

# INFORMATION SHEET



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## Artwork made using animal and plant material: Australia

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Australia has strict laws that aim to protect plants and animals that are threatened, native, vulnerable or endangered. This is a particularly important issue for Aboriginal and Torres Strait Island artists who often use native seeds, feathers, skins, bones, grasses and woods in their artwork. It can also affect non-Indigenous artists wanting to create artwork using plant and animal matter.

This information sheet looks at how the Commonwealth legislation affects the use of native species in artwork. 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 on its use in artwork under the relevant State laws. Arts Law is currently developing a companion information sheet on the impact of State laws.

You can read about how these laws affected Australian artist Gerard Geer [here](#).

### How does the Environment Protection and Biodiversity Conservation Act 1999 (Cth) affect artists?

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) makes it an offence to kill, injure, trade, keep or move certain species in Commonwealth areas. It also prohibits the export of certain native plant and animal species (including as part of an artwork).

The EPBC Act impacts artists mainly in two ways. The Act:

Restricts the taking or use of threatened plants and animals in Commonwealth areas unless:

a permit has been given; or

those activities are traditional non-commercial activities conducted by native title holders on their traditional lands; and

Requires a permit to be obtained before exporting artwork incorporating threatened or regulated native plant and animal species.

This means the EPBC Act may affect the places and areas where artists can collect plant and animal material for use in their artwork. The Act may also create issues for artists wishing to show their art in overseas exhibitions or galleries, or who wish to sell their artwork to foreign buyers.

## Dead or alive, the whole or any part of a plant or animal?

The EPBC Act applies to whole animals and plants as well as parts of animals and plants such as feathers, shells, plant fibres or animal furs. It does not matter if the animal or plant was found living or dead, meaning the laws can include plants and animals that were taken for another purpose, or found already dead (eg. road kill).

## Which native species are affected?

Arts Law is currently developing a table of native species commonly used in the artwork of Aboriginal and Torres Strait Island artists showing which species are threatened and which are regulated.

## Threatened species

The Australian Government's Department of Environment keeps a list of threatened species on its website <http://www.environment.gov.au/epbc/about/epbc-act-lists>. As at 30 May 2016, threatened species include a number of species used in Aboriginal art including Saltwater Crocodiles, Dugong and Marine Turtles.

Unless you have a permit, it is an offence to kill, injure, or take a listed threatened species in a Commonwealth area.<sup>1</sup> It is also an offence to keep, trade, or even move, a threatened species that was taken from a Commonwealth area, without a permit.<sup>2</sup>

## Regulated Native Specimens

A regulated native specimen means any plant or animal that is, or is derived from a plant or animal native to Australia.<sup>3</sup> It includes all threatened species.

Sulphur Crested Cockatoos and River Whaler Shark are native species commonly used in the Aboriginal art of certain areas. Pandanus Spiralis which is commonly used to create traditional woven baskets in Arnhem Land was on the list of Regulated Native Specimens until December 2012. Arts Law secured an exemption for it so that export permits are no longer required. See Arts Law's article "Elcho Island Arts Centre – Part 2: Export Exemption to Benefit Indigenous Artists" <http://www.artslaw.com.au/art-law/entry/elcho-island-arts-centre-part-2-export-exemption-to-benefit-indigenous-arti/>

Regulated species can be freely taken and used in artwork within Australia (subject to any State law, and parks/reserve management plan) – but cannot be exported from Australia without a permit.<sup>4</sup>

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<sup>1</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 196.

<sup>2</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 196B/C/D.

<sup>3</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 303DA.

<sup>4</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 303DD.

## Species protected under CITES

It is also an offence under the EPBC Act to export species that are protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Be aware that CITES legislation in overseas countries may also restrict the import of Australian species into that country. To find out which Australian species are covered by the CITES, check the full list here: <https://cites.org/eng/app/appendices.php>

## Exempt Native Specimens

Some native species including Red and Grey Kangaroos have been exempted from the operation of the EPBC Act. A list of exempted native specimens can be found on the Department of Environment's website, <http://www.environment.gov.au/biodiversity/wildlife-trade/natives/list-exempt-native-specimens>

Such species can be freely taken and used in artwork – even from a Commonwealth area (subject to any State law, or park/reserve management plan) - and can be exported without a permit.

