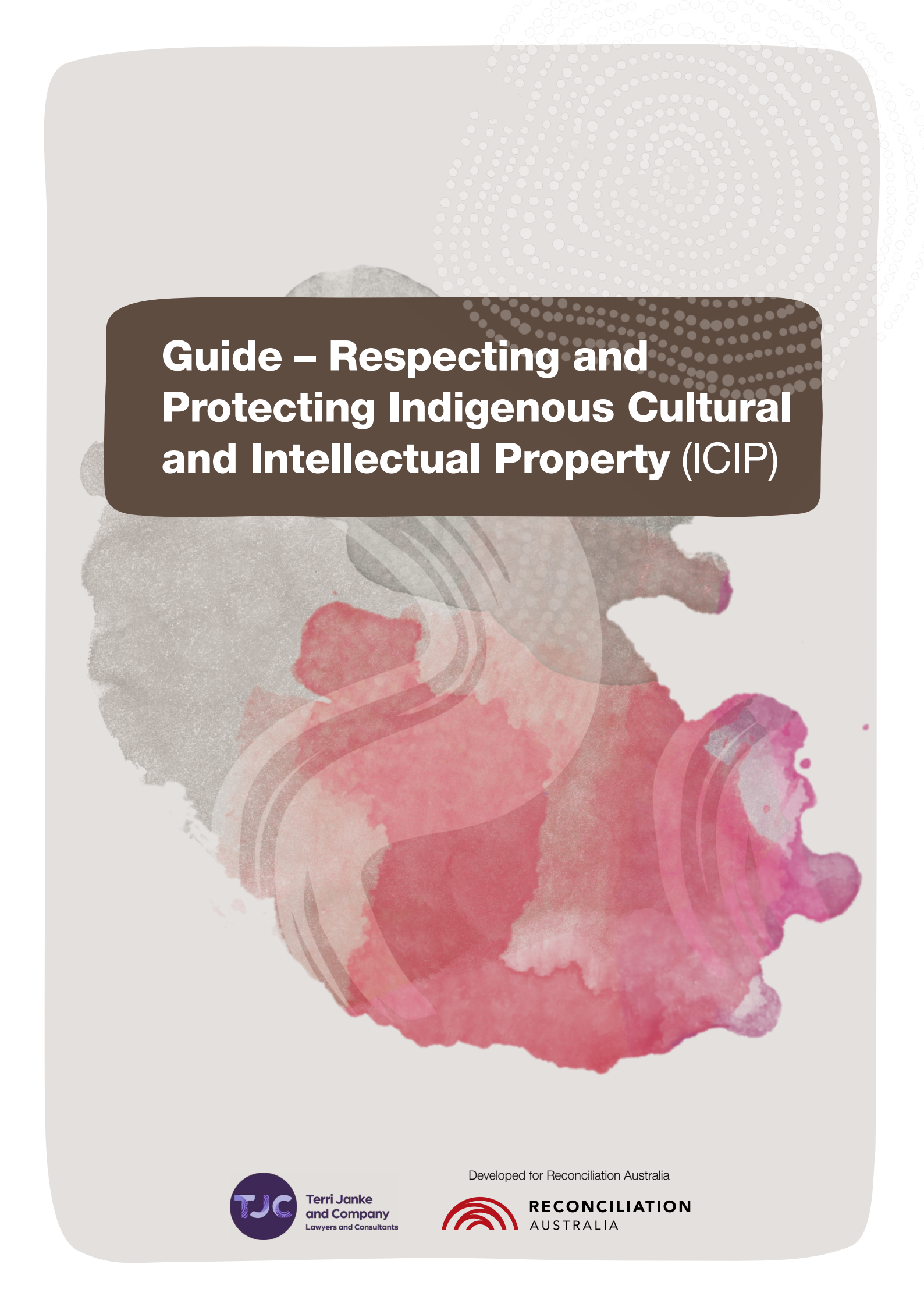




Guide – Respecting and Protecting Indigenous Cultural and Intellectual Property (ICIP)



**Terri Janke
and Company**
Lawyers and Consultants

Developed for Reconciliation Australia



RECONCILIATION
AUSTRALIA

Acknowledgement of Country

Terri Janke and Company (TJC) acknowledge the Traditional Owners of the lands on which we live and work. We extend our respect to all Aboriginal and Torres Strait Islander peoples throughout Australia. We recognise their ongoing connection to land, sea and community. We pay our respects to their knowledge, and to the Elders past and present.

Reconciliation Australia acknowledges the Traditional Owners of Country throughout Australia and recognises their continuing connection to lands, waters and communities. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders past and present.

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Reconciliation Australia is an independent, not-for-profit organisation promoting reconciliation by building relationships, respect and trust between the wider Australian community and Aboriginal and Torres Strait Islander peoples. Visit reconciliation.org.au to find out more.

Cultural Warning

Aboriginal and Torres Strait Islander readers should be advised that this document may contain names or references to people who have since passed away.

Language

Throughout this document, the term 'First Nations' is used to refer to the Aboriginal and Torres Strait Islander peoples and communities of Australia. When referring to specific communities or language groups, we seek guidance from those in authority about the respectful and appropriate language protocols.

Legal Notice

The laws and policies referred to in this publication are current as of June 2025. Any reference to laws and policies are for general use only and should not be relied upon for legal advice for a specific matter. For such matters, it is recommended to obtain professional legal advice from a suitable, qualified legal practitioner.

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Executive Summary

Reconciliation Australia commissioned Terri Janke and Company to develop this Indigenous Cultural and Intellectual Property (ICIP) Guide. ICIP is the physical and non-physical elements of First Nations cultural heritage, Traditional Knowledge and cultural expressions. Under Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*, First Nations peoples have the right to control, protect and develop their ICIP.

There are no standalone Australian laws that automatically and holistically protect ICIP. This is why this guide is important. This guide is designed to inform First Nations peoples about their ICIP rights, and to provide practical guidance to First Nations peoples on how to ensure their rights are being respected. First Nations peoples can use this guide to understand ways they can protect their ICIP rights when they are using or sharing ICIP with other people, businesses, organisations, universities, local Councils and government departments. Non-Indigenous people can also use this guide to understand and respect the ICIP rights of First Nations peoples.

ICIP is vulnerable because Australian intellectual property laws only protect things that are written down or expressed by individual people and in a material form. Intellectual property laws also only last for a limited amount of time. Because ICIP is owned by a whole community and is often not in a material form (like oral knowledge), and because ICIP rights do not end, Australian intellectual property laws do not automatically protect ICIP.

This guide offers ways for First Nations peoples to use intellectual property laws to protect ICIP.

