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First Languages, Law & Governance Guide

A Guide for Indigenous Language Centres to assist them in managing the legal and governance challenges of working on Indigenous language projects

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Commissioned by the Department of Communications and the Arts



Australian Government

Department of Communication and the Arts



First Languages, Law and Governance Guide

A Guide for Indigenous Language Centres to assist them to manage the legal and governance challenges of working on Indigenous language projects. This Guide is relevant to a variety of language resources including materials delivered in language classes, at festivals and community events and professional development activities by Language Centre staff.

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WARNING

Terri Janke and Company would like to advise readers that this report may contain images or names of people who have since passed away.

Important legal notice

The laws and policies referred to in this publication are current as at 3 March 2020. Any reference to laws and policies are for general use only. You should not rely on this document for legal advice for a specific matter. We recommend you obtain professional legal advice from a suitable qualified legal practitioner.

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Glossary

Abbreviations

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
CATSI Act	Corporations (Aboriginal & Torres Strait Islander) Act 2006
Cth	Commonwealth
FLA	First Languages Australia
ILA	Indigenous Languages and Arts (ILA) program administered by the Australian Government's Department of Infrastructure, Transport, Regional Development and Communications (formerly Department of Communications and the Arts)

Terms

Aboriginal Corporation (or Torres Strait Islander Corporation) or Indigenous Corporation	Corporations established under the Corporations (Aboriginal & Torres Strait Islander) Act 2006
Auspice	An auspice is an organisation that manages grant funding on behalf of a group, person or another organisation. For example, a small group of language workers may be unincorporated and will use a larger organisation such as a land council as their auspice in order to receive grant funding.
Austlang	A database managed by the Australian Institute of Aboriginal and Torres Strait Islander Studies that provides information about Aboriginal and Torres Strait Islander languages which has been assembled from a number of referenced sources.
Indigenous	Indigenous refers to Indigenous peoples, the Aboriginal and Torres Strait Islander peoples, from Australia. Also, called First Nations and/or First Peoples.
Indigenous Cultural and Intellectual Property (ICIP)	'Indigenous Cultural and Intellectual Property' or 'ICIP' is widely used in Australia following the report Our Culture: Our Future. ICIP includes intangible and tangible aspects of cultural heritage from cultural property and cultural sites to languages, human remains and documentation of Indigenous peoples. ICIP is transmitted from generation to generation. It is constantly evolving and its creation is on-going.
Indigenous Cultural Expression	Manifestations of Indigenous culture including performance, dance, stories, art, designs, language, names, symbols, handicrafts and ceremonies.
Indigenous Knowledge	Knowledge passed down through the generations and pertaining to Indigenous peoples and their region. It includes ecological knowledge of Country and plants, healing, ways of Indigenous knowing and cultural practices.
Orphan works	Orphan works are copyright material where the author cannot be identified. The rules of copyright protection continue to apply even if the author is not presently identifiable. Orphan works may be protected by copyright – there is no special exception that allows for unlicenced use of orphan works.

Introduction

“A key aim of our language work is ensuring Aboriginal and Torres Strait Islander people are at the forefront: our mob should be leading language projects and programs from inception to completion.”

Daryn McKenny, Miromaa Aboriginal Language and Technology Centre

“The aim of our language work is to give our people the self-determination to teach their own language, and share their own culture.”

Lynette Ackland, Gugada and Mirning woman, Manager Far West Languages Centre.

Aim of the guide

Indigenous languages are the foundation of Indigenous identity. Today, there are many Indigenous peoples who have been impacted since colonisation, and this means that there is a lot of work being done by hard working members of the Aboriginal and Torres Strait Islander communities to awaken and strengthen Indigenous languages. As stated by First Languages Australia, Aboriginal and Torres Strait Islander people have the right to access the resources and all the support needed to be able to once again hear and speak their languages.¹

Indigenous language revitalisation is gaining momentum. Many Aboriginal and Torres Strait Islander groups and communities are establishing programs which will collect and hold language recordings to develop languages materials so that the languages can be spoken with strength and pride. The increasing use of digital technology in innovative and culturally sensitive ways is helping communities with the capture, teaching and learning of their languages.

The management of Indigenous language projects presents many legal and governance issues including dealing with copyright, publishing agreements and managing legal corporations. This guide aims to be a practical resource for Indigenous Language Centres (Language Centres). It contains information and advice to assist centres with the management of language projects and programs, intellectual property (IP), Indigenous Cultural and Intellectual Property (ICIP), governance issues, and commercial and business objectives. Importantly, it positions Indigenous languages and projects within the framework of ICIP and provides practical advice for best practice and ICIP protection using the *True Tracks®* principles.

The guide focusses on three essential aspects of running a Language Centre:

1. Good governance practices
2. Managing contracts
3. Strategic use of IP

By providing an overview of these three areas, along with practical advice and solutions, we hope this guide will enable Language Centres to:

- implement strong governance and institutions that safeguard their IP and ICIP rights
- manage and protect their rights and culture through law and contracts
- use contracts to make important aspects of ICIP protection legally binding on project partners
- become more financially self-reliant by capitalising on their significant knowledge and cultural assets and diversifying their income streams
- ensure that the legal rights in language resources are owned and managed in culturally appropriate ways

Strong governance structures and commercially robust business planning will ensure that Language Centres grow strong, stay strong and protect culture long term.

The Australian Government's Indigenous Language and Arts Program

Aboriginal and Torres Strait Islander individuals, communities and organisations devote considerable time, effort, passion and expertise to keeping their languages and cultures vibrant and strong.² The Australian Government provides annual operational funding to more than 20 Language Centres across Australia through its Indigenous Languages and Arts (ILA) program.³ While these Language Centres are listed here by state, language areas do not necessarily align with state borders.

LANGUAGE CENTRE NAME	LANGUAGE(S)
New South Wales	
Miromaa Aboriginal Language & Technology Centre	Awabakal (directly) and provision of support for many other languages nationally
Muurrbay Aboriginal Language & Culture Co-operative Ltd	Gumbaynggirr, Gathang, Bundjalung, Darkinyung, Dhanggati, Yaygirr
Regional Enterprise Development Institute Ltd (Murdi Paaki Language Hub)	Gamilaraay, Yulaalarayaay, Paakantyi/Barkindjil, Ngiyampaa Wangaaypuwan, Wayilwan and Muruwari
Wiradjuri Condobolin Corporation	Wiradjuri, Wemba Wemba, Yorta Yorta, Nari Nari
Northern Territory	
Batchelor Institute of Indigenous Tertiary Education	Murrinh-Patha, Marri Ngarr, Marri Amu, Marri Tjevin, Magati Ke, Malak Malak, Ngan'giwumirri, Ngan'gikurunggurr, Jaminjung, Marrithiel, Matngele, Burarra/Gun-nartpa, Djinang, Ndjebbana, Nakkara, Kune, Worrorra, Wunumbal, Ngarinyin—Ungarinyin
Ngukurr Language Centre Aboriginal Corporation	Marra, Ritharrnu, Wagilak, Ngandi
Papula Apparr-Kari Aboriginal Corporation	Warumungu, Garrwa, Mudburra, Warlmanpa, Alyawarra, Warlpiri
Queensland	
Cape York Institute	Angkamuthi, Mpakwithi, Gudang, Guugu Yimidhrr, Wik-Mungkan, Wik-Elken, Wik-Ngadharr, Wik-Ngathanja, Olkola
Gidarjil Development Corporation	Taribelang (Darpil), Gureng Gureng, Bayali, Gangulu, Darumbal, Mandalgu (Wadja), Yiman, Barada, Bidjara, Waka Waka, Wadjingu
North Queensland Regional Aboriginal Corporation Languages Centre	Barada, Barana, Bindal, Biya, Tagalaka, Wiri, Yirandali, Djabugay
Torres Strait Regional Authority	Kala Lagaw Ya, Meriam Mir
Yugambeh Museum (Kombumerri Aboriginal Corporation for Culture)	Kabi Kabi, Waka Waka, Bidjara, Gunggari, Yugambeh, Gugu Jan, Jandai
South Australia	

LANGUAGE CENTRE NAME	LANGUAGE(S)
Ceduna Aboriginal Corporation (Far West Languages Centre)	Wirangu, Gugada/Kokatha, Mirning, Pitjantjatjara, Yankantjatjara
The University of Adelaide – Mobile Language Team	Adnyamathanha, Arabana, Barngarla, Diyari, Kuyani, Lower Arrernte, Narungga, Ngayawang, Nukunu, Wangkangurru, Yirawirung, Yankunytjatjara, Kaurna, Barngarla
Tasmania	
Tasmanian Aboriginal Centre Ltd (TAC)	Palawa Kani
Victoria	
Victorian Aboriginal Corporation for Languages (VACL)	Gunditjmara, Taungurrung, Boon Wurrung, Tati Tati, Latji Latji, Wadi Wadi, Mutti Mutti, Wathurung
Western Australia	
Bundiyyarra Aboriginal Community Aboriginal Corporation	Wajarri, Badimaya, Yinggarda, Nhanda, Warriyangka, Malgana, Ngarla
Mirima Council Aboriginal Corporation	Miriwoong, Gajerrong
Noongar Language Centre	Nyaki Nyaki, Bibbulman, Yuat, Wardandi, Kaniyang, Goreng, Pinjarup, Wiilman, Wadjari, Wajuk, Balardung, Tjapanmay
The National Trust of WA	
Wangka Maya Pilbara Aboriginal Language Centre (Aboriginal Corporation)	Ngadju, Ngalia, Tjupan, Kaalamaya, Marba, Cundeelee Wangka, Kuwarra Putijarra, Yinhwangka, Ngarla, Kariyarra, Nyamal, Manyjilyarra, Nyangumarta, Martu

Collectively, these Language Centres provide services, research and do revival work for approximately 150 different Indigenous languages. As well as the ILA funded Language Centres, there are many other language organisations and community groups across Australia who are dedicated to language revival. These organisations exist at the local, regional and state levels in urban, regional and remote areas of the country, with some working across multiple language groups and communities. They all do important work for their respective languages and have their own set of unique circumstances due to varying historical, political and cultural environments. All Language Centres, community organisations, projects and initiatives across Australia will find this guide useful.

First Languages Australia

Founded in 2013, First Languages Australia (FLA) is the peak body committed to ensuring the future strength of all Aboriginal and Torres Strait Islander languages.

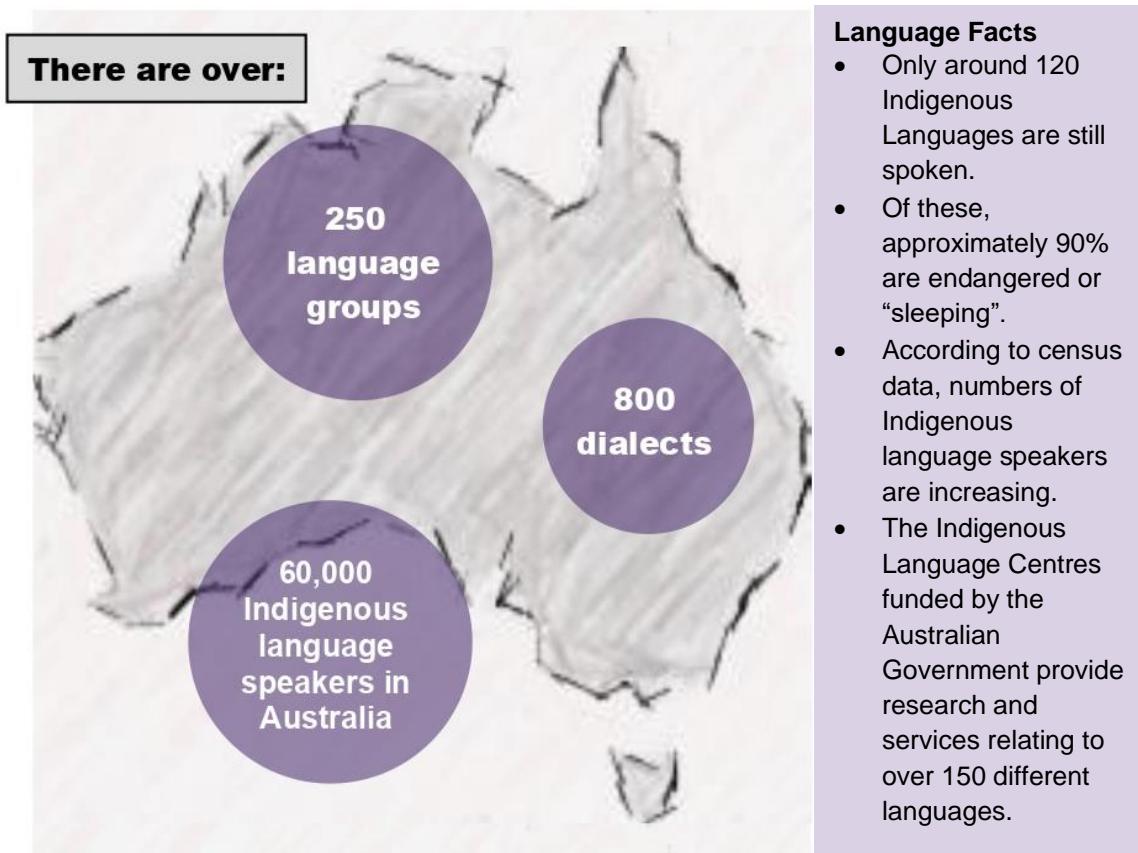
FLA supports the network of Language Centres and community language programs around Australia while advocating on behalf of the language communities to governments at all levels. The organisation takes a leading role in the promotion of First Languages to raise awareness of their diversity and importance to all Australians. FLA provides communication within the network, undertakes research and produces publications and resources to support the work being done in community language programs.⁴

i Indigenous Languages and Revitalisation in Australia

Practising culture through language

Aboriginal and Torres Strait Islander languages are an integral part of Indigenous cultures and identities. They are central to Indigenous cultural heritage as an important vehicle for cultural practices, cultural expressions and the transmission of knowledge and stories. Languages contain environmental, social and spiritual knowledge, support kinship structures and provide communities with a sense of belonging. They connect people to each other and the lands, seas, plants and animals. This being the case, Indigenous Language Centres hold and protect vast amounts of cultural knowledge.

Indigenous Languages in Australia



The National Indigenous Languages Survey Report 2005, acknowledged the past role of governments in the decline of Australian Indigenous languages, not only through neglect but also through active and punitive measures to suppress languages:

This history is seen by many as creating a responsibility for present-day governments to do what they can to repair the damage, where this is desired by Indigenous people. It is not a question of restoring the past, but rather, of building new institutions for the future in which language and culture are recognised as playing a positive role in raising new generations who are self-aware, capable and proud of their heritage.⁵

The first National Indigenous Languages Policy was launched in 2009 as Indigenous Languages – A National Approach.⁶ It recognised the need for coordinated action to support Indigenous languages. The policy called for government, Language Centres, and educational and research institutions to collaborate. The Commonwealth Parliament Inquiry, Our Land, Our Languages (2012), highlighted that Indigenous language use and learning provides

significant social, economic and health benefits to individuals and communities.⁷ With Language Centres playing a leading role, Indigenous communities are continuing their revival and preservation efforts to ensure their languages are passed on to the next generation.

The scope of language revitalisation activities

The scale and scope of the projects undertaken by Language Centres are extensive and ambitious. For example, the Wangka Maya Pilbara Aboriginal Language Centre serves an Aboriginal population of over 7,500 people spread over 502,000km², incorporating eight languages. Their key objective is to build capacity to deliver comprehensive language and linguist services. In order to fulfil this goal, Wangka Maya employs new technologies and innovative services.

Consultation with Language Centres during drafting of this guide showed enthusiasm and creativity in researching, design and delivery of language services. New and emerging technologies are further diversifying the scope of language revitalising activities.

Embracing technology

The resources developed by Language Centres has extended far beyond print media and physical publications (e.g. dictionaries, books and posters). In the current digital era, Language Centres frequently use digital technologies to collect, store, and facilitate community access to language resources. Language Centres embrace audio-visual recordings, digital archives and databases, web portals, cloud storage, language apps and even emerging technologies such as virtual reality (VR).

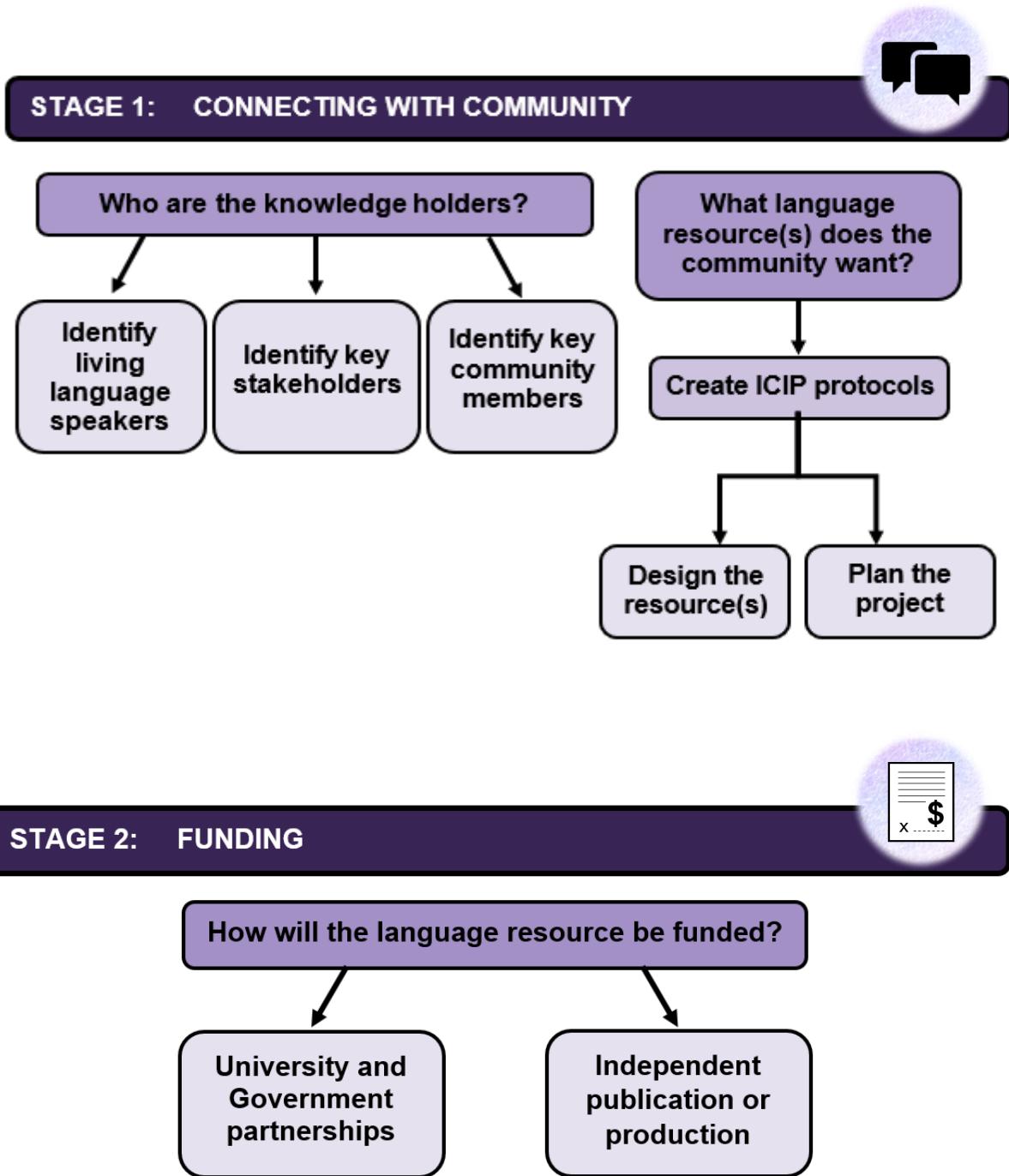
Teaching language

Language Centres have developed diverse methods for teaching languages and include participants of all ages such as early-age, youth and Elders. Language programs and projects take place in urban, regional and remote locations, including in classrooms and on Country. On-Country teaching and learning of languages often incorporates other cultural activities such as camping trips, ceremonies, art making, song and performance.

