Artwork Made Using Animal and Plant Material – New South Wales

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.

For an example of how an artist's creative practice can be affected see Arts Law's interview with Gerard Geer.

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 New South Wales.

What the laws in New South Wales mean for artists

The protection of native plants and animals in New South Wales is governed by three key laws and their associated regulations: the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**); the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**); and the *Fisheries Management Act 1994* (NSW) (**FM Act**). These Acts impact artists in two main ways as they:

1. Restrict the taking or use of protected (almost all native animals and many native plants) or threatened species[1] from places in New South Wales unless:[2]
2. a licence has been given; or
3. they are used in certain non-commercial, domestic activities performed by Aboriginal people; or
4. they are used in certain traditional, non-commercial activities conducted by native title holders on their traditional lands; and
5. Require a licence to be obtained before exporting or importing artwork incorporating protected or threatened species into or out of New South Wales.

As a consequence, the law in New South Wales 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 New South Wales, 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 New South Wales she would need to consider what type of animal bones she was using. If she used the bones of a native animal protected under the BC Act, for example a Red Kangaroo, she would need to obtain a licence to collect, hold and use the bones.[3] However, using the bones of a dingo, which is unprotected,[4] would not require any form of licence provided the bones were not collected from certain areas.

Where did you find the plant or animal material?

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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 internationally export certain species of plants and animals (or their parts including feathers, fur, bones and teeth). However, the restrictions relating to killing or collecting plants and animals operate only within 'Commonwealth areas' where NSW laws do not apply. For further information regarding the Commonwealth scheme please look at the Commonwealth Information Sheet.

These are some Commonwealth areas in New South Wales:

- all publicly owned airports including Sydney, Bathurst and Illawarra
- Commonwealth Marine Reserves in Jervis, Hunter, Cod Grounds, Solitary Islands and Lord Howe (visit the Australian Marine Park's website for exact locations: https://parksaustralia.gov.au/marine/parks/temperate-east/)
- New South Wales' coastal waters from 3 nautical miles out to sea (5.5km), as well as coastal estuaries and riverbeds and
- Booderee National Park, Jervis Bay.

Within these areas, Commonwealth law protects:

- Certain species of possum, including the native Mountain Pygmy-possum and Leadbeater's Possum5
- Various species of New South Wales plants, including the Silver-leaved Mountain Gum, Monga Tea-Tree, Velvet Wattle and *Acacia carneorum* (Needle Wattle or Purple-wood Wattle)
- Certain species of native New South Wales grass, such as *Amphibromus fluitans* (River Swamp Wallaby Grass), and *Arthraxon hispidus* (Hairy-joint Grass).6

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

2. Was it in a protected area in New South Wales?

New South Wales law generally prohibits all harming, trapping and taking of plants and animals from 'parks', which include national parks, historic sites, state conservation areas, regional parks, nature reserves, karst conservation reserves, wildlife refuges, wilderness areas (or areas subject to a wilderness protection agreement) and Aboriginal areas. This includes, for example, parts of plants,8 'fossils' (meaning any naturally preserved remains or evidence of past life, including animal bones and shells),9 and animal eggs or nests.10 This prohibition applies even if the plants or animals are not native, and are not classified as protected or threatened under New South Wales law.

As well as protected land areas, there are several marine protected areas (which include marine parks, aquatic reserves, and marine and estuarine habitats within?national parks and nature reserves)11 and New South Wales waters that carry restrictions on commercial or recreational fishing under the FM Act.12 Different restrictions may apply depending on the area and time of year. More information about fishing restrictions and marine protected areas can be found on the New South Wales Department of Primary Industries website.

Is it a protected or threatened species?

For plant or animal material collected outside Commonwealth areas and New South Wales protected areas, the next issue to consider is whether the species is protected or threatened under New South Wales law. The BC Act and the FM Act (or their associated regulations) list the species which are protected or threatened under New South Wales law. This means that if there is a specific plant or animal species you wish to use in your artwork, it is important to check both Acts and their

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regulations to see if it is listed.

1. Protected plant and animal species (non-marine)

The following categories of species are 'protected' under the BC Act throughout New South Wales:

1. **Protected animals**—*all* native amphibians, birds, reptiles and mammals (including marine mammals such as whales, but excluding dingoes), or any amphibians, birds, reptiles and mammals that periodically or occasionally migrate to Australia; 13 and
2. **Protected plants**—over 60 species of plants, including Sturt's Desert Pea, Christmas Bells, Maidenhair Fern and Waratah. The full list appears in Schedule 6 to the BC Act, accessible here.