This includes:

- Using contracts with ICIP clauses that state that Traditional Owners own their ICIP and that ICIP rights must be respected. Contracts are legally binding.
- Putting ICIP into material form. For example, if you write down your oral knowledge, the writing becomes protected by copyright law.
- Informing other people of your ICIP rights and asking them to respect those rights.

No one should use First Nations peoples' ICIP in any way without the Free, Prior and Informed Consent of Traditional Owners. This is the standard of consent set by the *United Nations Declaration on the Rights of Indigenous Peoples*. Free, Prior and Informed Consent (FPIC) means:

Free: consent is given without any pressure. You only give consent because you want to. No one should make you give consent or make you feel like you have to.

Prior: this means that your consent must be given before any activities begin.

Informed: you are told all the details of what you are consenting to. You have the right to know all details before you consent.

Consent: you give your consent.

This guide also discusses Indigenous Data Sovereignty rights. Indigenous Data Sovereignty refers to the right of First Nations peoples to control the collection, interpretation and sharing of Indigenous Data. Indigenous Data is all information that is about or affects First Nations peoples. Indigenous Data Sovereignty is important because it gives First Nations communities information that has the capacity to empower self-determination over matters that impact First Nations people.

1. Introduction

1.1 What is this guide?

This guide provides information on the rights that First Nations peoples have in relation to their Indigenous Cultural and Intellectual Property (ICIP).

This guide is designed to help First Nations peoples to understand their ICIP rights. This guide is also intended to assist non-Indigenous people to understand the ICIP rights of First Nations peoples.

Reconciliation Australia engaged Terri Janke and Company (TJC) to develop this ICIP guide.

1.2 Why is this guide important?

It is important that First Nations and non-Indigenous people understand the ICIP rights of First Nations peoples and how to respect and protect these rights. This is because Australian laws do not always protect ICIP rights (see [Gaps in Australian Law](#)). The information in this guide is important because it explains what ICIP rights exist, where the law fails to protect these rights, and how these rights can be protected when the laws fail to do so.

1.3 Who can use this guide?

1.3.1 First Nations peoples

First Nations peoples can use this guide to understand their ICIP rights. First Nations peoples can use this guide to understand their ICIP rights and how they can protect and assert them. This may be useful when engaging with local councils, the media, businesses, organisations, art galleries and audiences. The checklist at [Appendix A: General Checklist](#) can be used to check if ICIP rights are being respected.

1.3.2 Non-Indigenous people

This guide can also be used by non-Indigenous people, businesses, organisations, media, government departments and councils who are working with First Nations peoples and their ICIP. These stakeholders can use this guide to understand, respect and uphold the ICIP rights of First Nations peoples. The checklist at [Appendix A: General Checklist](#) can also be used by non-Indigenous people to check they are respecting ICIP rights.

2. Indigenous Cultural and Intellectual Property (ICIP)

2.1 What is ICIP?

ICIP refers to the physical and non-physical elements of First Nations cultural heritage, Traditional Knowledge and cultural expressions. The different forms of ICIP can be seen in the following graphic:



Figure 1: What is ICIP? Adapted with permission from © Terri Janke and Company, 2025.

ICIP can include:

- Traditional Knowledge (about Country, Kinship, and land and water management)
- Traditional Cultural Expression (includes artwork, language, stories, designs and symbols, literature, totems and caring for Country practices)
- performances (ceremonies, dance and song)
- cultural objects (including but not limited to arts, crafts, ceramics, jewellery, weapons, tools, visual arts, photographs, textiles, contemporary art practices)
- ancestral remains
- secret and sacred information (including sacred/historically significant stories, sites and burial grounds)
- sensitive information, such as Kinship
- documentation of First Nations peoples' cultural heritage in all forms of media, such as films, photographs, artistic works, books, reports, archives, records taken by others, sound recordings and digital databases.

2.2 What are your ICIP rights?

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 31 states that Indigenous peoples have the right to maintain, control, protect and develop:

- their Traditional Knowledge
- their Traditional Cultural Expressions, and
- the products and manifestations of their traditional sciences, technologies and cultures.¹

These are all ICIP. You can refer to UNDRIP Article 31 to advocate for your ICIP rights.

To protect your community's ICIP, you also have the right to:

- have your community recognised as the primary custodians and interpreters of its ICIP
- authorise or refuse the use of ICIP
- benefit from any authorised commercial use of ICIP
- keep anything that is secret and sacred safe.

All rights have corresponding responsibilities. Anyone engaging with First Nations peoples and their ICIP has the responsibility to ensure ICIP rights are respected.

Previous court cases in Australia have said that First Nations community members have obligations to protect their ICIP. This means First Nations peoples need to have the necessary power to deliver on these obligations.

UNDRIP Article 31 also states that Indigenous peoples have the right to maintain, control, protect and develop their intellectual property (IP). This means that under international law, you and your community have the right to maintain, control, protect and develop your ICIP and any IP that includes your ICIP. To understand IP better, please see the [Intellectual Property \(IP\)](#) section of this guide.

The checklist at [Appendix A: General Checklist](#) can be used to check if ICIP rights are being respected.

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 31(1).

3. How Australian Law Protects ICIP Rights

While Australia has agreed to UNDRIP, it has not implemented UNDRIP into Australian laws. Australian IP laws also do not fully protect ICIP rights. It is important to understand what Australian IP laws are and how they work. This will help you to understand when ICIP is protected by law and when it isn't.

What Australian laws DO protect

- Art
- Music
- Books
- Poetry
- Research papers
- Writings
- Film
- Recorded songs
- TV and radio broadcasts
- Plays

What Australian laws do NOT protect (if there is no contract)

- Oral songs
- Oral stories
- Knowledge
- Facts
- Ideas
- Information
- Language words
- Techniques
- Styles

Figure 2: Do Australian laws Protect ICIP Rights? © Terri Janke and Company, 2025

This guide explains what IP laws are in the next section. After that, this guide explains the ways Australian IP laws do not protect ICIP rights in more detail.

4. Intellectual Property (IP)

4.1 What is IP?

Intellectual Property (IP) refers to the creative efforts that are the result of an individual's intellectual effort, such as creations and inventions. IP laws create rights that protect the creations of individuals.

It is important to understand the basics of IP law, especially copyright, because this will help you understand the ways ICIP can be vulnerable. This will help you to better protect ICIP.

4.1.1 Copyright

4.1.1A What is copyright?

Copyright is a form of law which gives creators the right to control how their work is used.

4.1.1B What does copyright protect?

Copyright protects works that are in material form. This includes things like:

- Books
- Music recordings
- Artwork
- Photos
- Written recordings
- Databases

Copyright also protects things like:

- Film and sound recordings
- Broadcasts

4.1.1C What doesn't copyright protect?

