Aboriginal Art and the Protection of Indigenous Cultural Rights

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A Successful Indigenous Industry

A miracle of fair proportions is occurring which is having a significant impact on white/black relations in Australia. Though one could well understand black people retreating from the white world in which they find themselves, the opposite is occurring in relation to the willingness of black people to share their cultural heritage with the rest of Australia and the world.

It is of little value seeking to address Aboriginal artistry in anything other than its cultural and political context — being the expression of association and identity with the land and values which must be understood and protected not just by Aboriginal people but by all of us. There is nothing more foreign to an Aboriginal person than detachment from the land for which he or she is responsible, and it is worth observing that many of the leading painters of Arnhem land are people who have joined in the homeland movement, and who have returned to their traditional lands after having lived elsewhere. The return to the land has served as a key impetus for their artistry.

At a critically important level, Aboriginal painters are telling us how to look after our land. They are not people who trouble over the celebration of themselves. Their work is anonymous, except to the extent that they reveal their tribal origins in their work through, for example, their mark or cross-hatching. The lauding of individual Aboriginal painters is very much a western response to Aboriginal art, and a facet of Aboriginal artistry which Aboriginal people find quaint.

The Aboriginal art industry is perhaps the most successful indigenous industry in Australia. The industry turns over tens of millions of dollars a year. In the 1988 report of the Review Committee, ‘The Aboriginal Arts and Crafts Industry’, retail sales of Aboriginal art in 1988 were said to amount to $18.5 million, of which $7 million was distributed to the creators of the art, amounting to about 5,000 people, who otherwise by and large are dependent on government assistance for a substantial part of their income. Dealers report prices being fetched for Aboriginal artworks up to and in excess of $10,000, the most significant patrons being public galleries, although there are some significant private collectors, the most notable being the Robert Holmes à Court collection.

The Aboriginal art industry gives work to thousands of people. In addition to the artists themselves, there are the craft centres through which artistic works are sold. While these centres are generally managed by white advisers, they employ local Aboriginal people, who it is hoped will manage their own art centres in the coming years. Aboriginal communities have set up their own arts-based industries. The Tiwi community of Bathurst Island has a screen printing industry based on the designs of the Tiwi people. They create and sell garments and print fabric which is sold to garment manufacturers throughout Australia. Desert Designs is a partnership of two white people and the Aboriginal artist Jimmy Pike. The work of Jimmy Pike is merchandised and sold throughout Australia as well as internationally.

On a general cultural level, Aboriginal artistry creates a window of recognition between white and black Australia. The works of Aboriginal artists have become our national artistic symbols. It has become inconceivable for any major public building to be opened today which does not feature some Aboriginal art. Australians who care share a significant collective pride in the emergence of Aboriginal artistry in the community at large. The output of Aboriginal artists is staggering, as was made plain by the ‘Windows on the Dreaming’ exhibition in 1990 at the Australian National Gallery.

While many of us have only discovered bark and dot painting in recent years, that fact in itself is a significant pointer to the process of emergence which has occurred. Wall paintings at Ubirr Rock in Kakadu National Park attest that Aboriginal people have the longest surviving artistry in the world. Included in among the paintings there are snapshots of contact with the white world, including Aboriginal portraits of nineteenth-century white sailors and their ships. There is a lot to be said for a culture that has survived and protected itself and its integrity for tens of thousands of years. This article is largely concerned with an examination of how this culture has protected itself, and argues that we would do well to seek to incorporate laws which reflect this method of protection into the legal system concerned with the protection of Aboriginal art and culture.

The Law and Aboriginal Painting

What does the law have to do with Aboriginal painting? Given the background described above, the reader will be better able to understand the concern and outrage felt in Aboriginal circles about the trivialisation of Aboriginal icons in the cheap tourist goods market. A series of cases have been brought to protect the copyright in Aboriginal art, the first being a case that was brought by John Bulan Bulan in 1989.2 Bulan Bulan is an Aboriginal artist who lives at Garmeda outstation, near Maningrida, about 600 kilometres east of Darwin in central Arnhem Land. He is among the best known Aboriginal painters in Australia, and his work is widely admired by western art critics and curators of the major Aboriginal art collections.

