

# INFORMATION SHEET



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## Artwork Made Using Animal and Plant Material - NSW Law

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For many artists, plant and animal material 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 – 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 laws: the *National Parks and Wildlife Act 1974* (NSW) (**NPW**), the *Threatened Species Conservation Act 1995* (NSW) (**TSC**); and the *Fisheries Management Act 1994* (NSW) (**FMA**). 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 New South Wales unless:
  - a. a licence has been given; or
  - b. they are used in non-commercial, domestic activities performed by Aboriginal people; or
  - c. they are used in traditional non-commercial activities conducted by native title holders on their traditional lands; and
2. Require a licence to be obtained before exporting or importing artwork incorporating threatened or protected 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 Australia.

***Example 1 – Jennifer Trask, making artwork from Animal Bones***

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

[http://www.jennifertrask.com/Jennifertrask.com/Jt\\_Home.html](http://www.jennifertrask.com/Jennifertrask.com/Jt_Home.html)

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 an animal protected under the NPW, for example a Bandicoot, 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.

## 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 New South Wales laws do not apply. For further information regarding the Commonwealth scheme please look at the [Commonwealth Information Sheet](#).

In New South Wales, these are some Commonwealth areas:

- all publically owned airports including Sydney, Bathurst and Illawarra;
- Commonwealth Marine Reserves in Jervis, Hunter, Cod Grounds, Solitary Islands and Lord Howe (visit Commonwealth Department of Environment Website for exact locations: <http://www.environment.gov.au/topics/marine/marine-reserves/temperate-east>);
- New South Wales’ coastal waters extending 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 Possum;
- Various kinds of species of New South Wales plants, including Silver-leaved Mountain Gum , Monga Tea-Tree, Velvet Wattle and *Acacia carneorum* (Needle Wattle or Purple-wood Wattle); and

- Certain species of native NSW grass such as *Amphibromus fluitans* (also known as River Swamp Wallaby Grass), and *Arthraxon hispidus* (Hairy-joint Grass).<sup>1</sup>

If the plant or animal material is not taken or kept in a ‘commonwealth area’ but is taken from New South Wales, the state legislation will apply.

## 2. Was it in a ‘Protected area’?

NSW law prohibits all taking of plants and animals from ‘wildlife refuges’, ‘conservation areas’<sup>2</sup> and ‘certain wilderness areas’<sup>3</sup>. This includes dead species as well as parts of plant<sup>4</sup> and animal matter such as leaves, feathers and bones.<sup>5</sup> This prohibition will apply even if the plants or animals are neither protected nor threatened under NSW law. The following areas in New South Wales are protected areas:

- Barrington Tops;
- The Royal National Park;
- Blue Mountains National Park;
- Bulahdelah State Conservation area; and
- Kosciusko National Park.

## Is it a protected or threatened species?

The next issue to consider is whether the species is protected or threatened under New South Wales law. Each of the *National Parks and Wildlife Act 1974* (NSW) (**NPW**), the *Threatened Species Conservation Act 1995* (NSW) (**TSC**), and the *Fisheries Management Act 1994* (NSW) (**FMA**) lists the species which are threatened or protected. This means that if there is a specific plant or animal species you wish to use in your artwork it is important to check all three Acts to see if it is listed.

### 1. Protected plant and animal species (Non-marine)

The following categories of species are ‘protected’ under the NPW Act throughout New South Wales:

- a) **Protected animals**— all mammals, birds, reptiles and amphibians are protected fauna unless listed as ‘unprotected fauna’.<sup>6</sup> Non-native animals are protected unless specifically excluded as “unprotected fauna”<sup>7</sup> (for example, bears, lions, dogs, hedgehogs, hares, donkeys, rabbits and apes); and

<sup>1</sup> See <http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=flora>.

<sup>2</sup> Full list here: <http://www.nationalparks.nsw.gov.au/conservation-and-heritage/state-conservation-areas>.

<sup>3</sup> See list of national Parks here: <http://www.nationalparks.nsw.gov.au/visit-a-park>.

<sup>4</sup> National Parks and Wildlife Regulations 2009 (NSW) reg 18; *National Parks and Wildlife Act 1974* (NSW) s 57.

<sup>5</sup> *National Parks and Wildlife Act 1974* (NSW) ss 70 and 71.

<sup>6</sup> *National Parks and Wildlife Act 1974* (NSW) s 5(1) (definitions of ‘fauna’ and ‘protected fauna’. ‘Protected fauna’ means fauna species NOT named in Schedule 11). Sch 11 lists ‘unprotected fauna’.

<sup>7</sup> Unprotected fauna are listed the *National Parks and Wildlife Act 1974* (NSW), Sch. 11.