Copyright does **not** protect:

- Oral songs
- Oral stories
- Oral information
- Ideas
- Facts
- Techniques and styles

4.1.1D Copyright requirements

Copyright protection happens automatically in Australia, if the four things below are met:

1. The work must have a connection to Australia
2. The work must be original
3. The work must be recorded in material form. Material form refers to physical mediums such as writings, artworks, and audio or video recordings
4. The work must be made with a degree of skill, labour and effort.

4.1.1E Who owns copyright?

The author or creator of a work owns the copyright in that work. For example, if an artist paints a painting, then the artist owns the copyright in the artwork.

4.1.1F Do I need to apply for copyright?

You do **not** need to apply for copyright. Copyright exists automatically in Australian law. If you have created something that meets the requirements for copyright, you have copyright rights.

4.1.1G What rights does copyright give you?

Copyright gives you the right to:

- reproduce or make copies of your work
- communicate your work to the public
- perform your work in public
- adapt or change your work
- publish your work
- earn money from your work
- prevent or restrict others from using your work.

Copyright also gives you the right to stop other people from using your work in the ways listed above.

A creator or author may choose to give a licence to another person or organisation to give permission to do certain things with their work. A licence should be in writing.

4.1.1H Can others use my copyright?

Others cannot use your copyright or any work you have copyright in without your permission.

If any person, business, organisation, council or government department wants to use your copyright work, they must get your consent and approval to do so. You can request a licence agreement or deed of assignment. Licence agreements and deeds of assignment are written contracts that allow you to give someone else permission to use your work. You can use these contracts to control how, when and where the other party can use your work, and for how long they can use it.

A **licence agreement** means that you are giving others permission to use your copyright but you still own it. You have the right to be paid for others to use your copyright work. They can only use your copyright work in ways that you agree to in the licence agreement.

A **deed of assignment** means you give others ownership of your copyright work. If you assign (give) your copyright to others, you will not own copyright in the work anymore. You have the right to be paid to assign your copyright. However, even if you assign your copyright away, you can still get a licence to use the work, even if you don't own the copyright anymore. Even if you assign away your copyright, you still have moral rights (discussed in the next section).

It is always wise to seek legal advice regarding your situation to ensure you correctly enter into a licence or deed of assignment. A licence gives permission for another person or organisation to do certain things with your work for a limited amount of time, rather than a complete assignment of copyright. This will mean you retain control on how, when and why it is used.

4.1.2 Moral rights

4.1.2A What are moral rights?

There are three IP rights that are called 'moral rights'. Moral rights are legal rights that are protected by law under the Copyright Act 1968 (Cth). Moral rights can be enforced by the courts.

The three moral rights are:

- 1. The right of attribution:** the right to be acknowledged as the author or creator or performer of a work. For example, if you write a song, and someone uses your song in a YouTube video they have posted online, the video must say that you are the creator of that song.
- 2. The right against false attribution:** the right to not have others take credit for your work. For example, if you create a painting, no one else can say that they made the painting.
- 3. The right of integrity:** the right to not have your work treated negatively. For example, if you create an artwork, someone else cannot change it without your consent.

If you think your moral rights have been breached or impacted, you can use moral rights laws to advocate for your rights. You can also contact a lawyer to assist you. Arts Law provides free legal advice to artists and arts organisations and can assist you in upholding your moral rights.

4.1.2B Who has moral rights?

The author or creator of a work

The author or creator of a work has moral rights. Examples of an author or creator of a work are:

- Artists
- Songwriters
- Book authors
- Filmmakers
- Note-takers
- Photographers

All these kinds of people have moral rights.

The performer of a work

The performer of a work, like a dancer or actor, also has moral rights.

5. Gaps in Australian Law

There are multiple differences between ICIP and IP under Australian laws. Some of these differences are:

	IP	ICIP
1. Ownership	Owned by individuals.	Owned by a community.
2. Material Form	Exists in physical (material) form. IP laws only protect works that are in material form.	ICIP is often not in material form. For example, oral knowledge is ICIP, but is not in material form.
3. Duration of Rights	Individuals who own IP only have rights to this IP for a limited period of time.	ICIP rights exist 'in perpetuity'. This means that ICIP rights last forever and do not expire.

Individual Ownership

Australian IP laws recognise and protect individual ownership. Australian IP laws do not recognise or protect communal ownership.

Examples

If a First Nations person has knowledge of a cultural story from their community and shares this story, according to cultural protocols, the story is still owned by the community and not an individual. The community would not automatically own copyright in the story either, because only individuals can own copyright.

Material Form

Also, IP laws only protect intellectual property that is in material form. This means that ICIP, such as oral knowledges and histories, which are passed on orally across generations, are not automatically protected by copyright because they are not in material form.

Examples

For example, if an author writes a book, they own copyright in the book because it is in

material form. However, if a First Nations person shares oral knowledge, but does not record it or write it down, they do not own copyright in the knowledge because it is oral and not in material form. However, if a First Nations person writes down or records their oral knowledge, they will own copyright in the writing or recordings. Similarly, if a musician composes a song, but does not record it, they do not own copyright in it because the song is not in material form. If the musician records the song, then they would own copyright in it because it is in material form.

Duration of Rights (time that protections last for)

The law states that copyright expires 70 years after the death of the author. However, ICIP such as First Nations stories or designs are passed on across generations, and for much longer than 70 years. Copyright does not adequately protect ICIP, because copyright does not provide protection for long enough to protect ICIP for all future generations.

6. How You Can Legally Protect Your ICIP

6.1 Contracts

If you are working with any person, business, organisation, media, arts centre or gallery, council, or government department, and you are sharing ICIP, you can protect your ICIP rights by using a written contract that includes an ICIP clause. An ICIP clause is a part of a contract that states that the parties to the contract agree to uphold ICIP rights. If someone wants to work with you and your ICIP, you can say they must include an ICIP clause in the contract. An ICIP clause should:

- recognise communal ownership
- assert that ICIP is owned by the Traditional Owners
- say when and how ICIP can or cannot be used
- require that ICIP is not used or adapted without the Free, Prior and Informed Consent (see Free, Prior and Informed Consent (FPIC)) of Traditional Owners
- say that cultural protocols should be followed
- ensure that Traditional Owners receive adequate benefits – benefits can be monetary or non-monetary
- ensure that Traditional Owners are paid for their time and efforts
- include a cultural mourning protocol. You can use a cultural mourning protocol to choose if and how ICIP can be used in the event of your death.

6.2 Cultural mourning protocols

Below is an example of a cultural mourning protocol that can be included in contracts:

Please select below what you would like us to do in the event of your passing (please tick one box only - if you do not tick any of these boxes then box 1 will apply):

- ☐ *The information you give may continue to be used*
- ☐ *The information you give will not be used anymore (where possible)*
- ☐ *We will ask your family representative if we can continue to use the information you give*

Name of representative:

Address:

Telephone/ email:

IP law will not automatically protect ICIP. IP law will generally only protect the rights of an individual to their work that is in a material form. This is why it is important for a contract to specifically say how ICIP rights are protected, for ICIP to be protected properly under Australian laws.