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1 Department of Aboriginal Affairs, July 1989.

In 1987, a T-shirt manufacturer reproduced one of Bulun Bulun’s paintings without his permission. Subsequently, a revised version of the T-shirt design was created which drew on another one of Bulun Bulun’s paintings. Again, no permission was sought. In 1989, Bulun Bulun took the apparently unprecedented step of bringing an action for infringement of copyright and breaches of the Trade Practices Act 1974 in the Federal Court in Darwin, arising from these unauthorised reproductions. The manufacturers of the T-shirts and two Darwin tourist shops which sold the T-shirts gave undertakings to the court agreeing to cease the manufacture and sale of the T-shirts and to deliver up all remaining stocks. A series of similar actions followed involving another 14 artists who brought similar claims against the T-shirt manufacturers, as well as shops and distributors, selling their T-shirts bearing reproductions of their artistic works without permission.

In an affidavit sworn by Bulun Bulun in the proceedings, he referred to the unauthorised reproduction of his artistic work as follows:

This reproduction has caused me great embarrassment and shame and I strongly feel that I have been the victim of the theft of an important right. I have not painted since I learned about the reproduction of my art works and attribute my inactivity as an artist directly to my annoyance and frustration with the actions of the respondents in this matter. My interest in painting has been rekindled by the efforts made on my behalf to resolve this problem, and I am just starting to paint again although I am doing so in anticipation that this problem will be resolved in the near future. If it is not resolved satisfactorily, I have considered never painting again. My work is very closely associated with an affinity for the land. This affinity is the essence of my religious beliefs. The unauthorised reproduction of art works is a very sensitive issue in all Aboriginal communities. The impetus for the creation of works remains very important in ceremonies and the creation of art works is an important step in the preservation of important traditional custom. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the cultural continuity of the tribe.

The Bulun Bulun case and the related proceedings never went to trial. The proceedings were settled out of court, and a sum of approximately $150,000 was paid to the artists by way of compensation for damage to them and for their costs. It was decided between the artists concerned that they would each share equally from the total amount of money available for distribution to them, and a substantial amount of money was distributed to each of the artists affected.

It was significant that the artists decided to share the returns on the sum of money paid by the respondents equally, notwithstanding that some of the designs were the subject of more widespread infringement than other designs in the group of cases. It was explained by some of the artists that they felt they had suffered equally because each of them had had a design which had been reproduced without permission.

The resolution of cases received a good deal of public attention and there appeared to be much public support for the proposition that Aboriginal artists ought to be able to protect their designs from unauthorised reproduction. It was clearly established that Aboriginal artists could and would rely on copyright protection to prevent any unauthorised reproduction.

Nevertheless, the limited resources available to fight these cases was stretched to breaking point. The bringing of cases was supported by a limited allocation of funding made by the Federal Government and the Australia Council to the North Australian Aboriginal Legal Aid Service. This service is ordinarily engaged in defending Aboriginal people against criminal charges, and has few, if any, resources to pursue non-criminal matters. At the time that the actions were proceeding there were a number of murder cases against Aboriginal defendants on foot in Darwin, and the Legal Aid Service was gravely concerned that it could not contribute any financial and human resources whatsoever on the copyright work, as it was being asked to do, while there was serious doubt as to its ability to carry out its duties on behalf of Aboriginal defendants facing the most serious criminal charges. Accordingly, the Legal Aid Service regretfully decided that it could no longer continue to instruct in the copyright matters and it became necessary to find another ‘home’ for the cases. At that time, being about the start of 1990, in addition to the above-mentioned cases, there were a whole series of other cases made against people who had reproduced Aboriginal designs without permission, nearly all of which were resolved by the unauthorised reproducer making a payment of money which was then distributed to the artist concerned. In addition, another Aboriginal artist, Terry Yumbulul, had commenced an action complaining about the reproduction of his ceremonial ‘Morning Star Pole’ on the plastic commemorative 1988 ten dollar note. This action was brought against the Reserve Bank of Australia and an agent who negotiated the arrangements, Anthony Wallis, as well as his company Aboriginal Artists Agency Ltd.

