Artwork made using Animal and Plant Material – Queensland

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 containing native and threatened species – Australia. 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 Queensland.

What the laws in Queensland mean for artists

The protection of native plants and animals in Queensland is governed by the *Nature Conservation Act 1992* (Qld) (**Nature Act**), and the *Fisheries Act 1994 (*Qld) (**Fisheries Act**). While there are several pieces of subordinate legislation made under these acts, the most relevant regulations are the *Nature Conservation (Protected Areas Management) Regulation 2017* (Qld) (**Protected Areas Management Regulation**) (amended in 2020), the *Nature Conservation (Animals) Regulation 2020* (Qld) ?(**Animals Regulation**) and the *Nature Conservation (Plants) Regulation 2020*?(Qld)?(**Plants Regulation**) which both came into effect on 22 August 2020.1

These laws impact artists in two main ways as they:

1. Restrict the taking or use of protected plants and animals from places in Queensland unless:2
2. a licence, permit or other authority has been given; or
3. they are used in non-commercial, domestic activities performed by Aboriginal people;
4. they are used in traditional non-commercial activities conducted by native title holders on their traditional lands; or
5. for animals, a general authorisation applies;3 and
6. Require a licence to be obtained before exporting or importing artwork incorporating protected species into or out of Queensland.

As a consequence the law in Queensland 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 Queensland, or who wish to sell their artwork to buyers within or outside 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 Queensland she would need to consider what type of animal bones she was using. If she used the bones

of an animal protected under the Nature Act, for example a common

wombat (also known as bare-nosed wombat), she would need to obtain a licence to collect, hold and use the bones. However using the bones of a dingo, which is unprotected, would not require any form of licence provided she did not collect the bones from certain areas (such as a national park).

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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 animal or plant species you want to use in your artwork. 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 Queensland laws do not apply. For further information regarding the Commonwealth scheme please look at Arts Law's Commonwealth Information Sheet.

These are some Commonwealth areas in Queensland:

- all publicly owned airports including Townsville, Richmond and Winton
- Commonwealth Marine Reserves, in particular the Coral Sea Marine Reserve which covers 989,836 square km (visit Australian Marine Park's Website for exact locations: https://parksaustralia.gov.au/marine/parks/coral-sea/#map)
- Queensland coastal waters extending from 3 nautical miles out to sea (5.5km) as well as coastal estuaries and riverbeds and
- Shoalwater Bay Military Training Area, Byfield.

Within these areas, Commonwealth law protects:

- Certain species of possum, including the native Mountain Pygmy-possum and Leadbeater's Possum4
- Various species of plants, including Red Silky Oak (also known as the Queensland Waratah), Gympie Nut, Rough-shelled Macadamia tree
- Certain species of native Queensland grass such as *Dichanthium queenslandicum* (also known as King Blue-Grass), and *Eriocaulon carsonii* (Button Grass).5

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

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

Queensland law prohibits the taking of natural and cultural resources from "protected areas".6 The "natural resources" of a protected area include "the natural and physical features of the area, including wildlife, soil, water, minerals and air".7 " Wildlife" means "any taxon or species of an animal, plant, protista, procaryote or virus".8 This includes dead species as well as parts of plant and animal matter such as leaves, feathers and bones and applies regardless whether the species is protected or not.

The following areas in Queensland are protected areas:

- Daintree National Park
- Noosa National Park
- Whitsunday Islands National Park
- Cooloola Recreation Area and
- Inskip Peninsula Recreation Area.

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

If the plant or animal species was harvested before the relevant Act commenced operation, there is some evidence to suggest that Queensland's Department of Environment and Heritage Protection (**DEHP**) may exercise its discretion not to prosecute. For example, it may elect not to pursue a person who is trying to sell the skull of a whale on Gumtree, found on a Queensland beach in the 1970s. However, anecdotal evidence from other states suggests that the time and expense involved in defending charges and proving such matters to the Department's satisfaction mean that it is always wise to seek advice from the DEHP in advance, if possible.

Is it a protected or regulated wildlife species?

For plant or animal material collected outside Commonwealth areas and Queensland protected areas, the next issue to consider is whether the species is 'protected' or 'regulated' under Queensland law.

1. **Protected Wildlife under the Nature Act**

The Animals Regulation9 and Plants Regulation10 identify whether a specific animal or plant is protected in Queensland. However, if it's a marine animal, the position is more complex as the Fisheries Act also needs to be considered.