7. Other Ways to Protect ICIP

7.1 ICIP Notices

Sometimes ICIP is not in a form automatically protected by copyright. While a contract is the strongest way to protect ICIP under western law, it may not always be possible to have a contract in place. You can still let people know about your ICIP rights and encourage them to respect these rights. An ICIP Notice is something you can use to help protect your ICIP. It is

a piece of writing that you can include in a work. ICIP Notices state that:

- the work contains ICIP
- the ICIP is owned by Traditional Owners
- ICIP rights should be respected.

ICIP Notices can be used for artworks, film and audio recordings, books, writings and anything else that is in material form.

The following is an example of an ICIP Notice:

*This work embodies the cultural heritage, Traditional Knowledge and/or traditional cultural expressions of the **[Community Name]** Community. It was created with the consent of the custodians of the Community.*

*The **[Community Name]** Community has the right to maintain, control, protect and develop their cultural heritage in accordance with Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples. Dealing with any part of such materials for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the **[Community Name]** Community and may also breach the Copyright Act 1968 (Cth). For enquiries about permitted reproductions of these materials, contact **[Contact Person Name]** at **[Contact Number]**.*

There are no standalone laws to protect ICIP in Australia. This means if someone does not respect the ICIP Notice it is unclear if the courts will enforce it. This is why we recommend contracts as they enable stronger protection of ICIP rights. However, as ICIP Notices are less formal and may be easier to use than contracts, we recommend ICIP Notices are used as a starting point. At the very least, an ICIP Notice lets people know about your rights and their responsibilities.

7.2 Putting ICIP into material form

You can also protect ICIP by putting it into a material form. For example, if you have an oral song, and you record the song, it becomes protected by copyright law because it is in a material form. Also, if you write down your oral knowledge, the writing becomes protected by copyright law.

7.3 Advocacy

You can use the information in this guide about your ICIP rights to advocate for and spread awareness of ICIP rights. A lot of people might not know what your ICIP rights are or will not have heard of the term ICIP. Telling people what your ICIP rights are before you work with them or share your ICIP with them can help protect your ICIP rights. You can use UNDRIP and the section What are your ICIP rights? from this guide to inform other people about your rights. You can also use the checklist in Appendix A: General Checklist to check if your ICIP rights are being respected properly.

Following are some examples of situations where you might want to tell people about your ICIP rights:

Public speaking

If you are doing any kind of public speaking, and you will be talking about or sharing ICIP, you can tell everyone in attendance that your talk contains ICIP, and that you and your community have ICIP rights that should be respected.

Speaking with media

If you are speaking with the media about ICIP, you can tell them beforehand about your ICIP rights, and request that your rights be respected.

You can make requests like these:

- That the media only use ICIP with your consent, and that they only use ICIP in the ways that you give permission for.
- If the media will be making any reports that include language words, you can request that they only use language words with your consent. You can also request that they check any spelling or pronunciation or language words with you.
- If the media are asking you about cultural stories, you can request they allow you to review any written or video reports to ensure that their reports are culturally appropriate before they are made public.
- You can also request they use an ICIP Notice for any written or video reports.

When creating and sharing artwork

There are a few different ways that people might want to use an artwork you have created that contains ICIP. A person, business, organisation or government department might ask you if they can use an artwork you have created for their website, promotion materials, their Reconciliation Action Plan or for their offices. They might also ask you to create a brand-new artwork for their use. You can do things like these to help protect your ICIP rights:

- Request that you are paid in accordance with the NAVA Code of Practice. These are guidelines developed by the National Association for the Visual Arts. They tell you what kind of payment is fair for the use of your artwork.
- Request that a licence agreement be used. You can also request that the licence agreement includes an ICIP clause.
- Include an ICIP Notice with the artwork to ensure Traditional Owners are attributed as the owners of the ICIP in the artwork.
- Request that you be properly attributed as the creator of the artwork.
- Request that an accompanying story or piece of writing be included with the artwork to ensure the cultural integrity of the ICIP. This helps you control how people interpret your ICIP and helps make sure that the way ICIP is presented is accurate and culturally appropriate.

When sharing ICIP in research

If people, universities, businesses, organisations or government ask you to help them with research that is about or contains ICIP, you can tell researchers about rights that you have. Researchers might ask you to respond to surveys, interviews or group consultations.

If you are sharing ICIP with researchers, you have rights like these:

- The right to share in the benefits of the research. Benefits can include:
 - Being paid for your time and contributions (you can request that you are paid the rate of a consultant under the NAVA Code – [see this link](#))
 - Being given free copies of research materials once the research is completed.
 - You and/or your community being asked to assist with the collection and interpretation of research.
 - You and your community being asked by the researchers to co-author the research.
- The right to control the interpretation of any ICIP in the research.
- The right to be attributed for any contributions you make.
- The right of your community to be attributed as the Traditional Owners of ICIP.
- The right to protect the cultural integrity of ICIP.
- The right to protect ICIP for future generations.

7.4 When do I need to think about how to protect my ICIP?

You might want to think about how you can protect your ICIP if you are:

- Making your ICIP publicly available (for example, on a website).
- Creating an artwork that contains ICIP, that will be used or publicly available.
- Being consulted, and you are providing others with Traditional Knowledge or cultural knowledge.
- Performing a dance, song or play that contains Traditional Knowledge or traditional cultural expressions.
- Making or performing in a film that includes ICIP.
- Writing a book, script or paper that contains ICIP.
- Starting a business and are using ICIP in your work or business model.

7.5 How can I protect ICIP for future generations?

You or your community may like to share your ICIP for things like truth-telling, a paid community speaking event, publishing a book, podcasts, song, dance, art, cultural tours or any other way you feel you and your community would benefit from you sharing this knowledge.

If you do, you can ask for an ICIP clause to cover the arrangement in a contract. Australian laws do not automatically protect ICIP, but Australian laws protect things that are included in contracts. Therefore, if a contract has an ICIP clause, ICIP is protected by the law. We recommend that ICIP clauses recognise Traditional Owners as the communal owners of ICIP.

Cultural mourning protocols can also give future generations the power to make decisions over the ICIP you share after your passing. Please see [Cultural mourning protocols](#) for an example of a cultural mourning protocol.

8. Free, Prior and Informed Consent (FPIC)

8.1 What is FPIC?

You have the right to Free, Prior and Informed Consent (FPIC) under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). If anyone wants to consult with you or use your ICIP, your personal or community story, your artworks, recordings of you speaking or your image, they must seek FPIC from you first.

