Artwork made using Animal and Plant Material – Victoria

For many artists, plant and animal material is a central part of the artworks that they create. This can raise unique legal issues, as certain plants and animals are subject to strict laws in Australia. This is a particularly important issue for Aboriginal and Torres Strait Islander artists who often use native seeds, feathers, skins, bones, grasses and woods in their artworks. It can also affect non-Indigenous artists wanting to create artworks using plant and animal matter.

At the Commonwealth level, *the Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) regulates the use of native species. For further information see Arts Law's Information sheet – Artwork made using animal and plant material. However, each State and Territory also has its own legislation and even if a species can be used in an artwork without breaching the Commonwealth legislation, there may nevertheless be prohibitions under the relevant state laws. This information sheet focusses on the impact of laws in Victoria.

What the laws in Victoria mean for artists

The protection of native plants and animals in Victoria is governed by three laws: the *Wildlife Act 1975* (Vic) (**Wildlife Act**), the *Flora and Fauna Guarantee Act 1988* (Vic) (**FFG Act**); and the *Fisheries Act 1995* (Vic) (**FA**). These Acts impact artists in two main ways as they:

1. Restrict the taking or use of threatened or protected plants and animals from places in Victoria unless:

1. a licence has been given; or

1. they are used by Aboriginal people in accordance with a Natural Resource Agreement; or

1. they are used in traditional non-commercial activities conducted by native title holders on their traditional lands; and

1. Require a licence to be obtained before exporting or importing artwork incorporating threatened or protected species into or out of Victoria.

Example 1 – Jennifer Trask, making artwork from Animal Bones

Jennifer Trask is a contemporary artist based in New York who carves intricate sculptures from animal bones.

If Jennifer was making these sculptures in Victoria she would need to consider what type of animal bones she was using. If she used the bones of an animal protected under the Wildlife Act, for example a Leadbeater Possum, she would need to obtain a 'Wildlife Specimen' licence to collect, hold and use the bones. However, using the bones of a fox, which is unprotected, would not require any form of licence, provided the bones were not collected from certain areas.

As a consequence, the law in Victoria will impact on the types of plant and animal materials artists can use in their artwork. The regime may also create issues for artists wishing to exhibit their work in galleries within Victoria, or who wish to sell their artwork to buyers within or outside Australia.

Where did you find the plant or animal material?

1. **Was it in a Commonwealth area?**

It is important to know where you found the species. Commonwealth law requires a permit to kill, collect or export, certain species of plants and animals (or their parts e.g. feathers, fur, bones and teeth). However, the regime only operates within "Commonwealth areas" where Victorian laws do not apply. For further information regarding the Commonwealth scheme

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please look at the Commonwealth Information Sheet.

These are some Commonwealth areas in Victoria:

- Carlton Gardens
- Melbourne, Essendon and Moorabbin airports
- Various marine reserves located in the Bass Strait, including the Apollo, Boags, Beagle, Flinders and East Gippsland Commonwealth marine reserves (visit the Australian Marine Park website for exact locations: https://parksaustralia.gov.au/marine/parks/south-east/)
- Victoria's coastal waters extending from 5.5km from the shoreline
- Puckapunyal Military Area, located north of Melbourne and south-east of Bendigo
- Longlea, which adjoins Bendigo Regional Park
- Some 525 ha of Commonwealth property at Mangalore.

Within these areas, Commonwealth law protects:

- Certain species of possum, including the native Mountain Pygmy-possum and Leadbeater's Possum
- Various kinds of native Victorian wood, including Siah's Backbone, Isaac Wood, Warby Range Swamp Gum and Strzelecki Gum
- Certain species of native Victorian grass, such as *Austrostipa wakoolica*, *Austrostipa metatoris*, Adamson's Blown-grass, Hoary Sunray (also called Grassland Pepper-Daisy), River Swamp Wallaby-Grass (also called Floating Swamp Wallaby-grass), Narrow-leaf Bent-grass, Salt-lake Tussock-grass, and Feldmark grass.

If the plant or animal material is not taken or kept in a 'Commonwealth area' but is taken from elsewhere in Victoria, the state legislation will apply.

Was it in a 'protected area' in Victoria?