- b) **Protected native plants**—over 100 species are protected in New South Wales,<sup>8</sup> including Sturt’s Desert Pea, Christmas Bell, Maidenhair Fern and Waratah. The full list can be accessed here: <http://www.legislation.nsw.gov.au/#/view/act/1974/80/sch13>.

## 2. Threatened plant and animal species (Non-marine)

Meanwhile, the TSC Act lists ‘threatened species’. Any offences involving threatened species will generally carry a more serious penalty than for ‘protected’ species. Almost 1000 animals and plants in New South Wales are ‘threatened species’. These include, critically endangered species,<sup>9</sup> endangered species,<sup>10</sup> and vulnerable species.<sup>11</sup> You can check to see if a particular species is threatened by using the search function located via this link: <http://www.environment.nsw.gov.au/threatenedSpeciesApp/>

## 3. Protected Marine Species

Commonwealth law applies to waters extending beyond 3 nautical miles (5.5km) out to sea. The law in New South Wales will govern from the low water mark up to 5.5.km out to sea.<sup>12</sup> Marine species are not included in the NPW or TSC. Instead, if you are using marine animals or plants, such as seal or crayfish, any protected or threatened species will be listed in the FMA.

The FMA lists both protected and threatened marine plants and animals. Generally, these species receive the same protection as other native animals (aside from some additional protection with respect to approaching from certain distances). Some examples of threatened marine species include, Greynurse Sharks, Great Hammerhead sharks, and Murray Crayfish. The full list of protected and threatened species can be found here: <http://www.dpi.nsw.gov.au/fishing/species-protection/conservation/what-current#key>.

## What are the prohibitions?

If you are using a species listed as either protected or threatened under NSW 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 it may be an offence to sell or exhibit the completed artwork without a licence.

### 1. Protected plants and animals

Under the NPW Act it is an offence to: buy, sell or possess,<sup>13</sup> import or export across state borders;<sup>14</sup> or exhibit<sup>15</sup> protected fauna (animal species) anywhere in New South Wales. This includes artworks containing these any parts of these protected species. The maximum penalty is \$11,000 and/or 6

<sup>8</sup> Ibid, species listed in Schedule 13 are protected.

<sup>9</sup> *Threatened Species Conservation Act 1995* (NSW) Schedule 1A (eligibility criteria s 10(2)).

<sup>10</sup> Ibid Schedule 1 (eligibility criteria s 10(3)).

<sup>11</sup> Ibid Schedule 2 (eligibility criteria s 10(4)).

<sup>12</sup> <https://www.environment.gov.au/system/files/resources/2e286b1a-c6e2-4e3d-95cf-c98a8dea60fd/files/profile-appendixb.rtf>

<sup>13</sup> *National Parks and Wildlife Act 1974* (NSW), s 101.

<sup>14</sup> Ibid S 106.

<sup>15</sup> Ibid S 107.

months imprisonment or both.<sup>16</sup> Data from 2003 to 2009 suggests that fines with respect to protected fauna were quite variable, with fines ranging between \$300 and \$9,000.<sup>17</sup>

Similarly, it is an offence to pick, have in your possession,<sup>18</sup> or sell a protected native plant within New South Wales without a licence.<sup>19</sup> The maximum penalty is \$11,000 (plus \$1,100 for each additional plant), or 6 months imprisonment, or both.<sup>20</sup> However this prohibition does not apply if the plant material is purchased from a licensed supplier such as a licensed florist or nursery.<sup>21</sup>

## 2. Threatened plants and animals

It is an offence to harm or pick a threatened species<sup>22</sup> listed under the TSC Act and it is also an offence to buy, sell or possess a threatened species.<sup>23</sup> This includes whole or parts of species, as well as dead species. While similar offences apply to “protected” species listed in the NPW Act, offences against ‘threatened species’ generally carry a more serious penalty.

### ***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 and Perisher Wallaby-grass, a threatened plant, 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 a threatened plant under NSW law and should be avoided. Threatened plants cannot be collected, even if dead on the side of a footpath, without first obtaining a licence to do so. A licence to take and use a threatened species is only granted in narrow circumstances and it is unlikely that an artist would successfully obtain one. This means that 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) or purchased from a reputable nursery or florist who has the requisite licence to sell these species. 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 Park or protected area. This is so even if the leaves are found dead on the ground.

<sup>16</sup> S 101(1).

<sup>17</sup> <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp109/07.html>.

<sup>18</sup> *National Parks and Wildlife Act 1974* (NSW) s 117(1).

<sup>19</sup> *Ibid* S 118.

<sup>20</sup> *Ibid* ss 117 and 118.

<sup>21</sup> *National Parks and Wildlife Act 1974* (NSW) s 117(3)(e).

