

2ND EDITION



Protocols for producing Indigenous Australian performing arts

# Performing arts

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The Australia Council respects Indigenous communities and culture. Readers should be aware that this protocol guide may contain references to members of the Indigenous community who have passed away.

### IMPORTANT NOTICE

The information included in this guide is current as at September 2007. This document was first published under the title 'Performing Cultures' in 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.

## Performing arts

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## Introduction

Australia's Indigenous artistic and cultural expression is rooted in thousands of years of practice and its uniqueness has been recognised internationally.

When the Musée du Quai Branly opened in Paris in 2006, visitors were spellbound by the immense power of the large collection of Australian Indigenous art works, including special landmark commissions on the ceilings and façade by eight of Australia's best known Indigenous contemporary artists. In May 2007, Emily Kngwarreye's *Earth's Creation* sold at auction for more than \$1 million, the highest price ever for a painting by a female artist in Australia.

While works by individual artists such as these are protected by copyright, there are often no legal rights around the broader reproduction and use of Indigenous cultural heritage material. Australia does not yet have a law that prevents alteration, distortion or misuse of traditional symbols, songs, dances, performances or rituals that may be part of the heritage of particular Indigenous language groups.

That is where the Australia Council for the Arts' protocol guides come in. The five guides in the suite spell out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material. They can help people do the right thing. These guides recognise that in Indigenous Australian communities the artist is a custodian of culture, with obligations as well as privileges.

The five guides in the suite are:

- Media arts
- Music
- Performing arts
- Visual arts
- Writing.

They are relevant to anyone working in or with the Indigenous arts sector, including:

- Indigenous and non-Indigenous artists
- people working within related fields of Indigenous artform practice
- Australian and state government departments
- industry agencies and peak organisations
- galleries, museums and arts centres
- educational and training institutions
- Indigenous and targeted mainstream media.

The protocol guides endorse Indigenous cultural and intellectual property rights – the rights of Indigenous people to own and control their cultural heritage. These rights are confirmed in the 2006 *United Nations Declaration of the Rights of Indigenous Peoples*,<sup>1</sup> which says Indigenous people have the right to practice and revitalise their cultural traditions and customs. 'This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.'

In *Our culture: our future*<sup>2</sup>, Terri Janke recommended significant changes to laws, policy and procedures to protect Indigenous cultural knowledge and expression. The Australian Government has yet to make a determination on this matter.



In Australia, Indigenous heritage comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people have a living heritage. Their connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, music, the visual arts, and media arts are some of the mediums for transmitting Indigenous cultural heritage.

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

Although each guide in the suite addresses cultural protocols specific to an artform, the same underlying principles are common to each.

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

We also hope the guides will spark debate and that additional protocols will be developed across artforms.

Send any comments about this guide or any suggestions for improvement to the Australia Council for the Arts.

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### Using the this guide

This guide is designed to be an initial point of reference in planning a work with Indigenous performing arts practitioners, or using Indigenous cultural material. When you need specific advice

on the cultural issues of a particular group, we recommend you speak to people in authority, or engage an Indigenous cultural consultant with relevant knowledge and experience.

Reading this guide from cover to cover is an important and highly recommended first step.

The introduction defines protocols as used in this guide, and looks at the special characteristics of Australia's Indigenous performing arts.

The next section, Indigenous heritage, gives an overview of the issues that inform the development of Indigenous protocols. It explores the complexity of Indigenous Australia and the potential impact of this on the planning of a drama or dance project. It also charts international initiatives for the protection of Indigenous cultural and intellectual property rights.

The key sections, drama principles and protocols and dance principles and protocols, present the nine principles that support the protection of Indigenous cultural heritage. It includes valuable information on protocols specific to the use of cultural heritage material in drama and dance practice. A number of case studies and commentaries from Indigenous performing arts practitioners identify pitfalls and offer readers valuable advice.

The common issues section covers fees and employment conditions, festival performances and the 'welcome to country' protocol, which are common to both dance and drama. There are also references to a number of other protocol documents produced in recent years.

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

The implementation section provides a checklist of key points to consider when developing protocols for a performing arts project.

### What are protocols?

*It's easy to get caught up in following the path of least resistance. We have to go with what's important, not what's easy.<sup>3</sup>*

Wesley Enoch, Indigenous theatre director

Protocols are appropriate ways of using Indigenous cultural material, and interacting with Indigenous people and their communities. Protocols encourage ethical conduct and promote interaction based on good faith and mutual respect. Indigenous protocols arise from value systems and cultural principles developed within and across communities over time.

Responsible use of Indigenous cultural knowledge and expression will ensure that Indigenous cultures are maintained and protected so they can be passed on to future generations.

It is important to recognise 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 engaging with Indigenous performers and their communities, there are some fundamental principles within which to conduct respectful work.

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

The guide identifies many specific protocols, which can be applied or adapted by writers, producers, directors, choreographers, dramaturges, dancers, performers, designers,

event managers, arts organisations and others working in the performing arts.

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

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

These protocols are accepted and used by many Indigenous performing artists and arts organisations and have also been used for several Indigenous performance projects.

### What is Indigenous performance?

Indigenous performance is an important part of Indigenous culture.

Performance is about expressing cultural belonging. It is part of ceremony, storytelling, celebration, mourning, coming together and telling of events in Indigenous people's lives, both past and present.<sup>4</sup>

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

Indigenous performance refers to:

- acting
- dancing
- directing
- dramaturgy.

These performances are carried out primarily by Indigenous Australians or are based on the cultural expression of Indigenous Australians.

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

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

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

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

### Special nature of Indigenous performance

For Indigenous cultures, drama and performance are central to identity, place and belonging and are an expression of a unique and continuing tradition.

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

- renewing and teaching law and culture
- ceremony
- storytelling
- preserving language
- entertainment
- recording personal stories

- recording stories of common Indigenous Australian experiences
- telling Indigenous experience to the wider community
- celebrating
- commenting on life, society and politics
- showcasing and sharing Indigenous experiences through collaborative writing, performance and recording
- sharing Indigenous experience with audiences in Australia and overseas.

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

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

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

Many other important issues are addressed in subsequent chapters.

### Indigenous heritage

The Indigenous performing arts are an important means of expressing Indigenous heritage – past, present and future. Indigenous heritage, enshrined in Indigenous cultural and intellectual rights, is discussed at length in *Our culture: our future*.<sup>5</sup> Under copyright laws, these rights are not always protected and this is why we encourage the use of Indigenous protocols.

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

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

There are many Aboriginal and Torres Strait Islander cultures – not just one. 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.

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, language group affiliations and community, and organisational and government structures. A range of authority structures exists across urban, regional and remote communities. It is important to acknowledge the complexity of Indigenous Australia when negotiating the use of Indigenous heritage for a performing arts project.

Indigenous Australians are concerned that there is no respect for their Indigenous cultural knowledge, stories and other cultural expression in the wider Australian cultural landscape. Concerns include the current legal framework that does not promote or protect the rights of Indigenous people – particularly to own and control representation and dissemination of their stories, knowledge and other cultural expression.<sup>6</sup>

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

#### **Our culture: our future**

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

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

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, as well as the particular language that may be intrinsic to cultural identity, knowledge, skill, and teaching of culture.

For a full list of rights see *Our culture: our future – report on Australian Indigenous cultural and intellectual property rights*.<sup>7</sup>

### Current protection of heritage

Australia's current legal framework provides limited recognition and protection of Indigenous heritage rights. *Our culture: our future* recommended significant changes to legislation, policy and procedures. The Australian Government has not yet responded formally to these recommendations.

However, there are proposals to amend the *Copyright Act 1968* (Cth) to recognise Indigenous communal moral rights. In the absence of laws that protect Indigenous cultural and intellectual property, 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 ensure that Indigenous people's cultural heritage is respected and protected over time.

These rights are given international recognition in the *United Nations Declaration on the Rights of Indigenous Peoples*. Article 31 states:

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

2. *In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.*<sup>8</sup>

The *Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights* 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>9</sup>

*Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (1993)*, adopted by the former Aboriginal and Torres Strait Islander Commission's Indigenous Reference Group in 1997,<sup>10</sup> state: '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>11</sup>

Internationally, the World Intellectual Property Organisation (WIPO) has established an intergovernmental committee (IGC) 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>12</sup>

Based on its extensive international, regional and national experience and on input from different countries, the WIPO IGC developed two important documents, which outline policy and legal options for traditional cultural expression and knowledge. These are:

- (i) the protection of traditional cultural expressions/expressions of folklore; draft objectives and principles<sup>13</sup>
- (ii) the protection of traditional knowledge; draft objectives and principles.<sup>14</sup>

The latest WIPO provisions for the protection of traditional cultural expressions (TCEs) suggest three layers of protection tailored to different forms of cultural expression. It says TCEs of particular religious and cultural significance should be noted in a public register so there is certainty as to which are protected and for whose benefit. The items in the register would be afforded a form of protection similar to that given by intellectual property rights legislation.

It recommends in Article 3, that when TCEs have been registered or notified, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent certain acts taking place without its free, prior and informed consent.

With TCEs other than words, signs and names, these acts include:

- the reproduction, publication, adaptation and communication to the public and adaptation of its traditional cultural expressions
- any use of traditional cultural expression which does not acknowledge in an appropriate way the community as the source
- any distortions, mutilations or other modification of or inappropriate action in relation to the traditional cultural expression
- the acquisition or exercise of intellectual property rights over the traditional cultural expression adaptations of them.<sup>15</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>16</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.

## Drama principles and protocols

Indigenous drama takes many forms, including plays, storytelling and musicals. It can be performed in all sorts of venues from theatres to the street. Indigenous drama might include cultural heritage such as traditional songs or dances, tell a traditional story belonging to a particular language group, or tell the story of a person or community.

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

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

1. Respect
2. Indigenous control
3. Communication, consultation and consent
4. Interpretation, integrity and authenticity
5. Secrecy and confidentiality
6. Attribution
7. Proper returns
8. Continuing cultures
9. Recognition and protection.

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

### 1. Respect

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

#### Acknowledgment of country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia. As such they have a strong link to country, meaning the totality of life and the spirit of the particular area of land they

and their ancestors inhabited. In *Nourishing Terrains*, Deborah Bird Rose says:

*Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like 'spending a day in the country' or 'going up the country'. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart's ease.*<sup>17</sup>

When organising a performance or event of local, state or national significance, it is respectful to invite a representative of the traditional owners to attend and present a 'welcome to country' address.

A 'welcome to country' is an address given by an Indigenous custodian of the land, included in the official openings of events. As a matter of cultural protocol, large cultural events should invite an Indigenous custodian or representative of the traditional landowner group to provide a 'welcome to country'. Alternatively, an Indigenous person of prominence or an elder who has lived in the area and contributed to the Indigenous community may also be asked to acknowledge country if they are not in a position to welcome.

It is respectful for others speaking officially to also acknowledge country and custodians at the site of the event. For example, the master of ceremonies (MC) at an event could make an introductory acknowledgement to the traditional owners of the land.<sup>18</sup>

Seek advice from the Indigenous community on the preferred manner of acknowledgement, and the relevant groups to be acknowledged. It is important to acknowledge country and custodians at the site of each performance or event. In many instances it may not be appropriate for every performer to acknowledge country and the custodians. It will often be more appropriate for the MC or other spokesperson to acknowledge on behalf of performers and audience.<sup>19</sup> Seek advice from the Indigenous community on the preferred manner of acknowledgement.

Museums and Galleries of NSW has published a written 'welcome to country' protocol, which is available from its website at <[www.mgnsw.org.au](http://www.mgnsw.org.au)>. This is a useful guide to assist with preparation for launches and events, but is also useful for those organising dances and performances.

#### Case study: Welcome to country

Sam Cook is the executive director of the Perth-based Indigenous theatre company, Yirra Yaakin Theatre. She is from Nyikina country in the Kimberley area. She talks about the protocol for her and Yirra Yaakin in Noongar country.

We are a very pluralist society and culture. As a Nyikina woman living in Noongar country I understand the boundaries of my own cultural authority. I never assume to have the authority to speak for other Indigenous nations and ensure that I too engage with a clear sense of protocol and respect, be it locally, nationally or within the international Indigenous community. As a practical example of this, at the recent historical 'welcome to country' held here in Perth, which celebrated the 14 different groups that make up the Noongar nation, my role as a Nyikina person who is also

executive director of Perth-based Yirra Yaakin, was to 'lead from behind'. The elders were the bosses as was the Noongar community. Therefore it was my job to make sure the elders had the information they needed, that the production values were all in place, and that we realised this outstanding event. So if the elders asked for Yonga Bookas (kangaroo skin cloaks), I make sure they had them without question.<sup>20</sup>

#### Accepting diversity

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

#### Representation

Indigenous cultures should be represented using Indigenous cultural values. It is important to avoid outdated or inappropriate perspectives and terminology. When a non-Indigenous group collaborates with Indigenous performers and the community, it is best to invite an Indigenous person to work as a cultural consultant or have in place a clear process to enable a two-way exchange and meaningful partnership. The tasks may include liaising between the groups, and advising on cultural protocols and the use of Indigenous cultural material so that its integrity is valued, protected and respected.<sup>21</sup>

#### Living cultures

Indigenous cultures are living and evolving entities, not simply historical phenomena. Developing a dramatic work often involves adapting or reinterpreting traditional or contemporary works. Extensive consultation is important to identify who has authority to speak for a work<sup>22</sup> and who can authorise any adaptation.



## 2. Indigenous control

*Theatre companies like Yirra Yaakin put the principle of self-determination into practice and we are re-setting the way things are done. We are determining the way forward. Rather than providing people with a false sense of Aboriginal people's experiences, we are finding our way forward by developing our artistic, creative and contemporary work.*

Sam Cook<sup>23</sup>

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

One significant way is for all participants in a project to discuss how Indigenous control over a project will be exercised. This raises the issue of who can represent language groups and who can give clearance of traditionally and collectively owned material.

To consult effectively and gain consent for the use of Indigenous cultural material in a particular project, the Indigenous people with authority for specific stories, geographic locations, dances or performances need to be identified.

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. It should never be assumed that this position will be provided freely, and in accordance with any consultation or business dealing, remuneration should be considered at no less than industry standard rates.

For initial contacts we recommend the following directories.