Victorian law prohibits all taking of all species of plants and animals (whether native or non-native and whether or not listed as threatened or protected) from areas which are 'protected'. Protected areas include 'State Wildlife Reserves'.1 and 'Nature Reserves'.2 This includes dead species as well as parts of plant and animal matter such as leaves, feathers and bones.3 Further, it is also an offence to take sand or soil from a Wildlife Reserve or Nature Reserve.4 The following areas in Victoria are protected areas:

- Alpine National Park
- Agnes Falls Scenic Reserve
- Tarra Bulga National Park
- Tarago Reservoir Park and
- Mount Worth State Park.

1. **Was the species harvested before the commencement of the Acts?**

The Victorian Department of Environment, Land, Water and Planning (**DELWP**) has indicated that if the plant or animal species was collected or harvested before the relevant Act commenced operation, it may exercise a discretion not to prosecute. For example, it may elect not to pursue a person advertising to sell the skull of a whale on Gumtree, if the skull was collected from a beach in Victoria in the 1960s before the FA commenced. However, examples in other states suggest that the time and expense involved in proving such matters and defending charges, mean that it is always wise to seek advice from the DELWP in advance, if possible.

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Is it a protected or threatened species?

For plant or animal material collected outside Commonwealth areas and Victorian protected areas, the next issue to consider is whether the particular animal or plant species is protected or threatened under Victorian law. Each of the Wildlife Act, the FFG Act and the FA lists the species which are threatened or protected. If it is animal material that you are using, then the Wildlife Act is the place to look. Meanwhile, plants and fish are dealt with by the FFG Act, and some specific aquatic species are covered by the FA.

1. **Protected and Threatened animal species (including marine mammals)**

Under the Wildlife Act, there are two categories of fauna that are protected throughout Victoria.

1. **'protected wildlife'** – means *all* wildlife, whether alive or dead, and any parts of such animals including eggs.5 This includes bones and skulls even if found on public land. However, pest animals (within the meaning of the *Catchment and Land Protection Act 1994* (Vic)) are excluded (for example foxes, rabbits, feral pigs and feral goats), as are animals specified by order of the Governor in Council to be 'unprotected'.6

1. **'threatened wildlife'** — means protected wildlife that is specified in the 'Threatened List' made under section 10(1) of the FFG Act. Again, this includes both alive and dead specimens and any parts of such animals including eggs.7 Further, this list includes specific marine mammals, for example, whales, seals and dolphins. While this list is made under section 10(1) of the FFG Act, the offences relating to threatened wildlife and marine mammals are contained in the Wildlife Act. The latest list of threatened species can be found on the DELWP website via this link: https://www.environment.vic.gov.au/conserving-threatened-species/threatened-list.

The main difference between 'protected' and 'threatened' animals is that the offences, while similar, will carry a much higher penalty when it is a 'threatened' animal that has been used.

1. **Protected plant species**

Under the FFG Act, there are two categories of flora that are protected throughout Victoria:

1. **'restricted use protected flora'**?– means those flora that are exclusively threatened by take (which means to kill, injure, disturb or collect8) for commercial or personal use only, not other activities9. For example, some species which are attractive or highly sought after, such as orchids and grass trees, are protected so that the removal of these species from the wild can be controlled. Take for other reasons (e.g. incidental to track maintenance) isn't restricted as long as reasonable care is taken not to impact the flora.10

1. **'generally protected flora'?**– refers to all other protected flora that are threatened by take for all other reasons (e.g. development, infrastructure maintenance works, etc.) and can include those species at risk of both commercial/personal take and incidental take.

These categories have separate controls in place regarding how people interact with them, and separate penalties if people don't adhere to them.

The current protected flora list can be accessed on the DELWP website here: https://www.environment.vic.gov.au/conserving-threatened-species/threatened-list.

Some key species that are protected under the FFG Act are:

- Various species of native Victorian wood, including: Yellow-wood, Willow Needlewood, Northern Sandalwood, Buff Hazelwood, several species of eucalypts (including Black Gum, Lima Stringybark, Warby Range Swamp Gum, Buxton Gum, Kamarooka Mallee, Bellarine Yellow-gum, Little Desert Peppermint and Strzelecki Gum); and

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- Several species of native Victorian grass, including: Plump Swamp Wallaby-grass, Jericho Wire-grass, Rough-seed Wire-grass, Purple Wire-grass, Allied Bent-grass, Narrow-leaf Bent-grass, Adamson's Blown-grass, Purple Blown-grass, Wind-blown Tussock-grass, Salt-lake Tussock-grass, Rock Tussock-grass, Slender Mud-grass, and Grey Grass-tree.

