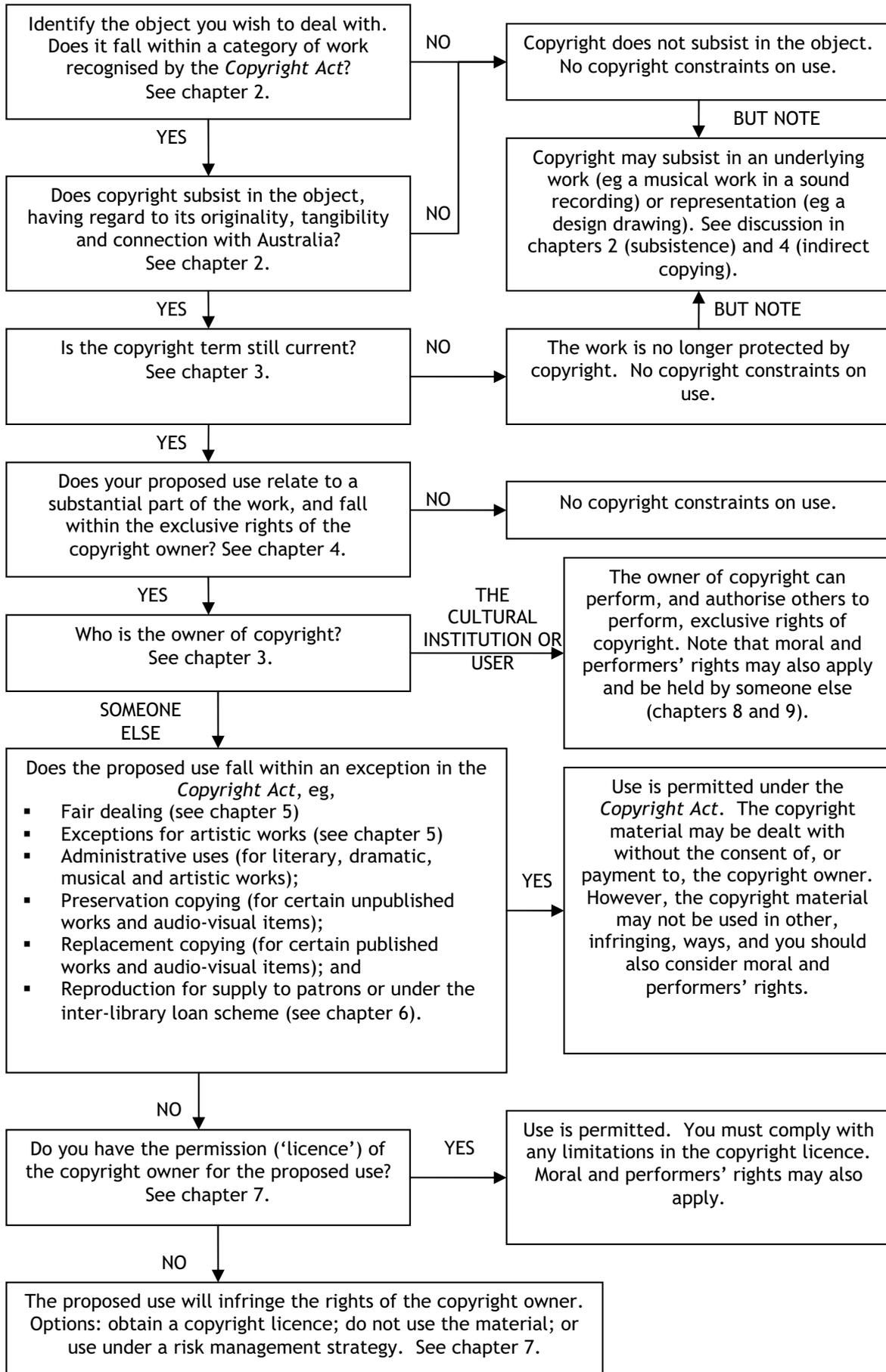
## Subsistence of copyright

There are no formalities for the subsistence of copyright, in the sense that copyright need not be registered or 'asserted'; instead, copyright arises when certain criteria are met. These derive from the *Copyright Act* and case law.

First, the item must fall within a category of subject matter protected by the *Copyright Act*, being 'Part III works' (literary, dramatic, musical and artistic works: s 32) and 'Part IV subject matter other than works' (sound recordings, cinematograph films, sound and television broadcasts, and published editions: ss 89-92).

Second, if an item falls within one of these categories, copyright will only subsist if the work is sufficiently 'original', exists in material form, is not insubstantial, and has certain 'territorial connecting

Figure 5.1: Procedure for determining whether a proposed use might infringe copyright.



factors' (these link the making or publication of the work with Australia, as well as other countries).

While these factors may sound impressive, they are not very onerous, meaning that copyright protects a wide range of material, including works that are not creative or aesthetic in character.

## Ownership, exclusive rights and infringement

### *Ownership*

The default rule in the *Copyright Act* is that the 'author' or 'maker' of a work or subject matter is the owner of copyright. However, there are a number of statutory exceptions to the default rule, including for employee-created works (the default rule is that copyright is owned by the employer) and certain, specified commissioned works and subject matter (the person who commissioned the work or subject matter owns copyright). There are special rules for works that have been jointly authored: Part III, Division 9.

### Subsistence and 'originality': Indigenous works

Some commentary in relation to copyright and Indigenous cultural expression has argued that copyright protection may be inadequate because such works may fail to meet copyright's originality requirement.

The *Copyright Act* expressly provides that copyright only subsists in 'original' literary, dramatic, musical and artistic works: s 32. Although originality is not an express requirement for subsistence of subject matter such as films and sound recordings, there is an implicit requirement that such works not be copied due to the interaction of other provisions.<sup>2</sup>

The term 'original' is not defined in the *Copyright Act*. In Australia, there is a very low threshold for originality: a work will be considered 'original' where the author has expended a sufficient level of skill, labour and judgment in its creation. For example, it has been held that a telephone directory, a compilation of facts in which listings are presented alphabetically by surname, is an 'original' work.<sup>3</sup>

Commentators have observed that Indigenous cultural works may not be original if they draw on Indigenous designs, spirituality and traditions. The originality requirement has therefore been identified as poorly accommodating Indigenous expression.

As noted by Andrew Kenyon, 'judicial statements during the 1990s, however, would seem to have moved the Australian law beyond this question.'<sup>4</sup> For example, in *Milpurruru v Indofurn*, Justice von Doussa observed that while artworks the subject of that case followed 'traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality.'<sup>5</sup> For a further discussion of this case, see the text box in Chapter 2.

Furthermore, an argument that contemporary Indigenous expression may not be 'original' raises the inference that Indigenous culture is static and grounded in the past, rather than dynamic and changing over time.<sup>6</sup>

Thus, the fact that Indigenous cultural expression adopts existing designs or techniques, or depicts stories or themes that have been passed on through many generations, does not – and should not – prevent it from constituting an 'original' work under the *Copyright Act*.



Furthermore, copyright may also be transferred by assignment or by will. For a summary, see Table 5.3.

The term 'author' is not defined in the *Copyright Act*. However, the meaning of 'author' in relation to literary, dramatic, musical and artistic works is generally understood to be the person who wrote or produced the relevant expression, or 'clothed the idea in form'. For instance, where one person supplies ideas or stories, and another produces the relevant expression, the latter is the 'author' of the resulting copyright work.<sup>7</sup>

The *Copyright Act* provides that the 'maker' of a sound recording or cinematograph film is the owner of copyright: ss 97(2), 98(2). The maker of a sound recording is the person who owned the record at the time when the first recording was made: s 22(3)(b) - this will generally be the producer. (Note: new provisions change this default rule for sound recordings of live performance, by providing that performers are also makers of those recordings.<sup>8</sup>) The 'maker' of a film is the 'person by whom the arrangements necessary for the making of the film were undertaken': s 22(4)(b). An exception relates to commissioned recordings and films (those made in

pursuance of an agreement in return for 'valuable consideration'), in which the person commissioning the recording or film owns copyright in it: ss 97(3), 98(3).

## Duration

The Free Trade Agreement between Australia and the United States led to extension of the copyright term for some works.

Currently, published literary, dramatic and musical works are protected for the life of the author plus seventy years, and published sound recordings and films protected for seventy years following the year of publication. If any of these materials are unpublished, copyright subsists, in effect, indefinitely. Artistic works are protected for the life of the artist plus seventy years. For instance, if a painter died in 1980, copyright in her works will subsist until 2050.

In considering the duration of copyright, the 'transitional provisions' must be consulted for pre-1 May 1969 works: see the text box on 'copyright and older works'.

## Copyright ownership and Indigenous knowledge

It is common that Indigenous collection items embody cultural expression that was 'authored' or 'made' (in the copyright sense) by individuals having no association with the community or individuals from which the underlying ideas derive.

Take the example of an anthropologist who performs research with an Indigenous community, and draws upon that work in a manuscript or article. As the person who wrote the relevant expression, the anthropologist will be the 'author' of the work and, under the operation of default rules in the *Copyright Act*, the owner of copyright.

An Indigenous participant could seek to control use of the information discussed through contractual measures, and may have a cause of action restraining certain disclosures under equitable obligations of confidence (see Chapter 4); however, he or she will not own copyright unless the researcher expressly agrees to an assignment of copyright.

For a longer discussion on copyright and oral history projects, see case study 1 in *Copyright and Cultural Institutions: Guidelines for Digitisation*.



## Communal ownership and Indigenous artwork

Under the *Copyright Act*, the default rule is that the owner of copyright is the person (or people) who authored the relevant work. It has been commented that this fails to accommodate principles of custodianship and communal ownership that apply in Indigenous law. These arguments were raised in the Federal Court in the case of *Bulun Bulun v R & T Textiles*.<sup>9</sup>

In 1978, Johnny Bulun Bulun painted an artistic work known as 'Magpie Geese and Water Lilies at the Waterhole.' This work was created in accordance with the laws of the Ganalbingu people. A number of years later, Bulun Bulun and another Aboriginal artist and senior member of the community, George Milpururru, brought an action against a company that had imported and sold fabric that, it was alleged, infringed copyright in the artistic work. Bulun Bulun brought the claim as *legal* owner of copyright, while Milpururru was an applicant both in his own right and as representative of the Ganalbingu people (argued to be the *equitable* owners of copyright).

The company admitted that it had infringed copyright, however it questioned the standing of Milpururru to participate in the proceedings. The decision of Justice von Doussa therefore revolved around the claims of equitable ownership made by Milpururru.

His Honour noted that a claim to communal legal ownership of copyright would conflict with ownership provisions of the *Copyright Act*, which vested ownership in the 'author' of a work. In this respect, the concept of 'joint authorship' was inapposite, as it envisages 'the contribution of skill and labour to the production of the work itself,' and there was 'no evidence ... that anyone other than Mr Bulun Bulun was the creative author.'<sup>10</sup>

However, Justice von Doussa also held that a special, 'fiduciary' relationship existed between Bulun Bulun and the Ganalbingu people, on account of the grant of permission to create the artwork given to Bulun Bulun in accordance with laws and customs of the Ganalbingu people.<sup>11</sup> This *equitable relationship* gave rise to obligations: (1) 'not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people'; and (2) 'in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.'<sup>12</sup> Justice von Doussa also stated that:

'The conclusion that in all the circumstances Mr Bulun Bulun owes fiduciary obligations to the Ganalbingu People does not treat the law and custom of the Ganalbingu People as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu People as part of the factual matrix which characterises the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it.'<sup>13</sup>

The decision did not, therefore, recognise some sort of communal ownership in the relevant community as a matter of copyright law. However, it is authority that Indigenous laws can inform the existence of a separate equitable obligation (in this case, a fiduciary relationship), and that if an artist has failed to fulfil his or her fiduciary obligations, a range of equitable remedies or actions may be available to the community. In the facts before the court, Bulun Bulun had done all that was required to enforce copyright, and no equitable intervention was necessary.

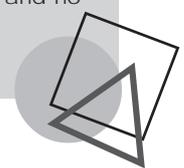


Table 5.2: Duration of copyright

Section	Work	Publication Status	Duration
33	Literary, dramatic or musical work	Was published, performed, broadcast or offered for sale <b>during</b> the lifetime of the author.	Life of the author plus seventy years.
		Was published, performed, broadcast or offered for sale <b>after</b> the lifetime of the author.	Seventy years after the calendar year in which publication, performance broadcast or offer for sale first takes place.
		Has never been published, performed, broadcast or offered for sale.	Effectively indefinite.
33	Artistic work (but not an engraving)	N/A	Life of the artist plus seventy years.
33	Engraving	Has been published.	Seventy years after the expiration of the calendar year in which the engraving was first published.
		Has not been published.	Effectively indefinite.
34	Anonymous or pseudonymous work (not being a photograph)	Has been published.	Seventy years after the expiration of the calendar year in which the work was first published.
		Has not been published.	Effectively indefinite.
80	Work of joint authorship	N/A	Same period as provided in section 33 except that references to the 'author' are taken as references to the author who died last.
93	Sound recording	Has been published.	Seventy years after the expiration of the calendar year in which the recording is first published.
		Has not been published.	Effectively indefinite.
94	Cinematograph film	Has been published.	Seventy years after the expiration of the calendar year in which the film was first published.
		Has not been published.	Effectively indefinite.
95	Television or sound broadcast	N/A	Fifty years after the expiration of the calendar year in which the broadcast was first made.
96	Published edition	N/A	Twenty-five years after the expiration of the calendar year in which the edition was first published.

Table 5.2 below summarises the current rules in relation to duration.

### *Exclusive rights*

The exclusive rights that are enjoyed by the copyright owner are set out in Table 5.3. These rights vary depending on the type of work under consideration.

For example, the exclusive rights of the copyright owner of a literary, dramatic or musical work are to: reproduce the work in a material form; publish it; perform the work in public; communicate the work to the public; make an adaptation of the work; and do any of these acts in relation to an adaptation: s 31(1)(a).

In contrast, the rights in relation to artistic works, sound recordings and cinematograph films are more limited. For example, the exclusive rights in relation to films are to: make a copy of the film; cause the film to be seen or heard in public; and communicate the film to the public: s 86.

For the purposes of this Primer, the reproduction/copying and communication rights are of greatest relevance. The *Copyright Act* expressly states that the former includes digitising an analogue work, sound recording or film (ss 21(1A), (6)), as well as creating a two-dimensional version of a three-dimensional work and vice versa: s 21(3). The latter extends to online communication and other forms of electronic transmission: s 10(1)

## Copyright and older works

Australia's current copyright legislation, the *Copyright Act 1968* (Cth), came into force on 1 May 1969. The 1968 Act replaced, and contained important differences from, the earlier copyright legislation that applied in Australia. An important question arose as to how the 1968 Act should treat material that existed prior to its entry into force.