- *The Black Book Directory 2005 – Indigenous Arts & Media Directory*. Published by Blackfella Films and Australian Film Commission and available online at <[www.blackbook.afc.gov.au](http://www.blackbook.afc.gov.au)>.
- *Blacktalent* – Australia's online directory for Aboriginal and Torres Strait Islander arts industry practitioners. Published by Ilbijerri Aboriginal and Torres Strait Islander Theatre Cooperative and available online at <[www.blacktalent.com.au](http://www.blacktalent.com.au)>.
- *Black Pages* directory – *Black Pages* is Australia's first and only national online Indigenous Business and Community Enterprise Directory and is available at <[www.blackpages.com.au](http://www.blackpages.com.au)>.
- Australian Institute of Aboriginal and Torres Strait Islander Studies has links to a list of Aboriginal and Torres Strait Islander organisations. [www.aiatsis.gov.au/library/links/atsi\\_links](http://www.aiatsis.gov.au/library/links/atsi_links)

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, you must obtain permission from the local land council or trust, or the community council concerned. For information, consult the land council in the region you intend to visit, or for the Torres Strait, contact the Torres Strait Regional Authority.

For information about language use, contact the Federation of Aboriginal and Torres Strait Islander Languages (FATSIL). FATSIL provides a National Indigenous Languages Directory with contacts and profiles for language centres, universities, TAFEs and other relevant bodies and individuals, listed by location at <[www.fatsil.org/links/nild.htm](http://www.fatsil.org/links/nild.htm)>.

For performing arts projects related to the Torres Strait, contact Torres Strait Regional Authority, <[www.tsra.gov.au](http://www.tsra.gov.au)>.

Some other useful starting points for inquiries include:

- Aboriginal land councils

- Office of Indigenous Policy Coordination
- Indigenous media associations including the Australian Indigenous Communications Authority (AICA) and other Indigenous organisations listed in the contacts section of this guide
- Torres Strait Regional Authority
- Island Coordinating Council
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- Indigenous unit of the Australian Film Commission
- Indigenous theatre companies
- Indigenous language centres
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries
- relevant individuals or family members
- elders and custodians of relevant Indigenous language groups.

### Engaging Indigenous contributors

When engaging Indigenous contributors to participate in a project, most organisations use the definition of Aboriginal identity used by the Australian Government as a guide. The Australia Council's Aboriginal and Torres Strait Islander arts board requires a confirmation of Aboriginal/Torres Strait Islander identity to be signed. Applicants must provide a confirmation of identity from an organisation registered under the *Aboriginal Councils and Associations Act 1976* since July 2007, registered under *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, or other relevant legislation and a declaration that they are of Aboriginal or Torres Strait Islander descent, identify as an Aboriginal and are accepted as such in the community in which they live.

There are other ways to engage contributors, especially for festivals. Refer to the First Nations Status application developed for The Dreaming

Festival (see the dance section of this guide); the application processes developed for the Garma Festival; and the protocols of Woomera Aboriginal Corporation, also in the dance section).

## 3. Communication, consultation and consent

Indigenous people should be consulted on the use and representations of their Indigenous heritage and be fully informed about the implications of consent. Consultation should address the communal nature of Indigenous cultural expression. Without effective consent, misappropriation of Indigenous cultural material may occur.

In some areas, non-Indigenous writers have reproduced the cultural stories they hear from Indigenous people. The stories are often retold without seeking permission from the Indigenous community. This is a serious breach of Indigenous protocols and can cause real disruption and distress in the Indigenous community that owns the story. It is also a missed opportunity to give space to Indigenous voices – to hear the story told by an Indigenous person.<sup>24</sup>

The process of communication, consultation and consent may include:

- identifying community members who have authority to speak for the Indigenous cultural heritage in the dramatic work
- discussions with community members, providing information about the proposed project, seeking consent to use the Indigenous material, seeking guidance on use and feedback on proposals
- accepting that the community may not consent to the project
- ongoing discussions about the way in which the work will be developed, performed and presented
- clear recognition of the Indigenous intellectual property of the work.



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

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

**Case study: Yirra Yaakin Noongar Theatre – *The Dreamers***

In the 2002 season of *The Dreamers*, directed by Wesley Enoch, the theatre company Company B employed Lynette Narkle, associate director at Yirra Yaakin Noongar Theatre, as cultural advisor. Enoch worked closely with the family of the playwright, the late Jack Davis. The play involved references to Western Australian Indigenous cultural material, and Lynette was contracted to ensure that the proper cultural protocols were followed.<sup>25</sup>

**Case study: Kooemba Jdarra Indigenous Performing Arts – *Luck of the Draw***

The play, *Luck of the Draw*, tells the story of some members and family of the Stolen Generation. When Kooemba Jdarra, an Indigenous performing arts company based in Brisbane, performed the play, the company hired an elder from Cherbourg to advise the cast and crew on cultural issues.<sup>26</sup>

A number of Indigenous groups consult regularly with the Indigenous community on the development of their overall work, and the development of particular performances.

**Comment: Ilbjerri Aboriginal and Torres Strait Islander Theatre Co-operative**

At Ilbjerri we are focusing on strategies to get as many Indigenous people to come along to performances as possible as our primary goal is to produce works for and by our community. Our 'Blak Bums on Seats' project ran focus groups with Indigenous organisations and community members to find out what audiences want, so Ilbjerri can cater for those audience needs. We are asking, "What do Indigenous audiences want to see?" and using those answers to guide our development.<sup>27</sup>

**Case study: Kooemba Jdarra Indigenous Performing Arts**

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

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

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

Kooemba Jdarra has developed strong community consultation protocols for production of its work, and *Going to the Island* was a great example of the successful operation of its cultural protocols.<sup>28</sup>

**Case study: Ilbjerri Aboriginal and Torres Strait Islander Theatre Co-operative**

Since 2005, Ilbjerri Aboriginal and Torres Strait Islander Theatre Co-operative has collaborated with Indigenous community partners to ensure that its work is meaningful to the Indigenous community. Ilbjerri teams up with an Indigenous organisation with specialised skills as co-producers. The Indigenous community partner works with Ilbjerri on the creative development, is consulted and involved at each step, and is acknowledged for its contribution to the production. The productions are also the beginning of an ongoing relationship between Ilbjerri and the Indigenous community partners.

*The Dirty Mile* is a collaboration with Parkies Vic Inc., the community organisation that represents the Parkies who live and socialise in Melbourne's public space. Through Ilbjerri's Indigenous community partnership with Parkies Vic, permission to perform on the land in Fitzroy could be worked through. The partnership also meant that the Parkies were an important part of the production and were involved in performance. The story of Fitzroy is one of a continual and ongoing attempts to disperse the local Aboriginal population and it is also a story of the ongoing resistance to those pressures. By working in partnership with Parkies Vic, Ilbjerri was able to undertake a cultural process to recognise this important organisation and support that resistance.

In another example, the Department of Human Services' Blood Borne Viruses section asked Ilbjerri to create a production about Hepatitis C. Ilbjerri asked its peak Indigenous community health organisation,

the Victorian Aboriginal Community Controlled Health Organisation (VACCHO), to be involved. VACCHO's role as a partner on *Chopped Liver* is significant and extends Ilbjerri's ability to find Indigenous ways of working. This partnership draws on VACCHO's network of member health services to directly involve their health workers in bringing their clients as audiences to *Chopped Liver*. VACCHO also contributed significantly to the script development, making sure the health facts were correct and that the play was written in a voice its clients would recognise.<sup>29</sup>

**Case study: Yirra Yaakin Noongar Theatre**

**INDIVIDUALS**

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

**COMMUNITIES**

In 1999 we wanted to develop work based on the traditional stories about waterways in the southwest of Western Australia. We knew families from that area who had those stories, so we went and talked to them. They in turn advised that we talk to others – and this of course unearthed more stories. We spent about six to eight months talking to the owners of those stories. The work we produced in 2000 was called *Djildjit*. It's not unusual for any of our works to be developed over an 18 to 20-month period before production starts.

#### ADVISING NON-INDIGENOUS ORGANISATIONS ON CONSULTATION PROTOCOLS

We were asked by a non-Indigenous festival organiser about how to conduct consultation for a performance in a remote area. We told them the names of the families who were responsible for that area. They consulted with a few families, but stopped when they had a majority in agreement. We advised them that they needed to talk to all the families, not just a majority.<sup>30</sup>

#### Time frames for consultation and consent

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

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

Non-Indigenous funding bodies need to realise that the process is the most important thing. Kooemba Jdarra's Nadine McDonald comments: 'Funding bodies say: "Product! Product! Product! It's Indigenous Australian theatre!" Yes, well it is, but the process has to be done the right way'.<sup>31</sup>

#### Consultation on all stages of production

Like many artforms, drama will often be produced in many different circumstances. A play may be performed within a particular local environment, or it may be invited to tour around the world. It is important to consider these issues during consultation, or return for further consultation. In the event of a tour, it is important to be able to provide information on the context in which the work will be performed. For example, what

is the nature of the festival? Who else will be performing? Is it a suitable setting for the play?

Rachel Swain of Marrugeku Company says, 'We always think very carefully about the context the work is later toured in'.<sup>32</sup> Dramatic works may also be produced in a number of media. It may be performed live, or adapted for film, television, radio and may be available on the internet. It is important to include discussion of different locations and media in consultations.

#### Complexity of the consultation process

Consultation can be very straightforward, but frequently it is more complex. It is not enough to find just one person who will agree to the project or a particular interpretation of a work. It will generally be necessary to discuss the project widely with language group or family members, and to get advice from several people to establish the custodian of material.

The consultation process is ongoing over a period of time. It is rarely 'one-off' consent and may be a continuing process of working with the traditional owners as the production develops. It may take two years to develop a work because people have to meet their cultural obligations. There may be a death in the family and people have to attend.

For example, when Dallas Winmar was writing *Aliwa*, Aunty Dot Collard got sick, and the process had to wait until she got better. When they were in Adelaide and Jack Davis passed away, they had to wait again.<sup>33</sup>

Rachael Swain describes the nature of consultation.

*It's a lot about time, and some of the old men we're working with, like Thompson (Yulidjirri), last time we worked together he said, 'Well, what's really important is that we work really slowly. If we do the wrong thing some of us might get sick. We have to work so slowly that we can find out if that happens while we're*

*working, and then we know we've gone the wrong way and [can] start going a different way. We have to work so slowly that we keep in touch with each other as we go...'*<sup>34</sup>

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

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

*The play Solid, which is about Aboriginal people from the Kimberley and the south-west of Western Australia, was first performed in the Kimberley, then toured the south-west before its Festival of Perth season. We leave about four months between performances in the community the work is from, and the performances in Perth or other locations, so we can work with the input we get from the community.*<sup>35</sup>

#### Consultation issues for contemporary creators

Contemporary Indigenous actors, dancers, directors, choreographers and those who collaborate with them are creators of Indigenous culture. Creation of culture has many aspects. One role of creators is to value ongoing cultural obligations and to keep culture active and vibrant through practice.

Another widely accepted role of creators is to observe and comment on society's ways and directions. Comment might include depicting sensitive issues, practices or trends in the community. Indigenous director Wesley Enoch regards this as an important role:

*One of the roles of theatre is to confront and question the status quo, otherwise we risk confining the role of theatre to 'celebration' only.*<sup>36</sup>

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

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

#### No means no

And finally, there is always the possibility that during consultation people will decide not to engage or discussions break down, or people just do not want to participate for any number of reasons.

*It was summed up to me by someone who said, "If someone says no, they mean no".*<sup>37</sup>

## 4. Interpretation, integrity and authenticity

### Interpretation Development of a dramatic work

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

It is common practice to require actors to take on the role of cultural advisors in the development of authentic and appropriate dialogue and themes. It is more appropriate to engage a cultural consultant who is paid to undertake this work, rather than expect actors to fulfil both roles.

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

Indigenous actors are paid and credited with acting, but they are doing the job of actor/scriptwriter/cultural and community consultant.<sup>38</sup>

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

Wesley Enoch says:

*It is still the writer who has to choose what to take on and what to reject in their pursuit of a better script/performance... As a course of action, the employment of a cultural consultant as a single focus point is the best option.*<sup>39</sup>

### Performance of a dramatic work

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

Helen Anu says:

*Performing a song in the wrong context can ridicule that work. There are many songs that are not appropriate to be performed at a political venue or meeting, for instance.*<sup>40</sup>

### Case study: Marrugeku Company

#### IMPACT OF CONTEXT ON A PERFORMANCE

*We think very carefully about the ways our work is presented also. We turn down a lot of touring work we get offered if the context for presenting the work is not appropriate. We have found that particularly in Europe there is an 'exotifying' of Indigenous culture. We don't go unless we feel that the presenter has enough understanding to contextualise the work properly. We feel that is a big part of our responsibility. We take on how the work is seen and toured, how it is contextualised, when it is shown and where it is shown.*<sup>41</sup>

### Integrity

Integrity is an important aspect of the treatment of original literary, dramatic, musical and artistic works. It is also important for any copies that are made of them. Performances will often include aspects of all four types of works. Under the *Copyright Act*, the moral right of protection for integrity provides a right of protection for individual authors against inappropriate treatment of their work. For example, unauthorised sampling of Indigenous music may alter the original meaning of the work and infringe the author's moral rights.

Maintaining the integrity of a work is important for the creators, but integrity of performance is also very important for the Indigenous communities where the performance includes traditional dance, story, song or art which is of special cultural significance to the community where it originates. Unfortunately, there is no

legal remedy yet for a community as a whole if traditional material is subjected to inappropriate treatment. A legal remedy may be introduced by the Indigenous Communal Moral Rights Amendment to the *Copyright Act*, which is currently proposed by the Australian Government. See the section on Indigenous communal moral rights in this guide. At present, individual creators can exercise their moral right of integrity in their copyright material.

### Comment: Yirra Yaakin Noongar Theatre

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

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

The protocols need to recognise that when a non-Indigenous company licenses the use of an Indigenous work, they are not just buying the performance rights; they are required to engage with the Aboriginal community. The theatre company that originally developed the work needs recognition for their role in facilitating the engagement.<sup>42</sup>

### Comment: Ilbjerri Aboriginal and Torres Strait Islander Theatre Co-operative

#### MAINTAINING THE INTEGRITY OF AN INDIGENOUS VOICE IS CENTRAL TO THE WORK OF ILBIJERRI

We are conscious that funding bodies need to see box office numbers, product and financial returns. Our challenge is to fulfil

those requirements while at the same time, keeping true to our core values, working in an Indigenous way and maintaining an Indigenous voice.<sup>43</sup>

### Authenticity

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

In the Torres Strait, for instance, phrases or accents are distinctive among certain Island language groups. Respect for authenticity and integrity would require acknowledgement and consultation on the form to be adopted in performance.<sup>44</sup> The use of the Dhari, the Torres Strait Island traditional headdress, would require permission, proper consultation and respect for authentic use in any performance.<sup>45</sup>

Many Aboriginal theatre companies strive to ensure their work and work practices embrace Indigenous practices.