2. Threatened species and ecological communities (non-marine)

The BC Act then classifies certain 'protected' species as 'threatened', with Schedules 1 and 2 to the BC Act listing 'threatened species' and 'threatened ecological communities' of plants and animals. Any offences involving threatened species or animals and plants that are part of a threatened ecological community will generally carry a more serious penalty than for protected species. Almost 1000 animals and plants in New South Wales are threatened species. Threatened species are further assessed as critically endangered species, endangered species and vulnerable species.14 You can check to see if a particular species is threatened or search for threatened ecological communities by using the Office of Environment and Heritage's threatened biodiversity profile search tool.

3. Protected and threatened marine species

Commonwealth law applies to waters extending beyond 3 nautical miles (5.5km) out to sea.15 The law in New South Wales governs from the intertidal zone (between the low and high water mark) up to this point. Marine species other than marine mammals are not covered by the BC Act. Instead, if you are using marine animals or plants, such as sharks or crayfish, any protected or threatened species will be listed in the FM Act or the *Fisheries Management (General) Regulations 2019* (NSW) (**FM Regulations**).

Generally, protected and threatened marine species receive the same protection as other native animals and plants. Threatened marine species, populations and ecological communities are described in the Schedules of the FM Act as critically endangered, endangered and vulnerable.16 You should note that marine vegetation, the habitat of threatened species, populations or ecological communities, and critical habitat can also be protected under the FM Act.17 Some examples of threatened marine species include Greynurse Sharks,18 Great Hammerhead sharks,19 and Murray Crayfish.20 A list of **protected** marine species can be found here21, and a list of **threatened** marine species is available here22.

What are the prohibitions?

If you are using a species that is protected or threatened under New South Wales law, there are a number of strict offences that may apply. For example, if an artist were to collect and use feathers of a protected or threatened bird species in their work, it may be an offence to possess the feathers, and to exhibit and sell the completed artwork without a licence.23

1. Protected and threatened plants and animals (non-marine)

Under the BC Act it is an offence to deal in or attempt to deal in an animal or plant that is protected, threatened or part of a threatened ecological community anywhere in New South Wales.24 To 'deal in' an animal or plant means to buy, sell, trade or possess the animal or plant, or to import it into or export it from New South Wales.25 This extends to dead animals and plants and to any part of them, and would include the sale of artworks containing part of any protected or threatened animals or plants.26

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The maximum penalties for this offence are significant and vary depending upon whether the animal or plant involved is protected, threatened (vulnerable), or threatened (other than vulnerable):

- Dealing in **protected** animals or plants carries a maximum penalty of $22,000 for individuals;[27]
- Dealing in **vulnerable** animals or plants or animals and plants which are part of a **vulnerable ecological community** carries a maximum penalty of $88,000 for individuals;[28] and
- Dealing in **threatened species or animals or plants part of a threatened ecological community** (other than vulnerable, including endangered or critically endangered) carries a maximum penalty of $330,000 or 2 years' imprisonment (or both) for individuals.[29]

There are also separate offences for harming protected or threatened animals, and picking protected or threatened plants.[30]

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 Pandanus, a protected plant,[31] and Perisher Wallaby-Grass, an endangered plant,[32] to weave sculptural artworks.

While it may be tempting to collect and use parts of these plants, caution should be exercised!

Perisher Wallaby-Grass is an endangered plant under New South Wales law[33] and should be avoided. Threatened plants cannot be collected and possessed, even if found dead on the side of a footpath, without first obtaining a licence to do so.[34] Unless the artist has successfully obtained a licence, a plant like the Perisher Wallaby-Grass should not be incorporated into an artwork and a substitute should be used.

The artist may be able to collect and use the Pandanus, which is a protected plant, if it is collected from private land (with the owner's consent)[35] or purchased from a reputable nursery or florist who has the requisite licence to grow, pick and sell the species.[36] If obtained legally, the artist could weave with the Pandanus and go on to sell the artwork without needing to buy a licence.

However, the artist cannot take Pandanus, or parts of the Pandanus from a national or other park in New South Wales, or even collect it from the side of the road outside a park.[37] This is so even if the leaves are found dead on the ground.

