

# Checklist 5: How do we meet our intellectual property obligations?

Information for organisations delivering human services in New South Wales

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## This fact sheet covers:

- ▶ What is intellectual property?
- ▶ What are moral rights?
- ▶ What are the different categories of 'material' and how are they treated under the Human Services Agreement?
- ▶ How can your organisation make sure it complies with its intellectual property obligations under the Human Services Agreement?

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This checklist is part of the **Guide to the Human Services Agreement (Guide)**. The Guide provides information on organisations' key legal obligations under the Human Services Agreement. The Guide includes a suite of resources to help organisations meet their obligations.



### Caution

The information contained in this document is intended as a guide only and is not legal advice. Interpreting contract terms is complex. If your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. Refer to [our webpage on legal advice](#) to see if your organisation may be eligible for free legal advice.

This checklist has been prepared on the basis of the Agreement for Funding of Services – Standard Terms dated 16 October 2019 (**Standard Terms**) and Agreement for Funding of Services – Schedule dated 31 March 2017 (**Schedule**), published on the [BuyNSW website](#) (together referred to as the **Human Services Agreement** or **Agreement**).

If the terms on which your Human Services Agreement is based have been amended, please review the information in this document carefully to make sure they are consistent where necessary.



### Note: organisations funded by the Department of Communities and Justice

The Department of Communities and Justice (**DCJ**) has added supplementary conditions to the standard form Schedule. [The most recent DCJ Schedule, dated 16 October 2019 is available on the DCJ website.](#)

This factsheet has not been amended to take into account the DCJ Schedule. If your organisation uses the DCJ Schedule, refer to Not-for-profit Law's [fact sheet on the DCJ's supplementary conditions](#) to understand how the DCJ conditions apply to your organisation's obligations under the Agreement.



### Tip

Read this checklist with the Human Services Agreement and the Guide at hand for reference. Clauses that we refer to in this document will be the clauses in the Standard Terms (unless we state otherwise).

## What is intellectual property?

Intellectual property (**IP**) is property created through intellectual and creative efforts. It gives legal rights to creators of certain materials.

The most common types of IP are listed in the table below.

IP protection category	What the IP protection covers
<b>Copyright</b>	Original ideas and information which are written down or 'fixed' in material form (ie. not simply ideas). This can include writing, drawings, diagrams, patterns etc. Copyright is protected under the <i>Copyright Act 1968</i> (Cth) ( <b>Copyright Act</b> )
<b>Trade marks</b>	Brands, service or product marks and logos. Trade marks are registered under the <i>Trade Marks Act 1995</i> (Cth)
<b>Patents</b>	Inventions and innovations. Patents are granted under the <i>Patents Act 1991</i> (Cth)
<b>Designs</b>	Shapes, configurations, patterns and ornamentation of products. Designs are registered under the <i>Designs Act 2003</i> (Cth)
<b>Moral rights</b>	Personal rights of the author or performer of a work to be attributed, not to have their authorship or performership falsely attributed, and to have the integrity of their authorship or performership maintained. Moral rights are created under the Copyright Act

## What are moral rights?

Moral rights are personal rights that belong to the individual author or performer of copyright material. They are separate to copyright and can't be waived or assigned (transferred). However, the person with moral rights can consent to certain uses of their material.

Only people (not organisations) have moral rights. Moral rights generally last for the same period as copyright protection (which is generally for the creator's life plus 70 years). This rule varies for films.

Moral rights are made up of the right to:

- be properly attributed as the author or performer of material
- not have material falsely attributed to someone else, and
- not have material treated in a 'derogatory' way

In practice, the moral rights provisions of the Copyright Act mean that your organisation must, in addition to not infringing copyright in materials:

- correctly acknowledge the person who created the copyright material if it is reproduced (in addition to seeking permission to use copyright material, or even if you own copyright), and
- not use that material in a derogatory way.

'Derogatory' is generally taken to mean that material is treated in a way which would be damaging to the creator's reputation or honour.

There is, however, a defence of reasonableness, and the Copyright Act sets out a range of matters to be taken into account in determining what is reasonable in the circumstances.

## Moral rights consent

In Australia, a person's moral rights are personal and can't be assigned, sold, licensed or waived. This is different to copyright (which includes for example, the right to copy or publish a literary work), which may be transferred or licenced.

However, a person who has moral rights in copyright material may give their consent to another person doing something (or not doing something) that would otherwise infringe their moral rights.

## What are the different categories of 'material' and how are they treated under the Human Services Agreement?

Intellectual property rights are dealt with under clause 16 of the Standard Terms and in the Schedule.

Under the Standard Terms, organisations have different obligations in relation to different categories of material.

