



FEBRUARY 2003



issues paper:

**Towards a Protocol for Filmmakers Working with
Indigenous Content and Indigenous Communities**

Prepared by Terri Janke & Company

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<http://www.afc.gov.au>

PREFACE

The Australian Film Commission (AFC) is developing a new protocol for filmmakers working in the Indigenous area.

Existing protocols such as Lester Bostock's *The Greater Perspective*, and Darlene Johnson's *Indigenous Protocol* for SBS have focussed on documentary filmmaking and television news crews. The AFC document will cover documentaries and drama, including short dramas, feature films and television drama, setting out a framework to assist and encourage recognition and respect for the images, knowledge and stories of Indigenous people as represented in all these formats.

We envisage that the protocol will include principles for:

- working on Indigenous content;
- working with Indigenous people; and
- working in Indigenous communities.

It will also include sections on:

- copyright law and related legal issues such as contracts;
- case studies on working with Indigenous content in both drama and documentary productions;
- information for Indigenous communities on their rights and obligations when working on film projects;
- information for non-Indigenous filmmakers working with Indigenous subject matter;
- a general contacts directory; and
- a resource bibliography.

This issues paper has been prepared to seek your opinions on what should be covered in the protocol, and how to address the various issues raised.

We welcome your comments. You can send them in writing, by post, fax or email, or on audio or videotape. Or you can contact the consultant who is preparing the protocol, Terri Janke, to organise an interview via telephone.

Send submissions to:

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The closing date for submissions is 30 June 2003.

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INTRODUCTION

Indigenous¹ people and their cultures have been the subject of many films and television programs, from documentaries and ethnographic films, to drama series and feature films. For Indigenous people, the experience has been mixed. On the one hand, film offers the opportunity to use a popular medium to promote their perspectives; on the other hand, the filmmaking process can be exploitative. For instance, many productions made from a non-Indigenous perspective reinforce negative stereotypes. Films can also exploit Indigenous communities and Indigenous knowledge with little or no consultation with Indigenous people, and without any benefits to Indigenous communities.

In response to the issues facing Indigenous communities when approached by filmmakers, the Northern Land Council produced a protocol in 1987 for filmmakers coming onto Aboriginal land. Written by Chips Mackinolty and Michael Duffy, *Guess Who's Coming to Dinner in Arnhemland* sets out a framework for helping communities consider a range of questions, including:

- Whose interest does the film serve?
- Who has editorial control?
- Who has distribution control?
- Are there employment opportunities for Indigenous people?
- Are there any environmental issues?
- Are sacred sites involved?
- What legal issues are involved?²

Lester Bostock's *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* was published by SBS in 1990 and revised in 1997. The document addressed cross-cultural film production and was largely focussed on advising non-Indigenous film crews who entered Indigenous communities for news reporting.³

More recently, in 2001, SBS Independent commissioned Darlene Johnson to draft a protocol for its website that would inform documentary filmmakers of their responsibilities when filming Indigenous people and in Indigenous communities. Darlene's protocol establishes a process which, among other things, encourages respect for the culture and dignity of Indigenous participants in a film project, by promoting cultural integrity. There is also provision for informing Indigenous participants of their rights as storytellers within the filmmaking process.⁴ Darlene successfully used this protocol for her documentary, *Stolen Generations*, and incorporated the process into the participants' contracts.

In the past two years, feature films such as *The Tracker*, *Rabbit Proof Fence* and *Australian Rules* have sparked debate over fictional use of Indigenous stories, events and characters. At a forum held during the Adelaide Festival in 2002, many issues were discussed by filmmakers, including the appropriateness of dramatising real life events that are sensitive for Indigenous people, and the requirement for prior consultation.

The debate has highlighted the need for an industry-level Indigenous cultural protocol, and this paper has been produced to encourage discussion about what such a protocol should include. The aim is to develop a framework which can assist filmmakers working with Indigenous content and Indigenous people to recognise and respect the images, knowledge and stories of Indigenous people.

¹ 'Indigenous' refers to the Aboriginal and Torres Strait Islander people, the original owners and inhabitants of Australia.

