Artwork made using Animal and Plant Material – Northern Territory

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 Commonwealth legislation, there may nevertheless be prohibitions under the relevant state laws. This information sheet focusses on the impact of laws in the Northern Territory.

What the laws in the Northern Territory mean for artists

The protection of native plants and animals in the Northern Territory is governed by two key Territory laws: the *Territory Parks and Wildlife Conservation Act 1976* (NT) (**TPWC Act**) and the *Fisheries Act 1988* (NT) (**Fisheries Act**). These Acts impact artists in two main ways, as they:

1. Restrict the taking of and interference with protected wildlife (which includes almost all native Australian animals and many native plants)[1] from places in the Northern Territory unless:

1. a permit has been given;[2] or

2. they are used in non-commercial, domestic activities performed by Aboriginal people;[3] or

3. they are used in traditional non-commercial activities conducted by native title holders on their traditional lands;[4] and

2. Require a permit to be obtained before exporting or importing artwork incorporating threatened, protected or otherwise prohibited species of animals and plants into or out of the Northern Territory.[5]

The law in the Northern Territory 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 the Northern Territory, or who wish to sell their artwork to buyers located 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 the Northern Territory, she would need to consider what type of animal bones she was using. If she used the bones of a native animal, for example the Northern Quoll, she would require a permit to 'take or interfere' with the bones.[6] Jennifer would still need a permit to take or interfere with the bones, regardless of whether she found them in a protected area such as a national park, on the street or in her own backyard. However, if Jennifer used the bones of a goat, which is not native to Australia and not otherwise prohibited, she would not require a permit, provided she did not collect the bones from certain areas (such as a national park).

Most land in the Northern Territory, outside of townships, is either Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) or pastoral leasehold land over which native title can exist (and in many places has been determined to exist) under the *Native Title Act 1993* (Cth) (**Native Title Act**).

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There are important legal differences between native title and Aboriginal land rights. Aboriginal land under the ALRA is a grant of freehold title to an Aboriginal land trust to hold for the benefit of the traditional Aboriginal owners. This land is administered by an Aboriginal Land Council and you may need a permit to access this land.[7] Aboriginal land can include the intertidal zone. One example of a large area of Aboriginal land in the Territory is the Arnhem Land Aboriginal Land Trust which covers the 90,000 square kilometres between the mouth of the East Alligator River in Van Diemen Gulf in the west and the mouth of the Roper River in the Limmen Bight in the east, excluding Cobourg Peninsula, as well as all islands off the Territory's coastline except Groote Eylandt.[8] Many parks in the Northern Territory are Aboriginal land.

Land where native title exists may be subject to another type of tenure (e.g. a pastoral lease). Native title is the recognition by Australian law that some indigenous people have rights and interests to their land that come from traditional laws and customs. Large areas of the Northern Territory are covered by native title determinations.[9] Where land is subject to native title rights and interests, then native title holders may have special rights and interests to use resources from and on that land. Your right to access land which is subject to native title will depend on factors including whether or not you are a native title holder, the nature of other tenures that apply to the land and whether or not the native title is exclusive. Many parks in the Northern Territory exist on land where native title has been determined to or may exist.

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 plant or animal material you want to use in your artwork. Under Commonwealth law, a permit is required 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 Territory 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 the Northern Territory:

- Kakadu National Park
- Uluru-Kata Tjuta National Park
- the North Marine Parks Network (several marine parks in the sea extending from 28km to 340km from the coastline of Australia, the seabed under it and the airspace over it)[10] and
- other Northern Territory coastal waters from 3 nautical miles out to sea (5.5 km), as well as coastal estuaries and riverbeds.