The general approach is that no distinction is drawn between works that were made or published before 1 May 1969 and those created after that date: the 1968 Act applies in a like manner to items existing at its commencement and to items made later. However, there are certain exceptions to this rule. For example:

- The 1968 Act represented the first time that Australian copyright law had a category of protected material called 'cinematograph films'. However, films made prior to 1 May 1969 may be protected as original dramatic works or a series of photographs.
- Copyright does not subsist in an artistic work made before 1 May 1969 which was, or could have been, registered as an 'industrial design' under designs legislation.
- There are subtle differences in the rules regarding subsistence, duration and ownership of literary, dramatic, musical and artistic works, and sound recordings. For example, up until the US-Australia Free Trade Agreement, copyright in photographs taken prior to 1 May 1969 subsisted for 50 years following the year in which the photograph was taken. This means that copyright has expired in all photographs taken prior to 1 January 1955.

For further discussion of these rules (which are found in the 'transitional provisions'), see Chapter 2 of *Copyright and Cultural Institutions: Guidelines for Digitisation*.



## *Infringement*

Copyright in a work or subject matter is infringed where:

- a person who is not the owner of copyright,
- does in Australia (or authorises the doing of),
- any act comprised in copyright (ie an exclusive rights, as discussed above),
- in relation to the whole or a substantial part of the work or subject matter,
- without the 'licence' (ie, permission) of the owner: ss 14, 36(1), 101(1).

The reference to 'substantial part' means that it is not necessary to reproduce or otherwise deal with an entire work for an infringement to take place: there will be an infringement where a 'substantial part' is dealt with. This phrase is not defined in the *Copyright Act*. However, case law on 'substantial part' reveals that quality is more important than quantity, meaning that even small parts of a work can be 'substantial', based on their recognisability, importance and originality. This means that in many instances, reproduction or other dealings by cultural institutions and their patrons will relate to a 'substantial part', raising the possibility of copyright infringement.

In those instances, three broad options are available to avoid infringing copyright:

- select material which is not protected by copyright, or for which copyright has expired;
- obtain a licence or assignment from the copyright owner; or
- rely on an exception in the *Copyright Act*, such as fair dealing, or the libraries and archives provisions.

This Primer will consider the second and third options in detail.

## Licences and assignments

### *Licences*

Under a licence, the copyright owner (the 'licensor') grants permission to someone else (the 'licensee') to perform acts that usually could only be performed by the copyright owner. Where there are joint owners of copyright, or multiple copyrights subsist in the one item, licences must be obtained from all the copyright

owners. (Note that strategies can be developed to streamline this process, for example where a filmmaker warrants that all underlying rights in a film have been cleared.)

Licences can be exclusive or non-exclusive. Under an exclusive licence, the licensee can perform the licensed acts to the exclusion of all others, including the copyright owner. In order to be binding, an exclusive licence must: be in writing; authorise the holder of the licence to do an exclusive copyright act to the exclusion of all other people (s 10(1)); and, be signed by or on behalf of the owner of copyright.

In contrast, under a non-exclusive licence, two or more people (including the copyright owner) can perform the same acts in relation to the same material. A non-exclusive licence can be made orally or in writing. That said, there are clear benefits from obtaining written evidence of a licence; this will be crucial if there is later uncertainty or a dispute regarding its existence or terms.

Both exclusive and non-exclusive licences may have certain restrictions or limitations on their operation. For example, a licence may be for a set duration, or only allow use of the material within a certain place.

A licence may be binding even though it contains very little detail; the main issue is whether the licensor has provided a binding consent to the licensee.<sup>14</sup> At a minimum, a licence should include: details of the parties to the licence; a description of the work being licensed; the date the licence was made; the rights granted by the licensor; the territory and term of the licence; and any payment to be made by the licensee to the licensor. There are other terms that could be included, such as termination clauses, limits on assignment and sub-licensing, governing law clauses, and so forth. For a detailed discussion of this, see chapter 7 of *Copyright and Cultural Institutions: Guidelines for Digitisation*.

### *Assignment*

An assignment is a transaction in which copyright is transferred from the copyright owner to an assignee. This transfer may either relate to all of the copyright owner's rights, or be limited by act, territory or term: s 196(2). For example, a novelist may assign newspaper serialisation, book publication and film rights to three separate people.<sup>15</sup>

According to the *Copyright Act*, to be legally effective, an assignment must be 'in writing' and signed 'by or on the behalf of' the copyright owner: s 196(3). That said, courts have held that assignments

may be effective even though the precise requirements of the Act have not been followed.<sup>16</sup> It is beyond the scope of these guidelines to describe these circumstances in detail. Furthermore, the uncertainty that results from lack of writing means it is wise for institutions to have a policy that assignments be documented in written form.

There is no precise form of words that must be used for an assignment to be effective: what must be clear is that the relevant instrument assigns copyright, and does not merely convey physical property rights or grant a licence.<sup>17</sup> For example, it is not necessary to use the words 'assign' or 'copyright', so long as the agreed terms reflect the intention to assign. That said, there is a clear benefit in using precise language to describe the nature of the grant. For example,

some cultural institutions are grappling with the legal effect of acquisition forms in which the donor transfers all 'right, title and interest' in an object to the institution, with no mention of intellectual property rights. In the absence of a direct reference to copyright, it is open to argue that copyright did not form part of the grant.

## Copyright Exceptions

The *Copyright Act* contains various exceptions: provisions that permit users to perform otherwise infringing acts without obtaining the permission of the copyright owner. The exceptions discussed in this Primer are all unremunerated, meaning that the user is not required to pay any money to the copyright

### Agreements to assign: legally effective?

Some cultural institutions use documentation in which a copyright owner can agree that copyright will pass to the institution at a future date – often when the copyright owner dies.

At a practical level, this has the benefit of allowing the copyright owner to control and receive income from copyright throughout his or her life, while also reducing posthumous problems with tracing ownership of copyright, and negotiating with new owners who may be completely unfamiliar with the copyright work. But are these statements legally binding?

In general, a bare agreement to perform an act or transfer an interest is not enforceable under contract due to lack of 'consideration': a *quid pro quo* or exchange of benefits or promises between the parties. For a legally enforceable interest to arise, the transaction must be made by way of deed.

However, section 196(2) allows an assignment to be limited 'so as to apply to part of the period for which the copyright is to subsist'. There being no mention of whether the assignment must take place *immediately* or not, this section could be construed as permitting an assignment that will take place in the future, so long as it is 'in writing signed by or on behalf of the assignor': s 196(3). This will depend on how liberally a court interprets s 196(2). If the clear intention of the parties is to assign copyright at a particular date, a court may well construe the transaction to give effect to this intention.

If the meantime, cultural institutions that wish to wear belts and braces may be advised to take separate or additional measures to secure a legally effective transfer, such as asking the copyright owner to transfer copyright to the institution in his or her will.

This situation should also be contrasted with assignment of *future copyright*, which relates to assignments of copyright that is yet to come into existence: s 197. That provision permits an assignment of future copyright to be valid.



Table 5.3: Owners of copyright and moral rights, and their rights.

Work	Copyright owner*	Rights of copyright owner	Moral rights holder**	Rights of moral rights holder
Literary, dramatic and musical works	Default rule: the author: s 35(2). Note special rules for journalists, some commissioned artistic works and employees: ss 35(4)-(6).	See section 31(1)(a): <ul style="list-style-type: none"> <li>to reproduce the work in a material form;</li> <li>to publish the work;</li> <li>to perform the work in public;</li> <li>to communicate the work to the public;</li> <li>to make an adaptation of the work;</li> <li>to do any of these acts in relation to an adaptation.</li> </ul> See also rights in relation to commercial rental agreements [s 31(c), (d)].	The author.	There are three rights: <ul style="list-style-type: none"> <li>the right of attribution: Part IX, Division 2;</li> <li>the right not to have authorship falsely attributed: Part IX, Division 3; and</li> <li>the right of integrity: Part IX, Division 4.</li> </ul>
Artistic work	Default rule: the author: s 35(2). Note special rules for journalists, some commissioned artistic works and employees ss 35(4)-(6).	See section 31(1)(b): <ul style="list-style-type: none"> <li>to reproduce the work in a material form;</li> <li>to publish the work; and</li> <li>to communicate the work to the public.</li> </ul>	The author.	As above: <ul style="list-style-type: none"> <li>the right of attribution;</li> <li>the right not to have authorship falsely attributed; and</li> <li>the right of integrity.</li> </ul>
Sound recording	Default rule: the maker: s 97(2). Note special rules for commissioned recordings: s 97(3).	See section 85: <ul style="list-style-type: none"> <li>to make a copy of the sound recording;</li> <li>to cause the recording to be heard in public;</li> <li>to communicate the recording to the public;</li> <li>to enter into a commercial rental arrangement in respect of the recording.</li> </ul>	Moral rights do not subsist in sound recordings.	N/A
Cinematograph film	Default rule: the maker: s 98(2). Note special	See section 86: <ul style="list-style-type: none"> <li>to make a copy of</li> </ul>	The 'author' (defined to mean the	As above: <ul style="list-style-type: none"> <li>the right of</li> </ul>

Work	Copyright owner*	Rights of copyright owner	Moral rights holder**	Rights of moral rights holder
	rules for commissioned films s 98(3).	the film; <ul style="list-style-type: none"> <li>to cause the film to be heard and/or seen in public; and</li> <li>to communicate the film to the public.</li> </ul>	director, producer and screenwriter): s 189.	attribution; <ul style="list-style-type: none"> <li>the right not to have authorship falsely attributed; and</li> <li>the right of integrity.</li> </ul>
Television or sound broadcast	The maker: s 99.	See section 87: <ul style="list-style-type: none"> <li>to make a cinematograph film or sound recording of the broadcast (or a copy of such a film or recording); and</li> <li>to re-broadcast it or communicate it to the public otherwise than by broadcasting it.</li> </ul>	Moral rights do not subsist in broadcasts.	N/A
Published edition	The publisher: s 100.	See section 88: to make a facsimile copy of the edition.	Moral rights do not subsist in published editions.	N/A

\* Copyright may also be transferred by assignment, will or operation of law: s 196(1). The default rule for Crown copyright is that it is owned by the Commonwealth or the State: ss 176-8.

\*\* Moral rights can only be held by natural people: s 190. Moral rights cannot be transferred by assignment, will or operation of law: s 195AN(3). When an author dies, his or her moral rights are exercised by their 'legal personal representative': s 195AN(1).

owner to take the benefit of the exception. Two sets are dealt with: the fair dealing exceptions, and the libraries and archives provisions.

### *Fair dealing*

The current fair dealing exceptions apply to dealings undertaken for the purposes of research or study, criticism or review, reporting the news, and giving professional legal advice: ss 40-42, 43(2), 103A-103B. Uses that fall outside these prescribed purposes are not permitted as fair dealings, regardless of how fair they might be.

The fair dealing provisions are relevant within the

cultural institution sector in two main ways: first, they cover much research activity of staff and patrons, particularly for users of published collections in libraries; and second, they are relevant for some public programs (such as critical lectures on an artwork or film). In both cases, further re-use may require a licence from the copyright owner. For example, if an Indigenous patron photocopies a journal article that relates to her ancestors, it will be a fair dealing if this is for her own study. If she wishes to scan this article and include it in a database being created by an Indigenous knowledge centre, her purpose is no longer research or study, and she will need to rely on another exception or obtain a licence from the copyright owner.

(Note: this analysis is based on statements by Justice Beaumont in *De Garis v Neville Jeffress Pidler Pty Ltd*, which related to allegations of copyright infringement against a press clippings business operated by the respondent company.<sup>18</sup> The respondent tried (unsuccessfully) to argue that its activities fell within the ambit of fair dealing. In deciding in favour of the applicant, Justice Beaumont held, at a number of stages, that the relevant purpose for assessing fair dealing was *that of the alleged infringer*. Thus, it was not relevant that the clients of the company might use the clippings for research purposes. Similarly, in the United Kingdom it has been

held that a person who publishes study notes is not protected by fair dealing, even though users consult those materials for research or study purposes.<sup>19</sup>)

Many activities of cultural institutions and their patrons do not fall within the scope of the current fair dealing exceptions. For instance, making reproductions of collection items for use in not-for-profit educational materials would be unlikely to be covered by fair dealing, even if those dealings were fair. This may change following the introduction of some new exceptions, as has been announced by the Attorney-General's department in May 2006: see text box.

## New Flexible Dealing Exception

On 14 May 2006, the Attorney-General, the Hon Philip Ruddock MP, announced that a series of amendments would be made to the *Copyright Act*, including some new exceptions.<sup>20</sup> Relevantly for this discussion, these amendments include:

'a new flexible dealing exception that will allow for:

- non-commercial uses by libraries, museums and archives (eg. this may allow a museum to include extracts of historical documents in materials for visitors); ...

To avoid confusion, the new extended dealing exception will not apply to uses where an existing exception or statutory licence already operates. Any new use falling within this exception must comply with the standards in Australia's international treaty obligations.'

The reference to 'standards in Australia's international treaty obligations' refers to the 'three-step test' that is found in a number of international instruments that Australia has signed. This test provides that 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'<sup>21</sup> There has been considerable academic commentary (not to mention disagreement) on the operation of the three-step test.

As at the date of writing this text, the precise wording of the new exception has not been released, so it is impossible to make any substantive comments about its application. The use of the words 'by libraries, museums and archives' raises the question of whether the exception will only apply to reproductions *made by staff of an institution*, or whether it could extend to dealings by volunteers or patrons. Another key question will be the extent to which the exception will be invoked for *public* uses, such as including material in a digital archive being created by an Indigenous Knowledge Centre. In what circumstances could this 'conflict with a normal exploitation of the work' or be said to 'unreasonably prejudice the legitimate interests of the right holder'?



## *(b) Libraries and archives provisions*

The *Copyright Act* contains a number of provisions specifically directed to cultural institutions: these are referred to as the 'libraries and archives provisions': ss 48-53, 110A, 110B.

The term 'archives' refers to archival material in specified institutions<sup>22</sup> as well as collections of non-profit archives, museums and galleries more generally.<sup>23</sup> The meaning of 'archives' therefore extends beyond its common usage, that is, a repository of documents or records. There is no definition of 'library' in the *Copyright Act*.

For a decision-making flowchart in relation to use of the *current* libraries and archives provisions, see Figure 5.4. The government has announced that it

intends to make some technical amendments to some of these provisions,<sup>24</sup> as well as 'a new exception for national cultural institutions to be able to more effectively preserve and provide public access to items in their collections of historical and cultural significance to Australia for future generations without breaching copyright.'<sup>25</sup> At the time of writing this text, the wording of these new exceptions has not been released.