² Chips Mackinolty and Michael Duffy, *Guess Who's Coming to Dinner in Arnhemland*, in Marcia Langton, 'Well, I heard it on the radio and I saw it on the television', Australian Film Commission, Sydney 1993, p. 91

³ Lester Bostock, *The Greater Perspective*. See http://www.sbs.com.au/sbs_booklet.pdf

⁴ Darlene Johnson, *Indigenous Protocol*. See <http://www.sbs.com.au/sbsi/documentary.html>

PROTOCOLS AND INDUSTRY PRACTICE

Protocols are appropriate ways of working with Indigenous cultural material, and interacting with Indigenous people and their communities. Protocols encourage ethical conduct and promote interaction based on good faith and mutual respect. – *Terri Janke*⁵

Indigenous Australian cultures are diverse. Ways of dealing with Indigenous cultural issues and material will differ from community to community, and will also vary depending on the subject matter. A protocol cannot specifically address all the issues that may arise in a particular film project, but the framework it provides can be adapted and applied to specific situations.

Protocols are not in themselves legally binding, but over time they establish practices that can be relied on as industry standards. Protocols may also be incorporated into filmmaking contracts, and endorsed by funding agencies and professional associations.

⁵ Terri Janke [Terri Janke and Company], *Writing Cultures: Protocols for Producing Indigenous Australian Music*, Aboriginal and Torres Strait Islander Arts Board of the Australia Council, Sydney, 2002, p. 3

WHAT ISSUES SHOULD THE PROTOCOL COVER?

This section discusses the issues we have identified for coverage in the protocol. We seek your comments and welcome discussion on these and any other issues you would like to raise.

INDIGENOUS HERITAGE

Indigenous cultural and intellectual property rights refer to Indigenous people's cultural heritage. Heritage comprises all objects, sites and knowledge, the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which are regarded as pertaining to a particular Indigenous group or its territory.

Indigenous people's heritage is a living heritage and includes objects, knowledge, stories and images based on that heritage, created today or in the future. For Indigenous people, the stories of their ancestors are their heritage, and so are the stories that recount Indigenous experience over the years of colonisation. This includes stories about living in the bush, growing up on missions and life in the city. These experiences shape Indigenous cultures and are of heritage significance to current and future generations of Indigenous people.

Indigenous cultural and intellectual property rights include the right for Indigenous people to:

- own and control Indigenous cultural and intellectual property;
- ensure that any means of protecting Indigenous cultural and intellectual property is based on the principle of self-determination;
- be recognised as the primary guardians and interpreters of their cultures;
- authorise or refuse to authorise the commercial use of Indigenous cultural and intellectual property according to Indigenous customary law;
- maintain the secrecy of Indigenous knowledge and other cultural practices;
- be given full and proper attribution for sharing their heritage;
- control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

For a full list of rights see *Our Culture: Our Future*.⁶

The use of Indigenous cultural heritage in film and television is becoming increasingly popular. Oral stories, traditional knowledge, images, photographs, language words and histories are just some of the Indigenous heritage material that finds its way onto the screen. In the past, there has been concern that such material is appropriated without any respect or recognition that the material comes from a distinct cultural group. Concerns have also been expressed that some representations of Indigenous cultural heritage material has compromised its cultural integrity.

A great number of generations may contribute to the development of an item of Indigenous knowledge or tradition. In this way, Indigenous cultural heritage is communally owned. Currently intellectual property laws do not recognise this element, focussing on material form and individual ownership, and only protecting for a limited period (see also 'Copyright law and Indigenous culture', page 13).⁷

The underlying principle of the filmmaking protocol will be to respect and recognise Indigenous people's rights to their cultural heritage.

⁶ Janke, Terri [Michael Frankel and Company, Solicitors], *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*; commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, 1998, pp. 47–48.

⁷ *ibid.*

CONSULTATION

The process of consultation is an important part of filming with Indigenous people. They need to be informed of what is proposed to be filmed and why, and their input needs to be sought about projects that directly include Indigenous cultural material.

It is also important to recognise that certain Indigenous knowledge is collectively owned, and in order to obtain informed consent it may be necessary to consult and obtain permission from a number of levels of authority. Further, if permission is given, it may be subject to conditions and on-going reassessment.