1. **Protected fish species**

Commonwealth law applies to waters extending beyond 3 nautical miles (5.5km) out to sea.11 The law in Victoria governs waters from the low water mark up to this point.

Fish species are protected if they are on the Threatened List under the FFG Act.12 This includes Grey Nurse Sharks, Great White Sharks and Freshwater Catfish. The protection extends to all parts of the fish including teeth, alive or dead, and preserved in any manner.13 The full list can be accessed here: https://www.environment.vic.gov.au/conserving-threatened-species/threatened-list.

1. **Protected Aquatic and Priority Species under the Fisheries Act**

Finally, there is a specific category of 'protected aquatic biota' that are declared and regulated by the FA.14This includes species of seahorses, sea dragons and pipefish.15 Disconcertingly, any fish or aquatic invertebrate listed under the FFG Act is deemed to be 'protected aquatic biota' for the purposes of the FA.16 The position is unclear, but this potentially means that artists who use a fish species protected under the FFG Act may be liable for offences under both Acts.

What are the prohibitions?

If you are using a species listed as either protected or threatened under Victorian law, there are a number of strict offences that may apply.

1. **Protected plants**

Under the FFG Act it is an offence to take, trade in, keep, move or process protected flora without a licence or permit.17 Currently, the fine is 120 penalty units, or $21,808.80 (as at 1 September 2021).

1. **Threatened and protected animals (including marine mammals)**

Under the Wildlife Act it is an offence to buy, sell, acquire, receive, dispose of, keep, possess, control, breed, process, display, take samples from or experiment on threatened wildlife or other protected wildlife (including marine mammals) without a licence or other authorisation.18 For example, an artist would not be able to collect threatened or protected species found dead by the side of the road. It is also an offence to take any wildlife from a State Wildlife Reserve19 or to export wildlife from Victoria to another State or Territory.

The offences for protected and threatened species are similar; however the penalties with respect to threatened species are much harsher. For example, keeping a protected animal can result in a penalty of 50 penalty units and/or 6 months imprisonment (with an additional 5 penalty units per head of wildlife). Meanwhile, keeping a threatened animal will carry a maximum penalty of 240 penalty units and/or 24 months imprisonment (with an additional 20 penalty units per head of wildlife). The current value of a penalty unit in Victoria is $181.74 (as at 1 September 2021),20 which means an offence involving a protected species may result in a $9,087 fine compared to a $43,617.60 fine for threatened species.

Additionally, there are specific provisions under the Wildlife Act that deal with offences against Whales.21 As such, it is an offence to kill, injure, take or interfere with a whale,22 and any person who has in their possession a part of a whale, or product derived from a whale is guilty of an indictable offence.23 As with other threatened species, these offences carry very serious penalties and may result in a fine of $181,740. This means that an artist should be very careful about acquiring any part of a whale, such as teeth, bones or skull, to incorporate into an artwork.

Example 2 – Collecting and incorporating plants into an artwork

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An artist has been collecting parts of plants found in national parks and around her suburb. She is particularly interested in using Plump Swamp Wallaby-grass to weave sculptural artworks. While it may be tempting to collect and use parts of this plant, caution should be exercised! Plump Swamp Wallaby-grass is a protected plant under Victorian law.

The artist cannot cut or dig up the living grass anywhere in Victoria except from private property with the owner's consent. She is also prohibited from taking the grass from any protected areas (such as a nature reserve), although she could collect and use dead grass (such as grasses blown by the wind found on the ground) on public land outside protected areas. Otherwise, the artist must either purchase specimens from a reputable nursery or florist who has the requisite licence to sell these species or get her own permit. If obtained legally, the artist could weave with the Plump Swamp Wallaby-grass and go on to sell the artwork without needing to buy a further licence.