The broad scale and scope of Indigenous language projects means that Language Centres need to consider ever more complex legal and governance issues that arise in response to their different activities and resource development projects.

ii The Life of a Language Resource

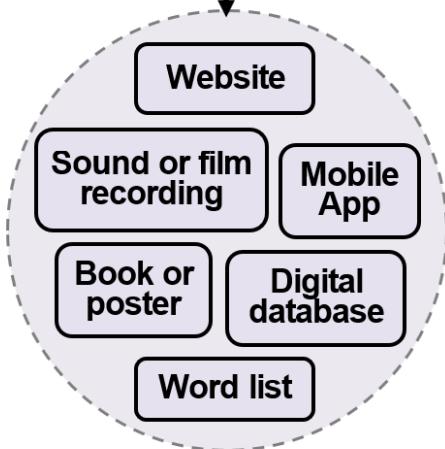
To focus on the perspectives and needs of Language Centres, this guide provides information for each stage of the life of a language resource. Keeping in mind that every language resource project has unique needs, challenges and aims, this guide provides a template 'life of a language resource' to help Language Centres plan their projects.



STAGE 3: CREATING THE RESOURCE



How will the language be recorded?



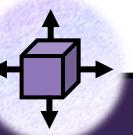
Consulting knowledge holders

What existing resources do you want to use?

Legacy Materials

Orphan Works

STAGE 4: DISTRIBUTING THE RESOURCE



How will the language be used?

Will it be used commercially?

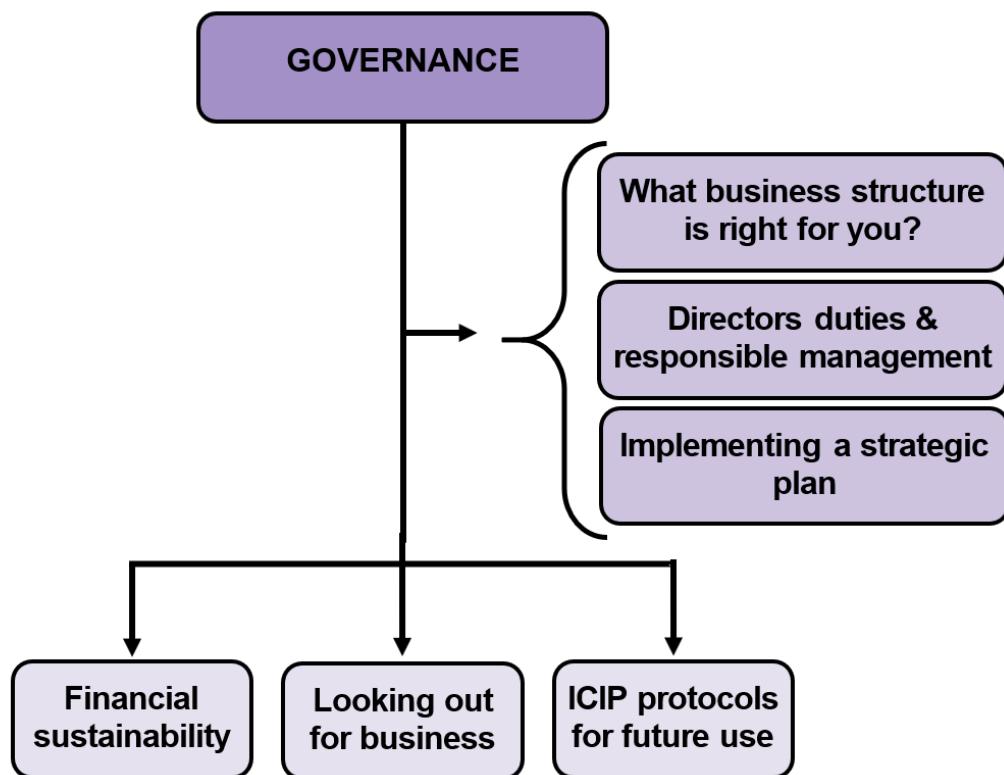
Who will have access?

Conditions for use?

Will it be used for education?



STAGE 5: PLANNING FOR THE FUTURE



At each stage of the life of a language resource, various legal and governance decisions need to be made.



Stage 1: Connecting with community

At the outset of any language revival or maintenance project, the first question asked is: who can speak our language? The language may be in various stages of revitalisation: some people who start out on a language project have been asked by key community members and knowledge holders to revive the language while others are starting without already knowing living language speakers and knowledge holders. Nevertheless, starting out any language project means identifying living speakers and knowledge holders.

Starting the conversation about revitalising language can be very painful for all involved because it brings up the past and history around why language needs to be revived. Many Elders feel shame around the fact that their language was taken away from the community. It is important to acknowledge their trauma and be understanding about any possible reluctance to speak the language. If they want to be involved in the project, it is important to make sure that their consent is:

- Free: voluntarily and without coercion, intimidation or manipulation
- Prior: well in advance of commencement of activities

- Informed: after the language project has been fully and sufficiently explained to them

Planning carefully when and how you obtain consent will ensure the success of the project, and that it is self-directed by the community. Talking with living speakers and knowledge holders about why the language revival project is important and how it will be beneficial starts the conversation about attaining their free, prior and informed consent. Connecting with community also means asking: what language resources do they want? How do they want to share and learn their language? Will using new technologies be a challenge, or will it enable sharing over large distances? The answers to these questions will guide the design and decision-making process throughout the life of your language resource.



Stage 2: Funding

Creating a language resource always costs money. Most Language Centres receive public funding from Australian, state or even local government grants.

Some Language Centres receive funding from project partners, such as from a university, not-for-profit, philanthropic or non-government organisation. A Language Centre may also enter into an agreement with a publishing company.

From wherever a Language Centre receives funding, there are a range of issues to be considered including:

- understanding funding agreements
- negotiating funding agreements
- complying with funding agreements
- government and/or university co-branding on your language resource(s)
- ownership and usage of finished language resource(s)
- distribution of royalties
- rights of the Indigenous community into the future
- access to language materials by community after the language resource has been made

It is essential for Language Centres to understand the risks and issues relating to funding, and to be able to identify and communicate their needs and rights. That way, they can leverage their unique position and cultural knowledge to ensure that funding agreements are fair.

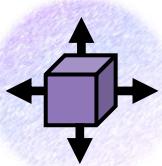


Stage 3: Creating a resource

Indigenous languages are recorded in all kinds of ways. Language Centres create books, posters, films, websites and innovative mobile phone apps, as well as many other kinds of language resources. Whatever form a language resource takes, it is important to know who owns the resource once it is made.

For this reason, Language Centres need a basic understanding of IP law, which can empower them to:

- understand their rights in relation to material they create
- ensure the Language Centre remains the owner of the resource(s) they create
- where appropriate, acquire rights if there is shared ownership over the resource (e.g. if other people and organisations have contributed to making the resource). The Arts Law Centre of Australia has developed a suite of contract templates for the creation and distribution of language resources. Contact Arts Law or First Languages Australia for more information
- understand the risks when using other people's material (such as photos, artworks, or words)



Stage 4: Distributing the resource

After the language resource is made, Language Centres will want to share it with their community, and possibly with the wider community. Most Language Centres want to make their materials freely available to anyone in their community, and sometimes even to the broader Indigenous community. Some Language Centres also want to make money from the private and public sector, for example by providing language services such as Welcome to Country, using Indigenous language for naming purposes, translation, education and research. Some Language Centres want to keep their resources exclusively for the use of descendants of the language group.

A language resource distribution plan might address:

- who will have access to the finished resource: anyone; any Indigenous person; only the local community
- using Language Centre resources for financial gain
- how language resource(s) should be protected from exploitation by those without permission, especially if the material is uploaded online
- compliance with legal requirements around publication
- access conditions and terms of use
- compliance with privacy laws if the Language Centre is taking personal information (e.g. payment details for language resources and services)
- cultural protocols around use of the language resource(s)

These decisions should be made within a strong governance framework and with an understanding of the relevant legal and ICIP issues. You may wish to consider using Arts Law's Licensing Agreement if the resource is to be licensed by a third party like a school or other organisation.



Stage 5: Planning for the future

Long term planning for Language Centres means planning how today's projects will be looked after tomorrow and setting up the next generation of language workers for success. For instance, how will the resources be stored so that they remain accessible in the future? Donation of copies to libraries or archives (for example, AIATSIS) for safekeeping is one possible method. Cloud storage of digital resources is also a possibility.

In addition, where an individual owns copyright in a resource (or part of a resource) you may need to consider preparing an agreement that says what will happen to those rights when the person passes away.

The Language Centre itself may also change its structure over time. For example, it may start out as an unincorporated organisation, receiving support from a larger entity, perhaps a university. However, as the Language Centre grows it may register as an Aboriginal Corporation. As the Language Centre continues to grow and changes its legal status, an IP management plan will help to ensure continuity in ownership of IP.

In some instances, the Language Centre may decide to close its doors. Again, future planning is necessary to ensure the resources created and owned by the Language Centre are passed to the most appropriate person or organisation.

Planning for the future will keep your Language Centre going strong and will ensure your hard work and your language is looked after into the future.

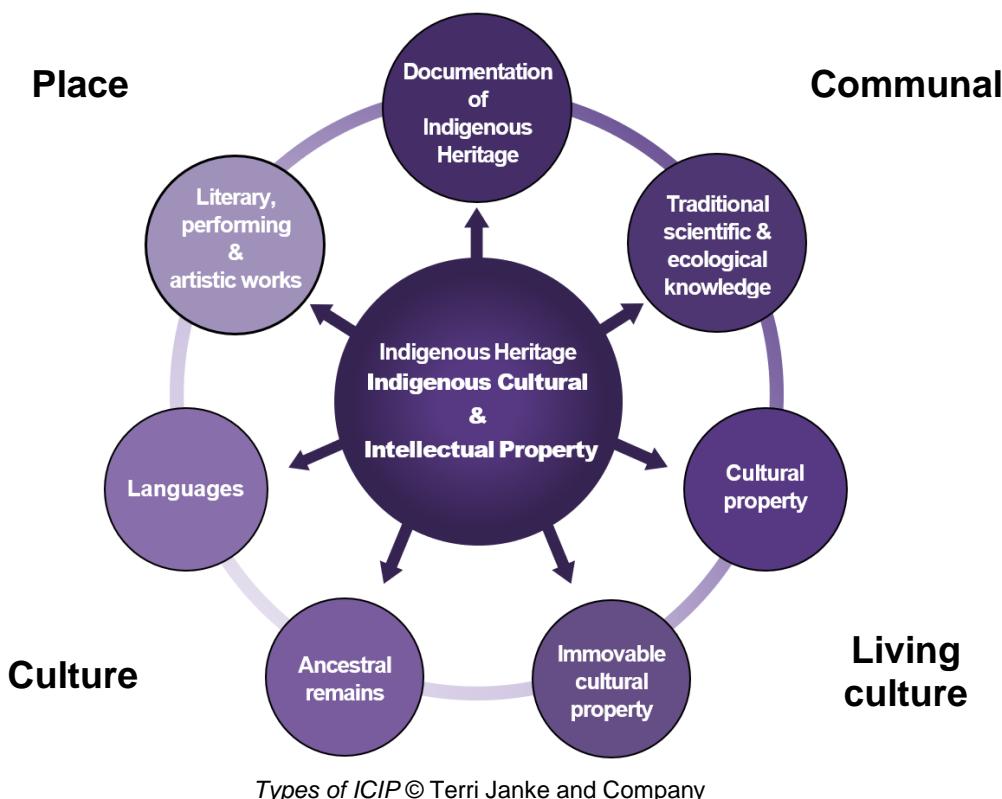
iii Indigenous Cultural and Intellectual Property and Indigenous Languages

This section provides a broad overview of the concept of ICIP, which is key to understanding the legal and governance issues relating to Languages Centres. It will be relevant at all stages in the life of a language resource.

What is ICIP?

Like Indigenous cultures and communities, ICIP is diverse and multifaceted. Broadly, ICIP is Indigenous peoples' rights to their cultural heritage. It encompasses Indigenous Knowledge and Indigenous Cultural Expressions such as:

INDIGENOUS KNOWLEDGE intangible	INDIGENOUS CULTURAL EXPRESSIONS tangible
<ul style="list-style-type: none">• Languages• Scientific, ecological and biological knowledge• Astronomical and navigational knowledge• Technical knowledge (construction)• Medical knowledge	<ul style="list-style-type: none">• Artistic and literary works• Performances (e.g. ceremonies, music, dance, song)• Cultural property (e.g. possum skin cloaks; spears; shields)• Ancestral remains• Indigenous human genetic material



Indigenous heritage is living and constantly evolving. It varies from community to community and is transmitted from generation to generation. Many generations may contribute to the

development of ICIP. In this way, ICIP is communally owned. Indigenous customary laws and cultural protocols determine who can know, share and make public ICIP.

Indigenous rights in relation to ICIP

Indigenous peoples have the right to:

- own, manage and control their ICIP
- be consulted about use of Indigenous Knowledge
- give or withhold consent around use of their ICIP (the ‘free, prior, informed consent right’)
- make self-determined decisions about their ICIP
- protect their ICIP in a self-determined way
- be recognised as the primary guardians and interpreters of their cultures
- authorise or refuse to authorise the commercial use of their ICIP
- be given full and proper attribution for sharing their cultural heritage
- have self-determination over the recording of Indigenous Cultural Expressions

Indigenous languages are ICIP

As an integral element of Indigenous cultures and knowledge systems, Indigenous languages are ICIP. Languages are vital to the preservation, revitalisation and transmission of Indigenous knowledge and cultural expressions. Like all ICIP, languages are constantly evolving.

As custodians of Indigenous languages, Language Centres are the holders of immense knowledge about Indigenous heritage and culture. Indigenous languages describe the relationship between people and places, including knowledge of natural features, plants and animals. These relationships constitute Indigenous customary law that connects people to their traditional land. Therefore, the work of reviving Indigenous languages involves the revival of these ancient relationships by gathering, storing and disseminating a huge variety of ICIP. This includes documented and oral histories, songs, biological and environmental knowledge, and construction/manufacturing techniques.

True Tracks® Principles

The ten True Tracks® Guiding Principles (True Tracks Principles) provide a template for developing ICIP protocols in projects. The True Tracks Principles were developed by Terri Janke and Company in line with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples and other key international law standards. They are adaptable for various projects, including those involving Indigenous languages.

PRINCIPLE	APPLICATION TO INDIGENOUS LANGUAGE PROJECTS
1 RESPECT	Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, knowledge and cultural expressions, including languages. This is a right of respect.
2 SELF-DETERMINATION	Communities need to participate in decision-making processes relating to projects involving their ICIP so that they may freely determine their political status and pursue their economic, social and cultural development.
3 CONSENT & CONSULTATION	Free, prior and informed consent for use of ICIP must be sought from the relevant Indigenous parties before a project

PRINCIPLE	APPLICATION TO INDIGENOUS LANGUAGE PROJECTS
	commences and continue throughout all stages, including future uses.
4 INTERPRETATION	Language projects should ensure Indigenous control of the interpretation of their culture and languages. This includes recognition of the relevant Indigenous peoples as the primary guardians and interpreters of their languages.
5 CULTURAL INTEGRITY	Maintaining the cultural integrity of ICIP keeps culture strong and authentic. This involves respecting the customary laws and cultural obligations associated with the ICIP.
6 SECRECY & CONFIDENTIALITY	Respecting and protecting the confidentiality of certain ICIP material in accordance with Indigenous customary laws and community expectations. This may involve protocols if a Language Centre is storing secret/sacred ICIP.
7 ATTRIBUTION	Indigenous peoples should be acknowledged and attributed as the owners of ICIP in addition to copyright attribution. Indigenous contributors, writers, creators, source communities and custodians should be attributed in a prominent place in all language publications.
8 BENEFIT SHARING	Ensuring that Indigenous peoples share in the benefits from the use of their ICIP, especially if it is being commercially applied. Contributors should be told all the ways they can, and cannot, benefit from the use of their ICIP, and given a fair opportunity to negotiate the terms of usage.
9 MAINTAINING CULTURE	Language Centres must consider how a proposed use of language and language material might impact on the future use by Indigenous peoples who are entitled to inherit the ICIP. For this reason, it is essential to get legal advice when entering into agreements.
10 RECOGNITION & PROTECTION	Australian policy and law should be used to recognise and protect ICIP rights. For example, copyright laws, protocols and contracts can be used to help ensure the protection of Indigenous languages.

The True Tracks® Guiding Principles are not linear or sequential but interrelate and overlap, reflecting the nature of ICIP. True Tracks® should, where possible, be applied throughout the life of any project or business activity involving ICIP.



Knowing the relevant law and following the True Tracks® Guiding Principles will help produce a language resource that is:

- protected from claims of inappropriate use
- supported by the community
- ready for future use and adaptation by the next generation of language workers

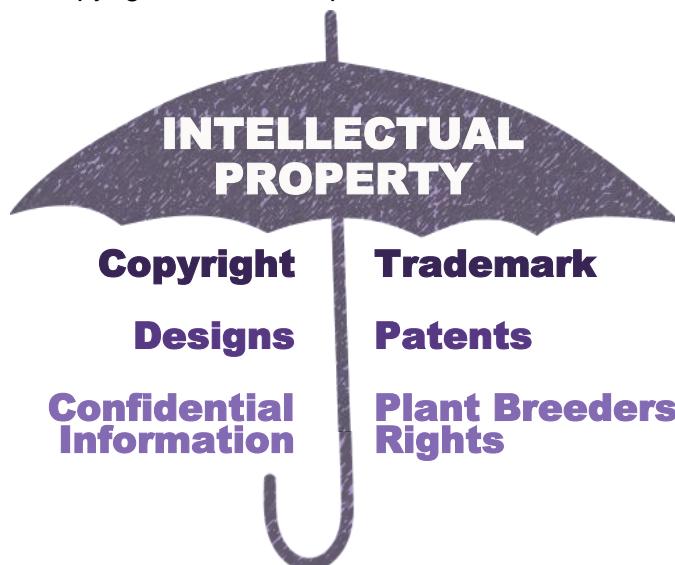
iv Overview of Intellectual Property Law

This section will provide a brief overview of the areas of law that Language Centres should be aware of. These areas are:

- intellectual property
- corporations and director's duties
- types of written agreements
- international law

Intellectual Property Law

IP law encompasses copyright, trademark, patents and several other areas of law:



IP laws are designed to recognise, protect and reward new creations and innovations by creating rights of ownership and exclusive use over the author's work and creations. These rights make people's work and creations commercially valuable. This encourages creativity, investment and business ventures.

Copyright

Copyright is a bundle of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings and films, published editions and broadcasts under the Copyright Act 1968 (Cth).

Copyright is separate to the title (or property right) in a physical item. When a work is sold, the copyright remains with the creator.

