Artwork made using Animal and Plant Material – South Australia

For many artists, plant and animal materials form 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 containing native and threatened species – Commonwealth. 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 South Australia.

What the laws in South Australia mean for artists

The protection of native plants and animals in South Australia is governed by two laws: the *National Parks and Wildlife Act 1972* (SA) (***NPW Act***) and *Fisheries Management Act 2007* (SA) (***FM Act***). 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 South Australia unless:

1. a permit has been given; or

1. they are used in non-commercial, domestic activities performed by Aboriginal people; 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 South Australia.

As a consequence, the law in South Australia will impact 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 South Australia, or who wish to sell their artwork to buyers within Australia.

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 South Australia she would need to consider what type of animal bones she was using. If she used the bones of an animal protected under the NPW Act, for example an Echidna, she would not only need to obtain a permit to collect, hold and use the bones, but would require a specialist permit to sell the artwork incorporating the bones. However, using the bones of a dingo, which is unprotected, would not require any form of permit.

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 operates only within "Commonwealth areas" where South Australian laws do not apply. For further information regarding the Commonwealth

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scheme please look at the Artwork containing native and threatened species – Commonwealth Information Sheet.

In South Australia, these are some Commonwealth areas, including:

- all publicly owned airports including Port Lincoln and Coober Pedy;
- Commonwealth Marine Reserves in Murat, Western Eyre, Southern and Western Kangaroo Island, and Murray (visit Commonwealth Department of Environment Website for exact locations: http://www.environment.gov.au/topics/marine/marine-reserves);
- South Australian coastal waters extending 3 nautical miles out to sea (5.5 km) as well as coastal estuaries and riverbeds; and
- Murray Mallee-Calperum Station and Taylorville Station.

Within these areas Commonwealth law protects:

- certain species of possum, including the native Mountain Pygmy-possum and Leadbeater's Possum;
- various kinds of species of South Australian plants, including Spiny Daisy, Coast Spider-orchid, Mount Compass Swamp Gum and Mount Compass Oak-bush; and
- certain species of native South Australian grass such as Eriocaulon carsonii (also known as Salt Pipewort or Button Grass).1

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

1. **Was it in a 'protected area'?**

Any plants2 and animals found in South Australia's 'reserves',3 'wilderness protection areas', 'forest reserves' and 'wilderness protection zones' cannot be collected for use in an artwork. This includes dead species as well as parts of plant and animal matter such as leaves, feathers and bones and covers native and non-native species and whether or not they have been classed as protected or threatened species. Generally, licences will not be granted in respect of plant or animal material in South Australia's protected areas.

Protected areas in South Australia include:

- Lincoln National Park;
- Flinders Ranges National Park;
- Coorong National Park;
- Ferries-McDonald Conservation Park; and
- Ferguson Recreation Park.

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

South Australia's Department for Environment and Water (**DEW**) has indicated that if the plant or animal species was harvested before the Acts were introduced, then the Department may exercise its discretion not to prosecute. For example, it may elect not to pursue a person advertising to sell on Gumtree the skull of a whale if the skull was collected from a beach in South Australia in the 1960s before the NPW Act commenced. However, anecdotal evidence suggests that if possible, it is always wise to seek advice from the DEW in advance given the time and expense involved in proving such matters and defending charges.

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Is it a protected species?

For plant or animal material collected outside Commonwealth areas and South Australian protected areas, the next issue to consider is whether the species is classified as a 'protected' species under South Australian law. The NPW Act lists protected plants, animals and marine mammals, meanwhile the FM Act lists protected marine species.

1. **Animal species**

All native and non-native mammals, birds and reptiles are 'protected animals' unless listed in Schedule 10 of the NPW Act as an 'unprotected species'. For example, Dingoes, Galahs, and Budgerygahs are not protected in South Australia.4 Certain 'protected animals' are categorised further as 'endangered',5 'vulnerable',6 or 'rare'.7 For example, Feathertail Gliders and Platypuses are listed as 'Endangered species'8 meanwhile Slender-billed Thornbills are a 'Vulnerable species'.9 All of these 'listed' species can be seen in Schedules 7, 8 and 9 of the NPW Act.

The definition of 'animal' does not expressly extend to dead animals so it is arguable that certain animal 'by-products' such as shed or discarded animal parts including snake skins, echidna quills, feathers and fur may be collected without a permit, even if the animal itself is protected.10 However, a licence would be required to sell any resulting artworks. Fish, insects, butterflies, spiders, scorpions and other invertebrates11 are outside the scope of the Act as they are not 'mammals, birds or reptiles'.