Current Protection Available for Copyright

During the course of 1990, and partly as a response to the success of the copyright infringement proceedings and the need to provide a workable structure for copyright matters to be pursued, the Aboriginal Arts Unit of the Australia Council decided to set up an agency which would manage the copyright interests of Aboriginal people — the Aboriginal Artists Management Association Inc. This association received some funding from the Aboriginal Arts Unit which was used to pursue the various copyright claims which remained on foot. In addition to carrying out this work, the Association continues to act as an organisation to which requests for the reproduction of Aboriginal art are referred and which provides advice and assistance in relation to the use of Aboriginal art. It is based in Sydney and managed by staff with extensive field knowledge of Aboriginal communities, particularly the activities of Aboriginal artists. The resources of the Association to support the bringing of copyright cases are extremely limited, and it is a matter of concern that the wherewithal does not exist within the Aboriginal legal aid framework for instructing in cases of the kind. Not only have the cases been important in Aboriginal legal and cultural terms, but they have represented a willingness on the part of Aboriginal people to look to courts for redress in relation to
matters of commercial significance, and an expression of an acceptance that the courts and legal proceedings can be used to commercial effect by Aboriginal people. This development represents a significant turn-around in thinking from notions of the law as an oppressor of black people. In that sense, the involvement of Aboriginal legal aid would be highly constructive, and it is a source of concern that the Northern Australian Aboriginal Legal Aid Service in Darwin considered that it had to opt out as the solicitors for the copyright cases.

Despite repeated requests on the part of various people with an interest in this matter, the relevant authorities, most particularly ATSIC (the Aboriginal and Torres Strait Islander Commission, which has replaced the Department for Aboriginal Affairs), have indicated that they are unable to find the resources within the Aboriginal legal aid system to support the bringing of cases by Aboriginal people to protect their cultural rights and their commercial interests arising from the reproduction of Aboriginal art.

One of the most significant developments arising from the resolution of the T-shirt cases was that instances of unauthorised reproductions of authentic Aboriginal designs on garments, which had been endemic in 1988, ceased to be found in tourist shops. It was made clear by the cases that such reproductions would be answered by copyright proceedings and the result was that people clearly did not want to invite that risk. Instead, the need of the tourist market responded to the challenge, as it were, by creating their own versions of Aboriginal art. Most tourist shops today are replete with examples of T-shirt designs which may appear to be works of Aboriginal art but are in fact caricatures of Aboriginal art. One of the more depressing manifestations of this characterisation of Aboriginal art has been the invention of the X-ray koala bear. One issue which justifiably arises for attention is whether there ought to be protection to prohibit this bastardisation of Aboriginal art, and if so, how this protection would work.

The Yumbulul Case

The Yumbulul case has been referred to above. Terry Yumbulul, the applicant, brought an action against the agent and the Reserve Bank of Australia arising from what he said was the unauthorised reproduction of his artistic work, known as the ‘Morning Star Pole’, on the commemorative 1988 $10 bank note. He also sued the agent who negotiated the arrangements — Anthony Wally and his company Aboriginal Artists Agency Ltd.

The Reserve Bank relied on an agreement entered into between the applicant and the agent whereby permission to reproduce the ‘Morning Star Pole’ was obtained. Nevertheless, the Reserve Bank settled the dispute with the applicant by agreement, which involved the payment of a sum of money without admission of liability. The action continued between the applicant and the agent, but was dismissed by French J in the Federal Court in Darwin following the hearing of the matter.  

The applicant complained in the proceeding that he had been deceived into signing the agreement permitting the reproduction of his artistic work on the basis of certain representations which the applicant said had been made by the agent. The agent denied making the representations. The judge held that the agent did not make the alleged representations.

The applicant also claimed that he was induced by mistake to sign the agreement and that furthermore the agreement was not binding on the grounds that it was entered into arising from the unconscionable conduct of the agent. French J held that there had been no such mistake and that the conduct of the agent was not unconscionable. In relation to the claim of unconscionability, the court also held that the applicant had a sufficient understanding of the agreement in question to be bound by it. This finding is a significant one in legal terms as it sets a standard for the application of principles of unconscionability in relation to tribal Aboriginal people. The decision is also of particular interest as the court indicated that it was concerned that the traditional Aboriginal rights attaching to the reproduction of the artwork were not protected under existing law.

