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# cultures



WRITING



Protocols for Producing Indigenous Australian  
Literature

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*Writing Cultures: Protocols for Producing Indigenous Australian Literature*



An initiative of the Aboriginal and Torres Strait  
Islander Arts Board of the Australia Council

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

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# introduction

*As an Aboriginal writer I am constantly aware of literature being the 'little sister' to other artforms like visual arts, theatre, music and dance. The 'little sister' syndrome exists largely due to the fact that literature is a relatively new artform for Aboriginal people, visual and performing arts being part of our culture since the beginning of time...*

*We have now mastered the same language that was once used against us – describing us as barbaric and savage – and we have empowered ourselves to tell our stories, in our styles, for our people.*

Dr Anita Heiss.<sup>1</sup>

Even though publishing has only become accessible to Indigenous writers in the past 50 years, literature is a vital part of Indigenous culture. Writing, for Indigenous Australian people, is largely about expressing cultural belonging – however, it goes beyond that.

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

As part of their practice, Indigenous writers take on responsibilities as educators, informants and conveyors of the diversity of Aboriginal and Torres Strait Islander cultures. Writing encompasses several obligations for Indigenous authors and these may bring about conflict in the creation and publication of their literary works. *Writing Cultures* looks at some of these issues.

Indigenous people's right to own and control their cultural heritage is known as 'Indigenous cultural and intellectual property rights'. The term is used in *Our Culture: Our Future*<sup>2</sup> to refer to those rights as they are developing within international law. Since 1998, when *Our Culture: Our Future* was first published, the term 'Indigenous heritage rights' has gained more favour in the international arena. In *Writing Cultures* we use 'Indigenous heritage' to refer to these rights.

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

As primary guardians and interpreters of their cultures, Indigenous people have well-established protocols for interacting with their cultural material. New situations will also require cultural protocols. *Writing Cultures* guides the reader through many of these protocols.

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

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

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

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

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

We also hope the guides will spark debate and that additional protocols will be developed across artforms. Your comments and ideas can be forwarded to [atsia@ozco.gov.au](mailto:atsia@ozco.gov.au) or Director

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### Using the *Writing Cultures* guide

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

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

The next section, **Indigenous Heritage**, is an important overview of the issues that inform the development of Indigenous protocols. It looks at the complex web of relationships in Indigenous Australia, and how this might impact on the planning of a writing project. It also charts international initiatives for the protection of Indigenous cultural and intellectual property rights.

The key section, **Principles and Protocols**, presents nine principles we have developed to support the protection of Indigenous cultural heritage. There is valuable information on protocols specific to the use of cultural heritage material in writing practice. A number of case studies and commentaries from Indigenous writers identify pitfalls and offer advice.

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

**Follow up** provides a checklist of key points to consider when developing protocols for a writing project. It offers different and more specific information than the preceding sections. We therefore suggest you use the points outlined here alongside the *Principles and Protocols* and *Copyright* sections before developing a checklist for your own project or practice.

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

### What are protocols?

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

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

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

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

The protocols outlined in *Writing Cultures* are shaped by nine principles. The protocols are, by definition, ways of actioning these principles.

For example, a cultural protocol to action the underlying principle of respect is to acknowledge the Indigenous country and custodians at the site of each spoken word performance, launch or literary event, and in the acknowledgment of a published text about a specific Indigenous country.

*Writing Cultures* identifies many specific protocols which can be applied or adapted by writers, publishers, arts organisations, cultural institutions and others working with Indigenous literature.

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

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

### What is Indigenous literature?

Indigenous literature in an Australian context refers to the written word and text produced by Aboriginal and Torres Strait Islander people.

Indigenous literature crosses a range of genres including:

- short stories
- plays
- novels/novellas
- non-fiction, including essays and opinions
- poetry
- autobiography / biography
- community and oral histories
- children's books.

## Special nature of Indigenous literature

*The story is the most powerful thing on earth because it will last as long as there are two people left on it. And when there is only one she will whisper these stories to remind herself of what has been lost and, in that way, she will have the company of her ancestors.*

Bruce Pascoe.<sup>3</sup>

Knowledge, history and other cultural information has been orally transmitted through many Indigenous generations. Now, Indigenous writing has an important place in the transmission of Indigenous culture.

Some of the reasons Indigenous writers put pen to paper include:

- facilitating ongoing transmission of information
- providing reading materials for Indigenous readers
- recording community histories
- recording oral histories/life stories
- community ownership of stories
- cultural reclamation and maintenance
- language reclamation and maintenance
- entertainment
- as a form of personal and community healing (e.g. stories of the Stolen Generation)
- providing an authentic voice in Australian literature and the literary scene
- educating the broader community about Indigenous issues
- educating Indigenous communities on local and national Indigenous issues.

Over the past ten years the development of Indigenous writing has resulted in a range of works on contemporary themes, such as Glenys Ward's *Wandering Girl*<sup>4</sup> and Kim Scott's *Benang*.<sup>5</sup>

*There are many reasons to write. I partly write to think things through in the form of a story, and to seek a deep communication with the future and the past; attempting to understand my own ancestors, and attempting to communicate with integrity to both present and future readers among my people.*

Kim Scott.<sup>6</sup>

Indigenous writers also pen poems, stories and novels on themes that are not solely about Indigenous issues. For instance Aboriginal poet Norm Newlin also writes poetry inspired by love.

Literature and oral stories, like other aspects of Indigenous heritage, often stem from a social and cultural base. In some cases, stories may relate to a group or groups of Indigenous people where one author cannot be singled out from group ownership. The story of the Wagilag Sisters is an example of a culturally-based story that has ancient origins and spans a number of clan groups.

Indigenous Australians are concerned there is no respect for their Indigenous cultural knowledge, stories and other expression in the wider cultural environment.

Concerns include the current legal framework that does not promote or protect the rights of Indigenous people – particularly to own and control representation and dissemination of their stories, knowledge and other cultural expression.<sup>7</sup>

A further concern is the passing on of stories and Indigenous knowledge to outsiders. In Indigenous communities, the telling of stories is a right given to particular and qualified individuals. The re-telling of those stories by unqualified outsiders may be offensive to customary law beliefs.



# Indigenous heritage

An Indigenous person's connection to Indigenous heritage is expressed in contemporary life through his or her relationship with land, waterways, animals and plants, and his or her relationships with other people.

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

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

Indigenous literature is an important means of expressing Indigenous heritage – past, present and future. Indigenous heritage, enshrined in Indigenous cultural and intellectual rights, is discussed at length in *Our Culture: Our Future*.<sup>8</sup>

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

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

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



### **Our Culture: Our Future**

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

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

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

Indigenous cultural and intellectual property rights include the right to:

- own and control Indigenous cultural and intellectual property
- ensure that any means of protecting Indigenous cultural and intellectual property is based on the principle of self-determination
- be recognised as the primary guardians and interpreters of their cultures
- authorise or refuse to authorise the commercial use of Indigenous cultural and intellectual property according to customary law
- maintain the secrecy of Indigenous knowledge and other cultural practices
- full and proper attribution

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

For a full list of rights see *Our Culture: Our Future*<sup>9</sup>

### **Current protection of heritage**

Australia's current legal framework provides limited recognition and protection of these rights.

*Our Culture: Our Future* recommended significant changes to legislation, policy and procedures.

As yet there has been no formal response to these recommendations from the Australian government. Much of the rights recognition has been done at an industry and practitioner level, through the development of protocols and use of contracts to support the cultural rights of Indigenous people.