1. **Plant Species**

Under the NPW Act, all 'native plants' (including flowers, seeds and leaves) are protected.12 Similar to the protected animal species, certain plant species are listed as 'endangered',13 'vulnerable',14 and 'rare'15. This includes dainty maiden-hair, club spear-grass, and several types of wattle. Lists of the endangered, vulnerable and rare plant species can be viewed in Schedules 7, 8 and 9 of the NPW Act. The difference between these categories of plants is the severity of the penalty for any offences under the NPW Act.

The NPW Act does not include non-vascular plants, fungi and other life forms which do not have a current legal conservation status in South Australia.

1. **Marine mammals**

The NPW Act also provides protection for 'marine mammals' which are defined to include seals, sea lions, dolphins and whales.16 These same species are also protected under the FM Act as 'aquatic mammals'.

1. **Marine Species Protection under the Fisheries Management Act**

Commonwealth law applies to waters extending beyond 3 nautical miles (5.5 km) out to sea. The law in South Australia will govern the waters from the low water mark up to this point.17

The FM Act provides protection for two types of marine species:

1. Aquatic mammals—seals, sea lions, dolphins and whales; and

1. Aquatic resources of a protected species as declared by the *Fisheries Management (General) Regulations 2017* (SA) to be a protected species for the purposes of the FM Act — this includes freshwater catfish, white sharks and Murray River Crayfish.

South Australia's Department of Primary Industries and Regions (DPIRSA) Fisheries and Aquaculture division website states that all marine mammals, including seals, sea lions, dolphins and whales, are protected at all times in South Australian waters.18 The FM Act prohibits the taking of an aquatic mammal (such as those marine mammals identified on the DPIRSA website) or aquatic resource of a protected species; or injuring, damaging or otherwise harming an aquatic mammal or

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aquatic resources of a protected species.19 The FM Act does not define ‘taking’ in relation to aquatic mammals, however, the DPIRSA website advises individuals to report marine mammals that are dead. As such, it is best practice to contact DEW at https://www.environment.sa.gov.au/contact-us before undertaking any activity relating to marine mammals.

What are the prohibitions?

If you are using a species listed as either protected or threatened under South Australian law, there are a number of strict offences that may apply. For example, if an artist were to collect and use feathers of a threatened bird species it would be an offence to sell or exhibit the completed artwork without a licence.

1. **Protected animals**

Under the NPW Act it is an offence to take,20 possess,21 keep,22 sell or give away,23 or import or export across state borders,24 a protected animal, or its eggs. This would apply to artworks containing any parts of these protected species. Penalties for these offences range from a fine of $2,500 (keeping and sale of protected animals) up to a fine of $10,000 or imprisonment for 2 years (illegal possession of animals, not being a marine mammal).

The severity of the penalty may also vary depending on the type, and number of species involved. For example, the penalty for taking an ‘endangered’ animal (other than a marine mammal) is a maximum of $10,000 or imprisonment for 2 years compared with a maximum penalty of $5,000 or imprisonment for 12 months for taking a ‘rare’ species. Further, additional fines may be imposed on the basis of the number of animals involved in the commission of the offence.25 For example, you may be fined an additional $750 for each animal of a vulnerable species involved in the commission of an offence.

The Act defines the “carcass” of an animal as:

“the whole or any part of—

? ? ? ? ? ? (a) ? ? ? ? the flesh or internal organs of the animal; or

? ? ? ? ? ? (b) ? ? ? ? the feathers, wool, hair, skin or hide of the animal; or

? ? ? ? ? ? (c) ? ? ? ? the bones, horns or hooves of the animal” and contains a specific offence in relation to selling or giving away the carcass of a protected animal. There is no mention of carcasses in the provisions restricting the ‘taking’ of unprotected species. This suggests that it is not an offence in South Australia to collect roadkill, or bones, horns, feathers, wool, or hair which is not part of a live animal.26 However, it would be an offence to possess such materials if not legally obtained.27 Further, even if legally obtained, it is an offence to offer for sale, sell or give away any artworks incorporating such materials.28

1. **Protected plants**

It is an offence to take,29 sell or give away,30 a native plant from any reserve, wilderness protection area or public land.31 Again, the penalty would vary depending on the type of native plant involved but the maximum penalty would be $10,000 or imprisonment for 2 years32 for an endangered species.

Meanwhile, on private land it is an offence to take a native plant that is a prescribed species, although the NPW Act and associated regulations do not currently protect any native plants as prescribed species.33 It is also prohibited to take *any* native plant from private land without the consent of the land owner.34 This may result in a $1,000 fine.