1. **Protected fish species**

If the artwork incorporates marine species protected under the FFG Act, including any parts such as teeth or bones,24 a licence may be needed. It is an offence to take, trade in or keep any 'Listed Fish' without a licence or unless authorised by order of the Governor General in Council.25 This would include teeth from a Grey nurse shark. Currently, the fine is 50 penalty units ($9,087 as at 1 September 2021).

1. **Protected Aquatic and Priority Species**

Finally, a person must not take, injure, damage, destroy, possess, keep, display for reward, release or sell protected aquatic biota, without a permit or authorisation.26 The fine is 50 penalty units ($9,087 as at 1 September 2021).

Example 3 – Using roadkill and found animal materials

An artist wants to make sculptures using found animal materials. This includes some Grey Nurse Shark teeth found at a local beach and some animal material found by the side of the road. In particular, the artist has found the quills and skull from the corpse of an echidna, and feathers from a Spotted Bowerbird.

As a 'listed fish', it would be an offence to take and use the teeth of the Grey Nurse Shark without a licence. It is unlikely that an artist would obtain a licence to use a listed fish, so the teeth should be avoided. Meanwhile, the echidna parts are from a protected species and the artist will need to obtain a Wildlife Specimen licence *before* collecting the materials—even if found dead by the road. Further, the artist would need to clarify with DELWP whether a potential buyer would also need to obtain a licence to buy and hold the artwork incorporating the echidna parts.

However, the collection and use of the feathers of a protected bird species will fall within the 'shed' materials exemption if they were not taken from the body of a bird but were found separately having been 'shed' or discarded. Therefore, the artist would not require a licence to use of the feathers of the Spotted Bowerbird, although a licence may be required to sell or exhibit the resulting artwork.

Is there an exemption or defence that applies?

If you are using, or have incorporated into an artwork, any part of a plant or animal species which is protected or threatened under Victorian law, liability may be avoided if you fall within one of the exemptions, or if a defence can be established.

1. **Exemptions for Aboriginal and Torres Strait Islanders**

There are two key exemptions available for Aboriginal and Torres Strait Islander peoples.

Firstly, all three Victorian Acts are subject to the *Native Title Act 1993* (Cth) which provides that holders of native title rights cannot be restricted by State law from engaging in certain activities on land over which native title has been granted.27 To fall within this exemption, the native title holder must be exercising a native title right or interest (i.e. the use must have a traditional basis), and the resource must be taken for the purpose of satisfying the native title holder's personal, domestic or

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non-commercial communal needs. It is unclear if this could be relied upon to cover artwork made for commercial sale and you should seek further legal advice before seeking to rely on this provision.

For example, the following native title interests exist in Victoria:

- the Gunai and Kurnai People hold native title over 45,000 hectares of land located in Gippsland;
- the Gunditjmara People and the Eastern Maar People hold native title over Crown land in south-western Victoria; and
- the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk Peoples hold native title over some Crown reserves along the banks of the Wimmera River.28

Secondly, Traditional Owners who have entered into an out-of-court settlement of a native title claim with the Victorian government may also be exempt from the restrictions on dealing with protected flora and fauna if the settlement package includes a Natural Resource Agreement.29 The purpose of a Natural Resource Agreement is to recognise Traditional Owners' rights to take and use specific natural resources and provide input into the management of land and natural resources generally.

Under sections 82 and 83 of the *Traditional Owner Settlement Act 2010* (Vic), the Governor in Council may, on recommendation of the Minister, authorise the members of a Traditional Owner group to do a range of things to 'natural resources' (which include flora and fauna)30 on land subject to a Natural Resource Agreement, including:

- access, hunt, take, use or interfere with the natural resource;31
- cut, dig up or remove the natural resource;32
- sell or give away any of the natural resource;33 or
- any other similar activity in relation to the natural resource.34

Information on Natural Resource Agreements entered into pursuant to the *Traditional Owner Settlement Act 2010* (Vic) can be viewed on DELWP's website (see here: https://www.forestsandreserves.vic.gov.au/joint-management/agreements-with-traditional-owners). Currently, there are agreements in force with six Traditional Owner groups. These are the:

- Dja Dja Wurrung Recognition and Settlement Agreement
- Gunaikurnai Settlement Agreement
- Gunditjmara Settlement Agreement
- Taungurung Recognition and Settlement Agreement
- Wotjobaluk/Barengi Settlement Agreement
- Yorta Yorta Agreements.