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

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

*Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.*<sup>10</sup>

The Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights, in Article 8, urges Indigenous people to 'develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge'.<sup>11</sup>

Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (1993) were adopted by ATSIC's Indigenous Reference Group in 1997.<sup>12</sup> Article 39 states:

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

In January 2002, the World Intellectual Property Organisation's International Forum, *Intellectual Property and Traditional Knowledge: Our Identity, Our Future*, held in Muscat, Oman, adopted a Declaration recognising that 'traditional knowledge plays a vital role in building bridges between civilisations and cultures, in creating wealth and in promoting the human dignity and cultural identity of traditional communities'.<sup>13</sup>

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

- access to genetic resources and benefit-sharing
- protection of traditional knowledge, innovations and creativity
- protection of expressions of folklore.<sup>14</sup>

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.<sup>15</sup> The prior and informed consent of the traditional owners is required to:

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



# principles and protocols

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

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

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

## Respect

Respectful use of Indigenous cultural material, including stories, traditional knowledge and information about life experience, is a basic principle. It is important to consider this when developing Indigenous literary works for publication and wide dissemination.

### Acknowledgment of country

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

When organising a book launch or literary event, it is respectful to seek the consent of the Indigenous owners of the land.<sup>16</sup>

If consent is given, it is respectful to acknowledge country and custodians at the site of each spoken word performance, book launch, storytelling or literary event, and in the acknowledgment of a published text about a specific Indigenous country.

Seek advice from the Indigenous community on the preferred manner of acknowledgment.

### Representation

Representation of Indigenous cultures should reflect Indigenous cultural values and respect customary laws.

It is respectful to write and speak about Indigenous cultures in a manner preferred by those cultures, avoiding derogatory or outdated terms and perspectives. It is important to consult with relevant groups about preferred language and terms.

### Accepting diversity

There is great diversity of experience and cultural context within Indigenous communities. Indigenous literature reflects this diversity in the genre, subject matter and cultural setting the Indigenous writer might choose.

People working in the literary field are encouraged to foster diversity of expression in Indigenous writing.

### Living cultures

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

### ***Publishing stories and ideas***

The effects of publication of an Indigenous story – whether sacred, closed or general – should be discussed prior to publication. Books, the Internet, journal articles and magazines are part of the mass media, and are open for general consumption.

Once publicly released, it is difficult to control how a story might be embraced, adopted and engrained within dominant and other cultures. There are also legal limits in being able to control the general expression of Indigenous stories and knowledge once the copyright period expires. For example, ancient Greek stories, fairytales and Bible stories are all re-told in many different ways and languages by writers of varying cultural backgrounds.

Using knowledge as part of the general spread of ideas is a concept that often sits at odds with Indigenous notions of holding and disseminating knowledge. It is a right given to people based on their standing in an Indigenous society.

## Indigenous control

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

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

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

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, permission must be obtained from the local Land Council or Trust, or the relevant Community Council. For a list of Indigenous authorities see the *National Directory of Aboriginal and Torres Strait Islander Organisations*.<sup>17</sup>

Some other useful starting points for inquiries include:

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

It can also be prudent to involve Indigenous people in all stages of writing projects, including Indigenous writers, community members, storytellers and editors.

### Commissioning Indigenous writers

When engaging Indigenous writers to participate in a project, including writing assignments and speaking engagements, most organisations use the ATSIC definition of Aboriginal identity as a guide.

The current practice of the Australia Council requires all Indigenous participants to provide a letter of support confirming their Aboriginal or Torres Strait Islander identity from an Indigenous organisation.<sup>18</sup>

Discuss copyright ownership at the outset. The following factors may be relevant in discussions:

- nature of the commission
- nature of subject matter
- whether it is a collaboration
- fee for services.

## Communication, consultation and consent

Communication and consultation with the relevant Indigenous people in authority, and their consent, will need to be sought for each project.

According to Bruce Pascoe:

*Consent by both non-Indigenous and Indigenous writers is a priority. People wanting to write about Indigenous people should discuss their artistic ideas with Indigenous friends and acquaintances as well as consulting protocols. If the non-Indigenous writer doesn't know any Indigenous people to consult with then that is a great reason to abandon the project.*<sup>19</sup>

Kim Scott discusses issues within the consultation process:

*It's difficult to know how to consult adequately in many instances. So there's great need for trust. And the authority is given by genealogical descent, by 'connection' to community and place, and by the validation of elders.*<sup>20</sup>

Jackie Huggins advises non-Indigenous writers when consulting and seeking consent:

*One word of caution though – don't expect Aboriginal people to easily welcome you into their world. Some of us will be more open and tolerant than others. There is a long history of violence, mistrust, guilt and fear that cannot be erased overnight. Know when you are becoming an intruder rather than an accomplice. Do some homework first. Read books, watch films, do Aboriginal studies courses. You should never expect Aboriginal people to do all the education because it's unfair and a personal drain... If there is trust, respect and genuine interest, one will possibly get past the first encounter and continue a dialogue.*<sup>21</sup>

Some protocols identified by Indigenous writers as important to the communication, consultation and consent process include:

- The need to identify relevant people with whom to discuss the intended publication.
- When interviewing informants take good notes. If they provide photographs, recordings, news clippings and other materials, these should be looked after and returned as soon as they have served their purpose.
- Keep appropriate/relevant Indigenous people informed and advised, and where possible, provide regular updates.
- When the first draft or work has been completed, take it back to the Indigenous people you consulted for approval and confirmation of facts.
- Be flexible with time – and understand that the consultation process may be lengthy. Do not expect to have a reply to a question in a day or a week. Each community will need time to consider and consult.

## Creation stories

Creation stories or Indigenous Dreaming Histories – referred to by different Indigenous groups as the *Jukurpa*, *Bugari* or *Alljeringa*<sup>22</sup> – are important to Indigenous cultures.

It is protocol to consult with cultural custodians of a story and other community members. There may also be one or more groups that have custodianship of a story. Consultation with, and consent from each identified group should be sought. Be prepared to reconsider your project if consensus cannot be reached.

Under copyright law, it is not an infringement to refer to another writer's work. Creation stories that are published have copyright protecting the expression. However, it is possible for a writer to adapt a story, tell it in a different context or use different words, creating copyright in another form. It is also possible for a writer to include or write about creation stories without following the correct Indigenous protocol of seeking permission from the people in authority.

If the writing of creation stories involves the verbatim transcription of an oral story from specific informants, then permission, attribution and ownership of material should always be recognised.

Should non-Aboriginal writers be writing Aboriginal creation stories? This issue is discussed by Dr Anita Heiss in *Writing About Indigenous Australia: Some issues to consider and protocols to follow: a discussion paper*.<sup>23</sup> Some Indigenous writers and community people strongly believe that Indigenous people should exclusively write creation stories.<sup>24</sup>

The best approach for a writer in this situation is to get prior permission from the relevant Indigenous custodians of creation stories and once obtained, involve them in the process of writing, editing and publication.

Pat Mamanyjun Torres notes that the process she went through to publish *The Story of Crow* in 1987 required continual dialogue with the custodians of the story. She says:

*During my initial research period, approval was obtained from Auntie Magdalene for the future publication of this material in a book format so that children could learn about our culture. At all times throughout the development of the material her approval was sought for the working drafts and eventually the finished product.*<sup>25</sup>

Many Indigenous writers make draft copies available, before publication, to the relevant Indigenous people and family members for comment.

## Recording oral stories

Traditionally, Indigenous stories have been orally transmitted and passed on through the generations via the art of storytelling. Committing these stories to material form now creates a copyright interest in the expression of the story. In the past, there have been instances where non-Indigenous individuals have worked with Indigenous people to record their clan and creation stories. Copyright has belonged in the written expression, attributing the non-Indigenous person as the sole writer and copyright owner. Indigenous people see ownership of stories and information differently.