### Case study: Ilbjerri Aboriginal and Torres Strait Islander Theatre Co-operative

Ilbjerri is committed to ongoing development of Indigenous ways of working. Why have an Indigenous Theatre Co-op if we are just emulating mainstream theatre? We should be constantly challenging mainstream theatre concepts. One of the ways we do this is by writing as a team. So while the playwright has the final say in the creative product, having a team of playwrights working



together brings a collaborative Indigenous voice rather than just one voice to those processes and decisions. Writing as a team is a challenging creative process. In *The Dirty Mile* for example, the Indigenous writers brought a combination of dramatic, historical/academic and theatrical skills to the table. We felt it was a more Indigenous way of working. We are in the process of developing a contract which will set out the legal position for this kind of collaboration, so that everyone gets the correct share of copyright, and is consulted before the play is produced again.<sup>46</sup>

#### Case study: Yirra Yaakin

There are so many people making a livelihood out of plagiarising the Indigenous community – we butt up against that all the time. For example, we had a very serious problem when a non-Indigenous woman wrote a story about the experiences of Aboriginal people in the Pilbara. A major theatre company came to Yirra Yaakin and wanted to work with us, but we insisted on following proper protocols for production of the work. The non-Aboriginal woman set herself up as the community liaison officer and that situation created a lot of distress because the real issues were not communicated accurately between us in the city and the Aboriginal people in the Pilbara. Then they used our logo as a brand of authenticity and we had to go to great lengths at staff and board level to distance ourselves from this production. At the same time it caused unnecessary stress and an increased workload on the company. In addition to this we had to re-establish a positive relationship with this particular community, when invariably we were the victims of a non-Indigenous ambition to tell our Indigenous stories.<sup>47</sup>

### 5. Secrecy and confidentiality

Some Indigenous material is not suitable for wide dissemination on the grounds of secrecy and confidentiality. It is the responsibility of those putting together dramatic projects to discuss any restrictions on the use of cultural material with relevant Indigenous groups.

The secret and confidential nature of the material may come from particular Indigenous customary rules and practices. According to these rules, a lot of Indigenous cultural material can be known and passed on only by certain people and under certain conditions. These are a different and additional set of rules to those, which govern access to information in the wider community. So, even where someone might get access to Indigenous material, there may be strict rules about how, when and to whom it can be passed on.

Just because you like Indigenous knowledge – like stories or songs or you might hear, or want to know more about Indigenous knowledge – that does not mean you have the right to know it or to use that knowledge.<sup>48</sup>

Use of a cultural consultant, good communication, consultation and consent procedures will help to avoid breaking these rules and causing harm.

It is the responsibility of the project organisers to discuss any restrictions on use with the relevant Indigenous groups.

#### 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 law, 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 language group

members (such as men or women or people with certain knowledge).

Most material that is sacred has customary law restrictions on its use. The consultation process should clearly state the proposed use and observe any restrictions according to gender or other customs.

#### Representation of deceased people

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

#### Personal privacy

If you are planning to depict an identifiable individual or community, ask the individual, community or relatives of the individual for permission and check whether the details are correct. Personal or confidential information must not be disclosed without permission from the people who would be affected by the disclosure. Ensure there is close consultation around these issues.

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

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

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

### 6. Attribution

Indigenous people should be attributed for the use of their cultural heritage material in dramatic works. It is important to consult on the form of

attribution people may want, such as proper wording and spelling of names.

The moral rights provisions of the *Copyright Act* require that individual authors are identified as the creator of the work – the law requires that the playwright or author is identified and acknowledged.

Attribution can include:

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

In the Kooemba Jdarra production of *Going to the Island*, the participation of the community was an important part of the publicity for the production, and the community was acknowledged in the program.<sup>49</sup>

### 7. Proper returns and royalties Wages and conditions

An ongoing issue for Indigenous and non-Indigenous performers is that of fair rates of pay and conditions. How do performers find out about fair pay and conditions?

The Media, Entertainment and Arts Alliance (MEAA) provides advice and support for its members on many different issues including employment.<sup>50</sup> See the: common issues section in this guide for more information.

#### Case study: Yirra Yaakin

Yirra Yaakin is committed to advocating for good wages and conditions for performing artists. Indigenous performing artists should be paid the equity rate at least. Yirra Yaakin pays above the equity rate as part of our commitment to fair pay.

We get calls to do all kinds of work for nothing. It's a plague! There is a real attitude that Indigenous performers should 'do it for love'. But it misses the point that the value of Indigenous economic development is in the arts. Looking after the arts is part of looking after the community's wellbeing.

It's one thing to focus on building houses, but a lot of times there's a need to find the rightful place of Indigenous arts in the Indigenous cultural context. For instance, performing the animal dances is about learning about the animals and about how to hunt them. It's really about feeding families. The segmenting off of the arts has changed this value. It tends to be seen as a 'free air filler' at events. Those attitudes have changed the role of the performing arts and the proper understanding of its value. The important role of the arts, and respect for that role have been damaged.<sup>51</sup>

### Royalties

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

Royalties may be negotiated by individuals and included in contracts. In some cases royalties are paid to the Indigenous community, which has participated in the work.<sup>52</sup>

Royalties are also paid to the originating theatre company when it licences the performance rights to the work. Generally, a small Indigenous theatre company will license to a larger non-Indigenous theatre company. At present there is no recognition in the royalty structure for the effort, time and cost to Indigenous

theatre companies of consultation and adherence to cultural protocols in the development phase.<sup>53</sup>

### Other payment and condition issues

Apart from the usual wages and allowances for travel and accommodation, Indigenous writers, performers and directors may have specific cultural requirements, which must be met if they are to participate in a work. For instance, some Indigenous participants may have particular dietary or medical requirements that must be met if they are to spend extended periods away from home – touring, for example.<sup>54</sup>

Performers are also familiar with the seasonal nature of their work, and it is an important factor when negotiating wages and conditions. As Wesley Enoch puts it, 'a cheque has to go a long way!'<sup>55</sup>

In New South Wales the government has set policy guidelines for a recommended fee for service for Aboriginal cultural performances. Suggested minimum fees are provided for 'welcome to country', didjeridoo performances and dance performances.<sup>56</sup>

## 8. Continuing cultures

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

Cultures are dynamic and evolving, and protocols within each group and community will also change. Consultation is an ongoing process, and thought should be given to ways of maintaining relationships for future consultation. This might include consultation at a later date for further uses of the material not envisaged at the initial consultation.

The protocols need to be followed throughout the process of development, production and into touring and licensing arrangements. If a company

licenses use of work to be presented by another group – for example, re-staging a play – the agreement should be clear on any protocols to be followed during the re-staging process.

For instance, the company, which originally developed the work, may require that the source community or particular contributors view the work prior to public performance, or be credited at each performance. In addition to these protocols, the ownership of the cultural heritage material should be clarified.

### Comment: Yirra Yaakin

In some cases, if you insist that protocols are followed you can be marginalised. We have a multi-award-winning production called *Windmill Baby* which has toured all over the world, but we can't tour this play to the major cities in Australia, because they won't agree to follow the protocols.<sup>57</sup>

At Yirra Yaakin we have an ingrained sense of protocol. We always advocate for an authentic Aboriginal experience, rather than a play with Aboriginal themes. We actively exchange our cultural authority amongst our Indigenous nations worldwide. In Australia we are still slowly coming away from an anthropological view, where non-Aboriginal people feel they have the right to tell our stories. We draw on all the experiences of being Aboriginal with connections to the past and contemporary life. Aboriginal culture is very much a living culture and the urban experience contributes as much value as the regional and remote experience.

Through our dreaming process, we are developing new visions, new cycles and we are accepting of a purely blackfella imagination which is based on everything that is part of being Aboriginal.

Other Aboriginal people in Western Australia, outside urban areas are doing the same thing. The Bardi Dancers, for example, perform an important dance and song-cycle, which was dreamed in the last 40 years, and in June 2006 this was the historical performance at Stonehenge in the UK.

This was entirely relevant and significant, highlighting the clear link to past tradition and living culture.<sup>58</sup>

## 9. Recognition and protection

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

Yirra Yaakin Noongar Theatre is developing the concept of 'branding' for its dramatic works. While Yirra Yaakin invests the time, effort and financial resources in proper consultation, frequently it is not attributed when the dramatic work reaches the national or international stage. Effective branding of a Yirra Yaakin work will increase recognition of the company when a work is licensed and toured by a larger company. It will also indirectly increase returns to the company.<sup>59</sup>

It is important to understand these laws and how cultural material might be protected under them. See the attribution and copyright sections of this guide for further information.

There are currently no special laws dealing with Indigenous cultural material. The *Copyright Act* has been criticised for not recognising the communal ownership of heritage material and the continuing right of heritage custodians to control the use of this material.

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

## Dance principles and protocols

Indigenous dance takes many forms including storytelling, ritual and entertainment, and may combine with other artforms such as drama and visual arts. Dance productions are generally collaborative works involving the expertise of dancers, choreographers, artistic directors, production crew and others.

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

1. Respect
2. Indigenous control
3. Communication, consultation and consent
4. Interpretation, integrity and authenticity
5. Secrecy and confidentiality
6. Attribution
7. Proper returns and royalties
8. Continuing cultures
9. Recognition and protection.

In the following pages, we have suggested protocols for using Indigenous cultural material, and interfacing with Indigenous artists and Indigenous communities.

### 1. Respect

*If you honour and respect Indigenous protocols, your production will work out well. It can often be a challenge but it's the right process. If you don't seek protocol it won't. Be a success on a number of levels.*

Rhoda Roberts<sup>60</sup>

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

### Acknowledgment of country

When organising a dance performance, festival or event of local, state or national significance, it is respectful to invite a representative of the traditional owners to attend and give a 'welcome to country' address.

See the discussion on page 10 about 'welcome to country.'

### Representation

Indigenous cultures should be represented using Indigenous cultural values. It is important to avoid outdated or inappropriate perspectives and terminology. When a non-Indigenous group collaborates with Indigenous performers and the community, it is best to invite an Indigenous person to work as a cultural consultant. Their tasks include liaising between the groups, advising on cultural protocols and the use of Indigenous cultural material so that its integrity is valued, protected and respected.<sup>61</sup>

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

*When we went into creative development for our full-length piece in 1997, Fish, we drew up a formal agreement which stated that the Munyarryun clan give their consent for use of their traditional dance and song (which uses the Yirritja language in its raw form) and [that] these materials would be used by Bangarra. We've been in a very fortunate position because Djakapurra (Munyarryun clan member) and his sister Janet are actually working with us – so we don't have the problems of going back and forth, checking the way material is being used and isn't distorting any of its true meanings or transgressing any protocols. They are constantly overseeing this through their very presence.<sup>62</sup>*

### Accepting diversity

There is great diversity of Indigenous dance forms and styles among Indigenous communities.

This diversity comes from the different styles and forms belonging to language groups across the mainland and islands. Diversity is also reflected in the many different ways Indigenous people express their experiences in dance. This might influence the creation of new dance forms representing personal experiences and observations, new interpretations of stories about individuals, families or communities, and research and revival of Indigenous dance styles. Indigenous dancers value their diverse styles and identities. Broad acceptance of this diversity makes an important contribution to creative endeavour and cultural development.

### Living cultures

Indigenous cultures are living and evolving entities, not historical phenomena. The development of new forms of expression is an important part of contemporary Indigenous culture. Dynamic cultures are often influenced by different styles, but care must always be taken when interpreting or adapting traditional or contemporary dance forms. In the case of traditional dance, it is essential to identify the person with authority to speak for that dance, consult with them for permission to use their dance, and follow their directions. Contemporary dance is an equally important element of Indigenous culture, and extensive consultation should be undertaken before interpreting or adapting contemporary dance.

### 2. Indigenous control

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

One significant way is for all participants in a project to discuss how Indigenous control over a project will be exercised. The advice and liaison skills of a cultural consultant can be very useful. Discussions should include the issue of who can represent language groups, who can

give clearances of traditionally and collectively owned material, and who can speak for contemporary dance.

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

Several groups are developing their own policies and procedures to protect their culture, and to ensure the integrity of productions.

#### Case study: Woomera Aboriginal Corporation

Woomera Aboriginal Corporation, a custodian of Mornington Island's Lardil cultural heritage, is developing an intellectual property policy that reflects the Mornington Island community's intention to protect its culture and traditions while at the same time demonstrating respect for others. The policy is drafted partly in response to a preponderance of unauthorised performances of Mornington Island's songs and dances. The policy promotes a strategy for protecting ownership of Mornington Island's own songs and dances and provides policies and procedures that discourage unauthorised attempts that exploit Lardil culture. Woomera has no desire to secrete Mornington's rich dance tradition and freely promotes Lardil culture through dance performance, film, recordings, publications and exhibitions.<sup>63</sup>

#### Case study: The Dreaming Festival – The First Nations Status application

We have developed a First Nations Status form which has been developed for performers unknown to the festival and/or collaborative works with Indigenous and non-Indigenous artists. It requires people who want to perform at the festival to tell us



their First Nations Status. We have adopted the title because it reflects the fact that we are a national and international festival. The form provides us with information on the artist's background, clan group and cultural background, asks for a brief description of the project, asks the applicant to describe the process of cultural communication they have undertaken, provide letters or support materials from cultural custodians, elders, the group or a person from the community that supports the project, and indicate what the projected outcomes are. It is important that the outcomes contribute to Indigenous cultures, revitalisation and maintenance of an elder's language of a story or dance. The form also requires a description of the team.

These procedures and processes are really important for The Dreaming Festival, not just for administrative purposes (although they really help there) but also for getting the content right.

They also help artists to develop the skill and materials they will need in the future. By answering the questions in the First Nations Status form, artists articulate their identity, their respect for Indigenous cultural protocols, and their connections to community, their art, their skills, their project and their outcomes. Articulating all those aspects is really useful for developing a package or kit for the next festival, funding application or corporate partnership. The festival assists performers by creating that promotional material. The high-resolution photographic images taken during the festival and the short text describing them can be put together as a great press or promotional package. We need to develop our policies and procedures. We need to challenge ourselves to do that.

This process is empowering Indigenous musicians and performers to learn and take

on the role of manager. So, in future, Indigenous managers can manage Indigenous performers.<sup>64</sup>

Speaking to the right people and organisations about the use of Indigenous cultural material 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. See pages 12 and 13 of this guide.