French J addressed the matter in relation to the agent’s defence that the reproduction in question was permitted under statute because of the provisions in sections 65 and 68 of the Copyright Act 1968. These sections permitted the reproduction of a sculpture which is on permanent public display. In this case, the artistic work was a pole which was on permanent public display in the Australian Museum in Sydney. It was argued by the applicant that the pole was not a sculpture. While the judge did not decide the question he said that if the agent’s view of sections 65 and 68 was correct, ‘then it may be the case that some Aboriginal artists laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. This question and the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators’. While the action was unsuccessful for the Aboriginal artist in question, the proceeding may have the beneficial outcome of stimulating debate about appropriate protection for Aboriginal art in the context of addressing the inadequacies which exist in the law as it stands.

The issue of the rights of tribal owners of designs arose in the Yumbulul case because it was said by the applicant that the right to permit the reproduction of the ‘Morning Star Pole’ rested with the tribal owners of the rights, being the elders of the Galpu clan in north-east Arnhem land, and not himself as a creator and copyright owner of the pole. Thus, it was acknowledged by the applicant that the permission to reproduce the ‘Morning Star Pole’ had to be obtained from the relevant tribal owners. The applicant said that he was not able to give this permission, and that to the extent that the agreement he signed gave such permission, then he had not appreciated that this was the case.

Aboriginal Understanding of Ownership

The problem demonstrates a fundamental difference in approach between the ownership of rights in artworks as the notion is understood under the Copyright Act, being founded on the notion of the individual creator of a copyright interest having a property right in such interest, and the notion of the ownership of rights in Aboriginal law, being based on collective rights which are managed
on a custodial basis according to Aboriginal tradition. Under Aboriginal law, the rights in artistic works are owned collectively. Only certain artists are permitted within a tribe to depict certain designs, with such rights being based on status within a tribe. The right to depict a design does not mean that the artist may permit the reproduction of a design. This right to reproduce or re-depict would depend on permission being granted by the tribal owners of the rights in the design.

The tribal owners of a design under Aboriginal law retain the right to permit reproductions of designs which belong to their tribe. Any rights granted by the artist who created the design to make a reproduction of it are granted pursuant to licence of the tribal owners. The artist would need to consult with and get the permission of the tribal owners of the rights before agreeing to anyone else reproducing a design. Applying copyright principles to the problem, it may be said that the tribal owners of designs have an equitable interest in the copyright in such designs insofar as they, and not the legal owners of copyright per se, have the right to permit the reproduction of such designs or refuse permission. The tribal owners of rights do not have a legal interest in copyright in the absence of an assignment of copyright from the copyright owner to the tribal owners pursuant to the provisions of section 196 of the Copyright Act which requires that any assignment be in writing. There may be an answer to the problem posed by French J in considering the application of notions of equitable ownership of copyright.

The courts recognise that an action for an interlocutory injunction to restrain infringement of copyright can be brought by an equitable owner of copyright in his own name. Nevertheless, it is the case that a permanent injunction will not be granted to an equitable owner without joining the legal owner of copyright. In that case, Viscount Cave LC stated:

That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; it was always the rule of the Court of Chancery and is, I think, the rule of the Supreme Court, that, in general, where the plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action. If this were not so, the defendant, after defeating the claim of an equitable claimant might have to resist later proceedings by the legal owner, or by persons claiming under him as assignees for value without notice, without any prior equity, and proceedings might be indefinitely and oppressively multiplied.

It follows from this well-established principle that the tribal owners may, under principles of equity, protect their interests in the designs for which they are the custodial owners, and that they may obtain an interlocutory injunction to prevent the improper reproduction of a design without permission. In order to obtain any further relief, it will be necessary for the tribal owners to join the legal owner of copyright, who will in most cases be the artist who created the artistic work in question. It will be appreciated that there is a fundamental dichotomy of interests between the rights of ownership as they stand under Aboriginal law and the rights of ownership under western law.