Copyright does not protect oral stories if the requirement of material form is not met. Hence, people writing about what you said will have a copyright interest in the written form even if their contribution to the written form is minimal. You may not be able to stop them from writing your ideas, unless you told them in confidence. If you told them in confidence, and they knew it was confidential, you may be able to stop them publishing your ideas by taking an action in breach of confidential information.<sup>26</sup>



## Protecting oral stories from unauthorised copying

Magabala Books suggests the following way of protecting rights when a story is first recorded:

*Most Aboriginal stories are part of an oral tradition and have never been written down. If someone wishes to record a story (by writing it down or taping it) then the recorder could claim to be the copyright owner of the material because they are the one who has written it down. A way to control this would be for the storyteller to argue that, as the story is theirs, the recorder should assign in writing the copyright back to the storyteller, who can then license the recorder to use the material in certain specified ways, such as for research or for linguistic work.<sup>27</sup>*

## Sensitivity of content

Be aware of gender division of responsibility and knowledge in many Indigenous communities. Sensitive content such as secret and sacred material or gender-based works may require special communication procedures. These procedures should first be ascertained. Consultation may take time depending on the sensitivity of the material.

## Writing life stories

In writing life stories of Indigenous people it is important to respect the rights of the subject in terms of ownership and approval over the representation of the story.

The following questions arise:

- Who is in control of the representation of the story?
- Is there anything sensitive that needs to be removed from the story – particularly in relation to events and cultural beliefs that involve other people?

## case study

### Writing lives

An Indigenous woman worked with a playwright to create a play about her life. The woman orally related her life story to the playwright who took notes. The oral transmission of the story does not constitute material form, which is created when the notes are made. The playwright used the notes as a basis to develop a plot.

He skillfully wrote more words and interpreted the woman's words into a framework suitable for production as a performance. After completion, there was a discussion about who owned copyright. The Indigenous woman had a legitimate claim to copyright in the play, given she had provided notes and information on her life. However, the playwright was also arguably entitled to some copyright interest given he had skillfully developed text and a framework for her story.

In the end the parties agreed that the Indigenous woman should own copyright, however both should share royalties and be jointly attributed as authors. In this way, the resulting play was a collaborative work.

This example illustrates how copyright law can affect the rights of Indigenous people to important cultural stories. However, these problems can be avoided if issues are discussed at the outset and included in written agreements.

## Interpretation, integrity and authenticity

It is important for Indigenous culture that the interpretation, integrity and authenticity of a story is maintained. This means that Indigenous people will need to be consulted on how Indigenous heritage is presented.

### Interpretation

Interpretation refers to how cultural material is presented. This includes the perspective given and the language used in relation to cultural heritage and the medium in which it is reproduced.

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

Today, as Indigenous people seek to re-assert and reclaim control over their cultural heritage material, Indigenous interpretation of the material is a way of enhancing the cultural significance of the work.

Indigenous people should be given the opportunity to interpret and present their own cultures.

Some important questions to consider about interpretation are:

- How will your writing affect the Indigenous group it is based on?
- Does it empower them?
- Does it expose confidential or personal and sensitive material?
- Does it reinforce negative stereotypes?

### Use of terminology

Writers are encouraged to examine the terminology used in Indigenous writing.

For instance, Pat Mamanyjun Torres notes instead of using 'Dreamtime' (a Westernised construction) for creation stories, Indigenous language words should be used such as *Jukurpa*, *Bugari* and *Aljjeringa*.<sup>28</sup>

The following references provide guidelines on the appropriate use of grammar and terminology in relation to Indigenous people:

- Jackie Huggins, in her article 'Respect v Political Correctness' provides some guidance. For example, she states that 'a' is for apple, agile, anger, another, address and alphabet, but not for Aboriginal.<sup>29</sup>
- There is a list of terms in the Australian Society of Authors' paper, 'Writing about Indigenous Australia' written by Dr Anita Heiss.<sup>30</sup>
- There is also a *Style Manual for Authors, Editors and Printers* which sets out guidelines for the non-discriminatory portrayal of Aboriginal and Torres Strait Islander people.<sup>31</sup>

### Research

In the past Indigenous people have complained that Indigenous culture has been falsely stated in texts.

It is important to make sure writing is based on sound research and facts that are credible.

The Australian Institute of Aboriginal and Torres Strait Islander Studies is a useful starting point for research. The premises are in Canberra and they also have a website with a catalogue of their library resources at [www.aiatsis.gov.au](http://www.aiatsis.gov.au)

### Authenticity

A major issue for authenticity is the appropriation or fabrication of an Indigenous identity to market works. This differs from the adoption of pseudonyms as it is calculated to exploit an identity for financial gain. A series of literary frauds have been uncovered in the past five years, including an instance where a non-Indigenous author created a false identity and the resulting book was marketed and sold as Indigenous, although it was not written by an Indigenous author.

Dr Anita Heiss considers authors appropriating Aboriginality do so for their own benefit.<sup>32</sup> Such actions have angered many Indigenous writers and the Indigenous community generally.

The ASA recommends the introduction of a labelling system that would allow readers to know when books are written primarily by Indigenous authors, and when they are a collaboration with non-Indigenous writers.

## Editing

*In working in a partnership situation with Indigenous communities or individuals it is important to understand that it is the community or the individual who should have the power to be the final censor of the work, not the editor, translator or writer. Trust is the key to a successful outcome for all concerned.*

Sally Morgan.<sup>33</sup>

The editorial process of a manuscript can have a large impact on how the final document is presented and interpreted. The editing process can affect the authentic voice of Indigenous writers.<sup>34</sup>

For Indigenous writers there are concerns that non-Indigenous editors often misunderstand the content of their manuscripts, and often alter language and style to cater for a mainstream non-Indigenous audience. Some issues include:

- editing of 'Aboriginal English' to make it grammatically correct or to make it 'High English'
- drawing plot and themes towards Westernised concepts of storytelling and morals
- editing sensitive material.

*Sometimes people will share something very sensitive, but that doesn't mean they want it included in a publication.*

*Other times someone may share a story which is very sad and indicate that they want this story published, but after some thought change their minds. Such decisions must be respected. This is why it's important to have an editing process that allows lots of time for consultation so that people can really think about what they want to say without feeling pressured to commit to something they may later regret.*

Sally Morgan.<sup>35</sup>

It would be most appropriate to have an Indigenous editor work on an Indigenous author's manuscript. However, given the limited numbers of Indigenous editors (there are only three or four working full-time in the industry), this might be difficult.

Findings from an Australia Council survey showed that respondents believed non-Indigenous editors could capably edit Indigenous books. However, the report highlighted the need for trained Indigenous editors as a priority.<sup>36</sup>

The Literature Board of the Australia Council has funded an Indigenous editors' training program to increase the number of trained Indigenous editors.

## case study

### **Jandamarra and the Bunuba Resistance**

The book *Jandamarra and the Bunuba Resistance*<sup>37</sup> published by Magabala Book in 1995 was written by Howard Pederson with custodian, Banjo Woorunmurra. The book accounts the resistance of the Bunuba people and relates a history which was previously untold. Copyright is shared by Pederson, a non-Indigenous writer and Woorunmurra. The book was edited by Sandra Phillips, an Indigenous editor.