In their current form, the libraries and archives provisions can be roughly divided into three main groups.

### *1. User and institution requests*

One group of provisions allow reproductions to be made in response to requests from users and other cultural institutions.

## Can Indigenous knowledge centres rely on the libraries and archives provisions?

There are strong arguments that Indigenous knowledge centres are able to rely on the libraries and archives provisions, as they perform analogous functions to other cultural institutions, in particular libraries.

As noted in the main text, the term library is not defined in the *Copyright Act*. However, its general usage is shifting as there is greater use and development of electronic repositories and other digital materials. That is, the fact that collections are held in digital form rather than as hard copies would not appear to preclude a body from being a library, if its collection is maintained for study and reference purposes.

In contrast, the term archives is defined in the *Copyright Act*, and refers to collections 'of documents or other material of historical significance or public interest that is in the custody of a body [and] is being maintained by the body for the purpose of conserving and preserving those documents or other material': s 10(4). By stating that the relevant purpose of holding the collection is *preservation*, the definition may not apply where an Indigenous knowledge centre holds analogue or digital *copies* of material primarily for reasons of *access*.

In conclusion, in the absence of any case-law or amendment by the government, there is some uncertainty in relation to the ambit of bodies that constitute 'libraries' and 'archives'. However, there would seem to be good arguments that Indigenous knowledge centres fall within the provisions because they have equivalent functions to libraries.



Sections 49 and 50 permit libraries and archives to reproduce and communicate *published* articles and works in their collections upon user request or under the inter-library loan scheme. For section 49 to apply, the user must require the reproduction for the purposes of research or study: s 49(1). For section 50, the reproduction must be required for inclusion in the collection, or to fulfil a section 49 request: s 50(1). Commercial availability declarations are required before some reproductions can be made: ss 49(5), 50(7A), (7B).

Similarly, section 51 allows the making and communication of reproductions of old, *unpublished* works in the open collection of an institution by a user (or by an officer of a library or archives for supply to a user) for the purpose of research or study or with a view to publication (see section 52). An equivalent provision exists for old, unpublished sound recordings and cinematograph films: s 110A.

Finally, sections 51A(1) and 110B allow original artistic works, manuscripts, sound recordings held as a 'first record', and cinematograph films held as a 'first film', to be reproduced for the purpose of research 'at' the library or archives, or 'at' another library or archives. This appears to cover both internal research, as well as research by a user. However, the use of the word 'at' may require that the library or archives retain any reproduction made. If a user wanted their own copy for research purposes, they would need to rely on another provision of the *Copyright Act*.<sup>26</sup>

## 2. *Internal, administrative activities*

The second group of exceptions relate to internal, administrative activities. Thus section 51A(1) allows the reproduction or communication of a work that forms, or previously formed, part of the collection of a library or archives, for these purposes:

- for original artistic works and works held in manuscript form - preserving the work against loss or deterioration: s 51(1A)(a); and
- for published works that have been damaged, deteriorated, lost or stolen - replacing the work (s 51(1A)(b), (c)) - but note that a commercial availability declaration is required: s 51A(4)).

Similar provisions apply to sound recordings and cinematograph films in s 110B. For the preservation copying provisions to apply, the sound recording must be held as a 'first record', and a film held as a 'first film'.

Section 51A also allows a library or archives to make

a reproduction of a work for administrative purposes (s 51A(2)), and to communicate that reproduction to officers of the library or archives by making it available online at a computer terminal within the premises of the library or archives (s 51A(3)). There is no definition of 'administrative purposes' in the *Copyright Act*, but it would appear to extend to a variety of internal activities, such as staff-only catalogues, documenting preservation activity, planning exhibitions, and so forth. No equivalent provisions exist for sound recordings and films.

## 3. *Internal, electronic access*

The final group of provisions allow electronic versions of collection items to be made publicly available within the premises of the institution.

Thus, section 51A allows institutions to make a preservation reproduction of an original artistic work available on copy-disabled terminals installed on the institution's premises, but only where the original work has been lost or deteriorated since the preservation reproduction was made, or where the work is so unstable that it cannot be displayed without risk of significant deterioration: s 51A(3A), (3B).

Section 49 allows articles and published works that have been acquired in electronic form to be made available online within the premises of the library or archives on terminals that do not allow the making of an electronic reproduction or communication of the article or work: s 49(5A). The explanatory memorandum for the Digital Agenda legislation notes this aims to allow the equivalent practice to displaying hard copy books within a library.<sup>27</sup>

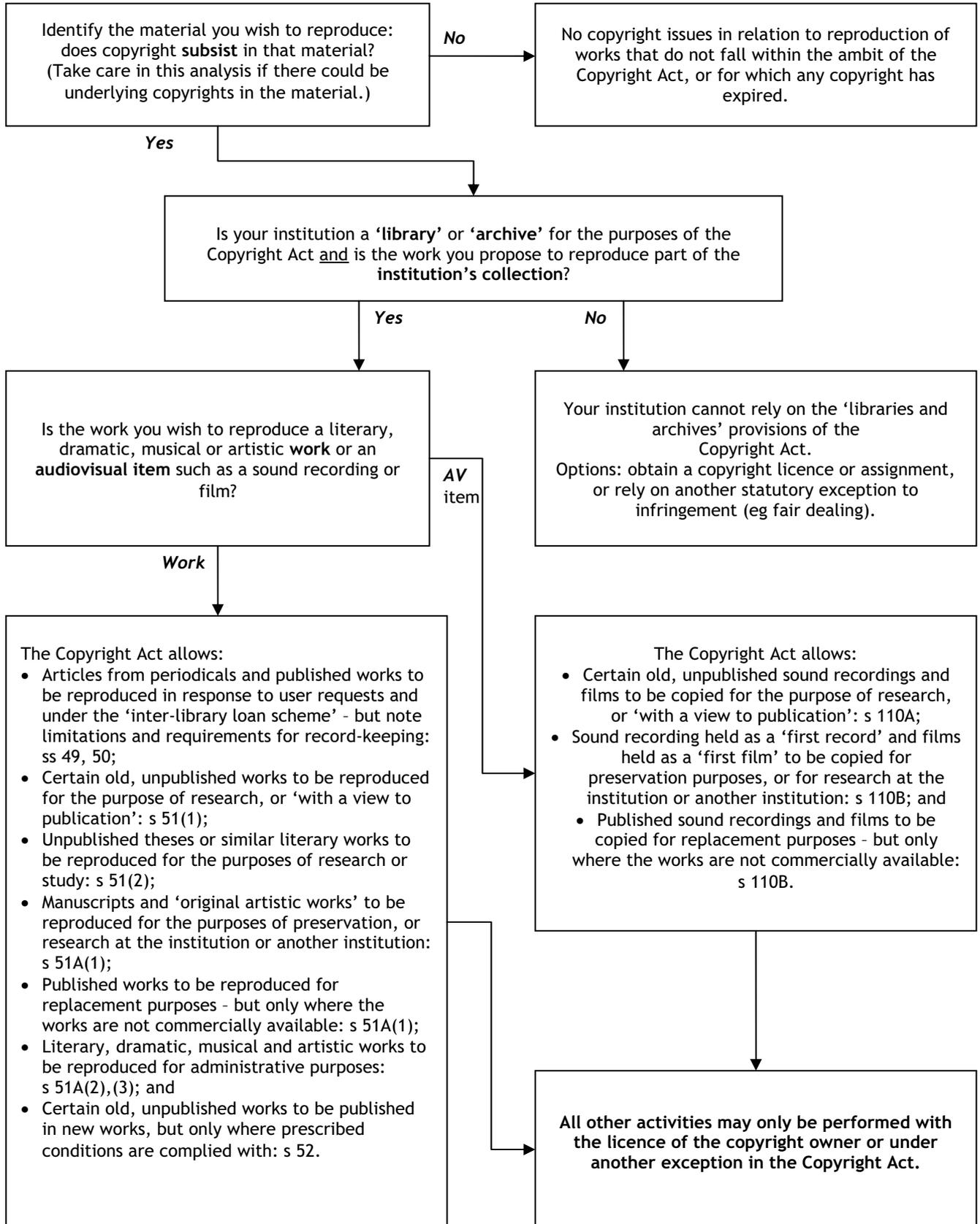
## Moral rights

The *Copyright Act* has separate provisions in relation to the 'moral rights' of certain authors of copyright works: Part IX. The moral rights provisions are a relatively recent addition to Australian law, having come into force on 21 December 2000.

Moral rights subsist in literary, dramatic, musical and artistic works, and cinematograph films: s 189. The 'author' of a work holds the moral rights in relation to it; for films, this means the director, producer and screenwriter: s 189. Moral rights can only be held by natural people (s 190), and that moral rights cannot be transferred by assignment, will or operation of law: s 195AN(3). For a discussion of the possibility of Indigenous communal moral rights, see the text box.

The author is granted three moral rights under Part

Figure 5.4: Decision-making flowchart for using the libraries and archives provisions.



- IX:
- (1) *The right of attribution of authorship.* This is the right to be attributed as author of the work whenever an 'attributable act' is performed in relation to the work: Part IX, Division 2. The identification must be clear and reasonably prominent: s 196. The term 'attributable act' means:
- (a) for literary, dramatic and musical works - reproduction in a material form, publication, performance in public, communication to the public, and making an adaptation: s 194(1);
  - (b) for artistic works - reproduction in a material form, publication, exhibition in public and communication to the public: s 194(2); and
  - (c) for films - making a copy of the film, exhibiting the film in public and communicating the film to the public: s 194(3).
- (2) *The right not to have authorship falsely attributed.* Acts of false attribution are set out separately for literary, dramatic and musical works, artistic works, and cinematograph films: Part IX, Division 3. However, these acts are relatively similar, and include:
- (a) inserting or affixing another person's name to the work, in a way that falsely implies that they are the author of the work;
  - (b) dealing with a work with a name affixed or inserted that the person knows is not an author; and
  - (c) dealing with an altered version of work as though it is, in fact, the original work.
- (3) *The right of integrity of authorship.* The right of integrity is the right not to have works subjected to 'derogatory treatment': Part IX, Division 4. What constitutes 'derogatory treatment' is defined separately (but in fairly similar terms) for literary, dramatic and musical works, artistic works and films: ss 195AJ to 195AL. The term 'derogatory treatment' covers these situations:
- (a) doing an act that results in a 'material distortion of', 'mutilation of' or 'material alteration to' a work that is 'prejudicial to the author's honour or reputation';
  - (b) doing any other act that is 'prejudicial to the author's honour or reputation'; and
  - (c) exhibiting an artistic work in public in a way that is 'prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs'.
- The general rule is that moral rights continue in a work until copyright ceases to subsist in that work: s 195AM. The one exception to this rule is the right of integrity in relation to cinematograph films, which expires when the author dies: s 195AM(1). When an author dies, his or her moral rights are exercised by the 'legal personal representative': s 195AN(1).
- It is an infringement of moral rights to do an attributable act without identifying the author (s 195AO), perform an acts of false attribution (s 195AP) or to subject a work to derogatory treatment: s 195AQ(2). Certain dealings with works that have been subject to derogatory treatment (ss 195AQ(3)-(5)), as well as commercial dealings with infringing articles (ss 195AU, 195AV), are also prohibited.
- There are two significant defences to infringement. Firstly, there will be no infringement of the rights of attribution or integrity when the act was 'reasonable' in all the circumstances: ss 195AR, 195AS. The *Copyright Act* sets out factors that are relevant for determining whether non-attribution or derogatory treatment is reasonable. For example, in determining whether subjecting a literary, dramatic, musical or artistic work to 'derogatory treatment' is reasonable, the relevant factors include:
- (a) the nature of the work;
  - (b) the purpose for which the work is used;
  - (c) the manner in which the work is used;
  - (d) the context in which the work is used;
  - (e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
  - (f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
  - (g) whether the work was made:
    - (i) in the course of the author's employment;

- or
- (ii) under a contract for the performance by the author of services for another person;
  - (h) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law; and
  - (i) if the work has 2 or more authors –their views about the treatment: s 195AS(2).

Secondly, there will be no infringement of moral rights if an act or omission falls within the ambit of a written consent provided by the holder of moral rights in a work: ss 195AW, 195AWA. The scope of this varies for different works and authors, with employees able to give the broadest type of consents.

- (1) *Consents relating to films, or literary, dramatic, musical or artistic works included*

*in a film.* The consent may be given in relation to 'all or any acts or omissions occurring before or after the consent is given.' The consent may relate to specified works that already exist, or works of a particular description the making of which has not begun or that are in the course of being made.

- (2) *Consents relating to literary, dramatic, musical or artistic works (other than those included in a film).* A consent will only have effect if given:

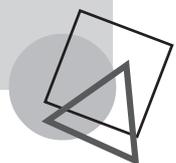
- (a) in relation to specified acts or omissions, or specified classes or types of acts or omissions, whether occurring before or after the consent is given; and
- (b) in relation to either of the following:

## Communal moral rights

The current moral rights provisions are held by 'authors' and, like other aspects of the *Copyright Act*, are predicated on notions of individual ownership, rather than claims that are communal in origin. As noted by Patricia Loughlan:

'Whereas moral rights spring from a strongly individualistic artistic tradition and focus on the personality and emotional needs of the creating artist and on the uniqueness of the created object, Aboriginal art is based on ideas about communal creation, ownership and control of the often ancient images and stories which constitute art works, and about the subordination of the individual ego of the artist.'<sup>28</sup>

This is not to say that moral rights are of no benefit from Indigenous communities; on the contrary, individual artists and authors can enforce their rights in a way that is consistent with Indigenous laws and practices. For example, the integrity right may serve to prevent reproduction or display in a manner that is culturally insensitive. However, there have been repeated calls for communal rights to be recognised in Australian copyright law. In 2003, the government drafted possible amendments to the *Copyright Act* that would recognise communal moral rights, however this bill (which has been criticised by some commentators as failing to incorporate useful rights) was never introduced into parliament.<sup>29</sup>



- (i) a specified work or specified works existing when the consent is given; or
  - (ii) a specified work, or works of a particular description, the making of which has not begun or that is or are in the course of being made.
- (3) *Consents relating to works made by an employee for the benefit of his or her employer.* A consent may be given by an employee:
- (a) for films and works included in films - in relation to all works made or to be made by the employee in the course of his or her employment; or
  - (b) for works not included in films - in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment.

A consent given for the benefit of the owner or prospective owner of copyright in the work is presumed, unless the consent provides to the contrary, to extend to the copyright owner's licensees and successors in title, and to persons authorised by the owner to do acts comprised in the copyright. Finally, a consent may be invalidated if it was obtained through duress or false or misleading statements.