Copyright is the main area of IP law that Language Centres will come into contact with in the life of a language resource.



Creating copyright materials

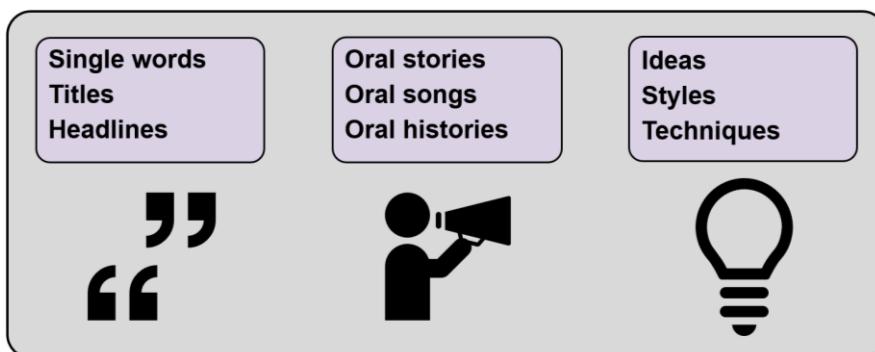
Copyright only protects certain kinds of material. Under the Copyright Act, copyright material falls under two separate classes of creations: ‘Works’ and ‘Subject Matter Other Than Works’. The table below lists just a few examples of what might be protected under copyright.

WORKS	SUBJECT MATTER
Artistic works <ul style="list-style-type: none"> • Paintings • Drawings • Photographs • Sculptures • Engravings • Craftwork (e.g. jewellery) 	Film <ul style="list-style-type: none"> • Recordings of moving images and accompanying sounds • Documentaries • Television episodes • Filmed interviews 
Literary works <ul style="list-style-type: none"> • Stories • Books • Poems • Song lyrics • Brochures • Theses • Transcripts of recordings • Field notes 	Sound recordings <ul style="list-style-type: none"> • Recorded songs or sounds • Performances • Recorded stories • Recorded interviews • Digital sound files • Tapes • Vinyl • CDs 
Musical works <ul style="list-style-type: none"> • Musical score • Sheet music • Guitar chord diagrams 	Broadcasts <ul style="list-style-type: none"> • Web broadcasts • Television broadcasts • Radio broadcasts • Podcasts 
Dramatic works <ul style="list-style-type: none"> • Plays • Operas • Dance • Scripts 	Published editions <ul style="list-style-type: none"> • Anthologies • Collections of works • Encyclopedias • The layout of a publication 

What is not protected by copyright?

Copyright does not protect facts, ideas or information. Copyright only protects the material expression of an idea. Works that are ‘insubstantial’ or which did not require ‘skill, labour and judgment’ to create will not attract copyright protection. Substantiality is determined more by quality than by quantity.⁸

Copyright does not protect



EMI Songs Australia v Larrikin Music Publishing (2011)⁹

What if the reuse constitutes only a small part of your finished work?

- This case, featuring two iconic Australian songs, illustrates how the concept of a 'substantial part' operates in practice.
- Kookaburra ('sits in the old gum tree'), was written in 1934, and later came to be owned by Larrikin Music Publishing. Following the broadcast of the ABC program Spicks and Specks, Larrikin became aware of the similarity between part of the Kookaburra song and the flute riff in the 1980 song Down Under ('we come from a land down under').
- Larrikin took the band Men at Work and their producers, EMI, to court alleging that a substantial part of Kookaburra had been reproduced by the song Down Under, and a copyright infringement had occurred.
- The judge found that the songs sound similar to an ordinary listener. This finding was supported by expert evidence that demonstrated an objective aural similarity.
- The judge also found that the written sheet music of each song looked similar.
- The judge was most influenced by the fact that for a period of time when Colin Hay, the lead singer of Men at Work, performed Down Under, he sang the words of Kookaburra at the point where the flute riff would otherwise be played.



What does this mean for your Language Centre? This means that you should take care when using existing resources for a new language resource – even if the reproduction forms only a small component of your finished resource.

For example: Your Language Centre is preparing a poster for an upcoming language event. The poster may be A3 in size and in the top corner there is a reproduction of another artist's painting – even if the reproduction is relatively tiny in context with the rest of the poster, you should still seek permission to use the image from the copyright owner.

Fairfax v Reed International¹⁰

Will titles and headings have copyright protection?

- Reed International created an online service giving subscribers the headline and by-line of articles from various newspapers owned by Fairfax.
- The service did not reproduce the look and feel of the words on the newspaper's page or digital service, and it did not include the photographs, advertisements, or other elements of the layout. The legal argument was solely over the words.

- Copyright subsists in original literary works, however the court found that the headlines in the case weren't literary works. The judge said that 'headlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works'.
- News headlines only identify the work, so extending copyright protection to them would prevent others from even referring to the work without infringing copyright.

What does this mean for your Language Centre? This means that, generally, titles and headings will generally not have copyright protections attached to them. This may mean that you are able to reproduce them without having to seek permission. Similarly, other people may be able to reproduce titles and headings of your language resources. If the titles and headings of your work contains culturally significant material – such as language words – you should consider putting your audience on notice of the ICIP contained in the title.

For example: Two of your Language Centre staff have written a journal article that is about to be published. They have used a language word in the title. To ensure that readers are put on notice of the cultural significance of the word, the lead to the article includes an ICIP notice:

This article, embodies the cultural heritage, traditional knowledge and traditional cultural expressions of the [Community Name] community. It was created with the consent of the custodians of the community. Dealing with any part of this article – including any language words – for any purpose that has not been authorised by the custodians is a serious breach of 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/email].

Many aspects or forms of ICIP do not qualify for copyright protection.

IP law's focus is on individualised novel creation. This is a western law perspective of creativity which fails to consider communal ownership and intergenerational transmission of traditional cultural expressions. Unfortunately, this leaves many aspects or forms of ICIP without legal protection. Indigenous arts, songs, designs, stories and knowledge has been and continues to be exploited outside of Indigenous peoples' communities by people not entitled to do so. Such exploitation occurs without recognition of any Indigenous connection and without benefits accruing back to Indigenous peoples.

Copyright	↔	ICIP
Material Expression		Material & Immaterial
Individual Ownership		Communal Ownership
Protected Under Law		Recognised; not Enforceable
Economic & Moral Rights		Cultural Rights
Assignable Rights		Handed Down/Cultural Practice
Limited Duration		Rights Continue

The issues and the shortfalls in Australian IP laws in relation to protecting ICIP have been widely documented. See, for example Indigenous Knowledge: Issues for protection and management¹¹ and Our Culture Our Future: A Report on Australian Indigenous Cultural and Intellectual Property Rights¹².

Although law reform is required, Indigenous peoples have used copyright law strategically to prevent other people, companies or organisations from exploiting their traditional knowledge and culture without their permission. By using Australian IP laws to their advantage and developing protocols, Indigenous peoples will be better able to maximise the economic value of products and services that are based on their Traditional Knowledge. Many of these instances have been used as case examples in this guide.

Knowledge, dance, designs and stories passed on orally

These types of cultural materials and expressions are generally not in material form and is therefore not automatically protected under standard copyright laws.

Further, with Indigenous cultural expression some stories have been passed down through many generations. An individual author may not be able to be identified, and indeed may not exist, because so much of Indigenous cultural expression is owned communally.

Styles and motifs

It is only the expression of the style, motif or symbol (i.e. expression through an artwork, a song, or a poem) that is protected by copyright, but not the style, motif or symbol itself. This means that unless someone is copying from a particular copyright work, it is not an infringement of copyright to paint, write about, or make a performance, song or film about these styles, motifs or symbols. For example, the rarrk/cross-hatching, and depictions of symbols (such as creation figures like the Wandjina from the Kimberley Aboriginal language group) are not protected, but a painting including those designs would be protected.

Indigenous languages

Copyright does not subsist in a word or language itself. Spoken words themselves would not attract copyright protection unless they were recorded or documented in some way.

Languages are not owned or protected from exploitation. Under copyright law, Indigenous peoples cannot stop others from using Indigenous language in their works although language resources may be recognised and protected under copyright law. See the table below for a summary of copyright protection for language resources.

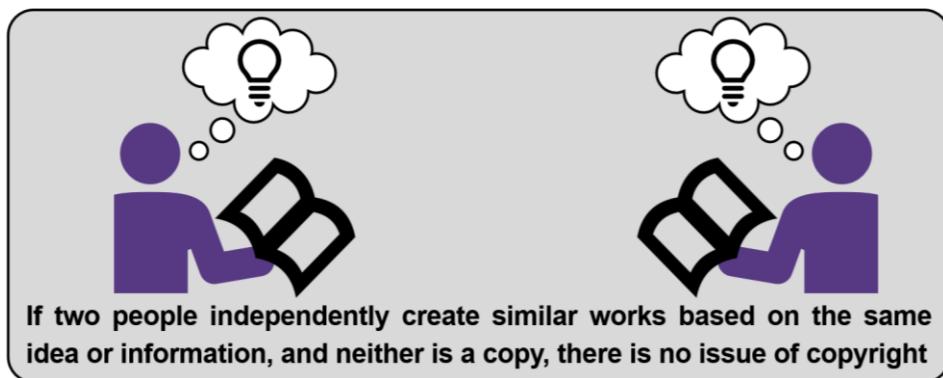
LANGUAGE RESOURCE	COPYRIGHT PROTECTION?
Oral words	No copyright protection
Words in songs handed down through the generations, not attributed to a songwriter	No copyright protection
Composed song/music in Aboriginal language	Musical work
Language dictionary	Literary work – compilation

LANGUAGE RESOURCE	COPYRIGHT PROTECTION?
Printed dictionary	Published edition has copyright
Language website	Compilation of literary work, artistic works
Language software	Literary work
Language video resources	Film
Oral tapes/recording taken of Aboriginal speaker	Sound recording
Mobile phone app	Literary works; artistic works – compilation

Requirements for copyright protection

Copyright will exist in a work as soon as it is created in a material form or as soon as a recording or film is made, provided that:

- The work is **original**: it must not be copied, and the creator must have used the necessary degree of skill, labour and effort to create a new work
- The work is in a **material form**: a work must be written down or recorded in a fixed form



Copyright ownership

The copyright owner is usually the ‘creator’ of a literary, artistic, musical and dramatic work (i.e. the artist, photographer, composer, writer, or choreographer who created the work) or the ‘maker’ of a film, sound recording or broadcast. However, there are some exceptions to this general rule of copyright ownership:

- an employer generally owns copyright in a work made by an employee under an employment agreement, a contract of service or apprenticeship
- copyright in a commissioned work will belong to the creator, and the commissioner will have the licence to use the work for the purposes of the commission – however, copyright in a commissioned film or sound recording (if a fee is paid), will belong to the commissioner
- where copyright has been commissioned under a written agreement, the agreement may specify who owns copyright
- copyright may be inherited under the terms of a will

Copyright is Automatic

- Makers of copyright works, films and sound recordings **do not need to register their copyright** with a government department or complete any other formality. There is no copyright register in Australia.
- Copyright attached to any language resource will be automatically owned by one or more people, companies or organisations.
- Ownership of copyright in a language resource will depend on the circumstances

Joint copyright ownership

There can be more than one owner of copyright in a work when more than one person contributes to the creation of a work and the contribution of each author is not separate from the contribution of the other author(s). Language Centres should consider joint copyright ownership if any other people or organisations contribute to the creation of a language resource.

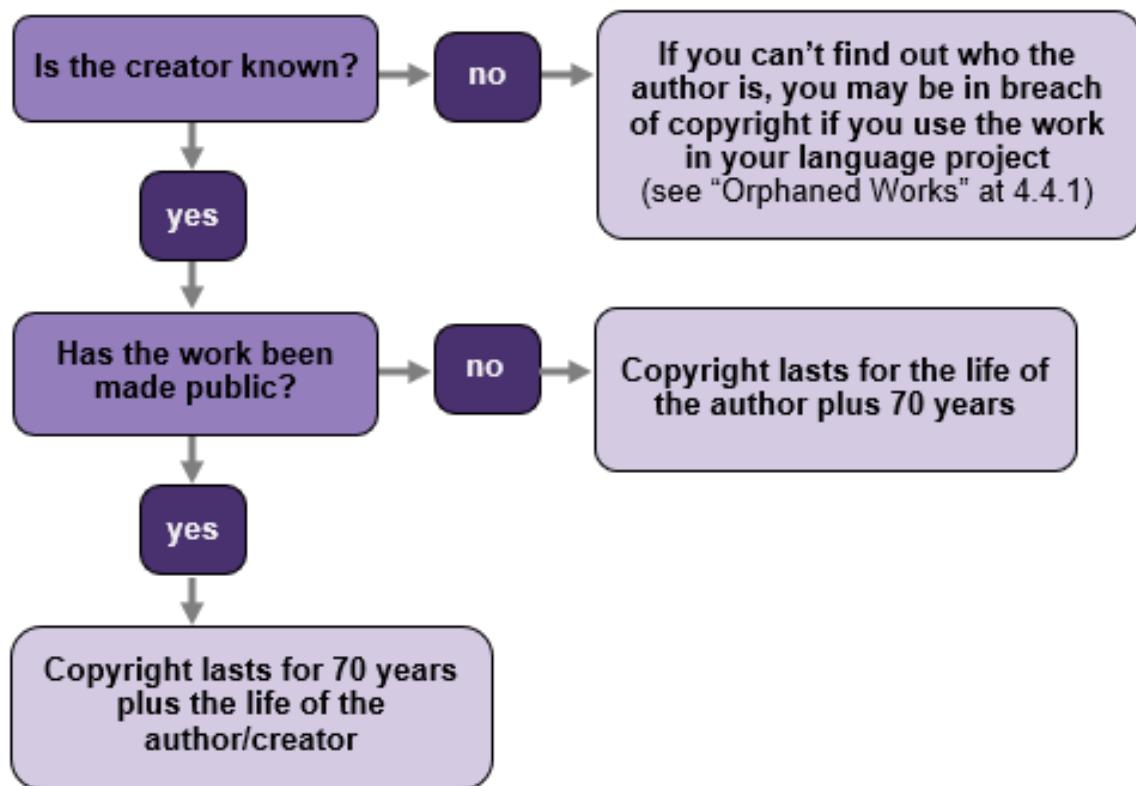
Can copyright be given away?

Copyright owners can give their copyright to another person or company. This can only be done in writing, usually by contract or agreement. Once copyright is given away, the creator has no copyright interest in the work. Where possible, Indigenous artists and creators should keep the copyright in their works so they can maintain control over future reproductions.

It is important for Language Centres to check agreements to make sure they are not giving their copyright away forever, instead of licensing specific use of their work for a limited time. Language Centres should check agreements when:

- language resources are used by another person, company or organisation
- using a digital database to record words, sounds, and/or other language work
- sharing their work temporarily with a service provider
- posting any material on social media

How long does copyright last?



The general rule is that copyright protects original works (literary, dramatic, artistic and musical works) during the lifetime of the creator and for 70 years after their death.

Once the copyright term in a work expires, it is said to be in the public domain. A work that is in the public domain can be used by anyone without infringing copyright. Many unpublished works (such as old diaries, letters, manuscripts, reports and theses) would have entered the public domain and are free for all to use and exploit. This is relevant to Indigenous Language Centres who collect old publications containing word lists and translations of Indigenous words into European languages. However, Indigenous Language Centres should never assume that a work is out of copyright and is free to use without permission just because it is old.

Copyright and wills

Copyright owners also need to think about who will control their copyright and receive any royalties that might be payable to their estate after their death. It is important for language custodians to have wills, and to provide for who can control their copyright works after they die. Wills could also address who should speak for any ICIP contained in the work.

ICIP rights are forever

While copyright is time-limited, rights to ICIP are perpetual. ICIP, as well as the rights and obligations attached to ICIP are handed down through the generations. To respect ICIP rights,

it may be necessary to get permission to use Indigenous stories, designs and themes even though legally, they are in the public domain.

Where the work contains ICIP, even though a work is out of copyright, there may still be ICIP rights that require the consent of the relevant Indigenous custodians or communities.

What rights do copyright owners have?

Economic rights

Copyright owners have the exclusive right to control the reproduction of their work and other subject matter. This is the most important right, and probably the one most often infringed. An original work, which is protected by copyright, can be infringed if it is reproduced in the same format or in a different format – for example, where a literary, dramatic or musical work is reproduced as a sound recording or film.

Infringement means reproducing a ‘substantial part’

Material protected by copyright does not have to be reproduced completely for an infringement to occur. If a ‘substantial part’ of the material is reproduced without permission from the copyright owner, an infringement of copyright may occur. A ‘substantial part’ does not mean a certain percentage of the material.

The phrase ‘substantial part’ refers to the quality of what is taken rather than the quantity, and courts have not prescribed any particular proportion as amounting to a substantial part. In determining whether the part taken is ‘substantial’, the most important question is whether the part is an ‘essential’, ‘vital’ or ‘material’ part, in relation to the work as a whole. It also depends on what kind of work or subject matter is being used or copied.

Making copies for preservation

While the Copyright Act does include an exception to infringement allowing copies of copyright material to be made for preservation purposes, this exception is very limited.

The copy can only be made by a library or certain archives, which unfortunately excludes a lot of Language Centres.

This means that the usual permissions need to be sought when digitising a language resource.

Moral rights

Moral rights are separate from the economic rights of copyright owners. Creators have moral rights even if they do not own copyright in their work. Moral rights are personal rights of the creator of a work, which cannot be sold or given away. Copyright owners are entitled to three moral rights under the law:

Three Moral Rights under the Copyright Act

1 The right of attribution	Creators of works and films, and performers have the right to be identified as the creator and performer where the work, film or
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	performance is reproduced in material form, published, performed, adapted, or communicated to the public.
2 The right not to have authorship falsely attributed	Creators of works and films, and performers have the right not to have their work falsely attributed to another person.
3 The right of integrity	Creators of works and films, and performers, can bring a legal action against parties who edit, alter or treat their works and performances in an inappropriate way, causing harm to their honour or reputation.

There are no communal moral rights under the Copyright Act

The communal nature of ICIP is not recognised by copyright law. Copyright law does not allow Indigenous language groups to ensure the integrity of their ICIP or to protect and guard against issues of misuse and false attribution. However, Indigenous creators are still entitled to the same individual moral rights as all other creators under copyright law.

How to deal with moral rights

You may wish to use and/or commission artworks, photographs, written text and recorded performances for your language resource(s). When you use other people's work in your language resources, you must ensure that the creator's moral rights are dealt with appropriately. This is the case whether the creator of the work owns the copyright or not.

If you're using someone's work in your language resource, you can fulfil your obligations in relation to moral rights by:

- **Developing processes for making sure that you comply with attribution and integrity:**
 - if you want to use a work, find out who the copyright owner is and if the copyright owner is different to the creator
 - keep a record of the copyright owner and creator's details (if different) for each work you use in your language resource(s)
 - keep records of work you use in your language resources, including which resource(s) are used and how they have been used
 - ensure you have correctly attributed the creator to the work you're using before you publish it or make it public
 - do not alter a work in a way that would have a negative impact on the creator's reputation or honour
- **Using clearances for moral rights consents:**
 - if you want to alter a work in a way that may negatively impact the creator's reputation or honour, or use the work without providing attribution you will need to obtain the creator's consent
 - creators can give consent for certain things that may otherwise breach their moral rights – make sure you have their consent in writing

Using ICIP material not protected by copyright

Although copyright law does not require people who use ICIP material to seek permission, it is best practice to set up a protocol within your Language Centre to ensure that the True Tracks® Principles are applied when using ICIP. You should also consider including ICIP clauses into written agreements.