Issues that might arise during the consultation phase include:

- the need to identify the right people to speak to;
- the need to inform Indigenous people about the nature of the project in the initial research stages and continue to consult through the scripting, production and post-production stages to allow feedback;
- the time constraints of film production schedules in the context of Indigenous community timeframes;
- the need to consult with specialist Indigenous agencies when reporting on or including sensitive subject matter such as drugs and alcohol abuse.

We are particularly interested in hearing your views on the role of consultation in writing and producing drama, including **short dramas, feature films, and television drama.**

CONSENT

When visiting an Indigenous community for the purpose of filming, it is important to get the consent of the community. Lester Bostock's guide, *The Greater Perspective*, states:

The Aboriginal and Torres Strait Islander communities themselves, and the traditional owners or custodians of a location, have a right to say 'No' to any proposals put to them by others for acceptance. Their decision should be respected.⁸

This applies to any Indigenous community, whether remote, regional, urban or city.

Specifically, when visiting Aboriginal or Torres Strait Islander lands, it is a requirement that a permit be obtained from the local Land Council or Community Council.

There are Indigenous media organisations throughout Australia that have expertise in working from within an Indigenous community on media and film issues. These organisations could also be a potential first point of contact.

It is also important to seek consent for the **use of Indigenous cultural and intellectual property.**

Some questions that may need to be addressed as part of the consent process are:

- What are the potential benefits and impact of the film for the Indigenous individuals and/or community involved?
- Do all parties understand the concept of the film project?
- Has the proposed film and its dissemination been fully explained? Is it understood that the film will be publicly exhibited, for sale and/or distributed worldwide?

⁸ Lester Bostock, *The Greater Perspective*, op.cit. p. 25

Darlene Johnson's protocol outlines a process for informing Indigenous subjects who agree to take part in a film. The filmmaker must make sure that the subjects fully understand the terms of the agreement and that this agreement is documented in clear plain English.

Again, we would particularly like to know what you think about the issue of consent as it applies to **feature films, short drama and TV drama**.

CULTURAL INTEGRITY

For Indigenous people, ensuring that an event, story or artwork retains its cultural integrity is of utmost importance. Indigenous Australians are concerned that their heritage and their people are often depicted in derogatory ways which have little regard for cultural or personal integrity.

They are concerned at the manipulation and distortion of images and stories they see occurring. Given the nature of the medium, and the editing process, the presentation of Indigenous cultural material in a manner that promotes integrity requires careful consideration.

The issues of representation, authenticity, creating and producing the film, and respecting cultural beliefs (see below) are all related to cultural integrity.

REPRESENTATION

Indigenous Australians have criticised the representation of their people in film and television as often offensive or insulting. In filmmaking, Indigenous people may be portrayed through the use of words, language, plot, characters and cultural symbols.

Professor Marcia Langton discusses this issue in her essay, '*Well, I heard it on the radio and I saw it on the television*'. She states:

It is clearly unrealistic for Aboriginal people to expect that others will stop portraying us in photographs, films, on television, in newspapers, literature and so on. Increasingly, non-Aboriginal people want to make personal rehabilitative statements about the Aboriginal 'problem' and to consume and reconsume the 'primitive'.

Rather than demanding an impossibility, it would be more useful to identify those points where it is possible to control the means of production and to make our own self-representations.⁹

The issue of representation is especially important in films and TV programs that present fictitious events and characters, and it is also one of the most difficult issues to address appropriately. How can non-Indigenous filmmakers be encouraged to get the portrayal of Indigenous people 'right'? To what lengths should filmmakers be expected to go in consulting and obtaining consents in their search for cultural integrity and 'authenticity'?

AUTHENTICITY

Non-Indigenous filmmakers who want to portray Indigenous stories must take responsibility for finding out about the cultures they are representing. Filmmakers often don't respect the authenticity of stories and cultural material. Yet Aboriginal audiences can pick out the false cultural references, for instance, where the names and languages are not from that particular area and the stories and the dances are wrong. It's like putting a plastic bag in an English period film.

A lot of film representations of Indigenous cultures are pastiches from a variety of Indigenous nations. Filmmakers don't do the proper research about the cultural content for Indigenous films, and often they just make it up.