FPIC is the standard of consent set by UNDRIP that is required when engaging with First Nations peoples, their communities and their cultures. FPIC means:

Free: this means that consent is given without any pressure. You only give consent because you want to. No one should make you give consent or make you feel like you have to.

Prior: this means that your consent must be given before any activities begin.

Informed: you are told all the details of what you are consenting to. You have the right to know all details before you consent.

Consent: you give your consent.

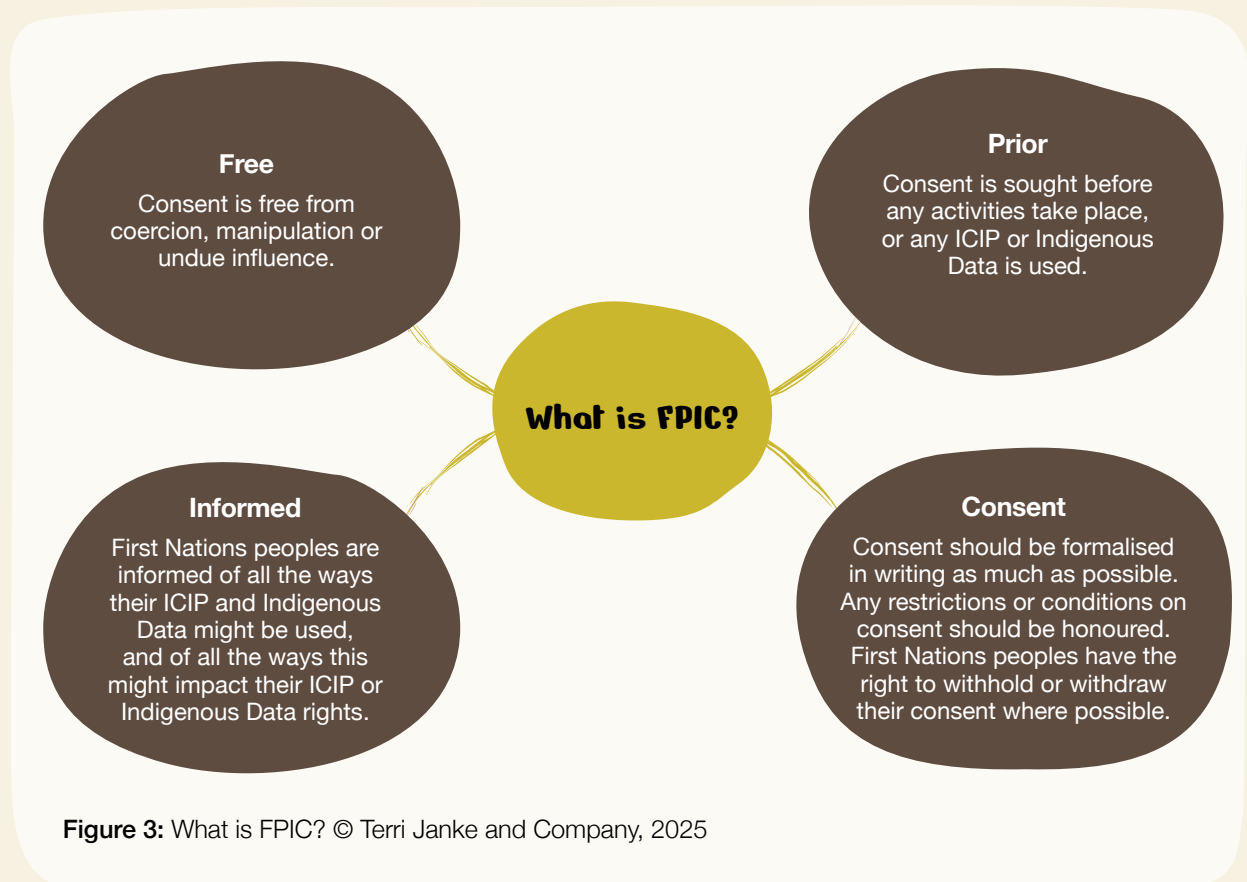


Figure 3: What is FPIC? © Terri Janke and Company, 2025

If anyone is seeking FPIC from you to use your ICIP, you can request they get your FPIC in writing, in the form of a consent form. This means that there is a written and legal record of what you consent to. If you give consent for someone to use your ICIP for something in particular, they have to ask for your FPIC again if they want to use your ICIP for anything else. If they want to change anything that contains your ICIP in any way, they must get FPIC from you again first.

Below are some examples of when FPIC rights are not being respected. Remember you can ask for your rights to be put in a contract. In the contract you can set out exactly what you are providing permission for. This will make it very clear what you have given Free, Prior and Informed Consent for.

Example 1: A First Nations artist called Debra is commissioned to create an artwork for an event that a company is hosting. Debra has heard of the good work this company does and is excited to do this. Debra gives consent for their artwork to be used for the event but does not want the artwork to be shown on the company's website. The company's employees pressure Debra to say yes to them using the artwork on the website by telling her that allowing them to use the artwork for their event means they can use it on their website, which is not true. Even if Debra says yes, she is not giving FPIC, because she has been pressured into saying yes. The company also tries to say that Debra doesn't deserve more money for the artwork being shown on the website because the artwork has already been created for the event. This is not true, because more uses for the artwork means that Debra is entitled to more money.

Example 2: A film student asks a First Nations dancer, Susie, if she would be in their video for an assignment at university. At first, Susie is excited to showcase her dancing, including Traditional Dance styles from her community and says yes. Susie does not ask any other questions, and they film the dance. However, after filming Susie asks what the course is and who the teacher is. Susie discovers they know the teacher (they have a bad history) and tells the filmmaker she no longer wants to use that dance as it makes her uncomfortable now. The filmmaker still submits the video anyway. Even though Susie said yes to being filmed first, she did not give FPIC because she was not informed of all the details before the filming was done. Susie also withdrew consent and this was not respected.

Example 3: Ryan is doing a Welcome to Country and yarning at an important event for his local council. The council wants Ryan to tell his family's Dreaming stories and his history growing up on the local Mission. Ryan feels uncomfortable doing this, but the Council says that it will make the whole event better, and that Ryan will be letting people down if he does not do it. Ryan feels bad for saying no and tells the story on the day even though he does not want to. The council record the story on the day, without Ryan's knowledge, and post it on Facebook. FPIC was not given here, because Ryan was pressured into doing something he did not want to. The council did not get his FPIC for the recording, or for posting the recording, and breached Ryan's FPIC rights.

8.2 What if I give my consent, but change my mind later?

If you give your consent for others to use your ICIP, but change your mind and want to withdraw your consent later on, you can request that your ICIP stop being used. These requests should be listened to and honoured where possible.