The remedies available to a successful plaintiff in a moral rights action include injunction, damages, declarations, orders for public apology, and orders for the reversal or removal of false attribution or derogatory treatment: s 195AZA.

## Performers' rights

The *Copyright Act* gives performers rights in relation to their live performances. The term 'live performance' is defined in the *Copyright Act* to include dramatic and musical performances as well as 'a performance of an expression of folklore' (ss 22(7), 248A).

The rights given to performers fall into two

categories.

1. *Ownership rights.* As discussed earlier in this chapter, the usual rule is that the 'maker' of a sound recording - the person who owned the first record at the time it was produced - is the owner of copyright: ss 22(3), 97. However, following amendments made by the *US Free Trade Agreement Implementation Act 2004* (Cth), this rule is different for copyright in 'sound recordings of live performances'. In those cases, the term 'maker' includes both the owner of the first record and the 'performers' involved in the performance: s 22(3A).

Importantly, these rules apply to existing and new recordings, although there are some significant limitations on their application to the former.

Thus, where a cultural institution acquires a sound recording of a live performance (particularly one made after 1 January 2005), it must consider the range of people - producers and performers - who may be owners, and from whom it may need to obtain any copyright clearances.

2. *Anti-bootlegging rights.* The *Copyright Act* provides that performers have the right to bring an action for the unauthorised use (sometimes called 'bootlegging') of their live performances. Unlike the Ownership Provisions, the Anti-Bootlegging Provisions apply to films made of live performances as well as sound recordings.

A number of acts can constitute an 'unauthorised use' of a performance - these are listed in section 248G. The following activities are included within that list of unauthorised uses, if they are performed during the 'protection period' of the performance and without the authority of the performer:

- making a direct or indirect recording of the performance;
- communicating the performance to the public, either directly from the live performance or from an unauthorised recording of it;
- making, selling or hiring a copy of a

recording which the person knows, or ought reasonably to know, was an unauthorised recording; and

- causing to be seen or heard in public, a copy of a recording which the person knows, or ought reasonably to know, was an unauthorised recording.

'Direct' means directly from the live performance, while 'indirect' means made from a communication of the performance: s 248A(1). The default rule is that the 'protection period' is 20 years after the year the performance was given: s 248CA(1). However, for some *sound recordings* this period is 50 years - such as those in the first and third bullet points, above.

Communicating an *authorised* recording of a performance to the public without the authority of the performer does not constitute an 'unauthorised use' for the purpose of these provisions: s 248G(3).

The upshot of this analysis for cultural institutions is that they should take care in collecting recordings of live performances that were not authorised by the performers, as the making, possession or communication of such recordings may infringe rights under the *Copyright Act*.

Like moral rights, performers' rights are additional to other rights granted under the *Copyright Act*.

## Endnotes

1 Emily Hudson and Andrew T Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (2005), available at [www.ipria.org](http://www.ipria.org) and [www.law.unimelb.edu.au/cmcl/](http://www.law.unimelb.edu.au/cmcl/) ('Hudson and Kenyon Guidelines'). A 16 page précis, *Copyright and Cultural Institutions: Short Guidelines for Digitisation*, is also available.

2 See discussion in James Lahore and Warwick A Rothnie, *Copyright & Designs* (Volume 1), [10,165].

3 *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1.

4 Andrew T Kenyon, 'Copyright, Heritage and Australian Aboriginal Art' (2000) 9(2) *Griffith Law Review* 303, 311.

5 *Milpurruru v Indofurn* (1995) 30 IPR 209, 216.

6 Kamal Puri, 'Preservation and Conservation of Expressions of Folklore' (1999) 32 *Copyright Bulletin* 5, 16-17.

7 Eg, *Walter v Lane* [1900] AC 539; *Donoghue v Allied Newspapers* [1937] 3 All ER

503; *Express Newspapers v News (UK)* [1990] FSR 359.

8 Where a sound recording is made of a live performance, some performers are also 'makers', and hence owners, of copyright: Hudson and Kenyon Guidelines, above n 1, chapter 9.

9 *Bulun Bulun v R & T Textiles* (1998) 157 ALR 193.

10 Ibid 205.

11 Ibid 209.

12 Ibid 211.

13 Ibid 210.

14 *Clune v Collins Angus & Robertson Publishers* (1992) 25 IPR 246.

15 This and other examples are given in Staniforth Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (1999-), [14.235].

16 Eg, *Acorn Computers Ltd v MCS Microcomputer System Pty Ltd* (1984) 4 IPR 214.

17 Eg, *Wilson v Weiss Art Pty Ltd* (1995) 31 IPR 423.

18 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.

19 *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

20 Attorney General Philip Ruddock, Media Release 088/2006, 'Major copyright reforms strike balance', 14 May 2006, available at [www.ag.gov.au](http://www.ag.gov.au).

21 Eg, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), article 13.

22 These institutions are the Australian Archives, the Archives Office of New South Wales, the Public Record Office and the Archives Office: *ibid*, s 10(1).

23 The collections of non-profit bodies that hold material of historical significance or public interest for the purpose of conserving or preserving those items also fall within the definition of 'archives': *ibid* s 10(4). The Copyright Act expressly notes that 'museums and galleries are examples of bodies that could have collections covered [within] the definition of archives'.

24 See report titled 'Digital Agenda Review - Government responses to Phillips Fox recommendations and related matters', available at [www.ag.gov.au](http://www.ag.gov.au).

25 Media Release 088/2006, above n 20.

26 Ricketson, above n 15, [11.320].

27 Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999 ¶ 75-77.

28 Patricia Loughlan, 'The ravages of public use: Aboriginal art and moral rights' (2002) 7(1) *Media and Arts Law Review* 17, 19-20.

29 Discussed in Terri Janke, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property', in Martin Nakata and Marcia Langton, *Australian Indigenous Knowledge and Libraries* (2005), 107-109.



# Chapter 6:

## Ethical Collection Management and Cultural Clearances

Australian cultural institutions are increasingly using negotiation and consultation with Indigenous people - including formalised processes such as cultural consents and memoranda of understanding - as part of **improved practice** in the management of Indigenous collections. This Chapter examines these practices, and provides some suggestions for issues that should be considered when implementing new procedures for Indigenous cultural materials. This discussion is focused on **principles and processes**: the individual details of the processes developed and used in any particular cultural institution will vary according to the nature of the material, the views of the relevant Indigenous people, and so forth.

At a broad level, the ultimate aim is to improve the involvement of Indigenous people in the management of Indigenous collections. There are a variety of different ways to achieve this, such as:

- developing standards for the accessibility and storage of sensitive cultural information in accordance with applicable Indigenous laws;
- drafting new collection management policies in consultation with Indigenous owners;
- using cultural clearances or subject consents for certain uses of Indigenous cultural materials;
- repatriating original materials to Indigenous communities;
- supplying analogue or digital copies of such items; and
- running training programs in curatorial studies or library management for Indigenous students (this may form part

of a broader partnership between larger collecting institutions and Indigenous knowledge centres).

This Primer deals most extensively with the first three of the methods listed above. Furthermore, the principles discussed here are at a quite high level of generality. The intention is to discuss techniques and issues that can form part of institutional policy, without being prescriptive. More specific guidance and examples can be found in other guidelines and protocols that have been produced or adopted by cultural institutions, arts organisations, and other bodies, some of which were listed in Table 1.1. In the cultural institution sector, the protocols developed by ATSILRN provide a very useful summary of the range of strategies available for cultural institutions,<sup>1</sup> as do the *Continuing Cultures, Ongoing Responsibilities* guidelines published by Museums Australia.<sup>2</sup> It is recommended that individual institutions dealing with these issues on a regular basis consider and draft their own policies using the principles discussed here and in other sources, and seek input from Indigenous peak bodies or advisory committees before such policies are finalised.

The methods described in this primer assume a high degree of cooperation with Indigenous people and a focus on acting in accordance with their expressed preferences beyond the letter of the law. As discussed in Chapter 1, this is not just a matter of facilitating Indigenous access to collections: it is 'about the authority of Indigenous people to determine how and under what conditions they want to manage their knowledge and cultural materials in the new millennium. At every level it must be about developing trust and good working relationships between Indigenous people and collecting institutions.'<sup>3</sup>

This Chapter begins by repeating one of the key points from Chapter 2: that Indigenous people commonly do not have any legal authority to make decisions in relation to Indigenous collections. It then discusses possible strategies for recognising and giving effect to the legitimate interests of Indigenous people to be involved in such decision-making. These are presented under four headings:

1. building information about collections: this section deals with recognising the various types of information that may be particularly sensitive;
2. consultation;
3. obtaining cultural clearances; and
4. reaching agreements for collection management.

## Who has authority for decision-making?

Chapters 2 to 5 described how Australian law recognises various proprietary rights and other legal interests in relation to collection items: see Table 2.3. Part of the bundle of rights that is inherent in ownership is the authority to decide how property is used - and to exclude others from exercising these rights. This authority is not unfettered, but must be exercised consistently with the rights of *other* rights-holders, and any relevant legislation or regulations.

An important point from Chapter 2 was that Indigenous people are commonly absent as *legal* owners or rights-holders, particularly for the vast body of records and ethnographic material made *about* Indigenous people since the colonisation of Australia. This has significant consequences for the issue of who has the ability to control and determine how Indigenous lives, knowledge and spirituality is shared, both between Indigenous people, and amongst the non-Indigenous community.

For example, Maori filmmaker Merata Mita has written that:

‘The institution and not the living members of the family or tribe makes the decision according to its own cultural values, what it thinks will be most important and appropriate. This leads to what has unfortunately become a norm where indigenous cultural is mythologized and becomes another vehicle of

cultural oppression alienated from genuine indigenous experience.’<sup>4</sup>

Similarly, Terri Janke, in the *Writing Cultures* protocols, states that:

‘In the past, Indigenous cultural material has been subject to interpretation by non-Indigenous people.

Today, as Indigenous people seek to re-assert and reclaim control over their cultural heritage material, Indigenous interpretation of the material is a way of enhancing the cultural significance of the work. Indigenous people should be given the opportunity to interpret and present their own cultures.’<sup>5</sup>

Increasing the level of engagement between institutions and Indigenous people is about changing existing models of collection management, and increasing the ability of Indigenous people to make decisions about their own cultural heritage and information. These policies and practices may be both *general* and *specific*.

Thus, *general policies* are those that create frameworks for thinking about the management and use of Indigenous cultural materials. This might include policies in relation to how Indigenous people are portrayed in exhibitions or publications, the circumstances in which digitised photographic images will be made available on publicly-available websites, and how catalogues will deal with material that contains language or content that is now considered culturally offensive. It may be useful for Indigenous staff and/or an advisory committee of Indigenous people and representatives to assist in developing these policies.

In contrast, *specific practices* are those that relate to *particular collections items*, and may include identifying *which Indigenous people* have legitimate rights or interests to guide or control the use those items. These rights or interests might arise because:

- an Indigenous person or people *created* the item (or are descendants of the creator);
- an Indigenous person or people have rights of ownership or access under Indigenous customary laws; or
- personal, spiritual or cultural information of an Indigenous individual, family or community has been recorded in ethnographic materials or other written, photographic or audio-visual records.

Some of these rights give rise to a legally-enforceable claim, for instance, where a person owns copyright (see Chapter 5) or is the confider of 'confidential information' (as discussed in Chapter 4). However, in many cases, these rights or interests come from ethics or customary law.

Importantly, *multiple people may have rights or interests in relation to the same item*. It should not be assumed that, because one person has been consulted or given consent to an activity, that no further work needs to be done. It is useful to directly ask whether you should speak with someone else instead of, or in addition to, the person you have consulted.

Furthermore, there will be circumstances in which *cultural rights are contested*: for example, where two communities believe that they are the origins of the one artefact. *It is not your job to arbitrate between competing (non-legal) claims*. One approach is to record the different information that has been provided, and who provided that information. It may be that, with time, additional information will become available that clarifies the situation, or that competing owners will resolve this amongst themselves. In the meantime, it may be appropriate to consult with all people who have legitimate claims to an item, and to refrain from activities that significantly disturb the status quo (eg, repatriating the artefact to one family or community).

Difficulties can arise where divergent views exist as to the appropriate treatment or use of an item. Unless the particular claim has a legally-recognised dimension (such as a creator owning copyright in an artistic work), then decisions in relation to management and access will not make the institution

liable as a matter of law. Instead, the institution can focus on the *quality* of consultation: allowing sufficient time for discussions to be completed; providing a clear and thorough explanation of the collection and/or a proposed project; and ensuring that people with legitimate rights and perspectives are not left out. If some people consent to a use while others do not (eg, inclusion of footage in a documentary or exhibition), it may be valuable to have a written policy that helps guide decision-making (for instance, that the majority view is followed, or that the decision must be approved by Indigenous advisors and senior staff).

## Understanding the collection

A first step in changing practices in relation Indigenous collections is gaining an understanding of the type of Indigenous cultural materials in the collection - including whether this material contains any restricted or sensitive information. Knowledge of the general content of the collection is essential when developing appropriate management policies, as procedures may be very different between different types of cultural materials. It is extremely important for Indigenous people to be involved in the process of classifying the collection and devising strategies for its management. Some thoughts on consultation are considered in the next section.

In general, respect should be shown *whenever* an institution acquires, makes accessible or reproduces material created by, or relating to, Indigenous people. That said, there are certain types of Indigenous material which are of particular

### Key point

Do not assume that you only need to consult with, or obtain a clearance from, a single individual. There may be multiple people who have perspectives and interests that you should have regard to. One useful strategy is to always ask whether there is someone else you should speak with instead of, or in addition to, your initial contact person.



sensitivity. Where possible, these kinds of sensitivities should be identified at the point of acquisition.

### *Secret and sacred material*

This term refers to material that is restricted under Indigenous laws: it may be that only initiated people may access certain sites or receive certain information, and/or that access or disclosure is only allowed for one gender. The ATSI LRN protocols suggest that an item should be considered secret and sacred if it:

'contains information which is considered to be secret or sacred by the community to which it pertains. Suitable management practices will depend on both the materials and the communities served by the organisation.'<sup>6</sup>

Barrina South, Aboriginal Project Officer at the Australian Museum, has provided some useful advice for institutions dealing with secret / sacred material. She writes that:

'To assist in developing a positive working relationship with your Indigenous communities, encouraging participation in developing exhibitions and/or public programs it is important to know what restrictive material you hold in your collections which may offend some of the Indigenous community. It is your responsibility to store this material in an appropriate way, away from the 'open' material and ensure this material doesn't go on display.