But Indigenous culture is bound by a highly developed system of Aboriginal law and social organisation, so if filmmakers want to make films about us, our culture and our experience, they should do the work and find out about our law. – *Rachel Perkins*¹⁰

'Authenticity' refers to the cultural source of Indigenous heritage material. Giving proper consideration to authenticity means respecting customary laws or cultural obligations and ensuring that the appropriate context is given to the cultural material. To take cultural heritage material out of context or use it inappropriately is offensive to Indigenous people.

CREATING AND PRODUCING THE FILM

Script development: The script is the underlying work on which a film is based. When a film is about an Indigenous topic, it is often recommended that Indigenous people should be employed as writers or script consultants. Cultural awareness at this early stage can reduce the likelihood of any cultural offence.

In particular, makers of feature films or TV dramas should consider the context in which cultural images, stories and themes are incorporated within the film. For example, filmmakers have sometimes attempted to present a story in a specific place but used an Indigenous language and cultural symbol from a different Indigenous cultural group. And the portrayal of contemporary Indigenous characters and settings is just as important to get 'right'.

Overall, the same level of research and development should be applied to Indigenous elements as to any other aspect of the script. What strategies could be used to help filmmakers develop an authentic 'voice' for an Indigenous character – or an authentic treatment for any Indigenous element of a film project?

Another aspect of this issue, which was highlighted in discussions about the making of *Australian Rules*, relates to the **dramatisation of real-life events**. Just as consultation is required in documentary making, it is recommended that early consultation with family members and community people be undertaken when basing a drama on the lives of real people.

Films **adapted from existing material** – a literary work, traditional story or life story, for example – *require re-consultation* with Indigenous people. How should people working with Indigenous material in adaptations deal with Indigenous cultural content?

Pre-production and production: As discussed above, filming with Indigenous people or material, or in Indigenous communities, requires consultation and consent (see page 8). On drama productions, directors sometimes rely on Indigenous cast members to act as cultural consultants on set. Is this appropriate? What strategies could be used to ensure that Indigenous characters and locations are researched in advance of the shoot, with appropriate consultation and consents obtained, and that Indigenous elements are developed to the same level of detail as any other element of the production?

Editing and post-production: Indigenous people are concerned that their filmed images may be manipulated and distorted at the post-production stage. Some Indigenous participants have sought to be involved in the editing process, or to view rough cuts of the footage taken. However, as Frances Peters-Little notes, the film editing process is lengthy and technical.

¹⁰ Telephone conversation with Rachel Perkins, 20 January 2003

Technical treatments such as juxtaposing of images, graphics, super-impositions and addition of musical tracking can add new meanings to the primary visual message. Therefore when talent are invited to come and join the editing process, they see a film that is very different from how the finished project will be, and it can be a despairing process for them.¹¹

If consultation has been clear and effective in the early stages, and there is ongoing communication with participants, they are less likely to build up expectations that are not met by the final result. However, the fact is that films do change during the editing process. When this occurs, at what point should a filmmaker be expected to go back and re-consult? If consents have been obtained, should they be re-confirmed?

RESPECTING CULTURAL BELIEFS

Representation of deceased people: In many Indigenous communities, the reproduction of names and images of deceased people contravenes mourning practices and is offensive.

This raises issues such as what should be required of filmmakers if a participant dies during filming. What if the film is completed but a principal actor or interviewee dies? If the film is to be broadcast nationally for instance, should it be a requirement that a warning be given?

The ABC and SBS have adopted a practice of broadcasting a warning before a program that features Indigenous people. This consists of an audio warning in English over the written warning. Cathy Eatock has suggested that the warning could be translated into the relevant language to ensure that family and community members can understand these warnings.¹² Perhaps a symbol could be adopted that would signify that images of deceased people may be broadcast.

Darlene Johnson's protocols include a death protocol that the filmmaker is responsible for negotiating and defining with the Indigenous community – something it is often preferable to do at the time of filming. She suggests options such as removing the subject from the film or 'pixelating' or masking the face. The filmmaker is also responsible for drafting the warning for the beginning of the film.¹³

Sacred sites and material: The reproduction of secret or sacred images in films is also an issue. For instance, under Indigenous customary laws, some images and knowledge may not be seen by the general public, or may be gender-specific and may only be seen by initiated men and women.¹⁴ It may not be appropriate for such material to be widely disseminated.