1. **"protected animals"** are animals prescribed under the Nature Act as being extinct, endangered, vulnerable, threatened, near threatened or least concern wildlife.11 Examples of protected animals include the blue-faced parrot-finch, northern hairy-nosed wombat and chestnut dunnart.12 The term "animal" is given an expansive definition, so this protection will extend to feathers, hair, fur, skin, scales, shell, exoskeleton, bones, horns, antlers, teeth or tusks,13 and will include alive or dead animals or their eggs.14

You can check the conservation status of any animal in Queensland via this link: https://apps.des.qld.gov.au/species-search/.

Animals that are not listed in the Animals Regulation, are not "protected", for example foxes, rabbits and cane toads.

Under the Nature Act, "animal" is defined to include coral, reptiles and fish.15 Accordingly, marine species such as sharks, dugongs, turtles, and dolphins are listed in Schedule 1 of the Animals Regulation. However, unlike plants and animals, marine species are regulated by several pieces of legislation and just because a marine species does not appear in the Animals Regulation does not mean it can be freely used (see below).

1. **"protected plants"** are those prescribed under the Nature Act as being extinct, endangered, vulnerable, threatened, near threatened or least concern wildlife.16 For example, the following species are protected under Queensland law: Mt. Emu she-oak (*Allocasuarina emuina*); guinea flower (*Hibbertia elata*) and Cape York climbing wattle (*Senegalia pennata* subsp. *kerrii*).17 This protection extends to parts of the flowers, seeds, or pollen of the plant (whether alive or dead, standing or fallen).18

You can also check the conservation status of any plant in Queensland via this link: https://apps.des.qld.gov.au/species-search/.

However, the definitions of "protected animal" and "protected plant" exclude:

- processed animal or plant products 'made or derived from' the protected species;19
- animal products listed in Schedule 5 of the Animal Regulations, such as: crocodile skin; dead butterflies; and the eggs and feathers of emus;20

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- plant products listed in regulation 186(1) of the Plant Regulations;21 and
- native plants that are not found 'in the wild' such as a protected plant that has been planted and maintained on private land.22 An artist would be able to collect and use plant material of this kind without a licence (although it may still be necessary to comply with the Code of Practice for the take or use of a protected plant under an exemption (**Protected Plants Code of Practice**) (see below).23 For further information on when a plant would be taken to be "in the wild" see the Queensland Department of Environment and Science Operational Policy.24

1. **Regulated fish and protected marine species**

Commonwealth law applies to waters extending beyond 3 nautical miles (5.5km) out to sea.25 Queensland law governs to the low water mark and from the low water mark up to this point. Significantly, Queensland law governs the tidal lands and waters in the Great Barrier Reef Coast Marine Park.26

If you are using marine animals, such as sharks or dolphins, both the Fisheries Act and the Nature Act may apply. Under these two regimes marine species are protected as either:

1. **"regulated fish":** the Fisheries Act protects "regulated fish" which are species listed under the *Fisheries Declaration 2019* (Qld) (**Fisheries Declaration**).27 Listed species are either regulated by size and number taken, or prescribed as a "no-take" species. For example, blue spotted coral trout must be bigger than 50 cm and smaller than 80 cm to be taken, while Bloomfield River cod and female blue swimmer crabs can never be taken.28 The lists of size and possession limits and no-take species for recreational fishing in tidal waters and fresh waters can be found on the Queensland Government's website.29
2. **protected marine species** are protected animals under the Nature Act (mentioned above) that are marine species, and include dugongs, turtles, dolphins, and grey nurse sharks.30

What are the prohibitions?

If you are using a species which is protected or regulated under Queensland law, there are a number of strict offences that may apply.

1. **Protected animals (including protected marine species)**

Under the Nature Act it is an offence to take, keep or use a protected animal from anywhere in Queensland.31 This includes keeping or using any parts of these protected species to make an artwork. The penalty depends on where the animal was taken from and the class of offence. If the animal is taken from a protected area (see above for discussion on protected areas), a maximum fine of 3000 penalty units or 2 years imprisonment applies.32 The penalty for taking animals from areas other than protected areas depends on whether it is a class 1, class 2, class 3 or class 4 offence.33 The "class" of offence will depend on the number of species taken as well as their conservation status.34 For example, the unauthorised taking of 1 or more echidna, koala or platypus is a class 1 offence.35 The maximum penalty for this is 3000 penalty units or 2 years imprisonment. As at 1 July 2021, one penalty unit is $137.85 so the maximum fine would be $413,550.