Within these areas Commonwealth law protects plants and animals, including:

- Various marsupial mice native to the Northern Territory, including the Northern Hopping Mouse, Water Mouse, Short-Tailed Hopping Mouse and Long-Tailed Hopping Mouse
- Certain parrot species, including the Night Parrot and Princess Parrot (Alexandra's Parrot)
- Some species of shark, including the Speartooth Shark[11]
- The Edgar Range Pandanus and
- Bloodwood gumnuts and acacia seeds.[12]

2. Was it in a protected area in the Northern Territory?

Any plants or animals, including part of a plant or animal, found dead or alive,[13] in a park, reserve, wilderness zone,[14] sanctuary,[15] or area of essential habitat declared under the TPWC Act,[16] cannot be collected for use in an artwork unless:

1. a permit of licence has been granted;[17] or

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2. the plant or animal is used for domestic, non-commercial activities by the traditional Aboriginal community or native title holders in that area.

1. **Parks, reserves and wilderness zones**

An area of land may be declared to be a park or reserve.[18] A list of parks and reserves is publicly available on the Northern Territory Government Website: https://nt.gov.au/leisure/parks-reserves/find-a-park/find-a-park-to-visit.

A whole or a specified part of a park or reserve may also be declared to be a wilderness zone.[19] A wilderness zone is an area of a park or reserve that must be maintained in its natural state and used only for the purposes specified in the management plan.[20]

2. **Sanctuaries and areas of essential habitat**

Any area of unoccupied Crown land in the Northern Territory or an area of land held by the Conservation Land Corporation may be declared a sanctuary under the TPWC Act.[21] The general public are prohibited from entering sanctuaries.[22]

Habitat that is essential for the survival in that area of wildlife generally or a species of wildlife may also be declared to be an area of essential habitat.[23]

3. **Protected environmental areas and prohibited actions**

In addition, the *Environment Protection Act 2019* (NT) (**EPA**) includes powers for the Minister to declare an area of land to be a "protected environmental area",[24] and to declare an action to be a "prohibited action".[25] A protected environmental area declaration specifies certain actions prohibited in the protected area, whereas a prohibited action declaration prohibits certain actions across the Territory as a whole. It is an offence to carry out the actions specified in the protected environmental area declaration within the protected area or engage in a declared prohibited action within the Northern Territory.[26]

Is it possible that actions undertaken by artists in the creation, display and sale of their work may also be captured by the EPA.

Is it a protected, threatened, unprotected or prohibited species?

For plant or animal material collected outside Commonwealth areas and protected areas in the Northern Territory (i.e. a declared park, reserve, sanctuary, wilderness zone or area of essential habitat), the next issue to consider is whether the species is protected or threatened under Northern Territory law.

1. Protected plants and animals (including some marine species)

The following categories of species are 'protected' under the TPWC Act throughout the Northern Territory:

1. **Protected animals** – *all* mammals, birds, reptiles and amphibians that are indigenous to Australia, as well as *all* animals (including marine animals) that are in a park, reserve, sanctuary, wilderness zone or area of essential habitat.[27] All species of threatened animals (see below) are also classified as protected.[28] These protections extend to dead animals and parts of animals, as well as eggs and animal by-products such as secretions or reproductive material.[29]

2. **Protected plants** – all species of threatened plants (see below),[30] as well as plants that are in a park, reserve, sanctuary, wilderness zone or area of essential habitat. These protections extend to dead plants and parts of plants, including seeds, pollen, algae and secretions.[31]

2. Fish and aquatic life

The following further categories of aquatic plants and animals are protected from being taken for particular purposes under the Fisheries Act:

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1. **Fish** – any species or class of fish including crustaceans, echinoderms, and molluscs and includes an aquatic animal (except birds), an egg, fry, spat, or lava of fish, the dead body or a part of the dead body of a fish, and the shell or exoskeleton of a crustacean, echinoderm, or mollusc.[32]

2. **Aquatic life** – any species of plant or animal life (except birds) which must inhabit water at some point in its life.[33]

The purposes for which fish and aquatic life must not be taken are discussed further below, under the heading 'What are the prohibitions?'.

3. Threatened plant and animal species (including marine species)

The TPWC Act also provides for plants and animals to be classified as threatened.[34] Lists of threatened animals[35] (including fish) and threatened plants[36] are available on the Northern Territory Government website. The lists of threatened wildlife are further sorted into extinct, critically endangered, endangered and vulnerable.