If the information or ICIP that you provided is used in content or resources that are published in the public domain, it might not be possible to withdraw consent. Some examples of these instances are:

- If you consent to sharing ICIP with university researchers for a research paper, once this paper is published, it is very unlikely that you will be able to withdraw your consent.
- If you consent to being interviewed for a news report, and you consent to sharing ICIP in the interview, you cannot withdraw consent after the interview has aired on TV, radio or been published online.

First Nations peoples have the right to be informed if consent cannot be withdrawn. You have the right to be informed of this before you give consent. This means that when people are asking for your consent to use your ICIP, they should tell you whether or not you can withdraw your consent later on. You have the right to ask them about this if they do not tell you first.

9. Indigenous Data Sovereignty

9.1 What is Indigenous Data?

Indigenous Data refers to information or knowledge in any format or medium, which is about and may affect Indigenous peoples as a community or an individual, such as:²

- Facts, information or statistics about or from First Nations peoples.
- Facts, information or statistics about Country
- Sensitive information about First Nations peoples, such as family histories.
- A First Nations person's personal information including their name, date of birth and mob.

9.2 What is Indigenous Data Sovereignty?

Indigenous Data Sovereignty refers to the rights of Indigenous people to own Indigenous Data and to control things like:

- the **creation** of Indigenous Data (e.g. writing down information or statistics that is about or affects First Nations peoples)
- the **collection** of Indigenous Data (how information that is about or affects First Nations peoples is collected and developed e.g. how research is conducted to collect information)
- **access** (this includes controlling who can access Indigenous Data, how they access it, and where they access it)
- **analysis and interpretation** of Indigenous Data (First Nations peoples determine what Indigenous Data means)

- **management** of Indigenous Data (including where and how Indigenous Data is stored)
- how, when, why and where Indigenous Data is **shared**, and
- how, when, why and where Indigenous Data is **used**.³

Indigenous Data Sovereignty is important because it helps contribute to self-determination and helps empower First Nations communities in culture and social and economic inclusion. When First Nations peoples are in control of information that is about or affects their communities, they can use this information to help their communities in ways that are led by First Nations people. Also, when First Nations peoples are not in control of Indigenous Data, there is the risk that the data will be interpreted in ways that are harmful for First Nations peoples. For example, data could be used or interpreted in ways that perpetuate harmful stereotypes instead of empowering communities.

² Maiam nayri Wingara Indigenous Data Sovereignty Collective, 'Defining Indigenous Data Sovereignty and Indigenous Data Governance' *Maiam nayri Wingara (Web Page)* <<https://www.maiamnayriwingara.org/definitions>>.

³ Ibid.

9.3 What are your Indigenous Data Sovereignty rights?

At the Indigenous Data Sovereignty Summit in 2018, the Maiaṃ nayri Wingara Indigenous Data Sovereignty Collective and the Australian Indigenous Governance Institute asserted that First Nations peoples have the following Indigenous Data Sovereignty rights:

1. The right to control the creation, development, stewardship, analysis, dissemination and infrastructure of data.

This means you have the right to decide:

- a) how Indigenous Data is made or collected
- b) where Indigenous Data comes from
- c) how Indigenous Data is stored
- d) what Indigenous Data means.

2. The right to data that is available and accessible at individual, community and First Nations levels.

This means that data can be accessed by individual First Nations peoples as well as groups of First Nations people.

3. The right to data that is relevant and empowers sustainable self-determination and effective self-governance.

This means you have the right to Indigenous Data that is helpful for you and your community. It also means that data helps you and your community make decisions about your lives and the things that affect your lives. This data can be used to have positive, meaningful and helpful outcomes for your community. For example, a First Nations community organisation might want access to data about participation in education in their community that they can use to develop culturally appropriate education programs.

4. The right to data structures that are accountable to First Nations peoples.

This means the way Indigenous Data is managed is in line with community needs and values.

5. The right to data that is protective and respects First Nations peoples' individual and collective interests.

This means that data can be used to help achieve your community's goals. It also means that data is not collected or interpreted in ways that are harmful to First Nations peoples (e.g. the data does not contribute to stereotypes).

In situations where you are sharing your ICIP, individuals and organisations may create records which include your ICIP and Indigenous Data. For example, if you speak with a government department and you share information about yourself, the government department may have data about your name, age, address, mob and culture. You have the right to access that data.

9.4 Keeping Places

A Keeping Place is a safe, First Nations led space for the collection, storage and repatriation of First Nations cultural materials, designed to help preserve and celebrate First Nations cultures. Keeping Places can be physical places and/or digital databases. It is possible that ICIP and Indigenous Data you share may be held in a Keeping Place if you consent to it.

Important things to consider when it comes to Keeping Places are:

- Are ICIP and Indigenous Data stored securely?
- Is access to ICIP and Indigenous Data appropriately restricted to those with cultural authority to access it and according to cultural protocols?
- Do you have access to any ICIP or Indigenous Data you contribute to a Keeping Place?
- If it is a digital Keeping Place, are there cybersecurity risks?
- Is access to secret, sacred and culturally sensitive information (such as men's business and women's business) restricted?

Are ICIP and Indigenous Data appropriately and adequately categorised, tagged, filed and stored so that people know when information is sensitive or restricted?

10. Examples of How to Uphold Your ICIP and Indigenous Data Sovereignty Rights

This part explains what your rights are in relation to a variety of activities. You can refer to this part to understand how to protect your ICIP and Indigenous Data Sovereignty rights. There is a checklist later at [Appendix A: General Checklist](#) you can refer to to make sure you're covering everything.

10.1 Welcomes to Country and smoking ceremonies

Traditional Owners who are asked to do a Welcome to Country or smoking ceremony have the right to be paid for their time. The fee for Welcomes to Country and smoking ceremonies are often set by Aboriginal Land Councils. Many Aboriginal Land Councils offer Welcomes to Country and smoking ceremonies as a service and can be contacted to provide these services.

Helpful Resources

Part 8 of the National Association for the Visual Arts' *Code of Practice for Visual Arts, Craft and Design* (the NAVA Code) also provides guidance on the appropriate fees for Welcomes to Country and smoking ceremonies. To access Part 8 of the NAVA Code, [click here](#).

10.2 Artworks and performances

If you are producing an artwork or participating in a performance, you have multiple rights you should advocate for. There are resources you can use to advocate for these rights to be upheld.

Copyright

If you produce an artwork, you automatically own the copyright in this artwork. This means that no one should use your artwork without your permission. Under Australian intellectual property (IP) laws, you have rights to benefit from use of that artwork. Refer to [4.1.1 Copyright](#) for more information on your copyright rights.

Moral rights

Artists and performers have moral rights. Refer to [4.1.2 Moral rights](#) for more information on your moral rights.