1. **Protected plants**

It is an offence to take36 or use37 protected plants from 'in the wild' unless it is in accordance with an applicable conservation plan, or a licence or permit has been issued, or some other exemption or defence applies. If the plant has been unlawfully taken, then it is an offence to keep or use it.38 As above, the penalty for any of these violations will depend on the

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"class" of the offence. For example, a class 1 offence, involving 1 or more plants classified under the Plants Regulation as 'extinct' may result in a maximum fine of 3000 penalty units ($413,550 as at 1 July 2021) or 2 years imprisonment.39

Example 2 – Collecting and incorporating plants into an artwork

An artist has been collecting parts of plants found in Daintree National Park and around her suburb. She is particularly interested in using Bunya Mountains bluegrass and Thompson's wire grass to weave sculptural artworks.

The Daintree is a 'protected area' in Queensland and all taking of native plant species from the Daintree is prohibited.40

Thompson's wire grass (*Aristida thompsonii*) is an endangered plant under Queensland law,41 and cannot be collected, even if found outside the park and dead on the side of a footpath, without first obtaining a licence to do so.42 A licence to take and use an endangered species is only granted in very narrow circumstances and it will be very difficult to obtain a licence for artwork purposes. This means that a plant like Thompson's wire grass should probably be avoided and a substitute found.

The artist may be able to collect and use Bunya Mountains bluegrass (*Bothriochloa bunyensis*) (which is a vulnerable plant) 43 if it is found outside the Daintree National Park and:

- collected from the artist's own land, or from private land (with the owner's consent);44 and
- harvested or collected in accordance with the Protected Plants Code of Practice (considering size of plant, amount taken and damage to plant).45

If obtained legally (for example from a nursery)46 (see below), the artist could then weave with the Thompson's wire grass and go on to sell the artwork without needing to buy a licence.

1. **Regulated fish under the Fisheries Act**

Meanwhile under the Fisheries Act, it is prohibited to take, possess, use or sell regulated fish.47 This would include if any parts of these regulated fish (such as teeth or bones) were incorporated into an artwork.

Example 3 – Using roadkill and found animal materials

An artist wants to make sculptures using some grey nurse shark teeth found at a local beach, and the quills and skull of an echidna, and the bones of a rabbit both found dead by the side of the road.

The grey nurse shark is an endangered species.48 From August 2020, a person is allowed to take, keep and use a natural product (such as teeth)49 from a protected animal for non-commercial purposes.50 This includes use for artwork, even though that art may be sold in the future (for indirect commercial gain).51 The shark teeth can be used in the sculpture without a licence.

Meanwhile, the echidna parts are from a 'least concern' species52 and the artist will need to obtain a 'least concern animal collection authority'53 *before* collecting the specimen – even if found dead by the road. We recommend that the collection authority number be included on or with the finished artwork, particularly if the work is going to be sold.

However, because rabbits are not a protected species, the use of the bones of the rabbit would not require a licence and an artist would be able to take and use any part of a rabbit carcass found outside a national park or protected area to make an artwork.

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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 regulated under Queensland 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 Islanders.

Native Title

Firstly, the Nature Act and Fisheries Act are both 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.54 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 and you should seek further legal advice before seeking to rely on this provision.

Examples of some native title interests in Queensland include:

- the Muluridji People hold native title over approximately 12,285 hectares of land and waters in the far north Queensland area;
- the Gangalidda and Garawa Peoples hold native title over 5,810 sq km of land located North-West of Burketown near the Gulf of Carpentaria (650km west of Cairns); and
- the Pitta Pitta People hold native title over land in the Shire Council of Boulia.55

Aboriginal or Torres Strait Islander people

Secondly, there are a number of exemptions under Queensland legislation allowing Aboriginal or Torres Strait Islander people to:

1. take, use or keep protected wildlife (plant or animal) in accordance with tradition or custom,56 however, this exemption does not apply to protected wildlife in a 'protected area'57 nor, if a conservation plan expressly excludes the taking, using or keeping of protected wildlife under Aboriginal tradition.58 This exemption does not clearly cover an Aboriginal artist wanting to incorporate a protected species into an artwork for commercial purposes;
2. take, use or keep fish or marine plants if they are taken for personal or non-commercial communal needs using either a fishing apparatus which is prescribed under the a regulation or declaration as either a recreational fishing apparatus or an Aboriginal or Island traditional fishing apparatus;59
3. take, use or keep natural resources (plants or animals) taken from a 'protected area' if it is taken in accordance with an Aboriginal tradition authority;60 and
4. take, keep and use a protected marine turtle or dugong if they take the animal under Aboriginal custom in accordance with a permit or under a traditional use of marine resources agreement.61

1. **General exemptions for plants**

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The Plants Regulation provides some general exemptions for taking and using protected plants62 as long as the plant is not taken from a protected area63 and the person taking or using the plant complies with the 'Code of Practice For the take or use of a protected plant under an exemption' (**Protected Plants Code of Practice**).64 The quantities that can be taken under the Protected Plants Code of Practice are very specific and vary depending on the size of the plant. For example, a person must not remove more than 20% of the flowers, fronds or foliage from any one plant in any 12-month period.65

The exemptions that are most relevant to artists are:

Taking and using parts of protected plants with landholder's approval: An exemption applies to a person who takes and uses a part of a protected plant, other than a critically endangered plant or endangered plant, if:

- the person is the landholder, or has the written approval of the landholder, of the land from which the part is taken; and
- the person takes no more parts than specified in the Protected Plants Code of Practice for the species of plant; and
- the person's primary reason for taking the part is to use the part. 66

Taking of least concern plants for use from the wild: An exemption applies to a person who takes and uses least concern plants, other than special least concern plants, from the wild without a licence, where the person's primary reason for taking the plant is to use the plant.67 The person cannot take the plant by clearing and has to ensure taking the plant does not impact on a threatened plant or near threatened plant growing in close proximity.68

Is a licence, permit or authorisation available?

Another way to avoid liability for an offence is to obtain a licence, permit or authorisation. While there are some licences available, unfortunately obtaining a licence as an artist is not easy.

1. **Licences for protected plants and animals**

If the plant or animal used is a protected species listed under the Nature Act, there are several types of authorisations available. The type of licence, permit or authorisation that an artist will need depends on the type of species, where the species was found, and what the species is being used for.

1. **a) Using, holding, collecting or selling protected animal materials**

There are three options that might be relevant to artists enabling them to use, collect, hold or sell a limited scope of animal materials:

1. Dead animal collection authority;69
1. Least concern animal collection authority;70 and
1. Discarded or naturally shed parts of a protected animal.71

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Collection authority

If an artist is creating their own taxidermy specimens a **collection authority** is required.72 As noted above, there are two types of collection authority available. Which one an artist applies for will depend on whether the animal is a **'least concern'** animal or **'protected'** animal under the Animals Regulation. Although both authorities allow the artist to obtain dead specimens and create taxidermy works, only least concern animals can be collected from the wild, for example where found as roadkill. Protected animals cannot be collected from the wild and instead need to be obtained from a licensed recreational/commercial seller73, for example an emu farm. Once an animal has been treated, declared to be a processed product and appropriately labelled, no licence is required to hold or sell the artwork containing that specimen.

Discarded or naturally shed parts of a protected animal

From August 2020, individuals such as artists can take, keep, and use naturally shed, lost or excreted (without any human intervention) parts of a protected animal for a non-commercial purpose, without the need for a licence, permit or specific authorisation.74 Examples include bird feathers, naturally shed snake skin or snake teeth that have been naturally excreted. 75 Importantly this applies to "natural products" used for artwork, even though that art may be sold in the future (ie indirect commercial gain). If, however, the discarded part is sold directly (such as wholesale sale to a retailer or art studio) then a?harvesting licence?is required.

Example 4 – Queensland artist Paige Garland, feathers from roadkill

There is no doubt that feathers can make stunning artworks. This is certainly true of the artworks made by Queensland artist, Paige Garland. Paige collects feathers from native birds, killed on southeast Queensland roads. Because these feathers are protected under the Nature Act, she has had to obtain a permit. Generally speaking, these permits will not allow Paige to collect the carcasses, but do allow her to take feathers from dead birds that she finds.