<sup>22</sup> *National Parks and Wildlife Act 1974* (NSW) s 118A.

<sup>23</sup> *Ibid* s 118B.

### 3. Protected and threatened marine species

Finally, if the artwork incorporates threatened marine species, including any parts such as teeth or bones,<sup>24</sup> under the FMA, it may be an offence to buy, sell or possess that work.<sup>25</sup>

**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 quills and skull of an echidna, and the bones of a rabbit.

As a threatened species, it would be an offence to take and use the teeth of the Greynurse shark without a licence. It is unlikely that an artist would obtain a licence to use a threatened species, so the teeth should be avoided. Meanwhile, the echidna parts are from a protected species and the artist will need to obtain a general licence *before* collecting the specimen – even if found dead by the road. 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 any part of a rabbit found outside a national park or protected area to make an artwork.

## Is there an exemption or defence that applies?

If you are using, or have incorporated into an artwork, any part of a plant or animal species which is protected or threatened under NSW 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.

Firstly, there are a number ‘domestic use’ exceptions under the National Parks and Wildlife Regulations 2009 (NSW)(*the regulations*). As a consequence, Aboriginal people are exempt from:

- the prohibition on harming protected fauna for their own domestic purposes;<sup>26</sup> and
- the prohibitions on picking or possessing protected native plants for domestic purposes.<sup>27</sup>

The regulations also provide more specific exemptions if the species was obtained from a wildlife refuge, conservation area, wilderness area or area subject to a wilderness protection agreement. In that instance, Aboriginal people are exempt from offences relating to:

<sup>24</sup> Definition of “fish” under *Fisheries Management Act 1994* (NSW) s 5.

<sup>25</sup> *Fisheries Management Act 1994* (NSW) S 220ZB.

<sup>26</sup> National Parks and Wildlife Regulations 2009 (NSW) reg 74(2).

<sup>27</sup> *Ibid* reg 75.

- harming fauna within<sup>28</sup> these wilderness areas where the animals are hunted for domestic purposes<sup>29</sup>; and
- picking or having native plants in their possession within these specific areas if it is for their own domestic purposes.<sup>30</sup>

It is unclear whether these exemptions would enable Indigenous artists in NSW to incorporate protected species into artworks produced for sale as this is likely to be regarded as a commercial not domestic use.

Secondly, all three Acts contain a Native Title exemption.<sup>31</sup> Holders of native title rights do not need authorisation to engage in certain activities on land over which native title has been granted.<sup>32</sup> 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. Again, it is unclear whether this could be relied upon to cover artwork made for commercial sale.

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

- The Bandjalang People hold native title over certain areas in Evans Head and the surrounding hinterland;<sup>33</sup>
- The Dunghutti People hold native title over several lots at Crescent Head, near Kempsey;<sup>34</sup> and
- The Githabul People hold native title over 1120 sq km in nine national parks and 13 state forests in northern New South Wales.<sup>35</sup>

## 2. 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:

- Having a licence allowing the collection, and use of the species and the sale of the finished artwork;
- Using a protected native plant species which occurred naturally or was cultivated on private property for non-commercial purposes (however, this will not apply if the species is threatened species).

<sup>28</sup> Ibid reg 72(1).

<sup>29</sup> Ibid reg 72(2).

<sup>30</sup> Ibid reg 71(2).

<sup>31</sup> *Fisheries Management Act 1994* (NSW) s 287; *Threatened Species Conservation Act 1995* (NSW) s 145.

<sup>32</sup> *Native Title Act 1993* (Cth) s 211.

<sup>33</sup> [http://www.crownland.nsw.gov.au/\\_data/assets/pdf\\_file/0009/652149/banjlang-court-order.pdf](http://www.crownland.nsw.gov.au/_data/assets/pdf_file/0009/652149/banjlang-court-order.pdf)

<sup>34</sup> [http://nativetitle.org.au/documents/NSW\\_DunghuttiEldersCouncil.pdf](http://nativetitle.org.au/documents/NSW_DunghuttiEldersCouncil.pdf)

<sup>35</sup> <http://www.nntt.gov.au/Information%20Publications/Determination%20brochure%20Githabul%20people%20November%202007.pdf>

## Is a licence available?

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

### 1. Licences for protected plants and animals

If the plant or animal used is a protected species listed under the NPW Act, two types of licences are available. These are:

1. A **general licence** which will allow the holder to harm, keep, exhibit or sell protected fauna<sup>36</sup> or, pick<sup>37</sup> and grow protected native plants on private land for sale;<sup>38</sup> and
2. An **import and export licence** that will allow an individual to move native animals or plants (or parts of them) across NSW state borders.<sup>39</sup> (applications here: <http://www.environment.nsw.gov.au/wildlifelicences/LicencesToTransportAnimalsInterstate.htm>)

#### a) Protected Animals

The most applicable licences for artists wanting to work with protected animal species are the general licence, and the taxidermy licence.

