



# Respecting Culture: Case Studies of incorporating Indigenous Data Sovereignty and Indigenous Cultural and Intellectual Property rights into Government Contracts

This fact sheet is designed to provide advice to NIAA staff who are looking to incorporate Indigenous Cultural and Intellectual Property (ICIP) into contracts. It includes two case studies and some background and advice on ICIP and how it relates to the implementation of the Framework for the Governance of Indigenous Data (GID).

## **Case Study 1: Provider wanted to ensure that clauses on their ICIP rights could be inserted into a funding agreement and honoured**

The NIAA was negotiating a funding agreement with an Aboriginal Corporation as the Provider. The Provider raised concerns about the default Intellectual Property clauses in the Head Agreement (the role of the Head Agreement is explained further below).

The NIAA uses Project Schedules to amend and expand on a standard Head Agreement with standard clauses. But the Provider was uncomfortable going ahead without being able to negotiate clauses on their inherent right to cultural and intellectual property with reference to their own Lore and Laws, and their rights under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The NIAA staff involved sought early advice from the NIAA legal team. This was about whether the clause suggested by the provider for the project schedule was workable. The NIAA worked collaboratively to confirm and reassure the Provider that, in the case of a conflict between the Head Agreement and the project schedule, a project schedule clause would take priority.

The parties amended the project schedule by inserting a clause that recognised and protected the Provider's ICIP rights. The agreement was both legal and workable for the NIAA to administer.

## What is Indigenous Cultural and Intellectual Property?

According to the AIATSIS Code of Ethics, ICIP refers to all aspects of Indigenous peoples' cultural heritage, both tangible and intangible. It can include everything from knowledge and knowledge systems through to human remains and genetic information, as well as cultural material, such as arts and crafts, and the documentation of heritage, such as films, books and photographs.



# How does ICIP relate to the Framework for the Governance of Indigenous Data?

The NIAA, in line with all APS agencies, recognises that partnering with Aboriginal and Torres Strait Islander stakeholders is essential for respecting the right to self-determination. As part of this commitment, Commonwealth data leaders co-designed the Framework for the Governance of Indigenous Data (GID) with Aboriginal and Torres Strait Islander peoples. It acknowledges the best outcomes occur when the government and Aboriginal and Torres Strait Islander people work in partnership to inform, design and deliver better ways to achieve outcomes.

APS agencies have agreed to implement the Framework for Governance of Indigenous Data (GID) through to 2031. The GID Framework applies to all government-held Indigenous data. The definition of 'Indigenous data' adopted in the Framework has been originally provided by Maïam nayri Wingara, and so it "refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually".

## What is Indigenous Data?

In Australia, 'Indigenous data' refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually. – **Maïam nayri Wingara**

Given ICIP is a form of Indigenous knowledge, which can be either individual or collective, it also falls under the definition of Indigenous data as adopted by the GID Framework. So, ICIP held by government is also subject to the GID Framework's guidelines and actions required to be implemented by all APS agencies.

Implementing the Framework is not just about the governance of government-held data. It is also about supporting self-determination and effective self-governance through meaningful partnerships with Aboriginal and Torres Strait Islander peoples and communities.

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*"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, cultural knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, cultural knowledge, and traditional cultural expressions.*

**– Article 31 of the UNDRIP**

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# Incorporating ICIP into a grant or other contract

As part of their work, NIAA staff sometimes negotiate grants and other contracts with Aboriginal and Torres Strait Islander communities, businesses or organisations.

NIAA staff must find ways to ensure First Nations' rights to their own cultural heritage (intangible and tangible), traditional knowledge, and cultural expressions are respected within existing agreements, while working within the current Commonwealth legal framework.

## Cultural Protocols for ICIP

NIAA employees must consider legal, ethical, and moral implications when engaging with Aboriginal and Torres Strait Islander cultural and intellectual property (ICIP).  
– **First Nations Cultural Protocols for NIAA Staff**

Grant funding agreements with the NIAA generally include a standard Head Agreement and the Project Schedule that sets out specific contractual requirements. The template Head Agreement's Intellectual Property clauses give the Commonwealth a non-exclusive, royalty-free licence to use, reproduce, publish, adapt and exploit agreement material and any existing material for Commonwealth purposes. It also provides the Commonwealth with the right to licence that material to the public under a Creative Commons Attribution.

This Intellectual Property clause may conflict with an organisation or community's right to own and control their cultural and intellectual property. Clauses in the Project Schedule can amend the Head Agreement but need to be negotiated and mutually agreed.

In some cases, organisations may have existing clauses they prefer to insert. These may need to be amended in concert with the NIAA's legal team.