It follows that in order to try and mesh the interests of Aboriginal communities with rights under non-Aboriginal law, it would be appropriate for tribal owners to be joined along with copyright owners in the bringing of copyright infringement proceedings. This does raise the difficult question of identifying the tribal owners on the basis of their claim of ownership, although these sorts of issues have been previously, and I believe appropriately, addressed by the Federal Court of Australia in the case of *Foster v Mountford*. In that case, the court respected the rights of custodial owners in tribal secrets to protect those secrets under the principles of breach of confidence. The question of standing to bring proceedings to protect Aboriginal relics was resolved by the High Court in favour of people acting as representatives of their tribes. In that case, persons who claimed to be descendants and members of the Goundi-gumara tribe and custodians of the relics of those people according to their laws and customs which were relics of cultural and spiritual importance to them were held to have standing to commence an action to restrain a contravention of the Archaeological and Aboriginal Relics Preservation Act (Vic.) 1972.

It also follows that those engaged in the licensing of Aboriginal art ought to have regard to this issue and any licence affecting works which are the subject of tribal rights should be entered into by the copyright owner together with the equitable owners of copyright, being the tribal owners. While this may seem cumbersome, it does more properly reflect the way that things ought to work under Aboriginal law. The gap in this proposed approach is that there is a need for the equitable owners to join the legal owners in order to obtain any relief, but more often than not one would expect that there would be a sympathetic response as between the equitable owners and the legal owner in the event of any unauthorised reproduction.

As an alternative, it is also worth considering the legislative enactment pathway. What might be sought to be done is the creation of a right attaching to a tribe as represented by the relevant tribal custodians, being rights which might sit alongside the individual copyright rights of artists. The parallel might be with claims of ownership of traditional Aboriginal land under, for example, the Aboriginal Land Rights (Northern Territory) Act 1976, which provides for title in Crown land, being traditional Aboriginal land, to be granted to Aboriginal Land Trusts.

### A Proposed Legislative Solution

The relevant procedure may be incorporated into the Aboriginal and Torres Strait Islander Heritage Act 1984, which is concerned with the protection of areas, relics, remains and objects of traditional Aboriginal significance. The Act generally provides for protection to be afforded to sacred sites and objects on application by interested persons to the Minister for Aboriginal Affairs, with the minister having powers to make declarations to give effect

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to the protection sought. In 1987, the Act was amended to provide for a unique set of provisions expressed to apply to Victorian Aboriginal Cultural Heritage, such amendment being made at the request of the Victorian Government. This amending legislation envisages a special role for what are referred to as 'local Aboriginal communities', which are defined as an organisation specified in the Schedule to the Act, being mostly co-operatives and Aboriginal corporations, all of which have legal standing. A local Aboriginal community may inform the minister that a place or object requires protection by way of a ministerial declaration. If the minister refuses the application, the local Aboriginal community can apply for the appointment of an arbitrator to review the minister's decision. A local Aboriginal community may also give advice to the minister on the compulsory acquisition of any Aboriginal cultural property as well as on any other issues relating to Aboriginal cultural property. No civil right of action, as such, is given. 'Aboriginal cultural property' is defined as meaning 'Aboriginal places, Aboriginal objects and Aboriginal folklore'. 'Aboriginal object' is defined as an object 'of particular significance to Aboriginals in accordance with Aboriginal tradition'. 'Aboriginal folklore' means 'traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition'. This definition could well be extended to deal with the notion of artistic works as it is understood in the Copyright Act 1968, as well as designs generally. It should be noted that the minister has a right of compulsory acquisition to protect and preserve Aboriginal cultural property, which upon such acquisition would vest in the relevant local Aboriginal community. This right is specified as applying where cultural property is of an irreplacable nature and would not apply to a design as such, but rather is concerned with objects.