### 3. Communication, consultation and consent

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

#### Comment: National Aboriginal Islander Skills Development Association (NAISDA)

The most important thing is that when students dance a cultural dance, they have to have the permission and the blessing of the Indigenous tutors who taught them the dance. The tutors give their cultural knowledge and skill so freely – and we can't just run off with it. We must always ask permission.

Indigenous dancers don't have the right to do cultural performances without the consent of the community where the dances come from.

It is very important to pay proper respect to the people where the dance has come from and make sure that you have permission to do the dances.<sup>65</sup>

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

#### Case study: Woomera Aboriginal Corporation

Mornington Island people have experienced appropriation of their work through unauthorised recording and distribution of their cultural property. They are wary of requests to film, photograph and record performances. Recent betrayals of trust and privilege inhibit a former willingness to perform publicly outside the community.

Woomera successfully sued a recording company which illicitly copied and distributed Mornington Island songs recorded by the corporation. Many years were spent in reaching a settlement. Woomera's intellectual property policy will include procedures that enforce the strict limitation of recording (and photographing) dance performances.<sup>66</sup>

#### Duration of consultation on performances

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

As with drama, consultation for use of Indigenous dance is a complex process and may take some time. It may be necessary to talk to many family or language group members rather than one individual in order to achieve proper informed consent from the custodian of the material.

#### Case study: Wik-Mungkan Dance

NAISDA's Ronne Arnold travelled to Aurukun to learn and study the dances of the Wik-Mungkan people. He was a guest in their country for three weeks before they began to teach or show him their dances. He says, 'You must wait – you must not get impatient and you must wait'.<sup>67</sup>

#### Comment: Rhoda Roberts, The Dreaming Festival

There must be three months set aside for protocols and discussions with community. No collaborative productions should occur without the knowledge and permission of the cultural custodians.<sup>68</sup>

#### Case study: Woomera Aboriginal Corporation

Woomera Aboriginal Corporation has strong community consultation methods, though no system is foolproof. Woomera holds regular committee meetings that are often attended by other members of the organisation. Woomera's staff consult widely in the community before certain decisions or recommendations are made. Difficulties can arise when key individuals are away or when consent is obtained from an individual who, themselves, may not have consulted widely enough.<sup>69</sup>

### 4. Interpretation, integrity and authenticity

Indigenous performers and their communities should have control over how their cultural heritage is presented. The presentation of a performance work includes its interpretation, integrity and authenticity.

#### Interpretation

Interpretation refers to how cultural material is interpreted and presented. This includes the perspective given to the cultural heritage material and the language used. It is important for performers and choreographers to respect the cultural protocols of the owners and the custodians of country in the development and performance of dance.

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

people seek to reassert and reclaim control over their cultural heritage material, Indigenous interpretation of the material is a way of enhancing the cultural significance of the work.

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

Dalisa Pigram<sup>70</sup>

### Integrity

The context of a dance performance must also be appropriate. In relation to Torres Strait dance, Helen Anu says, 'Performing a dance in the wrong cultural context can ridicule the dance and its cultural meaning.'<sup>71</sup>

'Teaching Torres Strait Island dancing must be done with close regard to accuracy and context. For educating – you have to get it right.<sup>72</sup> It is not enough just to give an exhibition of the dance; it must be accompanied by the history and acknowledgment of the traditional custodians of the dance.'<sup>73</sup>

Working together with Indigenous choreographers and communities can ensure or re-establish the integrity of a production.

### Case study: Mimi at The Dreaming Festival

I understand the original idea of the *Mimi* production was Michael Leslie's. During the creative development, it was solidly re-embellished by non-Indigenous people. Through a process of re-commissioning the production for the Festival of the Dreaming 1997, an Indigenous choreographer was employed. The choreographer then took the work and performers back to Arnhem Land. By the time they got to Yirrkala it was a changed company and a changed work.<sup>74</sup>

### Authenticity

*People sometimes say that we have to use the styles and steps of other clans because we have lost our own. It's not true that we have lost our own. We can look back; research the archives for our original steps, our imagery and our languages. We can revitalise them and develop our dances and chants. We shouldn't be appropriating clan work. There are proper ways to develop new work. We can collaborate with Western techniques, and take guidance from the cultural custodians. We don't need to just slap on ochre and handprints if it's not our way. We can find and revitalise our own skin designs.*

*All along the east coast, Tasmania and Victoria we can do the research to find our languages and our chants. It takes time to do the research but it can be done. Funding should be going to the research and development of our original designs and original dance steps. It's our way to become part of the national identity, and is so empowering for us to revitalise and reclaim our cultures. We researched and found out so much for the Woggan-mugule dawn ceremony at the Royal Botanic Gardens. Through our*

*research we developed the women fishing, and the emu decoy dance, and the original images of the shields. We researched and found the old imagery of shields used in New South Wales with intricate lines chiselled into them. And we saw so much from other areas, there's so much to be proud of.*

Rhoda Roberts<sup>75</sup>

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

*We were participating in a workshop and there was a non-Indigenous person teaching us a dance step. We were being taught a particular way, and I knew that the style in that country was not that way. The women do not dance with a heel strike in that country. So we sat down and told the woman teaching that we would not dance that way, and that we would only dance the proper way.<sup>76</sup>*

In the Torres Strait, permission must be sought before performing a Torres Strait Island dance. It is important to show particular care when using traditional instruments, and respect for ownership of dances and music by language groups on different islands.<sup>77</sup>

### Interpretation, integrity and authenticity when recording

Indigenous dance is not always easily recorded using the usual methods, such as labanotation.<sup>78</sup>

Ronne Arnold, dancer and teacher at NAISDA,<sup>79</sup> described his experiences when he was taught the dances of the Wik-Mungkan people in northern Queensland. Ronne explained that labanotation is very useful for recording Indigenous dance, but proper notation of Indigenous dance utilises a particular aspect of the labanotation method.

*In general, Western dance is recorded by focusing mainly on the steps. Indigenous*

*dance is most accurately recorded by focusing on the actions of the dance. Correct notation is important to protect the integrity of the dance.<sup>80</sup>*

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

If a recording is made and stored, it is important to accurately label the recording with the names of the dances, the dancers, time and place so that future viewers of the film are aware of its content. This is an important aspect of respect for cultural practices. For example, if a dancer or other person depicted on the film passes away, family and community members can make informed decisions about future use of the film.<sup>81</sup>

It is always important to consider the copyright ownership of cultural heritage material prior to recording it, particularly for the first time.

### Interpretation, integrity and authenticity in collaborative projects

*Collaboration is good. We often need the experiences of both Indigenous and non-Indigenous people but any collaborative project must have an Indigenous perspective. Collaborative productions must have an Indigenous person in creative control. They must have an Indigenous director, Indigenous choreographer and/or Indigenous curator. Indigenous creative control and protocols which include communication and permission from the community are essential.<sup>82</sup>*

Rhoda Roberts<sup>82</sup>

### 5. Secrecy and confidentiality

Some Indigenous material is not suitable for wide dissemination on the grounds of secrecy

and confidentiality. It is the responsibility of the choreographer, dancers and those working on the project to discuss any restrictions on use with relevant Indigenous groups.

### Secret and sacred material

The reproduction or unauthorised use of sacred or secret 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 community members (such as men or women or people with certain knowledge).

Most material that is sacred has customary law restrictions on its use. The consultation process should clearly state the proposed use and observe any restrictions according to gender or other customs.

### Personal privacy

If you are planning to depict an identifiable individual or community group, ask the individual, community or relatives of the individual for permission, and check whether the details are correct and appropriate.

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

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

### Representation of deceased people

In many Indigenous communities, the reproduction of names and images of deceased people is not permitted. The deceased person’s family or community should be consulted so that the appropriate protocols are observed.

### 6. Attribution

Indigenous people should be attributed for the use of their cultural heritage material in dance or performance works. It is important to consult on the form of attribution people may want, such as proper wording and spelling of names.

The moral rights provisions of the *Copyright Act* require that individual authors are identified as the creator of the work – the law requires that the choreographer of a dance work is identified and acknowledged.

Woomera Aboriginal Corporation has engaged in collaborative performances that melded traditional and contemporary dance styles. Lardil elders who supervised rehearsals and performances ensured there was prior agreement that the performance pieces were exclusive to the production and could only be performed in conjunction with Mornington Island people. It was also agreed that attributions were to be made to the choreographer of the contemporary component of the work and to Lardil elders. No separate rights to any work containing traditional components were to be given to a choreographer or artistic director.<sup>83</sup>

### 7. Proper returns and royalties

Although the Australian Government introduced legislation<sup>84</sup> in 2006 that fundamentally altered the way award wages and conditions are set and managed, the current award rates and standard contracts still provide important benchmarks for fair pay and conditions.

It is important to know the award rates of pay for dancers and other aspects of work

conditions such as superannuation, workers compensation and unfair dismissal. The MEAA helps its members with those issues.<sup>85</sup> It also operates the Alliance Inquiry Desk for members, and provides information regarding rates of pay, contracts and commissions, advice on superannuation, social security and taxation, legal support and debt recovery. Dancers should also understand their tax obligations. The Australian Taxation Office has a useful website at <[www.ato.gov.au](http://www.ato.gov.au)>.

There are now many successful Indigenous dancers and dance companies, but it can still be a struggle for dancers to get proper recognition for their skills, proper fees and work conditions.

### Comment: National Aboriginal Islander Skills Development Association (NAISDA)

*There’s not a lot of money out there. We get asked a lot to do performances for nothing. I won’t let the students perform unless they are getting properly paid.*

*Some of the graduates from NAISDA are doing quite well from their dancing at festivals and other places. But they have to work really hard for the money because of the attitude that you should be performing for nothing. You have to ‘show’ why you should be paid the fee! But people need to understand all the years of training, the hours of rehearsal, the time it takes to develop a dance piece, the constant training and work at maintaining fitness that dancers have to do.<sup>86</sup>*

Sometimes the distribution of payment includes recognition and payment for the community.

### Case study: Marrugeku Company

*Everyone in the Marrugeku Company gets the same wage, that’s our way of acknowledging everyone’s skills. The community receives a 3 per cent royalty when the show is sold. Sometimes the community has asked that its royalty be paid in particular things the member may feel [they] need rather than a cash payment.<sup>87</sup>*

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

### Case study: Mornington Island Dancers (working with Dance North)

*We wanted to get something back from working together with professional people in a theatre; learning about lighting, sound, discipline and doing yoga. There were amazing things happening in the process.<sup>88</sup>*

## 8. Continuing cultures

Productions and festivals of Indigenous performance have an important role in keeping culture strong.

### Case study: The Dreaming Festival and Mornington Island Dancers

*The Dreaming Festival has been working with a core group of men from Mornington Island for three years now. It has been a really valuable process because the community lost some of its most important songmen in an accident a few years ago. They were very worried because the young people didn’t seem to be learning the culture. About three years ago we went to Mornington Island and sat with the men and recorded some of their music. We assured them that we would look after it, and not allow anyone to use it.*



*We had developed a long relationship with the dancers, so they were able to trust us with their music. We took the music and mixed some 'doof doof' into the recording. We took it back. The older men said that the young ones didn't want to learn the steps for the songs, but when we put on the tape with the 'doof doof' the kids came out – they knew the dance steps and the language and were creating a new piece.*

*They have since travelled to Sydney and worked with other dancers, including women from central Australia. We worked with the dancers from Sydney, the centre and the north according to protocols to develop a piece that included them all as the final work of the performance. Two of the young men, one from Sydney and one from Mornington, are still working together.<sup>89</sup>*

Contemporary Indigenous dancers are learning a number of techniques and developing new and emerging Indigenous styles.

*Contemporary Indigenous dance is emerging as a strong dance technique at the moment. It is being taught at NAISDA along with ballet and contemporary dance techniques. I would love to see Indigenous contemporary dance get the same respect as other techniques. I would also love to see the individual dancers who are developing that style get the respect and recognition they deserve. The Indigenous students get exposure to cultural dance and contemporary dance techniques. They graduate with a very different and distinctive style from other contemporary dancers.<sup>90</sup>*

Finally, it is important to remember that cultures are dynamic and evolving. Also, technologies change and works develop over time. Consultation with Indigenous custodians may often be

required when responding to new conditions or opportunities. For instance, consultation will be needed if a production is to tour overseas, or to be filmed. It is important to consider how relationships with a community or individual can be maintained for future consultation.

### 9. Recognition and protection

Australian law and policies should be developed and implemented to respect and protect Indigenous heritage rights. There are currently no special laws dealing with Indigenous heritage cultural material. The *Copyright Act* has been criticised for not recognising the communal ownership of heritage material and the continuing right of traditional custodians to control the use of this material.

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

#### Case study: Woomera Aboriginal Corporation

Woomera realises copyright legislation is entrenched in the material form – songs and dances need to be recorded and notations made if these items are to be protected in law.

Woomera produced the Lardil Songs Register in 1998. This document contains information including the words (lyrics) of all known Lardil songs (ceremony is not included). Mornington people recorded the songs in writing (and on tape), and included the names of those who dreamt the song, the country they're from and who's connected with it – thereby creating a structure of where the song belongs in the community.<sup>91</sup>

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

#### Case study: Bangarra Dance Theatre

*The intellectual property for the cultural knowledge and material which is being used obviously still resides with the Munyarryun community and the clan. The contract we have with them is almost like a licence whereby we agree to use that material in certain ways in certain performances. Because most of the time the traditional material is being integrated into contemporary performance, or is being adapted in a contemporary way, the fee we pay to Djakapurra in his role as cultural consultant is almost like a 'cultural design' fee.*

*Apart from the specific dances and songs which are being used, there's an overall infusion of the Munyarryun clan's culture in the work. In terms of actual copyright, when we commission the broader choreographer and composer, we enter into a relationship with them as a sub-commission. The amount of contemporary choreography versus traditional movement, and the amount of synthesised contemporary music versus traditional song, is something worked out during the creative processes between the choreographer and Djakapurra, and the composer and Djakapurra. So we have contractual relationships with the clan for the overall work and then with the artists that we commission. They in turn have a relationship with any other collaborators, who, in this case, is Djakapurra.<sup>92</sup>*

#### Cultural protocols on Aboriginal dance

The National Aboriginal Dance Council Australia (NADCA) is a collective voice for Indigenous dance in Australia. NADCA aims to provide and maintain a national network to support Indigenous dance in its many forms and to advocate and lobby on behalf of dancers nationwide. NADCA is committed to preserving and promoting awareness for Aboriginal dance both nationally and internationally. At the 2<sup>nd</sup> National Aboriginal Dance Conference in Adelaide in 1997, the NADCA steering committee considered the following statement:

The Law/The Dreaming Kuarna word is 'Munaintya'

'Munaintya' (The Law/The Dreaming) is the base of our core, of our being – spirit – life

Aboriginal Dance must come from the 'Munaintya' and draw its reasons – rationale – history – roots – base for being from the 'Munaintya'

After much discussion, NADCA then adopted the following vision statement:

'Aboriginal dance comes from the wellspring of law and the Dreaming and is essentially connected to the core of our spiritual life and the renewal of our Mother Earth'

Priority 2 from NADCA's Strategic Plan 1998-2002 highlights the critical importance of accuracy in developing documents regarding cultural protocols and, in NADCA's case, specifically cultural protocols on Aboriginal dance.