In *Film and Photography: A Matter of Respect for the Park and Its People*, Uluru-Kata Tjuta National Park's traditional owners explain the concept of sacred material as follows:

In our Law, certain sites, ritual objects, designs and ceremonies are restricted to people who can 'properly' view them. The reason why people may have 'proper' access may vary. For example, some areas of country are restricted to women, some to men. Similarly, some ceremonial activities may only be witnessed by those with sufficient knowledge and seniority to give them the right to do so.¹⁵

¹¹ Frances Peters-Little, 'On the impossibility of pleasing everyone: The legitimate role of white filmmakers making black films', *Art Monthly Australia*, May 2002, No 149, Canberra, ACT, 2002, p. 9

¹² Cathy Eatock, correspondence to Terri Janke, 24 January 2003

¹³ Darlene Johnson, *Indigenous Protocol*, written for Special Broadcasting Services, at <http://www.sbs.com.au/sbsi/documentary.html>, accessed 14 January 2003

¹⁴ See *Foster v. Mountford* 14 *Australian Law Reports* 71

¹⁵ See Uluru-Kata Tjuta National Park, *Film and Photography: A Matter of Respect for the Park and Its People*, Uluru, 2002

Uluru-Kata Tjuta National Park has also developed film and photography guidelines that cover commercial filming.¹⁶ The guidelines restrict the filming of some important religious sites throughout the park.

ENCOURAGING INDIGENOUS PERSPECTIVES

The recent popularity of Indigenous content in films indicates that audiences are interested in Indigenous stories. In the past, however, many films that included Indigenous cultural material were made by non-Indigenous filmmakers without Indigenous consultation. Now, filmmakers are beginning to work with Indigenous people to develop films that project Indigenous stories in a culturally appropriate way. For example, the makers of *Rabbit Proof Fence* adapted the book *Follow the Rabbit Proof Fence*, by Doris Pilkington, and worked with an on-set cultural consultant. The filmmakers also showed Doris Pilkington early rushes of the film.¹⁷

There is also a growing force of Indigenous filmmakers. A small number have made feature films, including Rachel Perkins, director of *Radiance*; Ivan Sen, director and writer of *Beneath Clouds*; and Tracey Moffat, director and writer of *Bedevil*. Many more are making documentaries, short dramas and television series, and are all forging their place in the Australian film industry, working to provide an Indigenous viewpoint. However, how these Indigenous perspectives are included in the mainstream film industry remains an issue.

ATTRIBUTION

The Indigenous owners of material need to be consulted about how they wish to be acknowledged. It may be particularly important to identify the names and clans of people who appear in images. To fail to attribute perpetrates the anonymity of Indigenous faces and continues to silence Indigenous voices.

SHARING OF BENEFITS

Indigenous people seek the right to benefit from commercial use of Indigenous cultural heritage. They complain that, although their images and knowledge are often used in films, they do no share in the benefits.

How can Indigenous people be included in the sharing of benefits from filmmaking? For instance, skills development programs could be provided, or copies of the film could be deposited with the Indigenous people and groups concerned.

If the material is to be used for commercial purposes, should Indigenous owners of the material receive appropriate financial rewards? For instance, if artworks are reproduced in films other than by way of incidental filming, the copyright owner is entitled to a licence fee. Should the owners of cultural designs and stories be entitled to similar fees?

In some cases this might involve a once-off payment, but if the image is to be used widely, it may be better to negotiate a royalty payment. Cathy Eatock considers:

Broadcasting is a commercial purpose. However, documentaries rarely make money. Indigenous participants whose stories and knowledge is being included are entitled to an upfront fee.¹⁸

We would particularly welcome any comments in relation to payments of royalties or other benefits-sharing issues (see also 'Copyright law and Indigenous culture', page 13).