At the Australian Museum because we encourage Indigenous people to visit our collections and participate in exhibition design and public programs, we store this collection in a secure area separate from the 'open' collections area as to avoid offending or making our visitors uncomfortable. Due to the nature of the collection we have amended our acquisition guidelines stating that we don't actively seek or collect this type of material. If you don't have a clause like this in your collection management documents, it is worth considering including a similar clause. Due to the nature of this material and the restrictions placed on them the Australian Museum has embarked on a repatriation project to return this material back to communities where applicable. ...'<sup>7</sup>

Thus, some issues that might form part of a collection management policy in relation to secret and sacred materials include:

- *Storage.* What facilities are necessary to store secret and sacred objects? What procedures will need to be implemented to ensure that restricted collections cannot be accessed or inadvertently observed in contravention of Indigenous laws?
- *Access.* What sort of restrictions on access are appropriate for the material? Ethical practice may well be to close the collection to researchers, the public and general staff, with access only automatically allowed for people with

## Key point

Respect should be shown whenever an institution acquires, makes accessible or reproduces material created by, or relating to, Indigenous people. In addition, there are certain types of Indigenous material which are of particular sensitivity. This Primer identifies five categories: secret and sacred material; sensitive material; material including names or images of deceased people; offensive or personal material; and material collection without proper informed consent.



ownership or access rights under Indigenous law, and personnel of the institution who have direct responsibility for the collection. In all other instances, access is only allowed with the agreement of the appropriate Indigenous owners.

- *Exhibition.* Following on from the comments in relation to access, it may also be useful to expressly prohibit the public display or exhibition of secret and sacred objects, and develop a procedure from removing exhibition content if secret or sacred material is inadvertently used.
- *Repatriation.* Will the institution be involved in returning secret or sacred objects? If so, how will this take place?
- *Acquisition.* As noted in the statements by South, it may be appropriate to adopt a policy that an institution will no longer actively collect material that is known or suspected to contain secret or sacred information. Alternatively, if such material is acquired, will this be pursuant to special procedures?
- *Digitisation.* Where secret or sacred information is reproduced or embodied in an analogue recording, photograph or manuscript: will the institution digitise this material? If so, for what purposes? Can digital materials be included in a database? If so, have technological measures been put in place to ensure that restrictions under Indigenous laws are maintained?

#### *Sensitive material*

The term sensitive is used here to refer to material that is not secret or sacred, but, likewise, is not completely unrestricted, under Indigenous laws.<sup>8</sup>

Separate policies may be needed in relation to the storage, access, repatriation, exhibition and acquisition of sensitive material. For example, South suggests that sensitive materials should be stored in a way that viewing is restricted. South also suggests special procedures if sensitive materials are exhibited. She writes:

'When displaying sensitive material it is very important to contact your local community as some sensitive material may risk offending some of the community.

For example, you may be considering an exhibition centred on carved trees from south-eastern Australia. One of the interesting experiences I have come across with the Australian Museum's carved tree collection is the variety of Indigenous responses to such items according to their own cultural protocols. Some communities regard the carved trees as sensitive, however there are others who regard them as 'open'. Another example of an object, which can be sensitive or 'open', includes message sticks. Some communities regard message sticks as sensitive and others wish to display them. These examples strengthen the importance of community consultation.

With the labelling of your displays it is important to recognise the traditional owners of the community and also mention the fact you have engaged in community consultation regarding the exhibition and it also necessary to mention there may be material in the exhibition which may offend some Indigenous people.'<sup>9</sup>

#### *Material including names or images of deceased people*

In some Indigenous communities, there are mourning practices for deceased people, and it is offensive to reproduce the name, voice or image of that person until the mourning period is over. These practices vary from community to community, and it is therefore wise to consult with the family or community of a deceased person if the use of his or her name, voice or image is being contemplated. Furthermore, where material, photographs or recordings of deceased people are used in an exhibition, database or publication it is wise to warn of this prior to entry or use.

#### *Offensive or personal material*

The sections above described three examples of materials that contain information that might be restricted under Indigenous laws: secret and sacred information; sensitive information; and images of deceased people. However, it may be appropriate to impose other limitations on the use of Indigenous cultural material due to the private content of material, its potential to cause offence for political or historical reasons, or the circumstances of its creation.<sup>10</sup>

For example, some cultural institutions hold photographs and moving image recordings of Indigenous people in humiliating and degrading positions. Permitting that material to be re-used in a publication may cause significant personal distress (particularly for family and descendants, if the Indigenous subjects are identifiable). In those circumstances, real questions arise regarding whether use of the image is so important that it outweighs potential offence.

If an exhibition or database may contain language or views that are offensive to Indigenous people, an express warning to this effect should be given prior to entry or use.

#### *Material collected without proper informed consent*

Questions also arise in relation to content that was collected or created without the true informed consent of Indigenous people. Although this material may not include restricted information, or degrading language or images, the fact that Indigenous people never authorised its creation raises important questions about its current use. Thus, acting in a respectful manner may include consulting with Indigenous people prior to major acts of public disclosure (such as publishing photographs on an online database), and making all reasonable efforts to notify relevant Indigenous communities of the existence of the collection.

## Consultation

Consultation with Indigenous people and peak bodies is a key component in recalibrating practices in relation to Indigenous collections. As noted above, consultation may range from a general discussion in relation to frameworks for institution practice, through to liaison in relation specific projects and/or individual collection items. Where material is **identified** (ie, the Indigenous creator, subjects or community is known), consultation may occur directly with the creator or subjects, their descendants or family members, and senior members of a group or community. Where material is **unidentified**, consultation with Indigenous representatives and other peak bodies may be conducted to develop a culturally-sensitive management strategy. Possible starting points include: Aboriginal Land Councils; the Indigenous Unit of the Australian Film Commission; the Torres Strait Islander Regional Authority; Indigenous media organisations, knowledge centres and publishers;

and Indigenous curators at state and federal collecting institutions.<sup>11</sup> The Black Book directory is another useful source; it lists more than 2,700 Indigenous people and organisations, and can be searched online.<sup>12</sup>

Some topics for consultation include:

- *Collection management policies.* It is important that Indigenous people and representatives are involved in the creation of new collection management policies for Indigenous collections.<sup>13</sup>
- *Collection awareness.* Many cultural institutions hold collections whose existence is not broadly known to Indigenous people. The development of online technologies is helping change this: many cultural institutions now make catalogues or descriptions of collections available online. However, there are additional steps that cultural institutions may be able to take to facilitate Indigenous awareness of collections.<sup>14</sup> For example, an institution that has ethnographic material in relation to a particular Indigenous community might contact senior members of that group to inform them about the collection, and invite them to view items and discuss their management.
- *Identification of material in the collection.* Many cultural institutions are in possession of Indigenous cultural materials that are anonymous or poorly documented. Allowing Indigenous people to read, view or audition that material provides invaluable assistance in the development of comprehensive catalogue information. This sort of information adds to the cultural value of the collection by providing important ancillary and context-setting information: this is of enormous value to Indigenous people and cultural institutions alike. Where material has not previously been recognised as restricted or sensitive under Indigenous laws, it also provides the opportunity to change policies in relation to storage and access.
- *Catalogues and collection information.* Even where a collection is well catalogued, existing approaches to categorisation may lack identifiers that are meaningful to Indigenous people, or

include terminology that is inaccurate or offensive. The ATSilRN protocols contain some specific suggestions for new approaches to classification of Indigenous cultural materials.<sup>15</sup>

*Specific projects and uses of cultural materials.* Consultation is an important part of the planning and execution of projects that either relate to Indigenous experiences or knowledge, or incorporate Indigenous cultural materials. As noted in the *Taking the Time* cultural protocols (which deal with both Indigenous and non-Indigenous communities):

‘Consultation does not mean asking someone simply to rubber stamp your final draft of a proposal, exhibition outline or exhibition text. People who are genuinely consulted should be involved in the process of developing the proposal, storyline or text. Real consultation means they also shape the direction of the project, develop its terms of reference and participate in its outcomes.’<sup>16</sup>

Strategies for obtaining cultural clearances (ie, permissions for a particular use) are dealt with in the next section. In some respects, clearances can be viewed as the final stage of consultation, in which *particular consents* for use of *particular materials* are obtained. It is important that prior to this, there is an appropriate level of Indigenous consultation and engagement in planning a project or use, having regard to the nature of the project, the sensitivity of the information to be used, and so on. For example, an exhibition that documents the life of a specific Indigenous person may require different Indigenous input when compared with an exhibition on women and sport, which includes Indigenous athletes.

## Cultural clearances

### *Generally*

This primer uses the term ‘cultural clearances’ to refer to the variety of formalised permissions that cultural institutions (and their patrons) obtain when accessing, reproducing or disseminating Indigenous cultural materials. Individual institutions may call these subject permissions, community clearances or ethical consents. They are not required as a

matter of law (although they might take place in parallel with legally-required negotiations, for instance in relation to copyright or confidential information). Cultural clearances range from specific, one-off permissions, through to ongoing statements in relation to the management and accessibility of collection items. Because they are not legally mandated, there is no standard form of words or formalities that must be adopted. Table 6.1 sets out a suggested general process for obtaining cultural clearances.

### *Form and documentation*

As noted above, cultural clearances have varying degrees of specificity, in terms of both the material(s) to which they apply and the scope of the permitted use(s). For example, some clearances pertain to the ongoing management of a collection, while other are project-specific, such as a permission for a photograph to be used in an exhibition.

Because cultural clearances are not legally required, there is no prescriptive form or wording that is necessary (unless it is intended to create *legally binding obligations*, as discussed later). Furthermore, it may be appropriate for verbal permissions to be accepted: if a signed consent form cannot be obtained, then, at the very least, a file note should be retained setting out the date permission was given, for what, and by whom. Having recourse to such written evidence is useful if there is later a complaint in relation to the use of cultural content, as it demonstrates actual efforts that were made. It may also be appropriate to send a letter to the person who provided the consent repeating the content of the discussions.

In consulting with an Indigenous person in relation to a possible cultural consent, the key aim is to ensure that the person understands what material the consent relates to, and the use or uses that are proposed. Because consents will commonly be given by individuals rather than established organisations, you have an obligation to fully explain what the person is agreeing to. Preferably, this should take place face-to-face, or over the telephone. In some cases, it may be necessary for a translator to assist in this process. Allow plenty of time for a clearance to be obtained: a *minimum* of one month may be appropriate for a single consent. This timeframe may be considerably longer if this is your first contact with a particular family or community, the person lives in a remote location, or the agreement of multiple people is required.

Table 6.1: A possible process for obtaining cultural clearances

Stage	Process and comments
<p>1. Commence planning for the proposed project, including consultation with Indigenous people.</p>	<p><u>Internal projects</u>: Consultation is an important part of the planning and execution of projects that either relate to Indigenous experiences or knowledge, or incorporate Indigenous cultural materials. The level of consultation and the people to consult with will depend on the nature of the project, whether specific Indigenous people or communities are referred to, the type of cultural information being used, the sensitivity of that information, and so on. This consultation may be ongoing throughout the project, with an opportunity for suggestions and feedback from Indigenous people to be incorporated into the project.</p> <p><u>External requests</u>: When dealing with a request from an external person to be provided with access to a collection and/or to be supplied with reproductions of collection items, it may be appropriate to enquire about:</p> <ul style="list-style-type: none"> <li>• the reason why access is required;</li> <li>• the type of items to be consulted (eg, sound recordings from an open collection, or records containing sensitive or private information);</li> <li>• the uses that are proposed to be made of copy documentation (eg, private research by an Indigenous person in relation to their genealogy, or inclusion of footage in a broadcast or documentary); and</li> <li>• the extent to which the requestor has consulted with Indigenous people or referred to Indigenous resources in developing their project.</li> </ul> <p>It may be reasonable to refuse a request if it seems that a person has not undertaken an appropriate level of Indigenous consultation or engagement.</p> <p><i>Example: A person is writing a local history for an area, and requests copies of photographs of Indigenous people living at the mission for research purposes. The person has not spoken with any people who lived at the mission or their descendants. It may be appropriate to require that these discussions take place prior to providing copies.</i></p>
<p>2. Identify any Indigenous cultural materials that are to be included in the project output (exhibition, website, publication).</p>	<p>Cultural clearances have varying degrees of specificity, in terms of both the material(s) to which they apply and the scope of the permitted use(s). It is important to assemble an appropriate level of detail in relation to the proposed material and uses.</p>
<p>3. Assess whether material is identified or unidentified.</p>	<p><u>Identified material</u> is that for which any:</p> <ul style="list-style-type: none"> <li>• Indigenous creator;</li> <li>• Indigenous subjects;</li> <li>• community of origin; or</li> <li>• location of creation or collection,</li> </ul> <p>are known or readily ascertainable.</p> <p><u>Unidentified material</u> refers to material where the creator, subjects and origins are anonymous or not specified.</p> <p>There may be clues or ancillary evidence that can help you identify the material. For example, is the general origin known? Could material be inspected or auditioned by Indigenous people, who might know the subjects or origins of the material? If the donor or lender is contactable: can they provide any further information that can help identify the material?</p>

<p>4. Commence discussions with relevant Indigenous owners (identified material) or Indigenous representatives (unidentified material) in relation to the proposed uses of Indigenous cultural materials.</p>	<p>Where Indigenous cultural material is <u>identified</u>, consultation may occur with:</p> <ul style="list-style-type: none"> <li>• a subject, creator or interviewee;</li> <li>• a family member or descendent of one of these people;</li> <li>• an elder or other senior member of a community or clan; and/or</li> <li>• an individual from an Indigenous representative body.</li> </ul> <p>It may be necessary to obtain a clearance from more than one person. It is advisable to ask whether the person you have contacted is in a position to provide the relevant consent, and whether there are other people that you should speak with as well as, or instead of, that person.</p> <p>Where possible, initial contact should be made in person or over the telephone. If this is not possible, write and request an opportunity to speak with the individual(s).</p> <hr/> <p>Where material is <u>unidentified</u>, consultation may occur with relevant Indigenous representatives. This may include:</p> <ul style="list-style-type: none"> <li>• Indigenous staff of the institution;</li> <li>• an Indigenous advisory board or committee set up by the institution; and/or</li> <li>• Indigenous peak bodies, such as land councils and local keeping places.</li> </ul> <p>Document this analysis on the institution's internal files.</p> <p>Where material is made available to the public, include appropriate warnings that some material has not been able to be identified, and may possibly contain content or images that some people may find offensive.</p> <p>Have a procedure for people to notify the institution about the identification of material (including any inappropriate use of content), including how those notifications will be analysed and dealt with (eg, verifying notifications; taking down offensive content from the Internet).</p>
<p>5. Assess whether consent is required as a matter of law and/or ethical practice.</p> <p>If consent is legally required, make sure that the form and documentation of the consent complies with any necessary legal formalities.</p>	<p>In some cases, consent is <u>legally required</u> from Indigenous people. Examples:</p> <ul style="list-style-type: none"> <li>• consent is required under cultural heritage legislation (see Chapter 3);</li> <li>• information constitutes 'confidential information' because of its secret character <u>and</u> it appears to have been confided or obtained in circumstances that suggest its confidentiality must be maintained (see Chapter 4);</li> <li>• the institution knows that Indigenous confiders placed restrictions on the use of confidential information, and the proposed use is outside acts that were permitted (see Chapter 4);</li> <li>• there is an express contractual obligation on the cultural institution by the Indigenous confiders to obtain consent to use information or material (see Chapter 4);</li> <li>• consent is required under privacy principles contained in privacy legislation (see Chapter 4); or</li> <li>• copyright, moral rights, or performers' rights are held by Indigenous people: see Chapter 5.</li> </ul>