Priority 2. Cultural Maintenance and Protection

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

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

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

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

NADCA is currently in the process of developing a pilot program to formulate a document on 'Cultural Protocols on Aboriginal Dance'. NADCA is in the process of acquiring funds for the project, and continues to discuss and document protocols at its conferences and gatherings.<sup>93</sup>

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

NADCA is committed to the development of a 'Cultural Protocols on Aboriginal Dance' document as it will ultimately contribute to the organisation fulfilling its primary objective,

which is the maintenance, preservation and promotion of Aboriginal dance, as stated in its mission statement below:

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

## Common issues

### Welcome to country

Recognition of Indigenous protocols, acknowledging another language group's ownership and seeking permission to be in another's country have become recognised widely in recent years. This recognition includes acknowledgement and adherence to the cultural protocols of the traditional owners. It may be expressed in a 'welcome to country' address given by a respected community member or elder, or other ceremony preceding an event or function.

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

In some instances, Indigenous organisations offer contemporary alternatives to the welcome to country address. In the urban area of Brisbane, Indigenous performers provide a Contemporary Celebration<sup>94</sup> which includes performers such as the Indigenous Women's Choir, Indigenous rap performers, an opera singer and dancers. The celebration includes acknowledgement of traditional owners and Indigenous ancestors.

### Communication, consultation and consent

Doreen Mellor outlines the importance of early consultation:

*Consultation with a community or group of people is not simply a formality...*

*Consultation is required as a precursor to consent for it to proceed. It is not appropriate to have decided that the activity is to proceed, or that its structure or format is established before consulting the Indigenous group or person involved. The idea may be a good one from an external point of view.*

*Consultation establishes the internal, cultural perspective and it is important to accept that it is this perspective that should determine the appropriate course of action.*

*With regard to the process of obtaining consent:*

- *Allow time (perhaps more than one meeting) for communication of a proposal.*
- *Allow time for a decision to be made.*
- *Remember that the decision will be made on other bases than the ones brought from outside the community – different types of knowledge operating in Indigenous communities may conflict with the requirements of a project.*
- *Be prepared to take 'no' for an answer (but don't take it personally).*
- *Respect the views of all factions within a community, and ensure that consent comes from the appropriate groups for a particular activity or project.<sup>95</sup>*

### Fees and employment conditions

An ongoing issue for Indigenous and non-Indigenous performers is that of fair rates of pay and conditions. The Media, Entertainment and Arts Alliance (MEAA), the union representing performers working in Australia, provides advice and support for its members on many different issues including employment and fair rates of pay.<sup>96</sup>

If you are working for or engaged by a large, reputable company, your working conditions will be set by an award or an enterprise agreement. It is important to read the award or agreement so you understand the rights and responsibilities of you and your employer.

The Australian Government introduced significant changes to industrial relations laws in 2006. However, the industry enterprise agreements and awards that set out minimum employment terms and conditions of performers and standard contracts contained within them still apply to performers.

The current equity minimum rates of pay for performers can be viewed on the MEAA website at <www.alliance.org.au>. These include information about annual salaries, hourly rates of pay and rates for rehearsal, screen tests and extra work.

If you are a freelance performer, engaging a good agent is one way to get help with representation and advice on these employment issues.

The MEAA can provide a list of all current agents for each state and territory.

Performers should be familiar with the rates of pay and conditions for their skills and level of experience. A contract for performance in Australia should meet the standards for pay and conditions as set out in the current equity awards and enterprise agreements. For more information, contact the state equity organiser or the national enquiry desk on 1300 656 512.

Do not sign anything before you make sure that it is fair remuneration for your work.

### Tax

Freelance performers should make sure that their tax obligations are up to date. You can check with the Australian Taxation Office on 13 28 61 or visit <www.ato.gov.au>. It is also important to consider whether you need to register for an Australian Business Number (ABN). You can apply for an ABN online through the Australian Business Register at <www.abr.gov.au>.

### WorkChoices

In 2006 the Australian Government introduced legislation<sup>97</sup> that fundamentally altered the way award wages and conditions are set and managed.

Instead of the old award rates, wages and conditions are governed by contracts called Australian Workplace Agreements (AWAs) between employers and employees based partly on the Australian Fair Pay and Conditions Standard.

### The new rules

The Australian Fair Pay and Conditions Standard (the Standard) sets out the minimum wages and conditions of employment that apply to employees in the Australian Government's WorkChoices system.

These minimum conditions of employment are:

- minimum wage of \$511.86 per week
- a maximum of 38 ordinary hours of work per week, to be averaged over 12 months plus 'reasonable overtime'
- four weeks of paid annual leave (with an additional week for shift workers)
- 10 days of paid personal/carer's leave (including sick leave and carer's leave), with provision for an additional two days of unpaid carer's leave per occasion and an additional two days of paid compassionate leave per occasion
- 52 weeks of unpaid parental leave (including maternity, paternity and adoption leave).

These conditions together with preserved Australian Pay and Classification Scales (APCS) and wages set by the Australian Fair Pay Commission (Fair Pay Commission) make up the Standard.<sup>98</sup>

These laws also change the ways in which employees and contractors are treated. There are also changes to unfair dismissal laws. There are now many situations in which unfair dismissal laws do not apply. For example, employers who employ up to 100 workers are exempt from unfair dismissal laws. Employees who are seasonal workers, engaged under a contract of employment for a specified period or a specified task, on probation, casual employees engaged for a short period, trainees, earning more than \$98,200 or who are dismissed for a genuine operational reason are not allowed to pursue an unfair dismissal claim. Genuine operational reasons include economic, technological, structural or similar matters relating to the employer's business.<sup>99</sup>

For up-to-date information, visit the MEAA<sup>100</sup> website. MEAA provides its members with support on employment issues. The Arts Law Centre of Australia can also review employment contracts. However, performers can still be covered by the Industry Standard Agreements and awards.

### Residuals

Residuals are amounts of money which may be paid to performers for future uses of recordings of their work, such as repeats of television shows and commercials. Residuals will only be paid for future uses of works when it is a term of the agreement between the actor and producer. If the agreement includes payment of residuals, they will be distributed by MEAA at the end of each quarter to performers who are alliance members. It is important to check any agreements before signing them. In 2006, \$2.95 million was distributed to MEAA members as residual payments for film and television work.<sup>101</sup>

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

*I had an ordeal in negotiating the rate of pay for people performing their traditional dance. The assumption was that Aboriginal people performing traditional dances did not rely on this as their mode of employment (bread and butter) and wouldn't have to go through high level training to attain the knowledge to dance, and therefore weren't deemed as important to pay as say an opera singer for the same amount of time.<sup>102</sup>*

Not all performers wish to be paid at the award rate. Some Indigenous people suggest that the award rate does not include recognition of the nature of Indigenous performance. It was suggested that rates of pay should include an amount that recognises the additional cultural element in Indigenous performance.<sup>103</sup>

### Royalties

Royalties are payments made to copyright owners and performers for the use of their work. The amount of money paid as a royalty will generally be set by the employer or by agreement. Check this amount against standard industry practice and also consider the inclusion of royalties in recognition of the cultural contribution to any performance or event.

### Festival performances

*It is really important to use good protocols at festivals because we are taking the traditional forms into contemporary settings. The Dreaming Festival is setting a benchmark for Indigenous authenticity, authorship and control.*

Rhoda Roberts<sup>104</sup>

A number of Indigenous groups have developed protocols for engaging contributors and participants for festivals. Please check the First Nations Status application process for The Dreaming Festival,<sup>105</sup> in the dance section of this guide.

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

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

### Case study: The Garma Festival

The Garma Festival sets out a number of different protocols for the conduct of visitors and participants. These include a process for seeking permission to photograph or record the festival.



The Garma website advises people wanting to take photographs of Yolgnu that they must obtain the permission of a senior Yolgnu elder first. Also, anyone who wishes to take photographs or make any other kind of recording at the Garma Festival must sign an agreement with the Yothu Yindi Foundation (YYF).

The agreement sets out the conditions for recording. These conditions acknowledge the rights of the traditional owners over anything done at the festival including all their knowledge which is embodied in everything done at the festival. The person recording must agree not to use the recording for any purpose that might be detrimental to the traditional owners or inconsistent with their law and custom. The person making the recording must also agree not to try to get permission from individual traditional owners without the consent of the YYF.

The person must agree to only use the recording for personal use. No use can be made of the recording without the prior permission of the YYF. The YYF must be given a high quality copy of the recording. The copyright in the recording will be held by the YYF for the benefit of the traditional owners. Anyone making a recording must follow the directions of the YYF staff. The YYF can use the recording for any purpose, as long as it credits the maker of the recording.<sup>106</sup>

#### **Case study: Mornington Island Dancers**

In contracts with festivals we are often asked to assign limited recording and broadcast rights to our performances for promotion and other purposes closely related to the festival event. This has not been abused to

our knowledge, but seems not to recognise the special care and attention warranted by traditional owners. Often contracts need additional qualifications in this area so that control is not lost on traditional dance and song items.<sup>107</sup> Issues of authenticity and integrity also arise in festival performances.

We had problems negotiating the numbers of people to invite, because the dances and songs needed a particular amount of people for the presentation to maintain its cultural integrity. The festival budget couldn't cater for the cultural needs of the groups, therefore the artistic and cultural integrity of the overall event was compromised on a daily basis.<sup>108</sup>

As well as encouraging respect for Indigenous cultural protocols, teaching of Indigenous performance, and the development of Indigenous contemporary dance, some people are working on assisting Indigenous people to record their performances.

#### **Case study: The National Recording Project for Indigenous Performance in Australia**

The National Recording Project for Indigenous Performance in Australia is using digital technology to record Indigenous performance. The project was conceived in 2002 by elders and academics at the Garma Festival.

The aim of the project is to systematically record and document the 'performance traditions of Indigenous Australia. Through this process, it will assist in the development of local knowledge centres and other digital archives as primary repositories for locally recorded and documented materials, and a secure national repository in which copies

of all data generated can be archived. Rather than being driven by conventional academic agendas, all localised recording and documentation operations will be directed by local elders and driven by local priorities. Primary responsibility for the management of archived data will reside in local knowledge centres and other digital archives with assistance from project partner organisations'.<sup>109</sup>

#### **Management and agency agreements**

Good management and a good agent are great assets for dancers, performers, writers, dramaturges and directors. They will often be required to sign an agreement with a manager or agent. It is important to review the agreement closely before signing. Legal advice should also be considered before signing.

#### **Creative Commons licensing**

Creative Commons is a concept that encourages copyright owners to allow people to use their copyright material without seeking prior permission or paying for it. A copyright owner can make his or her songs available on the internet through open content licensing protocols and thereby promote better identification, negotiation and reutilisation of content for the purposes of creativity and innovation. A number of Australian arts advocacy organisations, including APRA, have raised serious concerns about the licences, particularly that they may not effectively limit commercial or derivative uses.<sup>110</sup>

#### **Copyright What is copyright?**

It is important for people working in the performing arts to develop an understanding of copyright so they can negotiate their rights. It is also important to keep track of changes to the laws that might affect those rights.

Copyright is a form of legal protection that provides the copyright owner with the rights to exclusively use and authorise others to use their copyright work and other subject matter. Copyright owners have the right to prevent others from using the work without their permission. The law refers to the copyright owner's right to control the use of their work as the right to capitalise on his or her work.

The *Copyright Act* provides that the author of a work is the copyright owner.<sup>111</sup>

The author of a dramatic work may be the writer, or authorship may be shared between the writer(s), cultural advisors and the custodians of any Indigenous material used in the work.<sup>112</sup> Performers have a different set of rights with only limited copyright ownership in certain circumstances: see the copyright and performers' rights section of this guide.

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

This section provides some general copyright information and is intended as a guide only. For specific legal advice we recommend consulting a lawyer with specialist knowledge in copyright.

#### **How does copyright protect performance?**

Copyright is a form of legal protection that aims to provide copyright owners with the right to exploit or use the work, and to prevent others from exploiting it without the author's permission. In the case of performing arts, copyright protection exists in the dramatic work. It may also exist in any literary work such as the text of the play, any musical work that is part of the performance, a recording of the work and any adaptation of the work.

A dramatic work is a work that is intended to be performed. The *Copyright Act* defines a dramatic work as a choreographic show, or other dumb show (mime, for example), or a scenario, a script for a film, but not the film itself.<sup>113</sup> Film is protected under a separate part of the Act.

The *Copyright Act* also provides that in some cases, where the author of a dramatic work is employed, the author's employer will own the copyright in dramatic works. These are works that are produced under a contract of employment. It is possible to modify this arrangement by contract between the employer and the author, prior to the writing of the work.<sup>114</sup>

Authors who are commissioned to write a work should exercise care when negotiating an agreement to ensure they retain copyright in the completed work. If performance or dance companies enter agreements with a funding body for development of a work, the company is advised to check the contract and be certain about who owns the intellectual property in the work.

### Originality

Copyright protects works that are original. In the past, it was thought that Indigenous works reproducing pre-existing themes were not 'original' because they were handed down through the generations. In the 'Carpets case',<sup>115</sup> the judge recognised that each artist contributed his or her own skill, labour and effort to bring originality to his or her artwork. Hence, the artworks were protected by copyright. There is scope for this reasoning to be applied to dances and songs.

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

Courts have considered a number of cases where a party alleges that their dramatic work

has been copied. In deciding this question, the courts have considered evidence relating to the creation of the works and the question of originality of the work, particularly the 'combination of the principal situations, singular events and basic characters'.<sup>116</sup>

The court has held that: 'In general there is no copyright in the central idea or theme of a story or play, however original it may be; copyright subsists in the combination of situations, events and scenes which constitute the particular working out or expression of the idea or theme. If these are totally different, the taking of the idea or theme does not constitute an infringement of copyright'.<sup>117</sup>

### How is performance reduced to material form?

Copyright protects works that are recorded in some way. The work must be in a permanent and tangible form.<sup>118</sup> This may be in the written word, sound recordings, video or other film recording. In the case of choreography, dance steps may be recorded using notation such as Labanotation, Benesh, Eshkol-Wachman Movement Notation or Sutton dance writing. This is described as being 'reduced to a material form'.