See Part 3 Creating the Resource for information on how to use ICIP protocols in your language project

More information

- The Australian Copyright Council: www.copyright.org.au/
- Arts Law Centre of Australia: www.artslaw.com.au/
- Copyright Agency: www.copyright.com.au/
- Terri Janke & Company: Lawyers and Consultants: www.terrijanke.com.au/resources

The remainder of this guide will follow the legal ICIP issues that arise during the life of a language resource. Beginning with the early research stages and connecting with community and following through to the creation and distribution of the resource. Finally, the guide will look to the future of the Language Centre and examine the legal resources and strategies available to help ensure Language Centres and language revitalisation projects continue going from strength to strength.

Stage 1 Connecting with Community



1.1. Who are the knowledge holders?

Connecting with the community is always the first step in creating a language resource.

1.1.1. Identify living language speakers, key stakeholders, community organisations and community members.

Make a list of all the people, organisations and community members who will be involved in the project, or who will have a stake in the project. Make a document with their names and contact details. This will be an invaluable resource at all stages of the life of the resource. The list should remain confidential and be kept in a secure location – never share any contact details or personal information if you don't have that person's permission.

1.1.2. Gaining consent from individual language speakers and knowledge holders to be involved in the language project

You should obtain written consent from living speakers and knowledge holders who want to be involved in the project. Written consent is a good idea because it sets out clearly what the language speaker/knowledge holder expects to gain from being involved in the project, and what you expect them to contribute to the project. For example, you should clarify:

- will they be paid for their contribution?
- how will they be credited in the language resource(s)?
- will they be entitled to any royalties if the project is financially successful, and if so, what percentage?
- what happens if there is a dispute between other language speakers/knowledge holders or contributors?
- how will you ensure that there is an ongoing consent process?
- who owns copyright in written material, artworks, voice recording, videos, etc.?
- will language speakers/knowledge holders have access to material they helped create, even if they're not the copyright owner?

1.2. What resource(s) does the community want?

Language Centres create resources to generate fluency of the Indigenous language(s) within their community, and to revive the traditional knowledge and cultural practices associated with their language(s). These goals are achieved by designing the resource(s) with the community, and with their wants and needs at the forefront.

1.3. Create ICIP protocols

ICIP protocols for Indigenous languages should give you guidance on:

- how the language should be used in the future
- best practice for engaging knowledge holders and community in consultation, and what is required to ensure free, prior, informed consent
- guidance around disseminating the language and language resources

- an outline of community decision-making model(s) and relevant customary law practices
- how records of the process and consents should be kept
- how the community and knowledge holder should be attributed in language materials
- any other matters that may be important or relevant to the community in relation to revival and use of their language and language resources

1.3.1. Engage the community

Connect with community members well in advance of starting the project and plan out your community engagement so that you meet your goals and understand community expectations.

Organise a meeting with key stakeholders and community members to tell them about your plan to create a language resource and ask for their input. This is an opportunity to manage the community's expectations about possible outcomes of the project.

Write the community's views and opinions into one document. This will form the basis of your ICIP protocols which can be used over the life of the resource to guide your decision-making processes.

Creating ICIP protocols can be a long, complex process. You should seek legal advice to ensure that all legal details of IP and ICIP have been considered.



Remember: Copyright does not change until the law changes but ICIP rights change over time with community experiences. In relation to languages we have seen this particularly as people become more comfortable with using and hearing their languages and decide to share them with the public and on the internet.

Faith Baisden, First Languages Australia¹³

SCENARIO: WHY ARE ICIP PROTOCOLS IMPORTANT?

A Language Centre has entered into an agreement with a big publishing company to create a children's book that will be written in both English and an Indigenous language.

The publication company approaches the Language Centre with an offer 'too generous to refuse'. The deal includes a large sum of money for the Language Centre, which they could reinvest to create more language resources. The Language Centre engages Derek to tell the story and create the illustrations for the book. They will translate his words into language.

Derek has permission from Elders to tell the possum dreaming story but will need to show the illustrations to them before it can go to print.

	WITH ICIP PROTOCOLS	WITHOUT ICIP PROTOCOLS
Contract	<p>The Language Centre tells the publishing company that they only engage with companies who are willing to abide by their ICIP protocols. They also want to ensure that ICIP is included in the written agreement.</p> <p>The publishing company has never heard of ICIP, but after learning more, they agree to abide by the protocols.</p>	<p>The Language Centre does not want to miss out on this opportunity, and so they decide to go ahead with the deal.</p> <p>When the Language Centre manager meets with the publishing company to sign the contract, she asks for the terms of the deal to be explained to her.</p>

	<p>Before anything is signed, the publishing company ensures that the manager of the Language Centre fully understands the terms of the contract – they have negotiated with each other in good faith.</p>	<p>Some of the words don't make sense.</p> <p>The publishing company says, 'this is our standard agreement – all our authors have signed this, and none have regretted it.'</p> <p>The manager doesn't want to seem unprofessional, so she signs the contract. Derek signs it too.</p>
Delivery	<p>The publishing company works closely with the Language Centre and Derek. They understand that sometimes things can take longer than expected. When there is a tragedy in the community, the publishing company are willing to push back the publishing deadline.</p> <p>When the final draft of the book is complete, it is taken to a community meeting to show to the Elders. They are very happy, but one Aunty wants a small change to one of the illustrations to comply with customary law. Derek easily makes the change, and the book is delivered to the publisher.</p>	<p>Derek and the Language Centre feel rushed by the publishing company.</p> <p>The publishing company threatens to cancel the deal if the book is not delivered on time. Derek and the Language Centre work quickly to produce the book, and hand it over to the publishing company in time. However, they do not have time to run it by the Elders before publication.</p>
Publication	<p>Per the contract, the Language Centre receives three boxes of books, and Derek receives one for each of his grandkids.</p> <p>There is a launch party on Country where an Elder welcomes the publishing company representatives in language.</p> <p>Everyone loves the book and the kids love the illustrations.</p>	<p>The publishing company send a few copies of the book to the Language Centre with a bunch of flowers and a congratulations card. Derek shows the book to the Elders. One Aunty is very upset because one of the illustrations breaches customary law. Derek did not know because this is women's business. It is too late to change anything.</p> <p>Derek is told that under the contract he will have to travel to Melbourne, Sydney and Adelaide to promote the book. He was not aware of this – he has many community and family obligations.</p> <p>The publishing company is annoyed as they have already planned the whole book tour. They tell him 'it's all in the contract!'</p>

<p>Long-term plans</p> <p>Under the contract, the Language Centre and the publishing company own 50% of the copyright in the book each. The ICIP remains with the community.</p> <p>Derek is attributed as the writer and illustrator, and the community are attributed as the owners and custodians of the ICIP. The Language Centre's logo is printed alongside the publisher's logo.</p> <p>The book was a great success, and after 5 years, the Language Centre wants to re-print the book.</p> <p>The Language Centre consults with Derek and the community before giving permission for the re-print to go ahead.</p> <p>The Language Centre receives a percentage of the profits and Derek receives an additional royalty cheque.</p>	<p>Under the contract, the publishing company own all the copyright in the book. The ICIP remains with the community, but there are no terms under the contract that allow them to enforce these rights.</p> <p>Derek is attributed as the writer and illustrator, but the community are not attributed as the owners and custodians of the ICIP.</p> <p>The book was a great success, and after 5 years, the Language Centre wants to re-print the book.</p> <p>The publishing company does not seek permission. The Language Centre finds out about the re-print when Derek tells them he received a royalty cheque. Under the contract, the Language Centre is not entitled to any royalties.</p>
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1.4. Design the resource(s): blue sky-thinking

Now is your chance to collate the information you have gathered and think broadly about what resource(s) will meet the needs of the community. At this stage, you don't need to be constrained by preconception or concerns about funding.

1.4.1. Who is the resource for?

Put together a picture of who you want to make the resource for. Understanding who you are making the language resource for will give you a framework to work from over the life of the language resource. For example:

- is the resource meant to be exclusively for the Indigenous language group, or will it be aimed at the broader community too?
- where does the community live? Are they spread out over a large area, on an island off the mainland, gathered in a small town, or in a big city?
- how will the community access the resource(s)?
- do you need multiple resources?
- how will users access the resource?
- would a film, music or artistic project be more accessible than a literary work?
- what age group(s) would you like to target? Young people might be engaged by digital media, whereas Elders might prefer a physical book.
- how will the resource be used by community organisations and service providers (such as schools, medical centres, etc.)?

These are the kinds of questions that will help you determine who will be using the resource. There are likely to be many more, which you should decide upon based on your own circumstances. You may need community input to answer some of these questions – this

stage will help you to identify the questions you need to answer to decide who you are making the resource for.

Plan the Project

Creating a project plan is very important to ensure that you have thoroughly considered everything that will need to be done to create your language resource. At this stage of the project, you should start thinking practically about how the resource will be made, how the resource will be funded, and what timeline you envisage for the project. Importantly, a project plan will help you forecast the possible cost of each stage of the project.

1.5. Create a project plan

A project plan should include:

- a one-line vision statement which encapsulates what the goal of the project is, and what it is expected to deliver
- a broad project timeline
- a detailed plan, including specific tasks that need to be completed over the life of the language resource
- who will complete each task, and when it will be completed by

A project plan can be created using a table, which might look like the table below:

Priority	Task Description	Who	Cost	Start	Finish
1.					
2.					
3.					
4.					

Stage 2 Funding



Funding agreements should make provision for who will own the copyright in the final language resource. Partnering with a university can also mean that university employees and students may expect to be able to share in the research resources. It is important to establish how these rights will be shared at an early stage. If you intend to self-publish, you should review all publishing agreements carefully. Standard form publishing agreements can sometimes contain clauses about copyright assignment, exclusive licences and royalty payments that could disadvantage Language Centres.

2.1. University and government partnerships

You may receive external funding – perhaps from a university or the federal or state government. This funding may be for a particular project, or it may be for the Language Centre more generally.

You should always check the terms of your funding agreements. Ask yourself these questions:

- What is the stated purpose of the grant? Does the language resource fall within the stated purpose of the grant?
- What does the funding agreement say about IP and copyright? Does the funding body share in any of the Language Centre's copyright?
- What does the agreement say about the funding body's right to use the finished resource? If the funding body is a university, does the agreement require that the university is permitted to use the resource in teaching and research?

2.2. Independent publication or production

The Language Centre may choose instead to publish the language resource themselves, using Language Centre funds. Even if the Language Centre is the recipient of funding for general purposes, it is still important to check the terms of that agreement as there may be limitations on the purposes for which the funds can be used. If the funding agreement does include a limitation on the purpose for which the funds can be used, you will need to keep a clear record that any publishing costs are withdrawn from a separate costs account.

If a Language Centre decides to self-fund a language resource, you should also consider carefully any agreement you enter into with a publisher. These considerations are addressed in more detail in **Part 4.1.2 Holding on to your copyright and looking out for rights holders**.

SCENARIO

Tamara wants to pitch to her Language Centre about an animation project she has in mind. However, she needs to consider how the Language Centre will fund the project.

Answer/Discussion

The Language Centre has two funding agreements at the moment – one with the nearby university and one with the state government. Tamara checks the terms of the university funding agreement and notices that the stated purpose of the grant is 'for support of language projects that preserve and promote the use of language'. So, it appears that she

could use university funds on the project. However, there is an additional term that the university will own the IP rights in the finished product of any project funded under the university agreement. Tamara realises that this would mean that the university would own the copyright in the animation if she pays for it with funds from the university grant.

Instead she checks the state government funding agreement. This agreement states that funds from the government may be used on ‘community events and engagement programs that connect community to language.’ It seems that Tamara will not be able to fund the animation with state government funds as it does not fall within the category of ‘community events and engagement programs’.

However, the Language Centre has an income stream generated from their language consultation services. At the next planning meeting, Tamara suggests the animation project be funded with this money and the board agrees.

Stage 3 Creating a Resource



3.1. How will the language be recorded?

New and emerging technologies have increased creative opportunities to make language accessible. Where once the primary forms of language resources might have been printed books, and audio and video recordings, now there are many more methods of recording, storing and accessing language information. A language resource could even combine a number of methods. For example:

- an online database that includes photographs and audio and video recordings
- an e-book that includes links to external websites that show short videos of the subject matter referred to in the book
- an augmented reality app that allows users to view video and audio clips telling the history of the place in which the user is currently standing

These new technologies and the new ways of layering those technologies (incorporating several creative forms in a single resource) means that there are often several contributors to a finished product, all of whom will retain copyright over their own contribution. In the example above of an online database, there are several possible contributors.

At this stage, copyright law is relevant in two capacities:

1. making sure that when using existing resources you do not infringe existing copyright owned by other stakeholders
2. ensuring that the copyright agreements between the Language Centre and other collaborators in the new resource are equitable, allow the Language Centre to use the resource as intended, and allows the Language Centre reasonable scope for future uses. You may wish to consider using Arts Law’s Licensing Agreement between Language Centre and Contributor when engaging contributors.

3.2. Consulting knowledge holders

Most language resource research will begin by consulting with a knowledge holder. When consulting with a knowledge holder the first step should be to refer to your ICIP protocol for the project (if you have one). See **1.3 Create ICIP protocols** and **3.4.2 Accessing legacy materials through protocols**.

The next step is to identify whether the knowledge holder provides any additional resources that may be copyright protected. Remember that copyright law focuses on material form so the knowledge itself may not be copyright protected, but as soon as that knowledge is recorded (e.g. written down or recorded) it is that physical record that will be copyrighted. Copyright materials provided by knowledge holders might include:

- photographs of the knowledge holder
- written records taken by the knowledge holder during their own research of their language
- audio recordings held by the knowledge holder or another speaker

Who is the copyright owner of these resources? In many cases, it may be the knowledge holder themselves – as with the example of the written research notes. However, in other circumstances, it may be a third party – as with the example of the photograph of the knowledge holder (usually the copyright holder will be the photographer). Where the copyright owner is someone other than the knowledge holder, you will need to seek permission to use or reproduce the resource (see '**What existing resources do you want to use?**').

It is important to keep records of the terms on which the knowledge holder has agreed to assist you. This can be through a file note kept by the Language Centre, however, ideally you would also have a collaboration agreement. This agreement should be succinct, in plain language and signed by the language holder. The content of the collaboration agreement will depend on the circumstances, but some important terms to include are:

- the knowledge holder has agreed to help you in producing the language resource
- what they have agreed to provide you with – how much of their time? What additional resources do they have?
- what benefit is the knowledge holder receiving in exchange for their assistance?
- if they are providing you with original or copies of any other resources (e.g. research notes or recordings)
- any conditions the knowledge holder would like to put on your reuse of their knowledge
- if those resources were created by the knowledge holder, that the knowledge holder gives the Language Centre permission to use those resources for permitted uses (and what those permitted uses are)

In general, the knowledge holder should remain the copyright owner of any materials they contribute to the project.



Remember: Copyright law does not stop people from using the underlying ideas, information or techniques that are contained in the written material and once a language resource is published it is difficult to control how that information will be used by the public. It is important to warn the knowledge holder of this early in the consultation process.



John Bulun Bulun & Anor v R&T Textiles Pty Ltd [1998] FCA 1082 recognised that copyright owners may owe a duty to the clan when dealing with copyright works that incorporate traditional ritual knowledge. Where knowledge holders provide Language Centres with cultural heritage knowledge in circumstances of trust and confidence, the Language Centres may have a legal duty to care for that knowledge in a way consistent with customary law.

3.3. What existing resources do you want to use?

In addition to consulting with knowledge holders, you may also be using a number of existing resources, or the knowledge holder may have provided you with resources in which they do not own copyright (and therefore may not be able to give you a copyright licence to reuse the resource). Examples of resources include:

- sound recordings
- film and video
- books, info sheets and written articles
- online language databases
- unpublished research notes
- historical publications such as newspapers
- published academic texts and resources

When working with existing resources, it is possible that those resources are copyright protected. This means you will need to ask permission (also referred to as licencing) to use the resource.

3.3.1. When do you need a licence?

Remember that copyright does not protect the underlying idea or knowledge of a resource. From a western legal perspective, you only need to ask permission if you are doing one of the following with the work:

- **Reproducing** e.g. if you are creating a database of plant names, and you wish to publish a photograph of the plant next to the plant name
- **Publishing** e.g. a knowledge holder has a copy of a poem written by her grandfather and you wish to publish the poem for the first time
- **Performing or communicating the work in public** e.g. you have a film recording of a dance performance recorded with the permission of the performers by a staff member at the venue and you want to include the recording on your website
- **Adapting** e.g. you want to translate a children's book into an Aboriginal language

However, in reality, the resources that your Language Centre will access and use may be legacy materials – objects, documents, recordings and other kinds of materials that relate to Indigenous peoples, their cultures and affairs, which are held and maintained by non-Indigenous peoples and institutions. Access and use of legacy materials is addressed in **Part 3.4** below. -

3.4. Legacy materials

Our old people are our most valuable sources of our history and culture. It is absolutely essential that we have our own historical resources located in our own communities for ready access to assist our elders in their recollections of our history, **Henrietta Fourmile Marrie**.¹⁴

3.4.1. Access to and use of legacy materials

Accessing and using legacy materials is a key issue for Indigenous Language Centres and projects. Legacy materials capture precious information about Indigenous languages, traditional knowledge and cultural expressions that are essential for language revival work. The fundamental issue with legacy materials is that Indigenous peoples often don't have control over access to or use of them under the law. This is because ownership of legacy

materials vests legally in the non-Indigenous researcher as the author of the work or subject matter.

3.4.2. Accessing legacy materials through protocols

Galleries, libraries, archives and museums are a vital access point for Indigenous Knowledge as they hold large amounts of material containing Indigenous Knowledge such as films, sound recordings, reports, photographs, books and records. Many of these institutions are now implementing protocols which are designed to give Indigenous peoples and communities improved access to and use of legacy materials.

For example, the National and State Libraries Australasia developed:

- a position statement on Aboriginal and Torres Strait Islander library services and collections¹⁵
- a position statement on Aboriginal and Torres Strait Islander language services and collections¹⁶
- guidelines for collaborative practice between libraries and Aboriginal and Torres Strait Islander communities¹⁷

These protocols aim to provide a framework of best practice guidance to National, State and Territory libraries in their plans and approaches to Aboriginal and Torres Strait Islander library services and collections. The framework encourages collections and services that are 'accessible, appropriate and responsive to the needs and perspectives of Aboriginal and Torres Strait Islander peoples'¹⁸.

If you want to conduct research in an archival institute, a good starting place is to call them and ask if they have an Indigenous services unit or researcher. If they do, then you can ask to speak to the relevant staff member about your language project's requirements.

3.4.3. Licencing legacy materials

Where the original author (e.g. the non-Indigenous researcher) has passed away, the owner(s) of the copyright in a legacy material will usually be the family of the author/creator of the material. Examples of written agreements you might be able to make are:

- a licence to use the material in a particular way, or for a particular project
- an exclusive licence that gives permission to use the legacy material only to a particular individual or corporation (e.g. the Language Centre)
- a copyright deed which transfers ownership of the copyright to the relevant Indigenous person

In the first two examples, the copyright remains with the original owner (or their descendants), and they may ask for payment in exchange for permitting use of the material. You should seek legal advice if you want to make a written agreement.

Getting Legal Advice: Arts Law Centre of Australia

Arts Law, the national community legal centre for the arts, provides free or low-cost legal advice. Their 'Artists in the Black' service is dedicated to Indigenous artists and arts organisations.