2. Protected and threatened marine species

If the artwork incorporates any fish or marine vegetation of a threatened marine species, (including any parts of a fish[38] such as teeth, scales or bones), under the FM Act, it may be an offence to buy, sell or possess that work.[39]

Example 3 – Using roadkill and found animal materials

An artist wants to make sculptures using found animal materials. This includes some Greynurse Shark teeth found at a local beach and some dead animals found by the side of the road. In particular, the artist has found the quills and skull from the corpse of an echidna, and the bones of a rabbit.

As a threatened (critically endangered) species, it would be an offence to take and use the teeth of the Greynurse Shark without a licence.[40] It is unlikely that an artist would obtain a licence to use a critically endangered species, so the teeth should be avoided. The echidna skull and quills are from a protected species and the artist will need to obtain a licence *before* collecting the specimen – even if the echidna has been found dead by the road.[41] The licence number will need to 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 use the rabbit bones to make an artwork, provided the bones were not found in a New South Wales park (such as a national park or nature reserve).[42]

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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 threatened under New South Wales law, liability may be avoided if you fall within one of the exemptions, or if a defence can be established.

1. Exemptions and defences for Aboriginal and Torres Strait Islanders

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

Firstly, there are 'domestic use' exceptions under the NPW Regulations. As a consequence, Aboriginal peoples are exempt from:

- harming animals within particular wilderness areas where the animals are hunted for domestic purposes (although this defence does not apply in relation to raptors, parrots or animals that are threatened species or part of a threatened ecological community);43 and
- picking or having native plants in their possession within certain wilderness areas if it is for their own domestic purposes.44

Secondly, there are 'domestic purpose' defences available under the BC Act, which mean that:

- it is a defence to a prosecution for harming, attempting to harm or possessing protected animals if the act was done by an Aboriginal person or any dependent of an Aboriginal person for their own domestic purposes.45 Again, the defence does not apply in relation to a parrot, raptor, or an animal that is of a threatened species or part of a threatened ecological community.46
- it is a defence to a prosecution for picking or possessing protected plants (but only to the extent of gathering or harvesting fruit, flowers or other parts of the plants) if the act was done by an Aboriginal person or any dependent of an Aboriginal person for their own domestic purposes.47

It is unclear whether these exemptions and defences would enable Indigenous artists in New South Wales to incorporate protected species or animals and plants collected from certain wilderness areas into artworks produced for sale, as this is likely to be regarded as a commercial, not domestic use.

Thirdly, the BC Act and the FM Act contain a native title exemption, by recognising the operation of the *Native Title Act 1993* (Cth) (**Native Title Act**).48 The Native Title Act provides that, in certain circumstances, the holders of native title rights cannot be restricted by State law from engaging in certain activities (including hunting, fishing, gathering and cultural or spiritual activities) on land over which native title has been granted.49 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.50 Again, it is unclear whether the native title exemption 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.

2. Other exemptions and defences

There are also several other defences and exemptions available under the Acts. The most relevant ones for an artist who is making art incorporating threatened or protected species are:

- having a licence allowing the collection and use of the species and the sale of the finished artwork;

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- picking a protected plant which was grown or cultivated on private property with the consent of the landholder (although this defence will not apply if the species is a threatened species);[51]
- buying, selling or otherwise dealing in plants obtained from a person who was authorised to grow or pick and sell the plant by a licence under the BC Act;[52] and
- dealing (e.g. possessing, selling) with particular animals listed in regulation 2.22 of the *Biodiversity Conservation Regulation 2017* (NSW) (**BC Regulation**).

Is a licence available?

One of the main ways of avoiding liability for an offence is to obtain a licence. While there are licences available, unfortunately very few of the current licence classes are appropriate for artists or designed with artists in mind.

1. Licences for protected plants and animals

If the plant or animal used is a protected species under the BC Act and no other exemptions or defences apply, artists will require a 'biodiversity conservation licence' issued by the New South Wales Department of Planning, Industry and Environment (**DPIE**) under Part 2, Division 3 of the BC Act.

In practice, DPIE breaks up the biodiversity conservation licences it issues into several classes. A number of changes have been made to the way DPIE issues licences since the BC Act commenced in late 2017, and further changes continue to be rolled out. Check DPIE's website[53] regularly for further updates to the way licences are issued and the licence classes available.

a) Protected Animals

In its taxidermy licence information sheet[54], DPIE asks that people wishing to use animals or animal parts to make jewellery, handicrafts or artwork that may be sold or displayed to contact the Wildlife Team for advice before applying for a licence (on 9585 6406 or wildlife.licensing@environment.nsw.gov.au). Arts Law strongly recommends that artists make contact with the Wildlife Team and describe which animals you are planning to use in your artworks and what use you wish to make of them (for example, the artworks will be for exhibition and sale in New South Wales) to ensure you can obtain a licence that covers your specific situation.