The notion of specified 'local Aboriginal communities', in the case of the Victorian part of the Aboriginal and Torres Strait Islander Heritage Act 1984, ought to be extended to the other states and territories. The Act should also be extended to give such corporate entities recognised by law the right to act to protect communal interests in cultural heritage generally, as well as artistic works and designs of traditional Aboriginal significance specifically. The Aboriginal and Torres Strait Islander Heritage Act 1984 ought accordingly in its general operation to be amended to provide for protection to cover artistic works and designs of traditional Aboriginal significance. There should also be a civil right of action vested in the 'local Aboriginal communities', as defined, to protect artistic works or designs of traditional Aboriginal significance in a similar fashion to the protection of copyright interests generally under the Copyright Act 1968 (but not including the time limitation on copyright protection). Pursuant to this scheme, a recognised 'local Aboriginal community' could apply for an injunction to restrain the unauthorised reproduction or adaptation of one of its designs, and seek damages arising from such unauthorised reproduction or adaptation. The same principles which apply in relation to the standing of 'local Aboriginal communities' to claim heritage protection under the Aboriginal and Torres Strait Islander Heritage Act 1984, in its present form, could apply in relation to the protection of artistic works or designs of traditional Aboriginal significance.

Thus, it is proposed that the Aboriginal and Torres Strait Islander Heritage Act 1984 be expanded to cover:
(a) the protection of artistic works as defined under the Copyright Act 1968 and designs of traditional Aboriginal significance in addition to the above-mentioned manifestations of Aboriginal culture and tradition presently protected;
(b) the national operation of the scheme of protection under the Act, with there being a national listing of 'local Aboriginal communities' in the Schedule to the Act; and
(c) the recognition of civil rights of action akin to copyright rights available to 'local Aboriginal communities' to prevent the unauthorised reproduction or adaptation of artistic works or designs of traditional Aboriginal significance.

These changes would exclude the implementation of any time limitation as one finds in copyright law. Accepting this exclusion, the changes as proposed would mean that there is protection available in the case of artistic works or designs of traditional Aboriginal significance which are not protected at all under copyright, because, for example, the term of copyright (being generally 50 years after the death of the author of a work) may have expired. Thus, cave paintings may be protected at the behest of 'local Aboriginal communities', with such protection extending to include the recognition of prohibitions on the reproduction of important cave art, such as the Wandjina image of north-west Australia. This has been reproduced on many occasions on garments to the great concern of the tribal owners of the rights in question. The legislative protection suggested would provide an answer to this significant problem. The proposal is also responsive to the difficulty which is sometimes encountered in trying to track down a copyright owner in order to bring a copyright proceeding. The interests of a tribe can be harmed, with an artistic work or design being unprotected under existing law because a copyright owner cannot be located or has, in fact, died with the estate being difficult to follow up or being uninterested in the matter. Indeed, tribal interests may be harmed where the copyright owner is not interested in an unauthorised reproduction for whatever reason.

While there is an approach available under equitable remedies to deal with the matters raised by French J in the Yambilul case concerning the rights of tribal owners of designs, the legislative path mooted above would focus on the protection of claims of communal ownership in a way which is directly consistent with Aboriginal notions of ownership of rights and would be a step forward in developing the regime of rights created by the Commonwealth to protect Aboriginal culture and heritage, providing an important legislative recognition of the vital connection between land rights, sacred sites, protection of heritage and relics and artistry. An understanding of this nexus is critical to a full appreciation of Aboriginal art.

Conclusion

While we praise and respect Aboriginal art, there is much about it which is not well understood. Without an understanding by the general community of the needs and
requirements of those who create the art, then the show of confidence expressed by Aboriginal people in the world around them through their artistry may come to nothing, and the failure properly to respect rights may lead Aboriginal people to the view initially formed by Bulun Bulun that it is not worth the trouble and effort.

Ultimately, the respect for and protection of Aboriginal culture has much to do with a coming to terms with the wisdom of the Aboriginal people, and learning about and incorporating some of their value system which has spawned the oldest continuous culture in the world. Aboriginal people are masters at living with and fostering their environment. The sooner this genius for living is fully recognised, the better for all of us. We only have ourselves to blame for not comprehending or being willing to comprehend the Aboriginal mastery of their world. In this sense, the need to work to protect the artistry of Aboriginal people is so important because we are dealing with a vital element of the on-going process of reconciliation and understanding between white and black people through art, and furthermore we are concerned with the expression of the dignity, pride and continuity of the Aboriginal people.