Visit their website to make contact:

- Arts Law 'Artists in the Black' Arts Law (2020) [Online] Available on www.artslaw.com.au/artists-in-the-black/ (accessed 28 February 2020)
- Arts Law 'Legal Advice' Arts Law (2020) [Online] Available on www.artslaw.com.au/services/legal-advice/ (accessed 28 February 2020)



Material protected by copyright does not have to be reproduced completely for an infringement to occur. If a 'substantial part' of the material is reproduced without permission from the copyright owner, an infringement of copyright may occur.

A 'substantial part' does not mean a certain percentage of the material. Determining whether a copyright infringement has occurred depends more on the quality of what was copied or reproduced rather than the quantity.

If your Language Centre is ever in doubt about whether reuse, in whole or in part, of pre-existing materials would be considered a substantial reproduction, they should seek legal advice.

SCENARIO

Now that Tamara knows how she will fund her Language Centre's language resource animation, she is starting to plan the resource in more detail. Tamara would like to engage a graphic designer to make a short animation of a grandmother and granddaughter going on a bushwalk. The grandmother will point to the plants and explain to her granddaughter what they are, and how they change through the seasons.

Tamara was inspired by memories of walks with her own grandmother. She has already identified a number of resources and now needs to consider the copyright and ICIP issues:

Tamara has found a sketch book filled with illustrations of flowers labelled with their language names.

There is no name on the sketchbook, but on the inside cover of the sketchbook is a handwritten message:

To my favourite little flower, on her 9th birthday.

Love, Nan.

The catalogue entry for the sketch book shows that it was donated to the archive about 10 years ago.

Answer/Discussion

What are the copyright issues?

- As the grandmother was the artist, she will have been the copyright holder of these illustrations.
- If the Language Centre wanted to re-use the images in the animation they would need to seek permission from the grandmother, or if she has passed away, the family members who inherited her copyright. The Language Centre should consider using Arts Law's Licensing Agreement between Language Centre and Contributor. However, if the Language Centre just intends to use the plant names, then permission may or may not be necessary depending on whether the reuse could be considered a "substantial part" in the circumstances. The Language Centre will need to seek legal advice.

What are the ICIP issues?

- Tamara should consult with the grandmother and her family about the project and ensure that she has permission to use the ICIP contained in the book.
- This consultation should be done at the very start of the project to ensure all consents are free, prior and informed.
- Tamara should also consult with the family on the wording of a traditional custodian's notice that will accompany the final resource.

A CD of a bird song from the local area

Tamara would like to use a recording of a local bird as part of the soundtrack for the animation. The inside cover of the CD clearly states that copyright in the recording is held by the Language Centre, but Uncle Jimmy Ryan is given a particular thanks for his assistance on the project.

What are the copyright issues?

- As the project is being run by the Language Centre and the Language Centre already has copyright in the recordings, no further permission is required.

What are the ICIP issues?

- Tamara should consult with Uncle Jimmy Ryan to tell him about the project and check if he is happy to have the recordings reused. The Language Centre should also check with Uncle Jimmy whether he would like to be credited as a contributor to the project and what form of words he would prefer.

Consultation with knowledge holder

Ashleigh is a language speaker. She is not an employee of the Language Centre, but the Language Centre has worked with her in the past. Tamara would like to consult with Ashleigh on the names and spelling of the plants.

What are the copyright issues?

- If Ashleigh is contributing her knowledge only, there are no copyrighted resources used and so no further permissions are required.

What are the ICIP issues?

- Ashleigh would be a project consultant. Therefore, the consultation process should follow the project's ICIP plan (if they have one) and any relevant cultural protocols.
- Ashleigh should receive fair benefit in exchange for her time and knowledge.

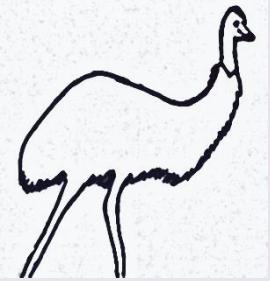
- The Language Centre should also keep detailed notes of the consultation process, and any consents. Ideally, the Language Centre would also prepare a short consultant agreement with Ashleigh confirming the agreed terms.

Language Centres may sometimes find themselves acting as a project manager in the development of language resources, liaising with different copyright holders including:

- Contractors e.g. the software engineer engaged to build the software, or the graphic designer engaged to design the animation
- Knowledge holders e.g. the language speaker who contributes their illustrations
- Existing resources e.g. archived audio recordings or the notes of a linguist

See below for examples of language resources with multiple copyright holders.

Example: Language entry in a digital database

Word in Indigenous Language/English	
 Historical references <hr/> <hr/> <hr/>	<i>Speaker icon</i> <i>pronunciation</i>
	Definition <hr/> <hr/> <hr/>
Traditional stories and knowledge <hr/> <hr/> <hr/>	

- Software designer ©
- Person who recorded spoken word ©
- Photographer ©
- Author(s) of written sections ©
- ICIP in the language, traditional stories and knowledge

Example: An album of songs sung in language, recorded on a CD



- Written version of the music ©
- Written version of the lyrics ©
- Recording of the song ©
- Designer of album cover ©
- Image(s) used on the cover ©
- ICIP in the language, traditional stories and knowledge

In some instances, it might be appropriate for the Language Centre to request a copyright assignment by asking that the copyright holder transfer their copyright to the Language Centre in exchange for a fee or some other benefit. For example where the Language Centre commissions a dictionary or when the linguist has consented to return the benefit of their work to the Indigenous people. In other circumstances it would be more culturally appropriate and equitable for the original copyright holder to retain their rights and for the Language Centre to ask for a licence to use the material. In this scenario, the Language Centre should consider using Arts Law's Licensing Agreement between Language Centre and Contributor.

Remember, an employer generally owns IP (including copyright) in a work made by an employee under an employment agreement, a contract of service or apprenticeship. In comparison, where work is done by an independent contractor, it is more usual for the contractor to retain all their IP. Make sure your employee and contractor agreements include !P clauses that make it clear who owns the IP.

Case Study: Young Champions Profiles for ABC Life

Why reviving Indigenous languages is so important

ABC Life / By Annalee Pope
Updated 31 Dec 2019

One of Annalee Pope's most rewarding experiences as a language worker was teaching language to young children in Bundaberg. (ABC Life: Charlotte Allingham)

Share

I am a Wakka Wakka descendant from central Queensland. When I was young my grandfather would come to my school and talk to all the

Education is the key to keeping Bardi language and culture strong

ABC Life / By Vincent McKenzie
Updated 31 Dec 2019

Vincent McKenzie, or Bawunge as he's called in Bardi language, is proud to know both his cultural ways and Western ways to be able to walk in both worlds. (ABC Life: Charlotte Allingham)

Share

My name is Vincent McKenzie. My Bardi name is Bawunge.

I found the missing part of me in the Nukunu language

ABC Life / By Anil junior Samy
Posted 3 Sep 2019

Anil junior Samy says he always felt that was a part of him missing growing up. Finding his Nukunu language has been part of finding that missing piece. (ABC Life: Charlotte Allingham)

Share

I was born in Alice Springs in the Northern Territory to Beth Turner and Anil Samy.

Images supplied by First Languages Australia

In 2019, ABC Life approached First Languages Australia wanting to work together to profile Young Language Champions around the country.

Through the year, Young Champions were invited to write a 600-800 word profile of themselves for publication on ABC Life. Where possible, the contributors were asked to provide a short quote in their language, along with its translation. Six people contributed.

An ABC journalist was assigned to work with the contributors to help them prepare and edit their story for publication.

The ABC paid each contributor a writers' fee for their stories.

First Languages Australia's role was to identify Young Champions who wished to participate.

The ABC rights agreement signed by the writers was the same for all participants. The agreements confirmed that intellectual property for the work remains with contributors, who gave the ABC an exclusive right to publish the story provided on their platforms. If at any stage the ABC wishes to use the material for a non-commercial purpose they must obtain written approval from the contributor.

Benefit back to community has been in the form of publication and free access and distribution across ABC digital platforms and channels (and beyond).

To give the series a consistent feel, the contributors were also asked to provide a photo with which an illustrator was commissioned to make a portrait.

Here are all the articles:

Annalee Pope, 'Why reviving Indigenous languages is so important', *ABC Life*, 21 February 2019, [Online] Available from: www.abc.net.au/life/inside-the-battle-to-keep-australias-indigenous-languages-alive/10825812. [Accessed 28 February 2020]

Anil Junior Samy, 'I found the missing part of me in the Nukunu language', *ABC Life*, 13 August 2019, [Online] Available from www.abc.net.au/life/reviving-nukunu-language-sa-indigenous-culture/11369346 [Accessed 28 February 2020]

Vincent McKenzie, 'Education is the key to keeping Bardi language and culture strong', *ABC Life*, 3 September 2019, [Online] Available from www.abc.net.au/life/education-is-the-key-to-keeping-bardi-language-culture-strong/11271482 [Accessed 28 February 2020]

Skye Cox, 'Skye Cox's connection to past and future generation through palawa kani and Tasmanian Aboriginal dance', *ABC Life*, 8 July 2019, [Online] Available from www.abc.net.au/life/skye-coxs-link-to-past-and-future-generations-in-palawa-kani/11261436 [Accessed 28 February 2020]

Rudi Bremer, 'Rudi Bremer is reintroducing herself to Gamilaraay and becoming a language champion' *ABC Life*, 28 December 2019, [Online] Available from www.abc.net.au/life/rudi-bremer-on-learning-gamilaraay-as-an-adult/11788194 [Accessed 28 February 2020]

Ebony Joachim, 'Language and culture go hand in hand for Yorta Yorta woman Ebony Joachim', *ABC Life*, 9 May 2019, [Online] Available from: www.abc.net.au/life/yorta-yorta-woman-helping-keep-language-strong/11041818 [Accessed 28 February 2020]

SCENARIO

The language animation project is well underway. Tamara has confirmed which resources she will be using and in what way.

Answer/Discussion

The illustrations

Tamara has decided not to use the illustrations in the sketch book. However, she did get in touch with the granddaughter, Sonia, who is now an adult, to discuss the project. Sonia was delighted to hear that the book inspired Tamara and has asked whether her grandmother can be acknowledged in the credits. Tamara agrees that this would be a great idea and has confirmed with Sonia how she would like her Nan acknowledged. Tamara does not make a separate written agreement with Sonia but keeps detailed notes of what was agreed and has confirmed them in an email to Sonia.

The CD

As the Language Centre already owns the copyright in the CD, no licence is required for reuse. Tamara has checked with Uncle Jimmy and he has confirmed that he is happy to have the recordings played in this animation.

Consultation with Ashleigh

Tamara and Ashleigh have been building a good working relationship through this project. During their consultation sessions Ashleigh has written some of the dialogue that will be used in the final animation. She has also provided photographs she has taken of her own granddaughter who has become the inspiration for the animation of the little girl.

Tamara has prepared a written agreement with Ashleigh about their collaboration, using Arts Law's Licensing Agreement between Language Centre and Contributor. Terms include that:

- in exchange for her consultation fee, Ashleigh provides an exclusive licence to the Language Centre to use the original dialogue she has written
- Ashleigh retains copyright in the photographs of her granddaughter, but that she has given the Language Centre a non-exclusive licence to use them to create the animation of the little girl

The animation

Tamara has engaged graphic designer Jack to create the animation. When she engaged Jack they came to an agreement that in exchange for the commission fee, Jack would transfer his rights in the animation to the Language Centre. They have decided to confirm

this arrangement in a written agreement. The agreement is about 2 pages long and includes terms that mean:

- all IP rights (including copyright) transfer from Jack to the Language Centre upon payment of Jack's invoice
- that title to all the physical and digital copies of the animation transfers to the Language Centre upon payment of Jack's invoice but that Jack may keep a copy for his own non-commercial use and use in his personal portfolio
- that in respect of his moral rights, where reasonably practical the Language Centre will promote Jack as the graphic designer behind the animation

Note, these agreements – written and verbal – have been used to take care of both copyright and ICIP. Where these agreements include terms about how ICIP should be looked after, these ICIP protections become legally enforceable between the parties.

3.5. Orphan works

Orphan works are copyright works, films and sound recordings for which it has not been possible to identify, locate or contact the rightsholder (copyright owner). Orphan works may be protected by copyright. The use of such works without a licence or permission from the rightsholder would therefore be an infringement of copyright. There is no exception under the Copyright Act that allows for the use of orphan works.

Examples of orphan works that you may wish to use in your language resource(s) are:

- ancient or ICIP materials
- archival works
- images (or other material) sourced online

Using orphan works

If you want to use orphan works in any of your projects, it is best practice to conduct a 'reasonably diligent search' to find and locate the copyright owner. If you can identify the rightsholder, but are unable to contact them, you should provide clear and adequate attribution in relation to their work. If the copyright owner comes forward, they may ask for payment for use of their work, or for you to stop using their work. Use of orphan works should also respect any protocols relating to ICIP.

If you do choose to use orphaned material, you can use a 'good faith notice' with the material:

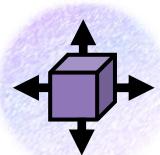
Orphan Works Good Faith Notice (example)

[Name of Indigenous Language Centre/corporation] defines orphan works as: '*copyright material for which the rightsholder cannot be identified, or has been identified but cannot be contacted, after a reasonable good faith search by the user*'.

[Name of Indigenous Language Centre/corporation] has undertaken a good faith reasonable search to attempt to find the rightsholder(s) of orphan works used in this [type/name of language resource]. The content has been used in order to further our goal of [mission statement, e.g. 'reviving and maintaining Indigenous languages']. Should rightsholders wish to negotiate permission to use their content, please contact: [relevant contact details].

This won't protect you from an infringement action, however if you demonstrate that you are acting in good faith and are willing to negotiate, the other party may be less likely to take action against you. Also, if possible, it would be prudent to put aside a sum of money in case a legitimate owner should come forward and you need to negotiate an appropriate fee for the use.

Stage 4 Distributing the Resource



All your planning and hard work has paid off and you have the finished language resource. Now it is time to think about getting the resource out there. This will involve identifying the rights of your project collaborators, as well as your own rights. Collectively, these rights will need to be protected through the publication and distribution stages of the resource.

4.1. How will the language be used?

4.1.1. Identify the rightsholders

It is likely that there were many contributors in creating the resource – other Language Centre employees, contractors, and members of the community. These stakeholders have contributed their IP and ICIP to the language resource and you need a plan to respect and manage those contributions, as well as protect the Language Centre's own interests in the resource.

SCENARIO

Toby has just picked up the first run of the new language CD. The CD is aimed at primary school kids and includes eight songs sung in language. The first seven are original works written and performed by Mara, a local Aboriginal woman. The words are set to music written and performed by Mara's partner John.

The eighth song is a cover performed by John and Mara of a kid's song from sheet music that was found in the Language Centre archives. The author of the original music and lyrics for this song passed away in 1935 but her great-grandchildren still live in the area.

The artwork on the front cover of the CD was created by a local Aboriginal designer commissioned by the Language Centre. The designer gave the Language Centre a license to use his artwork in exchange for the commission fee.

What are the relevant IP and ICIP rights?

Answer/Discussion

From this scenario, it is clear that the Language Centre will be managing several bundles of IP and ICIP rights – some their own, and some on behalf of other people:

- The Language Centre owns copyright in the CD itself
- Mara owns copyright in her lyrics
- John owns copyright in his music
- The designer owns the copyright in the artwork
- John and Mara own copyright in their interpretation of the cover song

- As the original copyright owner of the sheet music passed away more than 70 years ago, copyright no longer subsists in the song. However, the Language Centre may still have a cultural obligation to consult the great-grandchildren about the adaptation of the original song

4.1.2. Holding on to your copyright & looking out for rights holders

Publication and distribution of a language resource is made up of two distinct stages in the life of a language resource and at both stages, you need to look out for your rights as well as the rights of other contributors to the resource. The next section will look at the distribution stages in more detail, however, this section will also highlight the legal and ICIP issues your Language Centre should consider when making key publishing decisions.

In practical terms, the decision on how to publish the resource (i.e. in what form) is often the first decision made when planning a language resource e.g. the decision to create a book. However, when you reach the actual publication stage, there are still key decisions to be made, for example: What publisher will I use? Can I use grant money to pay the publisher? The issue of funding was discussed in more detail in **Part 2 Funding**, but is relevant again here as it is one of the decisions that can potentially impact your rights, as well as the rights of the other contributors to the resource – particularly where grant agreements come with terms and conditions.

Publication agreements

In many instances publication/production will involve negotiating an agreement with an external party. This may mean signing a contract (for example with a publishing house) or accepting a set of terms and conditions (for example when posting to YouTube or Instagram).

Always make sure you are aware of the terms and conditions you are agreeing to – in many cases (particularly when using social media) you may be giving away rights to the content you are posting.

The Language Centre will generally own copyright in the finished publication. However, remember that when you are signing a publication agreement you are making decisions that could impact the rights of the other contributors to the language resource.

For example, when you are signing a publishing agreement to print a picture book, always check for the following terms:

- make sure that the Language Centre retains (or at least shares) copyright in the printed book
- when you are giving the publisher licence to publish the book, make sure you know how long the licence will last for, and how and when to get your rights back

These terms are important protections for the Language Centre's copyright. The Language Centre has put a lot of work into the language resource, and it is both commercially and culturally appropriate that you should retain (or share) copyright over the finished work.

These terms also impact your own responsibilities to the contributors. Returning to the picture book example, if the Language Centre has agreed with the author and illustrator that they should retain copyright in their contributions (the text and the illustrations respectively), the Language Centre may licence the publisher to use the text and illustrations but they cannot assign rights to the publisher.

Distribution agreements

Sometimes the distinction between publication and distribution is clearer than others. If you are publishing a book, you may have a publishing agreement with a publisher, and a distribution agreement with, say, an online store or storefront. However, if you are publishing a short film on YouTube, publication and distribution are the same step.

Depending on the language resource there are a lot of different methods of distribution:

- Podcasts
- Short films published to YouTube
- Books sold online or in stores in print or digital form
- Photographs published on the Language Centre website
- Words uploaded to language software
- Posts and photographs on social media

Depending on the type of language resource, the intended audience, the nature of the content etc., the resource may be distributed widely or with restricted access, at no cost or for a fee.



Remember: If you decide to use a contributor's material for a purpose not covered by the original license or if you would like to use a contributor's ICIP for a purpose beyond the original consent you must return to the contributor for further permission.

When negotiating a distribution agreement check that any license granted to a distributor is limited to what is necessary to distribute and promote the language resource. You may wish to consider using Arts Law's Licensing Agreement for a Language Resource.

In some cases, you may not have the opportunity to negotiate the terms and conditions of a distribution agreement. It is particularly important to check the terms and conditions of social media platforms. Terms of service may also change over time, so it is important to keep up-to-date with any changes.

Note: If you sell your language resources online (e.g. through your website) you should be aware of your other legal obligations - in particular your obligations under consumer law and privacy law.

SCENARIO

Toby's Language Centre plans to distribute the CD in a number of ways. See below for the relevant IP and ICIP considerations for each method of distribution.

	Distribution method 1: The CD will be sold on the Language Centre's website	Distribution method 2: The CD will be available for sale on a third-party website
Protecting the Language Centre's rights	As the Language Centre is the distributor, there is no need for a separate distribution agreement. However, when advertising the CD on the website, the	What terms has the Language Centre negotiated with the website? How will they receive payment for the CDs purchased?