ICIP

If your artwork or performance contains ICIP, you and your community have rights to this ICIP. See [What are your ICIP rights?](#) for more information on your ICIP rights. Because Australian IP laws do not completely protect ICIP automatically, it is important that you enter into a written contract before your artwork or performance is used. If a person, organisation, business, council or government department asks you to create an artwork or do a performance, you can use written contracts to:

- state and ensure that the ICIP in the artwork or performance is owned by the Traditional Owners
- ensure that Traditional Owners are acknowledged and attributed as the owners of ICIP in the artwork or performance
- ensure the ICIP can only be used in ways that you or your community agree to.

Helpful Resources

Arts Law

You can contact Arts Law for free legal advice in relation to your artwork

Arts Law website: artslaw.com.au/contact

Arts Law email: artslaw@artslaw.com.au

Arts Law phone: (02) 9356 2566

The NAVA Code of Practice

The NAVA Code, developed by the National Association for the Visual Arts, outlines the standards for working conditions for people in the arts industry. Part 8 of the NAVA Code includes guidance on how to appropriately pay artists and performers for their work. This includes guidance on:

- [artist fees for commissioning new artworks](#)
- [public art](#)
- [licensing for print reproduction and digital use](#)
- [performances](#)

10.3 Renaming, dual-naming and signage

Councils, businesses, universities, organisations and government departments may work with First Nations communities to:

- rename places, buildings or areas with their traditional names, a name that is in a First Nations language, or the name of a First Nations person
- give a place a dual name – a non-Indigenous name as well as a name that is in First Nations language
- create signage for a place that includes First Nations language or information about local First Nations histories or knowledges.

Renaming, dual-naming and signage promotes and acknowledges First Nations peoples as the Traditional Owners of their lands and the connection between communities and Country. For example, K'gari, previously known as Fraser Island. The use of First Nations languages, histories and knowledges in renaming, dual-naming and signage means that ICIP is being used. Language and its revitalisation is deeply important to First Nations cultures and should be respected.

Self-determination

Under UNDRIP Article 3, First Nations peoples have the right to self-determination over their cultural development. This means you have the right to lead or have a say in how your community's ICIP, including language, histories and knowledge, is used in renaming, dual-naming or signage. Self-determination should be specifically defined by the community. As Australia has not implemented UNDRIP, this means the right to self-determination is technically not protected in Australian law. This is why contracts are important. We recommend that where you share your ICIP, a contract says that the parties will respect UNDRIP, including the right to self-determination.

FPIC

Renaming, dual-naming and signage involves using ICIP. You and your community have the right to be consulted about the use of your ICIP and therefore have the right to be consulted about the use of your community's language, histories or knowledges. First Nations languages, histories and knowledges should not be used without the FPIC of Traditional Owners.

If anyone wishes to use the name of a person who has passed away, or information about a person who has passed away, for renaming, dual-naming or signage, FPIC must be given by that person's family. If the family cannot be contacted, the person's community group should be contacted for FPIC.

Interpretation

Under UNDRIP Article 31, First Nations peoples have the right to maintain, control, protect and develop their ICIP. This means you have the right to control the way your ICIP is interpreted.

You have right to ensure the use of language, histories and knowledges is accurate and sensitive, to protect your cultural heritage. This includes having control over the spelling and pronunciation of language words and the interpretation of any text or stories that are included in signage.

To ensure the spelling of language words is accurate, you can request to review the spelling of words before they are used. To ensure respectful and accurate pronunciation of language words, you can also request that signage includes accompanying text that explains the appropriate ways to pronounce any language words.

Indigenous Data Sovereignty

If First Nations languages, histories and knowledges are being recorded and included in renaming, dual-naming and signage, then this is Indigenous Data. Language and stories are also ICIP. For example, a local council that is renaming a place with a word from your language might have records of different language words and their meanings. If the council consulted with you and your community, they may have records of what you and your community said. You have the right to control how this data is collected, interpreted, used and shared. This means you and your community have the right to control the spelling of the language words and what they mean. You also have the right to access this Indigenous Data. The council may also use things that you and your community said in consultations to create signage for the place that is being renamed that outlines your community's history. You and your community have the right to control what information about your history is used in the signage and how this information is used to tell a story.

10.4 Oral history and knowledge

10.4.1 Sharing oral history or knowledge

If you are sharing verbal history or knowledge with others, you are sharing ICIP. This means you have a number of rights when sharing verbal history or knowledge, including:

- the right to be consulted about any activities before sharing your verbal history or knowledge
- the right to FPIC, which includes:
 - the right to be informed of how your oral history or knowledge may be recorded – your oral history or knowledge may be recorded by being written down, audio recorded, or video and audio recorded
 - the right to be informed of how any records of your oral history or knowledge may be stored and accessed
 - the right to be informed of every way that your oral history or knowledge might be used, shared or published.
- the right to control how your oral history or knowledge is interpreted (e.g. if the media wants to do a story on your oral history or Traditional Knowledge, you have the right to control what they say and how they represent your oral history or knowledge. They should allow you to review the story to make sure it is accurate and culturally appropriate. They should not print or air the story before you approve of how they describe your oral history or knowledge)
- the right to be acknowledged and attributed for any oral history or knowledge you share (e.g. if you share oral history or knowledge with a university researcher, and they publish their research, the research should say that you provided the researcher with the information)
- the right to be paid for your time and the knowledge you share - you also have the right to be paid for any audio or video recordings of you that are to be used in resources or published publicly (e.g. if your local council wants to do consultations with you and asks you to share information about your community's history so the council can promote local First Nations cultures, you have the right to be paid for your time. If the council wants to film what you say, so they can post the video on their website, you should be paid more money)
- the right to have your community acknowledged as the owners of any Traditional Knowledge or cultural knowledge (e.g. if you create an artwork for a government department's office, and the artwork contains any Traditional Knowledge or cultural knowledge, they should hang a notice next to the artwork that says your community are the Traditional Owners of the ICIP in the artwork)
- the right to make sure any secret, sacred and sensitive information remains confidential or secret - you do not have to share information if it is not appropriate to do so or you do not wish to.

You have the right to be consulted before any recordings of your oral history or knowledge are made. No recordings should be made without your consent. You have the right to refuse your oral history or knowledge being recorded. You have the right to be informed of all proposed uses of the recordings.

When sharing oral history or knowledge, there are strategies you can use to ensure that Traditional Owners are recognised as the owners of this oral history and knowledge. These strategies include:

- consent forms, and
- Traditional Owners' notices.

Consent forms

A consent form is a kind of contract that you can use to allow others to use your ICIP. You can also use a consent form to restrict how others use your ICIP. Before sharing your oral history or knowledge, you can request a consent form that:

- includes an ICIP clause, stating that all ICIP shared is owned by the Traditional Owners
- states that ICIP will only be used in the ways you consent to it being used
- includes a cultural mourning protocol which allows you to choose how your oral history or knowledge may be used in the event of your passing – you can also use a cultural mourning protocol to choose how any recordings of your oral history or knowledge may be used in the event of your passing (see [Cultural mourning protocols](#) for an example).