Some examples of species that are classified as threatened in the Northern Territory include:

- animals such as the Golden Bandicoot, Night parrot and Leatherback turtle;
- fish such as the Northern river shark, Lorentz grunter and Largetooth sawfish; and
- plants such as the Darwin palm, Waddy-wood and Latz's wattle.

Offences relating to threatened wildlife attract a greater penalty than those offences involving wildlife that is only protected. For example, to take or interfere with **protected** wildlife in the Northern Territory carries a maximum penalty of $78,500[37] or imprisonment for 5 years for an individual. The maximum penalty for taking or interfering with **threatened** wildlife is a $157,000 fine,[38] or imprisonment for 10 years.[39]

4. Unprotected wildlife and prohibited entrants

If any *native* plant or animal does not fall within the definition of 'protected' wildlife described above, it is 'unprotected wildlife'.[40] Artists should be aware that there are even restrictions on taking or interfering with unprotected wildlife for commercial purposes unless they are specifically authorised to do so.[41]

Artists should also be cautious if they are working with non-native animals (or parts of them) because there are restrictions on keeping, importing or exporting wildlife that is not native to the Northern Territory or 'prohibited entrants', as well as keeping or dealing with exotic animals that are not native to Australia.[42] These restrictions do not apply to a number of common animals such as cattle, pigs, goats and domestic rabbits.[43]

What are the prohibitions?

If you are using protected or prohibited species in your artwork, 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, even if they were found outside of a protected area, it would be an offence to keep, sell or exhibit the completed artwork without a licence. Each of the maximum penalties for the offences outlined below are current to 30 June 2022.

1. Protected animals (including marine species) and plants

Under the TPWC Act it is an offence to take or interfere with protected wildlife (animals and plants) from all areas in the Territory and to take protected wildlife out of the Territory unless the person is authorised to do so under the Act.[44] It is also an offence simply to possess a protected animal (including a part of an animal).[45] If the offender is acting as an individual, they may incur a maximum penalty of imprisonment for 5 years or a $78,500 fine, or if they are a body corporate they may face up to a $392,500 fine.

2. Threatened animals (including marine species) and plants

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Similarly it is an offence under the TPWC Act to take or interfere with threatened wildlife from all areas in the Northern Territory and to take threatened wildlife out of the Northern Territory unless the person is authorised to do so under the Act.[46] It is also an offence to possess a threatened animal (including part of an animal).[47] If the offender is acting as an individual, they may incur a maximum penalty of imprisonment for 10 years or a $157,000 fine, or if they are a corporation they may face up to a $785,000 fine.

Example 2 – Collecting and incorporating plants into an artwork

An artist has been collecting parts of plants found in parks and around her suburb. She is particularly interested in using the petals from the *Hibiscus cravenii*.

The *Hibiscus cravenii* is a threatened (and therefore also protected) plant listed as "vulnerable" under Northern Territory law. The *Hibiscus cravenii* is also listed as "threatened" under Commonwealth law.

The artist cannot take the plant from either a Commonwealth area or the Northern Territory without a permit.

The artist should apply for and obtain a permit 'to take or interfere with wildlife' which would allow her to collect *Hibiscus cravenii* petals in the Northern Territory from a nominated area and incorporate them into her artworks. She should make sure to include the licence number on any artwork made using the petals.

3. Unprotected animals (including marine species) and plants

Under the TPWC Act it is an offence to take or interfere with 'unprotected wildlife' (which includes all invertebrate native animals and plants that are not classified as protected and/or threatened) from all areas in the Northern Territory *for commercial purposes,* unless the person is authorised to do so under the Act.[48] If the offender is acting as an individual, they may incur a maximum penalty of imprisonment for 5 years or a $78,500 fine, or if they are a body corporate they may face up to a $392,500 fine.