Finally, a person must not have in their possession or control a native plant that has been illegally taken.35 This may result in a maximum fine of $10,000 or imprisonment for 2 years in the case of a native plant of an endangered species. Thus the owner of an artwork containing pieces of an endangered plant could face criminal penalties.

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Example 2–Collecting and incorporating plants into an artwork

An artist has been collecting parts of plants found in national parks and around her suburb. She is particularly interested in using the leaves and bark of Menzel's wattle.

Menzel's wattle is a protected plant listed as 'vulnerable' under South Australian law and is also protected under Commonwealth law.

The artist cannot take the plant from either a Commonwealth area or an area 'protected' under South Australian law. For example, the artist would not be able to collect or use any Menzel's wattle that was found in Ferguson Recreation Park. The artist should either collect it from private property (with the owner's permission) or apply for an 'individual, community group, commercial or botanic garden' permit which would allow her to collect Menzel's wattle from any areas outside Commonwealth and protected areas and incorporate it into artworks for sale. She should make sure to include the licence number on any artwork made.

1. **Protected marine mammals**

It is prohibited for a person to take a marine mammal (dead or alive), or its eggs, or have a marine mammal or its eggs in their possession if it has been illegally taken or acquired. 36 It is likely that this prohibition would include the discarded bones and teeth of such species. The maximum penalty for taking a marine mammal is a fine of $100,000 or imprisonment for 2 years.

1. **Protected Marine species**

Under the FM Act it is an offence to take or injure an aquatic mammal, or the aquatic resource of a protected species.37 This may result in a fine of $100,000 or imprisonment for 2 years. Similarly, it is an offence to sell, purchase or possess an aquatic resource that was taken without authority under the FM Act to do so.38 The maximum penalty for this offence would be up to $50,000 or imprisonment for 4 years.

Example 3 –Shark Teeth and Josephine's Gallery Coober Pedy

Shark teeth and jaws can often make beautiful jewellery or sculptures. However, as Mr and Mrs Brennan-Kuss discovered, selling shark teeth in South Australia can be risky!

In July 2010, Mr and Mrs Brennan-Kuss, owners of Josephine's Gallery in Coober Pedy were charged with breaching the FM Act by illegally possessing and selling a 'protected aquatic resource', a set of Great White shark jaws and teeth. Fortunately for the couple, because the shark's teeth and jaw had been taken from the ocean before the FM Act had been enacted (2007), their conviction was overturned on appeal.

Artists should be very careful about incorporating protected marine species into artworks. While it may not be an offence to use or sell the jaw or teeth of a great white shark caught before 2007, it may not always be easy to tell where the specimens came from and the penalties for such offences can be very severe. Fines can range up to $250,000 for corporations or $50,000 or imprisonment for 4 years for natural persons.

Is there an exemption or defence that applies?

If you are using, or have incorporated into an artwork, any part of a species which is protected under South Australian 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**

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

Firstly, the South Australian laws 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.39 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 non-commercial communal needs. It is unclear if this could be relied upon to cover artwork made for commercial sale.

As at 6 April 2021, there have been 32 determinations of Native Title in South Australia. For example, the following native title interests exist in South Australia:

- The Adnyamathanha People hold native title over approximately 41,085km of land in the Flinders Ranges and adjoining plains, north east of Port Augusta;
- The Gawler Ranges People hold non-exclusive native title over approximately 34,000 km of land and waters in the Gawler Ranges area of South Australia; and
- The Arabana people hold native title over approximately 68,823 km of land in the central north of South Australia.40

Secondly, there are a number of 'domestic use' exceptions under the NPW Act. In particular, Aboriginal and Torres Strait Islanders are exempt from offences relating to taking protected animals or native plants from lands other than in protected areas, provided that the animal, egg or plant is taken for food or solely for cultural purposes.41 Aboriginal and Torres Strait Islander people will also be exempt from such offences in relation to protected areas if the species are taken for food or cultural purposes and there is a proclamation in force permitting these species to be taken.42 The following reserves have been proclaimed as reserves where an Aboriginal or Torres Strait Islander may take a protected animal, egg or native plant: 43

- Mamungari Conservation Park;
- Nullarbor National Park;
- Nullarbor Regional Reserve;
- Yellabinna Regional Reserve; and
- Yumbarra Conservation Park.

For further advice about what can and can't be done on these reserves contact the Fauna Permit Unit of the South Australian DEW on +61 8 8204 1910.