It may be that the most applicable licence for artists wanting to work with protected animal species is the taxidermy licence. This is a type of general licence appropriate for artists looking to prepare and possess preserved, protected native animal specimens, including native animal parts such as claws, bones or eggs. Application forms are available on DPIE's website[55]. The licence fee for a professional or hobbyist taxidermy licence is $30 for one year (as at 1 September 2021).[56]

Note that 'professional' taxidermists may sell specimens they have prepared under licence. However, to continue to hold those specimens, collectors should be aware that they may require a licence to possess the preserved specimen if it incorporates a protected native animal. A licence to possess preserved specimens may be obtained using the same application form as the taxidermy licence, and the licence fee is $30 for five years (as at 1 September 2021). Collectors should also be aware that a licence to possess preserved specimens does not permit them to on-sell or trade the specimens they possess.

Unless the terms of their taxidermy licence, or other licence to use animal parts in their artworks, specifically provide that they are permitted to export their work interstate, artists may also require a licence under the BC Act to transport any native animals out of New South Wales. More information about licences to transport native animals into and out of New South Wales is available on DPIE's website[57], together with a licence application form. Further information on the import and export

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of materials between states in Australia generally can also be accessed on Australian Interstate Quarantine's website[58].

Example 4 – The exhibition

An artist has successfully obtained a licence from DPIE to incorporate feathers from the protected Australian White Ibis into two sculptural works that are included in an exhibition in Sydney. 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.[59] For interstate export, an export licence under the BC 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. When transporting artwork overseas, the Commonwealth EPBC Act must be considered. If the species is listed as threatened under the EPBC Act, a licence to export the work overseas will also be required. See the Commonwealth fact sheet here.

DPIE also offers a specific licence for the carving and decoration of emu eggs, where the eggs have been obtained from licenced captive sources[60]. The artist's licence number needs to be written or included on the egg once carved so that it may be sold or exhibited.

b) Protected Plants

Unfortunately, the regime for the grant of licences for the use of native plants is complex and licences currently available for the picking and sale of protected native plants appear to be designed for commercial businesses such as growers and florists. Artists will likely only be able to take, possess, use and sell protected plant material by purchasing it from a seller who is licenced to grow or pick and sell the plant (such as a licenced florist or nursery) to rely on the defence that applies to plants acquired in this way.[61] It is a good idea for artists to retain all receipts for plant purchases and confirm the BC Act licence details of their plant supplier, if possible, to ensure they are in the best position to make out this defence if a query arises about the source of their plant material. An artist will not be required to obtain a separate licence to hold or sell these legally obtained specimens, even once transformed into an artwork. You should contact the Wildlife Team at DPIE for more information on 02 9585 6406.

2. Licences for threatened plants and animals

If the plant or animal used is a threatened species listed under the BC Act, there are three types of licences issued by DPIE:

1. scientific licence – for research, education and conservation;
2. threatened species licence – to harm or pick a threatened plant or animal, ecological community, or to damage habitat; and
3. licence to harm flying foxes – to harm species of flying foxes that are causing damage to property.[62]

At present an artist wishing to use a threatened species would be unlikely to fall within any of these limited categories. While a scientific licence may be most relevant, informal discussions with DPIE suggest that it is very unlikely that permission would be granted to use a threatened plant or animal in an artwork. DPIE's taxidermy licence information sheet also specifically provides that a taxidermy licence will only be issued for threatened species or birds of prey (such as eagles or owls) for scientific or educational uses, for example to allow a specimen to be kept at a school or other educational facility.

Arts Law strongly recommends that threatened species not be incorporated into artworks. Further information about applying for licences for working or living with threatened species can be found on DPIE's website[63].

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3. Licences for threatened marine species

A licence may be granted to perform actions that may otherwise harm a threatened marine species or its habitat under the FM Act.64 Applications for licences under the FM Act are made to the New South Wales Department of Primary Industries. Application forms and further information can be found online65 .

4. Appealing licence decisions or conditions

Licence applicants under the BC Act may request reasons for licencing decisions if their application is refused.66 Refusals to grant licences and decisions to impose conditions on licences issued under the BC Act or the FM Act can be appealed to the Land and Environment Court.67

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above. Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457. Also visit the Arts Law website (www.artslaw.com.au) for more articles and information sheets.

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