Protecting contributor rights	<p>Language Centre should clearly mark their copyright ownership with a © and consider applying a watermark to photos of the CD to discourage people from copying.</p> <p>The Language Centre should ensure that any contributor should have their contribution appropriately attributed. This is important for both their legal moral rights as well as their ICIP rights.</p> <p>Has the Language Centre consulted with the family of the original musician of the eighth track? How would they like their great grandmother to be attributed? Would they like some free copies of the CD?</p> <p>How would John,Mara and the designer like to be attributed? Would they like some free copies of the CD?</p>	<p>Will any of the revenue raised from the sale of the CDs be paid to Mara and John?</p> <p>What benefit will the designer receive?</p> <p>Has the Language Centre attributed the contributors?</p>
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4.1.3. Rights registration and statutory deposit

It may be appropriate to register an International Standard Number (ISN) for the resource or make a statutory deposit.

International Standard Numbers

If you are publishing a book, serial publication or notated music (e.g. sheet music or song books) you may consider registering for an International Standard Number (ISN). As the name suggests, these are internationally recognised unique identifiers.

They are not compulsory and they do not give copyright protection (you do not need to register your copyright). But they do make it easier for your audience to find your publication, and therefore may increase sales. In addition, an ISN may be required if you intend to make your publication commercially available.

You are able to register for your ISN through Australian agencies. The following table summarises the ISN's available:

ISN	Type of publication	Australian agency responsible for registration
International Standard Book Number (ISBN)	Books (including digital)	Australian ISBN Agency
International Standard Serial Number (ISSN)	Serial publications (including digital) e.g. journals or newsletters	Australian ISSN Agency

International Standard Music Number (ISMN)	Notated music (including digital) e.g. sheet music and song books	Australian ISMN Agency
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For further information, check out the National Library of Australia's site Apply for an ISBN, ISSN or ISMN:

National Library of Australia, 'Apply for an ISBN, ISSN, or ISMN', 2020, [Online] Available on www.nla.gov.au/content/apply-for-an-isbn-issn-or-ismn (accessed 28 February 2020)

Legal deposit

The *Copyright Act 1968* (Cth) requires all Australian publishers to deposit their publications in the National Library of Australia within one month of publication.¹⁹ This includes both print and digital publications – the scheme refers to these as offline and online publications. The NLA does not collect audiovisual material.

Offline publications include:

- Hardcopy print materials
- Electronic materials published on a disk, USB flash drive or similar media

Online publications include:

- Ebooks
- Websites
- Electronic journals

The scheme applies to anyone who makes a publication available to the public for sale or for free, and this will include the publication of language resources. This includes websites, books, journals, sheet music, maps, magazines and newspapers.

For more information on the deposit process, including a flow chart of when a publication should be deposited as well as contact details for depositing offline publications see the NLA's website How to deposit:

National Library of Australia, 'How to Deposit', 2020, [Online] Available on www.nla.gov.au/legal-deposit/how-to-deposit (accessed 28 February 2020)

If the publication is online, you should deposit it through the National edeposit service (NED): National edeposit, 'National, State and Territory legal deposit made easier', 2020 [Online], Available on ned.gov.au/portal/ (accessed 28 February 2020)

State and territory deposits

In addition to the National deposit scheme, there are state and territory laws that may also require publishers to deposit their publications with state or territory libraries within their region.

National and State Libraries Australia (NSLA), the peak body for Australia's national, state and territory libraries provides a summary table on the requirements for legal deposit in Australia:

National and State Libraries Australia, 'Legal Deposit in Australia', 1 January 2018, [Online] Available on www.nsla.org.au/resources/legal-deposit (accessed 28 February 2020)

The table shows deposit requirements for printed material, audiovisual material (e.g. CDs, DVDs and films) and born-digital material (documents intended to be read in electronic form) and provides contact details for the relevant state or territory body. Requirements vary widely, however, NED is increasingly being used to deposit digital material. The NSLA also encourages publishers to deposit their digital material with NED even when not legally required to do so.

For a more detailed summary of your state or territory deposit obligations and contact information, see:

National edeposit, 'What are my legal deposit obligations?', 12 March 2019, [Online] Available on ned.gov.au/resources/legal-deposit-obligations.html (accessed 28 February 2020)

4.1.4. Licences to language resources

So far, this section has focused on ways Language Centres can protect the rightsholders up to the point of publication and initial distribution. Once a language resource is in circulation, Language Centres may receive requests from people or businesses to use or licence a language resource.

Examples include:

- request to play a language song on the radio
- request to use a language book in a school course
- request to access or use software developed by the Language Centre
- request to use a photograph or artwork owned by the Language Centre in a museum or art gallery exhibition

This section will provide an overview of the relevant IP and ICIP considerations when negotiating a license that will allow a third party to use your language resource.

Below is a list of questions you should ask yourself when considering granting a license to one of your language resources:

IP and ICIP considerations when licensing a language resource

Who is making the request?

- Who is the person/company/government department making the request?
- What is their connection to the Language Centre or local community?
- Have you worked with them before?

What will they use the language resource for?

- How do they want to use the language resource?
- Is it a commercial use?
- Is the use for teaching or research?

When will they use the language resource?

- How long do they want to be able to use the language resource?
- Is it a short-term one-off use? Or will it be on-going? For how long?
- When and how can the licence end?

Where will they be using the language resource?

- Who is the intended audience of the reuse of the language resource?
- Is the audience limited to your local community or Australia wide? If the use is online, there could be an international audience

Why do they want to use the language resource?

- What benefit is the requesting party receiving from the reuse?
- Does the requesting party's purpose match the goals and objectives of your Language Centre?

How will the use impact the Language Centre?

- How will the reuse impact the Language Centre's rights to use, promote and benefit from their language resource?
- How will the use impact continuing contributor rights?
- Could the use cause cultural harm?
- Alternatively, could access to the resource allow an unintended use that could cause cultural harm?
- Does the use have a community benefit?

If your Language Ccentre is willing to consider granting a licence to a third party, remember that there are some key terms that you can use to maintain control over the reuse:

- **Term:** You can set the duration of the licence. You could limit the reuse to months or years or you could identify a circumstances or events that will trigger the end of the licence
 - E.g. You could grant a radio station a 3-month licence to play a language song on the radio in exchange for a set licence fee. Further use would require negotiation of another licence
 - Alternatively a licence could be in perpetuity, meaning no time limit
- **Purpose:** You can limit the purpose for which the language resource is used
 - E.g. The director of a local childcare centre hears the song on the radio and would like to teach the kids the song for the end of year parents concert. You could limit the licence to the purpose of teaching the kids. Once the end of year concert is done, the licence will expire. The licence will not cover other

uses by the child care centre, for example, performance to a local tv news program

- **Exclusivity:** You can negotiate whether the licence is exclusive or non-exclusive, meaning whether or not the Language Centre is free to continue using and licencing the resource to other people, while the licensee is using it
- **Use:** You should also be specific about what the licensee can do with the resource under the licence. Can they adapt it? Edit it? Alter it? You may wish to consider using Arts Law's Licensing Agreement for a Language Resource template when licensing your resource to third parties.

Stage 5 Planning for the Future



This means planning for the care of the resources and knowledge the Language Centre holds on behalf of the community. This also means ensuring the financial and governance operations of the Language Centre stay strong well into the future.

5.1. Governance

5.1.1. What business structure is right for you?

Indigenous Language Centres may take many forms. Possible structures include:

- Aboriginal Corporations registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and regulated by the Office of the Registrar of Indigenous Corporations (ORIC)
- Incorporated entity registered under the Corporations Act 2001 and regulated by the Australian Securities and Investments Commission (ASIC)
- Unincorporated entities such as community groups
- Projects within, or auspiced by, a Native Title Body Corporate
- Projects within, or auspiced by, a University

The structure of Language Centres may change over time from their original inception, as they grow stronger, more independent, and develop more and more programs. The biggest difference between the available governance structures is the difference between incorporation and non-incorporation.

Advantages of being an incorporated entity	Advantages of being an unincorporated entity
<ul style="list-style-type: none">• The Language Centre will be owned by the members and controlled by the directors. This means increased independence e.g. directors will have greater control over the programs and resources developed by the Language Centre• Being a separate legal person, it will be liable for its own debts• As a separate legal entity, the Language Centre will be treated like a legal person – it will have the power to enter into contracts and will have the right to sue and be sued. It also has the right to own property, including intellectual property• Is subject to perpetual succession which means the Language Centre will continue to exist until such time as it is wound up, regardless of whether there are changes in directors or employees	<ul style="list-style-type: none">• When Language Centres are just starting out, the additional legal and financial obligations of incorporation can be a hurdle. Remaining unincorporated can give the Language Centre greater flexibility as it is just starting out• If the Language Centre is auspiced under another entity there can be advantages such as increased access to other staff and resources

Disadvantages of being an incorporated entity	Disadvantages of being an unincorporated entity
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- Greater compliance obligations including tax and financial reporting obligations
- Increased legal responsibilities including directors' duties (see **Part 5.2. Directors Duties and Responsible Management**)
- Do not receive any of the advantages of being an incorporated entity
- If the Language Centre is auspiced, it can be more difficult to plan for the future, if those plans are dependent on the auspicing entity
- If the Language Centre is a community group, then the hiring and resignation of employees can make record keeping and management of on-going rights and responsibilities difficult

Here are some common scenarios in which the legal structure of your Language Centre becomes relevant:

- A language speaker has agreed to consult with you on an upcoming kids' book. You are preparing a consultation agreement. Who is the language speaker contracting with? If the language speaker wants to speak to someone about the agreement in the future (e.g. they wish to change the wording of the attribution notice) who should they speak to?
- The photographer who took photos of your Language Centre to advertise on your website is willing to give a licence to the Language Centre in exchange for her fee. Who will the photographer be licensing her copyright to? What happens if that person leaves?
- You are about to sign a publishing agreement. Who will be legally bound by the agreement? The person who actually signs the agreement? Your Language Centre? Your auspicing entity?

Risks

Deciding on the legal structure of your Language Centre requires considering the risks of each governance model. Some of these risks might be legal, financial, or even cultural. The presence of risk does not necessarily mean you should not choose that legal structure – it just means you should be aware of it, and that you should plan for it in order to avoid difficulties in the future.

Key IP risks associated with legal structure		
Incorporated entity	Unincorporated but independent entity such as a community group	Unincorporated entity auspiced under another entity, such as a Native Title Body or a University
Consolidating property (including IP) into the incorporated entity can be a great idea, but there is risk associated if the entity winds up or goes bankrupt. Where does that property go?	Continuity of management can be tricky as employees and volunteers come and go. There might be ambiguity over who may own property (including IP). It is possible that the IP will end up being owned by several individuals depending on	There is a risk that the auspicing entity may end up as the owner of Language Centre property (including IP) if they are the contracting party in commissioning, licensing and publishing agreements.

who was involved in a particular project. As people come and go from the Language Centre, these rights are scattered away. This creates risk where there are ongoing responsibilities to project collaborators. Disbursement of project IP also means that the Language Centre can find it difficult to accrue any on-going benefits from a language project.

Helpful resources

- If a Language Centre incorporates as an Aboriginal Corporation, ORIC has some fantastic resources and support including a Healthy Corporations Checklist, and templates of governance documents, found here: Australian Government, Office of the Registrar of Indigenous Corporations 'CATSI fact sheets', 26 June 2019, [Online] Available on www.oric.gov.au/resources/factsheets (accessed 28 February 2020)
- ORIC also provides several free services including LawHelp, a legal referral service: Australian Government, Office of the Registrar of Indigenous Corporations 'LawHelp', 26 July 2019, [Online] Available on www.oric.gov.au/lawhelp (accessed 28 February 2020)
- Another useful resource is the Indigenous Governance Toolkit which is a free, public-access document designed to assist Indigenous communities and businesses to build their governance structures: The Australian Indigenous Governance Institute, 'Indigenous Governance Toolkit', 24 February 2020, [Online] Available on toolkit.aigi.com.au/ (accessed 28 February 2020)

Important governance do's and don'ts

DO	DON'T
Know your duties	Don't forget that you are personally liable for failing to perform your duties as a director
Act in a transparent way	Don't assume you won't be accountable to others
Declare conflicts of interests	Don't forget to check your language centre's Conflict of Interest Policy

5.2. Directors' duties and responsible management

5.2.1. What is the role of the board?

The role of the board is to govern the organisation at a strategic level by overseeing the running of the Language Centre through its supervision and management of the Chief Executive Officer (CEO). In fact, the board is not directly involved in the day-to-day running of the Language Centre; these are the duties of the CEO. Instead, the board is responsible for making sure the CEO carries out his or her duties correctly, as well as ensuring that the

Language Centre complies with its obligations as a corporation. In practical terms, the board should meet regularly, with the CEO and providing them with all relevant information. The CEO will report on the running of the Language Centre and the board will direct the CEO to carry out his or her duties in a way that meets their legal obligations and is strategically beneficial for the long term running of the Language Centre. The rest of this section will focus on duties of the board of directors of your Language Centre.

5.2.2. What are directors' duties?

If your Language Centre decides to incorporate, it may incorporate as an Aboriginal Corporation under the CATSI Act, or as a Corporation under the Corporations Act. Alternatively, your Language Centre may operate as a division within a Corporation or Aboriginal Corporation.

Incorporation as an Aboriginal Corporation has benefits for Language Centres. Aboriginal Corporations have all the usual benefits of incorporation including limited liability, ability to own property in the corporation's name, and perpetual succession, as well as several additional support mechanisms. Instead of being regulated by ASIC, Aboriginal Corporations are regulated by ORIC, which is required to take into account the culture and unique circumstances of Indigenous businesses. Other benefits include:

- great access to regulatory support
- no registration fees and no on-going costs to maintain registration
- membership rules that emphasise Indigenous ownership and control and are particularly suited to organisations for whom community engagement is a priority

Whichever way your Language Centre is structured, if it is an independent incorporated entity, (or works as part of another incorporated entity) it is important that you have a good understanding of directors' duties. Directors' duties are legal obligations that apply to all corporations regulated by ORIC and ASIC. They are the essential do's and don'ts on good business management. If you are a director of a corporation and you fail to meet your directors' duties you will be held personally liable.

The directors' duties are:

- **Care and diligence²⁰** – you must take reasonable care when exercising your duty. This means:
 - make sure you are informed about the Language Centre, the projects it is working on, and what position it is in financially
 - be on the look out for external factors that might impact the Language Centre. This means staying up-to-date on the latest industry news, and political and policy shifts
 - be proactive in your management role. Take steps to find out more about the Language Centre and monitor what is going on
- **Good Faith²¹** – you must always act in the best interest of the Language Centre and for a proper purpose
 - The best interest requirement means that you must always take reasonable steps to act for the benefit of the Language Centre, while the proper purpose means that you should always act within your power as director
- **Disclosure of conflicts of interest²²** – as a director you may have a personal interest in the outcome of Language Centre decisions. Conflict of interest risks are quite common particularly when organisations play an active role in their community. The way in which you manage those conflict risks will determine whether you have followed

your duty as a director. Your decision must always be in the best interests of the Language Centre

- **Avoid improper use of your position or information²³** – as a director of a corporation, you are in a position of power and trust. It is important that you do not use your position (or information that you gain from your position) improperly. Improper use could include gaining a benefit for yourself or someone else, or causing detriment to the corporation
- **Avoid trading while insolvent²⁴** – as a director your duty of care and diligence means that you should have a reasonable idea of the Language Centre's financial position. You must not allow the Language Centre to carry on business while insolvent, meaning the Language Centre is unable to pay all its debts, as and when they fall due

In fact, these duties are frequently interdependent:

- Care and diligence means that a Language Centre director should have a reasonable idea of the Centre's financial position, allowing them to avoid trading while insolvent
- Acting in good faith and in the interest of the Language Centre means disclosing any conflicts of interest

Remember, Directors' duties are legally enforceable rules which you must follow. You could be held personally liable if you breach these rules. From a legal perspective, you must follow them, no matter what the circumstance.

Understanding these directors' duties and planning for them means you can avoid a legally risky position, as well as any conflict with cultural responsibilities or community expectations.

Acting in the best interests of the company

As a director of a Language Centre, you must make the best interests of the company your first priority.

SCENARIO: THE BEST INTERESTS OF THE LANGUAGE CENTRE?

A director of a local art gallery, Anna-Marie, has approached Bob, the director of the local Indigenous Language Centre. Anna-Marie, wants to pitch an idea to local council: she wants the council to have their ground floor offices converted into a permanent exhibition space that can have rolling 3-month exhibitions of local artists.

Anna-Marie suggests that she and the Language Centre form a long-term collaboration, connecting artists to the exhibition space. However, first she needs to sell the idea to council.

Anna-Marie wants to commission her friend to do a business plan that will impress council. Bob did not catch the name of Anna-Marie's friend – Doug, or maybe Dan? She has asked Bob to go halves in the cost of the business plan in exchange for a share of the profits when the exhibition plan is up and running.

Anna-Marie follows up with Bob the next day. Her friend needs a deposit by close of business the next day in order to secure his time to do the business plan. Can Bob arrange to have the money transferred to her this afternoon?

Fact Scenario 1:

Bob thinks the idea sounds interesting and has the potential to bring a significant financial benefit to the Language Centre. It seems like things are moving fast, and he doesn't want to get left behind. He transfers the money to Anna-Marie's nominated bank account.

Q1. Has Bob taken reasonable care and diligence before transferring the money?

Q2. What reasonably inquiries could Bob have made?

Answer/Discussion

On these facts, it does not look like Bob has taken reasonable care and diligence before transferring the money. He is not sure of Anna-Marie's friend's name, and the terms of the agreement between the Language Centre and Anna-Marie are still pretty vague.

Bob could have confirmed Anna-Marie's friend's name and then done some research on him. What kind of business does he run? Does he have a website? What qualifications does he have to prepare this business plan? What projects has he worked on before?

Other relevant questions Bob might ask include: Why is the payment so urgent? Why does Anna-Marie prefer Bob to pay her instead of Doug/Dan directly? Has Bob seen any documentation confirming the service to be provided and the cost of the service? (for example, a quote or invoice from Doug/Dan) Will Bob receive a receipt for his payment?

Fact Scenario 2:

After making reasonable inquiries about Anna-Marie's business idea, Bob decides that the project is in the best interests of the Language Centre. The council is so impressed with the business plan that they decide to make the project bigger – the house next door to the council office has just gone up for sale and the council wants to buy the property and convert it into an art space. The property is actually owned by Bob's friend Nathan. Bob discloses to Nathan the council's budget for the property sale which is \$100,000 more than Nathan's current asking price. Nathan raises the asking price for his house.

Q3. Has Bob breached his director's duties? How?

Answer/Discussion

As a director of the Language Centre, Bob has a duty to avoid improper use of his position (or information gained through his position).

Bob only knows about the council's budget through his involvement with the council on this art space project. It was improper for Bob to disclose this confidential information to Nathan in order to benefit his friend.

Avoiding conflicts of interest

The most important responsibility of any board is to ensure that it always acts in the best interest of the organisation it governs. Failure to manage conflicts of interest can seriously impair a board's ability to make decisions that benefit the Language Centre and can ultimately undermine the long-term sustainability of the organisation.

This section takes a closer look at what constitutes a conflict of interest and why they should be avoided.

What is a conflict of interest?