	<p>In some cases, <u>consent</u> is sought as part of <u>ethical practice</u>, independently of any legal requirement. Examples:</p> <ul style="list-style-type: none"> <li>• material is secret or sacred, or contains sensitive information;</li> <li>• material includes the name, voice or image of someone who is recently deceased;</li> <li>• material was created or collected without the informed consent of Indigenous people; or</li> <li>• material contains identifiable Indigenous people or communities, or describes or depicts Indigenous sites, beliefs, stories or art.</li> </ul> <p>Specific consent may not be required as part of ethical practice where:</p> <ul style="list-style-type: none"> <li>• material contains general information about Indigenous people or experiences;</li> <li>• Indigenous content is tangential to the key informational content of a work; or</li> <li>• Indigenous people participated in or authorised the general public disclosure of the work.</li> </ul>
6. Obtain the permission.	<p>There is no prescriptive form or wording that is necessary for a cultural clearance.</p> <p>It may be necessary to allow some flexibility in allowing verbal consents. If so:</p> <ul style="list-style-type: none"> <li>• make a written file note of the date of permission, who gave it, and for what materials and uses; and/or</li> <li>• send a letter confirming the content of the permission.</li> </ul> <p>Documentation should be drafted in plain language, set out the full content of the permission, and include contact details of staff at the institution in case further discussion is required. Any limitations or special requirements in relation to use or attribution should be noted.</p> <p>It is respectful to offer some tangible benefit for giving the clearance. This may be a free copy of the research output, a monetary payment, and so on.</p>
7. Add the permission to a register of cultural clearances.	<p>As with other permissions, the ongoing management of the collection will benefit from have an internal database or register of cultural clearances. Make sure you comply with any relevant privacy legislation in compiling this: see Chapter 4.</p>

In terms of the content of the discussion and any documentation, for a project-specific consent, this should include:

- identification of the person or people who provided consent and (where appropriate) the community or body that they represent;
- the date consent was given;
- a description of the material or information about which the consent relates;
- specification of the use(s) that have been

consented to, as well as any special restrictions or cultural sensitivities that should be observed in making those use(s);

- any preferences in relation to how Indigenous contributions or communities are referred to; and
- contact details of staff at the cultural institution.

Finally, one of the ongoing issues in research with Indigenous people has been the absence of any

tangible benefits flowing *to the research subjects or communities* from participation. It is respectful for Indigenous contributors to be given some sort of benefit: this could range from a copy of a research output (eg, a book) through to a share of income generated from commercialisation of a product.

### *Clearances and third parties*

The need for cultural clearances does not just apply to institutions' own use of Indigenous collection items. Where access to Indigenous material is sought by someone other than the community to whom material relates, it may be necessary to obtain clearances (or require that they be obtained) prior to that material being released. Some cultural institutions obtain cultural clearances on behalf of third parties (such as researchers or publishers), or only provide copies of documents if the third party can demonstrate that a clearance has been obtained. Where material is being provided to an external user, it may be wise to reiterate, in any documentation or correspondence between the institution and the user, that the material is being provided on the understanding that it will be only used for the purpose(s) specified in the cultural clearance.

## Agreements for collection management

### *Generally*

This final section considers the use *formalised arrangements* between cultural institutions and Indigenous people in relation to collection management. Such agreements might:

- give specified Indigenous people the ability to veto certain uses of certain collection items;
- require the institution to consult with specified Indigenous people in relation to collection management, use or deaccessioning;
- identify that certain material is considered restricted, sensitive or offensive, and set out requirements for dealing with that material;
- transfer possession of items to a keeping place or local institution by short or long-term loan; and/or
- develop a partnership between a major

collecting institution and local knowledge centre, for instance in the creation of a digital archive.

For an example of an institution that has developed special procedures for the acquisition and use of cultural materials (in this case, moving image materials with Maori content), see the text box on the New Zealand Film Archive.

### *Legally binding obligations?*

Depending on how documentation is drafted, it can create legally binding obligations between the parties. Binding obligations can arise in a number of ways; relevantly, these include:

- *Contract*. Under traditional rules, there are certain requirements that must be satisfied in order for a contract to arise: offer and acceptance; consideration (an exchange or *quid pro quo* between the parties); intention to create legal relations; and certainty (ie, the offer must set out the terms of the proposed contract in a manner that is sufficiently clear and complete).<sup>20</sup>
- *Deed*. A deed is a written agreement that uses particular wording and is signed using a special execution clause. A deed does not require consideration, and therefore can produce binding obligations where no contract would arise.
- *Estoppel*. Statements or promises made in the course of negotiations may also be enforceable under the doctrine of estoppel. That doctrine provides that where one person makes a representation, and the recipient relies on that representation to his or her detriment, the first party cannot withdraw from his or her representation if to do so would be 'unconscionable' (ie, unfair or unreasonable).<sup>21</sup>

If it is intended that documentation produce legally-binding obligations, it is advisable that a lawyer assist in the drafting process. One key initial matter is identifying the parties to the contract. For example, a contract cannot be made with the 'X family' or the 'Y community', but only with specific individuals or organisations (although these people could always represent the interests of other people). What happens if individuals die, or an organisation is dissolved or changes its legal identity?

## Case Study: The New Zealand Film Archive

The New Zealand Film Archive, Nga Kaitiaki O Nga Taonga Whitiāhua, has special procedures for the deposit of moving image materials with Maori content.

The process of developing these procedures, including creation of the Taonga Maori Deposit Agreement, is described by Barry Barclay in his book, *Mana Tuturu: Maori Treasures and Intellectual Property Rights*.<sup>17</sup>

The Archive accepts material on 'deposit': property in the physical object is retained by the depositor. (Legally, the deposit agreement would appear to be a bailment of unspecified duration: for a critique of long-term loans, see Chapter 2.) Deposit is documented by either the General Deposit Agreement or, for material with significant Maori content, the Taonga Maori Deposit Agreement. The Taonga Maori Deposit Agreement is available at the Archive's website,<sup>18</sup> as well as being reproduced in Barclay's book. Its key provisions are:

- *Acknowledgement of Maori content.* The Archive and depositor both acknowledge that the deposited materials have 'significant Maori content', and agree that they will be held by the Archive under the 'mana tuturu' principle: clause 5. The mana tuturu principle means 'Maori spiritual guardianship': clause 6.
- *Exercise of guardianship.* The guardianship is exercised by the 'kaitiaki (guardians) named in [an appendix to the document] and by their descendents, in perpetuity': clause 7. Barclay describes some debate as to whether guardianship should be exercised by named kaitiaki, or the descendents of the people filmed.<sup>19</sup>
- *Conflict management.* It is not intended that mana tuturu protection prejudice the rights of the copyright owner: clause 8. If there is a conflict between the Archive, depositor, copyright owner or kaitiaki, the Archive will 'actively promote discussion between the parties to the dispute in order to resolve the dispute': clause 9.
- *Return of materials.* If the Archive becomes unable to manage the materials under the mana tuturu principle, the materials shall be returned to the Depositor or, if that person cannot be located or has died, the kaitiaki named in the agreement, or their descendents: clause 10.
- *Preservation permitted.* The Archive is allowed to make copies of the deposited materials for preservation purposes, so long as those copies are used in a manner consistent with the deposit agreement: clause 11.
- *Conditions on access permissible.* The depositor may place conditions or restrictions on the access to the materials, having regard to the mana tuturu principle: clause 12.



Furthermore, the doctrine of privity of contract means that, in general, only those who are parties to the contract can bring an action under it. It may therefore be wise to think about whether the *parties* to the contract are representative of those with interests in the collection item. If they are not, should an agreement be entered into (as opposed to non-binding consultation), or should terms be limited to reflect this?

Another key consideration is the consequences if any terms are breached. Under basic principles of contract law, three main remedies are available if someone breaches a contract: orders that they pay monetary compensation (damages); orders that they refrain from conduct that constitutes a breach of contract (injunction); and orders that they perform the contract (specific performance). In general, injunction and specific performance will only be ordered where damages are an inadequate remedy. Breach by one party may also entitle the other party to terminate the contract.<sup>22</sup> This entitlement may arise because the contract expressly confers a right to terminate, or because the termination is permitted as a matter of law.<sup>23</sup>

Given the time and expense in resolving a contractual dispute (particularly if court proceedings are involved), it may be wise to consider an alternative dispute resolution process if there is disagreement about whether the contract has been complied with. For example, a contract might provide that if discussions between the parties fail to resolve a dispute, the parties will use a mediation service (for an example, see the service run by the Arts Law Centre of Australia<sup>24</sup>).

Other issues to consider when drafting a legally-binding agreement might include:

- the duration of the obligations (for example, it may be useful to specify the term of the agreement, and renegotiate or review the agreement at that stage);
- whether the institution will be liable for unauthorised third party use (for instance, where a reproduction supplied for one purpose is used, without permission, for another);
- whether the agreement can be terminated; and
- whether the agreement conflicts with other legal rights that subsist in the collection, for example, because the relevant material is on loan, subject to a

legally-enforceable condition by the donor, or protected by copyright. For example, the ability of an institution to supply digital copies of a series of photographs to a community will depend on whether those items are protected by copyright, and who owns that copyright.

Some of the issues that arise in using a *legally-binding* agreement are similar to those for conditional gifts: see Chapter 3. For example, obligations owed to one set of stakeholders may impair the ability of the institution to respond to the legitimate needs and interests of others. Furthermore, problems can arise where long-term agreements are used, but in the interim there are changes in cultural needs, classification of information, or technology. It is important to give thorough consideration of these issues *at the outset*. The answers will guide whether or not a legally binding agreement is used and, if so, how its terms will be framed. If it is not intended that discussions produce legally-binding obligations, then it might be wise to expressly state this in any written documentation that records them.

## Endnotes

1 Alex Byrne, Alana Garwood, Heather Moorcroft and Alan Barnes, 'Aboriginal and Torres Strait Islander protocols for libraries, archives and information services', endorsed at the Aboriginal and Torres Strait Islander Library and Information Resource Network (ATSILIRN) Conferences, December 1994 and September 1995; available at [http://www.alia.org.au/policies/atsi\\_protocols.html](http://www.alia.org.au/policies/atsi_protocols.html) ('ATSILIRN Protocols').

2 Janey Dolan, *Continuous Cultures, Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage* (Museums Australia, 2005): <http://www.museumsofaustralia.org.au>.

3 Martin Nakata and Marcia Langton, introduction to Martin Nakata and Marcia Langton (eds), *Australian Indigenous Knowledge and Libraries* (2005), 5.

4 Merata Mita, 'The Preserved Image Speaks Out: Objectification and Reification of Living Images in Archiving and Preservation', referred to in Barry Barclay, *Mana Tuturu: Maori Treasures and Intellectual Property Rights* (2005), 104.

5 Terri Janke, *Writing Cultures: Protocols for Producing Indigenous Australian Literature* (Australia Council, 2002), 13.

6 ATSILIRN Protocols, above n 1, protocol 5 ('Secret or sacred materials').

7 Barrina South, 'Indigenous protocols and working with Indigenous communities', paper for Outside In: Activating Audiences and Community Support, 12-13 September 2003, available at <http://www.mgns.org.au/files/resources/IndigenousProtocols.pdf>.

8 This follows the approach of South, *ibid*. This material might also be referred to as 'private'.

9 *Ibid*.

10 Eg, ATSILRN Protocols, above n 1, protocol 6 ('Offensive materials').

11 Some other examples are in Janke, above n 5, 9.

12 Black Book Directory: <http://www.blackbook.afc.gov.au/directory.asp>.

13 See ATSILRN Protocols, above n 1, protocol 1 ('Content and perspective').

14 *Ibid*, protocol 3 ('Accessibility and use').

15 *Ibid*, protocol 4 ('Description and classification of materials').

16 Ann Baillie, *Taking the Time: museums and galleries, cultural protocols and communities: A Resource Guide* (Museums Australia (Qld), 1998), 5.

17 Barry Barclay, *Mana Tūturū: Maori Treasures and Intellectual Property Rights* (2005).

18 See <http://www.filmarchive.org.nz/services/acquisition.html>.

19 Barclay, above n 17, 115-119.

20 Discussed in N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8th Australian Edition, 2002), [3.2]. There has been criticism that the traditional rules often do not accord with the realities of contract formation. These criticisms, as well as alternative approaches to looking at formation, are discussed at [3.5] to [3.9].

21 See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394.

22 Seddon and Ellinghaus, above n 20, [21.1]-[21.34].

23 A right to terminate is conferred by law where one party: repudiates the contract; breaches an essential term; or breaches the contract in a way that deprives the other party of the 'substantial benefit' of the contract: *ibid* [1.120].

24 See <http://www.artslaw.com.au/LegalServices/MediationService.asp>.

# Case Study: Law and Databases

## Introduction

Copyright issues arising in cultural institutions were described at a general level in Chapter 5 of this Primer. This case study takes those general principles further, considering their application to the creation of databases and multimedia products.

This discussion is important because the last few years have seen the increased development of electronic databases of Indigenous cultural materials by cultural institutions and Indigenous knowledge centres. Many of these databases are interactive, in the sense that users can also *create* additional content - either by incorporating new material, or annotating existing material, for example by writing some text describing the people and events depicted in a photograph. Such databases can have considerable value in recording family, local and cultural histories and memories in an accessible way.

The aim of this case study is to give cultural institutions some guidance on the many copyright issues that arise when a database is created. It discusses a series of questions, including: what permissions are needed in order to include materials in the database? What rights should be requested? In what circumstances will conduct by third parties infringe copyright in the database or its component parts? And what measures can they take to avoid infringement?

## What is a database? What is a multimedia work?

Before turning to questions of rights and permissions,

it is important to be clear what we are talking about. There are two kinds of subject matter that are important, although they overlap to a significant extent.