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

It is important to consider making arrangements for copyright ownership when oral cultural material is recorded, because generally, the maker of the recording is the copyright owner in the recording. This can be altered by agreement. A custodian of the cultural material could make an agreement with the maker of the recording, which vests copyright in the recording with the cultural custodian, before any information is provided.

### Who owns copyright?

The owner of the copyright in a dramatic work is generally the author.<sup>119</sup>

- The author(s) of a play will be the playwright(s).
- The author(s) of a dance will be the person or people who wrote the dance steps.
- The author(s) of a script for a film will be the writer(s).

The owner of copyright in a sound recording,<sup>120</sup> a cinematographic film<sup>121</sup> or a television broadcast<sup>122</sup> is generally the maker.

### Copyright exceptions

There are some important exceptions to the general rules about copyright ownership.

- Where the work is produced under a contract of employment, copyright will belong to the employer.<sup>123</sup>
- Where a work is produced under the direction or control of the Crown, copyright may belong to the Crown.<sup>124</sup>
- Where copyright has been assigned under a written agreement, the agreement may specify who owns copyright.
- Where a person or company makes an agreement and pays for the making of a sound recording<sup>125</sup> or cinematographic film,<sup>126</sup> the person or company that pays for the making is the copyright owner.

### How long does copyright last?

Copyright protects dramatic works for a set period of time. Copyright in a play, script or written record of dance steps<sup>127</sup> lasts for the lifetime of the creator and 70 years after their death.<sup>128</sup> After this period has expired, the work is considered to be in the public domain. Once a work is in the public domain the law no longer prevents others from accessing, copying or using their work.

Copyright owners might need to consider who they want to control the copyright and who will

benefit from any royalties during the 70 years of copyright after their death.

There are slightly different rules for copyright to sound, film and television recordings. Copyright in a sound recording<sup>129</sup> generally lasts for 70 years from the date of the making of recording. Copyright in a film<sup>130</sup> lasts for 70 years after it was first published, and copyright in a television or sound broadcast lasts for 50 years after the broadcast was made.<sup>131</sup>

The operation of the *Copyright Act* creates a number of problems when it comes to protecting Indigenous performance. The duration of copyright does not reflect the Indigenous people's right and obligations in relation to their cultural material. In order to respect Indigenous heritage it may be necessary to get permission to use Indigenous material from the traditional owners even though legally, the dramatic work is in the public domain.

One example is sound recordings and films of Indigenous dance made by early anthropologists, and which are now stored in archives and libraries. Seventy years after a recording is made or a film is published, the copyright expires and the work is in the public domain. It no longer has any copyright protection. For example, recordings made before 1937 are now in the public domain.

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

Woomera Aboriginal Corporation records its cultural material so it holds contemporary versions in material form.<sup>132</sup>

### What rights do copyright owners have?

Copyright owners have the exclusive right to authorise use and copying of their work. The copyright owner also has the exclusive right to earn money from the use, reproduction and publication of the work. The copyright owner of a dramatic work, such as the playwright, can do all or any of the following acts:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public (this includes broadcasting and the internet)
- make an adaptation of the work<sup>133</sup>
- make an adaptation of the original dramatic work and then reproduce, publish, perform in public, or communicate to the public this adaptation.<sup>134</sup>

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

### Performers' rights

Performers' rights are different to rights accorded to copyright owners. Performers' rights are, in general, more limited than a playwright or choreographer's rights. Each performer's permission must be obtained before recording a performance (either by sound or film) and communicating a performance to the public (by broadcast or transmission over the internet). Performers have other rights in relation to the use of recordings of their performance, including the right to say whether the recording can be used as a soundtrack for a film.

Performances include live performances of:

- a dramatic work<sup>135</sup>
- a musical work<sup>136</sup>
- the reading, recitation or delivery of a literary work<sup>137</sup>
- a dance
- a circus act or a variety act or any similar presentation or show
- an expression of folklore.<sup>138</sup>

Performers' rights will often be set out in employment contracts. Industry organisations such as MEAA should be consulted about industry standards and for advice on Australian workplace agreements.

The following activities are not regarded as performances by the *Copyright Act*.<sup>139</sup>

- performances of works for educational purposes; this means performance by a teacher or student where no box office fee is charged<sup>140</sup>
- reading, reciting or delivering the news
- performing a sporting activity
- participation as part of an audience.

### Copyright and performers' rights

Until January 2005, there was no copyright in a performance, but performers could grant or refuse permission to record and broadcast their performances. This was generally done by asking performers to sign a release form which allowed for certain uses of the performance such as making the recording, broadcasting it or putting it online. Once this release was signed, performers received no further rights in relation to the work or the recording of it unless they were entitled to residuals or royalties as a result of their contract.

Since January 2005, performers have new rights in audio recordings.<sup>141</sup> When a sound recording of a live performance is made, the performers<sup>142</sup> and the person/company who

paid for the recording are both regarded as copyright owners in the recording. Unless this situation is altered by a contract, the performer will then have a right to make a copy of the sound recording, perform it in public and communicate it to the public.<sup>143</sup>

In practice these new rights may be varied by contracts so they may not result in large gains for performers. For instance, if a sound recording of a live performance is made, and the performers are employed, the employer is the owner of the copyright unless this is altered by agreement.<sup>144</sup>

The rights of performers in audio recordings made before January 2005 are also now different. The performer may co-own copyright but they will not have any right to change the way the original copyright owner deals with the audio recording.

Performers who may have a copyright interest in audio recordings of their live performances should register with APRA and Phonographic Performance Company of Australia.

### Collaborative works

In many instances dramatic works have more than one contributor. For example, a play is often workshopped by writers, actors, directors, dramaturges and others. Copyright will protect the work of the author, who is generally the playwright, but will not allocate any rights to other people whose ideas were drawn upon. If the collaborators want to share in the copyright as joint owners, they will need to make an agreement with the playwright. The agreement should be in writing to avoid any future misunderstandings.

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

The creator must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions. Each creator in a work of joint ownership owns copyright in the resulting work. This means that each creator must obtain the consent of the others before exercising any of their rights under copyright.

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

It is very important to understand the way copyright law operates when working collaboratively.

In the performing arts, there are often many collaborators on a particular work. Writers, performers, directors, dramaturges, designers and others may all feel they have made a substantial contribution to the dramatic work.

However, it must be remembered that copyright is generally understood to belong to the playwright or choreographer. To avoid any future disagreements, the participating creators should discuss copyright and proposed use of the work prior to commencement of the project.

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

It is very important to understand the way that copyright law operates when working with Indigenous cultural material. The custodians of cultural images are generally not recognised as the legal copyright owners of an Indigenous artwork that depicts a language group's cultural images. For example, if an Indigenous playwright uses a story that belongs to his or her



language group in a play, the playwright will own the copyright in his or her version of the story, but the language group will have no copyright interest in the play unless the playwright assigns copyright to them, either as joint owners or as owners outright.<sup>145</sup>

### Communal ownership versus joint ownership

In *Bulun Bulun & M\* v R & T Textiles*,<sup>146</sup> the court considered that traditional Indigenous works containing 'traditional ritual knowledge', handed down through generations and governed by Aboriginal laws, are not works of joint ownership. Although under Aboriginal laws the entire community may have an interest in the particular work and its knowledge and expression, copyright does not recognise the group as the owners.

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

#### Case study: Woomera Aboriginal Corporation

A song may be dreamt by one person but others may have strong associated rights according to the subject matter of the song or country, story or place associated with the dreaming. Individual ownership is not practically carried on beyond the death of the originator but songmen of the language group may have a strong say over the songs of their forebears. There seems to be acceptance of old songs as belonging to a form of collective Lardil ownership.<sup>147</sup>

### Recording performances

It is important to have and check agreements for recordings of dramatic and dance works.

Prior to signing any clearance agreements for the recording, performers should consider any limits they may want to put on the use of recordings of their work. If performers fail to specify limits on use they will not be able to prevent unlimited broadcast and changes to the recording being made.

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

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

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

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

- When entering into an arrangement for the commercial recording of Indigenous performance, it is recommended that there be a written contract outlining the terms of the arrangement and obligations of the parties. Indigenous performers should be given the opportunity to consider contracts and obtain proper legal advice.
- When selecting illustrations or photos for promotional material, consult with the writer, choreographer, performer or director and other Indigenous people to check cultural appropriateness of the image.

### What are moral rights?

Moral rights are separate from the economic rights of copyright owners and may give Indigenous creators avenues to challenge inappropriate treatment of their work. Moral rights laws provide the following rights to authors of artistic, musical, dramatic and literary works; films and performers:

1. The right to attribution for the author of the work and performers<sup>148</sup> – 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. Performers have the right to be named in connection with their performance.
2. The right not to have authorship or performership falsely attributed<sup>149</sup> – For example, if someone other than the author is attributed as the author or performer, the true author or performer may take action for infringement of moral rights.
3. The right of the author to integrity of authorship or performership<sup>150</sup> – The author has the right to bring legal action if a work is treated in an inappropriate manner, resulting in a material alteration of the work that prejudices the author's reputation.<sup>151</sup> For example, if a dance or other dramatic work is

performed without permission, in a manner that is harmful to the reputation of the creators or authors of the dance, the creator may have an action for infringement of his or her moral right of integrity. It is important to note that if the author of the dramatic work consents to the use of the work, they cannot bring an action.<sup>152</sup> Also, if the person who subjected the work to inappropriate treatment can show that the treatment was reasonable in all the circumstances, then it is not an infringement.<sup>153</sup> Performers can object to treatment of their performance that demeans their reputations.

The *Copyright Act* only allows moral rights to be held by individuals. There is still no legal recognition of communal ownership of Indigenous cultural material. The potential of moral rights to increase copyright protection for Indigenous performance has not been fully explored, but it is hoped that it may provide some additional protection.

### Indigenous communal moral rights

If a literary work were treated inappropriately, only the individual author would have a remedy under moral rights. However, an Indigenous community which is the source of cultural material incorporated in a literary work does not have any moral rights under the *Copyright Act* even though under their customary laws, the language group or a person on behalf of the language group may have responsibility to safeguard the cultural integrity of the story embodied in the work. The moral rights framework under the *Copyright Act* also excludes Indigenous persons with authority other than the author (creator) from legally exercising moral rights over works embodying traditional ritual knowledge.<sup>154</sup>

In December 2003, the Australian Government drafted proposed amendments to the *Copyright Act* for Indigenous Communal Moral Rights. The Exposure Draft proposed the introduction

of Indigenous communal moral rights for copyright works and films.

These Indigenous communal moral rights will exist alongside individual moral rights, and will be exercisable independently of the individual author's moral rights. It also exists separately to the copyright in the relevant material.<sup>155</sup>

The Indigenous communal moral rights would exist in a work for the duration of the copyright period.

For there to be Indigenous communal moral rights in a copyright work, the following requirements must be met before the first dealing of the work:

- Drawn from traditional base. The work must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'. A community is defined loosely and can include an individual, family, language or community group.
- Voluntary agreement that communal moral rights exist. A voluntary agreement must be entered into between the creator of the work and the Indigenous community.
- Notice of association must be given to third parties. There must be acknowledgement of the Indigenous community's association with the work.<sup>156</sup>
- Consent from interest holders. Interest holders in the work (i.e. copyright owner/s) need to have consented to the Indigenous communal moral rights in the work.

An Indigenous community that has Indigenous communal moral rights to a work may exercise those rights only through an individual who is the authorised representative. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to its decision-making processes.<sup>157</sup>

The proposed regime incorporates defences and consents. However, it has been criticised as being overly legalistic and complex. The operation of the proposed law will be limited if the rights only arise where there is a voluntary agreement. This does not counter the situations where Indigenous knowledge and stories are used without consent as these stories can be appropriated by third parties if they do not agree that the new copyright work has Indigenous communal moral rights. Those who do not engage with Indigenous communities, and plunder their stories from archives, for instance, will not be liable for infringing these rights under these provisions.

While these proposals are not yet law, these guidelines recommend that the principles of integrity and attribution should extend wherever possible to all uses of Indigenous cultural and intellectual property, and where appropriate, the rights of the community also need to be discussed.

### Managing copyright to protect your interests

As copyright exists as soon as a script is written down, it is not a legal requirement to register copyright. However, certain precautionary practices can show that copyright belongs to you should there ever be a contest or case relating to infringement of your work. It is important to keep good records of your works. For example, if producing a play, write down your script or record it by film.

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

- title of the script, play or dance
- writer
- date created
- copyright owners
- if applicable, cultural group or language group.

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

### Copyright notice

You should also include a copyright notice. A copyright notice provides information about acceptable uses and includes details about contacting the copyright owner for consent to use in other material. It may be appropriate to seek advice from a suitable practitioner on the appropriate wording for the copyright notice.

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

© Wesley Enoch, 1999\*.

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

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

All songs written and performed by Terri Janke.

© Terri Janke, 1999\*.

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

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

Directed by: Wesley Enoch

Produced by: Theatre Company

Choreography: Robynne Quiggin

The following is an example of a copyright notice for language group-owned traditional stories:

Traditional story: Torres Strait Islands.  
This version: © A. Murray, 2002. This performance is made with the permission of the language group. It may not be reproduced in any form without the

permission of the writer and the language group concerned.

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

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

Authorised recordings of performances often carry a warning such as:

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

For more information on recommended copyright wording for publications, see the *Style manual for authors, editors and printers*.<sup>158</sup>

### Moral rights notice

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

The creator(s) asserts their moral rights.

### Licensing use of dramatic and dance works

Copyright is personal property and can be licensed under agreement for a fee. A licence grants the right to use or deal with copyright in a work. You can put limits on the licence, including limitations of time, territory and purpose. For example, a play or choreographic show could be licensed to a theatre or dance company to perform the work to the public for a period of time. The copyright in the play or choreographic show remains with the copyright owner.

It is important to have a written agreement with 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. It is very important to read, understand and consider any written

agreement before deciding whether you agree to the terms. It is always a good idea to get legal advice to ensure a full understanding of all the terms before signing any agreement.

When working with Indigenous cultural material including stories, songs, dance steps or motifs, it is important not to assume that it is in the public domain. This is so even when the copyright period in sound recordings or films of the material has expired.