## Intellectual Property Rights

Intellectual Property Rights are all rights given by law in relation to copyright works, trade marks, patents, designs and other products of intellectual activity whether the right are registrable or not.

## Agreement Material

Agreement Material is all material an organisation or an organisation's Personnel (which includes officers, employees, volunteers, agents, contractors and sub-contractors, as defined under clause 1.1 of the Standard Terms) creates in connection with the Human Services Agreement.

Under the Standard Terms, the organisation:

- owns the Intellectual Property Rights subsisting in the Agreement Material (see clause 16.1(a)) (this is the default position in the Standard Terms, however, this may not be the case in your specific funding arrangement – see further discussion below), and
- gives the NSW government agency a broad royalty free licence to use the Agreement Material indefinitely (see clause 16.2(a)). This means that the NSW government agency has a non-exclusive right to use, copy and change, including for commercial purposes, any material that has been created or developed using NSW government funding. The licence does not end when the Human Services Agreement ends and is transferable.

## Third Party Material

Third Party Material is all material (documents, records, software, goods, images, information and data) that is owned by a third party that is part of or used together with the Agreement Material (for instance, this could be some written material that you are quoting in a report or an image that you are using that belongs to a third party).

Under the Human Services Agreement, the organisation gives the NSW government agency a broad royalty free, non-exclusive licence to use the Third Party Material indefinitely (see clause 16.2(b)). This



means that the NSW government agency has the right to use, copy and change, including for commercial purposes, the Third Party Material, but only in conjunction with the Agreement Material. The licence doesn't end when the Human Services Agreement ends. If you are using Third Party Materials, you should check if the third party licence allows you to grant a licence of this nature.

## Your Other Material

Your Other Material means any material (documents, records, software, goods, images, information and data) owned by you before the date of the Human Services Agreement or which is created independently of the Human Services Agreement.

To the extent that this material is part of or used together with the Agreement Materials, you grant the NSW government agency a broad licence to use, copy, modify and exploit Your Other Materials but only in conjunction with the Agreement Materials.



### Tip

While the default position in the Standard Terms is that the organisation will own the Intellectual Property Rights in the Agreement Material, there may be instances where the NSW government agency wants to own the intellectual property in the Agreement Material.

To be sure of who owns the Agreement Material, you should refer to the Agreement for Funding of Services – Schedule, and the item that deals with 'Ownership or licensing of Intellectual Property Rights'.



### Note – Ownership of intellectual property


#### Existing intellectual property

If your organisation has existing material that was created by your organisation other than in performing the funded activities (called Other Material in the Standard Terms), your organisation owns its existing material and would only be giving the NSW government agency a licence to use existing material if this material is incorporated or supplied with Agreement Material.

#### Employees and intellectual property

In most cases, an employer will own the copyright in materials created by an employee in performing their role. However, this may not be the case in all circumstances and may depend on what is included in the terms of the contract of employment. Therefore, it's prudent to get an assignment (transfer) of intellectual property rights (and a moral rights consent) from all employees if this is not already included in the employee's contract of employment terms.

## How can your organisation make sure it complies with its intellectual property obligations under the Human Services Agreement?

Material category	Explanation	Reviewed 
<b>Agreement Material</b> (Material created in connection with the Human	The following applies regarding: <ul style="list-style-type: none"> <li>material created in connection with the Human Services Agreement (including any sub-contract agreement), and</li> </ul>	