¹⁶ Copies of the film and photography guidelines can be obtained from the Senior Media and Information Officer, Uluru-Kata Tjuta, National Park, PO Box 119, Yulara NT 0872. (08) 8956 1113, by fax (08) 8956 2360 or by email ulurumedia@ea.gov.au

¹⁷ Kevin Maher, 'Walkabout to freedom', *The Observer*, Sunday, October 27, 2002, Guardian Newspapers Limited, as accessed on <http://film.guardian.co.uk/Print/0,3858,4532867,00.html> on 24 January 2003

¹⁸ Cathy Eatock, correspondence to Terri Janke and Company, 24 January 2003

STOCK FILM FOOTAGE AND FUTURE USES

Approval for additional use must be gained before embarking on or approving any additional purposes for film footage that depicts Indigenous communities and participants. – *Cathy Eatock*¹⁹

The protocol could also examine the appropriate process for using stock film footage of Indigenous people and their cultural material. There are likely to be cultural issues that require consideration where images are taken from existing films or sourced from a film library and incorporated into new films.

It is recommended that filmmakers consult with Indigenous people on possible future uses of film footage, or the use of old footage taken for one purpose but now intended for another purpose. For example, old film footage may include representations of deceased people and careful consideration needs to be given to including this in new films for wide dissemination.

Another issue relates to participants' consent. For example, an Indigenous person may consent to their image and interview being used for a documentary about their particular culture, but it would not be appropriate to then use that image as stock footage for news items pertaining to any Indigenous matter.

ARCHIVING

When archiving Indigenous films, it is important to list the Indigenous participants by name and clan, so that if further consent is needed, the relevant person or community can be identified.

COPYRIGHT LAW AND INDIGENOUS CULTURE

In Australia the main body of law that provides ownership and reproduction rights to creators is the *Copyright Act 1968* (Cwlth). The Copyright Act provides individual creators with specific economic rights that allow them to exploit their works without others being allowed to copy them. The copyright owner of works, including recordings and films, has the exclusive rights to reproduce, sell and distribute the work. If the copyright material is used, the copyright owner can seek payment in the form of licence fees and royalties. The copyright owner can also assign their rights to third parties. When making films that include other people's copyright works, the rights must be obtained from the relevant copyright owners. It is standard industry practice for these rights to be cleared in writing.

However, Indigenous people who are the custodians of stories and knowledge may not be recognised as copyright owners under the Copyright Act. This is because the story may be oral, and not in a material form. The story may also have been passed down through generations, so there is not one 'author' but many, who have all contributed over years of refining the story. Should there be written rights agreements for Indigenous communal knowledge, stories and other cultural materials?

The protocol document will generally discuss the current legal framework in relation to copyright. However, filmmakers need to note that other legal issues also arise in contractual negotiations. For instance, film contracts may require copyright ownership or 'wide rights', while Indigenous people seek cultural ownership of knowledge and stories. How can these be recognised and incorporated into film contracts?

TOWARDS A WORKING PROTOCOL

We are interested in hearing your comments and ideas on the issues discussed in this paper, or on any other issues you would like to raise.

You can send your submissions in writing, by post, fax or email, or on audio or videotape. Or you can contact the consultant preparing the protocol, Terri Janke, to organise an interview via telephone.

Send submissions to:

Terri Janke
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PO Box 780
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Ph: 02 9693 2577
Fax: 02 9693 2566

Email: tjc@terrijanke.com.au

HAVE YOUR SAY

Here's a summary of the issues raised in this paper. We welcome your views on any or all of them:

Indigenous heritage (page 7)
Consultation (page 8)
Consent (page 8)

Cultural integrity (page 9)
Representation (page 9)
Authenticity (page 9)
Creating and producing the film (page 10)
Respecting cultural beliefs (page 11)

Encouraging Indigenous perspectives (page 12)
Attribution (page 12)
Sharing of benefits (page 12)
Stock film footage and future uses (page 13)
Archiving (page 13)
Copyright law and Indigenous culture (page 13)

If you have had personal experience of these or any other issues, please tell us about it. Also, please let us know if you would allow us to document your experiences as a 'case study' in the protocol document.

If you have used a protocol for any aspects of working with Indigenous content and Indigenous people, please tell us about it.

Are there any other areas or issues that should be included in the protocol document?

The closing date for submissions is 30 June 2003.

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The protocol will provide a framework to assist and encourage recognition and respect for the images, knowledge and stories of Indigenous people, as represented in documentaries and drama, including short dramas, feature films and television drama.

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Submissions should be sent to:

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