## Publishing

Few Indigenous writers have publishing deals with mainstream publishing companies. According to Willa McDonald:

*For Indigenous writing to be accepted by white publishers, it usually needs to be written in a way that is understandable by mainstream white Australians. The written word is part of white culture, and comes with rules about grammar, spelling and structure. Everything is sifted through white filters.<sup>38</sup>*

Most Indigenous writers come from outside the mainstream and have limited knowledge of the processes involved in developing a manuscript for publication. The publisher may have specific guidelines and style issues that are not applicable to Indigenous interpretation of works – for example, inhouse style of punctuation and grammar.

Publishers should make relevant inquiries to ensure a writer who is promoted and marketed as 'Indigenous' is an Indigenous Australian. The ATSIC test of Aboriginality is recommended.

A sensitive issue is whether Indigenous writers should compromise their cultural integrity during the editorial and publishing process to get their work published. Indigenous writers state that while some publishing companies are sensitive to Indigenous manuscripts, there is a tendency to edit towards genre and mainstream audiences.

Publishers are encouraged to broaden their understanding and appreciation of works that lie outside of the mainstream view of literary production. The publishing process must be a mutual process of collaboration between the author and the editor.<sup>39</sup>

There are few Indigenous publishing houses catering for the increasing number of new and emerging Indigenous writers seeking publication. The current houses are Magabala Books (Broome),

Aboriginal Studies Press (Canberra) and IAD Press (Alice Springs). The following areas are highlighted for consideration when publishing.

## Web publishing

Indigenous people are often concerned about the publication of Indigenous heritage on the Internet. This is because of the digital nature of the form presented and the ease of copying. Before publishing material online, discussions with Indigenous people are recommended.

## Illustrating Indigenous books

Visual elements are integral to many Indigenous stories. Sam Cook, an Indigenous illustrator, has developed a database of Indigenous illustrators and says it is important to work closely with the author in children's book or story-based designs. She advocates 'extra care and attention to detail' to ensure that Indigenous books have appropriate illustrations and authentic product.<sup>40</sup>

## Selecting cover images

The selection of artistic works for book covers may need consultation with the author and other relevant people. It is important to be sure that the cover image is culturally appropriate and not exploitative.

The use of traditional designs and motifs (Mimis and Wandjinas, for instance) raises issues for protecting Indigenous heritage.

One author noted the draft cover layout for her work included cultural images from areas in Australia not related to her area, or the area where the novel was set. This caused her embarrassment and if it had been published could have offended the cultural custodians of the images. She was fortunate the publisher had sought her prior approval – the image on the cover was changed to a more appropriate one.

## Secrecy and confidentiality

Some Indigenous cultural material is not suitable for wide dissemination on the grounds of secrecy and confidentiality. It is the responsibility of the writer, and those working on writing projects, to discuss any restrictions on use with the relevant Indigenous groups. Some issues to be aware of are discussed below.

### Representation of deceased people

The reproduction of names and images of deceased people in books may be offensive to Indigenous beliefs. Some Indigenous publishers have adopted the use of special warnings where necessary. For instance, IAD Press has adopted this practice<sup>41</sup> as has Aboriginal Studies Press. The following example is from the book, *Love Against the Law, The Autobiographies of Tex and Nelly Camfoo*, published by Aboriginal Studies Press:

*Readers should be aware that if members of some Aboriginal communities see the names or images of the deceased, particularly their relatives, they may be distressed. Before using this book in such communities, the wishes of senior members should be established and their advice taken on appropriate procedures and safeguards.*<sup>42</sup>

The deceased's family or community needs to be consulted so that the appropriate protocols are observed.

### Secret and sacred material

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

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

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

The publication of sacred and secret material raises sensitive issues for Indigenous people. Some people question whether it is at all appropriate to publish sensitive material in a manner where it can be disseminated widely.

One example that highlights concerns in this area is the case of *Foster v Mountford*<sup>43</sup> involving the issue of published secret and sacred material collected in research. Charles Mountford undertook a field trip in 1940 into remote areas of the Northern Territory. The Pitjantjatjara people revealed tribal sites and items of deep cultural and religious significance to the anthropologist. Mountford recorded the information and later wrote a book, *Nomads of the Australian Desert* (Rigby, 1976), which was distributed for sale in the Northern Territory.

The book contained information that was of deep religious and cultural significance to the Pitjantjatjara men. The information was shown to have been given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should the book come into the hands of the uninitiated – women and children. The court allowed them an injunction to stop the sale of the book in the Northern Territory.

Clearly, copyright in the book would have belonged to Mountford. The claim was based on an action for breach of confidence. That is, the researcher had known the confidential nature of the information and the detriment it may cause to the informant's society, yet still published it. Therefore the Pitjantjatjara were granted equitable relief to stop dissemination of the book where women, children and uninitiated people might find it.

This example illustrates the effect that publishing sacred or secret material may have on Indigenous cultures. In order to respect the cultural sensitivities associated with sacred and secret information, the wider publication of this material should be restricted.

### Personal privacy

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

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

## Attribution

Indigenous people should be attributed for use of their cultural heritage material in stories. In many instances in the past, and even today, Indigenous people have been used as informants for research, evaluations and theses.

Today, Indigenous people are seeking greater acknowledgment than being recognised as mere informants. They seek the right to be acknowledged as owners of this knowledge and information. They also seek to have a greater share in benefits generated from the use of their cultural stories.

### Individual and community contributors

Under the moral rights provisions of the *Copyright Act 1968 (Cth)*, the right of attribution is recognised for creators. However, it is recommended that contributors also be attributed for their role in the development of a literary work.

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

## Proper returns

Indigenous people should share in the benefits and receive proper returns for use of their cultural heritage material. When commissioning Indigenous writers, fees should be paid at an appropriate industry rate.

When using communally owned cultural heritage material, it is important to consider ways in which the clan or group can benefit from the use of their material. For example, you could provide copies of the published documents or conduct workshops for emerging writers.

## Continuing cultures

Consultation is an ongoing process. Cultures are dynamic and evolving, and the protocols within each group and community will also change.

It is important to consider how you will maintain relationships for future consultations. This might include consultation, at a later date, for future uses of the work that were not envisaged during the initial consultation.

## Recognition and protection

The increasing level of appropriation of Indigenous arts by non-Indigenous people has compelled Indigenous people to seek greater protection of Indigenous arts, including the call for new legislation recognising communal rights to culture.

### case study

#### ***Mutant Message Down Under***

In 1994, Marlo Morgan's best-selling book, *Mutant Message Down Under*, was marketed as a true account of the author's real spiritual experiences among a group of Aboriginal Australians known as 'Real People'. The book was supposedly inspired by the author's experiences with Australian Aboriginals during a very brief stay in the early 1990s. Indigenous groups voiced their concerns about the misinformation and distortion of Aboriginal culture that the book represented.<sup>44</sup>

According to one journalist's report, there is speculation over whether Morgan ever made the journey described in the book.<sup>45</sup> Robert Eggington of Dumbarton Aboriginal Corporation, condemns the book as a 'fabricated fantasy'. He further notes that if Morgan has done what she claims to have done without proper consent, she would have been in breach of Indigenous laws so seriously that the breach is punishable by death under Aboriginal law.<sup>46</sup>

## Resources

A number of protocol documents have been produced in recent years to meet the needs of particular communities, organisations, industries and situations. The following are selected as useful guides:

- *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, compiled by Alex Byrne, Alana Garwood, Heather Moorcroft and Alan Barries for the Aboriginal and Torres Strait Islander Library and Information Resources Network.
- *Indigenous Arts Protocol: A Guide*, Indigenous Arts Reference Group,<sup>47</sup> New South Wales Ministry for the Arts, 1998.
- *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector*, by Doreen Mellor, published by the National Association for the Visual Arts, 2001.
- *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, written and researched by Terri Janke, Michael Frankel & Company, Solicitors, for Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, Sydney, 1998.
- *Previous Possessions, New Obligations*, a policy document produced by Museums Australia in 1994 to provide a way for museums to approach Indigenous cultures. A plain English version with case studies has been published.
- *Taking the Time – Museums and Galleries, Cultural Protocols and Communities, A Resource Guide*, Museums Australia Inc. (Qld), 1998.