## What is a Commonwealth area?

The restrictions in the EPBC Act relating to taking and using threatened species (other than the restrictions on export<sup>5</sup> from Australia) ONLY apply to such species taken from or used in Commonwealth areas. A Commonwealth area is land owned or leased by the Commonwealth or a Commonwealth agency (including land owned in Norfolk Island), and airspace over the land, coastal sea and continental shelf of Australia.<sup>5</sup> This includes national parks, national marine areas, and world heritage areas owned and managed by the Commonwealth. For example the Kakadu National Park near the Injalak Arts centre in Gunbalanya is a Commonwealth area, and the EPBC Act would apply to native species found in that park.

## Exemption for traditional non-commercial activities of native title holders

The EPBC Act expressly provides that it does not affect the rights given to native title holders under section 211 of the *Native Title Act 1993* (Cth). That Act provides that holders of native title rights do not need authorisation to engage in certain activities on land over which native title has been granted.<sup>6</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 purpose of satisfying the native title holder's personal, domestic or non-commercial communal needs.

Although it is yet to be considered by a Court, it must be assumed that the native title exemption may not be enough to exempt the activities of Aboriginal and Torres Strait Island artists who have native title and who are hunting or gathering or using native species for the purpose of creating commercial

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<sup>5</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 525.

<sup>6</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 8.

artwork to be exhibited or offered for sale. There is an argument that this is not an activity “for the purpose of satisfying the [native title holders’] personal, domestic or non-commercial communal needs; and ... in exercise or enjoyment of their native title rights and interests.” Arts Law is seeking clarification of this issue.

The EPBC Act also states that the prohibitions on export don’t apply to the traditional use of an area by an Indigenous person for ceremonial purposes and non-commercial hunting and food gathering. This might cover the creation of artwork for use in performances and ceremonies but does not appear to be broad enough to cover hunting or gathering activities associated with commercial art production.<sup>7</sup>

## Permit to take or use threatened species

Under the EPBC Act, the Minister may grant a permit on a discretionary basis to kill, injure, take, trade, keep or move a listed threatened species. A permit will only be issued in very limited circumstances including that the “specified activity is of particular significance to indigenous tradition, and will not adversely affect the survival or recovery in nature of the conservation status of the listed threatened species or ecological community, the listed migratory species (including any population), or the listed marine species concerned.”

Be aware that this permit system is involved and the information required by the application paperwork is detailed. For more information, go to:

<http://www.environment.gov.au/biodiversity/threatened/permits>

## Permit for export

Under the EPBC Act, the Minister may grant a permit on a discretionary basis to export regulated native specimens for commercial or non-commercial purposes.

Non-commercial trade would include the exhibition of artwork overseas by a public museum or gallery or educational institution – where the artwork is not for sale. Non-commercial export is subject to certain conditions and is regulated through a permit system. For more information, go to:

<http://www.environment.gov.au/biodiversity/wildlife-trade/trading/non-commercial>

Export of artworks for the purpose of an overseas gallery show where the artworks will be available for sale would be considered export for commercial purposes. Generally, a permit for the commercial trade of regulated native specimens is permitted only when the plants or animals are obtained through approved sources such as captive breeding programs, wildlife trade operations or management plans. However the manager does have the discretion to grant a permit in exceptional circumstances. Arts Law managed to secure such a permit for Elcho Island Arts Centre to enable its exhibition of pandanus baskets at the Rebecca Hossack Gallery to proceed in 2011. See Arts Law’s case study “Elcho Island Arts Centre – when is an export permit required to exhibit artwork overseas?”

<http://www.artslaw.com.au/case-studies/entry/elcho-island-arts-centre-when-is-an-export-permit-required-to-exhibit-artwo/>

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<sup>7</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 303BAA.

## 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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