The more specific taxidermy licence is a type of general licence appropriate for artists looking to hold or use preserved specimens. Application forms can be accessed here:

<http://www.environment.nsw.gov.au/resources/nature/150764-form-taxidermy.pdf>. The fee for such a licence is \$30 for one year (as at 4 July 2016).

Meanwhile, 'general licences' other than taxidermy licences are granted on an ad-hoc basis. There is no official application form available. Instead artists can apply directly to the Office of Environment and Heritage with a written request including the details of the proposed use. One licence can cover multiple specimens. As with a taxidermy licence the fee is \$30 for one year (as at 6 July 2016). Arts Law understands that this licence has been successfully granted to artists to use protected species in artwork.

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 NSW without requiring these people to obtain an additional licence. However, once the licence had expired the purchaser would be required to renew it in order to continue to hold the artwork in NSW. All specimens must be named in the application and licences can be later amended to include additional species if required.

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<sup>36</sup> *National Parks and Wildlife Act 1974* (NSW) s 120(1).

<sup>37</sup> *Ibid* s 131.

<sup>38</sup> *Ibid* s 132.

<sup>39</sup> *Ibid* ss 126 (animals), 132A (plants).

**Example 4 –The exhibition**

An artist has successfully obtained a general licence to incorporate feathers from the protected Glossy black-cockatoo 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. For interstate export, an export licence under the NPW 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 protected under this regime, a licence to export the work overseas will also be required. See the Commonwealth fact sheet [here](#).

**b) Protected Plants**

While artists may be able to obtain a licence to use and hold protected animal species, there is no equivalent licence available for protected plants. Instead, the licences available are designed for ongoing commercial businesses for example, propagators or florists. Artists will only be able to take, hold and use protected plant material if purchased from a licensed source, for example, a licenced florist or nursery.<sup>40</sup> An artist will not be required to obtain a separate licence to hold or sell these legally obtained specimen, even once transformed into an artwork.

**2. Licences for threatened plants and animals**

If the plant or animal used is a threatened species listed under the TSC there are three types of licences available;<sup>41</sup>

1. Licences for scientific, educational and conservation purposes;
2. Licences to harm threatened species that are causing damage to property; and
3. Licences/certificates for actions that are likely to harm or damage the habitat of a threatened species, population or ecological community or cause that threatened species, population or ecological community to be picked.

At present an artist wishing to use a threatened species would be unlikely to fall within any of these limited categories. While a licence for scientific, educational and conservation purposes may be most relevant, informal discussions with the Office for Environment and Heritage suggest that it is very unlikely that permission would be granted to use a threatened plant or animal in an artwork. With the exception of emu parts (discussed below), Arts Law would strongly recommend that threatened species, in particular birds of prey, not be incorporated into artworks. Further information and application forms

<sup>40</sup> *National Parks and Wildlife Act 1974* (NSW) s 117(3)(e).

<sup>41</sup> *Threatened Species Conservation Act 1995* (NSW) s 91.

can be accessed here:

<http://www.environment.nsw.gov.au/threatenedspecies/S91TscLicenceForm.htm>.

Despite this, there is a specific licence available for the use of Emu products, including the skin, eggs, and feathers, where these have been obtained from licenced captive sources. This means that notwithstanding that emus are a threatened species, if an artist wanted to use the eggs or feathers of an emu, they may be able to apply for a licence to do so.<sup>42</sup> Application form here:

<http://www.environment.nsw.gov.au/resources/wildlifelicences/emueggapplication.pdf>. The licence number would need to then be written or included on the egg so that it could be sold or exhibited.

### 3. Licences for marine species

A licence may be granted to perform actions that may otherwise harm a threatened marine species or its habitat.<sup>43</sup> Application forms and further information can be found here:

<http://www.dpi.nsw.gov.au/fishing/species-protection/register-of-ministerial-orders>.

### 4. Appealing licence decisions or conditions

Refusals or restrictions places on licences can be appealed to the Environment Minister.<sup>44</sup> While the decision of the Minister is final and binding, it may be challenged in the Land and Environment Court.<sup>45</sup>

## 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 \(www.artslaw.com.au\)](http://www.artslaw.com.au) for more articles and information sheets.

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<sup>42</sup> *National Parks and Wildlife Act 1974* (NSW) s 125A.

<sup>43</sup> *Fisheries Management Act 1994* (NSW) s 220ZW.

<sup>44</sup> *National Parks and Wildlife Act 1974* (NSW) s 135(1).

<sup>45</sup> *Ibid* s 193.

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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.*