A **database** is a compilation of information, organised in a way that promotes ready retrieval and use of that information, whether by electronic or other means.<sup>1</sup> The items in a database may be almost any kind of copyright material: print-based works, photographs, artistic works, sound recordings, and moving image. Examples of databases generated by cultural institutions include PictureAustralia (hosted by the National Library of Australia), MusicAustralia (hosted by the NLA and the National Film and Sound Archive) and PANDORA (again, hosted by the NLA).

**Multimedia products** are compilations of two or more types of subject matter (eg text, animation, audio, data, photographs) in digital form, where the material is presented in a non-linear, interactive format.<sup>2</sup> For example, a cultural institution might create a digital display to accompany an exhibition, allowing users to click on pictures and receive more information, or listen to a short audio recording.

Thus, there is some overlap between databases and multimedia. Importantly for this Primer, both databases and multimedia works raise copyright issues at two levels. First, there are issues when a database or multimedia product is created: incorporation of existing material requires the right permissions, and permission and ownership issues arise when user contributions are included. Second, there are issues relating to the relationship between the compiler and the 'world at large' - specifically, what copyright exists in the database or multimedia product once compiled, and how may it be enforced? These two levels are dealt with in turn.

## Copyright issues when material is incorporated

### *The need for permission*

Creating a database or multimedia product involves collating a variety of items. Some may be protected by copyright: for example, journal articles, manuscripts, letters, photographs, sound and video clips, maps and drawings. Others will not be protected, for example facts, such as those in a telephone directory, or works in the 'public domain'.<sup>3</sup> Creating the database inevitably involves the exercise of copyright rights (discussed in Chapter 5), and so requires procedures for copyright compliance to avoid infringement. The issues are not unique, but the sheer number of works can make tracking down owners and negotiating consents very time-consuming.<sup>4</sup>

At a general level, the compiler has two options for avoiding copyright infringement:

1. consent-based: obtaining a licence or assignment from the copyright owner; or
2. exception-based: relying on a statutory exception in the *Copyright Act* that permits an act to be performed without seeking a permission of the copyright owner either for free or with payment of a fee.

Current exceptions are, however, of negligible relevance, although changes foreshadowed to the *Copyright Act* may change this position: see the discussion on copyright exceptions in Chapter 5, as well as the text box on the proposed flexible dealing exception.

### *Managing consents in constructing a database*

Creating a database or multimedia product which incorporates copyright material using a consent-based approach requires a series of decisions to be made by the compiler:

1. *Selection.* First, the compiler must identify which material is protected by copyright, and identify and locate the owner(s) of that copyright. If it is impossible to identify the owner or track them down, then a decision needs to be made whether to exclude the material, or include it pursuant to a risk management strategy.
2. *Type of transaction.* A decision needs to be

made whether an assignment or licence will be used. An assignment transfers ownership of copyright to the compiler, while a licence grants permission to the compiler to perform an act that would otherwise infringe copyright.

3. *Negotiation of terms.* The terms of the assignment or license must be negotiated.
4. *Moral rights.* Separate to the steps above, issues of moral rights and obtaining consents for actions that might implicate moral rights must be considered.
5. *Cultural consents.* The need for consultation and cultural consents must also be considered where Indigenous cultural materials are included in a database: see Chapter 6. This may also implicate technological issues: for example, if restricted knowledge is to be included on a database, how will it be separated from other content? What warnings will be given to users in relation to content that might be sensitive of distressing? The development of software targeted specifically to Indigenous digital archives is addressing many of these issues.<sup>5</sup>

Ideally, rights management should be considered at the outset of a project for the creation of a database or multimedia product: it is easier to manage such issues at the start, before significant investments are made, and while the structure of the database is still negotiable.

### *Identifying copyright material and owners*

In terms of ownership, the simplest case arises where a compiler has material created *especially for* the database or multimedia product.

If material is created by the compiler or their employees, then the compiler may own copyright in the work in his or her capacity as author of the work, or as employer of the author. However, if the work is created by an independent contractor, user or volunteer, the compiler will need to obtain a copyright licence or assignment to include the work in the compilation.

More complicated issues face a compiler who proposes to use *pre-existing copyright works*. The process here involves a number of steps:

- *Identifying whether copyright subsists in the items.* Copyright does not subsist in

## Copyright and existing databases/ multimedia products

The best time to deal with rights management is before a database product is created. However, if a database or multimedia product has already been created, but without proper attention to rights management, all may not be lost, as the compiler may have the benefit of implied licences with copyright owners.

An implied licence arises where a licence is necessary for the reasonable operation of a transaction, given all the circumstances – but was not expressly agreed to by the parties. For example, if a person submits a letter to a newspaper with a view to publication, there will be an implied licence for the newspaper to publish that letter.<sup>6</sup>

There may be circumstances in which the creator of a database or multimedia product has an implied licence to reproduce material on that product, and to distribute that product (electronically or otherwise). One obvious example is where material has been created for inclusion in the database. The following statements of principle are helpful where questions about implied licenses arise:<sup>7</sup>

1. If the relationship between the copyright owner and compiler is governed by a contract or licence, the terms of the permission given by the copyright owner will define the scope of the compiler's rights.
2. Terms may be implied as a matter of fact (implication based on the presumed intentions of the parties) or law (implication based on the legal status of a transaction). Where terms are implied as a matter of fact, the overriding principle is that the term must be necessary for the reasonable or effective operation of the contract in all the circumstances.<sup>8</sup>
3. The court will then look to the purpose of the transaction and the express terms of any agreement between the parties. Where a copyright work is brought into existence for a particular purpose, 'the permission impliedly given is to use the [work] for the purpose for which they were brought into existence'.<sup>9</sup> For example, if a user-contributor writes an annotation for a photograph on a database, there may be an implied permission for the compiler to reproduce that annotation for inclusion on the database, and to publish the database with the annotation so included.
4. Disagreements may arise in determining the scope of an implied consent. In the example given above, does an implied consent to 'publish' refer to publication in another medium (eg, online publication of a database previously available on disk or CD) or form (eg, publication of a book which includes the photograph and the user's annotation)?<sup>10</sup> And is there an implied consent for the user's contribution to be modified by another user-contributor?

The uncertainties inherent in paragraph 4 demonstrate why it is strongly preferable to rely on express permissions rather than implied terms.



## Orphan works and risk management

In some instances, it is impossible to locate the owner of copyright in a work – either because the creator or copyright owner is unknown, or because he or she is impossible to track down. These items are commonly referred to as ‘**orphan works**’. Cultural institutions frequently report that copyright law makes it extremely difficult to deal with orphan works.

There is no general exception in the *Copyright Act* permitting the reproduction or communication of an orphan work following ‘reasonable efforts’ to locate the copyright owner. In some cases, reproduction is permitted under a copyright exception such as fair dealing or the libraries and archives provisions. However, these provisions only apply in limited circumstances, and do not typically apply to public uses, such as a community database of Indigenous cultural materials.

In these circumstances, a compiler has two broad options: do not use the orphaned material, or use it following a risk management assessment. If a risk management approach is used, relevant questions may include:<sup>11</sup>

- What steps must be undertaken to identify the copyright owner? What steps must be undertaken to contact that person (if known)?
- If (despite these efforts) the owner cannot be identified or located: are there circumstances in which the work will nevertheless be reproduced, published or communicated? The nature of the work and the nature of the proposed use will be relevant. For example, a compiler may be comfortable in including snapshots of Indigenous families in a community digital archive where the consent of the family has been obtained, even though the photographer cannot be identified. In contrast, if photographs have been taken by a professional photographer, and appear to have been a source of remuneration, a different conclusion might result.
- Is there alternative material available for which copyright is easier to deal with?
- Have strategies been developed for dealing with any claims that might arise? Is it likely that they can be resolved? For example, a database used primarily within Indigenous communities may generate less concern for a copyright owner than a commercial CD-ROM that is a source of profit for a private organisation.
- Can a ‘disclaimer’ be used: a statement that while all reasonable efforts have been made to identify and locate the copyright owner(s), any person who believes they are the copyright owner of material is invited to contact the compiler. This does not absolve the compiler of liability in copyright law; but shows some good faith to deal with any copyright disputes.



individual facts, or in material where the term of copyright has expired.

- *Identifying the copyright owners where copyright subsists.* This involves applying the principles discussed in Chapter 5. This process may be further complicated if the original owner of copyright has assigned, or granted exclusive licenses for, particular rights in a work: in this case, identifying the correct rights holder can itself be extremely complicated.
- *Tracking down the copyright owners and negotiating the terms.* This involves finding the copyright owners, explaining the nature of the project, and then negotiating terms sufficient to allow the project to go ahead. Some copyright owners are represented by collecting societies such as Viscopy and Copyright Agency Limited (CAL).

Each of these steps can involve considerable practical challenges. Adequate time must be allowed for rights management and decision-making.

It is worth noting, too, that record-keeping at the early stages of development (creating another database of ownership and contact details) can save considerable trouble if renegotiation is required.

## Assignment or licence?

The difference between licences and assignments has been explained in Chapter 5: a license is a permission to perform acts normally allowed only when done by the copyright owner. Licenses may be exclusive or non-exclusive, express or implied. An assignment effectively transfers ownership of copyright, or some part of the copyright.

An initial decision for a compiler of a database or multimedia product is whether to rely on copyright licences, assignments, or a mixture of the two. Some of the considerations are summarised in Table 7.1 below.

The choice ultimately rests on such factors as:

- the nature of the copyright work: rights to control use and receive a revenue stream may be more important for a professional artist than a volunteer who writes some background material for a series of photographs;
- the nature of the compilation: if widespread commercial exploitation a possibility in the future, then assignments or exclusive licenses may be more important;
- the views and interests of the creator, particularly their need for control; and

Table 7.1: Comparison of assignments and licenses when compiling a database or multimedia work

	Advantages	Disadvantages
<b>Assignment</b>	<ul style="list-style-type: none"> <li>• Compiler, as assignee, becomes owner and can freely exercise rights.</li> <li>• In the event of later changes in the use of the product, compiler has flexibility and need not renegotiate.</li> <li>• Compiler can enforce against a third party who infringes only part of the product.</li> </ul>	<ul style="list-style-type: none"> <li>• Copyright owner must hand over control, which they may be reluctant to do.</li> <li>• Copyright owner may lose rights to future income streams from expanded use of database, or <i>other</i> uses independent of the compiler - this may be unfair or inappropriate.</li> </ul>
<b>License</b>	<ul style="list-style-type: none"> <li>• Can provide compiler with the rights they need without depriving copyright owner of future opportunities to exploit their work.</li> <li>• May be less expensive than a full assignment.</li> </ul>	<ul style="list-style-type: none"> <li>• Terms of the licence may make it difficult to change the use of the product without renegotiating rights.</li> <li>• Significant difficulties may arise if the copyright owner is later impossible to locate: the 'orphan works' problem.</li> </ul>

- whether the material was pre-existing, or was created for the database: in the latter case, seeking an assignment may be more reasonable given the limited potential for other uses.

In many instances, a non-exclusive licence will be more than sufficient to grant the compiler the rights he or she needs.

### *Negotiating license terms*

Constructing a licence involves two steps.

The first is to **identify the purpose and ambit of the database or multimedia project**. On this point, a **long term-view** should be taken: it is important to consider possible future uses of the database or multimedia product being created. Difficulties arise when rights are negotiated for one purpose, only to be renegotiated when the ambit of the project changes. For example, if rights are granted for distribution of a product on CD ROM, then the compiler may be unable to rely on that licence for another delivery platform - even if similar in its nature and use. A number of factors need to be considered:

- Is the project **commercial or non-commercial**: that is, are there plans to commercialise the database, or could it be foreseen that that might be desirable in the future?
- What is the **proposed duration** of the project: is it a one-off multimedia presentation for a single exhibition, or is the aim to construct a database which will continue to be built over a long period of time?
- What is the **proposed geographical extent** of the project: is use to be confined to a particular community, or will it be made available on the Internet? Note that it may be better to be more, rather than less, sanguine about possible future use, since new uses are often found for information once it is created.
- Who are the **envisaged users** of the product: is the database for community use only, or more generally by the public? Will commercial use be allowed?
- What **uses** will be allowed of the product: will the product be 'view only', or will users be able to print out material, or to obtain digital copies which might be further distributed, or placed by users on websites? What obligations will lie on the compiler to enforce any restrictions imposed?

What **delivery platforms** are envisaged or likely? Will the product be available only in hard copy, or only in one place - or will a platform such as the Internet be used, raising questions of broad public distribution. Will the license allow the compiler to migrate material to a new digital format, should existing technology be superseded or become obsolete?

Particularly in relation to **Indigenous cultural materials**: will different levels of 'accessibility' be required, so that rules regarding accessibility of sensitive or secret/ sacred material may be observed?

The second step is to **identify, in light of these considerations, the rights that will be required in order to give effect to that purpose, and the necessary duration of those rights**. At a minimum, an express license should include: details of the parties to the licence; a description of the work being licensed; the date the license was made; the rights granted by the licensor; the territory and term of the licence; and any payment to be made by the licensee to the licensor. However, there are many other terms that could be included, such as termination clauses, limits on assignment and sub-licensing, governing law clauses, and so forth.

Any producer of a database or multimedia project is going to need certain basic rights of **reproduction** (to make copies). This right may be limited to reproduction for certain purposes.<sup>12</sup> If it is anticipated that the product will be distributed to other institutions or individuals (whether by sale or otherwise), wider publication rights will be required. Again, limits might be placed on the number of copies of a product that can be made, the territory of distribution, and so forth. If online publication is anticipated, this should be specifically stated, and the compiler should ensure that the copyright owner gives worldwide rights (and is able to do so).

Further questions relate to the compiler's ability to make (or authorise the making of) adaptations or alterations to the licensed material. Some licence agreements may forbid any such alterations without the express consent of the copyright owner.<sup>13</sup> Others may permit modification as long as certain conditions are complied with. Obtaining consent to alter works, or to authorise third parties to make such alterations, is crucial where it is planned that users can themselves generate or amend content on the database. Without consent, such activities may infringe reproduction or adaptation rights, and may also infringe moral rights.

The natural impulse of some compilers may be to obtain a broadly worded grant of rights. However the advantages of a broad grant must be balanced against the interests of the copyright owner in retaining control over the work,<sup>14</sup> and the higher licence fees that might be requested for each additional right. Thus, a broad licence may not only be unnecessary for completion of a project, but may also prevent the copyright owner from renegotiating with the compiler if the project becomes commercially successful.<sup>15</sup> Similarly, while copyright owners may feel comfortable agreeing to unremunerated licences for non-commercial uses of their works, it may be unreasonable to expect similar consents for commercial uses. Obviously, these issues will vary depending on the nature of the copyright owner, work and project. As note above, a user-contributor who writes an annotation for a photograph in a database will have different interests and needs from a full-time author or artist. Similarly, some creators may be willing to forgo licence fees if the profits from a commercial venture are directed towards a charitable purpose (such as maintaining a knowledge centre).