Each agreement has unique conditions that will determine what a Traditional Owner can and cannot do with protected species. For example, the Dja Dja Wurrung people are able to hunt eastern grey kangaroos and common brushtail possums up to certain numbers per year.35 Details of all Natural Resource Agreements can be viewed on DELWP's website via the above link.

1. **General Exemptions**

There are also a number of other exemptions available under the Acts.

The most relevant exemptions available for an artist who is making art incorporating threatened or protected plant species are:

- specimens acquired from private land (provided consent from the landowner is obtained), as long as the specimen is not taken for the purpose of sale or the person has not sold or offered the specimen for sale;36

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- specimens found and collected from the ground on public land (however, not within 'protected' public land such as national parks), for example dead leaves, bark or branches found by the side of the road;37
- specimens acquired from a licenced florist or nursery;38 and
- specimens acquired in accordance with a Governor in Council Order.39

In all of the above instances, a permit will **not** be required to sell, purchase or hold the artwork incorporating the protected flora.

The exemptions available for an artist who is making art incorporating threatened or protected animal species are:

- **wildlife bred in captivity or from a particular source** — the *Wildlife Regulations 2013* (Vic) contain exemptions where the wildlife is listed in particular Schedules to the Regulations and has been bred in captivity or is from an approved source.40 This means that an artist does not need a licence to use some protected animal products in an artwork if they are sourced appropriately. For example, an artist would be able to use the eggs of an emu, without a licence, if these were obtained from a licenced emu farmer. Proof of purchase should be retained in these circumstances (for example, tax invoice or receipt).
- **'shed' or 'cast' animal specimens** — possessing particular animal materials that have been 'shed' won't be an offence or require a licence.41 This includes cast feathers, shed reptile skins, and the cast antlers of deer. However, this exemption only applies to the possession of the animal materials, not other actions that might constitute an offence such as selling them.

The 'shed' or 'cast' materials exemption also applies to the import and export of animal materials into Victoria.42 However, if you are importing or exporting from another state or territory in Australia, the law in that state should be considered as you may be required to have a permit in that other state. Similarly, export outside of Australia may require a licence under the Federal legislation.

Is a licence or permit available?

One of the main ways of avoiding liability for an offence is to obtain a licence. While there are some licences available, unfortunately obtaining a licence as an artist is not easy.

1. **Permits for protected plants**

Under the FFG Act, the secretary may issue a licence or permit to take, trade in, keep, move or process protected flora.43

Indeed, if an artist wishes to collect specimens from a live plant on public land (for example picking flowers or leaves) a permit will be required to do so. Application forms for a permit can be found via this link: https://www.environment.vic.gov.au/conserving-threatened-species/flora-and-fauna-guarantee-act-1988/protected-flora-controls. Currently, there is no fee required for this permit (as at 1 September 2021).

1. **Licences for protected and threatened animals (including marine mammals)**

There are several categories of commercial licences available.44 However, Arts Law's discussions with DELWP suggest that the majority of these licences will not be awarded to an artist wanting to incorporate animal parts into an artwork.

There are two types of licences that may be applicable to an artist using animal materials.

Firstly, if an artist was collecting species for the purpose of personally performing taxidermy processes, a Wildlife Taxidermist Licence would be required.45 This licence authorises the licence holder to possess, keep, buy, sell, process and dispose of wildlife listed in Schedules 2, 3, 4 and 7 of the *Wildlife Regulations 2013* (Vic) for the purpose of preserving, preparing and mounting, and restoring, parts or complete specimens of dead wildlife, or for the purpose of providing specimens of dead wildlife for use in commercial films.46 Importantly, the licence must be obtained *before* the specimens are collected.