See more about Paige's art here: http://www.couriermail.com.au/questnews/southeast/paige-garland-creates-beautiful-pieces-using-feathers-from-dead-birds/news-story/f629f534fdba190f18d764dd76833bc5.

1. **b) Importing or exporting animal materials across state borders**

There are three 'levels' of approval under the Nature Act for the movement of protected animals into or out of Queensland namely:

- Wildlife movement permits
- Movement advices and
- Chief executive's written approvals.

The type of approval required will depend on the type of species and where the specimen has originated from. Any plan to move wildlife into or out of Queensland should be discussed with the Permit and Licence Management branch of DES (on 1300 130 372, select option 4 or email PALM@des.qld.gov.au). For more information visit: https://www.qld.gov.au/environment/plants-animals/wildlife-permits/permit-types/moving-wildlife. Further information on the import and export of materials between states in Australia which are subject to interstate quarantine generally can be found here: https://interstatequarantine.org.au/travellers/interstate-quarantine/. You should also contact the wildlife authority in the other state to ensure that you have the necessary documentation from that state to proceed with the movement.

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Example 5 – The exhibition

An artist has incorporated feathers from the endangered Glossy Black-Cockatoo into sculptural works that are included in an exhibition in Brisbane. This use is permitted under the Animals Regulation as the artist found the feathers naturally discarded. 76

See more about Paige's art here: http://www.couriermail.com.au/questnews/southeast/paige-garland-creates-beautiful-pieces-using-feathers-from-dead-birds/news-story/f629f534fdba190f18d764dd76833bc5.

At the show, one work is bought by a collector who lives in Tasmania and another by a collector who lives in London. Because the use of the feathers does not require a permit or licence, no movement permit under the Animals Regulation is required to ship the artwork to the collector in Tasmania. However, the law in Tasmania will need to be considered and an import licence under Tasmanian law may be required. Because the Glossy Black-Cockatoo is also protected under the EPBC Act, a licence to export the work overseas will be required. See the Arts Law Commonwealth Information Sheet, and more information about Commonwealth import and export permits here.

1. **c) Licences to grow and harvest protected plants**

There are two types of licences available to harvest protected plants in the wild. These are the:

- Protected plant growing licence and77
- Protected plant harvesting licence. 78

The most applicable licence for an artist wishing to collect and use parts of protected plants found in the wild, is the 'Protected plant harvesting licence'. To be eligible for this licence you need to show:

- you are the landholder or have the written approval of the landholder of the land the plant is located on
- the proposed way of taking the plant is ecologically sustainable (a sustainable harvest plan must be submitted with the application)
- the proposed activities are not likely to adversely affect the plant's survival in the wild and
- the proposed way of taking the plant complies with the Protected Plants Assessment Guidelines.79

1. **d) Importing or exporting protected plants across state borders**

Under the Nature Act there is no prohibition against importing or exporting plants to or from Queensland and no permit required. However, an artist wanting to move an artwork containing plant material into or out of Queensland will still need to consider if the material used poses a biosecurity risk in which case other legislation may impose restrictions. 80

The requirements for importing plant material will depend upon where the material has come from. For example, the movement of flower seedlings from Tasmania into Queensland is not restricted but plant material from Victoria may 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 the Department of Agriculture and Fisheries (**DAF**) directly, prior to the transportation of any artwork incorporating plant species (contact number: 13 25 23).

The export of an artwork from Queensland to another state in Australia will 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.81

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1. **Licences for regulated marine species under the Fisheries Act**

The Fisheries Act does allow for licences to perform actions that might otherwise harm a threatened marine species or its habitat. There are a number of licences available, depending on what type of regulated species is involved and where it was found.

The most applicable permit for artists wanting to use material from protected marine species would seem to be the 'general fisheries permit'. Each application is considered on a case-by-case basis and the scope of the permit will be determined by the number of the species, type of species and consistency with the objects of the Fisheries Act. These permits currently cost $346.85 per year (as at 7 Sep 2021)82 and application forms can be accessed here:

https://www.business.qld.gov.au/industry/fisheries/commercial-fishing/licences-and-fees/commercial-fishing-licences/fishing-permits.

For more information see:

- The Queensland Department of Environment and Science website
- The Queensland Department of Agriculture and Fisheries website

If you have questions about any of the topics discussed above please contact Arts Law.

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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