### *User-generated additions to, and alterations of databases*

Particular issues arise where a database is going to be **organic**: that is, where users will contribute to the content of the database. Where a database is designed to act as a tool for building a record of family, local and cultural histories, it may be highly desirable to allow users to annotate and add to that database.

Managing 'organic' databases requires negotiation of some interesting copyright issues. For example, where user contributions are substantial enough to *themselves* be protected by copyright, the question of what rights will be sought from users arises. In addition, issues may arise regarding the effect on owners of *other* material in the database, depending on what users are doing. The exclusive rights of copyright in literary, dramatic, musical and artistic works prevent the distribution of altered versions of those works,<sup>16</sup> which may have implications where users are going to be allowed to alter that material:

- if users are simply **adding new material or annotations** (eg, descriptions of photos), then this is unlikely to involve 'transformation' in a way that implicates copyright owners' rights (although moral

rights may arise); however,

- if users are actively transforming or editing existing material, copyright owners may legitimately object unless they have given permission.

These issues can be handled through ordinary licensing and assignment principles. A compiler could for example, obtain **assignments** of copyright from user/contributors, taking care of the first of these issues. The compiler would also need permission from any owners of material incorporated into the database allowing permission for the envisaged forms of alteration or transformation.

An **alternative** is to use an open content licensing system, such as Creative Commons.<sup>17</sup> Open content licenses are designed for use by creators who wish to allow, or even promote, other people to distribute or transform their works. They do so by providing an integrated technical and legal system for creators to communicate permissions. That is, instead of drafting or negotiating copyright licences with individual users, a copyright owner can alert users to permitted and non-permitted uses of the work using a pre-existing, open content licence. Open licences have been adopted, in particular, in the context of joint or collaborative production of content. For example, the online encyclopaedia 'Wikipedia'<sup>18</sup> uses the 'GNU Free Documentation Licence', which has some similarities with the Creative Commons licenses. Users of Wikipedia are free to copy, modify and redistribute content so long as the same freedoms are granted to others, and an acknowledgement is given to the authors of the original Wikipedia article.<sup>19</sup>

Several licenses along these lines have already been drafted and made generally available. For example, Creative Commons provides a series of license terms on an (almost) mix and match style: individual creators can attach these to their work, allowing others to (say) make any non-commercial use of their work, and/or to transform their work, provided they allow others the same freedoms. As an alternative, a compiler could use these licenses as a starting point, but then add or change terms not suitable for their particular circumstances: as the BBC recently did in its Creative Archive project.

Thus a compiler of a database or multimedia product which is intended to be 'organic' has three (broad) options:

- obtain assignments of copyright from user-contributors and permission from

owners of existing material sufficient to allow the contributions;

adopt an existing open content system, and making it a requirement of all contributions that they are licensed under some existing license, or

create their own licensing system (possibly using an open content model, depending on how new content is to be re-used).

Some of the considerations relevant to each option are summarised in Table 7.2. In the end, however, whether an existing system like Creative Commons,

## Considerations in user-generated databases dealing with Indigenous cultural materials

It is easy to understand why user-generated or 'organic' databases are attractive for collecting and recording Indigenous histories, culture and knowledge. Recording older peoples' memories of events and people while we still can is important. Where individuals are remote, face-to-face meetings to convey knowledge and information can be difficult. As technologies for allowing simpler and more user-friendly editing interfaces develop, it is not surprising that people should see the potential and want to use it.

Organic databases raise copyright issues, dealt with in this chapter, but also a host of other issues, both legal and ethical.

From a legal point of view, issues of **information ownership** dealt with in Chapter 4 must be considered. Where users can contribute content directly into a database, there is always a risk that they will record personal information, or confidential information, in ways that may offend or harm the person to whom that information relates. Wherever personal information is allowed to be recorded by users, questions as to how the database or product will be kept accurate, and the information protected from inappropriate use, will arise.

From an ethical point of view, a significant risk of such databases is that information will be made available in ways that are contrary to Indigenous laws. As noted earlier, specific software for Indigenous databases has been developed: this software can be used to store material in a way that reflects Indigenous rules and customs.

These issues, both legal and ethical, do not admit of simple answers. But they suggest two things. First, that it cannot be assumed that the new database and technological tools are an unqualified good, just because they seem to provide wonderful tools for gathering information. They are potential tools but should be implemented in a legally and culturally sensitive way. The early default of such tools for user-based content generation – used in large Internet projects like Wikipedia, the online encyclopaedia – has been towards openness and accessibility according to largely American free speech values. They may require adjustment in different cultural conditions.

Second, to respond to the ethical issues involved, community involvement and cultural consents will be a necessary part of the development Indigenous databases.



or a custom-built option along open content lines, will depend significantly on the ambit of the project and the types of uses to be made of copyright materials.

### *Issues of moral rights and consents*

The moral rights have been described in Chapter 5. Not all uses of copyright material in a database will implicate moral rights: but there is significant potential for infringement, where, for example:

- material is included with no or inadequate attribution;
- an artistic work is cropped, or poorly coloured;
- a film is shortened for inclusion;
- there is 'contextual abuse': where the

work is not changed, but it is presented in a manner that is prejudicial to the honour or reputation of the author; or

- if users are able to modify and add to content by virtue of the product's interactivity.

Some have even argued that mere digitisation can, in some instances, infringe moral rights.

There are a number of strategies for dealing with moral rights compliance:

- (1) *Include moral rights provisions in copyright licences.* Many copyright licences now include a term in which the creator can set out his or her preferred form of attribution and title of the work.
- (2) *Engage with creators when creating the product.* Those wishing to include copyright works in a database or multimedia product may engage the

## Creative Commons and Indigenous Databases

There are real complications with trying to use any of the existing open content licensing schemes for databases or multimedia products comprising or including Indigenous cultural materials.

Creative Commons and other open licensing systems are built on an default position of maximum distribution and access to copyright-protected material. That may not work for cultural materials that contain restricted information. Similarly, some creators may feel uncomfortable in permitting adaptations or alterations to be made of their works.

One option may be to take open content licensing models as a starting point, and then consider what other terms might be necessary to respect cultural or preferred practices. That way, lessons could be learnt about how to create licensing models that allow collaborative input, even if the final product is limited in use to a single community.

However, there is a trade-off in adopting this approach. For example, one of the key advantages of using the Creative Commons system is the infrastructure that goes with it, such as the agreements and search engines. Adopting a model that is based on Creative Commons will not have the benefits of these additional services.



author in the process of creation, for instance by sending proofs of the use of the work for comment and approval.

- (3) *Use artist-made derivatives.* Where it is necessary to use a derivative of a

copyright work, it may also be possible for the author to create that version rather than the compiler. For instance, where an extract of a cinematograph film is required, the film-maker

Table 7.2. Some considerations for and against various copyright management models for organic databases

	Considerations in favour	Considerations against
User contributors required to assign copyright to the compiler	<ul style="list-style-type: none"> <li>• Compiler has full copyright rights, allowing full exploitation and enforcement of copyright in the final product into the future.</li> <li>• Likely to be more suitable where commercial exploitation is envisaged because open content licensing does not provide remuneration and competes with commercial use.</li> </ul>	<ul style="list-style-type: none"> <li>• Contributors may be sensitive to assigning copyright, and see little reason to do so for the compiler's benefit.</li> <li>• For contributors, there may be a risk that the compiler will receive contributions and later cut off general access. This may reduce incentives to contribute. Note that this problem may be greater for a project seeking 'general' contributions from members of the public at large. Where the database is a genuine community effort, for community benefit, then it may make sense to assign copyright to some official community body.</li> </ul>
Adoption of Creative Commons or other existing model	<ul style="list-style-type: none"> <li>• Takes advantage of existing drafting and technology: saves costs of creating own system.</li> <li>• Increasing public understanding of the terms: saves 'user education' costs.</li> <li>• Provides many of the terms creator of 'organic' database would want to have.</li> <li>• Encourages contributions by assuring individual creators that they will continue to receive the benefits of their contribution.</li> </ul>	<ul style="list-style-type: none"> <li>• Relatively inflexible: only a small set of licenses are available.</li> <li>• Likely to prevent commercial exploitation of database, as free version competes.</li> <li>• For indigenous collections: default position of Creative Commons and other open licensing systems is non-discriminatory openness; this may not be suitable for material with cultural sensitivity or secret/sacred information.</li> </ul>
Purpose-built license using some open content principles	<ul style="list-style-type: none"> <li>• Can draft terms to suit particular needs of the project.</li> <li>• Open content terms facilitate 'organic' databases created through 'serial collaborative creation': where later users of material add to or transform existing material.</li> <li>• Encourages contributions by assuring individual creators that they will continue to receive the benefits of their contribution.</li> </ul>	<ul style="list-style-type: none"> <li>• Costs involved in setting up legal and technical infrastructure for the licensing.</li> <li>• Because copyright remains with the contributors, enforcement may be problematic where infringer takes only part of the whole.</li> <li>• Likely to prevent commercial exploitation of database, as free version competes.</li> </ul>

might be asked to supply this.

- (4) *Be clear about interactivity.* If the database is intended to be fully interactive, then authors should be told about this, and specifically agree to it.

## Copyright Issues Between Compiler and the World: Enforcing Copyright

A final issue which should be mentioned is the issue of rights in a created database, and how they may be enforced against others. In brief, and focusing on Australian law:

- Regardless of the protection given to its individual elements, a database of literary material will be treated as a type of compilation, and protected as a 'literary work' by the operation of section 10(1) of the *Copyright Act*. It will also be considered 'original' due to the skill, labour and effort in creating the database - even if the resulting work does not show any creativity in the type of material included or its presentation. In contrast, some commentators have questioned whether a database of artistic or audio-visual material would receive separate protection.<sup>20</sup>
- As for multimedia products: again, individual elements are likely to be protected, as will be the underlying computer program. However, there is no clear model for protecting a multimedia work as a whole: various commentators have discussed whether they are protected as literary works, cinematograph films, dramatic works and/or computer programs.<sup>21</sup> However, none of these attempts have resulted in a satisfactory resolution.

In both cases, the *difficulty* is identifying when infringement will have occurred:

- For databases, the difficulty is determining what acts constitute infringement of copyright, and in particular, whether a 'substantial part'<sup>22</sup> of the work has been reproduced. This is not a straightforward analysis;
- With multimedia products, problems arise if the *entire product* is not given separate copyright protection. If a third party were to reproduce a substantial part of

such a product, the compiler would not be able to bring an action in copyright law *in relation to reproduction* of the compilation. Obviously, the owners of copyright in any individual works that were reproduced would still have an action.

An in-depth discussion of these issues is beyond the scope of this Primer. If enforcement of copyright in the *entire product* is an issue for a compiler, legal advice may be appropriate.

### Endnotes

1 See discussion in Mark J Davison, 'Sui Generis or Too Generous: Legislative Protection of Databases, Its Implications for Australia and Some Suggestions for Reform (1998) 21(3) *University of New South Wales Law Journal* 729, 730.

2 See discussion in Ann Monotti, 'University copyright in the digital age: Balancing and exploiting rights in computer programs, web-based materials, databases and multimedia in Australian universities' [2002] *European Intellectual Property Review* 251, 253.

3 The term 'public domain' has been given a number of definitions in relation to copyright, and may include materials that were never protected by copyright as well as those for which copyright has expired. For a discussion of tensions in referring to the 'public domain' for Indigenous knowledge, see the text box in Chapter 4.

4 Discussed in Michael McMahon, 'Commerce in (whose?) content - compulsory licensing of copyright works for multimedia products in Australia; Part I' (1997) 10(4) *Intellectual Property Law Bulletin* 49, 49-53.

5 For a discussion, see Jane Hunter, Bevan Koopman and Jane Sledge, 'Software Tools for Indigenous Knowledge Management', Museums and the Web 2003, Charlotte, March 2003, available at [http://archive.dstc.edu.au/IRM\\_project/software\\_paper/IKM\\_software.pdf](http://archive.dstc.edu.au/IRM_project/software_paper/IKM_software.pdf).

6 Discussed in *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 302-304.

7 This list is drawn from the reasoning in *Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd* [2005] FCAFC 138 (Branson, Kiefel and Finkelstein JJ).

8 In *Trumpet Software Pty Ltd v OzEmail Pty Ltd* (1996) 34 IPR 481, Heerey J (at 499) held that these principles are also relevant to a bare licence (that is, one not supported by consideration).

9 *Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd* [2005] FCAFC 138 (Branson, Kiefel and Finkelstein JJ), [18].

10 See, eg, *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 303.

11 See Emily Hudson and Andrew T Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (2005), 101-102.

12 For instance, the sample copyright licence titled 'Licensing your work for multimedia' developed by the Arts Law Centre of Australia and reproduced in Tony Davies, Julie Robb and Ian Collie, 'Licensing your work for multimedia' 1(3) *Artlines* 10, 13, grants a non-exclusive licence to reproduce the licensed work in a CD ROM and to distribute the CD ROM for the (to be completed) purposes.

13 In the sample copyright licence described above, the licence is provided on the basis that the publisher 'does not alter, add to, take away from, manipulate or in any

way damage the integrity of the work without [the licensor's] prior written permission': see *ibid*, 13.

14 *Ibid* 10-11.

15 See, eg, discussion in Colin Golvan, 'Bringing it all together: Some practical issues in the management of the electronic exploitation of copyright with specific regard to the publishing industry' (1996) 9(7) *Australian Intellectual Property Law Bulletin* 114, 115.

16 Copyright owners of literary, dramatic and musical works have an exclusive right of adaptation and an exclusive right of reproduction (this right is also granted to copyright owners of artistic works); the reproduction right cover copies which are somewhat or even extensively altered from the original. This is aside from the additional moral rights issues that arise when existing material is transformed in any way. The position is somewhat different for sound recordings and cinematograph films, where the copying right relates to the recording or film: making a sound- or look-alike is not an infringement of the copying right: eg, *CBS Records Australia v Telmak Teleproducts (Australia)* (1987) 9 IPR 440.

17 See <http://creativecommons.org>.

18 See <http://www.wikipedia.org>.

19 Discussed at <http://en.wikipedia.org/wiki/Wikipedia:Copyrights>.

20 See discussion in Mark J Davison, *The Legal Protection of Databases* (2003), 13.

21 See discussion in Tanya Aplin, 'Copyright protection of multimedia' (1997) 22(3) *Alternative Law Journal* 118.

22 Copyright Act, s 14. See also Ann Monotti, 'Copyright protection of computerised databases' 3 (1992) *Australian Intellectual Property Journal* 135, 140.

# Notes