A conflict of interest refers to a situation where a conflict arises for an individual between two competing interests. These are often (but not always) interests of duty to your corporation versus your own private interests. Conflicts may be:

- **Perceived** – the situation may appear as a conflict of interest to external parties or other people in your corporation. This negative perception could undermine the reputation of the Language Centre
- **Potential** – there may not be an actual conflict of interest yet, but there is potential for a conflict to develop either in time, or with a slight change of circumstance. For example, if your Language Centre engages a contractor who is related to, or a close friend of, one of its directors, this situation has the potential to develop into a conflict of interest, for example if the contractor asks for extra money without delivering extra services
- **Actual** – there is an actual conflict of interest where a director is in a position to influence a Language Centre decision that he/she has a personal or other business interest in, for example, the director is part owner of a supply company that is marketing their goods to the Language Centre. If the Language Centre contracts with the supply company, the director will make a financial benefit through his/her involvement with the supplier

Do conflicts of interest always involve a financial benefit?

Conflicts of interest can involve financial or non-financial interests or benefit. These benefits may include:

- **Financial payments** e.g. a supplier company may make a payment to a Language Centre's director in order to persuade them to select their business to supply to the Language Centre
- **Business or career opportunities** e.g. a director may persuade the Language Centre to give the local school a discount on their purchase of language resources because the director is hoping it will win him the good opinion of the school. He is hoping this will help him get the teaching job he applied for recently
- **Gifts of goods or services** e.g. a director may persuade the board to award a contract to a catering company, knowing that in exchange the catering company will give the director a substantial discount on her upcoming birthday party

What if the director does not receive the benefit?

A conflict of interest can occur when the benefit is expected by either the director or someone in a business or personal relationship with the director, including a:

- business partner or associate
- family member
- friend

A conflict still exists even if the benefit is not received.

Example

Dom has just applied for a teaching job at the local primary school. When he notices that the school has recently ordered 24 copies of one of his Language Centre's kids' books, he decides to offer to apply his staff discount to the order. Dom hopes that this will leave a good impression on the school and will help win him the job. Dom gives the school the discount, but misses out on the job.

Has there been a conflict of interest?

Yes, there has been a conflict of interest. Even though Dom did not get the job, he still used his position to disadvantage the Language Centre (lost profits) with the expectation that he would receive a personal benefit.

Why should conflicts of interest be avoided?

If a director of an Indigenous corporation which administers language services and projects has a conflict of interest, and does not manage that conflict in good faith and according to the Language Centre's conflict of interest policy, that would mean that their decisions would not be in the interest of the Language Centre.

Failing to manage conflicts of interest can damage the reputation of your Language Centre. This can cause key stakeholders (such as funders, donors, volunteers, community members and beneficiaries) to question whether decisions made by the board have been made in the best interests of your Language Centre or whether the board members have the necessary expertise for their role.

Practically speaking, failing to manage conflicts of interest can have a negative impact on fundraising and donations; recruitment and retention of staff and volunteers; and public trust and confidence in your corporation/Language Centre.

How should conflicts of interest be managed?

The best way to deal with conflicts of interest in your organisation is to establish a process, and to make sure any conflict of interest is brought out into the open.

Remember conflict of interest situations (or potential situations) are bound to happen – especially in organisations that work closely with the community. Language Centre workers are also members of the community with personal and business relationships. It is how you chose to disclose and manage those conflicts that will influence whether you fulfil your legal and ethical duties to your Language Centre.

SCENARIO: CONFLICT OF INTEREST?

Bob is organising a language event in his community. It is a big event – there will be lots of people attending, special kid's activities and speeches from politicians. Bob wants the event to be perfect because he wants to show the community all the great work his Language Centre has been doing and wants to impress all the politicians that are showing up.

Bob's sister Edith runs an event planning business in their town. Bob approaches Edith to help plan the event.

Fact Scenario 1:

When Bob is negotiating the contract with Edith, he explains that the Language Centre is organising the event on the scent of an oily rag. Edith knows what community organisations are and wants to help her brother, so offers her services at a hugely discounted rate.

Q1. Is there a conflict of interest here?

Q2. Why/why not?

Answer/Discussion

On the facts, the offer of the discount does not appear to be a conflict of interest for Bob. It is kind of Edith to offer the discount for her services and accepting her offer does not amount to acting against the interests of the Language Centre – in fact, it is a benefit for the Language Centre.

However, there is a potential or perceived conflict – Edith is Bob's sister. Could this personal relationship influence Bob's choice of event planning company?

Bob could manage this potential or perceived conflict by following the Language Centre's conflict of interest policy, declaring his relationship to Edith to the other directors and getting their permission

Fact Scenario 2:

Edith has been struggling to get business lately. She thinks she can make a lot of money from Bob's event because she knows his Language Centre gets lots of government funding. Edith tells Bob that if he gives her the contract, instead of giving it to a cheaper event organising company, she will organise his big 50th birthday party for free.

Q1. Is there a conflict of interest here?

Q2. Why/why not?

Q3. What can Bob do to manage this situation?

Answer/Discussion

Bob is faced with an actual conflict of interest: if Bob accepts Edith's offer *in order* to receive the benefit of discounted event organising for his 50th birthday party, he will not be acting in the Language Centre's best interest.

Again, Bob should refer to his Language Centre's conflict of interest policy for further guidance. However, the risks of this conflict of interest are significant – he could cause financial detriment to the Language Centre, as well as reputational damage.

It may be appropriate for Bob to step aside and let another of the Language Centre's managers or Board of Directors to make the decision on which event planning company to contract with.

Options to avoid or manage conflicts of interest

There are a number of ways to effectively disclose and manage conflicts of interest. Here are some examples. You may choose to use several measures to mitigate conflicts of interest, depending on the circumstances or the nature of the conflict:

- providing education to all Language Centre staff about identifying conflicts of interest
- disclosing all perceived, potential and actual conflicts to the stakeholders likely to be affected and obtain their consent

- appointing an independent third party to review or oversee the process
- restricting access to relevant information that is sensitive or confidential – the fewer people privy to confidential information, the fewer potential conflicts
- removing the conflicted person from the situation e.g. allowing the board member to sit out of that particular decision

Always keep good records of how the conflict was identified and managed – these will help you demonstrate that appropriate steps were taken.

5.3. Continuity and winding up

A Language Centre or language group may have different legal forms over the course of its existence.

Example

Several community members may start an interest group. They want to learn more about their language.

Within a couple of years the community group grows in numbers. More and more people join the group, wanting to learn more about their language. Several have started to suggest project ideas:

- One of the group members is also a playwright. She has written a play in language and would like to produce it at the local theatre
- Another group member has heard that the State library has some historic language resources that might be relevant to their research. He has suggested some fundraising ideas to fund a research trip to the library

The local university hears about the work of the interest group and has offered an auspicing arrangement. The interest group agrees and they start to work under the auspices of the university.

The group works with the university for several years:

- The university has provided enough funds to support two paid full-time positions
- Money raised through sale of resources have allowed several short-term contractors to be engaged for specific projects
- Several members volunteer their services
- Employees and volunteers have come and gone over the years

After several more years have passed, the group is now considering incorporation. It registers as an Aboriginal Corporation under ORIC.

In this hypothetical, the Language Centre moves through several legal structures starting as an unincorporated entity working independently, then an unincorporated entity auspiced by the University, and finally as an Aboriginal Corporation.

Continuity refers to how a Language Centre produces, manages and distributes its assets (including its IP rights) through these transitions. A Language Centre should always keep a record of what IP rights they own or licence from others. This is sometimes referred to as an IP Portfolio. Having a consolidated record of all the Language Centre's IP rights (owned or licenced) will help the Language Centre maintain continuity if and when they transition into another legal form.

Example

A Native Title body manages a language program. That program produces a book in language. The copyright in the published edition of the book is held by the Native Title body. However, copyright in the text is held by the author. The publication was produced under licence from the author.

Several years pass...

That language program decides to incorporate and become an Aboriginal Corporation. They check the Native Title body's IP portfolio and can see that the Native Title body holds copyright in the published book plus a licence from the author.

Knowing this, the newly formed Language Centre can negotiate with the Native Title Body to transfer copyright in the book. They also contact the author negotiate the transfer the licence to the Language Centre.

In this way, maintaining an up-to-date IP portfolio can contribute to continuity of ownership and management of the Language Centre's IP rights.

Continuity also refers to how a Language Centre manages the rights and responsibilities it takes on through agreements (for example, funding agreements, or agreements with contractors). This too will require planning to maintain continuity.

Remember

Contracts bind two or more legal entities. If your Language Centre operates as a division within a larger incorporated entity, such as a university, the agreement will most likely be between the contractor and the incorporated entity. Therefore, the incorporated entity will accrue the rights and responsibilities of the agreement.

For example: A Language Centre within a university commissions a designer to create a logo for the Language Centre. The commission agreement includes transfer of the copyright in the logo. As an unincorporated entity, the Language Centre cannot contract directly with the designer. Instead the contract is between the designer and the university. That being the case, it will be the university that owns copyright in the logo.

Record keeping for continuity of IP assets and contracts is also important if the Language Centre ceases to operate. If the Language Centre ceases to operate, it is recommended that steps be taken to close the Language Centre to remove it from either ASIC or ORIC's registers (depending on the method of incorporation).

Closing the Language Centre will mean that you do not have to continue your obligations as an office holder. It is recommended that you seek legal advice on the best way to close the Language Centre.

The process of closing the Language Centre will require that provision be made for the management of the Language Centre's assets. Again, this is where record keeping of IP assets and contracts will be essential, as it will mean that the IP assets can be redistributed as necessary to ensure that the accumulated knowledge and resources is passed on, even if the Language Centre does not continue.

5.4. Implementing a strategic plan

Implementing a strategic plan for the Language Centre can be a useful way of managing these important areas of governance. A strategic plan can provide an overview framework of agreed strategies for management of each planning area, as well as delegate responsibility to necessary staff and select review periods – it is important to keep the strategic plan up to date!

Below is an example template for a strategic plan.

Planning area	Strategy/actions	Person responsible	Next review date
Management of IP portfolio			
Collections management			
Roles and responsibilities of office holders			

5.5. Financial sustainability

5.5.1. Funding options

Funding agreements

Language Centres may have opportunities for funding agreements with various Australian, state/territory or local government entities. These funding agreements may be with:

The Australian government

The Indigenous Languages and Arts program invests around \$20 million annually to community-based organisations for projects that support participation in, and maintenance of, Indigenous culture through languages and arts. In addition, between 2016-2020 an additional \$10 million of funding was committed by the Australian Government to protect, preserve and celebrate Aboriginal and Torres Strait Islander languages.²⁵

State governments

E.g. In 2019 the Queensland Government's Indigenous Languages Grants Program awarded 31 grants for Aboriginal and Torres Strait Islander language preservation revival initiatives.²⁶

Indigenous Languages and Arts (ILA) Program²⁷

What organisations receive the funding?

The ILA program provides funding to organisations that support participation in, and maintenance of, Australia's Aboriginal and Torres Strait Islander cultures through languages and arts. To be eligible to apply for a grant, the organisation must be:

- An Aboriginal Corporation registered under the CATSI Act
- A company incorporated in Australia
- An incorporated trustee on behalf of a trust
- An incorporated association
- A partnership
- A registered charity or not-for-profit organisation
- An Australian local government body

An unincorporated association without an auspicing body is not eligible to apply for a grant.

What grants are available?

There are two streams of grant opportunity under the ILA program:

1. **Open competitive:** participation in the annual open competitive grant opportunity is available to all eligible organisations wishing to submit applications for languages and arts activities
2. **Restrictive competitive:** participation in the restricted competitive grant opportunity is by invitation only from the ILA program and is available to organisations that meet the eligibility criteria available for eligible organisations

What can the grant money be used for?

Grant money must be used on projects that will meet at least one of the ILA program's objectives:

- Preserve, revive and maintain Indigenous languages by facilitating preservation activities, promoting participation in teaching and learning and developing language resources
- Develop, produce, present, exhibit or perform a diverse range of traditional and contemporary Indigenous arts
- Support new and innovative forms of Indigenous expression through art
- Support the transmission and development of Indigenous cultural heritage and knowledge through language and arts projects

The grant money may be used for purposes such as engagement of consultants, facilitation of access to resources and facilitation of workshops and community meetings. However, there are restrictions on what the money can be used for, including ongoing employment of staff, operational funding or projects that are also being funded by other programs administered by the Australian Government.

Your grant application was successful, now what?

If your application is successful you must enter a legally binding agreement with the Commonwealth of Australia, represented by the department. The agreement will be legally binding on the Australian Government and the legal entity (Aboriginal Corporation, auspicing body etc) that applied for the grant.

What is included in the grant agreement?

The grant agreement will set out the terms and conditions on which the funding will be managed. In the grant agreement you will be required to:

- Meet key deliverables
- Collect and supply data
- Submit reports, activity plans, budgets and/or financial acquittals
- Undertake risk management
- Facilitate site visits by the Australian Government if requested

This is a brief summary of some of the key Guidelines for funding from the ILA Program. For more information see the Indigenous Languages and Arts Program website www.arts.gov.au/funding-and-support/indigenous-languages-and-arts-program.²⁸

Funding agreements are legally binding documents that set out the terms on which the funding body provides the grant. It will contain legal obligations for both the funding body and the legal entity contracting (the Aboriginal Corporation, auspicing entity etc).

Good governance mechanisms are an essential prerequisite for entering into funding agreements, as strong governance structure and reporting mechanisms are essential to the Language Centre's ability to deliver project outcomes.

Always carefully review the terms of a funding agreement. Some key questions you should consider include:

- What are the Language Centre's obligations under this agreement?

- How long does the funding agreement last?
- What are the deliverables required by the grant? When are they due? Are these deadlines feasible?
- What can the Language Centre spend the grant money on?
- What can't the Language Centre spend the grant money on?
- Who owns the project IP?
- Is the project IP subject to any licences? If so, in whose favour and what are the terms?

It is recommended that you seek independent legal advice on the terms of any funding agreement prior to signing the agreement.

Partnership agreements and collaborations

Partnerships with other organisations are a great way for Language Centres to work on language projects.

Project partnerships can expand Language Centres' access to resources and audiences and can promote awareness and increase visibility of the work of Language Centres. Promoting the immense cultural value of Indigenous languages and celebrating language as a living cultural practice will have flow on effects, for example it may get more people excited about language projects which in turn could give rise to further funding and partnership opportunities.

Other advantages include:

- opportunities for skills development for both parties
- additional financial and other resources for projects (diversification of income sources is discussed further in the next section)
- exciting opportunities to practice, celebrate and revitalise language and culture
- further income for the Language Centre, that can then be reinvested into further projects and services

This section looks at some partnership opportunities. For clarity we have grouped them under the following sub-headings:

- corporate
- research/academic
- Galleries, libraries, archives and museums (GLAM) sector

Corporate

In the context of this section, we refer to for-profit businesses – large and small – as corporates. Some hypothetical collaborations could include:

- businesses wanting to name meeting rooms using language words
- businesses that produce goods or services wanting to incorporate a language word into their product or service
- businesses wanting to incorporate language words into their branding and marketing
- creative collaborations that result in a product, service or performance that could be sold for a profit

Research/academic

Research and academic partnerships also pose opportunities for collaborative language projects.

The most apparent opportunities in the academic sphere are tertiary educational institutions including universities and private colleges such as TAFE and the Bachelor Institute. Language teaching at a tertiary level is increasingly well established. In addition, there is frequently government funding made accessible to tertiary education institutions, potentially expanding their capacity to collaborate with smaller Language Centres in mutually beneficial language projects.

Galleries, Libraries, Archives and Museums (GLAM) Sector

Collaborations in the GLAM sector can be an opportunity to showcase and celebrate languages.

Case Study: State Library of New South Wales' use of *Gambay: Interactive first languages map*

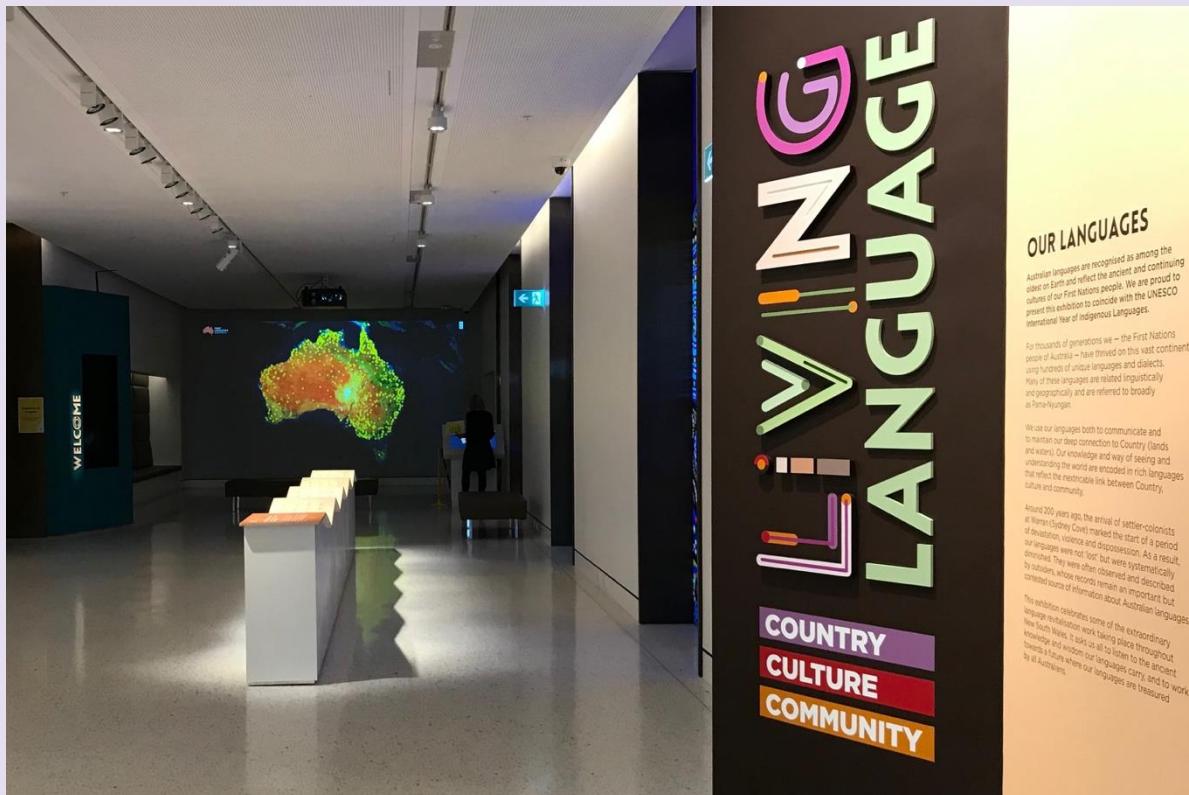


Image supplied by First Languages Australia

In 2019, the State Library of NSW developed an exhibition showcasing languages from across NSW. "Living Language: Country, Culture, Community" combined new video, text and photographic material with archival records from the library's collection.

State Library of New South Wales 'Living Language: Country, Culture, Community' State Library New South Wales 2020 [Online] Available on <https://www.sl.nsw.gov.au/exhibitions/living-language-country-culture-community> [Accessed 28 February 2020]

The exhibition team contacted First Languages Australia to request the use of *Gambay* in the exhibition as a wall sized interactive display on entry to the exhibition space.

Modifications to the map were requested to make it suitable for the display the exhibition team intended. First Languages Australia did not have the time or resources to make the changes but the library had skilled staff available.

Through a “relationship-source” model, the First Languages Australia committee agrees to share the *Gambay* software and content for individually approved projects. This project was approved under this model and FLA agreed to give the library access to the code that runs *Gambay* so that they could adapt it to fit their needs.