ICIP Notice

You can also request that if your oral history or knowledge is going to be included in any resources, such as writing, websites, books, designs, brochures etc, that these resources include an ICIP Notice. Please see [ICIP Notices](#) for more information.

10.4.2 Is there copyright in oral history and knowledge?

Copyright does not protect oral history or knowledge. This is because oral history and knowledge are not in material form, meaning they are not recorded in some way.

If someone is making written, audio and/or video recordings of your oral history or knowledge, the person who makes the recordings owns the copyright in the recordings. This is because the person making the recordings is the person creating the material form; therefore, they own copyright in the material form. However, while the person making the recordings owns the copyright in the recordings, you still own your stories, the knowledge itself and any other ICIP.

Because by default you will not own the copyright in any recordings others make of your oral history or knowledge, it is important to know all the details of how recordings of your oral history and knowledge may be used, stored, accessed, shared, adapted or published before you consent to your oral history or knowledge being recorded.

Best practice requires that Traditional Owners should have copyright assigned to them. You can advocate for this.

10.4.3 What happens if I write my oral history or knowledge down?

If you put your oral history or knowledge into writing, you have put it into material form, which means that the writing becomes automatically protected by copyright laws. This means that you have ICIP rights in the history and knowledge as well as copyright and moral rights in the writing.

If anyone uses the writing without your permission, this breaches your rights, and you have legally enforceable rights under copyright law to stop the other person/people from using your writing.

10.4.4 Oral history and knowledge checklist

When sharing your oral history and knowledge, you can use the following checklist to help make sure your rights are considered, and you are aware of all the risks involved:

- ☐ Is there FPIC?
- ☐ Have I been informed of all the ways my oral history or knowledge might be used?
- ☐ Do my community and I have control over how our oral history and knowledge is interpreted?
- ☐ Are there consent forms in place?
 - ☐ If yes, do consent forms include ICIP clauses and cultural mourning protocols?
- ☐ Is my oral history or knowledge being recorded?
 - ☐ If yes, have I given my consent to this?
 - ☐ If yes, have I been informed of all the ways these recordings will be used, stored, accessed, shared, adapted or published?
 - ☐ If yes, have I been told how long the recordings will be used for?
- ☐ Is my oral history or knowledge being published anywhere or used in any resources?
 - ☐ If yes, have my community and I been compensated?
 - ☐ If yes, do publications or resources include Traditional Owners' notices that acknowledge my community and I as the owners of our oral history and knowledge?

11. Artificial Intelligence (AI)

11.1 What are the risks with AI?

Artificial Intelligence (AI) is increasingly used in different areas of social, cultural and economic life. AI refers to computer systems that are able to perform tasks that usually require human intelligence, such as visual perception, speech recognition, decision-making and translation between languages.⁴ For example, AI can produce its own digital artwork. AI can be things like ChatGPT, Ask AI, Microsoft Copilot or Grammarly.

AI creates risks for ICIP. This is because AI does not have cultural understanding. AI takes information from all across the internet and other sources. These sources cannot be verified. This means that if AI is used in First Nations spaces, AI may:

- use content or sources that contain ICIP without permission from Traditional Owners
- use content or sources that contain Indigenous Data without consent
- use content from sources that are not culturally safe

- produce inaccurate or culturally insensitive information, and explain it in ways that lack nuance
- use ICIP or Indigenous Data without acknowledging or attributing Traditional Owners
- create works that misrepresent ICIP
- produce content that includes stereotypes
- misspell language words.

Because AI is such a new technology, it is not certain how the law applies to it. Therefore, it is likely that it may not be possible to own copyright in AI materials because copyright is only afforded to human authors who contribute 'independent intellectual effort'.⁵ In the future, it may be that certain First Nations led AI produces content based on culturally informed models. However, it is still recommended that any use of AI be treated with a high degree of caution.

⁴ 'An Introduction to Artificial Intelligence', *Australian Signals Directorate (Web Page)* <<https://www.cyber.gov.au/resources-business-and-government/governance-and-user-education/artificial-intelligence/an-introduction-to-artificial-intelligence>>.

⁵ 'Artificial Intelligence (AI) and Copyright', *Arts Law (Web Page)* <<https://www.artslaw.com.au/information-sheet/artificial-intelligence-ai-and-copyright/#:~:text=AI%20tools%20do%20not%20currently,if%20a%20work%20was%20protected.>>>.

11.2 What can you do to protect ICIP and Indigenous Data against AI?

If you are working with a company, organisation, government department or university on projects that include ICIP and Indigenous Data, there are things you can do that may help reduce the risks of AI. You can do things like:

- ask if any AI programs will be used in the project
- ask if they have an AI policy or protocol
- ask them to ensure that any cultural knowledges and sources are properly attributed, and have FPIC
- ask that any contracts state that AI will not be used for anything that includes ICIP or Indigenous Data
- reference UNDRIP, and state that using AI in ways that misrepresents ICIP is a breach of your rights under Article 31 of UNDRIP
- ask them not to use AI to produce any Indigenous artworks or designs
- ask them not to use AI to find sources of information about First Nations peoples, communities or histories
- ask them not to use AI programs to write any accompanying text, stories or summaries about First Nations peoples or their ICIP (e.g. if you create an artwork for an art gallery, and they are writing a description of the story that the artwork depicts, ask them not to use AI to write this description)
- if you are participating in consultations and you are talking about ICIP and/or Indigenous Data, you can ask that no AI generated transcripts are used to transcribe or summarise what you say.

Appendix A: General Checklist

This checklist can be used to ensure that ICIP rights are being respected. This list is an adapted version of Terri Janke and Company's True Tracks® Principles:

- ☐ **Self-determination:** Are activities led by First Nations people?
- ☐ **Interpretation:** Will Traditional Owners and ICIP rights holders control the interpretation of any ICIP or Indigenous Data?
- ☐ **FPIC:** Has consent been given by Traditional Owners for the use of any ICIP or Indigenous Data (see What is Indigenous Data?)?
- ☐ **FPIC:** Have Traditional Owners been informed of all proposed uses or adaptations of their ICIP and Indigenous Data?
- ☐ **Attribution:**
 - ☐ Have First Nations communities been attributed as the owners of ICIP?
 - ☐ Have you been attributed for the contributions you have made?
- ☐ **Protection:**
 - ☐ Do any contracts that are in place include an ICIP clause, stating that ICIP is owned by the Traditional Owners?
 - ☐ Are there any ICIP Notices used?
- ☐ **Benefit sharing:** have Traditional Owners been compensated for sharing their ICIP, Indigenous Data, personal and community stories and time?



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reconciliation.org.au/truth-telling

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