4. Prohibited entrants

Under the TPWC Act it is also an offence for a person to bring a 'prohibited entrant' (including all wildlife that is not native to the Northern Territory, and exotic animals that are not native to Australia) into the Territory, as well as to possess, release or take a prohibited entrant out of the Territory unless they are authorised to do so under the Act.[49] If the offender is an individual, they may incur a maximum penalty of imprisonment for 12 months or a $15,700 fine. Corporations could face up to a $78,500 fine.

For more information on offences relating to wildlife under the TPWC Act, visit the Northern Territory Government website: https://nt.gov.au/environment/animals/wildlife-permits/wildlife-offences.

5. Further prohibitions on taking and use of fish and aquatic life

The Fisheries Act makes it an offence to take or use fish or aquatic life (whether alive or dead) for sale, for the purpose of aquaculture, or for the purpose of exhibiting the fish or aquatic life for profit without a licence.[50] An offender may face a maximum penalty of imprisonment for 2 years or a fine of $31,400.

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 Northern Territory 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

The Northern Territory laws are subject to the Native Title Act which provides that in certain circumstances holders of native title rights cannot be restricted by Territory law from engaging in certain activities (including hunting, fishing, gathering and cultural or spiritual activities) on land over which native title has been granted.[51] To fall within this exemption, the native title

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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. The TPWC Act itself provides a specific acknowledgment that nothing in the TPWC Act limits the rights of Aboriginals who have traditionally used an area of land or water from continuing to use that area in accordance with Aboriginal tradition for hunting, food gathering (*otherwise* than for the purpose of sale) and for ceremonial and religious purposes.[52] 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.

Large areas of the Northern Territory are covered by determinations of or applications for determinations of native title. By way of example, the following native title interests have been determined to exist in the Northern Territory:

- The Jiyilijurrung and Yilyilimawu Gurindji People hold native title over approximately 5.7 square kilometres in the outer boundaries of the town of Kalkarindji;
- The Ilkewartn and Ywel Anmatyerr People north of Alice Springs hold native title over parts of 117,600 hectares of land along the Stuart Highway in the Northern Territory, approximately 150 kilometres north of Alice Springs; and
- The Patta Warumungo People hold native title over the Tennant Creek Township.[53]

More information on native title rights, including a full list of native title determinations, can be found on the National Native Title Tribunal website.[54]

2. Species exemptions

Under the TPWC Act, the Minister has broad powers to exempt a species of animal or plant (or in some cases the whole or part of the Territory) from the restrictions on collection, killing and use of protected wildlife under the TPWC Act, and other activities prohibited by the Act such as importing and exporting the species to or from the Northern Territory.[55] However, the only exemptions that currently appear to be operating relate to the keeping of particular native species that have been obtained lawfully (i.e. not taken from the wild). Certain species of animals may be kept without a permit under this exemption if, for example, they are bought from licensed sellers. A list of these exempt species is available on the Northern Territory Government website: https://nt.gov.au/environment/animals/wildlife-permits/native-animals-that-need-a-permit. Species that may be kept without a permit include Cockatiels, Galahs, Northern long-necked turtles and Children's pythons.

3. Defences

A limited defence exists in relation to the offence of taking of or interfering with protected wildlife where the offence occurred as a result of the person's reasonable use and enjoyment of the land where the wildlife was located and not the result of negligence on the part of the person.[56] It is likely this defence is designed to cover situations in which a need arises to move a protected animal that is interfering with a person's use and enjoyment of land (for example, removing a snake from a property for safety reasons) and would have limited applicability to artists collecting wildlife from the land for use in their artworks.

Is a permit or licence available?

One of the main ways of avoiding liability for an offence is to obtain a permit from the Northern Territory Director of Parks and Wildlife.[57] Written permission of the land holder or relevant lands authority from which the wildlife is to be collected must be obtained prior to a permit application being submitted. This means that permission must be obtained from the relevant land council if an application for a permit involves Aboriginal land.