As part of the agreement, FLA required that:

- FLA could review and provide comment on any visual modifications made.
- All modifications to the software were shared back to the source code so that other partners with similar needs were not required to duplicate the work in future.
- Any community feedback to improve language naming or placement received by the library from language custodians would be passed on to FLA with custodian contacts for future updates.

The agreement took two forms. Firstly, a letter from FLA outlining the terms of the relationship and outlining existing partners’ requirements, such as logo placement. And secondly, a “contributor licence agreement” assigning contributing developers’ rights in the code they write back to *Gambay*. The agreement was based on an existing licence that was published as an open-source document that could be reused and modified.

No funds were transferred through the agreement. The benefit to First Languages Australia and the languages network was the promotion of languages and *Gambay* through the collaboration.

Checklist for working with project partners

Here are some questions a Language Centre may want to consider before entering a project partnership:

- What are the desired project outcomes?
- What expertise or resources is your project partner contributing?
- Have you checked the previous experience of the project partner?
 - Do they have a good reputation?
 - Are their values consistent with the Language Centre’s ethics?
 - Do they have transparent dealings with you? Are they upfront and truthful?
- Have you considered what they are expecting to gain from the collaboration?
- Have you got legal advice about doing due diligence?

Philanthropy

Effective from 1 July 2019, Indigenous language organisations were added to the list of organisations eligible for endorsement as a deductible gift recipient (DGR). An organisation whose purpose is promoting Indigenous languages can apply for endorsement through the

Register of Cultural Organisations. This enables Language Centres to receive donations which enable the donor to claim a tax deduction for the gifts they give to the Language Centre.

For more information, see the ATO website - www.ato.gov.au/Non-profit/Newsroom/Fundraising/DGR-status-for-Indigenous-language-organisations/.

Commercial models for fees for service

The increased interest in using language words and resources has come from many different people and businesses. Some examples include:

- people from the local Indigenous community who want access to the language resources offered by the centre, such as the local school
- people from other Indigenous communities around Australia, or First Nations people internationally, who want to adapt some of the centre's archival resources or techniques to record and revitalise their own language.
- businesses (large and small) who want to use a language word, e.g. to name a meeting room.
- not-for-profit organisations may want to use language words to name rooms or projects, or they may want to use the language resources in a project of their own.
- government departments may also want to ask permission to use language word to name rooms, or use language words in reports.
- museums and galleries may be interested in collaborating with Language Centres to enhance the interpretation and cultural integrity of an exhibition.
- broadcasting networks e.g. tv or radio may want to use language words in their programming, or a factual entertainment program may want access to some of the knowledge and archival resources held by the Language Centres.
- universities may want to engage in research projects with the Language Centre. Language centres hold a great wealth of knowledge and many university departments may wish to access some of these resources in collaborative research projects.

Use of Language Centre resources – including the time spent working on a project by Language Centre staff – is a potential income stream for Language Centres, particularly where the Language Centre user gains a commercial or financial benefit.

The rest of this section takes a closer look at some of the services offered by Language Centres that could be offered at a charge.

Requests for commercial use of language words

Some Indigenous communities and Language Centres are developing infrastructure to facilitate free, prior, informed consent for use of languages, especially if the language is commercialised. Examples include naming rooms in corporate buildings, geographic name clearances and business or product names. Fees are often charged.

Communication, consultation and consent with the relevant traditional custodians of the language should underpin non-customary and commercial applications of words in business, product service and location names. This ensures that Indigenous custodians, language centres and stakeholders are involved in processes that determine how their languages are used. This approach is recommended by the United Nations Global Compact Business Guide on the Declaration on the Rights of Indigenous Peoples.²⁹

Language Centres can develop methods for handling language requests which include having a language request form and a schedule of fees on your website.

Case Study: Language Query – Victorian Aboriginal Corporation for Languages

The Victorian Aboriginal Corporation for Languages (VACL) website includes a *Language Query* page.

The page is aimed at organisations wishing to use Indigenous words to name a place, facility or program. It provides context for Language Centre users about the importance of asking permission and treating languages with respect.

It also highlights three key principles that a requesting party should consider:

- (i) **Seek permission and follow protocol:** it is protocol that if a requesting party wants to use a language word as a name, they should use a word from the language of the land where the place to be named, stands. The requesting party must consult with the Traditional Owners from the Country where the place is being named, or if the requesting party does not know who to contact, they can contact V.A.C.L by submitting a language query.
- (ii) **Translating English concepts into Indigenous languages is complex:** Translation of concepts is often not a simple case of opening a dictionary. The requesting party should remain flexible be prepared to take suggestions from Traditional Owners
- (iii) **It takes time to show respect:** Consultation takes time, and not waiting for permission can cause great offence.

Having introduced these important principles the VACL Language Query page then has an online form that site users can use to make an inquiry about using a language word.

Delivery of lectures

Delivery of lectures, workshops and other speaking events have also reportedly increased. These kinds of engagements can range in scope and form and be charged at a fee. Some examples might include:

- talks delivered to primary or high school aged students in person, or through skype or other video conferencing method
- speaking events or stalls at university open days or similar events
- speaking events or stalls at community events or festivals
- lectures or programs offered by the Language Centre to interested members of the community

Sale of language resources and online retail

Some Language Centres have established an online retail store to generate income streams³⁰ or are interested in developing one. Establishing an online store has the advantage of lower overhead costs compared to setting up physical retail space and widens the potential market for the products. It could sell a range of products such as books, language resources and other merchandise. It would also be an opportunity for the Language Centre to partner with local Indigenous business owners who produce artwork, jewellery, clothing, food products, or skin care and beauty products.

Although, remember that when selling language resources (online or in store) you should consider your obligations under consumer law. In addition, when you are handling people's personal information (e.g. name and address on the online retail store) you will also need to comply with privacy legislation).

SCENARIO

Mara works at a Language Centre in New South Wales. Dan, from Top Bank has contacted the Language Centre. Top Bank has just opened a new office building on land belonging to Mara's language group. The new building has three meeting rooms it would like to name using language words.

Dan has asked for Mara's help to choose three language words that would be appropriate, and that the local Indigenous community would be happy for Top Bank to use. Dan has asked Mara to provide a quote for these consultations.

Answer/Discussion

Mara knows that it will take two consultation sessions of about an hour each to discuss Dan's proposal with the community. It is about an hour's drive each way to the community, and she will need her colleague, Hope, to assist.

Tip: Set an hourly rate for staff. More experienced staff might complete some tasks quicker so they could charge a higher rate. It's also a good idea to set the rates higher than the rate at which you pay your staff. You know your centre's finances best, but remember that the charge-out rate for your staff should cover:

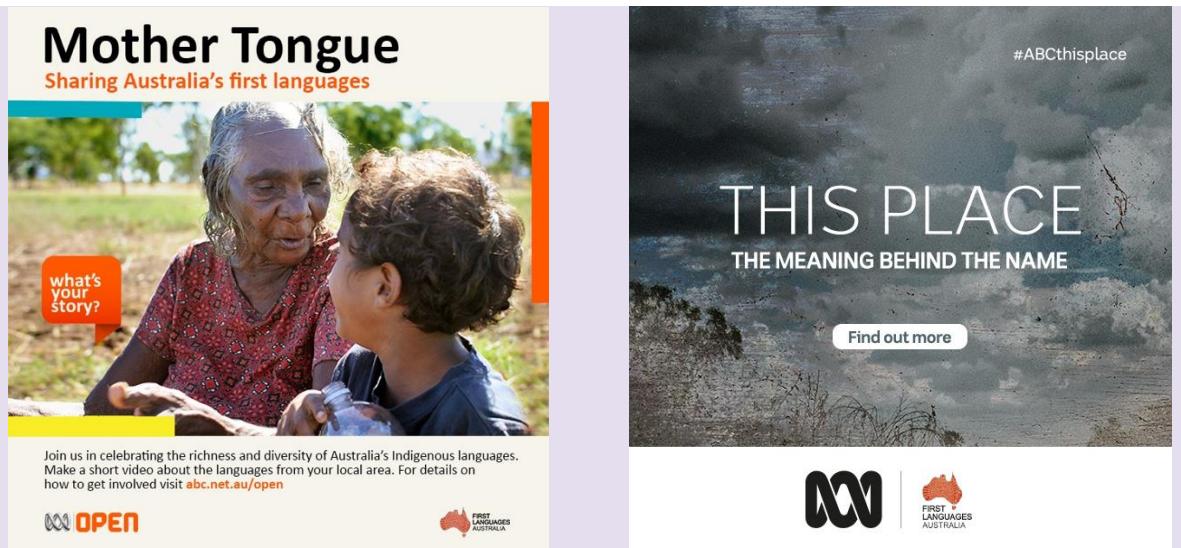
- their salary
- the cost to the centre of keeping them on (e.g. any professional development time)
- a profit margin that can be re-invested into the Centre

Negotiating benefit sharing

It is also important to consider ways you can negotiate benefits for the community. Benefits may be monetary, non-monetary or a mixture of both. The kinds of benefits negotiated will vary depending on community needs and the nature of any language project, but here are a few ideas:

- Requesting copies of any resulting publication that includes any language materials. These can be provided to members of the community who assisted in the consultations
- Where a language word, or person's name, has been used to name a room, installation, public artwork etc, request that an explanation plaque be placed giving context to the use of the word and promoting the cultural context of the language word
- Request that key members of the community who assisted in the consultations be invited to any launch events, and that reasonable travel expenses be reimbursed
- Request contribution to a community project
- Where relevant, request that documentation, including photographs, of the project in development, be provided to the community. The project, and the records, form part of the community's history which should be kept and maintained

Case Study: The ABC *This Place* and *Mother Tongue* projects are a collaboration between ABC Regional & Local division and First Languages Australia.



Images supplied by First Languages Australia

The *This Place* (2019) and *Mother Tongue* (2014-15) video projects were partnerships between First Languages Australia and ABC Regional & Local. The projects required Producers in each ABC station to make contact with language custodians in their regions and collaborate on video stories that promote the language of the region.

The stories were to be led by the custodians, who participated voluntarily, without payment, and approved the final films before publishing.

The ABC Producers were required to initiate the discussions, identify collaborators and work with the custodians to make and publish at least one film for their region. First Languages Australia was able to help make connections with local custodians where that was required.

The making of each film in the series required significant contributions from both the ABC staff and participating local custodians. An agreement was drawn up which stated that the cultural material remained the property of the community. The ABC and FLA agree to withdraw the films from circulation any time a participant requests.

The community members received:

- a film for their use into the future,
- access to associated teachers' notes for the film being made by ABC Education to support the sharing of the film in classrooms.
- promotion of their stories to ABC audiences through broadcast and social media channels.
- the opportunity to develop an ongoing relationship with their local ABC for future stories.

ABC Indigenous 'ABC This Place – the Story Behind Aboriginal and Torres Strait Islander Place Names', 12 January 2020, [Online] Available on www.youtube.com/playlist?list=PLmWe-V9tacwEPDUHggQgzE8YPRMaiNQyA (accessed 28 February 2020)

ABC Indigenous 'ABC Mother Tongue', 7 April 2019, [Online] Available on - www.youtube.com/playlist?list=PLmWe-V9tacwHqlfIBPvZMThlaYH6gH2u0(accessed 28 February 2020)

Tiered costing models

The possibility of a tiered costing model was suggested at the start of this section. A tiered costing model could take into account:

- The user's capacity to pay
- The community benefit from the project
- The nature and size of the benefit the user expects to gain

The Language Centre could draft a guideline or checklist for staff on how to quote for work. This could be an internal document (not posted on the website). It could also include a checklist of things to consider when quoting, for example:

- Is the requesting party an individual or an organisation?
- If an organisation, what kind?
- What does the requesting party want to use the information for?
- Does the project benefit the community?
- What benefit can the requesting party expect? Is it financial?

5.6. Looking out for business today and tomorrow

5.6.1. Future planning for rights held by the Language Centre

Often Language Centres do not consider management of IP rights a priority. During our consultations, Language Centres told us that much of the time they only have verbal agreements in relation to rights over language resources.

It is essential to develop and implement an IP management plan and protocols to preserve language resources for future generations and fulfil stated duties and responsibilities to the communities served by the centre. Making decisions about rights held by the Language Centres, and recording them in written agreements, may also prevent disagreements and issues arising years after a language resource was created.

Having an IP management plan and protocol empowers the centre to give advice to non-Indigenous collaborators.

5.6.2. Managing staff and contractors

It is important to have employment agreements with staff members setting out their duties and entitlements including leave and superannuation. There should also be conditions around performance reviews and key performance indicators.

It is ideal to have a clause that relates to IP clearly including terms that ensure all output of the employee vests in the Language Centre. Further, there should be clauses that include moral rights clearances which enable the Language Centre to use the content, add to and adapt it, without having to give attribution.

Depending on resources and the project, you may not want to employ people permanently but would prefer to engage them as contractors for projects. You should have written contractor agreements that clearly set out the nature of the relationship, the payment, including invoicing processes, GST, delivery and whether the contractor should provide a GST invoice. Most importantly, you will need to state that the intellectual property of any content belongs to the Language Centre, if that is what you want. This is because under the general copyright rules, creators of works remain the owners of works even if commissioned.

5.6.3. Archiving and storage

Storage of materials takes place in small, local and private collections as well as state, national and public collections such those run by AIATSIS, for example AUSTLANG.³¹

The Language Centre should consider the long term management of resources. Four key areas to consider are:

- Storage of original physical resources – is the space suitable and secure for safekeeping?
- Digital copies of resources – is there a process of back ups? Are security issues considered?
- Obsolescence of storage formats E.g. videos vs digital files?
- Use of online cloud storage – stored in Australia or overseas – check security of storage

5.6.4. ICIIP protocols for future use

Another key aspect is to ensure that the protocols for future uses are cleared with traditional owners, and that consultation on future projects are undertaken around integrity, authenticity and interpretation.

Summary – Checklist

Language revitalisation projects involve navigating complex legal and governance obligations in addition to the considerable work involved in the research, development and marketing of language resources.

The purpose of this guide is to provide an overview of the legal and ICIP issues that language workers encounter in their daily work. Greater clarity around their legal rights and responsibilities will empower language workers in their decision making and management of their language work and help ensure that Language Centres continue to be strong, well into the future.

Below is a quick reference checklist, following the stages of the language resource development. This checklist can be used to assist with language project planning and referred back to at any stage throughout the life of the language resource.

Stage 1: Connecting with the Community

Part 1

- Have you consulted the community?
- Have you spoken to Elders and members of family?
- Is there a committee overseeing the project?
- Have you identified speakers and cultural experts and advised them of the nature of the project?
- Will there be filming of people?
- Will there be photography of people, groups and locations?
- Have you obtained prior informed consent?
- Have you obtained written consent?

Remember, the Arts Law Centre of Australia has a Consent to Record template and a Storyteller's Release available for Language Centres

Stage 2: Funding

Part 2

- Have you read the funding criteria?
- Have you incorporated or set up a legal entity that is eligible for funding?
- What are the terms of IP in the funding agreement?
- Are you working with a university or other education entity such as a school or the department of education, or a media entity?
- Have you discussed Memoranda of Understanding, and what the project will create in terms of outcomes
 - Materials and resources?
 - Long term cultural benefits?

Stage 3: Creating the resource

Part 3

- Have you incorporated or set up a legal entity that is eligible for funding?
- Working with a linguist or language expert? Have you engaged them as an employee or contractor? Ensure you have a written agreement. Make sure you have IP covered in your clauses.
- Who are the credited authors?
- What are the terms of IP in the funding agreement?
- Have you discussed digital rights and database issues?
- Are you using illustrations? Engage the artist and seek a licence for the rights to the images
- Are you using photographs? If so, you will also need to get permission from the photographer and copyright owner as well as the people in the photo
- Altering images and illustrations? If so, you will require permission to change images and illustrations.
- Do you have permission to film or make a sound recording of anyone who is talking?
- Using existing resources? If so, you may need to get permission from the copyright owner, moral rights clearances from authors, and permission from the entity who created the resources. You should also follow cultural protocols for permissions
- Have you followed the ICIP protocols?
- Are you using artwork from the area, or using artists from the region?
- Have you reviewed your consultation and consent processes?
- Are you using agreements?

Remember, Arts Law has a Licensing Agreement between Language Centre and Contributor available, as well as a Commissioning Agreement for a Language Resource template

Stage 4: Distributing the resource

Part 4

- Database, digital apps and websites – have you considered the rights to any existing software? Have you secured the domain names? Have you engaged any technical suppliers, ensuring that the rights to the content are secured? Have you checked any relevant IP clauses and the rights to use for re-licensing?
- What is the purpose of the resource – will it be published, printed, put on the website?
- Have you reviewed the publishing agreement?
- What IP and ICIP notices will be included?
- Have you considered registering for an International Standard Number, e.g. an ISBN?
- Have you prepared terms and conditions of your website and for sale of items?
- Have you checked your legal deposit requirements?

Remember, Arts Law has a Licensing Agreement for a Language resource template available.

Stage 5: Governance

Part 5

- Is your organisation clear on the role of the board and the role of the CEO and staff?
- Have the board and management established regular meetings and a board calendar, and regular agenda items which include developing strategy, budget and legal compliance?
- Is the board comprised of people with the necessary skills to run the organisation?
- Are your board directors clear about their directors' duties?
- What manuals and policies have you prepared to help people comply with their governance responsibilities?
- What are your procedures for staff management?
- How can you nurture future directors?
- Are you eligible for DGR status?
- Are you complying with your Australian Charities and Not-For-Profits Commission (ACNC) obligations?

Stage 5: Succession

Part 5

- Governance systems – what has been established?
- Have you checked your compliance with company law?
- Have you registered any Trade Marks?
- Have you secured a Domain name?
- Do you have an IP Register?
- Do you keep a register of Cultural Organisations?

Further Resources

General

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
aiatsis.gov.au/

First Languages Australia <firstlanguages.org.au/>

International Year of Indigenous Languages 2019 (IYIL) <en.iyil2019.org/>

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Intellectual Property and Business

Terri Janke and Company, Law Way: Indigenous Business and the Law
www.terrijanke.com.au/law-way-publication

Terri Janke and Company, Trade Marks: Answers to questions and General Information (2014) <www.terrijanke.com.au/trademarks-doc>

Terri Janke and Maiko Sentina, Indigenous Joint Ventures: Information Guide (Indigenous Business Australia, 2018) <www.iba.gov.au/wp-content/uploads/Indigenous_JV_InfoGuide.pdf>

United Nations Global Compact, United Nations Declaration on the Rights of Indigenous Peoples: A Business Guide
www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf

Australian Small Business Advisory Services (ASBAS) Digital Solutions
www.business.gov.au/advisory-services/asbas-digital-solutions

Arts Law Centre of Australia & Artists in the Black
<<https://www.artslaw.com.au/artists-in-the-black>>

Arts Law has developed a suite of template agreements and resources for the creation and distribution of Language Centre resources. These include:

- Commissioning Agreement for a Language Resource
- Licensing Agreement between Language Centre and Contributor
- Licensing Agreement for a Language Resource
- Storyteller's Consent
- Consent to Record
- Info sheet & educational videos

ICIP

Terri Janke, Our Culture: Our Future (Report for Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998)
www.terrijanke.com.au/our-culture-our-future

Terri Janke and Maiko Sentina, Indigenous Knowledge: Issues for protection and management (Discussion Paper, IP Australia & Department of Industry, Innovation and Science, 2018)
www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf

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