- *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities*, Lester Bostock, Special Broadcasting Services, 2nd edn, 1997.
- The Australian Society of Authors has produced two discussion papers relating to issues of Indigenous literature. Written by Indigenous Portfolio holder Dr Anita Heiss, the first set of protocols focuses on issues for non-Indigenous writers to consider when writing about Indigenous Australian society and culture. The paper outlines what Indigenous writers have said on the topic and how non-Indigenous writers have dealt with the issue. The paper includes a basic code of ethics checklist covering areas of representation, consultation and attribution.  
  
The second paper, 'Australian Copyright vs. Indigenous Intellectual and Cultural Property Rights', explores the shortfalls in the Copyright Act's protection of Indigenous cultural interests.  
  
Both papers can be downloaded from the ASA website at [www.asauthors.org](http://www.asauthors.org)



# copyright

## How does copyright protect literature?

It is important for Indigenous authors to develop an understanding of copyright so they can negotiate rights to their literary works under licence.

Authors retain copyright in their works for 50 years after their death. Authors can license other people to reproduce their work under an agreement. This agreement will include certain terms such as the fee for use, the purpose of the agreement, the nature of the rights granted and the period of time the agreement will last.

Copyright owners need to think about who will control their copyright after their death. Another issue to consider is who will continue to receive any royalties.

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

## What is copyright?

Copyright laws are the main laws in Australia that govern the use, production and dissemination of original literary, dramatic and musical works. Rights are provided to writers under the *Copyright Act 1968 (Cth)*. There are no special laws for the protection of Indigenous cultural and intellectual property under the Copyright Act.

It is not necessary to register for protection of copyright. Copyright protects literary, artistic, musical and dramatic works as soon as they are created in a material form. This means that a work must exist in a permanent and tangible form.<sup>48</sup> For example, copyright would exist in a book's unpublished manuscript as a literary work.

Copyright protects the *expression* but not the underlying idea. As copyright exists in the written expression or, in the case of recordings, in the recorded form – Indigenous traditional<sup>49</sup> knowledge, dance, designs and stories that are orally or ephemerally transmitted are not protected under the standard copyright laws.

### Who owns copyright?

As the person who records the work in a material form, the writer is generally recognised as the copyright owner of a literary work. For instance, the copyright in the poem 'Journey', written by Terri Janke, is owned by her although published in the anthology *Untreated: Poems by Black Writers*. The publisher, in this example IAD Press, owns the copyright in the collection.

There are some notable exceptions to the general rule of ownership:

- An employer will own the copyright to works produced under a contract of employment unless an alternative arrangement is agreed to in writing. For example, if you are employed as a researcher for an organisation and write a book as part of your paid employment, it is likely that the copyright will be held by the organisation. If the work is commissioned and the writer is an independent contractor, the copyright will remain with the writer.
- The Government can assert copyright to works produced under its direction and control. However, if a writer receives a government grant from the Australia Council, for instance, the copyright will belong to the author.

Importantly, for copyright to exist, an individual author or group of authors must be identifiable.

With Indigenous cultural expression some stories have been passed down through many generations. An individual author may not be able to be identified, and indeed may not exist, because much Indigenous cultural expression is communally owned.

As copyright, interpreted through the Act, belongs to individuals as creators of works, the communal ownership of Indigenous heritage such as clan designs or clan knowledge is not recognised. Protection of much of this material is therefore not guaranteed.

### What rights do copyright owners have?

Copyright owners have the right to earn money from the use and copying of their literary work. The copyright owner of a literary work has the exclusive right to do all or any of the following:

- (i) reproduce the work in a material form
- (ii) publish the work
- (iii) perform the work in public
- (iv) communicate the work to the public
- (v) make an adaptation of the work
- (vi) do any of the above in relation to an adapted literary work.<sup>51</sup>

## Collaborative works

Under the Copyright Act, a 'work of joint ownership' refers to a work resulting from the collaboration of two or more authors and where each author's contribution is equal to the contribution of the other authors.<sup>51</sup>

The author must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions. In this interpretation, the custodians of cultural stories will generally not be recognised as the legal copyright owner of an Indigenous literary work that depicts clan creation stories.

Each author of a work of joint authorship owns copyright in the resulting work.<sup>52</sup> This means that each author must obtain the consent of the others before exercising any of their rights under copyright. For example, if an author wants to license the rights to reproduce a collaborative work to another party, he or she must get the consent of all the authors who participated in the collaboration.

### Communal ownership vs. joint ownership

In *Bulun Bulun v R & T Textiles*,<sup>53</sup> the court decided that artistic works containing Indigenous 'traditional ritual knowledge', handed down through generations and governed by Aboriginal laws, are not works of joint ownership. Although under Aboriginal laws the entire community may have an interest in the particular work, and the designs and knowledge within the work, copyright does not recognise the group as the owners.

The individual artist is recognised as the copyright owner and may have a special obligation to the clan to deal with the copyright in the work, in ways that are consistent with Indigenous law. Depending on the circumstances, this obligation may be enforceable in the court. The nature of this relationship may also extend to knowledge in the written form.



## How long does copyright last?

Copyright only protects works for a limited period. For example, a literary work lasts for 50 years after the death of the author.<sup>54</sup> Copyright assumes that some forms of Indigenous art and cultural expression are in the public domain and are free for all to use and exploit.

## What is the public domain?

Once copyright lapses, the work is said to be in the public domain. The law no longer prevents anyone from accessing and exploiting the material. For example, old stories that are out of copyright can be reproduced without the consent of the copyright owner. Indigenous people's right to culture exists in perpetuity. To respect Indigenous cultural heritage, it may be necessary to get permission to use Indigenous stories even though, legally, they are in the public domain.

## What are moral rights?

The moral rights provisions under the Copyright Act provide some new ways to challenge derogatory treatment of Indigenous literary works. Moral rights were introduced into the Copyright Act in December 2000.

These new laws provide the following rights to authors:

### 1. *The right to be attributed as the author.*

The author of a work has the right to be identified as the author where his or her work is reproduced in material form, published, performed, adapted, or communicated to the public.<sup>55</sup>

Authors can require their names be clearly and prominently reproduced alongside all reproductions of their works.<sup>56</sup>

### 2. *The right not to have work falsely attributed to another author.*

Authors can take action against parties who falsely attribute others as the creators of their works.

### 3. *The right of integrity.*

Authors can take action against parties who treat or alter their works in a derogatory way, causing harm to the author's reputation.<sup>57</sup>

This may, for instance, be a work that is edited or altered in a way considered derogatory to the writer. Whether or not the work has been treated in a derogatory way is subject to reasonable defence.<sup>58</sup>

Prior to making any significant alterations to, or adaptations of a literary work, it is important to get the consent of the author in writing.

The Australian moral rights laws are new, and their potential to increase copyright protection for Indigenous writers has not been fully explored.

One important point about moral rights is that they are individual rights. There is still no legal recognition of communal ownership of Indigenous cultural material.