Meanwhile, under the FM Act, a very limited exemption is provided for Aboriginal traditional fishing under a traditional fishing management plan.44 Information on traditional fishing management plans does not appear to be publicly available, but DPIRSA would be the best point of contact (through your relevant office https://www.pir.sa.gov.au/top_menu/contact_us/metropolitan_offices). Despite the limited scope of this exemption under the FM Act, as above, Aboriginal fishers are entitled to take aquatic resources for non-commercial purposes outside the requirements of the FM Act, in accordance with a Native Title exemption.45

1. **Defences**

There are a number of defences available under the Acts. The most relevant defences available for an artist who is making art incorporating threatened or protected species are:

- That the plant or animal material was not taken intentionally or negligently;46 or
- Was done in pursuance of a permit.

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Is a permit available?

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

1. **Permits for protected animals**

There are several types of permits available for animal material from a protected species under the NPW Act including:47

1. A **basic permit** to keep/sell protected animals;

1. A **specialist permit** to keep/sell protected animals;

1. A permit to **keep/sell the eggs** of a protected species; and

1. **Import and export** permits.

Arts Law's discussions with the DEW suggest that the most applicable permit for artists wanting to work with protected species would be the specialist permit to keep and sell protected animals. Unlike the basic permit, this permit would allow an artist to use a wider variety of animal species. Further, this permit would allow an artist to use any protected animal, whether vulnerable, endangered, or rare and would cover activities such as collecting roadkill. However, this permit would not cover marine mammals. The fee for such a licence is currently $129.00 for 1 year (as at 1 March 2019), and the application form can be accessed here: http://www.environment.sa.gov.au/licences-and-permits/animals-in-captivity-permits.

Once a licence is obtained, the licence number should be displayed on the final artwork—for example, by writing the licence number on the back of the artwork. This would mean that the artwork could be exhibited or purchased by third parties within South Australia without requiring the exhibitor or purchaser to obtain an additional licence. However, once the licence expired, the purchaser would be required to renew it in order to continue to hold the artwork in South Australia.

Additionally, a separate import and export permit would be required if the artwork was going to be transported out of South Australia.

Example 4 –The exhibition

An artist has successfully obtained a specialist permit to incorporate feathers from the endangered Orange-bellied Parrot into sculptural works that are included in an exhibition in Adelaide. At the show, one work is bought by a collector who lives in Tasmania and another by a collector who lives in London. One work is purchased by MONA in Hobart.

MONA will need to renew the specialist permit for as long as it holds the work in Tasmania. An export licence under the NPW Act will be required to ship the artwork to the buyer in Tasmania. Additionally, the law in Tasmania will need to be considered and an import licence under Tasmanian law may be required. When transporting artwork overseas, the Commonwealth EPBC Act must be considered. Because the Orange-bellied Parrot is also protected under the EPBC Act, a licence to export the work overseas will also be required. See the Commonwealth fact sheet here.

1. **Permits for protected plants**

If the plant is a native species protected under the NPW Act, there are several types of permits available:48

1. A **bush food collection** permit;

1. A **commercial plant collecting** permit;

1. An **individual, community group, commercial or botanic garden** permit;

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1. A **threatened species** collection permit;

1. An **scientific research** in South Australia; and

1. An **annual return** for the collection of native plant materials.

The most relevant permit for an artist wanting to work with protected plant species is likely to be the ‘commercial plant collecting’ or ‘individual, community group, commercial or botanic garden’ permit. This would allow an artist to use any protected plant material, including vulnerable, endangered or rare species taken from outside a protected area. The licence number should be displayed on the final artwork.

A commercial plant collecting permit is available, and an individual, community group, commercial or botanic garden permit. A permit fee of $104.00 is payable for the commercial plant collecting permit and no fee is payable for an individual, community group, commercial or botanic garden permit.

Unlike animals, the import/export of protected plants into and out of South Australia is not prohibited under the NPW Act. However, other legislation may impose restrictions such as if the plant material poses a ‘biosecurity’ risk.

Arts Law’s discussions with PIRSA suggest that the requirements for importing plant material will depend on where the material has come from. For example, the movement of cut flowers will be unrestricted from Tasmania, but may require a Plant Health Certificate if from Western Australia. Given the complexity and ad hoc nature of the requirements for the import of protected plants, the best option is to contact PIRSA directly, prior to the transportation of any artwork incorporating plant species (contact number: (08) 8226 0995).

The export of an artwork from South Australia 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 here.

1. **Permits for marine species**

There are several permits available under the FM Act. However, most would not be applicable for an artist seeking to use or sell protected marine species incorporated into an artwork. The most relevant permit would probably be to make a ‘general application’ to undertake activities that would not usually be allowed.49 These are assessed on a case-by-case basis and will depend on how consistent the proposal is with the objectives of the FM Act.50 The application fee for this permit is $148.00 (as at 1 March 2019) and forms can be accessed here: http://pir.sa.gov.au/fishing/permits_and_exemptions.

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