Material category	Explanation	Reviewed <input checked="" type="checkbox"/>
Services Agreement, including any Sub-contract Agreement) and <b>Your Other Material</b>	<ul style="list-style-type: none"> <li>your pre-existing material or material created independently of the Human Services Agreement (including any sub-contract agreement) but which is incorporated into or used in conjunction with the Agreement Material:</li> </ul>	
	<p><b>Written assignment</b> - You will need to get a written assignment of all worldwide, present and future intellectual property rights from all contributors to the Agreement Material and Your Other Material including from your employees, officers, volunteers, agents contractors, and sub-contractors</p> <p><b>Note:</b> If it's not possible to get a written assignment, an appropriate licence may suffice.</p>	<input type="checkbox"/>
	<p><b>Warranty</b> - You should also get a warranty (ie. promise) from all contributors to the Agreement Material and Your Other Material to the effect that their contribution to the material does not and will not infringe anyone's intellectual property or moral rights</p>	<input type="checkbox"/>
	<p><b>Moral rights consent</b> - You should also get a written moral rights consent from all contributors to the Agreement Material and Your Other Material that consents to you and any sub-licensees doing any act (or omitting to do any act) which would otherwise infringe the contributor's moral rights</p>	<input type="checkbox"/>
	<p><b>Supply copies on request</b> - You must provide the NSW government agency with copies of Agreement Material, promptly on request</p>	<input type="checkbox"/>
<b>Third Party Material</b> (Material owned by a third party incorporated into or used in conjunction with the Agreement Material)	<p>If any Third Party Material is incorporated in or used in conjunction with the Agreement Material, the following will apply:</p>	
	<p><b>Licence</b> - You will need to get a licence from the relevant intellectual property owner or licensee in respect of the Third Party Material to allow you to use, copy, modify and exploit the Third Party Material, in conjunction with the Agreement Material. The Licence must:</p> <ul style="list-style-type: none"> <li>be perpetual, irrevocable, worldwide, non-exclusive and transferrable, and</li> <li>include the ability to sub-licence to your Prime Contractor (sometimes referred to as a lead contractor) (if applicable) or the NSW government agency (each of whom must also be allowed to sub-licence) on a royalty-free basis</li> </ul>	<input type="checkbox"/>
	<p><b>Moral Rights</b> - You should get copies of all moral rights consents relating to the Third Party Material from the third party that is licensing the Third Party Material</p>	<input type="checkbox"/>
	<p><b>Warranty</b> - You should also get a warranty from the third party to the effect that you and any sub-licensee's use of the Third Party Material does not and will not infringe anyone's intellectual property or moral rights</p>	<input type="checkbox"/>
<b>Moral Rights Consents</b>	<p><b>Consents</b> - As set out above, you should get a moral rights consent from any person creating or who has created material in which copyright subsists and which is to be owned or used by you or your sub-licensees</p>	<input type="checkbox"/>



Material category	Explanation	Reviewed <input checked="" type="checkbox"/>
	<p>This includes moral rights consents relating to copyright material that pre-dates the Human Services Agreement (for example, Third Party Material and Your Other Material), which may be difficult to get</p> <p>In relation to material for which you are unable to obtain blanket moral rights consents you may need to consider the following:</p> <ul style="list-style-type: none"> <li>• Have the appropriate authors have been credited? <ul style="list-style-type: none"> <li>– If not, was it reasonable in the circumstances for the author not to have been credited (having regard to the factors set out in the explanation at the beginning of this checklist)?</li> </ul> </li> <li>• Has there been or will there be any false attribution of authorship?</li> <li>• Has the work been or will it be subject to derogatory treatment (for example, changed or treated in a way that is prejudicial to the author's reputation)? <ul style="list-style-type: none"> <li>– If so, is it reasonable in the circumstances for the work to be subject to derogatory treatment (having regard to the factors set out in the explanation at the beginning of this checklist)?</li> </ul> </li> </ul>	
	<b>Supply copies of consents on request</b> - You must supply copies of all moral rights consents on request by the NSW government agency	<input type="checkbox"/>
	<b>Notify</b> - You must notify the NSW government agency if you can't get any required moral rights consents	<input type="checkbox"/>
<b>Aboriginal Persons and Torres Strait Islander Persons</b>	<p>Do the services provided under the Human Services Agreement involve or impact on the cultural and intellectual property rights of Aboriginal Persons or Torres Strait Islander persons?</p> <p>If so, you must respect those rights and, where practical, take measures to protect those rights</p>	<input type="checkbox"/>

# Resources

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## Not-for-profit Law resources

Not-for-profit Law has developed a Guide to the Human Services Agreement which includes a fact sheet, a template sub-contract agreement, and a range of checklists which should be read together. See Not-for-profit Law's page on [Government Funding Agreements](#):

- ▶ [Fact sheet - Human Services Agreement: Department of Communities and Justice Supplementary Conditions](#)
- ▶ [Fact sheet – Human Services Agreement: Important clauses](#)
- ▶ [Checklist 1 – How do we meet our notification obligations?](#)
- ▶ [Checklist 2 – How do we meet our reporting obligations?](#)
- ▶ [Checklist 3 – How do we practically comply with the Human Services Agreement?](#)
- ▶ [Checklist 4 – How do we meet our privacy obligations?](#)
- ▶ [Checklist 5 – How do we meet our intellectual property obligations?](#)
- ▶ [Checklist 6 – What are our obligations when engaging Personnel?](#)
- ▶ [Checklist 7 – What records and registers do we need to keep?](#)
- ▶ [Checklist 8 – Things to consider before entering into a sub-contract agreement](#)
- ▶ [Template Sub-contract Agreement](#)

In addition, we have resources on the following related topic:

- ▶ [Intellectual property](#)

## Other related resources

- ▶ [BuyNSW website](#)
- ▶ [IP Australia](#)

## Legislation

- ▶ [Copyright Act 1968 \(Cth\)](#)
- ▶ [Designs Act 2003 \(Cth\)](#)
- ▶ [Patents Act 1990 \(Cth\)](#)
- ▶ [Trade Marks Act 1995 \(Cth\)](#)



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