## Licensing for publication

The publisher of a literary work will need permission from the writer to publish their work. Some points to consider are:

- Written contracts are preferred to oral agreements.
- Indigenous authors should be given the opportunity to consider contracts and obtain proper legal advice.
- The contract should be explained to Indigenous authors and, if necessary, a translator be used to explain the major issues of the contract.
- Appropriate royalties should be paid to the author.

- If the work is to be altered or adapted for mass production, authors should be given the opportunity to approve or otherwise reject the alteration or adaptation of their work.

It is a good idea to seek legal advice on copyright licensing issues.

### Assigning copyright

Copyright can also be assigned. This means that you give your copyright to someone else. They become the copyright owner and can authorise others to reproduce your literary work. Copyright is usually assigned under written agreement. Once assigned, the author relinquishes copyright in his or her literary work.

Where possible, Indigenous authors should retain the copyright in their works so they can maintain control over reproduction.

It is important for Indigenous authors to check agreements and make sure they are not assigning their rights away instead of alternatively licensing use of their work.

### Publishing contracts

Publishers offer authors a publishing contract which is an agreement to license the reproduction of a literary work. The contract may include terms such as:

- Royalties – Australian Society of Authors (ASA) Minimum Standards are encouraged
- Territory – which countries, for instance, will be the subject of the right to reproduce
- Term – length of time the literary work will be in circulation.

It is recommended that legal advice be sought on each contract. Magabala Books has produced a short information booklet on copyright, *A Basic Guide to Copyright*.<sup>59</sup> This provides some useful information on publishing contracts. Also, the ASA operates a Contract Advisory Service which is funded through the Literature Board of the Australia Council.

## Managing copyright to protect your interests

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

It is important to keep good records of your works. It is a good idea to write your story down, or type it into your computer.

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

- title of the paper, novel or short story
- writer
- date created
- copyright owners
- if applicable, cultural group or clan.

When authorising others to reproduce your works make sure that you use written agreements and keep records of the rights you have granted, and where your works have been published. Ask for copies of any journals or anthologies that reproduce your work.

### Copyright notice

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

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

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

© Terri Janke, 1999\*

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

The copyright in the poem 'Journey', written by Terri Janke, is published by IAD Press in the anthology *Untreated: Poems by Black Writers*. The writer owns the copyright in the poem, and the publisher owns the copyright in the collection.

The copyright for this **anthology** is noted as follows:

© Collection IAD Press, 2001.

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

Traditional story: Torres Strait Islands

This version: © A. Murray, 2002. This version is made with the permission of the clan. It may not be reproduced in any form without the permission of the writer and the clan concerned.

For more information on recommended copyright wording for publications, see the *Style Manual for Authors, Editors and Printers*.<sup>60</sup>

### Moral rights notice

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

The creator(s) assert their moral rights.

## When is copyright infringed?

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

A person will infringe copyright in a literary work if he or she publishes, adapts, reproduces the work in

material form or communicates the work to the public without permission from the copyright owner.

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

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

Some exceptions to copyright infringement are:

### Fair dealings provisions

The argument of 'fair dealings' can be a defence to allegations of copyright infringement. Copyright is not an infringement if the work is used for:

- research or private study purposes<sup>61</sup>
- criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made<sup>62</sup>
- the purpose of, or associated with the reporting of news in a newspaper or magazine and a sufficient acknowledgment of the work is made; or for the purpose of, or associated with the reporting of news by means of broadcasting or in a cinematograph film<sup>63</sup>
- judicial proceedings of a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.<sup>64</sup>

### Crown use of literary work

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

### Library copying

Libraries and archives can make copies of copyright works under certain circumstances in accordance with statutory procedures.<sup>65</sup>

### Educational copying

Educational institutions such as schools and universities can make multiple copies of print material, and can copy television and radio programs for education purposes. They must however pay statutory licence fees to the relevant collecting societies. Authors should be aware of these schemes, as there may be royalties payable in certain circumstances. Contact the Copyright Agency Limited, Screenrights or Viscopy where applicable.

## Lending rights

### Public Lending Right

Public Lending Right (PLR) is based on the concept that creators and publishers may incur a loss of income when copies of their books are freely available in public libraries, and are borrowed by the general public who might otherwise purchase the book.

Australian authors and publishers are eligible for payments under the scheme provided they meet eligibility criteria and satisfy specific requirements. Claims are made to the Department of Communications, Information Technology and the Arts. For information on guidelines visit the website [www.dcita.gov.au](http://www.dcita.gov.au). It is free for authors to register, however you must be registered to receive any payments.

### Educational lending right

Educational Lending Right (ELR) is a program of the Commonwealth Government's Book Industry Assistance Plan and will be funded from 2000–01 to 2003–04. ELR makes payments to eligible Australian authors and publishers whose books are held in educational lending libraries. It complements the PLR. For information on guidelines visit the website [www.dcita.gov.au](http://www.dcita.gov.au). It is free for authors to register, however you must be registered to receive any payments.

## Further copyright information

Copyright law may impact on the rights of Indigenous people to their traditional knowledge. It is therefore important for Indigenous writers to know about copyright laws.

For general information on copyright laws see:

- Australian Copyright Council  
[www.copyright.org.au](http://www.copyright.org.au)
- Arts Law Centre of Australia  
[www.artslaw.com.au](http://www.artslaw.com.au)
- Viscopy  
[www.viscopy.com.au](http://www.viscopy.com.au)

## Copyright collecting agencies

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. For management and administration of copyright, there are several collecting societies that have been established within Australia. These collecting societies administer the rights of members for a fee or share of the royalties. Some of them such as CAL and Screenrights have a legislative basis for collecting royalties. Others are voluntary organisations which artists are required to join. CAL, Screenrights and APRA are the most relevant collecting societies for authors.

### **CAL – Copyright Agency Limited**

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

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

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

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

For more information on CAL visit their website [www.copyright.com.au](http://www.copyright.com.au)

### **Screenrights**

Screenrights is a copyright collecting society for screenwriters, producers, distributors, music copyright owners, copyright owners in artistic works and sound recordings, and other rights holders in film and television.

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

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

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

For more information on Screenrights visit their website [www.screen.org](http://www.screen.org)

Screenrights has also established a website for educators at [www.enhancetv.com.au](http://www.enhancetv.com.au)

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

### **APRA – Performing rights for composers**

The Australasian Performing Rights Association (APRA) administers the performing rights in the music of composers, songwriters and publishers in Australia and New Zealand. These are the rights of performance in public and communication to the public.

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

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

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

For more information about APRA visit its website [www.apra.com.au](http://www.apra.com.au)

### **Viscopy**

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

Viscopy has about 2 000 Australian artist members, half of which are Indigenous artists and their estates.

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

Viscopy handles associated contracts, negotiations, legal requirements and the distribution of royalties.

There is no membership fee to join Viscopy. However, an administrative charge applies to clearances. Payments are then made to artists half-yearly.

For more information on Viscopy visit their website [www.viscopy.com.au](http://www.viscopy.com.au)



# follow up

## Applying the protocols

*Protocols are about people's value systems and their cultural beliefs.<sup>66</sup>*

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

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

**Follow up** provides a checklist of key points to consider when developing protocols for a literature project, or in your own writing practice. It offers different and more specific information than the preceding sections. We therefore suggest you use the points outlined here together with the *Principles and Protocols*, and *Copyright* sections.

The following principles are a framework for respecting Indigenous heritage:

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

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

## Respect

People working in Indigenous literature are encouraged to respect that:

- Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.
- It is important to seek consent from and acknowledge the Indigenous country and custodians at the site of each spoken word performance, launch or literary event, and in the acknowledgment of a published text about a specific Indigenous country.
- Indigenous people have the right to own and control their heritage – including Indigenous body painting, stories, songs, dances, images, traditional knowledge and other forms of cultural expression.
- Indigenous cultures are living cultures.
- The diversity of Indigenous culture should be acknowledged. Culture varies from country to country and from clan to clan.
- Indigenous people have the right to be represented by Indigenous people of their choice.