It is always necessary to consult with relevant Indigenous people for permission to use the material and if agreed, there should be scope for negotiating with Indigenous people on appropriate royalties for use. Some other points are:

- Written contracts are preferred to oral agreements.
- Everyone should have the opportunity to obtain independent and accessible legal advice.
- If the work is to be altered or adapted, Indigenous cultural custodians should be given opportunity to approve or reject any alteration or adaptation of their work.

### Assigning copyright versus licensing

Copyright can also be assigned. This means that you can give your copyright to someone else. They become the copyright owner and can authorise others to reproduce your dramatic work.

Copyright assignments must be in writing. Once copyright is assigned, the playwright, scriptwriter, choreographer, performer or other copyright owner in a work has no copyright interest in his or her dramatic work.

Wherever possible, Indigenous copyright owners should retain the copyright in their works so they can maintain control over reproductions.

It is important for Indigenous copyright owners and performers to check agreements and make sure they are not assigning away their rights instead of alternatively licensing use of their work. Always seek legal advice on copyright licensing issues.

### When is copyright infringed?

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

A person will infringe copyright in a musical, dramatic, artistic and literary work if he or she reproduces it in material form, publishes it, performs the work in public or communicates the work to the public, without permission from the copyright owner.<sup>159</sup>

For musical, dramatic and artistic works, it is also an infringement to adapt the work without the copyright owner's permission.

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

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

Exceptions to copyright infringement are detailed below.

### Fair dealings provisions

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

- research or private study purposes<sup>160</sup>
- criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made<sup>161</sup>
- for the purpose of parody or satire<sup>162</sup>

- for the purpose of, or associated with the reporting of news in a newspaper or magazine and a sufficient acknowledgement of the work is made; or for the purpose of, or associated with the reporting of news by means of a communication (including television, radio and the internet) or in a cinematograph film<sup>163</sup>
- judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.<sup>164</sup>

### Crown use of artworks

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

### Library copying

Libraries and archives can make copies of copyright works under certain circumstances in accordance with statutory procedures.<sup>165</sup>

### Educational copying

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

### Further copyright information

For general information on copyright laws, visit the following websites:

- 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)

### Creative Commons

Creative Commons is an American organisation that encourages creators to consider using less restrictive copyright. This might be useful for some people, but it can mean giving up your rights to control or benefit financially from your work. A number of Australian arts advocacy organisations have raised serious concerns about the licences, particularly that they may not effectively limit commercial or derivative uses.<sup>166</sup>

The creative commons licence uses 'CC – some rights reserved' rather than the © symbol used by standard copyright. Some creative commons music licences allow for file sharing, downloading and performance of the entire work. Others allow commercial uses, and allow the music to be used for sampling. In general all creative commons licences require that the author or person granting the licence be attributed.<sup>167</sup>

Some creative commons require you to give up aspects of your copyright. Others allow such wide use of your material that you lose a lot of control over the way your work is used. This could also cause serious problems if you later want to enter into a recording or publishing agreement, because you no longer have control of the rights a recording company may need.

It is very important to take some time to think about whether a creative commons licence suits you, and it is a good idea to get legal advice. Creative commons licences are non-revocable. So, once you have allowed others the wide use of your material under a creative commons licence, you cannot change your mind about it. You will not be able to stop someone from using the work according to the creative commons licence, even if you withdraw your work from circulation.<sup>168</sup>



**Hypothetical case study:  
Free website download**

Hanna has written and recorded a song that includes some verses in her language. She wants to distribute it on a friend's website because she is hoping for the widest distribution of her music. Her friend encourages her to make the whole song available on the site and sign a creative commons licence that will allow anyone to download the music for free, to use the work for sampling and to make commercial uses of the music. Hanna finds that someone has downloaded her song from the website, and used it in their new music. Hanna is very unhappy with the way the verses in language have been used. She also feels that her original song has been ripped off.

Hanna can remove her song from the website, but she cannot stop the uses that have already happened. She may be able to take legal action for breach of her moral rights, but there is no guarantee of success.

A year later Hanna is negotiating a recording contract, but she is unable to include this song in the deal because she has given up so many aspects of her copyright that the recording company won't include it in the deal.

**Copyright collecting societies**

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. Several collecting agencies have been established in Australia to manage and administer the copyright of its members for a fee, or a share of the royalties.

Some collecting organisations, such as the Copyright Agency Limited and Screenrights, have a legislative basis for collecting royalties. Others are voluntary organisations which artists

are required to join. APRA | AMCOS, CAL, Screenrights and Viscopy are the most relevant collecting societies for copyright owners in dramatic or dance works.

**Australasian Performing Right Association/Australasian Mechanical Copyright Owners Society**

The Australasian Performing Right Association (APRA) collects and distributes licence fees for the public performance and communication (including broadcast) of its members' musical works. Public performances of music include music used in pubs, clubs, fitness centres, shops, cinemas, festivals, whether performed live, on CDs or played on the radio or television. Communication of music covers music used for music on hold, music accessed over the internet or used by television or radio broadcasters.

The Australasian Mechanical Copyright Owners Society (AMCOS) collects and distributes 'mechanical' royalties for the reproduction of its members' musical works for many different purposes. These include the manufacture of CDs, music videos and DVDs, the sale of mobile phone ring tones and digital downloads, the use of production music and the making of radio and television programs. Since 1997, APRA has managed the day-to-day operations of the AMCOS business.

For more information about APRA | AMCOS visit <[www.apra.com.au](http://www.apra.com.au)>.

**Copyright Agency Limited (CAL)**

CAL is an Australian copyright management organisation that provides a bridge between creators and users of copyright material.

CAL is the non-exclusive copyright agent for authors, journalists, visual artists, photographers and publishers to license the copying and communication of works to the general community.

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

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

For more information about CAL visit <[www.copyright.com.au](http://www.copyright.com.au)>.

**Screenrights**

Screenrights is a non-profit organisation that collects royalties from television broadcast of copyright work. It distributes this money to the producers, screenwriters, distributors, music copyright owners, copyright owners of artistic works and other rights holders in the copied programs.

To help filmmakers market their programs to educational institutions and assist teachers in getting the most out of their copying licence, Screenrights set up <[www.enhancetv.com.au](http://www.enhancetv.com.au)>. This site gives educators free resources for using television in the classroom, as well as a weekly email guide of TV highlights.

Screenrights also administers provisions in the *Copyright Act* that allow pay television operators to retransmit broadcasts as part of their service provided they pay royalties to the underlying copyright owners. Copyright owners in TV can register titles with Screenrights to collect these royalties. They can also make their registration global, appointing Screenrights International to collect any royalties being held for them by other similar societies in Europe, Canada and the United States. This enables filmmakers to maximise their returns and minimise their costs.

For more information about Screenrights visit <[www.screenrights.com.au](http://www.screenrights.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. Of its 2000 members, approximately half are Indigenous artists or their estates.

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

Viscopy oversees 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 made to artists half yearly.

For more information about Viscopy visit <[www.viscopy.com.au](http://www.viscopy.com.au)>.

**Arts Law Centre of Australia**

The Arts Law Centre of Australia gives legal advice to artists, writers and filmmakers on matters relating to arts practice. The Arts Law Centre has a website ([www.artslaw.com.au](http://www.artslaw.com.au)) which publishes useful information sheets on copyright and the arts.

In 2004, the centre established the 'Artists in the Black' program which employs an Indigenous legal officer and an Indigenous information officer. An Indigenous reference group oversees the program. The 'Artists in the Black' program goals include:

- providing legal service and information to Indigenous artists, arts organisations and communities
- providing informed advocacy work on issues relating to Indigenous cultural and intellectual property.

### Media, Entertainment and Arts Alliance (MEAA)

MEAA is the union and professional organisation for individuals who work in the media, entertainment, sports and arts industries. The MEAA's 36,000 members include people working in TV, radio, theatre and film, entertainment venues, recreation grounds, journalists, actors, dancers, sportspeople, cartoonists, photographers, and orchestral and opera performers. It also includes people working in public relations, advertising, book publishing and website production – everyone who works in the industries that inform or entertain Australians.

MEAA was formed in 1992 when Actors Equity (AE), The Australian Journalists Association (AJA) and The Australian Theatrical & Amusement Employees Association (ATAEA) merged into a single professional organisation.

Since amalgamation, the Symphony Orchestra Musicians Association (SOMA) and the NSW Artworkers Union have joined MEAA; a Professional Sports Branch has been created; and the Screen Technicians Association of Australia (STAA) reconstituted itself under the MEAA banner.<sup>169</sup>

## Implementation

*Protocols are about people's value systems and their cultural beliefs.<sup>170</sup>*

The protocols in this guide are flexible. You can use them to develop protocols for your performing arts project, program or practice, and language group, region or community. This section tells you how to implement the protocols.

It provides a checklist of key points to consider when developing protocols for a performing arts project, or in your own performance practice. It summarises the preceding sections and also offers some different and more specific information.

### 1. Respect

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

- Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.
- Indigenous worldviews, lifestyles and customary laws should be respected in contemporary artistic and cultural life.
- Welcome to country and acknowledgement of country are important protocols of respect. Advice should be sought from the local community about their way of welcoming and acknowledging country.
- Traditional owners, performers and other Indigenous participants should be remunerated for their contributions to ceremonies.
- Indigenous cultures are living cultures.
- Indigenous culture is diverse. Culture varies from Indigenous country to country and from language groups.
- Indigenous people should be represented by the appropriate Indigenous people and in a manner they approve.

- The cultural contribution of Indigenous people to a performance should be valued, acknowledged and remunerated.
- Local cultural protocols and protocols associated with a work should always be respected and observed.

### 2. Indigenous control

Indigenous people have the right to determine how their cultural property will be used. They 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.

When working with Indigenous people:

- Identify appropriate Indigenous information and authority structures.
- Discuss your ideas for performances and projects with Indigenous dance schools, associations, Indigenous theatre companies, and Indigenous media organisations.
- The Australia Council for the Arts currently requires all Indigenous participants to provide a letter confirming their Aboriginal or Torres Strait Islander identity from an incorporated Indigenous organisation.
- When engaging Indigenous contributors to participate in a project, most organisations use the definition of Aboriginal and Torres Strait Islander identity used by the Australian Government as a guide.
- Keep appropriate/relevant Indigenous people informed and advised, and where possible, provide regular updates.

### 3. Communication, consultation and consent

When performing, recording, publishing or otherwise dealing with Indigenous material consider the following checklist:

- Have you considered how the work might impact on or portray Indigenous people?

- Have the relevant Indigenous people been consulted on the proposed project? Is there one person or a language group who has authority to speak for a particular work? Have they been consulted?
  - Have you sought permission from the relevant people to tell the story?
  - Is it a story that should be told by Indigenous rather than non-Indigenous people?
  - Does the dance belong to an Indigenous person or group and do you have permission to perform it?
  - Is the particular story or music acceptable for public use, or is it subject to restrictions? Always discuss this with Indigenous custodians.
  - Have you advised elders or people in authority of the possible risks and benefits from the wider performance of their cultural material?
  - Will the community or individual who is the subject of the play see it prior to public performance, and is there time allotted for incorporating their suggestions?
  - Have you complied with any intellectual property policies in place?
  - Has sufficient time been allowed for consultation? Consultation should address the communal nature of Indigenous cultural expression.
  - Are you flexible with time? The consultation process may be lengthy so do not expect to have a reply to a question in a day or a week. Each community will need a reasonable period of time to consider and consult within their communities.
  - Are you planning to write a play that depicts an identifiable individual or community? If so, ask the individual, community or relatives of the individual for permission, and observe close consultation and consent throughout the process.
  - Are there plans to license the work to another company? Are there consultation processes built into any agreements for ongoing use?
  - Is your project part of an ongoing partnership with the community? Could it be developed that way? Remember that consultation is an ongoing process for the life of the performance, the work and the company.
  - Have you asked what sorts of performances the community would like to see or hear more of?
  - Have you sought the consent of the storytellers or writers (including next of kin if deceased) and the traditional custodians for use of their cultural material?
  - Has the consent of the relevant Indigenous people been obtained on all issues raised in the communication and consultation process?
  - Are you proposing to adapt or alter, record or license the work? Prior informed consent must be sought for all uses.
  - Have you avoided disclosing sensitive information without discussion and consent? Disclosure about a person who has passed away will be very sensitive.
  - Have you received permission from all the Indigenous people affected by the disclosure of confidential information?
  - Have you considered the possibility that there may be no consent to your proposal?
- #### 4. Interpretation, integrity and authenticity
- Be responsible for your representations of Indigenous cultures. The following are some questions that need to be answered.
- How will your work affect the Indigenous group it is based on?
  - Does it empower Indigenous people?
  - Does it depict or expose confidential, personal and/or sensitive material?

- Does it reinforce negative stereotypes?
  - Are you proposing to adapt or alter the cultural heritage material in any way?
  - Have you discussed this and gained consent?
  - Will the individual or community who is the subject of the work get an opportunity to see the work prior to public release? Have their suggestions been incorporated?
  - Have you checked the proposed Indigenous Communal Moral Rights legislation that will introduce new legal obligations? You may require community input to ensure literary, musical, dramatic and artistic works and films are not treated in an inappropriate manner.
  - Have you sought advice on the correct cultural context for the performance material and the correct cultural context for heritage material?
  - Have you asked about any restrictions on the material, and the exact meaning of any language words if unsure?
  - Are there any restrictions on performance such as where, when and by whom?
  - Are you using heritage material such as imagery, music and language with proper regard to gender, language group affiliations and cultural restrictions?
  - Is it a story that should be told only by Indigenous people?
  - Does the performance expose confidential or sensitive material?
  - Be aware that the inclusion of personal material may be sensitive. If it is objected to by family or language group representatives, leave it out.
  - If depicting deceased people, seek permission from the family or language group representatives. Discuss issues of interpretation and authenticity.
  - It is a good idea to speak to elders and/or other Indigenous people in authority to identify sensitivities, sacred material or religious issues in the depiction of images, stories and events.
- #### 6. Attribution and copyright
- Indigenous people should be given proper credit and appropriate acknowledgement, including copyright and royalties, for their role in the development and use of their Indigenous cultural material.
- Copyright protects specific categories of material. The material must be original and must be reduced to material form. To be original, for the purpose of copyright protection, the author or authors must have applied sufficient skill, labour and judgment to create the work.
- To be 'reduced to material form' means the work must have been written or recorded. When publishing or licensing a dramatic work it is necessary to get copyright clearance from the copyright owners.
- #### Attribution
- Be sure to attribute the performance to all Indigenous custodians, the source community, writers, actors, dancers, directors, designers, choreographers, technical personnel and cultural consultants who contributed to the work at all stages.
  - Ask for correct wording of how the person or community wishes to be attributed with ownership or contribution.
- #### 5. Secrecy and confidentiality
- Indigenous people have the right to maintain confidentiality about their personal and cultural affairs.
- Secret and sacred refers to information that is restricted under customary law. The right of Indigenous people to protect secret and sacred cultural knowledge should be respected.
  - The right of Indigenous people to keep cultural knowledge confidential and control its use should be respected.