## 1. Familiarise yourself with the intent of the GID Framework

The GID Framework accepts the Maiam nayri Wingara definition of Indigenous data while asking agencies to work closely with Aboriginal and Torres Strait Islander partners to determine what this means in relation to Indigenous data held by the agency, Indigenous data priorities, and the practical actions that can be implemented to improve governance.

The GID Framework aims to:

1. Increase and enhance engagement and partnership between Aboriginal and Torres Strait Islander people and organisations, and government concerning data;
2. Increase the capability of both the Australian Government agencies and Aboriginal and Torres Strait Islander stakeholders to engage in the governance of Indigenous data;
3. Ensure Aboriginal and Torres Strait Islander people's priorities are influencing data collection, use, and dissemination; and
4. Ensure Aboriginal and Torres Strait Islander people have information on what data the government holds and how they can access it.

## 2. Seek legal advice early

Engaging the NIAA legal team early on in ICIP negotiations can give staff confidence that what they are negotiating is possible and feasible.



Key legal considerations are:

1. If a proposed clause is operational and imposes clear obligations. This allows the clause to give effect to the provider's intention, while being clear on how the NIAA can comply with the clause and respect ICIP.
2. The clause still allows the Agency to use material containing ICIP for the required purposes.
3. The clause does not introduce an unmanageable level of legal uncertainty for the Agency or the ICIP owners.

### 3. Ensure all parties are brought along on the journey

While undertaking negotiations, NIAA staff should work collaboratively with the NIAA legal team, any regional offices or policy areas, and the First Nations organisation or business itself.

This can involve:

1. negotiating respectfully and openly with the First Nations organisation or Traditional Owners about their concerns;
2. working within the Commonwealth and NIAA framework to find a solution;
3. allowing the First Nations organisation or Traditional Owners the time to gain consensus and authority for their negotiation within their own governance structures; and
4. using frequent, ongoing and open communication throughout the process.

Finding a solution that benefits all parties requires not just negotiating contract clauses, but understanding and respecting multiple rights, aspirations and perspectives. This involves the NIAA working with the relevant First Nations organisation or Traditional Owners to engender trust that the Agency is acting in good faith.

## What to do if there is a conflict?

There may be conflicts between what a partner proposes, the principles of Indigenous data sovereignty that underpin the GID, and the requirements of a funding or grant contract for accountability and the use of public funds.

This conflict may relate to data required by the Commonwealth to administer and report against a grant. The GID Framework affirms the Commonwealth's support for Indigenous Data Sovereignty, including through the provision of grants to organisations that deal with Indigenous data. When administering grants, Commonwealth agencies must also comply with relevant laws, including the Commonwealth Grants Rules and Principles 2024 (CGRPs), and the Public Governance, Performance and Accountability Act 2013.

In these cases, the principles outlined above still apply. But you should seek legal advice early and maintain respectful and consistent communication.



## Case Study 2: Provider had concerns that grant performance obligations breached ICIP rights

The NIAA was negotiating a funding agreement with an organisation serving Aboriginal individuals and communities as the Provider. In respect of the principles of Indigenous Data Sovereignty (outlined by Maïam nayri Wingara), the Provider proposed including clauses in the agreement that gave them an option to seek advice or recommendations from their own Indigenous Data Governance Committee (IDGC) about whether or not to provide NIAA with program data.

Responding to the Provider's proposal, NIAA staff sought advice on the proposed clauses from NIAA's legal team. NIAA legal team's advice was to avoid including any clauses that may lead to conflicts with the NIAA's obligation to uphold the Commonwealth Grant Rules and Principles 2024 (CGRPs), the Public Governance, Performance and Accountability Act 2013, and the Privacy Act 1988. For example, there were concerns that advice or recommendations from the IDGC might conflict with the NIAA's obligations for probity and transparency under the CGRP's (i.e. in the case where the IDGC advised the Provider to withhold data relevant to grant performance measures).

The Commonwealth Grant Rules and Principles 2024 (CGRPs) require the NIAA to apply the 'nine key principles for grant administration' during the life of a grant. Here, the relevant principles include:

- achieving value for money (see paragraph 12);
- an outcomes orientation (see paragraph 10);
- governance and accountability (see paragraph 14); and
- probity and transparency (see paragraph 15).

To negotiate a mutually agreeable solution amongst all parties, the NIAA staff worked with the Provider and NIAA legal team to devise clauses indicating that the NIAA would work collaboratively with the Provider to respond to any advice or recommendations from the IDGC in relation to program data, so far as they were not in conflict with the CGRPs. The clauses also established a collaborative process for the Provider and the Commonwealth to work through any disagreements.