- The cultural contribution of Indigenous people to literature should be valued, acknowledged and remunerated.
- Local community protocols and protocols associated with a specific work should always be respected and observed.
- Indigenous world views and customary laws should be respected in contemporary artistic and cultural life.

## Publishing stories and ideas

- The effects of a published Indigenous story – whether sacred, closed or general – should be discussed prior to publication.  
Once publicly released, it is difficult to chart how a story might be embraced, adopted and ingrained within dominant and other cultures.

## Indigenous control

Indigenous people have the right to control the use and expression of their cultural heritage.

- Discuss use of Indigenous cultural heritage material with Indigenous people in authority.
- Involve Indigenous people in all stages of writing projects, including Indigenous writers, community members, storytellers and editors.

## Communication, consultation and consent

- Consult with Indigenous people on the use and representation of their Indigenous heritage.
- Prior to use, inform Indigenous people about the implications of consent.
- Consultation should address the communal nature of Indigenous cultural expression.
- Has sufficient time been allowed for consultation? Each community will need a reasonable period of time to consider and consult within their communities. Do not expect to have a reply to a question in a day or a week.

## Creation stories

- Speak to elders and other people in authority about using creation stories. It is not acceptable to source material from other books without considering the rights of Indigenous people.
- Seek permission prior to writing or re-telling Indigenous creation stories.
- If a writer is not Indigenous, he or she should consider whether they should be reinterpreting creation stories – or whether an appropriate Indigenous person can be identified to tell and record the story.
- Identify appropriate information and authority bodies to discuss ideas for literary works – for example, language centres or Indigenous publishing houses if the idea involves adaptation or translation of a creation story.

## Recording oral stories

- Consult with relevant Indigenous people, family members, Indigenous organisations and other individuals relevant to the project.
- Make draft copies available before publication and allow relevant Indigenous people and family members to comment on drafts.
- Be aware that the inclusion of personal material may be sensitive.
- Consider who should own copyright in the published story.
- Clear publication rights with relevant people.

## Writing life stories

- If you are writing about living people, it is important to get their consent and work closely with them. Talk about copyright and intellectual property issues.

If it is primarily their story (for example, if transcribed from tapes), then the life story subject should own copyright.

If it is a collaboration (for example, where the writer has brought his or her skill to the work), then there may be some scope for sharing copyright.

- If writing about a deceased person, speak to the family or clan representatives to seek their permission and consult on issues of representation.
- If adapting oral stories and using true accounts for novels, consent should be sought from the person who is telling the story, elders and/or other persons in authority.
- Ensure that all collected materials such as photographs, recordings, copies of stories, CD-ROMs, books, radio interviews and newspaper clippings are returned to the original informant and/or family and community.

## Interpretation, integrity and authenticity

- Consult with Indigenous people about the integrity and authenticity of their Indigenous heritage.
- Indigenous individuals and communities should have control over how their cultural material is presented.
- Make sure the writing is based on sound research and that facts are credible.

### Interpretation

- Consider reasons for writing or commissioning a work. Reflect on whose perspectives of Aboriginality are being represented in any methodology.
- Be responsible for your representation of Indigenous cultures. Consider the following:
  - How will your writing affect the Indigenous group it is based on?
  - Does it empower Indigenous people?
  - Does it expose confidential, personal and/or sensitive material?
  - Does it reinforce negative stereotypes?

- Have you used appropriate terminology?
- The cover and illustrations of the book should be checked by the author to ensure they are authentic and not culturally offensive to other Indigenous groups.

### Editing

- Indigenous individuals and communities should have the final approval on how the written form of their cultural material is presented. Reasonable time should be given for checking drafts.
- Once approval is given, any future editing should be checked again with the relevant Indigenous people.
- The use of Indigenous people as writers and editors of manuscripts, books and reports about Indigenous cultural material is encouraged.

### Publishing

- Publishers should not assume that traditional Indigenous stories are free to be exploited. It is necessary to consult with relevant Indigenous people for permission. If agreed, publishers and collecting societies should negotiate with Indigenous people on appropriate royalties for use.
- Publishers should make relevant inquiries to ensure a writer who is promoted and marketed as 'Indigenous' is an Indigenous Australian person. The Aboriginal and Torres Strait Islander Commission's test for Aboriginality is recommended.
- Written contracts conforming to the ASA Minimum Standards are encouraged.
- Indigenous writers should be given the opportunity to consider contracts and obtain proper legal advice.

- The publishing contract should be explained to Indigenous writers and, if necessary, a translator should be used to explain the major issues of the contract.
- Special attention should be paid to clearing any suggestions or changes made through the editorial process.
- When selecting illustrations for the cover, consult with the Indigenous author, artist and other Indigenous people to check the cultural appropriateness of the image.
 

Where possible, an Indigenous artist should be commissioned, or the work of an Indigenous artist licensed for a fee – no less than the rate charged by Viscopy.

## Secrecy and confidentiality

- The right of Indigenous people to keep secret and sacred their cultural knowledge should be respected.
- Indigenous people have the right to maintain confidentiality about aspects of their personal and cultural affairs.

### Representation of deceased people

- In many Indigenous communities, the reproduction of deceased people's names and images in books is offensive to Indigenous beliefs.
- Consult with the deceased's family or community so that the appropriate protocols are observed.

### Secret and sacred material

- Secret and sacred material refers to information that is restricted under customary laws.
- The publication of secret and sacred material may be a transgression of Indigenous law.

- Some people question whether it is appropriate at all to publish sensitive material in a form which can be disseminated widely.

### Personal privacy

- The personal privacy of Indigenous people should be respected.
- Personal and confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure.
- It is the responsibility of those putting together writing projects to discuss any restrictions on use of the information with relevant Indigenous people and groups.

## Attribution

- Indigenous people should be given proper credit or appropriate acknowledgment for their role in the development and use of Indigenous cultural material.
- Indigenous people should be attributed for the use of their cultural heritage material in stories.
- Ensure that proper attribution is given to the writer and the source community, or other relevant Indigenous people.

## Proper returns

- Indigenous people have the right to receive proper returns for their contribution and the use of their cultural material, including copyright and royalties.
- Have fees or other benefits been negotiated with the informers, storytellers, writers and any relevant traditional custodians?



- The issue of copyright ownership of the material form of cultural expression should be discussed up-front.
- Indigenous people have the right to control the commercial exploitation of their cultural material.
- Indigenous people have the right to share in the benefits from any commercialisation of their cultural material.
- Check whether benefits other than royalties are sought by or due to Indigenous people.
- Have you registered the work with the Copyright Agency Ltd (CAL), Public Lending Right (PLR) and Educational Lending Right (ELR)?

## Continuing cultures

- Consultation is a continuous process.
- Indigenous cultures are dynamic and evolving, and the protocols within each group and community will also change.
- Have cultural protocols been considered and included in any future licence agreements for use of the work?
- Indigenous people have a responsibility to ensure that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

## Recognition and protection

- Indigenous people have the right to protection of their Indigenous heritage.
- The Indigenous author should own copyright in his or her literary work, giving him or her control of reproduction and dissemination of the work.