- Check for proposed Indigenous Communal Moral Rights legislation that may introduce legal obligations for attribution of community input to literary, musical, dramatic and artistic works and films.

### Copyright

- Seek copyright protection for all works.
- Identify all the owners of copyright in a work.
- Discuss the issue of copyright ownership with Indigenous representatives upfront.
- Indigenous creators who incorporate traditional knowledge into their work have a special obligation to the language group when exercising copyright in the work.
- In collaborative works copyright may be shared with the collaborating authors.
- Anyone intending to perform a work that is protected by copyright should seek advice to ensure they are not infringing copyright.
- Under the educational statutory licensing schemes, authors may be entitled to royalties for use of their work in formal teaching and learning situations. The relevant collecting agencies collect and distribute these royalties to members.
- The copyright owner of a sound or film recording is generally the individual who pays the costs of recording. However, this can be underwritten by agreement.
- Ask performers to sign clearance forms if their work is to be recorded at a festival or concert.
- Statutory exceptions to copyright infringement include the purposes of criticism or review or incidental filming.

### 7. Proper returns and royalties

Indigenous people have the right to be paid for their contribution and for use of their Indigenous heritage. Consider the following:

- Have fees or other benefits been negotiated

with the writers, performers, choreographers, directors, cultural advisors and traditional custodians?

- Is the cultural value of their work recognised in financial returns?
- Have Indigenous cultural advisors been acknowledged and properly remunerated for their contribution?
- Has registration with APRA and PPCA been completed? Are all other holders of rights acknowledged in that registration?
- Will Indigenous custodians share in the benefits from any commercialisation of their cultural material?
- Have you checked whether Indigenous people also seek benefits other than royalties, such as branding of a work or sharing of skills?
- If you are the recipient of an Australia Council grant, have you used written contracts and sought legal advice?
- Are the correct wages being paid, and proper working conditions provided, including insurances and superannuation?
- Are the correct taxes being paid?

### 8. Continuing cultures

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

- The use of cultural protocols is an important aspect of continuing Indigenous culture and should be adopted and followed.
- New and emerging styles of dance and performance are an important aspect of continuing cultures.
- Consider including cultural protocols in any future licensing agreements for use of a work.

### 9. Recognition and protection

Australian laws and policies should be developed and implemented to respect and protect the rights of Indigenous people and communities and their cultural heritage.

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

### Common issues

#### Festival performances

- Is it appropriate to film, photograph or record the performance?
- Have performers been advised and consulted on uses of any recordings of a festival performance?
- Do you have a policy on filming, photography or recording?
- How will you notify people about your policy on filming, photography or recording?
- Would it be useful to adopt a process to authorise filming, photography or recording in certain circumstances?
- Have written clearances from performers been sought?
- Are there any cultural considerations necessary for the scheduled performances?

#### Dramatic and dance works

- Writers, composers, choreographers, dramaturges and other contributors are referred to as 'authors' in a copyright context.

- The copyright owner is generally the author of the literary, musical or dramatic work. There are exceptions to this rule, including an author who is an employee under a contract of service.
- Authors do not need to register for copyright protection.
- Copyright in a literary, musical or dramatic work lasts for 70 years after the death of the author.
- The author of a literary, musical or dramatic work has the exclusive right to:
  - reproduce the work in a material form
  - publish the work
  - perform the work in public
  - communicate the work to the public
  - make an adaptation of the work
  - do any of the above in relation to an adapted work.
- When any of these rights are exercised the copyright owner is generally entitled to a licence fee or royalties for the use of their work.
- Styles of drama and dance are not protected by copyright. It is the expression of the style in the dramatic or dance work that is protected.
- The author has moral rights to his or her work and films, and performers have moral rights in their performances. Moral rights include the right of integrity, the right against false attribution and the right of attribution.
- There are proposals to introduce Indigenous communal moral rights into the *Copyright Act 1968*. Processes for recognising attribution and integrity issues for works that draw from a traditional base should be considered.
- In collaborative works, copyright may be shared with the collaborating authors. If company members collaborate to create a dramatic or dance work, the members will generally be the joint authors.

- The Indigenous author who incorporates traditional ritual knowledge in his or her dramatic or dance work has a special obligation to the language group when exercising the copyright in the work.
- There are special copyright provisions for commissioned photographs.

### Recording dramatic and dance works

- When recording a dramatic or dance work it is necessary to secure copyright clearance from the copyright owner. In a performance work this may include separate copyright clearances for use of the dramatic work, the choreography, the musical work and the artwork. Performers may also share in the copyright of sound recordings of live performances made after 2005.
- It is strongly recommended to use written agreements when licensing dramatic or dance works for commercial purposes.
- Broadcast and film companies should provide written agreements for copyright owners. Indigenous authors should be given the opportunity to consider contracts and obtain proper legal advice.
- Recipients of Australia Council grants are encouraged to seek legal advice on written contracts for recording.
- Have performers signed clearance forms if their work is to be recorded at a festival?
- Under the educational statutory licensing schemes, authors may be entitled to royalties for use of their works in books and films. The relevant collecting agencies – APRA, AMCOS, CAL, Screenrights and Viscopy – collect and distribute royalties to members.

### Copyright infringement

- A person will infringe copyright in a work if he or she publishes a substantial part of the work, reproduces a substantial part of the work in material form, performs a substantial part of the work in public,

communicates a substantial part of the work to the public, or makes an adaptation of the work without the permission of copyright owner.

- Statutory exceptions to copyright infringement include the purposes of criticism or review, and incidental filming.
- Public performance of a work can include any performance that is not domestic or private, even if no fee is charged. So, anyone intending to perform a work that is protected by copyright should seek advice to ensure they are not infringing copyright. Check the contacts page of this guide for copyright advice referrals.

## Resources

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

Bostock L, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities*, Special Broadcasting Services, 2nd edn, Sydney, 1997.

Byrne A, Garwood A, Moorcroft H and Barries A, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, Aboriginal and Torres Strait Islander Library and Information Resources Network.

Everett J, *Respecting Cultures*, Arts Tasmania Protocols, Arts Tasmania, 2002.

*Indigenous Arts Protocol: A Guide*, developed by the Indigenous Arts Reference Group, NSW Ministry for the Arts, 1998.

Janke T, *Doing It Our Way: Contemporary Indigenous Cultural Expression in New South Wales*, NSW Ministry for the Arts, Sydney, 2002.

Janke T, *Our culture: our future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, Solicitors, for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1998.

*Taking the Time – Museums and Galleries, Cultural Protocols and Communities, A Resource Guide*, Museums Australia (Qld), 1998.

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- 2 T Janke, M Frankel & Company, *Our culture: our future – Report on Australian Indigenous cultural and intellectual property rights*, Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney, 1998.
- 3 W Enoch, Indigenous Theatre Director, telephone consultation, 1 May 2002.
- 4 *ibid.*
- 5 T Janke, *Our culture: our future*, op. cit.
- 6 *ibid.*
- 7 *ibid.*
- 8 United Nations General Assembly, *Draft Declaration on the Rights of Indigenous Peoples, United Nations Documents*, Human Rights Council, Resolution 2006/2.A/HRC/1/1/3 23 June 2006
- 9 The Mataatua Declaration was developed at the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, 12–18 June 1993, at Whakatane, Aotearoa, New Zealand. A full text of the Declaration is cited in Terri Janke, *Our culture: our future*, pp306–310.
- 10 Mrs Erica Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples*, United Nations Document E/CN.4/Sub.2/1995/26. The full text, as adopted and elaborated on by ATSIC's Indigenous Reference Group, is cited in Terri Janke, *Our culture: our future*, pages 273–277. See also Erica Irene Daes, *Study of the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, United Nations Economic and Social Council, Geneva, 1993.
- 11 See the World Intellectual Property Organisation's website, <<http://www.wipo.int/globalissues>>, and WIPO Magazine, <[www.wipo.int/wipo\\_magazine/en/pdf/2002/wipo\\_pub\\_121\\_2002\\_03.pdf](http://www.wipo.int/wipo_magazine/en/pdf/2002/wipo_pub_121_2002_03.pdf)>, for further information.
- 12 *ibid.*
- 13 World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The protection of traditional cultural expressions/expressions of folklore, Draft objectives and principles*, WIPO/GRTKF/IC/10/4.
- 14 World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The protection of traditional knowledge; Draft objectives and principles*, WIPO/GRTKF/IC/10/5, 2 October 2006.
- 15 World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The protection of traditional cultural expression/expression of folklore; Draft objectives and principles*, WIPO/GRTKF/IC/10/4, Article 3, p19.
- 16 Section 6, *Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, South Pacific Community, Noumea, 2002.
- 17 DB Rose, *Nourishing Terrains*, Australian Heritage Commission, Canberra, 1996. [www.ahc.gov.au/publications/generalpubs/nourishing/index.html#foreword](http://www.ahc.gov.au/publications/generalpubs/nourishing/index.html#foreword)

- 18 D Mellor & T Janke, (ed), *Valuing art, respecting culture: Protocols for working with the Australian Indigenous visual arts and craft sector*, National Association for the Visual Arts (NAVA), Sydney, 2001, p13.
- 19 D Milroy, Telephone consultation with Robynne Quiggin, 20 January 2006.
- 20 S Cook, executive director, Yirra Yaakin Noongar Theatre telephone consultation with Robynne Quiggin, 9 November 2006.
- 21 J Harding, manager, Indigenous arts program, City of Melbourne, telephone consultation, 4 April 2002.
- 22 W Enoch, peer review notes, 1 May 2002 and telephone consultation with Robynne Quiggin 28 April 2006.
- 23 S Cook, op. cit.
- 24 A Hurley, associate lecturer Queensland University of Technology, telephone consultation, 4 October 2006.
- 25 W Enoch, consultation meeting, 7 February 2002.
- 26 N McDonald, Kooemba Jdarra Indigenous Performing Arts, telephone consultation, 26 March 2002.
- 27 K Belling, artistic director, Ilbijerri Aboriginal and Torres Strait Islander Theatre Co-operative, telephone consultation with Robynne Quiggin, 6 October 2006.
- 28 N McDonald, op cit.
- 29 K Belling, op cit.
- 30 P MacPhail, Yirra Yaakin Noongar Theatre, telephone consultation, 17 May 2002.
- 31 N McDonald, op. cit.
- 32 R Swain, Marrugeku Company, telephone consultation, 4 April 2002.
- 33 N McDonald, op cit.
- 34 R Swain, Marrugeku Company, transcript of discussion on dance from Awaye, ABC Radio National, in *Writing on Dance 20: Dance comes from the land*, p84.
- 35 P MacPhail, op cit.
- 36 Adapted from Wesley Enoch, peer review notes, 29 April 2002.
- 37 A Hurley, op. cit.
- 38 J Harding, op. cit.
- 39 Adapted from Wesley Enoch, peer review notes, 29 April 2002.
- 40 H Anu, consultation meeting, 14 August 2001.
- 41 R Swain, Marrugeku, op. cit.
- 42 P MacPhail, op. cit.
- 43 K Belling, op. cit.
- 44 H Anu, op. cit.
- 45 *ibid.*
- 46 K Belling, op. cit.
- 47 S Cook, op. cit.
- 48 A Hurley, op. cit.
- 49 N McDonald, op cit.
- 50 Media Entertainment and Arts Alliance, <[www.alliance.org.au/](http://www.alliance.org.au/)>.
- 51 S Cook, op. cit.
- 52 R Swain, op. cit., Marrugeku ensures that the community is paid a royalty of 3 per cent when the show is sold.
- 53 P MacPhail, op. cit.
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- 124 Section 176(1) of the *Copyright Act 1968* (Cth), Section 10 of the *Copyright Act 1968* (Cth). Section 35 of the *Copyright Act 1968* (Cth).
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- 127 A number of different diagrammatic methods are used for noting dance steps. They include Labonotation, Benesh, Eshkol-Wachman Movement Notation or Sutton dance writing.
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- 133 The right of adaptation: Section 10 (1) of the *Copyright Act 1968* (Cth) provides for a literary work in non-dramatic form to be adapted into a dramatic form. So a novel can be made into a film with the permission of the author. It also provides for a literary work in dramatic form to be adapted into a non-dramatic form. So a play can be adapted to a song.
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- 135 Including improvisation and also including performances with puppets.
- 136 Including improvisation
- 137 or the recitation or 'delivery' of an improvised 'literary work'.
- 138 Section 248A of the *Copyright Act 1968* (Cth).
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- 141 This does not apply to audio-visual recordings.
- 142 Performers includes conductors in this section.
- 143 The performer also has the right to enter into a commercial rental arrangement in respect of the recording.
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- 167 "Some creative commons licences allow users of the music to copy, distribute, display, and perform the work, make derivative works and make commercial use of the work on the condition that the author or licensor is attributed, and that if the material is reused or distributed, the licence conditions are made clear to other users." Creative Commons Deed <[creativecommons.org/licenses/by/2.5/](http://creativecommons.org/licenses/by/2.5/)>
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- Raymond D Blanco, Kooemba Jdarra Indigenous Performing Arts
- Nadine McDonald, Kooemba Jdarra Indigenous Performing Arts
- Rachael Swain, Marrugeku Company
- Ronne Arnold, National Aboriginal Islander Skills Development Association
- Jo Clancy, National Aboriginal Islander Skills Development Association
- Angelina Hurley, Queensland University of Technology
- Anastasia Charles, Terri Janke and Company
- Sonia Cooper, Terri Janke and Company
- Sam Cook, Yirra Yaakin Noongar Theatre
- Paul MacPhail, Yirra Yaakin Noongar Theatre
- David Milroy, Yirra Yaakin Noongar Theatre
- David Lloyd, Woomera Aboriginal Corporation
- Peter Cleary, Woomera Aboriginal Corporation
- Helen Anu, performer
- Dalisa Pigram, dancer
- Waiata Telfer, festival coordinator and dancer
- Past and present members and staff of the Australia Council's Aboriginal and Torres Strait Islander arts board and section