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Additionally, all Wildlife Taxidermist Licences are subject to a number of conditions,47 including that prior written approval of the secretary must be obtained before using the specimen in a commercial film and the licence holder must not charge a fee for the display of wildlife to the public.48 Because this particular licence is aimed at commercial taxidermists, it is more expensive than most, currently costing $611.71 per year (as at 1 September 2021).49

The above licence will only apply to an artist undertaking the preserving process themselves. Instead, if an artist wants to possess, keep, display, buy, sell or dispose of prepared or mounted specimens of dead wildlife, then the artist will require a 'Wildlife Specimen Licence'.50 There is a general 'Private Wildlife Licence Application' form that can be used to apply for a Wildlife Specimen Licence, available here. Arts Law's discussions with DELWP indicate that these licences are granted occasionally, but each application is considered on a case-by-case basis. Factors that will be relevant to DELWP's decision include if the use of the animal specimen is 'necessary' (for example, this may not be the case if an alternative species could be used), and if the use is consistent with the objectives of the Wildlife Act. These objectives are:51

- The protection and conservation of wildlife;
- The prevention of wildlife from becoming extinct; and
- The sustainable use of and access to wildlife.

Further, a similar case-by-case approach is used with respect to licencing requirements for the purchase, exhibition and sale of works incorporating protected species. Although DELWP may not always require licences to purchase and hold artworks incorporating protected species, this is far from a guarantee and artists should seek guidance from the department prior to selling or purchasing such artworks.

Currently the Wildlife Specimen Licence costs $15.03 for 1 year, or $7.51 for 1 year for individuals who are eligible for concession prices (as at 1 September 2021).52 For more information, please see: https://www.vic.gov.au/private-wildlife-licences.

1. **Licences for protected fish**

A licence or permit may be issued to take, trade in or keep listed fish.53 However, it appears that these permits will only be granted in narrow circumstances, for example, for education and/or scientific purposes: https://www.vic.gov.au/research-permits.

1. **Licences for protected Aquatic and Priority Species under the Fisheries Act**

Under the FA there are several licences available. Most relevantly to artists:

1. A licence to receive for sale any fish of a priority species;54 or

1. A general permit to take, possess or sell any species of fish.55

However, Arts Law's discussions with the Commercial Fisheries Licensing Office of Victorian Fisheries Authority, suggest that as long as the animal material has been obtained through a legal source, such as an aquarium, and proof of purchase is retained, a licence to hold or incorporate an aquatic species into an artwork will not be required. Again, it would be prudent to check with the Licensing Office in case this policy is changed.

1. **Permit for import and export of plants and animals**

Under the Wildlife Act, a permit to import and export protected wildlife to and from Victoria must be obtained.56 This would include the movement of any artworks that incorporate such materials into and out of Victoria.

There is no prohibition on the import and export of protected plants under the FFG Act. However other legislation may impose restrictions, such as if the plant material poses a 'biosecurity' risk.

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Arts Law's discussions with the Plant Standards Branch of Agriculture Victoria, which sits within the Department of Jobs, Precincts and Regions (**DJPR**), suggest that restrictions on the interstate movement of plant material into Victoria will depend on where the material has come from. For example, vegetable seedlings may be permitted to be imported from NSW but not from Queensland. Further, some species coming from any state (except Tasmania) will require a 'Plant Health Certificate'. Given the complexity and ad hoc nature of the requirements for the import of protected plants, the best option is to contact a Plant Standards Officer at Agriculture Victoria directly, prior to the transportation of any artwork incorporating plant species. While the department is re-named quite frequently, as at 1 September 2021 the best contact is 136 186 or plant.standards@agriculture.vic.gov.au (further information is also available here). Agriculture Victoria also publishes a helpful Plant Quarantine Manual, which provides details of all requirements for the movement into Victoria of plants, plant materials and related items.57

Meanwhile, the exportation of an artwork from Victoria to another state in Australia will also require consideration of the laws in the receiving state.

Further information on the import and export of materials between states in Australia can be accessed on Australian Interstate Quarantine's website.58

Example 4 – The exhibition

An artist has successfully obtained a Wildlife Specimen Licence to incorporate the bones of a threatened Eastern Barred Bandicoot into two sculptural works that are included in an exhibition in Melbourne. At the show, both works are purchased with one being bought by an individual who lives in Tasmania and another who lives in London.A licence would be required to transport the artworks interstate and overseas. For interstate export to Tasmania, an export licence under the Wildlife Act would be required. Additionally, the law in Tasmania would need to be considered and most likely an import licence under Tasmanian law would also be required. Because the Eastern Barred Bandicoot is also listed as a 'threatened species' under the Commonwealth EPBC Act, a federal licence to export that work overseas will also be required.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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