## Copyright

- The author is generally the copyright owner of a literary work. Exceptions include an author who is an employee under a contract of service.
- The work must be original and must be reduced to material form.
- To be original, for the purpose of copyright protection, the author must have applied sufficient skill, labour and judgment to create the work.
- Authors do not need to register for copyright protection.
- The copyright owner of a literary work has the exclusive right to:
  - (i) reproduce the work in a material form
  - (ii) publish the work
  - (iii) perform the work in public
  - (iv) communicate the work to the public
  - (v) make an adaptation of the work
  - (vi) do any of the above in relation to an adapted literary work.
- Copyright lasts for 50 years after the death of the artist.
- Ideas and themes are generally not protected. It is the *expression* that is protected.
- The Indigenous author who incorporates traditional ritual knowledge in his or her work has a special obligation to the clan when exercising copyright in the work.
- The author has moral rights to his or her literary work. This includes the right of integrity and attribution.
- When reproducing and publishing literary works, it is necessary to get copyright clearance from the author.

- Writers and publishers are encouraged to use written agreements.
- A person will infringe copyright in a literary work if he or she does any of the following without permission from the copyright owner:
  - publishes the work
  - reproduces the work in material form
  - adapts the work
  - communicates the work to the public.

Statutory exceptions include the purposes of criticism or review, and incidental filming.

- Under the educational statutory licensing schemes, authors may be entitled to royalties for use of their works. CAL and Screenrights (the Audio Visual Copyright Society) collect and distribute royalties to author and screenwriter members.



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- <sup>9</sup> Terri Janke, *Our Culture: Our Future*.
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- <sup>17</sup> *National Directory of Aboriginal and Torres Strait Islander Organisations*, Directories Australia, Sydney, 2001. Available through Crown Content, (03) 9329 9800 or [www.crowncontent.com](http://www.crowncontent.com)
- <sup>18</sup> Registered under the Aboriginal Councils and Associations Act 1976 (Cth) or other relevant legislation.
- <sup>19</sup> Bruce Pascoe, email to Terri Janke & Company, 15 June 2001.
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- <sup>21</sup> Jackie Huggins, 'Respect v Political Correctness', *Australian Author*, Spring 1994, vol. 26, no. 3, page 12.
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- <sup>26</sup> This is what happened in the case of Foster v Mountford where Pitjantjatjara men took action against the publication of a book containing sacred men's material.
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- <sup>45</sup> Susan Wyndham, 'The Mystery of Marlo Morgan Down Under', *The Australian Magazine*, 29-30 October 1994, pages 26–28.
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- <sup>47</sup> NSW Ministry for the Arts, *Guidelines 2001–2002*, Sydney, 2000, pages 103–104.
- <sup>48</sup> Anita Heiss, *Australian Copyright vs. Indigenous Intellectual and Cultural Property Rights*, discussion paper, Australian Society of Authors, Sydney, viewed 9 April 2002, [www.asauthor.org](http://www.asauthor.org)
- <sup>49</sup> Commonwealth Government of Australia, *Copyright Act 1968*, Sections 31(1)(a)(i) and (b)(i).
- <sup>50</sup> Indigenous works are not easily divided into categories of contemporary or traditional, despite common perceptions. In *Writing Cultures*, 'traditional' refers to works that have drawn from a pre-existing cultural base.
- <sup>51</sup> Section 31, *Copyright Act 1968 (Cth)*.
- <sup>52</sup> Section 10, *Copyright Act 1968 (Cth)*.
- <sup>53</sup> Section 35, *Copyright Act 1968 (Cth)*.
- <sup>54</sup> Bulun Bulun & M\* v R & T Textiles Pty Ltd (1998), 41 Intellectual Property Reports 513. The M\* refers to a deceased person and that is how the cultural protocol advises speaking of him.
- <sup>55</sup> Commonwealth Government of Australia, *Copyright Act, 1968*, Section 33.
- <sup>56</sup> Commonwealth Government of Australia, *Copyright Act 1968 (Cth)*, Section 194(1).
- <sup>57</sup> Commonwealth Government of Australia, *Copyright Act 1968 (Cth)*, Section 194AA.
- <sup>58</sup> Commonwealth Government of Australia, *Copyright Act 1968 (Cth)*, Sections 195AJ, 195 AK and 195 AL., ACT, 2000.
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# contacts

## Arts policy and funding

### Aboriginal and Torres Strait Islander Arts Board, Australia Council

PO Box 788  
Strawberry Hills NSW 2012  
Tel: (02) 9215 9065  
Fax: (02) 9215 9061  
Toll Free: 1800 226 912  
Email: [atsia@ozco.gov.au](mailto:atsia@ozco.gov.au)  
Web: [www.ozco.gov.au](http://www.ozco.gov.au)

### Arts NT

GPO Box 1774  
Darwin NT 0801  
Tel: (08) 8924 4400  
Fax: (08) 8924 4409  
Email: [arts.office@nt.gov.au](mailto:arts.office@nt.gov.au)  
Web: [www.nt.gov.au/cdsa/dam](http://www.nt.gov.au/cdsa/dam)

### Arts Queensland

GPO Box 1436  
Brisbane QLD 4001  
Tel: (07) 3224 4896  
Toll Free (Qld): 1800 175 531  
Fax: (07) 3224 4077  
Toll Free (Qld): 1800 175 532  
Email: [reception@arts.qld.gov.au](mailto:reception@arts.qld.gov.au)  
Web: [www.arts.qld.gov.au](http://www.arts.qld.gov.au)

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### Arts WA

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## NSW Ministry for the Arts

PO Box A226  
Sydney South NSW 1235  
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Web: [www.arts.nsw.gov.au](http://www.arts.nsw.gov.au)

## Copyright and legal

### Arts Law Centre of Australia

The Gunnery  
43–51 Cowper Wharf Road  
Woolloomooloo NSW 2011  
Tel: (02) 9356 2566  
Toll Free: 1800 221 457  
Fax: (02) 9358 6475  
Email: [artslaw@artslaw.com.au](mailto:artslaw@artslaw.com.au)  
Web: [www.artslaw.com.au](http://www.artslaw.com.au)

### Australian Copyright Council

PO Box 1986  
Strawberry Hills NSW 2012  
Redfern NSW 2016  
Tel: (02) 9318 1788  
Fax: (02) 9698 3536  
Email: [cpright@copyright.org.au](mailto:cpright@copyright.org.au)  
Web: [www.copyright.org.au](http://www.copyright.org.au)

### Indigenous Cultural and Intellectual Property website

Web: [www.icip.lawnet.com.au](http://www.icip.lawnet.com.au)

## Copyright collecting societies

### Australasian Performing Right Association - APRA

Locked Bag 3665  
St Leonards NSW 2065  
Tel: (02) 9935 7900  
Fax: (02) 9935 7999  
Email: [apra@apra.com.au](mailto:apra@apra.com.au)  
Web: [www.apra.com.au](http://www.apra.com.au)

### Copyright Agency Limited – CAL

Level 19, 157 Liverpool Street  
Sydney NSW 2000  
Tel: (02) 9394 7600  
Fax: (02) 9394 7601  
Email: [info@copyright.com.au](mailto:info@copyright.com.au)  
Web: [www.copyright.com.au](http://www.copyright.com.au)

### Screenrights

PO Box 1248  
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## Indigenous organisations

### Aboriginal and Torres Strait Islander Commission – ATSIC

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### Gadigal Information Service

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### Goolarri Media Enterprises

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### Island Coordinating Council

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### Torres Strait Islander Media Association

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### Torres Strait Regional Authority

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Web: www.tsra.gov.au

### Literary organisations

#### Australian Society of Authors

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Redfern NSW 2012  
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Email: asa@asauthors.org  
Web: www.asauthors.org



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