1. Permits for native, protected and prohibited animals and plants

Under the TPWC Act, a person may apply for a permit authorising them to:

1. Take or interfere with protected wildlife;

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2. Take or interfere with (native) wildlife for commercial purposes;
3. Keep protected wildlife;
4. Bring protected wildlife into, release protected wildlife in or take protected wildlife out of the Northern Territory; or
5. Bring prohibited entrants into, keep prohibited entrants in or take prohibited entrants out of the Territory.[58]

Permit applications may be granted or refused having considered:

1. The classification of wildlife;
2. The principles of management as set out in s 31 of the TPWC Act (e.g. the survival of wildlife in its natural habitat and the conservation of biological diversity within the Territory);
3. All relevant management programs, co-operative management agreements, declarations of areas of essential habitat and agreements made under sections 73 and 74;
4. The likely effect (and in particular any detrimental impact) on the continued survival of wildlife, habitats, vegetation and ecosystems and on the landscape and environment generally;
5. If the permit relates to prohibited entrants, matters relating to the retrieval, capture, disposal or destruction of an escaped prohibited entrant;
6. The welfare of the animal(s) to which the permit relates;
7. The protection of the safety and welfare of the public; and
8. Any other prescribed matters relating to the permit.[59]

The Northern Territory Government accepts applications for wildlife permits through the Parks and Wildlife Commission of the Northern Territory. There are several permit types available that are likely to be relevant for artists wishing to work with native and/or protected species in their art:

1. **Permit to take or interfere with wildlife** – this permit would allow an artist to collect the particular species of plant or animal named in the application (or parts of them) from the areas nominated in the application.[60] The Northern Territory Government website confirms that one of the purposes for which these permits may be issued is to take or interfere with wildlife for commercial purposes, such as seed harvesting or taking timber for didgeridoos.[61]
2. **Permit to keep protected and prohibited wildlife** – this permit would allow an artist to keep lawfully obtained (e.g. from a pet shop or breeder that has a current permit to keep and trade wildlife) protected or prohibited animals and plants nominated in the application, or parts of them.[62] If the application relates to parts of animals or dead animals, the particular parts in question must be noted on the application (e.g. shell, feathers or skull). Note that permits to keep protected and prohibited wildlife are not transferable from person to person, so if the artist were to sell or give away the relevant specimen, the new owner would *also* need to obtain a permit to keep the specimen.[63]
3. **Permit to import or export prohibited or protected wildlife** – this permit would allow an artist to export artworks containing protected or prohibited plant or animal parts that had been lawfully obtained and kept, to another Australian state or territory.[64] If the application relates to parts of animals or dead animals, the particular parts in question must be noted on the application (e.g. shell, feathers or skull).[65] Even if this permit was successfully obtained, the law in the receiving state or territory would also need to be considered before export, and it is most likely that a corresponding import licence would be required. Further information on the import and export of materials between states in Australia

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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.

Example 3 – The exhibition

An artist has successfully obtained permits to take and keep feathers found from the threatened (vulnerable) Masked Owl to incorporate them into sculptural works that are included in an exhibition in the Northern Territory. At the show, one work is sold to a collector who lives in Tasmania and another to a collector who lives in London.

An export permit under the TPWC 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 the artwork to London, the Commonwealth EPBC Act must also be considered. Because the Masked Owl is also protected under the EPBC Act, a licence to export the work overseas will also be required. See the Arts Law Commonwealth Information Sheet, and more information about Commonwealth import and export permits here.

2. Permits for fish

The TPWC Act makes it clear that the offence provisions relating to native and/or protected wildlife do not apply to aquatic life within the meaning of the Fisheries Act that has been caught, taken or harvested under a licence or permit granted under that Act.[66] There are a number of commercial permits and licences that may be granted under the Fisheries Act,[67] including a 'special permit' to take fish or aquatic life that would not normally be allowed.[68] Licence and permit applications are made to NT Fisheries. A significant fee may be payable for some of the commercial licences and permits that are available, and Arts Law recommends contacting the NT Fisheries Licensing team to discuss the purpose and scope of any application before applying. Further information about commercial fishing licences and application forms can be found here.

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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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.